

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Goldenkey Oil Inc. v. Song*,  
2025 BCSC 371

Date: 20250305  
Docket: S162031  
Registry: Vancouver

Between:

**Goldenkey Oil Inc.**

Plaintiff

And

**Shougen Song, Xiaoyu Gu, Heiju Song, Song International Holdings Inc.,  
Indepth Energy Inc. and Indepth Investments Inc.**

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 83 on  
March 7, 2025.

Before: Associate Judge Bilawich

## **Reasons for Judgment**

Counsel for the Plaintiff:

J. Yates  
A. Butler

Counsel for the Defendants:

K. Marlowe, K.C.

Place and Date of Hearing:

Vancouver, B.C.  
February 11, 2025

Place and Date of Judgment:

Vancouver, B.C.  
March 5, 2025

**Introduction**

[1] In 2016, the plaintiff commenced essentially parallel proceedings in Alberta and BC. The BC Action includes a certificate of pending litigation (“CPL”) which has been registered on title to a residential property in the name of the defendant Xiaoyu Gu (“Ms. Gu”). Since then, all substantive proceedings have been pursued in Alberta, while the BC Action has sat idle. Counsel says the BC Action was started and the CPL registered to preserve the plaintiff’s ability to satisfy any judgment it obtains in either the Alberta Action or BC Action.

[2] In this application, the defendants seek orders that:

- a) This action (the “BC Action”) be dismissed for want of prosecution; and
- b) The CPL registered on 3915 West 36<sup>th</sup> Avenue, Vancouver, BC (the “Vancouver Property”) be discharged.

[3] The plaintiff opposes all of the relief sought. It says none of the constituent elements of the test for dismissal for want of prosecution are present.

[4] The defendants have also applied in the Alberta Action to strike Goldenkey’s for delay, albeit a hearing date had not yet been scheduled.

**Background**

[5] The plaintiff Goldenkey Oil Inc. (“Goldenkey”) is an Alberta company whose business involved acquiring petroleum and natural gas leases and developing them into producing wells.

[6] The defendant Shougen Song (“Mr. Song”) was (indirectly) a shareholder as well as Chief Executive Officer and Chairman of the Board of Directors of Goldenkey between 2007 and January 2016. The defendant Ms. Gu is married to Mr. Song. The defendant Heiju Song (“Heiju”) is their adult son. Various combinations of these individual defendants own and control, directly or indirectly, the corporate defendants.

[7] Between about 2012 and 2013, Goldenkey and its joint venture partners drilled 6 wells in Alberta. It alleges that Mr. Song and others in senior management conspired to defraud it by causing it to pay funds for drilling services to several shell companies they controlled. The shell companies sub-contracted the drilling services to third-party vendors who actually carried out the work. The amounts transferred to the shell companies was significantly higher than the actual cost of the services. The shell companies used Goldenkey's funds to pay the third-party vendors, and the excess was distributed to one or more of the companies or individuals named as defendants in the Alberta Action. This is characterized as an "invoice markup" scheme. Goldenkey says between July 2012 and November 2013, it paid the shell companies about \$9.2 million, while the shell companies paid third-party vendors about \$5.2 million. It also alleges that various Alberta defendants improperly authorized cash withdrawals from Goldenkey accounts or caused it to transfer certain funds directly to them.

[8] The defendants vigorously deny the allegations. In setting out this background, it is not my intention to make findings of fact regarding any matters which may be in dispute in the Alberta Action. This is simply an attempt to recite background the parties provided for purposes of the present application.

[9] On February 9, 2016, Goldenkey started an action in Alberta Court of Queen's Bench, Court File No. 1601-02031 (the "Alberta Action") against Mr. Song, Ms. Gu and 30 other individuals and companies. The claims involve allegations of fraud, conspiracy, breach of fiduciary duty and unjust enrichment. The amount of damages sought is a total of \$9,174,384, plus special damages and out of pocket expenses relating to detecting and investigating the fraud, punitive and exemplary damages of \$1,000,000, amongst other relief. Goldenkey included a claim that on or about August 18, 2015, Mr. Song transferred the Vancouver Property to Ms. Gu for no consideration and that this was a fraudulent conveyance or preference. It seeks an order setting the transfer aside and making the assets transferred available to satisfy any judgment granted to Goldenkey.

[10] On March 3, 2016, Goldenkey started the BC Action against Mr. Song, Ms. Gu, Heiju and three of their companies. It is based on the same allegations made in the Alberta Action, albeit with a much smaller group of defendants. The amounts that is alleged to have been distributed from the shell companies and Goldenkey to the BC defendants during the relevant time is approximately:

<b>Recipient</b>	<b>Amount</b>
Mr. Song	\$58,936
Heiju	\$22,603
Indepth Energy Inc.	\$1,380,165
Indepth Investments Inc.	\$113,333
<b>Total</b>	<b>\$1,575,036.90</b>

[11] It alleges that Indepth Energy Inc. is owned and controlled by International Holdings Inc., which in turn is controlled by Mr. Song and Ms. Gu. It says Indepth Investments Inc. is controlled by Ms. Gu and Heiju. It alleges they conspired in the alleged fraudulent scheme and they received funds, benefits and property, which they hold as constructive trustees on behalf of Goldenkey.

