

CANADA / JUDGMENT

Jillings v. Jillings

2025 BCSC 1891

COURT

Supreme Court of British Columbia

DECIDED

29 September 2025

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2025 BCSC 1891 Jillings v. Jillings

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jillings v. Jillings,

2025 BCSC 1891

Date: 20250929

Docket: S39501

Registry: Chilliwack

Between:

Danial Jillings and Nicole Jillings

Plaintiffs

And

Steven Jillings, Tane Jillings, 1134502 B.C. Ltd., doing business as Signal

Automotive Inc., and Treo Technologies

Designated Activity Company

Defendants

Before: Associate Judge Robinson

Reasons for Judgment

Counsel for the Plaintiffs:

J. Corbett

Counsel for the Defendants:

M. Brown

F. Wu

Place and Date of Hearing:

Vancouver, B.C.

August 20, 2025

Place and Date of Judgment:

Vancouver, B.C.

September 29, 2025

INTRODUCTION

- [1] These reasons arise from an application by the Plaintiffs for leave to amend their Notice of Civil Claim, initially filed more than three years ago, on August 11, 2022.
- [2] The defendants oppose the application on various grounds.
- [3] In addition to opposing the plaintiff's application, the defendants have brought a cross application, wherein they seek an order striking portions of the Notice of Civil Claim. At the outset of the hearing, the defendant's application was adjourned generally and by consent. This was entirely reasonable since the defendant's application was premised on the Notice of Civil Claim in its present iteration and if the Plaintiffs are given leave to make the amendments sought, it would impact the defendant's application, including potentially, the advisability of such an application.
- [4] The plaintiff's application was filed in November 2023. The hearing was delayed because the defendants took the position that the affidavits on which the plaintiffs relied waived privilege over communications between them and their legal advisors. That issue required resolution before the present application could proceed. The time elapsed between the filing of the application and the hearing date is salient to one of the issues that arise in this context.

BACKGROUND

- [5] Given their shared surname, I will refer to the parties by their given names. In doing so, I intend no disrespect.
- [6] The plaintiffs, Danial and Nicole Jillings ("Danial" and "Nicole", respectively) are husband and wife.
- [7] The defendant, Steven Jillings ("Steven") is Danial's brother.
- [8] The defendant, Tane Jillings ("Tane") is Steven's son.

- [9] The claim arises from a business venture. The plaintiffs contend that they agreed to operate a family business with Steven and Tane (the "Business"). The Business involved exporting vehicles and developing software to manage the export of vehicles.
- [10] For this purpose, it is alleged that Steven established a corporate structure through which the Business would operate. That structure included the incorporation of the two corporate defendants, 1134502 BC Ltd., doing business as Signal Automotive Inc. ("Signal"), and Treo Technologies Designated Activity Company ("Treo").
- [11] Treo is incorporated in Ireland and is the sole shareholder and parent company of Signal. In turn, Steven is a director and the majority shareholder in Treo. Meanwhile, both Steven and Tane are directors of Signal and Tane currently serves as its Chief Operating Officer (having previously served as vice president of operations).
- [12] Previously, Danial had been both president and a director of Signal. He no longer serves in either capacity. Meanwhile, Nicole, who previously served Signal in a disputed capacity (either as a senior employee or as an independent contractor) is no longer engaged or employed by the company.
- [13] It is in the foregoing context that the litigation arises. Danial alleges that he and Steven reached an agreement in or about August 2017 pursuant to which:
- a) Steven would invest \$5 million and develop a corporate structure through which the Business would operate to maximize tax efficiencies (this allegedly included establishing a parent company and related subsidiaries);
 - b) Danial would operate the Business and retain ownership of the proprietary software on which the Business depended; and
 - c) Steven and Danial would work cooperatively to establish a "team" to manage and refine the software
- (the "Business Agreement").
- [14] Pursuant to the Business Agreement, it is alleged that Steven arranged to incorporate Signal in September 2017. Thereafter, in October 2017, Steven allegedly arranged to incorporate Treo. In doing so, Steven allegedly advised the plaintiffs that although he would be the sole shareholder of Signal, they would be equal shareholders in Treo (along with Steven). Moreover, Danial alleges that he was to be a senior employee and the primary operator of the Business while Steven was to be primarily responsible for corporate structure.
- [15] Meanwhile it is alleged that there was an agreement that both Nicole and Tane were to be employed as senior managers.

