

CANADA / JUDGMENT

Santos v. Turgeon

2023 BCSC 952

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 952 Santos v. Turgeon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Santos v. Turgeon,

2023 BCSC 952

Date: 20230605

Docket: S1913800

Registry: Vancouver

Between:

Bruce Santos

Plaintiff

And

Suzanne Turgeon in her capacity as the Executor of the last will and testament of Manuel Armando Santos, a.k.a. Manuel A. Santos, a.k.a. Manuel Santos, deceased, Suzanne Turgeon in her personal capacity, David Santos and Julia Santos

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

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Place and Dates of Hearing

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March 30-31, 2023,

Vancouver, B.C.

April 5, 2023

Written Submissions Received:

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Place and Date of Judgment

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June 5, 2023

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I. INTRODUCTION

- [1] This application asks how long disappointed beneficiaries can wait before commencing an action against the deceased's advisors after the collapse of an estate plan. The answer, perhaps not surprisingly, is "it depends." In this case however, I find that the plaintiff should be allowed to join the advisors now given the misleading and incomplete information the plaintiff received in the period following the collapse of the estate plan.
- [2] The plaintiff, Bruce Santos, is a beneficiary under his deceased father Manuel Santos' will dated July 31, 2009 (the "Will"). Given that the matter involves multiple members of the same family, I will use first names for identification but mean no disrespect thereby.

- [3] Bruce began this action on December 4, 2019, against Manuel's common-law spouse, Suzanne Turgeon, alleging that she failed to complete the necessary steps to effectuate Manuel's estate plan (the "Plan"), a plan which would have benefitted Bruce and his siblings.
- [4] Bruce sought to add Manuel's advisors as defendants on May 9, 2022. The advisors include the following individuals and firms involved in the preparation and implementation of the Plan:
- a) Manuel's accounting firm, MNP LLP ("MNP"), and his accountant, Keith Britz;
 - b) Manuel's investment firm, IPC Securities Corporation, doing business as Investment Planning Counsel ("IPC"), and his advisor, Ronald Orlando Wesman; and
 - c) Manuel's lawyer, Edward Kaye, and his firm, Waterstone Law Group LLP ("Waterstone");
- (collectively, the "Advisors")
- [5] The Advisors opposed the application to add, arguing that the plaintiff waited too long before engaging them.

II. BACKGROUND

A. The Evidentiary Framework

- [6] The facts below are largely derived from the pleadings and the affidavits filed by the plaintiff.
- [7] Evidence is not technically required to support a joinder application. The pleadings alone may be sufficient to establish the grounds for the order: *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16. The plaintiff's pleadings will obviously need to be tested at trial, but they may be relied upon for the purposes of the present application unless rebutted by evidence filed by other parties. Here the proposed defendants did file evidence, so I have also reviewed that material where necessary and appropriate.

B. The Plan and the Waiver

- [8] Before his passing, Manuel told Bruce that he wanted to make sure his affairs were in order, including by making arrangements with respect to his most significant asset, a pension he held through his employer, Canadian Pacific Rail ("CP") (the "Pension"). Manuel stated that he wished to provide for Suzanne through a specific bequest in his will and to provide for his children Bruce, David and Juanita through a bequest of the residue of his estate (the "Estate"). Manuel advised Bruce that he was going to liquidate his Pension to ensure that it passed to his Estate. He told Bruce that he would transfer any funds arising from this liquidation into the care of his investment advisor Mr. Wesman at IPC. I refer to these objectives collectively as the "Plan."

[9] On June 30, 2009, Manuel's accountant, Mr. Britz, wrote to Manuel (the "June 2009 Letter") confirming the outlines of the Plan. The letter stated that:

[Manuel's] intention is to ensure that [his] net worth goes to [his] children in the event that something happens to [him]. [He had] indicated that [Suzanne] has already been appropriately provided for. [Manuel] also wishes to arrange [his] affairs in the most tax efficient manner while still achieving [his] goal of leaving [his] estate to [his] children.

[10] Mr. Britz reviewed the steps necessary to implement the plan stating:

- a) "The first step is to remove [Suzanne] as the named beneficiary of the Canadian Pacific Pension Plan" and replace her with the "Estate of Manny Santos" as beneficiary.
- b) "The next step is to rewrite your will " which "should be worded to split the residual assets of the estate, after all just debts and income taxes have been paid, equally to each of your three children."
- c) The letter cautioned that there was a possibility of a wills variation claim by Suzanne and that Manuel should engage Waterstone for "legal assistance to properly draft [his] will and review this issue."

[11] On July 24, 2009, Mr. Wesman wrote to Mr. Britz (the "Wesman July 24 Email"), referring to their telephone discussion earlier that day. Mr. Wesman advised that Manuel presently had two accounts at IPC. He recommended establishing a "new nominee RRSP account so all registered funds would be under the same account." He said that if Mr. Britz concurred, he would "prepare documentation to establish that account. At the same time, [he] would obtain authorization from [Manuel] to change [the] beneficiary to "Estate", as [Mr. Britz] had indicated."

[12] Later that day, there was an email from Mr. Britz back to Mr. Wesman (the "Britz July 24 Email") advising that he had met with Suzanne and Manuel and that Manuel's will was going to be finalized shortly. Additionally, Mr. Britz noted that Suzanne was:

going to confirm the exact wording Pension Services wants in a letter requesting that the CPR company person plan changes the stated beneficiary to the Estate of Manny Santos (effectively removing Sue). Sue will get the letter started, get Manny to sign it and get it in by both fax and mail.

Mr. Britz added that the transfer of the pension funds could happen "as early as tomorrow" and that "[t]his transfer into the RRSP account (may need to be a locked in RRSP) will need to show the beneficiary as the Estate."

[13] On July 27, 2009, there was an email from Mr. Wesman to Mr. Britz (the "July 2009 Email") highlighting the urgency given Manuel's health status:

Apparently, on Friday, after I left the office, [Suzanne] and Manny dropped off a letter from a medical doctor from the Young Clinic stating that Manny has metastatic [sic] cancer and that he is in the palliative phase. As the attached memo states, this is required to unlock funds, if requested. This morning (Monday-27 July) Sue called. I faxed her the memo and advised her that Manny must contact his manager immediately to inform him that he wishes to retire, and that she should convey an urgency.

[14] That same day, Mr. Britz wrote to Mr. Kaye (the "July 2009 Letter"). This letter included the following information:

As we discussed today Manny has metastatic rectal cancer which has progressed rapidly in the last few weeks. As a result, he wishes to ensure his estate issues have been attended to. In that regard, he wishes to update his will as well as prepare a Power of Attorney.

Manny's intention is to ensure that his net worth goes to his children on his passing. He has indicated that [Suzanne], his common law spouse, has already been appropriately provided for.

Manny wishes the executors of his estate to be Ken Glazebrook (his brother-in-law from his first marriage living in Alberta) and [Suzanne] (his common-law spouse living in Hope, BC)

At present Manny has a large pension vested with CP Rail with [Suzanne] named as the beneficiary. We are currently in the process of transferring those funds to a RRSP plan in which his estate will be named as the beneficiary of the RRSP plan.

Mr. Britz confirmed that the Plan was for the residue of the estate to go to Manuel's three children. Mr. Britz expressed a concern regarding having Suzanne as executor "when his wishes are to leave his estate entirely to his children."

[15] On July 28, 2009, Mr. Britz's handwritten file notes (the "Britz July 2009 Notes") summarize a call from Suzanne, in which she had advised him that:

- Manny's boss went to Pension Services to ensure things get rushed à no hold ups.
- Sue is going to provide me with a copy of the documents [CP] is faxing to Sue from Pension Services.
- Need to rename beneficiary of Pension as Estate.

Mr. Britz also noted that he "called Pension Services of CP Rail today and got Dominic. Dominic advised him that the [Manuel] should both call and write requesting to remove [Suzanne] as beneficiary and request that the lump sum proceeds go to his estate."

[16] Mr. Kaye's materials from his file opened on or about July 28, 2009, contain the following notes of the instructions he received from Mr. Britz:

- a) Contact Manny today (at phone # from Keith Britz). Make appt for him to come in.
- b) Prepare draft will as per Keith instructions.

- c) Prepare draft PoA as per Keith instructions.