[12] Goldenkey also repeats its fraudulent conveyance / fraudulent preference claim relating to Mr. Song’s transfer of the Vancouver Property to Ms. Gu on August 18, 2015. It asked for a CPL, which it registered on title to the Vancouver Property.

[13] Goldenkey goes on to assert that it has a proprietary interest in the Vancouver Property based on (a) its claim against Mr. Song for fraud, conspiracy and breach of fiduciary duty and his beneficial interest in the property, (b) its claim against Ms. Gu as a conspirator in the alleged fraudulent scheme, (c) its claim against Ms. Gu as constructive trustee of the proceeds of the alleged fraudulent scheme, and (d) its claim that the Vancouver Property is the subject of a fraudulent conveyance.

[14] In Goldenkey’s response to the present application includes the following:

14. In the BC Action, but not the Alberta Action, Goldenkey claims a proprietary interest in lands owned by Ms. Gu and transferred to her by Shougen Song in August 2015 (the “Song Lands”), and seeks registration of

a certificate of pending litigation against those lands. The house on the Song Lands is the individual defendants' family home.

15. The BC Action was commenced, and a certificate of pending litigation was registered against the Song Lands, to preserve Goldenkey's ability to satisfy a judgment it obtains against the defendants in either the BC Action or the Alberta Action. Goldenkey is not aware of assets held by the defendants in Alberta sufficient to satisfy a judgment in the Alberta Action.

[footnotes omitted]

[15] Mr. Song tendered affidavit evidence indicating that he and Ms. Gu purchased the Vancouver Property (referred to as the "Song Lands" in the excerpt above) on February 9, 2010 (i.e. at least two years prior to the alleged fraudulent scheme) and that it was originally registered to Mr. Song and Ms. Gu as joint tenants.

[16] In or about June 2015, there was a meeting of Goldenkey's board of directors, at which they resolved to take steps which Goldenkey says either showed the other directors were aware of, or were on the path to discovering the alleged fraudulent scheme.

[17] On August 18, 2015, Mr. Song transferred his undivided half interest in the Vancouver Property to Ms. Gu for no consideration. Goldenkey says this was done to delay, hinder, avoid or frustrate his existing and anticipated creditors. It asks that the transfer be declared void as against it.

[18] Mr. Song and Ms. Gu say that in August 2015, Ms. Gu learned from their neighbours that the wife held title to their home in her name only. When Ms. Gu came to Canada, she gave up her career as a mathematics teacher at a university in China and could not find comparable work in Canada. She thought it would be fair that she hold title to their home in her name only as well. They agreed that Mr. Song would gift his interest in their home to her. He says this transfer was completely unrelated to any allegations that Goldenkey was making against him and his family.

[19] In September 2015, in order to gift his interest to Ms. Gu, they arranged to pay off the outstanding balance on the mortgage on their home, using their savings

and by borrowing money from their companies. Mr. Song does not specify how much was paid to redeem the mortgage, nor does he identify the specific sources of the funds. He insists they did not use money from Goldenkey or from the Indepth companies. The mortgage was cancelled from title on September 8, 2015.

**Procedural History – BC Action**

[20] Procedural steps taken in the BC Action include:

- a) On March 3, 2016, Goldenkey filed its NOCC and registered the CPL on title to the Vancouver Property;
- b) March 31, 2016, the defendants filed a jurisdictional response and made a request for particulars;
- c) April 7, 2016, Goldenkey delivered its response the to request for particulars;
- d) April 18, 2016, the defendants filed their response to civil claim;
- e) August 25, 2022, Goldenkey filed a notice of change of lawyer;
- f) August 9, 2024, the defendants filed their application to dismiss the BC Action for want of prosecution; and
- g) On October 4, 2024, counsel for Goldenkey sent a unfiled notice of intention to proceed to the defendants. It was filed with the court on October 7, 2024.

[21] The defendants say Goldenkey has taken no substantive steps to advance the BC Acton since April 7, 2016, when it responded to the request for particulars.

**Procedural History – Alberta Action / Indepth Action / Baytech Action**

[22] Procedural steps taken in the Alberta Action include:

- a) On February 9, 2016, Goldenkey filed its Statement of Claim;

- b) On February 19, 2016, Goldenkey filed an Amended Statement of Claim;
- c) On April 1, 2016, Mr. Song, Ms. Gu, Heiju, Indepth Energy Inc. and Indepth Investments Inc. (collectively, the “Indepth Defendants”) delivered a request for particulars;
- d) On April 8, 2016, Goldenkey delivered a response to the request for particulars;
- e) On April 18, 2016, the Indepth Defendants filed a Statement of Defence. Other defendants filed their Statement of Defence the same day;
- f) On July 18, 2016, Goldenkey served its “producible records”;
- g) Between September 19, 2016 and September 29, 2017, various other defendants served their “producible records”;
- h) On September 12, 2017, Indepth Energy Inc. started a second action [ABQB Court File No. 1701-12190] (the “Indepth Action”) seeking judgment against Goldenkey for shareholder loans owing, in the sum of \$9,277,202;
- i) Between October 3, 2017 and November 24, 2017, Goldenkey questioned several defendants in the Alberta Action;
- j) On October 26, 2017, Goldenkey filed its Statement of Defence in the Indepth Action;
- k) On February 15 and 16, 2018, in the Alberta Action, the Indepth Defendants questioned James Dai as corporate representative of Goldenkey, making 216 undertaking requests;
- l) On June 1, 2018, Indepth Energy Inc. served its producible records in the Indepth Action;