- [16] As presently constituted, the Notice of Civil Claim alleges that the defendants have wrongfully deprived Danial and Nicole of their ownership interest(s) as well as their share of the profits of the Business. The plaintiffs further allege that each of them has been wrongfully dismissed from their respective positions of employment.
- [17] In terms of specific causes of action, the Notice of Civil Claim, in its current form, pleads that:
- a) Steven owed the plaintiffs a fiduciary duty and that he breached that duty;
 - b) Steven's acts constituted oppressive and unfairly prejudicial conduct; and
 - c) Each of the plaintiffs were dismissed from their respective positions of employment without just cause and without sufficient notice.

PROPOSED AMENDMENTS

- [18] The plaintiff's proposed amendments are unquestionably substantial. For convenience, they may be categorized as follows:
- a) First, the plaintiffs seek to particularize the existing claims concerning Steven's alleged breach of fiduciary duty and oppression;
 - b) Second, the plaintiffs seek to add causes of action as against Tane concerning alleged breaches of fiduciary duty and oppression; and
 - c) Third, the plaintiffs seek to raise new causes of action related to an alleged breach of contract and an alleged breach of trust by Steven.
- [19] The defendants do not oppose the amendments insofar as they are limited to addressing grammatical issues or particularizing the existing claims. However, they submit that the proposed amendments go further than that and entail the introduction of new causes of action.

LAW

- [20] As a starting point, it is helpful to recognize that this application is brought pursuant to R. 6-1 in Supreme Court Civil Rules, BC Reg 168/2009 which provides:
- (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,
- (a) once without leave of the court, at any time before service of the notice of trial, or
 - (b) after the notice of trial is served, only with
 - (i) leave of the court, or
 - (ii) written consent of the parties.

- [21] While the foregoing confers discretion to grant leave to amend pleadings, it offers no insight as to the factors which ought to inform the exercise of that discretion. Instead, the applicable factors can be discerned by a review of the authorities.
- [22] In *Langret Investments S.A. v. McDonnell*, [1996] BCJ No. 550, our Court of Appeal endorsed a liberal approach in this context, holding:
- [24] Amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits.
- [23] In determining whether the proposed amendments are "useless", the threshold question is whether it is plain and obvious that the amendments are bound to fail. Put another way, the court is required to determine whether it is perfectly clear that the pleadings fail to raise an arguable case: *Carley Estate v. Allied Signal Inc.*, 1997 CanLII 2870 (BC CA) at para. 8.
- [24] That, however, is not the end of the analysis. Where the proposed amendments involve pleading a new cause of action after the expiry of the applicable limitation period, the exercise of the Court's discretion requires a determination of whether granting leave would be just and convenient.
- [25] The leading case in this regard continues to be *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, 1996 CanLII 3033 (BC CA). There, at para. 67, the Court held that the factors which ought to guide the Court's discretion included: the length of the delay in seeking the amendments; the explanation for the delay; the prejudice to the defendant; and the connection between the existing claims and the new causes of action. The Court made clear that these factors were not exhaustive and no single factor was determinative in an application to amend pleadings.
- [26] With respect to prejudice, the Court in *Langret Investments* leaves no doubt that "potential prejudice" is insufficient to defeat a proposed amendment. Rather, evidence of actual prejudice is required from an opposing party. The Court held that, were it otherwise:
- [43] an application could be defeated on technical grounds without regard to the effect it might have on the ultimate determination of the proceedings. Almost any amendment can be regarded as being "potentially" prejudicial to a respondent.

DISCUSSION

- [27] Before turning to address the areas of significant contention, I will address the amendments which are either not opposed or which must be allowed since they usefully help to clarify the claim as it is presently constituted.