(the "Kaye July 2009 Notes")

[17] There was a flurry of activity on July 30, 2009, including:

- a) an email from Mr. Kaye to Mr. Britz attaching a copy of the draft will and asking for his input to advise of any "inconsistencies between your instructions" and the language used;
- b) an email exchange between Mr. Wesman and Mr. Britz in which they discussed the finalization of Manuel's will "tomorrow". Mr. Britz advised that in a meeting he had on July 30, 2009, with "Sue and Manny", he was told that:

Sue is going to confirm the exact working Pension Services wants in a letter requesting that the CPR company pension plan changes the stated beneficiary to the Estate of Manny Santos (effectively removing Sue). Sue will get the letter drafted, get Manny to sign it and get it in by both fax and mail.

- c) an email in which Mr. Wesman advised Mr. Britz that Suzanne had called him "at about 2:30" and they were to meet on July 31, 2009, at 11:00 a.m. He set out that he would open a locked-in account and establish the beneficiary as the Estate. Mr. Wesman adds that he had "prepared a Letter of direction for Manny's signature changing his regular RRSP's beneficiary from the three children (currently) to "Estate"." He asked Mr. Britz, "Is this in accord with your strategies?" Mr. Britz responded saying, "Yes Ron this looks exactly like what I had in mind."

(collectively, the "July 30 Correspondence")

[18] Mr. Wesman provided evidence on this application that on July 31, 2009, he met with Bruce and Suzanne:

in my Chilliwack office to complete forms to open a LRSP account to receive the transferred-in funds from CPR Pension Services. At that meeting it was discussed in the presence of [Suzanne] that the fund's beneficiary was intended to be [the] "estate" and that [Suzanne] would subsequently sign a spousal waiver to release the funds because she was identified as "spouse" in the IPC account application.

[19] Further, "[i]n [Mr. Wesman's] opinion [Suzanne] understood the intent of the action, the rationale, and expressed no opposition." Mr. Wesman had previously confirmed the details of this July 31, 2009 meeting in a later November 8, 2010 letter to Mr. Kaye (the "November 2010 Letter"). In this letter, Mr. Wesman acknowledged that "in accord with [Mr. Santos'] direction, a subsequent spousal waiver would be required to release the funds to the "estate" and subsequently to Mr. [Santos'] children."

[20] Although this was not disclosed to Bruce until many years later, Suzanne executed a partial waiver of her rights under the Pension on July 31, 2009 (the "Waiver"), which was directed to CP's pension department. The Waiver states, inter alia:

I understand that my spouse has elected to transfer an estimated amount of \$530,695.08 out of the plan, and to receive \$154,071.70 in cash less withholding taxes.

I understand and agree that, in transferring the lump sum value my spouse is also transferring my rights to any survivor benefit to a locked-in vehicle. In receiving an amount in cash, if any, I am giving up any and all rights I might otherwise have to receive a survivor benefit with respect to such cash payment.

[Emphasis added.]

[21] The parties generally accepted, at least for purposes of this application, that the Waiver only covers a smaller cash portion out of the Pension and not the much larger amount that went into a Locked-in Retirement Savings Plan account ("LRSP"). The failure to ensure that there was a comprehensive waiver in place before Manuel's passing is the core of the proposed claims against the Advisors.

[22] Manuel liquidated the Pension and transferred the resulting funds to IPC (the "Pension Funds"). Manuel called Bruce and informed him that this process was complete. He also told Bruce that he felt at peace knowing that IPC would pass the Pension Funds to his Estate.

[23] Mr. Wesman confirms that after the transfer to IPC, the plaintiff's registered investments consisted of a RRSP and the LRSP. Mr. Wesman states that:

[i]n the initial transmission of funds to IPC Securities, a spousal waiver had not been required by CP because the marital status had been categorized as "marriage breakdown" in their records, and as such [Suzanne] was not showing as a "spouse".

This misunderstanding as to Suzanne's actual spousal status appears to be the genesis of all the problems that arose thereafter.

[24] Manuel's Will was executed on July 31, 2009. The Will provided that Suzanne would be paid a fixed \$220,000 from the Estate and noted that Manuel was also attempting to finalize arrangements to acquire and pay for an apartment and a sport-utility-vehicle for her. The Will provided that the residue of Manuel's estate would be divided into three equal shares for each of Bruce, David, and Juanita.

[25] Mr. Kaye's file ("Kaye Wills File") contains a questionnaire which states "no" to the question as to whether the residue was to go to Manuel's spouse. The notes also reflect that Suzanne was to receive an apartment and a vehicle, and provides that Manuel was "going to do [this] ASAP outside of estate. Sue has agreed this is all she is to receive and satisfies all her claims".

[26] Manuel died on August 8, 2009.

[27] Most of the documents reviewed above discussing the development and implementation of the Plan were not made available to Bruce for many years. Specifically:

- a) the November 2010 Letter was not disclosed to Bruce until Mr. Kaye provided same on January 30, 2018;
- b) the Waiver was not disclosed to Bruce until August 16, 2019, after a court-ordered subpoena was obtained requiring production of the CP Pension file;
- c) the July 2009 Letter, Kaye July 2009 Notes, and the Kaye Wills File were not disclosed to Bruce until August 31, 2021, through a list of documents produced by Suzanne; and
- d) the June 2009 Letter, Wesman July 24 Email, Britz July 24 Email, July 2009 Email, Britz July 2009 Notes, and the complete July 30 Correspondence were only produced to Bruce as part of an October 7, 2021 disclosure by Mr. Kaye.[1]

[28] The delayed provision of the Plan preparation and implementation documents feature heavily in my analysis below.

C. The Failure of the Plan

[29] Contrary to the Plan, Bruce and his siblings did not receive the Pension Funds through the Estate.

[30] Attached to a much later August 16, 2019 affidavit filed by Suzanne were notes from CP's pension file indicating that there was a conversation between Suzanne and a CP human resources service centre employee on August 6, 2009. The notes indicate that Suzanne suggested at that time that she would not complete certain forms because they were "not claiming common-law status", and that Suzanne understood that she had no claim on Manuel's pension or benefits anyway.

[31] On January 13, 2010, an affidavit was prepared by Manuel's executors, Suzanne and Ken Glazebrook, with a Statement of Assets, Liabilities, and Distribution. It stated that the Pension Funds were "payable to the estate". The Statement states that Manuel's estate was comprised of the following:

- a) real property at 63723 Heather Street, Hope, BC, worth approximately \$278,000;
- b) property in Belize, Central America, worth approximately \$50,000;
- c) monies in various accounts totaling approximately \$1,067,074.75; and
- d) approximately \$609,000.00 representing the CP Pension Funds.

[32] The grant of probate was obtained on April 15, 2010.

[33] On June 8, 2010, Mr. Kaye wrote to CP to confirm what happened with the Pension Funds. He asked if there was a waiver from Suzanne in CP's file. On June 24, 2010, CP replied that Manuel had chosen a lump sum distribution, part of which was paid in cash and the balance was transferred into the locked-in vehicle. CP indicated they had no record of any spouse, let alone a spousal waiver. CP noted, however that the rights to a pension can indeed be waived by a confirmed spouse. This meant all rights would have to be waived, as a partial waiver

cannot be made without "explicit language in the waiver to that effect".

- [34] In a letter from Mr. Kaye dated June 28, 2010, to Bruce and his siblings (the "June 2010 Letter"), he advised that "an issue which has recently come to light is a question about who is entitled to what portion of Manny's CPR Pension." He quotes from the former Pension Benefits Standards Act, R.S.B.C. 1996, c. 352 [PBSA]. He opines that "[t]he effect of these provisions is that [Suzanne] had a statutory right to receive not less than 60% of Manny's pension unless [Suzanne] provided the pension plan with a signed Release." He asserted that IPC had no signed release. Mr. Kaye added that IPC had contacted CP and "they have said that they do not have a signed Release either." Mr. Kaye noted that even if Suzanne did not have a direct right to the Pension Funds, she "also has an indirect claim based upon the provisions of the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA]" [emphasis added.] Mr. Kaye states that "If [Suzanne] did in fact waive her right under the PBSA to receive that income stream, [she] feels that given the large value of that income stream her share of the estate should be increased from the roughly \$224,000 set forth in the Will." The letter concludes as follows:

If you have any questions about the [WVA], I can prove you with information about that statute. However, I cannot provide you with any legal advice about what your rights and obligations are. If you wish to receive such advice, you will need to contact a lawyer and obtain that legal advice from that lawyer.