- m) On July 4, 2018, Goldenkey served its producible records in the Indepth Action;
- n) Between August 13, 2018 and November 25, 2018, the defendants in the Alberta Action provided their responses to undertakings given during questioning;
- o) On August 7, 2020, Goldenkey delivered its responses to the 216 undertakings given during the questioning of Mr. Dai;
- p) On March 11, 2021, Goldenkey filed an application (returnable April 13, 2021) for a Litigation Plan to set dates for steps to be taken to get the Alberta Action ready for trial;
- q) On April 13, 2021, two orders were made in the Alberta Action:
  - i. A Consent Consolidation Order, directing that the Indepth Action be consolidated with and heard as a counterclaim to the Alberta Action; and
  - ii. A Consent Order setting a Litigation Plan for the consolidated action;
- r) On May 31, 2021, Mr. Dai was questioned as corporate representative of Goldenkey regarding issues raised in what was the Indepth Action;
- s) On July 15, 2021, Goldenkey delivered undertaking responses arising from the May 31, 2021 questioning of Mr. Dai;
- t) On August 18, 2021, another group of defendants filed an application for Goldenkey to post security for costs;
- u) On August 31, 2021, Mr. Song was questioned regarding allegations raised in what was the Indepth Action;
- v) On October 8, 2021, Goldenkey served written interrogatories on the Indepth Defendants;

- w) On August 23, 2022, another group of defendants applied to schedule a hearing date for their application for security for costs and to set aside or vary the April 2021 Litigation Plan;
- x) On November 7, 2022, Goldenkey provided dates by which it would provide a responding affidavit to the security for costs application and propose new dates for unfulfilled steps from the April 2021 Litigation Plan. The Indepth Defendants and other defendants took the position that they would not take any further steps until the security for costs issue was resolved;
- y) On November 28, 2022, the Indepth Defendants filed an application for a Joint Case Conference regarding the Alberta Action and a third action which had been started in September 2017 by Baytech Energy Investment Inc. [ABQB Court File No. 1701-13148] (the “Baytech Action”). Goldenkey, Mr. Song, Indepth Energy Inc., Song International Holdings Inc., Ms. Gu and Heiju were all defendants in that action. Goldenkey says it was the only defendant who had filed a Statement of Defence, despite the passage of 5 years since the action had been started, and that no producible records had been exchanged;
- z) On November 30, 2022, the Indepth Defendants served responses to undertakings and to the written interrogatories in the Alberta Action;
- aa) On December 2, 2022, the Alberta Court ordered that Goldenkey post security for costs and directed that a Case Conference take place in the Alberta Action;
- bb) On December 21, 2022, Goldenkey requested that the Indepth Defendants respond to the Litigation Plan it had proposed on November 7, 2022;
- cc) On or about January 17, 2023, Plaintiff’s counsel in the Baytech Action wrote to Goldenkey advising it would be pursuing a partial summary

judgment application. The amount of damages being sought against Goldenkey was \$4,269,580;

dd) On January 25, 2023, the Indepth Defendants circulated a proposed Consent Order which included terms setting aside the April 2021 Litigation Plan, directing that the Alberta Action and Baytech Action be tried at the same time, or one after the other, that Goldenkey conclude all questioning within 4 months, that the defendants have several further rounds of questioning which would conclude by January 31, 2024, and directing that expert reports be exchanged between March 2024 and July 31, 2024.

### **Proposal / Bankruptcy Proceedings**

[23] On January 29, 2023, Goldenkey filed a Notice of Intention to make a Proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“*BIA*”). In the proposal proceeding, Goldenkey applied for an order vesting the Alberta Action and BC Action into a trust established for the benefit of the Alberta Energy Regulator, all Goldenkey creditors with proven claims and Goldenkey’s equity holders. The Indepth Defendants opposed this.

[24] On April 28, 2023, Justice Lema of the Alberta Court dismissed Goldenkey’s application for the litigation trust order, without prejudice to its right to apply again with more evidence: *Re Goldenkey Oil Inc.*, 2023 ABKB 263. The Indepth Defendants sought costs against Goldenkey. On June 15, 2023, the costs application was dismissed: *Re Goldenkey Oil Inc.*, 2023 ABKB 365.

[25] Goldenkey’s Trustee issued a notice asking that creditors advise of their intention to file a s. 38 *BIA* application to obtain Goldenkey’s interest in the Alberta Action and BC Action. This led to the Trustee proposing an auction process which would require bidders to notify the Trustee of their desire to participate by December 11, 2023, pay a \$50,000 deposit to the Trustee and attend the auction scheduled for December 15, 2023.

[26] On November 27, 2023, the Alberta Court approved an order authorizing the Trustee to carry out the auction process. By December 12, 2023, the only interested parties were Luck King Holdings Ltd. (“Luck King”) and Indepth Energy Inc.