- [28] In this regard, the defendants did not oppose the proposed amendments to the style of cause (changing the name of Signal from "1134502 BC Ltd., doing business as Signal Automotive Inc." to "Signal Automotive Inc.") nor the correction of certain grammatical and typographical errors. Accordingly, I grant leave to the plaintiffs to amend the style of cause as proposed. In addition, I grant leave to amend paras. 1 and 5 of Part 1 as proposed in the Further Amended Notice of Claim appended to the plaintiffs' Notice of Application since these amendments are necessary to correct the spelling of the parties' names.
- [29] In addition, many of the proposed amendments are not and cannot be contentious as they serve only to clarify the existing pleadings. They are more in the nature of factual averments than the basis for any claim. As an example, the plaintiffs propose the deletion of paras. 11 and 12 of the existing pleading and replacing those paragraphs with para. 13 to describe the parties' family relationship. Amendments such as these are helpful in understanding the claim and in advising the defendants of the claim they are being called to answer in the litigation. Since they do not raise any new causes of action, it is not necessary to consider whether the amendments are "bound to fail" nor did the defendants assert any prejudice in respect these proposed amendments.
- [30] Amendments which fall within the category of clarifying amendments are those proposed in paras. 6, 7, 13, 14, 15, 23, 32, 33, 45, 77, 78, 79, 80 and 81 of Part 1; para. 2, 3, 7, and 8 of Part 2; and paras. 11, 12, 13 of Part 3 of the Further Amended Notice of Claim. Leave is granted in respect of each of those proposed amendments.
- [31] Meanwhile, the amendments proposed to paras. 35, 51, 52, 57, 58, 59, 60, 61, 62, 63 and 64 of Part 1 of the Further Amended Notice of Claim, fit within the category of particularization of existing claims and in my view, do not, in themselves, constitute any new causes of action. The law recognizes a distinction between amendments which serve to "flesh out" existing allegations and those which go further and raise new claims. Those which fit in the former category are more readily allowed than those in the latter, particularly where a limitation period is at issue: see *Brown v. Cole*, [1994] BCJ No.2356 aff'd [1994] BCJ No. 3103 (S.C.).
- [32] In my view, with a couple of exceptions that I will discuss, the amendments proposed to paras. 35, 51, 52, 57, 58, 59, 60, 61, 62, 63 and 64 are in the nature of particulars.
- [33] To cite an example, as presently pleaded, the plaintiffs allege that Steven owed them a fiduciary duty and further that he breached his fiduciary duty thereby causing the plaintiffs to fail "to realize a profit in the lost dividends of the Corporate defendants and suffered a loss of the good will of the corporate defendants".
- [34] The proposed amendments provide particulars at para. 51 by setting out, in some detail, what the plaintiffs say constituted a breach of fiduciary duty by Steven, including: failing to act fairly, failing to act in good faith; and giving himself preferential treatment.

- [35] The proposed amendments set out in para. 62 similarly particularize the existing claim as it relates to Steven's allegedly oppressive and unfairly prejudicial conduct which has been pleaded from the outset of the litigation.
- [36] Rather than prejudice the defendants, these amendments serve to narrow the existing allegations and make the defendants more aware of the case to be met. There is no principled reason to refuse leave in respect of the amendments proposed at paras. 51, 52, 57, 58, 59, 60, 61, 62, 63, or 64 of Part 1 of the Further Amended Notice of Claim. None of them raise any new causes of action and none are prejudicial to the defendants. They serve a useful purpose in clarifying the issues between the parties and leave is granted to make these amendments.
- [37] That out of the way, I turn to address the amendments which are not as straightforward and which are contested by the defendants. These amendments all comprise new causes of action which were not alleged in the Notice of Civil Claim initially and unless leave is granted, would be statute barred.
- [38] For simplicity, I will address these proposed amendments as follows:
- 1) The breach of fiduciary claim against Tane (set out at paras. 20, 37 to 44 and 53 to 56 of Part 1 of the Further Amended Notice of Civil Claim);
 - 2) The oppression claim against Tane (set out at paras. 66 to 72 of Part 1 of the Further Amended Notice of Civil Claim);
 - 3) The claim for breach of contract against Steven (set out at paras. 26, 46 and 47 of Part 1 of the Further Amended Notice of Civil Claim); and
 - 4) The claim for breach of trust against Steven (set out in paras. 24, 34, 36 and 73-76 of Part 1 of the Further Amended Notice of Civil Claim).
- [39] As a preliminary issue, the Plaintiffs argued that the amendments related to a breach of fiduciary duty and oppression as against Tane were in the nature of particularizing existing allegations.
- [40] This argument is without merit.
- [41] As presently constituted, the Notice of Civil Claim does not contain any allegations which, if true, would give rise to fiduciary duties being owed by Tane to either of the plaintiffs. The only allegation is set out in para. 1 of Part 3 which baldly asserts: "The defendants breached a fiduciary duty owed to the plaintiffs".
- [42] Accordingly, in my view, to grant leave to make the amendments sought would be to countenance an entirely new cause of action.