- [35] Mr. Kaye inquired if Bruce and his siblings would simply "agree to amend the distribution of the estate" in Suzanne's favour. The siblings declined to do so.
- [36] On September 20, 2010, Mr. Kaye sent a further letter to the siblings (the "September 2010 Letter"). Mr. Kaye states that "it has come to the attention of the Executors that it may be a legal requirement that your father's locked-in RRSP be transferred to Sue, as his surviving common-law spouse." He says the executors were still looking into this, as was IPC. He says that the Superintendent of Financial Institutions of Canada ("OSFI") told him that "Manny's locked-in RRSP must be paid to [Suzanne] and that she can only waive her rights by naming a dependent child of herself of [sic] Manny as beneficiary." The letter continues:

You might ask at this point whether Sue can simply sign a waiver whereby she relinquishes her rights in the locked-in RRSP and allows the proceeds of the locked-in RRSP to be paid to Manny's estate. Unfortunately, it does not appear that this is an option which is available. When the locked-in RRSP is transferred into Sue's name, there are strict limitations in the Act about what she can do with the locked-in RRSP

- [37] Mr. Kaye concludes saying:

Although the Executors do not have a final answer from IPC in respect of the locked-in RRSP the Executors felt that it was essential that we inform you of the possible change to the distribution of the estate (or more correctly, the possible change to the value of the estate being distributed under the Will) because of the limitation period which will be expiring shortly under the [WVA]

The spouse and children have 6 months from the date of the Grant of Probate is issued by the Court to commence those legal proceedings, failing which they are prevented from making their claim. In this case the Grant of Probate was issued by the Court on April 15, 2010 so the limitation period expires on October 15, 2010. If you wish to commence legal proceedings under the [WVA], and do not do so by October 15, 2010 then you will in all likelihood not be able to do so after that. We may not have a final answer from IPC prior to October 15th, so if you feel that there is any possibility that you might wish to pursue a claim to enforce your rights under the [WVA], you should obtain legal advice immediately in order to preserve and protect your rights.

[Emphasis in the original.]

[38] By email dated October 7, 2010, Mr. Kaye wrote Bruce stating:

the terms of Manny's Will apply to only those assets which pass under the Will, and the Will terms do not apply to those assets which do not pass under the Will. Thus, if it does turn out that the locked-in RRSP is required to pass to Sue by statute and/or the pension plan terms, the locked-in RRSP is excluded from Manny's estate and the Will would not [apply to] it or govern it or its distribution...Sue would receive both the locked-in RRSP and the \$220,000 under the Will, subject to the right of you and your siblings to claim pursuant to the [WVA] that the provisions of the Will should be modified to make further provision for yourselves

2. With regard to your instructions to "pursue all means to convert Manny's locked-in RRSP into cash", this is precisely the issue which is being sorted out. The investment company has told us that they will not convert or cash in the fund without first receiving Sue's written consent/waiver because of her vested rights in the pension. It was that requirement which then spurred us to look into what the pension plan and investment company had specifically arranged. At the present time we are awaiting a response from the legal department of the investment company as to their position and requirements. When we hear from them, we will inform the beneficiaries accordingly.

[Emphasis added.]

(the "October 2010 Email").

[39] There is no indication in the materials that Mr. Kaye did follow up with the beneficiaries.

[40] The next day, on October 8, 2010, Waterstone commenced a wills variation proceeding on behalf of Suzanne. Suzanne pleads that the estate value was \$1,345,074.75, but that Suzanne was only set to receive \$220,000 under the Will. This action was discontinued on May 20, 2011, without being served (Bruce did not receive a copy of this filing until this litigation was commenced).

- [41] The earlier Disclosure Statement was revised by a Supplementary Affidavit sworn July 7, 2011 in the probate proceedings. The new affidavit declared that the LRSP "in the amount of \$484,961.20 held with Investment Planning Council is a locked-in RRSP and that pursuant to the terms of the Pension Benefits Standards Act (Canada), is legally required to be transferred to a locked-in RRSP in the name of the applicant, Suzanne Turgeon, who at the Deceased's date of death was the Deceased's common-law spouse."
- [42] Based on the present record, there was no material activity for the next two years.
- [43] On April 15, 2013, Mr. Glazebrook was removed as co-executor. Suzanne argued that she needed to remove Mr. Glazebrook as he was not cooperating in relation to the listing of certain real property. This left Suzanne as the sole executor.
- [44] There was then another two year pause without any material activity.

D. The Plaintiff Begins his Quest for Information

- [45] On October 29, 2015, Bruce's prior counsel, Andrea Frisby, contacted Mr. Kaye to discuss the failure of the Plan. There were further exchanges on February 25, 2016 and March 3, 2016. In an email of February 25, 2016, Mr. Kaye says:

unless Sue signed a Waiver whereby she waived her entitlement to receive her share of the pension as a whole, there was a legal requirement that these payments could not be made to the Estate. Sue never provided any such Waiver to CPR.

- [46] In her March 3, 2016 response, Ms. Frisby requested a copy of the CP file. This was not provided.
- [47] Bruce's new counsel, Joty Sandhu, requested documents from Mr. Kaye on December 6, 2017. Mr. Kaye responded on January 15, 2018, asserting that he acted only for the executor, not the Estate and that "[l]egal work and advice provided to the Executor do not belong to the Estate".
- [48] Bruce's lawyers replied on January 22, 2018, citing *Chang v. Lai Estate*, 2014 BCSC 128 at paras. 16-18, stating that:
- [i]t is well established that a beneficiary has a proprietary interest in and a right to production of any document relating to advice sought and obtained by an executrix or trustee in connection with the administration of an estate.
- [49] Mr. Kaye responded on January 30, 2018, saying that he had considered whether the exception noted by Bruce's counsel applied. Mr. Kaye did attach copies of certain correspondence at this time.
- [50] On February 19, 2018, Bruce's counsel advised that they had reviewed the documents and found "no justification" for having moved certain funds out of the Estate to Suzanne's benefit.

- [51] On March 6, 2018, Bruce's counsel wrote again to Mr. Kaye stating, "[o]ur office has been inquiring about the funds from the Deceased's CP Pension for the past three months and we have not received full answers". Bruce's counsel requested a phone call. Mr. Kaye declined the requests. He responded saying that he would consider responding to written questions. He noted that the residue of the Estate had not yet been distributed (unlike the Pension Funds that Mr. Kaye had already arranged for Suzanne to receive).
- [52] On March 9, 2018, Mr. Kaye wrote Bruce's counsel describing how the LRSP had gone to Suzanne, another cash account with IPC was supposed to go to her, a smaller account invested with McKenzie mutual funds was paid to the Estate, and a final account was "inadvertently paid directly to Sue Turgeon" even though it too belonged to the Estate. Mr. Kaye proposed to correct this last error by crediting the amount received against the bequest made in the Will to Suzanne.
- [53] On March 15, 2018, Mr. Kaye wrote an email to Bruce's counsel asserting that the cash account belonged to Suzanne, not the Estate. He repeated that "there was no Waiver at all from Sue."
- [54] On June 29, 2018, Ms. Sandhu again wrote to Mr. Kaye expressing dissatisfaction that he has not produced relevant materials, including all correspondence with IPC.
- [55] On July 6, 2018, Mr. Kaye confirmed he did not have a copy of a CP member booklet. On July 10, 2018, plaintiff's counsel repeated the request for a CP member booklet. On October 1, 2018, Mr. Kaye advised that since CP had paid out the cash component and transferred the LRSP, "there was no longer any monthly pension payment nor survivor pension payable", so there was "no pension Member", and no right to a booklet.
- [56] Also, on October 1, 2018, in response to an email from Mr. Kaye asking about CP's waiver requirement, CP advised as follows:

When a member is married or common law and declares that person and we have record of the spouse on file, if they were to elect a lump sum payment then the spouse is required to assign a spousal waiver, stating they understand the funds are being transferred from the plan. If the waiver is not signed then the member must take a monthly pension and they would elect an option with a specific survivor pension attached to their pension

- [57] Bruce's counsel sent Mr. Kaye a letter on October 26, 2018, again requesting correspondence between Mr. Kaye and CP. Mr. Kaye responded on November 5, 2018, providing certain correspondence between July 16, 2018 and October 1, 2018. Mr. Kaye also asserted that "regardless of what [Manuel's] intentions were when he submitted documents to CPR Pensions without disclosing the existence of his spouse, he was not entitled to avoid or ignore his legal obligations to his spouse, or to eliminate his spouse's rights in the pension, by simply not including her in his documentation. The fact is that he had a spouse at the relevant time, and his spouse had rights in his pension." Mr. Kaye argued that Suzanne's "rights were not removed when the funds were paid out by CPR." While acknowledging that

the beneficiaries had not yet approved any of the executor's accounts, Mr. Kaye asserted that since Suzanne had already received the Pension Funds, the matter was now "closed", and the Limitation Act, S.B.C. 2012, c. 13 [New Limitation Act] barred further discussion. He mentioned his reference in his June 2010 Letter about a possible wills variation action. He says that if such proceedings had been commenced at the time, each side would:

have ample opportunity to argue what an appropriate distribution of the Estate assets would have been, and [Suzanne] would also have had an opportunity to present her case as well. No proceedings were commenced, so we'll never know what the ultimate result might have been

[58] Bruce's counsel followed up for documents again on November 6, 2018. Mr. Kaye responded stating that:

[e]ffectively, the Executor in this matter determined that [Suzanne](in her personal capacity) had a legitimate and lawful claim that these funds, given their fundamental character as pension monies, were paid to the Estate in error, and that the funds belonged to her and need to be paid to her instead of the Estate. She did not require the express approval from the beneficiaries to pay the funds to herself as the funds did not belong to the Estate, nor do these funds now belong to the Estate.