[27] On December 15, 2023, Indepth Energy Inc. did not attend or participate in the auction. Luck King’s assignee, LJ Resources Co., Ltd. (“LJ Resources”) was the successful bidder. On January 24, 2024, an order was made confirming the sale and vesting the Alberta Action, BC Action and all related claims and rights in LJ Resources.

[28] In early 2024, the Trustee conducted a claims process regarding claims against Goldenkey. This completed by May 2014. The Trustee disallowed Indepth Energy Inc.’s claim for \$9,277,202 and allowed Baytech’s claim at \$4,829,747.

[29] LJ Resources takes the position that Indepth Energy Inc.’s counterclaim against Goldenkey for \$9,277,201.94 for outstanding shareholder loans was conclusively adjudicated (i.e. dismissed) in the bankruptcy proceeding. Indepth Energy Inc. appears to acknowledge that it cannot pursue recovery of the alleged shareholder loans, but says it can still raise them as a defence to the claim that Goldenkey is making against it.

**Post Assignment Steps – Alberta Action**

[30] Since the assignment, Goldenkey/ LJ Resources has taken the following steps in the Alberta Action:

- a) On July 4, 2024 and July 17, 2024, it sent a proposed consent order for a new Litigation Plan to the defendants but says they did not respond;
- b) On August 13, 2024, the Indepth Defendants and another group of defendants filed applications to strike the Alberta Action for delay. Those applications are still pending and no hearing date had been set yet when the present application came before me;

- c) On August 14, 2024, it sent a proposed Litigation Plan and draft Order asking that a trial date be set;
- d) On August 16, 2024, the Indepth Defendants objected to any further steps being taken in the Alberta Action pending the determination of the applications to strike the action due to delay;
- e) On August 23, 2024, it filed an application for an order setting a trial date;
- f) On August 30, 2024, LJ Resources' application was heard. Justice Silver ordered that the parties complete certain steps to resolve the application to strike due to delay, that the schedule and attend a case conference to consider setting of a litigation plan and setting of a trial date, and that the parties re-appear in Civil Appearance Court on September 20, 2024 to address progress and scheduling;
- g) On November 22, 2024, LJ Resources filed two applications:
  - i. One seeking a declaration that:
    - (1) All claims by Indepth Energy Inc. in the Alberta Action have been fully and finally determined by the disallowance of its claim by the Trustee in Bankruptcy and as such are *res judicata*; and
    - (2) Indepth Energy Inc. has no set-off rights or defences in this action and is estopped from re-litigating its claim and those issues;
  - ii. A second for production of records from Indepth Energy Inc. The Indepth Defendants produced some records the same day, which made the application unnecessary;
- h) On November 26, 2024, the parties attended a case conference. Justice Silver made an order:

- i. Approving a new Litigation Plan, which includes (without limitation) steps to resolve the applications to strike the Alberta Action for delay, and
- ii. That (by consent):
  - (1) Prior to December 16, 2024, Goldenkey pay \$100,000 into its solicitor's trust account as security for costs of certain defendants for taking steps set out in the litigation plan, pending final determination of the defendants' applications to deal with delay, or pending agreement or further order of the court; and
  - (2) Goldenkey make two former directors available for questioning.
- i) Goldenkey says it paid the security ordered into trust;
- j) On December 23, 2024, Justice Jugnauth was appointed Case Management Judge for the Alberta Action; and
- k) On January 23, 2025, the parties attended the first case management meeting before Justice Jugnauth, who directed that the applications to strike the Alberta Action for delay will be heard before Goldenkey's Declaration Application. Counsel indicated that it appears the applications to strike for delay will likely be scheduled for some time in or after June 2025.

[31] Goldenkey / LJ Resources say they have always intended and still intend to advance the Alberta Action to trials. The action is now at an advanced stage of readiness. Counsel advised that under Alberta's rules, in order to set a trial date, pre-trial processes must first be completed. Goldenkey argues that by linking two relatively less advanced actions to the Alberta Action, this delayed it from setting a trial date. It continues its efforts to do so. Defendants' counsel indicated that even if a trial date were to be sought now, it is likely that a trial could not be scheduled until at least early 2027.

### Applicable Law

[32] Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides:

#### **Dismissal for want of prosecution**

(7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[33] The test for dismissal for want of prosecution was modified in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. The new test is summarized at paras. 69-72:

[69] For clarity, I will summarize the revised framework of analysis that, in my view, should govern applications to dismiss actions for want of prosecution in British Columbia. The first two questions are:

- (1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?
- (2) Is the delay inexcusable?

[70] These two questions are to be answered in accordance with the law that has developed in British Columbia under the existing test. If both questions are answered in the affirmative, the court should move to the third and final question:

- (3) Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[71] The non-exhaustive list of factors set out at paragraph 45 of *International Capital Corporation* provides a useful starting point for assessing the interests of justice. To that non-exhaustive list, I would add one further factor: the merits of the action. While a judge should not engage in any searching examination of the merits on an application to dismiss for want of prosecution, if the action is bound to fail then the interests of justice favour its dismissal: *Ed Bulley* at para. 62.