- [43] The same is true in respect of a claim of oppression insofar as Tane is concerned. All of the allegations (in paras. 29 through 36 of the present iteration of the pleading) reference Steven. The only allegation of oppression against Steven is set out in para. 2 of Part 3 which states: "The defendants engaged in unfair and prejudicial conduct which caused the Plaintiffs to suffer".
- [44] That assertion is raised without any supporting material facts pleaded as against Tane.
- [45] With respect to the claims of breach of contract and breach of trust raised against Steven, the plaintiffs concede that these are new claims which are not pleaded in the current iteration of the Notice of Civil Claim.
- [46] That being so, it is necessary to first determine whether it is plain and obvious that the new claims are bound to fail based on the proposed amendments.
- [47] Regarding the claim for breach of fiduciary duty as against Tane, a helpful starting point is the decision of our Court of Appeal in *Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82. There, the Court noted that, in addition to the vulnerability arising from the relationship at issue, there are three requirements for establishing an ad hoc fiduciary: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: para. 134.
- [48] The defendants say that the failure to plead that Tane provided an express or implied undertaking to forsake the interests of all others (including his own personal interests) means that the claim, as pleaded, is bound to fail.
- [49] There is some merit to this argument. The only reference to any undertaking in the proposed pleading is found in para. 20 of Part 1 of the Further Amended Notice of Civil Claim which states:

It was an express or implied term of the Agreement that the Plaintiff Dan, the Defendant Steve and the Defendant Tane would act in good faith. At all material times, the Defendant Steve represented to the Plaintiff Dan that he would undertake the Corporate Related Matters in good faith and protect the Plaintiff Dan's interests. [emphasis added]

- [50] The undertaking alleged in the proposed pleading is an undertaking allegedly given by Steven. Nowhere in the proposed pleading is there an allegation of any undertaking, express or implied, given by Tane to Danial.
- [51] The proposed pleadings allege that:
- a) Danial believed that Tane was acting in his best interests (para. 37);
 - b) Danial relied on Tane to, inter alia, protect Danial's interests (para. 38);

- c) Tane had discretionary power and control sufficient to adversely affect Danial's interests (para. 39); and
- d) Tane had a responsibility to act in Danial's best interests and to refrain from obtaining a personal benefit at Danial's expense (para. 42).

[52] While the foregoing allegations are elements of a claim for breach of fiduciary duty, the existence of such a duty is dependent on the existence of an undertaking as described above. There is no allegation that Tane agreed, undertook, promised or even indicated a willingness look after Danial's alleged interests or to place Danial's interests in a position above all others.

[53] Rather, the plaintiff's position is premised on the nature of Tane's position vis-à-vis Danial, which is alleged to have rendered Danial particularly and peculiarly vulnerable. It is from this alleged vulnerability that the plaintiffs presumably intend to argue that the undertaking arises. A similar argument was considered and rejected by the Court in *Johnson*, supra, at para. 148:

In their oral submissions, the appellants argued that the particular circumstances of the relationship, characterized by vulnerability, power, and control, give rise to the undertaking in this case. These submissions conflate vulnerability and control with the existence of an undertaking. While vulnerability and control must be pled to satisfy the second and third requirements of the framework, they do not constitute a fiduciary undertaking. Indeed, if this were the case then the first component of the framework would serve no purpose.

[54] The foregoing suggests that the absence of any allegations related to an undertaking, either express or implied, given by Tane to Danial is problematic since it is required in a claim for breach of fiduciary duty.

[55] However, I do not read the decision in *Johnston*, supra as going so far as to create an absolute rule of pleadings where breach of fiduciary duties is concerned. Indeed, at para. 152, the Court allows that pleadings which "might suggest the existence of an undertaking that could support a fiduciary obligation" may be sufficient. In my view, that is an appropriate standard on the present application.

[56] The law requires me to read the proposed amendments liberally. In doing so, I accept that the express reference to Tane's "responsibility" to act in Danial's best interests and to refrain from obtaining a personal benefit at Danial's expense (at para. 42 of the Further Amended Notice of Civil Claim), might suggest the existence of the necessary undertaking.

[57] This is not to say that the plaintiffs will necessarily prevail at trial. At this stage, I am not required to assess the relative merits of the claim. My role is limited to determining whether, assuming the allegations are true, it is plain and obvious that the claim is bound to fail. In my view, the plaintiffs have met this low threshold.