[59] By letter dated January 29, 2019, Bruce's counsel wrote Mr. Kaye taking the position that no waiver should have been required. The letter also requested an array of documents, including Manuel's files with CP and IPC. Mr. Kaye responded on February 24, 2019, advising that Suzanne declined to sign authorizations to produce these documents.

[60] On June 6, 2019, Bruce's lawyers applied to Court for a subpoena to Suzanne requiring that she produce the CP Pension text, the member booklet, Manuel's complete pension file from CP, and Manuel's file with IPC. The Court made the order and required production within 14 days. On July 5, 2019, Suzanne and Mr. Kaye delivered certain documents concerning administration of the Estate, but nothing about the Pension text, booklet or forms. On July 29, 2019, Bruce's lawyers wrote demanding compliance with the Court order. On August 16, 2019, Bruce received certain documentation from CP. As noted above, the Waiver was in this package. Notably, the Waiver has an IPC fax header with a timestamp of August 4, 2009, suggesting that IPC may indeed have had the Waiver at the relevant time, contrary to Mr. Kaye's earlier assertion. Other documents in this package illustrated Mr. Wesman's dealings with CP with respect to the transfer of the Pension Funds, and included CP's statements about the necessity for a spousal waiver.

E. The Litigation and Further Document Production

[61] Bruce issued a Notice of Civil Claim ("NOCC") against Suzanne on December 4, 2019. An Amended Notice of Civil Claim ("ANOCC") was filed December 22, 2020. A Second ANOCC was filed December 9, 2021.

[62] The causes of action raised against Suzanne can be summarized as follows:

- a) Breach of contract:
 - i. Manuel and Suzanne made a contract to effect the Plan, but Suzanne only partly performed it by signing the partial Waiver;
 - ii. Suzanne failed to disclose the Waiver to the beneficiaries;
 - iii. Suzanne declined to sign the necessary additional waiver;
 - iv. as executor, Suzanne transferred funds to herself personally and benefitted from her breach of duty through the receipt of the Pension Funds.
 - b) Negligent misrepresentation: As executor, Suzanne owed a duty of care to the beneficiaries. She represented to them that she did not and would not waive her spousal rights to the Pension Funds. She breached her duty by failing to disclose that she had signed the limited Waiver.
 - c) Unjust Enrichment: It is alleged that Suzanne was enriched by the receipt of the Pension Funds, that the Estate was deprived of these funds, and that there is no juristic reason for the enrichment.
 - d) Secret Trust: Manuel bound Suzanne to a secret trust for the Pension Funds, which were to be held in trust for the benefit of the three residuary beneficiaries.
 - e) Breach of Fiduciary Duty and Breach of Trust.
- [63] On November 3, 2021, Bruce's counsel asked Mr. Kaye to respond to written questions. He responded on November 17, 2021. Mr. Kaye acknowledges in his response that he understood that the Pension Funds were to go to the Estate, which would "form part of the residue of his estate and be shared by his children". He also acknowledged that his handwritten notes indicate that Manuel's understanding was that Suzanne was satisfied with the Plan. In response to a question asking whether Mr. Kaye had discussed the potential conflict of interest, he declined to answer, stating: "This is a question about discussions which may have taken place between myself and my client, as Executor, subsequent to Manny's death. I believe solicitor/client privilege applies."

[64] This application to add the Advisors was delivered on May 9, 2022.

III. ANALYSIS

A. Legal Framework

i. The Rule

[65] This application is brought pursuant to R. 6-2(7) of the Supreme Court Civil Rules:

At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10) .,

- (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[66] In *Alexis v. Duncan*, 2015 BCCA 135, the Court of Appeal discussed the scope and operation of R. 6-2(7):

[14] Rule 6-2(7) governs the addition and substitution of parties. A court may add a party if one of three circumstances exist. Two of the circumstances are set out in R. 6-2(7)(b). Rule 6-2(7)(c) sets out the third circumstance.

[15] Rule 6-2(7)(b) is concerned with remedying defects in the proceedings as they stood prior to the application to add a party. It has a narrow application. Under R. 6-2(7)(b) the court must decide if the person ought to have been joined as a party or the person's participation in the proceeding is necessary to ensure that all matters may be effectually adjudicated: The discretion to add a party under R. 6-2(7)(b) exists if one of the conditions in subsections (i) and (ii) is established: However, "if neither of the prerequisite conditions is established then there is no discretion in the chambers Judge and he must refuse the application"...

ii. Rule 6-2(7)(b)

[67] Rule 6-2(7)(b) is engaged if the proposed new party is deemed necessary to the proper conduct of the proceeding. It is not enough that their participation as witnesses is "merely convenient": *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at para. 29.

iii. Rule 6-2(7)(c)

[68] In *Madadi v. Nichols*, 2021 BCCA 10 at paras. 22-24, Justice Fisher reviewed the principles underpinning the more expansive R. 6-2(7)(c):

[22] Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson*

Architects Inc., 2010 BCCA 329 at para. 45 [Neilson Architects]; Strata Plan LMS 1816 v. Acastina Investments Ltd., 2004 BCCA 578 [Acastina]; and MacMillan Bloedel Ltd. v. Binstead et al. (1981), 1984 CanLII 351 (BC CA), 58 B.C.L.R. 173 (C.A.) [Binstead]

- [23] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: Neilson Architects at para. 45, citing Acastina and Binstead. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the Proposed Defendants
- [24] If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. In Letvad, this court adopted a list of factors to be considered from Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282 (C.A.), a decision that addressed the amendment of pleadings after the expiry of a limitation period. These factors include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed new cause of action: Teal Cedar at para. 67; Letvad at para. 29; see also Chouinard v. O'Connor, 2011 BCCA 161 at para. 21. In the context of adding parties, the last Letvad factor may be more accurately described as the extent of the connection, if any, between the existing claim and the parties to be added.
- [25] The existence of a limitation defence is an important factor, as such a defence is extinguished if the proposed defendant is added: Limitation Act, R.S.B.C. 1996, c. 266, s. 4(1)(d), repealed and replaced with Limitation Act, S.B.C. 2012, c. 13, s. 22(1)(d); and Anonson v. North Vancouver (City), 2017 BCCA 205 at para. 13. However, this is not determinative

[Emphasis added.]

iv. The Relevance of the Applicant's Delay

- [69] The greater the applicant's delay, the less likely the application to add will be granted. However, (1) the applicant can reduce the weight of any delay by offering an explanation, and (2) in terms of explaining the delay, the conduct of other parties may be relevant.
- [70] In Neilson Architects, Justice Neilson allowed an appeal and added parties to this construction defects litigation. At paras. 88-89, she noted that there was a reasonable explanation for the delay, in that although the Strata Corporation knew of the defects early on, it was assured that they would be remedied. The Strata Corporation eventually brought

an action against certain defendants but was advised by its first lawyer to defer doing so against others. The court noted that this advice was erroneous. The court noted that there is a distinction between relying upon incorrect advice and purely dilatory behaviour on the part of the applicant:

- [86] Turning to the Letvad factors, there is no question there was a lengthy delay in bringing the application to join the respondents. Twelve years had passed since the Metropolitan was completed and the owners received the first report on problems with water penetration. Five-and-a-half years had passed since the writ was filed in the original action.
- [87] However, delay is not the only governing factor. The chambers judge was also required to consider the owners' explanation for the delay, and whether the respondents had established prejudice arising from the delay. There is nothing in his reasons to suggest he considered these factors. I am persuaded that his failure to do so led him to err in exercising his discretion to find that it was not just and convenient to join these respondents. I am also satisfied that if he had considered these matters, he would have reached a different conclusion.
- [88] The record demonstrates a reasonable explanation for a large part of the owners' delay in bringing the joinder application. While they had early knowledge of the Metropolitan's water problems, between 1995 and 1999 the original defendants reassured them these would be repaired, and remediation efforts took place. The respondents N.A.P. and Plaza 88 were directly involved in these.
- [92] In *Teal Cedar Products (1977) Ltd.* this Court commented on the role played by lawyers' advice in providing an explanation for delay. The plaintiff had received advice from its counsel that its claim against a defendant insurer for coverage would not succeed. Subsequent events led the lawyer to revise that opinion and the plaintiff brought an unsuccessful application to add a claim for coverage against that defendant after the limitation period had expired. On appeal, Finch J.A., writing for the Court, reversed that decision and allowed the new claim. He held that fault or culpability in the sense of intentional but mistaken conduct was not a decisive factor, and the initial advice from the plaintiff's counsel provided a satisfactory explanation for the delay in adding the claim. In deciding whether joinder was appropriate, a party should not be punished for having obtained mistaken advice.