[72] Under this framework of analysis, the prejudice to the defendant's ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interests of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[34] For the first question, "inordinate delay" is summarized in *Giacomini* at para. 38-39:

[38] An inordinate delay is one that is uncontrolled, immoderate, excessive and out of proportion to the matters in question: *Wiegert v. Rogers*, 2019

BCCA 334 at para. 32. The question of whether delay is inordinate is “not just a question of temporal arithmetic”, but rather requires consideration of the circumstances of the case: *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25. As explained by Saunders J.A. in *Sun Wave*, “some cases by their nature are susceptible of faster carriage or by the nature of the allegations call for more expeditious prosecution than others”: at para. 25. For example, a court may be less forgiving in assessing litigation delay where the allegations impact the defendant’s personal reputation, such as where fraud is alleged: *Sun Wave* at para. 25.

[39] The date of the commencement of the action is typically identified as the point from which delay is measured: *Wiegert* at para. 32. Delay must be considered holistically; the question is whether the overall delay is inordinate: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38.

[35] For the second question, whether the delay is excusable is summarized in *Giacomini* at para. 40:

[40] Whether the reason offered by the plaintiff for the delay amounts to an excuse also depends on the circumstances. As a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable: *Irving* at para. 8. The evidence led to explain delay may go to the issue of whether the delay was intentional and tactical, or whether it was the result of “dilatoriness, negligence, impecuniosity, illness or some other relevant cause”: *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27. A party who intentionally delays the prosecution of an action may be said to assume the risk of dismissal. Where the delay is also tactical, in the sense of intended to prejudice the defendant, this will weigh more heavily against the plaintiff in the analysis: *Ralph’s Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120 at para. 47. Where the reason for the delay is a lack of diligence on the part of plaintiff’s counsel, this might amount to a reasonable excuse in some cases, but in others it might not: *0690860 Manitoba Ltd.* at para. 29; *Wiegert* at para. 33.

[36] For the third question, assessing the interests of justice, the court approved the non-exhaustive list of factors in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45, and added one additional factor.

These include:

- a) The prejudice the defendant will suffer in mounting its case if the matter goes to trial;
- b) The length of the inexcusable delay;
- c) The stage of the litigation;
- d) The impact of the inexcusable delay on the defendant;

- e) The context in which the delay occurred;
- f) The reasons offered for the delay;
- g) The role of counsel in causing the delay;
- h) The public interest; and
- i) The merits of the action.

[37] The court noted that it is not helpful to characterize the remedy of dismissal for want of prosecution as draconian: *Giacomini* at para. 74:

[74] First, in my view, it is not helpful to characterize the remedy of dismissal for want of prosecution as “Draconian”, to the extent this label implies the remedy is excessively harsh or punitive. It must be remembered that a plaintiff faces the risk of dismissal of an action only once they are guilty of inordinate and inexcusable delay. Undue litigation delay undermines public confidence in the justice system, and should not be countenanced. Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it. If, having regard to the circumstances, it is not in the interests of justice to allow an action characterized by such delay to continue, then the remedy of dismissal is not excessively harsh or punitive. Rather, it is justified.

### **Analysis**

[38] I turn now to consider the three questions in the modified test.

#### **1 - Is the plaintiff’s delay in prosecuting the BC Action inordinate?**

[39] The defendants say Goldenkey started the BC Action on March 3, 2016; about 9 years ago. The last significant step was taken on April 18, 2016, when they filed their response to civil claim. Neither the filing of a notice of change of lawyer or a notice of intention to proceed qualify as a step: *DEB Construction Ltd. v. Mondaile Development Ltd.*, 2023 BCSC 1167 at para. 26.

[40] Goldenkey / LJ Resources argues the delay has not been inordinate, due to the intertwined nature of the BC Action and Alberta Action. It is appropriate to consider steps taken in both actions when assessing delay. It commenced the BC Action out of concern that the BC defendants had been involved in the alleged fraud and had attempted to put proceeds of the fraud (which they say includes the Vancouver Property) out its reach. Prosecution of the Alberta Action has progressed

steadily and is now well advanced. The various Alberta defendants have actively delayed and frustrated its efforts to set a trial date.

[41] Claims which involve allegations of fraud and claims which involve a CPL being placed on title to property are expected to be prosecuted with greater dispatch. The BC Action has both of these features. In *Royal Bank of Canada v. 0759452 BC Ltd.*, 2022 BCSC 131 [*Royal Bank*] at paras. 66-68, the court noted:

66 First, RBC has alleged fraudulent conduct. It has been held that claims of that kind are expected to be prosecuted with greater dispatch: *Kern v. Watson* (1997), 32 B.C.L.R. (3d) 398, [1997] B.C.J. No. 680 (S.C.); *Gill v. Hepburn*, 2012 BCSC 439. As Saunders J.A. stated in *Sun Wave* at para. 26:

The care spoken of in actions pleading fraud, in my view, includes doing more than allowing the allegations to float for years over the defendants, free from the rigours of prosecution and free from resolution.

67 Thus, in *SeaQuest (1993) Adventurecraft Inc. v. Gray Line of Victoria Ltd.*, 2008 BCSC 873, a delay of three years and three months was held, on that basis, to be inordinate, justifying dismissal of the claim for want of prosecution.

68 A second factor attracting a higher standard of diligence in this case flows from the fact that RBC has caused a CPL to be placed on title to the Property. It has been held that a party who has secured a privileged position by such means is required to prosecute the claim expeditiously: *Hanna's Construction v. Blue River*, 2006 BCCA 142 at paras. 20-21; *Rhyolite Resources Inc. v. Canquest Resource Corp.*, 1999 BCCA 36, at paras. 16-19.