- [58] In reaching this conclusion, I am not endorsing the manner in which the breach of fiduciary duty claim against Tane is framed. The proposed pleadings are decidedly imperfect and it would have preferable to have specifically outlined the existence of an undertaking, the source of such undertaking and its nature. However, the test under R. 6-1 does not require perfection. Rather, in assessing whether the proposed amendments raise an arguable case, a liberal interpretation of the proposed amendments is required.
- [59] In the circumstances, this approach inescapably leads me to conclude that it is not plain and obvious that the breach of fiduciary duty claim against Tane is bound to fail.
- [60] With respect to the oppression claim against Tane, different considerations arise. Specifically, the claim is brought pursuant to s. 227 of the Business Corporations Act, SBC 2002, c. 57 (the "BCA"). This is notable because Treo (the parent company of Signal) is alleged to have been incorporated under the laws of Ireland. As such, it would not be subject to the provisions of the BCA. It is on this basis that the defendants say that the oppression claim against Tane is bound to fail.
- [61] However, in my view, that is an unduly restrictive interpretation of the proposed amendments. The proposed amendments refer to the "Corporate Defendants" and to the "Business". Those terms are defined in the pleading as a collective reference to both Treo and Signal and to the general activity of the Corporate Defendants, respectively.
- [62] The proposed pleadings further allege that Tane excluded Danial from corporate management and decision making despite Danial's expectation of continued involvement.
- [63] Admittedly, neither the capacity in which Tane was acting when he committed the alleged oppression nor Danial's capacity in which he was allegedly oppressed can be discerned from the proposed pleadings. While this is certainly problematic, it is not a basis on which to hold that the claim is necessarily bound to fail. It is open to the Plaintiffs to argue and to lead evidence of oppression by Tane in his capacity as an officer of Signal which was oppressive or unfairly prejudicial to Danial as an unspecified stakeholder in Signal.
- [64] Without commenting on the likely success or merits of such a claim, I am unable to conclude that the oppression claim against Tane is necessarily bound to fail.
- [65] Regarding the new claims raised against Steven, the plaintiff concedes the proposed pleadings set out claims for breach of contract and breach of trust against. As such, they constitute new claims.
- [66] The defendants submit that the breach of contract claim is bound to fail. In doing so, the defendants point to the claim as proposed.

- [67] Specifically, the proposed pleadings refer to Steven having breached his contractual obligations by failing to make certain monetary payments in 2017. Since the underlying litigation was not commenced until the Notice of Civil Claim was initially filed, in August 2022, the Defendants say that claim is bound to fail since it is plain and obvious that it is statute barred: Limitation Act, SBC 2012, c. 13, s. 6.
- [68] This is undoubtedly a possibility and indeed, it may even be a probability. However, it cannot be said that this outcome is plain and obvious. There are statutory exceptions in the Limitation Act which might apply to the present circumstances. As an example, the statutory limitation period does not begin to run until the underlying claim is discovered or discoverable, pursuant to s. 8.
- [69] In my view, it would be premature at this stage to determine that the breach of contract claim against Steven is necessarily statute barred. That is an issue best addressed on a further application (supported by evidence which addresses the discoverability issues) or at trial. In saying that, if leave is granted to raise a claim for breach of contract as against Steven it would be without prejudice to his rights to plead and rely upon the Limitation Act as a defence to the claim. Leave, in this context, would not impair the defendants' right to argue that any claim was statute barred as of August 2022 when the Notice of Civil Claim was initially filed.
- [70] With respect to the substance of the claim for breach of contract, I am satisfied that the elements of the cause of action are set out in the proposed pleading. In this regard, a breach of contract claim need only allege the existence of a contract and a breach of the contract's terms: *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para. 91.
- [71] Here, the proposed pleadings allege that an agreement was entered into between Steven and Danial in 2017. Pursuant to that agreement, Danial alleges, inter alia, that Steven would pay him USD\$1.5 million (at para. 18(c)). Further, at para. 46(a) of the proposed pleading, it is alleged that Steven failed to make that payment.
- [72] These allegations, if true, could constitute a basis for liability in breach of contract.
- [73] Accordingly, this claim is not bound to fail.
- [74] Insofar as the breach of trust claim against Steven is concerned, the defendants contend that the proposed pleadings do not contain the material facts needed to establish a resulting trust. In taking this position, the defendants argue that because it is not alleged that Danial was a previous owner of any shares in either of the two companies there is no basis on which a resulting trust may be recognized. In making that submission, the defendants rely on the Court of Appeal's decision in *Rascal Trucking Ltd v. Nishi*, 2011 BCCA 348.
- [75] In that case, the Court held:

- [32] The essential characteristics of a resulting trust are that the trustee has title to, or an interest in, the property in question and that the claimant (the alleged resulting trust beneficiary) must have originally transferred the property in question to the alleged resulting trustee or supplied the whole or part of the purchase price when the property was bought from a third party and transferred to the trustee's name.
- [76] The defendants say that the foregoing requires a plaintiff in a claim for breach of trust to plead that: (1) Danial previously owned shares in Treo; (2) that those shares were transferred to Steven; and (3) that Danial supplied some or all of the purchase price for the shares when they were allegedly acquired by Steven on his behalf.
- [77] I disagree with that contention. While the foregoing elements can undoubtedly constitute the basis for a resulting trust, it is not necessary to specifically plead each of them. Instead, it is sufficient for a plaintiff to plead that he contributed to the acquisition of property but did not take title or ownership, which instead was held by another. In that case, a presumed resulting trust arises which is rebuttable by the title holder demonstrating that the plaintiff's contribution was not intended to create a beneficial interest.
- [78] With that in mind, the proposed pleading alleges that Danial and Nicole began to operate a business that was engaged in the sale of vehicles. It was this business which apparently constituted the foundation for the Business which is at issue in this litigation. Specifically, the plaintiffs allege that Steven proposed a partnership which included an agreement that Steven would effect that transfer of 50% of the shares in Treo to Danial.
- [79] In terms of Danial's contribution to the acquisition of those shares, a liberal interpretation of the proposed pleadings entitles me to infer that Danial contributed sweat equity to the operation of the Business. In addition, he contends that he owned or had a proprietary interest in the software (which predated the existence of both Treo and Signal) on which the Business depended. In exchange for these contributions, it is alleged that Steven agreed to transfer shares in Treo to him. Because that transfer did not materialize, Danial asserts a beneficial interest in those shares pursuant to a resulting trust.
- [80] As with other parts of the proposed pleading, the manner in which the plaintiffs have set out the breach of trust claim is decidedly imperfect. However, I need only be satisfied that it is not plain and obvious that the claim is bound to fail. The plaintiffs have met this threshold.
- [81] In summary, I find that the proposed pleadings raise four new causes of action which are not raised in the present iteration of the Notice of Civil Claim. It cannot be said that any of them are necessarily bound to fail. This is not to say that the Plaintiffs will establish liability in respect of any of the new causes of action. As set out in the proposed pleading however, neither can I say that any of them are bound to fail.
- [82] Having reached that conclusion, it is necessary to consider whether it is nonetheless just and convenient to grant the leave sought. This entails a consideration of the factors outlined in *Teal Cedar*, supra. Namely:

- a) the length of the delay in seeking the amendments;
- b) the explanation for the delay;
- c) the prejudice to the defendants; and
- d) the connection between the existing claims and the new causes of action.

a) Length of Delay

- [83] Regarding the length of delay, the parties agree that the operative period is to be measured from the date on which the limitation period expired, plus one year: *Amezcu v. Taylor*, 2010 BCCA 128, at para. 42.
- [84] The parties further agree that the limitation period for any claim for breach of fiduciary expired in either July or August, 2022. Accordingly, delay is to be measured from July or August 2023.
- [85] The defendants argued that delay should be measured from that date until the date on which this application was heard - more than 2 years later. The plaintiffs took the position that reference should instead be had to the date on which the application was brought, in November 2023.
- [86] I agree with the plaintiffs in this regard. The fact that the hearing of this application was delayed is regrettable. However, the delay is not attributable to any dilatoriness on the part of the plaintiffs. The time lapsed between the time this application was filed and the date on which it was ultimately heard owed to the need to resolve the issue of whether the plaintiffs' application materials constituted a waiver of privilege in respect of solicitor-client communications. This was a necessary issue that required resolution before the application could proceed.
- [87] In any event, delays in litigation are too often outside of the control of the parties and it is regrettably common for applications to be adjourned (often on multiple occasions) due to insufficient judicial capacity. In those circumstances, there are often significant lags between the date on which applications are brought and when they are ultimately heard. Where the delay is not attributable to the party bringing the application, it should not factor into the analysis under R. 6-1.
- [88] In the circumstances, the length of delay was not uncontrolled, immoderate, excessive or out of proportion to the matters in question. All of which is to say, it was not inordinate. It was no more than 5 months (and no more than 17 months after the applicable limitation period had "arguably" expired).
- [89] I pause to note that there will be cases where delay may, without more, constitute a basis to deny leave in applications of this kind. That is to say, where the delay is inordinate and unexplained it may not be either just or convenient to grant leave even though the delay is explained or where there is no evidence of prejudice to the opposing party. This is because

inordinate delay is capable of bringing the administration of justice into disrepute. The interests of justice are an important and necessary consideration on applications of this kind.

b) Reasons for Delay

[90] The plaintiffs' reasons for the delay present the most troubling aspect of this application. They rely on an affidavit from their solicitor (who, I am compelled to emphasize, was not counsel who appeared on behalf of the plaintiffs at the hearing of this application). Therein, their solicitor deposes:

The plaintiffs retained my firm on August 11, 2022. Upon review of the file I realized that the limitation period for commencing the action against the defendants arguably expired the next day. As such, I immediately drafted the notice of civil claim and filed it on August 12, 2022.