[Emphasis added.]

v. The Question of Prejudice

- [71] When a plaintiff seeks to add a party outside of the limitation period applicable to the claim against the new party, there is a presumption of prejudice in favour of the party opposing the application. The onus then shifts to the plaintiff to lead evidence rebutting the presumption of prejudice: *Med Finance Co. S.A. v. Bank of Montreal*, 1993 CanLII 1428 (B.C.C.A.). However, prejudice is presumed only with respect to the period which has passed

since the limitation period expired, plus one year to allow for service of a claim: *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 at paras. 7-8; *Thind v A.M. Fredericks Underwriting Management Ltd.*, 2020 BCSC 1733 at para. 29. In *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145, Justice Esson (as he then was) noted that the "presumption of prejudice" is not a presumption of law, but rather one of fact that is used in the absence of any other evidence. The whole context must be considered and prejudice measured by assessing whether there can be a fair trial. Given that prejudice to the defendants is most likely known by them, the failure to adduce evidence of it can be telling.

- [72] Actual prejudice may arise, for example, where the defendant has destroyed or discarded documents after the expiration of the limitation period which could have been important evidence in the defence of the proposed claim, or where there are faded memories or aging witnesses: *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 at para. 13; *Nilsson Bros. Inc.* at paras. 6-8.
- [73] The court in *Eastern Platinum Limited v Cameron*, 2020 BCSC 1353 summarized the proper approach to the question of prejudice as follows:
- [85] The Court of Appeal has stated that an amendment must not be refused merely because it may be potentially prejudicial to the other party. Evidence of actual prejudice that could not be compensated by costs must be present: *Langret Investments S.A. v. McDonnell*, 1996 CanLII 1433 (BC CA), [1996] B.C.J. No. 550 (C.A.) at paras. 43 and 46.
- [86] Regard must be had to both presumed and actual prejudice. With regard to presumed prejudice, Madam Justice Martinson in *Weinlich v. Campbell*, 2005 BCSC 1865 at paras. 54-55 explained that there must be a "balancing of prejudices", although the prejudice to the plaintiff in refusing an amendment will generally be greater than the prejudice to the defendant in granting the amendment. She stated:
- [54] With respect to presumed prejudice, a plaintiff is prejudiced if a party is not added to an action when, by virtue of the expiry of a limitation period, the pursuit of a claim in a separate action is impossible. Conversely, prejudice to a proposed defendant is presumed if the addition is contemplated after the expiry of the limitation period, because any possible limitation defence is lost.
- [55] As explained by Master Bolton in *Takenaka v. Stanley*, 91 B.C.L.R. (3d) 179, 4 C.P.C. (5th) 258, 2000 BCSC 242 at para. 41, the prejudice to a plaintiff in the former situation will usually be greater than the prejudice to a defendant in the latter. In the former situation the plaintiff loses the opportunity to ask a court to consider the claims that the defendant has done something the law of the land considers actionable. In the latter, the defendant loses a windfall opportunity to avoid entirely any potential liability. Their respective situations may be precisely balanced in financial terms, but not as a matter of justice. Master Bolton concludes: "[a] right to seek justice cannot be fairly equated with a right to cut short the search without an answer."

- [87] Counsel for the defendants rely heavily on the presumed prejudice argument in this case. As noted in Weinlich, on the level of principle this argument taken alone may not necessarily weigh in their favour. However, it is not necessary for me to decide the issue on the basis of presumed prejudice alone since in my view the defendants' argument fails on the basis of actual prejudice.
- [88] With respect to actual prejudice, the onus is on the party who opposes the amendment to demonstrate that the prejudice affects the party's ability to respond to the amended claim: Weinlich at paras. 56-58; Yablonski v. Corp. of the City of Cranbrook, 2002 BCSC 1875 at para. 37. In meeting this onus, the respondent must adduce evidence that the alleged delay would prejudice their ability to bring or defend an action such as lost witnesses or evidence or destruction of documents: John A. Neilson Architects at paras. 96-102; Levy v. Petaquilla Minerals Ltd., 2012 BCSC 776 at para. 14.
- [89] On this application I find it significant that the defendants have adduced no affidavit evidence to demonstrate that the alleged delay would prejudice their ability to defend the action and have made no allegations with respect to potential lost witnesses or evidence or destruction of documents.
- [74] In Neilson Architects, the Court of Appeal specifically discussed the role of limitation periods within the prejudice analysis:
- [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In Brito (Guardian ad litem of) v. Wooley (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in Strata Plan LMS 1725 v. Star Masonry Ltd., 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
 2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in Letvad.
 3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation

Act.

[48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, 1987 CanLII 164 (BC CA), [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

[Emphasis added.]

[75] As discussed below, I have determined that this fourth option is the most appropriate alternative in the present case.

vi. The Limitation Period

[76] As noted above, the potential expiry of the limitation period against the proposed new parties is relevant to whether addition is just and convenient, and whether there is prejudice.

[77] The consideration of limitations is complicated in this case because the determination of which of two statutes applies depends on a disputed issue as to when the claims were discovered. Specifically, this issue necessarily requires consideration of both the New Limitation Act or the Limitation Act, R.S.B.C. 1996, c. 266 [Old Limitation Act].

[78] Both acts provide leeway in terms of adding parties after the expiry of the limitation period.

[79] Section 4(1)(d) under the Old Limitation Act provides that:

If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to adding a new party as defendant under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

[80] Section 22 of the New Limitation Act provides as follows:

(1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

(d) new parties may be added as defendants.

- (5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.
- [81] Although it is possible to add a party after the expiry of the limitation period, the expiry of a limitation period is still relevant to the analysis, as noted above.
- [82] In terms of the basic limitation periods, the Old Limitation Act provides for different periods for different causes of action, including:
- a) A two-year period for injury to persons or property (which period is inapplicable to the present fact pattern);
 - b) A ten-year period applicable to breach of fiduciary duty, breach of trust, failure to distribute estate property, and constructive trust claims: Old Limitation Act, s. 3(3); *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278 at paras. 56 and 75-94; and
 - c) A six-year period applicable to other claims: Old Limitation Act, s. 3.
- [83] It may be possible to postpone the running of these limitation periods pursuant to s. 6 of the Old Limitation Act:
- (1) The running of time with respect to the limitation period set by this Act for an action
 - (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or
 - (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use,is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.
 - (2) For the purposes of subsection (1), the burden of proving that time has begun to run so as to bar an action rests on the trustee.
 - (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
 - (a) for personal injury;
 - (b) for damage to property;
 - (c) for professional negligence;
 - (d) based on fraud or deceit;
 - (e) in which material facts relating to the cause of action have been wilfully concealed;
 - (f) for relief from the consequences of a mistake;

- (g) brought under the Family Compensation Act;
- (h) for breach of trust not within subsection (1).
- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
 - (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
- (5) For the purpose of subsection (4),
 - (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
 - (b) "facts" include
 - (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
 - (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,
 - (c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and
 - (d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
- (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.
- (7) Subsections (3) and (4) do not operate to the detriment of a purchaser in good faith for value.
- (8) The limitation period set by this Act with respect to an action relating to a future interest in trust property does not begin to run against a beneficiary until the interest becomes a present interest.
- [84] The New Limitation Act imposes a two-year limitation period, the commencement of which depends on when a claim was discovered. The act provides a general rule for determining when something is discovered in s. 8:

Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[85] The New Limitation Act also has a particular discovery rule applicable to fraud or trust claims:

12(1) In this section, "fraud or trust claim" means

- (a) a claim based on fraud, or fraudulent breach of trust, to which a trustee was a party or privy,
- (b) a claim to recover from a trustee trust property, or the proceeds from the trust property, if
 - (i) that property is or those proceeds are in the possession of the trustee, or
 - (ii) that property was or those proceeds were previously received by the trustee and converted to the trustee's own use, or
- (c) any other claim arising out of the fiduciary relationship between a trustee and a beneficiary if the trustee
 - (i) wilfully conceals from the beneficiary the fact that

(A) injury, loss or damage has occurred,

(B) the injury, loss or damage was caused by or contributed to by an act or omission, or

(C) the act or omission was that of the person against whom the claim is or may be made, or

(ii) wilfully misleads the beneficiary as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.