[42] Goldenkey started the Alberta Action intending that it be the primary vehicle for advancing its claims against the Indepth Defendants and others. It has included a claim of fraudulent conveyance / preference in relation to the Vancouver Property in both actions. It appears that the BC Action was started primarily so it could register a CPL on the Vancouver Property, to preserve for eventual collection purposes. Procedurally, Goldenkey could not obtain a CPL (or its Alberta equivalent) against land located in BC through the Alberta Action. There are broader allegations in the BC Action that Mr. Song and Ms. Gu hold other property in trust for Goldenkey, but nothing specific has been identified.

[43] I agree the Alberta Action and BC Action are intertwined and that it is appropriate to consider progress in both actions when assessing whether delay in

prosecuting the BC Action has been inordinate. Goldenkey has obtained some record production and has questioned Mr. Song and Ms. Gu, including about the transfer of Mr. Song's interest in the Vancouver Property to Ms. Gu, through the Alberta Action.

[44] The BC Action is primarily being used to secure the Vancouver Property pending determination of Goldenkey's claims in the Alberta Action. Goldenkey argues that a trial of the Alberta Action is likely to resolve, clarify or substantially narrow issues raised in the BC Action. Judicial economy suggests that pursuing the broader claims through a single action is preferable to prosecuting parallel actions in two jurisdictions regarding the same or overlapping subject matter. Conflicting decisions would be embarrassing to both courts.

[45] Even viewing the delay through this broader lens, it still appears there has been substantial delay attributable to Goldenkey, and now LJ Resources. Both actions were started around the same time in early 2016. Approaching 9 years along, there have been significant periods of no or low activity in the chronology of the Alberta Action. One example is the roughly 2-year gap (2018-2020) between when Mr. Dai was questioned by the Indepth Defendants and when Goldenkey provided responses to his undertakings. Right after that is another 7-month gap before Goldenkey applied for a Litigation Plan. There is a 1-year period of apparent inactivity between October 2021 and November 2022. From January 2023 to July 2024, the focus turned to the bankruptcy proceedings, during which the Alberta Action saw little progress.

[46] Since Goldenkey's claims were assigned to LJ Resources, progress has been modest, due in part to the pending applications to strike due to delay, and the defendants' position that no steps should be taken until their applications are determined. Counsel suggested a hearing is not likely to occur before June 2025. If those applications are dismissed, defendants' counsel indicated a trial of the Alberta Action would likely not be set before early 2027 at best. This means the earliest trial of the Alberta Action would be about 11 years after the actions were started. Depending on the outcome of that trial, it may still be necessary for Goldenkey / LJ

Resources to pursue yet further proceedings in the BC Action before all BC-specific issues can be resolved.

[47] I conclude that, for purposes of the BC Action, Goldenkey's delay in prosecuting its claims has been inordinate.

**2 - Is the delay inexcusable?**

[48] The defendants say Goldenkey has not indicated it intends to proceed at this time, nor has it provided a reason for its inordinate delay. They suggest it does not appear to be motivated to advance either the Alberta Action or the BC Action.

[49] Goldenkey / LJ Resources says that even if the delay in the BC Action is found to be inordinate, it is still excusable because of the defendants' conduct in intentionally causing delay in the Alberta Action. It has been pressing ahead diligently with its claims in Alberta. Thus far it has not been necessary for it to expend judicial and party resources to advance the BC Action. But for the defendants' own delay, the Alberta Action would have been resolved by now, which would have allowed any necessary additional steps in the BC Action to proceed.

[50] Even if I accept that some of the global delay was caused or contributed by the Indepth Defendants or others defendants in the Alberta Action, that does not excuse Goldenkey's own delays. It did not offer any explanation for its own lengthy periods of inactivity. The defendants also cannot be blamed for delay during the bankruptcy proceedings.

[51] I conclude that, for purposes of the BC Action, the delay attributable to Goldenkey is inexcusable.

**3 - Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?**

[52] I turn now to consider the third question, which has several parts.

***(a) - Prejudice the defendant will suffer in mounting its case if the matter goes to trial***

[53] The defendants have not identified any specific prejudice in terms of their ability to defend the BC Action or the Alberta Action on their merits. It appears the BC Action is unlikely to become active again before sometime in 2027, or possibly later. It is not clear what issues might potentially remain for the BC Court to address at that point. Assumed prejudice could be expected through factors such as failing memories, unavailability of witnesses and loss or destruction of evidence. The plaintiff argues these are not a concern in this case because evidence relevant to issues which could arise in the BC Action has been preserved through the discovery processes taking place in the Alberta Action.

[54] I agree that the document production and oral discovery which has occurred in relation to the Vancouver Property under the Alberta Action does appear to help mitigate concerns about general passage of time before the BC Action can reasonably be expected to conclude. The defendants did not otherwise identify any specific concerns. This factor appears to be neutral or to marginally favour the plaintiff.

***(b) - Length of the inexcusable delay***

[55] I addressed the length of the delay above. The delay is compounded by the fact that further delay is inevitable before the Alberta Action can potentially be set for trial, meaning further delay before the parties are in a position to even start addressing any BC-specific issues under the BC Action. This factor favours the defendants.