[91] The foregoing indicates that the Notice of Civil Claim was prepared in haste, owing to the last-minute retainer of counsel. However, that evidence is inconsistent with facts subsequently revealed in the context of this application. The subsequent evidence leaves absolutely no doubt that the plaintiffs had been engaging with the law firm which drafted and filed the Notice of Civil Claim as early as June 2022 (more than 2 months before the Notice of Civil Claim was filed and before the limitation period "arguably" expired).

[92] This evidence belies any suggestion that the plaintiffs' solicitor was pressured by onerous time constraints. The evidence on this application demonstrates that the Notice of Civil Claim was in progress for approximately two months. Moreover, it is clear that during those two months, the plaintiffs' solicitor considered bringing many of the claims that are now sought by way of amendment.

[93] The evidence proffered by the plaintiffs' solicitor is not forthright. It appears that he is seeking to avoid blameworthiness rather than accept that he may have erred. As a minimum expectation of the Court, counsel are required to be honest and forthright and to be prepared to accept the consequences of their honesty.

[94] On this application, no satisfactory explanation is proffered for the failure to include the claims that the plaintiffs now seek to add by way of amendments when the Notice of Civil Claim was initially filed. Moreover, there is no evidentiary basis to explain why that plaintiffs waited for 17 months after filing the initial Notice of Civil Claim to bring this application in circumstances where the claims they now seek to raise were within the contemplation of their solicitor from the outset of the retainer.

[95] As I have indicated, this is troubling. However, it is not a basis on which to dismiss the application. The requirement for an explanation for any delay is most pressing in circumstances where the delay has been inordinate. Where, as in the present case, the delay has not been inordinate, the reason is less compelling.

c) Prejudice

- [96] Regarding prejudice, it bears restatement that the prospect of potential prejudice to the defendants is insufficient. Evidence of actual prejudice is necessary.
- [97] The defendants do not contend that they have suffered or that they will suffer any actual prejudice. Rather, their position is premised on a presumption of prejudice which they say arises due to delay and the associated loss of an ability to rely on a limitation period as a complete defence. While this is a significant loss, it must be balanced against the plaintiffs' loss of a right to pursue the claim in a separate action. This issue was addressed definitively by our Court of Appeal in *Amezcu*, *supra*, at para. 55:

The presumed prejudice to the plaintiff after the expiry of a limitation period was the inability to pursue the claim in a separate action. The prejudice to the Minister was the loss of "a windfall opportunity to avoid entirely any potential liability" for a claim that the law considers actionable: see *Weinlich v. Campbell*, 2005 BCSC 1865, 32 C.P.C. (6th) 18, at para. 55, which refers to the statement by Master Bolton in *Takenaka v. Stanley*, 2000 BCSC 242, 91 B.C.L.R. (3d) 179, that "[a] right to seek justice cannot fairly be equated with a right to cut short the search without an answer."

- [98] The Court in *Amezcu*, *supra* makes clear that the loss of a limitation period is not a separate factor to consider. It is the actual prejudice flowing from that loss that is relevant.
- [99] Notably, the defendants do not contend that their ability to respond to the proposed claim is compromised to any extent. Distilled to its essence, the defendants' position is that they will suffer prejudice because they will be required to address claims that, until now have not been raised. That is not a sufficient basis on which to decline leave in these circumstances. Indeed, it is probable that every defendant could assert the same prejudice as an objection to amended pleadings. Were that a compelling argument, it would foreclose the possibility of virtually all amendments.

d) Connection Between the Existing Claims and the New Causes of Action

- [100] At its heart, the Notice of Civil Claim concerns a failed business relationship among family members. The plaintiffs allege that Steven and Tane deprived them of rights and benefits to which they were entitled. The new claims raised in the proposed pleadings are entirely consistent with that narrative.
- [101] I have no difficulty in concluding that the new claims against Steven in the proposed pleadings are connected to the existing claims. The alleged breach of contract and breach of trust constitute alternative routes through the existing factual matrix. Although not adequately set out, it is apparent on reading the Notice of Civil Claim in its current form that Danial is alleging the existence of an agreement with Steven, and that he placed his trust in Steven to pursue their shared interest in the success of the business. He did so with an expectation of being entitled to participate in that hoped-for success.