(2) A fraud or trust claim is discovered when the beneficiary becomes fully aware

- (a) that injury, loss or damage had occurred,
- (b) that the injury, loss or damage was caused by or contributed to by the
 - (i) fraud,
 - (ii) fraudulent breach of trust,
 - (iii) conversion, or

(iv) other act or omission

on which the claim is based,

- (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
- (3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

13. A claim relating to a future interest in trust property is discovered on the later of the following:

- (a) the day on which the claim is discovered under section 8 or 12, as the case may be;
- (b) the day on which the interest becomes a present interest.

[86] In terms of determining which of the two Acts applies, the New Limitation Act's transition provision in s. 30 states in relevant part as follows:

- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date [being June 1, 2013], the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
- (4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date,
 - (a) in the case of a pre-existing claim referred to in section 3 of this Act, that section applies to the pre-existing claim,
 - (b) subject to paragraph (a) of this subsection, in the case of a pre-existing claim referred to in section 8 (1) (a) or (b) of the former Act, Part 2 of this Act and section 8 of the former Act apply to the pre-existing claim, or
 - (c) in the case of any other pre-existing claim,
 - (i) subject to subparagraph (ii) of this paragraph, this Act applies to the pre-existing claim, and
 - (ii) Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of

(A) the effective date, and

(B) the day the act or omission takes place under section 21 (2) of this Act.

[87] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 42, discovery was said to occur as soon as there was a "plausible inference of liability". In *Khoe*, Justice Blake stated:

[22] The degree of knowledge required to discover the existence of a potential claim is more than mere suspicion or speculation, but it is not so high as to require certainty of liability: Grant Thornton at para. 46. In a claim alleging negligence, the plaintiff does not require knowledge "that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care": Grant Thornton at para. 48. To require such knowledge could have the unintended consequence of indefinitely postponing the applicable limitation period. Rather, "[w]hat is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently": Grant Thornton at para. 48.

[88] It should also be noted there was a one-year COVID-19-related suspension of limitation periods between March 26, 2020-March 25, 2021: *Khoe v. Guo*, 2023 BCSC 381 at para. 27; COVID-19 Related Measures Act, S.B.C. 2020, c. 8, Schedule 2, Item 27.

B. The Application of Rule 6-2(7)(b)

[89] The claimant relied on the narrower R. 6-2(7)(b) as well as the broader R. 6-2(7)(c). In relation to R. 6-2(7)(b), the plaintiff argued that the Advisors ought to be parties as their participation is necessary to ensure that all matters in the proceeding may be effectually adjudicated on. I disagree. The claim against Suzanne relates to her conduct. While the Advisors may be witnesses to Suzanne's conduct, their participation is not "necessary" as that term has been interpreted.

C. Should the Advisors be added pursuant to Rule 6-2(7)(c)?

i. The Existence of a Possible Cause of Action against the Advisors

[90] The first step in the analysis under R. 6-2(7)(c) is to confirm that in the new claim against the new proposed parties, there is "a question or issue" relating to any relief claimed in the proceeding or the subject matter of the proceeding. The Advisors did not aggressively argue that the proposed pleading fails to disclose a claim.

[91] That said, the Advisors did suggest that at least aspects of the proposed claim are more properly treated as claims that should have been brought in the name of the Estate. They argued that such claims could only be brought with leave pursuant to s. 151 of the Wills Estates and Succession Act, S.B.C. 2009, c. 13.

151 (0.1) In this section, "specified person" means a beneficiary, an intestate successor or a person who may commence a proceeding claiming the benefit of Division 6 [Variation of Wills] of Part 4 [Wills]

(1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person

(a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or

(b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.

(1.1) A specified person may apply for leave of the court under subsection (1) in the proceedings described in that subsection.

[Emphasis added.]

[92] The Advisors note that leave has yet to be obtained.

[93] While not conceding that a leave application is necessary, or that it is necessarily required at this stage of the proceeding, the plaintiff signalled an intention to apply for leave. The plaintiff argues that this proposed approach is acceptable given that subsection 151(1.1) was amended effective September 16, 2019, to permit an application for leave under s. 151 to be made within the proceedings for which leave is sought.

[94] In *Chung v. Chung*, 2022 BCSC 1396, Justice Majawa held that it was acceptable to:

[35] commence a proceeding described in s. 151(1) in the name of the specified person and then seek leave to maintain that proceeding in their name and the name of the estate of the deceased person by way of application within that same proceeding.

[Emphasis added.]

[95] The proposed amended pleading sets out the claims for which the plaintiff proposes to seek leave. Suzanne's Response to Civil Claim as executor makes it clear that she refuses to advance the claims for which the plaintiff is prepared to seek leave.

[96] The plaintiff also argues that he is entitled to advance a direct action as a beneficiary against any trustees, executors and others who join in on their misdeeds. The plaintiff relies on the principles set out by Justice Newbury in *Everest Canadian Properties Ltd. v. CIBC World Markets Inc.*, 2008 BCCA 276:

[29] There is of course no doubt that in the context of a "normal" trust, a beneficiary may sue the trustee(s) for breach of duty in respect of the administration of the trust or trust property

[30] The beneficiary of a trust may also sue a third party or "stranger" to the trust who has knowingly participated in a breach of trust. This principle, established in the seminal English cases of *Barnes v. Addy* (1873-4) L.R. 9 Ch. App. 244, 43 L.J. Ch. 513 and *Selangor United Rubber Estates, Ltd. v. Cradock* (No. 3) [1968] 2 All E.R. 1073, [1968] 1 W.L.R. 1555 (Ch. Div.), was confirmed in Canada in *Air Canada v. M & L Travel Ltd.* 1993 CanLII 33 (SCC), [1993] 3 S.C.R. 787 at 809-12, 108 D.L.R. (4th) 592. The Supreme Court also held that for the stranger's conscience to be "sufficiently affected to justify the imposition of personal liability", he or she must have knowingly assisted the trustee in a fraudulent and dishonest breach of trust and that "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability." (At 826.) (See also 3464920 Canada Inc.

v. Strother 2005 BCCA 35, 38 B.C.L.R. (4th) 159 (varied 2007 SCC 24, [2007] 2 S.C.R. 177), at paras. 74-8.)

- [97] The plaintiff relies on the right of "disappointed beneficiaries" to pursue professional advisors whose negligence thwarts the deceased's intentions. This third-party beneficiary rule was developed in *Ross v. Caunters*, [1979] 3 All E.R. 580 (Eng. Ch. Div.), in which the court considered the issue of a solicitor's liability to a named beneficiary whose husband had witnessed the will, rendering the testator's gift to her void. The solicitors were held liable to the beneficiary for failing to warn the testator that his will should not have been witnessed by the testator to effect the gift properly. This principle has been subsequently adopted and applied in *Canada: Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353, 1978 CanLII 1930 (B.C.S.C.) at pp. 372-374; *Earl v. Wilhelm*, 2000 SKCA 1, leave to appeal to SCC ref'd, 27807 (20 March 2000) at paras. 32-42; *Frank and Ellen Remai Foundation Inc. v. Bennett Jones LLP*, 2016 SKQB 213 at para. 35; *Meier v Rose*, 2012 ABQB 82 at paras. 10-13.
- [98] Finally, the plaintiff asserts that any s. 151 issue at best creates an irregularity which can be remedied. As our Court of Appeal observed in *Ari v. Insurance Corporation of British Columbia*, 2021 BCCA 180 at paras. 45-66, the modern approach treats errors in procedure as irregularities, not nullities. Leave was required in order to issue a third party notice later than the Rules required. The court held that the issue could be remedied nunc pro tunc.
- [99] I agree with the plaintiff's position on these points; hence, it is not possible at this stage to say that the Advisors' s. 151 argument bars the proposed proceeding. I find that the plaintiffs have at least met the requirement to show that there is a possible cause of action against the Advisors. This low threshold requires only a real issue between the parties that is not frivolous or that there is a possible cause of action. That threshold has been met.

ii. Is the Addition of the Advisors Just and Convenient?

a) Introduction

- [100] I review below the various factors relevant to this issue set out in *Madadi*, being "the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed new cause of action".