***(c) - Stage of the litigation***

[56] The plaintiff argues that the Alberta Action is at a relatively advanced stage. A new Litigation Plan was recently put in place. There are applications to strike which may be heard in June 2025. The plaintiff has an application pending for declaratory relief. It is not clear when that might be scheduled. There appear to be other steps

required under the new Litigation Plan. It appears trial is not likely to be scheduled before early 2027.

[57] Generally, the closer an action is to trial, the more likely the court is to permit the action to proceed: *Ghag v. Ghag*, 2024 BCSC 400 at para. 14 c). In this case, even after the Alberta Action is resolved at trial, there may still be substantive issues which need to be addressed in the BC Action. The BC Action will not become active again until after the Alberta Action has been resolved. Once active, the BC Action could take a significant time to resolve in its own right. I do not agree that overall litigation can be considered “advanced” considering all that remains to unfold. Overall, this factor favours the defendants.

***(d) - Impact of the inexcusable delay on the defendants***

[58] Mr. Song says that Goldenkey has made serious allegations of fraud against him. He denies that he or his family defrauded Goldenkey and suggests that due to its refusal to repay the shareholder loans which Indepth Investments Inc. allegedly provided, they have lost a significant amount of money. He says the proceedings have been stressful, costly and time consuming to respond to. He believes the allegations are part of a calculated effort to remove him from his position with Goldenkey. The litigation has caused damage to his reputation and that of his family since 2016. He says the Chinese community in Canada is tight-knit. It has been embarrassing that the allegations were made at all, and painful that they have been allowed to linger for such an extended period.

[59] Goldenkey says Mr. Song’s evidence does not identify any specific harm and relies on generalities. This should be afforded no weight or minimal weight. Further, dismissing the BC Action would not relieve the defendants’ concerns because the Alberta Action will continue regardless.

[60] I accept that having serious allegations of fraud outstanding for approaching 9 years, and with the prospect of them not getting to trial in Alberta for at least 2 more years, does constitute a negative impact on Mr. Song, Ms. Gu and Heiju. See *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at paras. 25-26:

[25] ... The action engages allegations most serious to personal reputation – business defalcation and fraud. The damage that may be caused by a plaintiff advancing such claims is well known, see for example, the opinion of Justice Newbury in *H.Y. Louie Co. v. Bowick*, 2015 BCCA 256 dissenting, but not on this point. In *H.Y. Louie*, Justice Newbury referred with approval to this statement of Justice McKinnon in *Ip v. Insurance Corp of British Columbia* (1994), 89 B.C.L.R. (2d) 251 (B.C.S.C.), equally applicable to the actions of plaintiffs:

I appreciate that the defendant is faced with many fraudulent claims and that it has a duty to refuse payment where reasonable grounds exist for so doing. An allegation of fraud, wilful misstatement, or such other claims made against a person casts a serious pall over his or her reputation in the community. Very careful consideration must be given by the defendant before making such serious allegations. ...

[26] The care spoken of in actions pleading fraud, in my view, includes doing more than allowing the allegations to float for years over the defendants, free from the rigours of prosecution and free from resolution.

[61] Ms. Gu also says she is adversely affected because she has not been able to deal with the Vancouver Property. She points to s. 252(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250 (the “LTA”), which provides that if a CPL has been registered and no step has been taken in the proceeding for one year, the registered owner may apply for an order that the CPL be cancelled. Counsel argues that this establishes a standard of sorts when assessing delay in prosecuting a proceeding which involves a CPL. I note that Ms. Gu has not applied to cancel the CPL based on this section. She also has the option of applying to cancel the CPL pursuant to ss. 256 and 257 of the *LTA*, if she believes she is experiencing or likely to experience hardship and inconvenience due to the CPL registration.

[62] Overall, based on the long-outstanding serious allegations of fraud, this factor favours the defendants.

**(e) - Context in which the delay occurred**

[63] The defendants did not expressly address this particular issue in their argument.

[64] Goldenkey says the delay in the BC Action arises in the context of the Alberta defendants delaying progress in the Alberta Action. It also notes that the defendants have also taken no steps to move the BC Action forward.

[65] As noted above, I have concluded that Goldenkey is substantially responsible for the overall delay. The fact that the BC Action will not proceed until the Alberta Action is resolved is a concern. Goldenkey is pursuing its fraudulent conveyance and preference claims in both Alberta and BC actions, albeit the CPL is only available under the BC Action. It frankly appears that Goldenkey is primarily using the CPL as a form of pre-judgment execution. The factual and legal basis for its claim that Mr. Song and Ms. Gu hold their interests in the Vancouver Property in trust for Goldenkey is unclear.

[66] Overall, I consider this factor to be neutral.

***(f) - Reasons offered for the delay***

[67] The defendants did not specifically address this issue in argument.

[68] Goldenkey again blames the Alberta defendants for alleged delay tactics in the Alberta Action. I have concluded that Goldenkey bears substantial responsibility for the overall delay. I accept that it made some effort to move the matter forward, but there are significant gaps for which it offered no explanation. The delay during the insolvency proceedings was also significant. The anticipated further two-year delay leading up to a possible trial of the Alberta Action and delay before the BC Action potentially becomes active, are also significant concerns. Considered globally, this factor favours the defendants.