- [102] The proposed amendments arise from the same relationship and the same interactions between the parties. They do not significantly alter the tenor of the litigation.
- [103] It is more difficult to draw the same conclusions with respect to the new causes of action raised against Tane. As presently constituted, the Notice of Civil Claim does not include any pleadings which, if true, could give rise to liability as against Tane for oppression of breach of fiduciary duty. The current iteration of the Notice of Civil claim asserts in Part 3 that the defendants, collectively, have breached a fiduciary duty and to have engaged in oppressive and unfairly prejudicial conduct.
- [104] There is nothing in the balance of the pleadings which would support these assertions as against Tane, personally.
- [105] In the current version of the Notice of Civil Claim, the material factual averments raised in respect of Tane are simply that:
- a) He was a business partner of the plaintiffs (para. 11); and
 - b) He was to serve the Business in a management role (para. 12).
- [106] The proposed new claims as against Tane vastly expand the scope of the allegations against him and, as I have already found, could constitute a basis for liability where none previously existed.
- [107] In my view, although, the new claims arise from the same failed business relationship (to which Tane was allegedly a party), they are not connected to any of the current pleadings in any meaningful way. They are truly new claims which will alter the complexion of the litigation from his perspective. This is a factor which militates against granting leave to make the amendments related to breach of fiduciary duty and oppression against Tane.
- e) Just and Convenient
- [108] The factors in *Teal Cedar*, supra, while helpful and instructive, are not to be applied as a kind of "checklist". Rather, the overriding consideration is the proposed amendments will be just and convenient. That decision is ultimately a discretionary exercise: *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 21.
- [109] In the exercise of that discretion, and for the reasons outlined in the foregoing, I am satisfied that it would be both just and convenient to grant leave to make the amendments as they concern claims of breach of contract and breach of trust as against Steven.
- [110] The new causes of action are undoubtedly connected to the claims already set out and allowing the amendments will ensure that the full dispute is properly litigated.

- [111] My hesitation in reaching the same conclusion insofar as the proposed pleadings pertain to Tane arises from the fact that there is no pre-existing factual matrix from which the new claims can be said to emanate. At the same time, there is no evidence that Tane will suffer actual prejudice (apart from the loss of a limitation defence) if leave is granted. This needs to be measured against the prejudice to the plaintiffs if they are precluded from pursuing claims which I have determined are not necessarily bound to fail.
- [112] These factors, combined with the fact that the delay in bringing this application was not inordinate, satisfy me that it would be just and convenient to grant leave to grant leave to permit the amendments as they relate to what I regard as new causes of action against Tane.

CONCLUSION

- [113] For the reasons outlined, I allow this application and grant leave to the plaintiffs to file an Amended Notice of Civil Claim to the Notice of Application filed November 10, 2023.
- [114] My decision is premised on the fact that many of the proposed amendments are not contentious and serve to particularize and clarify that which has already been pleaded. These amendments will be of assistance to the parties and to the court is determining what is in issue in this litigation.
- [115] To the extent that the proposed pleadings set out new causes of action, I am unable to conclude that any of those claims are necessarily bound to fail. Moreover, I have found that there was no inordinate delay in bringing this application and that there is no evidence of actual prejudice to the defendants if leave is granted. Finally, although I have found that the new claims against Tane are unrelated to any of the existing allegations, it is nevertheless both just and convenient to grant leave as sought. Put another way, to deny leave in this context would be unjust.
- [116] Although, the plaintiffs have been entirely successful on this application, I am going to depart from the general practice it relates to costs. This application was made necessary because the claims that the plaintiffs now seek to raise were not raised from the outset. This occurred despite the fact that the claims were within the contemplation of the plaintiffs' solicitor prior to initiating the litigation. I have also found that the same solicitor was not forthright in purporting to explain the actions taken (or not taken).
- [117] In these circumstances, an award of costs made in favor of the plaintiffs may be construed as sanctioning the circumstances which made this application necessary. I am not inclined to make such an order.
- [118] Accordingly, notwithstanding the outcome, neither party shall receive costs in respect of this application.

"Associate Judge Robinson"

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