- [101] Given its importance on the facts of this present case, I begin with a review of the applicability of any limitation period.

b) Has the Applicable Limitation Period Expired Against the Advisors?

- [102] As noted, the expiry of the limitation period against the new proposed parties has been treated both as factor in the "just and convenient" analysis and as a condition to the invocation of the presumption of prejudice: *Neilson Architects* at para. 47.

[103] Manuel died on August 8, 2009, but no one proposed this as the operative date for the commencement of the limitation period. The Advisors acknowledge that the commencement has to be extended to at least 2010, as it was only then that anyone suggested that Suzanne was entitled to the disputed Pension Funds.

[104] The Advisors argue that the plaintiff had all the requisite knowledge as early as 2010 such that postponement ended (or discoverability began) so far back that joining the Advisors would not be just and convenient. In particular, they argue that by at least the end of 2010:

- a) Bruce knew what his father had told him about the Plan;
- b) Bruce knew that the Plan had failed; and
- c) Bruce was advised by Mr. Kaye that he should consider commencing a proceeding.

[105] I conclude that it is not clear on the present record whether the applicable limitation period against the Advisors expired before this application was brought:

- a) It cannot be said that the plaintiff had knowledge, either actual or constructive, of the material facts upon which a "plausible inference of liability" on the Advisors' part could be drawn in 2010. Specifically, I find that it is arguable that Bruce would only have been in a position to conclude that there was a plausible inference of liability after May 2020, given (1) the misleading information the plaintiff received from the Advisors at the time that the Plan failed, and (2) the delayed production of critical materials that would have indicated potential failings on the part of the Advisors.
- b) In relation to the advice received, I note the 2010 correspondence from Mr. Kaye to Bruce in which Bruce was told that the Pension Funds essentially had to go to Suzanne as she was the surviving common-law spouse and there was no waiver. Based on this information, Bruce could not reasonably have been expected to have sufficient knowledge or understanding that there was in fact a plausible claim to advance. Further, Mr. Kaye's advice to consider consulting counsel was not directed toward the viability of a claim of the present type. Rather it was directed toward a wills variation proceeding. However, Bruce has made it clear that he does not seek to vary the Will. It is the failure to effectuate the Plan that is the problem.
- c) In relation to the delayed production, the following documents, only produced to Bruce many years after their creation, were essential to him obtaining a proper understanding of what led to the failure of the Plan:
 - i. the correspondence with CP, IPC and the OSFI, which was only delivered to Bruce on July 5, 2019 and August 16, 2019;
 - ii. the Kaye Wills File, specifically the notes from his file regarding Manuel's Will preparation and the correspondence with Mr. Britz regarding the Plan, which materials were only delivered on August 31, 2021;

- iii. the Waiver, which was only produced on August 16, 2019, after a Court-ordered subpoena was obtained for the CP Pension file;
- iv. other correspondence and file materials from Waterstone, including communications between Mr. Kaye, Mr. Britz, and Mr. Wesman, which were only delivered on October 7, 2021; and
- v. Mr. Kaye's responses to the written questions posed by Bruce's counsel, which were only delivered on or about November 17, 2021.

[106] Given:

- a) Mr. Kaye's mistakes and/or misdirection (whether negligent, intentional or innocent); and
- b) Mr. Kaye's refusal to provide the relevant documents in a timely way.

I cannot fault the plaintiff's level of diligence: Grant Thornton at para. 44.

[107] The uncertainty between the applicability of the two Limitation Acts creates additional uncertainty as to whether the period should be treated as having expired.

[108] Under the Old Limitation Act, there is uncertainty as to whether a ten, six or two-year period applies. The plaintiff argues that they may be able to access the ten-year limitation period for trust claims under the Old Limitation Act. This is at least arguable. If the Old Limitation Act's six-year period applies, and one were to use a July 2011 start date based on the revised probate filing setting out that the Pension Funds were excluded from the Estate, then it is arguable that the relevant period ran out in July 2018 (given the additional year for service). However:

- a) for the reasons expressed above, it is not at all clear that the 2011 date is the appropriate date to start the clock; and
- b) the better view could well be that postponement will be available under the Old Limitation Act, given that the claim involves alleged professional negligence and arguably wilfully concealed facts. Postponement could push the start date so the plaintiff falls within the relevant period.

[109] The same conclusion about the lack of clarity regarding the proper limitation period also applies if the claim is treated as being governed by the New Limitation Act. For example, it is at least arguable that the claims against the Advisors fit within s. 12 of the New Limitation Act, given that the claims may arise "out of the fiduciary relationship" between Manuel and the Advisors. Furthermore, it is at least arguable that the more forgiving discoverability rules in s. 13 are engaged, given that the corpus of the estate has apparently not yet been distributed.

[110] Under either Limitation Act, Bruce will also benefit from the one-year suspension of limitation periods for starting a civil or family law claim in BC between March 26, 2020-March 25, 2021.

[111] Finally, and in any event, the expiry of the limitation period against the new proposed parties is not a bar. It is one factor to consider, amongst the others reviewed below.

c) Extent of the delay

[112] There was undoubtedly a long delay between the underlying events and this application to add. We are now 14 years after the Will was executed.

[113] However, an application will generally not be dismissed on this basis alone. In Neilson Architects, there was a 12-year gap between the events giving rise to the action and the application to add. Nonetheless, the Court of Appeal did allow certain parties to be added.

d) Explanation for the delay

[114] The analysis of this factor largely mirrors the discoverability and postponement discussion above.

[115] The plaintiff's explanation for the delay is that the Advisors provided inaccurate information, withheld information, and refused to produce documents material to assessing whether there was any cause of action and whether it was appropriate to bring a claim. Specifically:

- a) The plaintiff was misled, in that Mr. Kaye incorrectly advised him that Suzanne had not signed any waiver of her pension rights.
- b) Mr. Kaye inappropriately misdirected Bruce by referring to the wills variation legislation when that was not the appropriate cause of action to consider, given that the failure of the Plan occurred outside any dispositions under the Will.
- c) Mr. Kaye failed to disclose at the time that his firm was operating in a conflict of interest through its decision to act for Suzanne personally in her undisclosed wills variation claim.
- d) Mr. Kaye required Bruce to engage in an excruciating information extraction process over several years.

[116] I agree that these reasons comprise a reasonable explanation for the delay.

[117] Specifically, the plaintiff could reasonably have assumed that the Plan's failure resulted from Suzanne exercising her right to decline to sign any waiver. In other words, it would have been reasonable to presume that the failure of the Plan was not the result of misconduct by anyone, particularly not the fault of the Advisors. Mr. Kaye's October 2010 Email does not suggest that any of the Advisors had done anything wrong in the implementation of the Plan but rather suggested that it was an unavoidable situation.

[118] Further, as noted, the plaintiff was not made aware of Mr. Kaye's potentially divided loyalties. Mr. Kaye was writing to the plaintiff on October 7, 2010, asserting that Suzanne had "vested rights" while his firm was simultaneously suing on behalf of Suzanne in her personal capacity in litigation inevitably designed to lower Bruce's recovery. It is difficult to

understand how Mr. Kaye could have believed he could write to a beneficiary as he did while his firm was simultaneously acting for (1) the executors under the Will; and (2) Suzanne in her personal capacity in a challenge to that same Will. Again, this will be an issue for trial. But this lack of transparency is, at a minimum, a further explanation for the plaintiff's delay.

- [119] Next, I note that Mr. Kaye accepted that the ball was in his court in his October 2010 Email in terms of making further inquiries to determine how this problem arose. But on the record before me, it appears that he never did follow up with the beneficiaries about this issue.
- [120] When Bruce finally learned that there was a Waiver signed by Suzanne, but one that did not cover all of Pension Funds, he would only then have appreciated that he had a plausible argument to advance--i.e. that there must have been an error on the part of the Advisors in failing to secure a comprehensive waiver, given that Suzanne had shown herself willing and able to sign at least one type of waiver.
- [121] The later productions showing that the Advisors understood that Suzanne was onside with the Plan also heightens the "plausible inference of liability". In other words, it would appear that the problem was not the result of Suzanne failing to have the necessary intention to comply with the Plan before Manuel's death but arguably was an error on the part of the Advisors to ensure that there was a formal execution to match her intention to respect Manuel's Plan. Once Manuel died, that ship had unfortunately sailed, as the Waiver could not be executed after the fact. Unfortunately, by that point, Suzanne had control of the ship without any ability for Manuel, or anyone else, to exercise leverage to return the ship to its proper course.
- [122] Mr. Kaye's discussion of a possible wills variation action was arguably irrelevant at best and a distraction at worst. The failure to secure waivers had nothing to do with the fairness of the distribution under the Will.
- [123] The documents included in the Advisors' delayed productions also dramatically improved the prospects of a contractual claim against Suzanne. Many aspects of the plaintiff's claims against the Advisors are collateral or subsidiary to the main claim against Suzanne. The fact that Suzanne advised the Advisors of her awareness and acceptance of the Plan makes it more likely that Bruce will be in a plausible position to argue that:
- a) Suzanne should have executed the necessary full waiver, as agreed; and
 - b) the Advisors were negligent in not ensuring that this occurred.

[124] The plaintiff applied reasonable, if not overwhelming, pressure to extract the necessary documents. I accept that there were "down times", but these can be explained by the misleading and limited information received. The plaintiff steadily increased the pressure (in the face of multiple refusals) from 2015 to the beginning of the useful disclosures in 2018.

[125] In explaining the decision to pursue documents before commencing litigation, Bruce relies on an extract from *Novak v. Bond*, [1999] 1 S.C.R. 808 at para. 40 that I agree is germane: "People ought to be encouraged to take reasonable steps short of litigation to cope with their problems". As Bruce argues:

[t]he [p]laintiff is entitled to keep asking questions about the pension, about the cashed-in part of the pension, about the accounting of the estate and about other matters. It does not lie in the mouths of the Advisors to contend that after what Kaye set out in his correspondence with the [p]laintiff and his siblings that should have adopted a position of immediate distrust. There may be a duty to investigate, but Kaye was telling the [p]laintiff and his siblings that there was no loss. Instead, matters simply did not work out.

[126] I agree.

[127] IPC complains that the reasons for delay the plaintiff put forward at the hearing were inconsistent with the plaintiff's affidavit material. Specifically, IPC argues that, rather than focusing on the 2019 delivery of the Waiver, the plaintiff's affidavit material focuses on Mr. Kaye's response to questions in 2021. The plaintiff states as follows in the cited affidavit:

I became aware of the negligence of the Lawyers and Investment Advisors upon receipt of the written responses of Mr. Kaye to my counsel, or at the earliest upon receipt of the lawyer's original file materials on or about August 31, 2021.

[128] The fact that the plaintiff focussed on the earlier Waiver production date at the hearing is not something that the Court should hold against the plaintiff. Parties often adopt more reasonable positions at the hearing of a matter. Furthermore, just five affidavit paragraphs earlier, the plaintiff makes a point of attaching the Waiver. Finally, and in any event, in their Reply Argument, the plaintiff did continue to formally assert that 2021 is the proper discovery year.

[129] The Advisors submit that the plaintiff is under a positive obligation to be "duly diligent in "pro-actively" determining he has a cause of action". While I agree that while a plaintiff must exercise due diligence, it can be difficult to perform one's diligence when misleading information is provided at the outset and there is a subsequent lack of transparency and timely disclosure. In *Kirby v. Amalgamated Income et al*, 2006 BCSC 974, the Court considered the issue of "wilful concealment" when defendants sought to amend a counterclaim. Citing the provisions of the Old Limitation Act on "wilful concealment", the defendants submitted that the postponement provisions applied to extend the limitation period. The Court held that the plaintiff had failed to produce relevant documents despite

repeated requests, and hence the six-year limitation period did not run until the requested documents were produced (at paras.14-17). In *Re Estate of Horace Lee*, 2005 BCSC 1537, rev'd on other grounds 2006 BCCA 549, at paras. 42-43, the context of estate litigation where the beneficiaries were unaware of an important document undisclosed by the executor, the Court held that the running of the limitation period was postponed because the document had been wilfully concealed. I find that the lack of document production also supports the plaintiff's position.

e) The degree of prejudice

[130] Given my finding that it is not clear whether the limitation period against the Advisors has accrued, the Advisors' ability to rely upon the expiry of the limitations period to support a presumption of prejudice is limited.

[131] That said, the Advisors also rely on the following alleged evidence of actual prejudice.

[132] IPC asserts that persons with potentially relevant information are no longer employees of IPC or are unavailable to provide their recollections. In particular, an employee who handled estate matters for IPC and was involved in this file unfortunately passed away in September 2021. IPC also asserts that with the passage of time, a complete documentary record may no longer be available. Bruce submits that this is a weak claim of prejudice:

a) In IPC's supporting affidavit, the affiant says that:

Although my search is in its preliminary stages, I note that the documents that have been located to date refer to individuals who are no longer employed by IPC or affiliated with IPC Securities Corporation.

But she does not specify what documents or individuals she refers to.

b) While IPC's affidavit notes that an employee has died, there is no indication that the employee had evidence material to the intended allegations.

[133] Mr. Wesman advises that he retired in 2011 and "did not take any client files (or copies of those files) [and that] [t]hose files remained with IPC." However, Bruce notes that Mr. Wesman was able to produce the November 2010 Letter, setting out the background of his dealings with Manuel. His ability to refresh his memory from this contemporaneous correspondence should mitigate any prejudice.

[134] While Mr. Kaye provided an affidavit, it says little about prejudice. However, in his written responses dated November 17, 2021, he asserts that he does not have "any" or a "clear" recollection of certain matters. That said, he was able to rely upon notes or other documents to provide answers. I note that Mr. Kaye has had relatively steady involvement in the file in that his firm acted for Manuel, acted for Suzanne wearing both her hats, and corresponded on several occasions with Bruce's counsel over the years. All of this minimizes the potential for prejudice.

- [135] MNP and Mr. Britz put forward no affidavit evidence of actual prejudice.
- [136] In *Tundra Helicopters*, Esson J.A. cautioned against reliance on "bald assertions" of prejudice. In that case, the defendants submitted that they could not locate a former employee they claimed would be a "key witness". Justice Esson commented that the "language of the affidavits should be examined with a degree of scepticism", specifically noting that there was no indication why the former employee's whereabouts were no longer ascertainable and that "bald assertions" about the employee being a "key witness" was entitled to no weight (para. 32). The level of particularity here was somewhat lacking.
- [137] Another factor to consider is that it seems clear that the Advisors will be witnesses at trial in any event, further softening any relative prejudice: *Cutts v. Goddard*, 2020 BCSC 1939 at para. 47.
- [138] While I accept that there will be prejudice to the Advisors by adding them at this late date, it is not a particularly compelling or weighty factor on the facts of this case.
- f) The extent of the connection, if any, between the existing claims and the parties to be added
- [139] There is clearly a connection between the claim against Suzanne and the claim against the Advisors. The claim against Suzanne involves the failed implementation of the Plan, as does the proposed claim against the Advisors. The Advisors are other persons who may be responsible in whole or in part for the design and failure of the Plan. In particular, the Advisors are alleged to have failed to properly implement the Plan, including by failing to secure a proper waiver from Suzanne.
- g) Maintaining the Limitation Period
- [140] In *Neilson Architects* the court found that the proposed defendant's limitation period arguments should be preserved and the issue determined at trial. Given the need for a more complete presentation of the evidence and arguments to come to a proper conclusion on the limitations issue, I find that it is appropriate to order that any amendment is without prejudice to the Advisors' right to raise the limitation period at trial. This is also a commonly recognized manner of mitigating any alleged prejudice: *Cutts* at para. 47.
- h) Global assessment of Justice and Convenience
- [141] In all of the circumstances, it would be just and convenient for the Advisors to be added as defendants, even given the long gap from the date of the original events. The misleading information provided at the time, and the subsequent lack of transparency, are enough to justify the plaintiff's delay.

IV. CONCLUSION

- [142] The plaintiff's application is granted on terms, being that the limitation period defence shall remain available to the Advisors at trial.

[143] Unless the parties seek leave to make further submissions, the plaintiff shall have their costs of this application in the cause as against the Advisors.

"The Honourable Justice Branch"

[1] I note that while there were certain emails dated July 30-31, 2009 disclosed on August 31, 2021, the full extent of the emails, and in particular many of the key portions cited above were not disclosed until October 7, 2021.

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