***(g) - The public interest***

[69] The defendants did not address this factor in argument.

[70] Goldenkey argues that the public interest would not be served by dismissing the BC Action, as it may be Goldenkey's only avenue of recovery once it obtains a judgment. The actions both involve allegations of fraud, conspiracy, breach of

fiduciary duty and other misconduct. It would be contrary to the public interest to have judgments based on this type of misconduct go unsatisfied.

[71] I previously noted the passage from the *Royal Bank* case above the court's comment that cases involving allegations of fraud and cases which use CPLs to secure property both attract a higher standard of diligence in prosecution of the action.

[72] It is not clear that the Vancouver Property is the only potential source of collection of a potential judgment against the BC defendants. Goldenkey simply says it is not aware of the defendants having assets in Alberta sufficient to satisfy a potential judgment. It is not clear what inquiries it has made in this regard.

[73] Dismissal of a parallel proceeding on a procedural basis (as opposed to a dismissal on the merits) would be less prejudicial. Even if the BC Action is dismissed, Goldenkey will still be able to pursue its claims through the Alberta Action. It has made claims of fraudulent conveyance and preference with respect to the Vancouver Property in both actions. Dismissal of the BC Action would not prevent it from registering any Alberta judgment receives with the BC Court for execution and enforcement purposes. Dismissal of the BC Action would only have the practical effect of depriving Goldenkey of the CPL, in circumstances where it has been responsible for inordinate and unexplained delay in prosecuting serious allegations fraud, breach of fiduciary duty and conspiracy, amongst others.

[74] Overall, this factor favours the defendants.

***(h) - The merits of the action***

[75] The defendants say Goldenkey's claim lacks merit, particularly because it is substantially the same as the claim made in the Alberta Action. They suggest the BC Action is an abuse of process. I note that the defendants have not applied to strike the BC Action as an abuse of process.

[76] Goldenkey says this is not a case where there is “no reasonable prospect of success” or which is “bound to fail”. The court is not supposed to engage in a searching examination of the merits on this type of application. The court should conclude on a review of the pleadings and evidence tendered that the claim has significant merit. It also denies that the BC Action is an abuse of process. It says the BC Court has long accepted the practice of allowing a plaintiff to commence an action in BC to preserve its ability to execute on a judgment which is being pursued in another jurisdiction. This is not an abuse of the court’s process when there are concerns about whether the defendants’ assets in the other jurisdiction are sufficient to satisfy a judgment. They rely on *Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima*, [1982] B.C.J. No. 1491, 1982 CanLII 800 (B.C.C.A.) at para. 6:

6 The assets of the defendants are, by admission, in this jurisdiction. Despite the fact that the judge thought that Japan might be the convenient forum for this action, he felt bound by the decision of Wilson, J. (as he then was) in *Bank of America National Trust v. Payet* (1955) 1 D.C.R. 680 which permits duplicate actions where they are not vexatious or oppressive and where there is a chance that the assets in one of the forums are insufficient for realization upon a judgment. Since there are no assets in Japan and no duplicate action has been brought, the Chambers judge found this an even stronger case in favour of the plaintiff than *Bank of America*. I accept without hesitation the reasoning set out by Wilson, J. in *Bank of America* (supra) and, applying the rationale set out there, would apply it by affirming the judge on this first point.

[77] I note that in a subsequent decision, the Court of Appeal indicated that parallel actions ought to be avoided. See *472900 B.C. Ltd. v. Thrifty Canada Ltd.*, [1998] B.C.J. No. 2944 (C.A.) at para. 32:

[32] ... Comity, which played no part in the old rule, is now a major consideration. Parallel actions dealing with the same subject matter must now be avoided unless the party resisting the application to stay can demonstrate possible loss of juridical advantage. The right of a plaintiff to sue in the court of his choice is not now a significant factor. A primary purpose of the present rule is to avoid having two actions proceeding in different jurisdictions with the attendant risk of conflicting decisions. ...

[underlining added]

[78] I conclude that Goldenkey does have an arguable claim in the BC Action, with one exception. I am not able to conclude that it is an abuse of process.

[79] I do have concern about the merits of Goldenkey's claim that the Vancouver Property is held in trust for it. There does not appear to be a sufficient factual or legal basis set out to establish that funds from Goldenkey found their way into the acquisition of the Vancouver Property. It appears the property was purchased at least two years prior to the events underlying the alleged fraud and conspiracy. The timing of the transfer is suspect for a possible fraudulent conveyance of Mr. Song's undivided half interest in the property. That issue is also raised in the Alberta Action. The source of funds used to pay off the mortgage on the Vancouver Property in August 2015 is also a possible concern based on Mr. Song's affidavit evidence, but that issue is not expressly raised in Goldenkey's NOCC.

[80] Overall, this factor favours the plaintiff.

***Conclusion – Interests of Justice***

[81] Since the BC Action is a parallel proceeding, dismissing it for want of prosecution will not deprive Goldenkey / LJ Resources of the opportunity to continue pursuing the claims made in the Alberta Action. That includes the claim that Mr. Song's transfer of his interest in the Vancouver Property to Ms. Gu constitutes a fraudulent conveyance or fraudulent preference. I am also mindful that the BC Action appears to have been started for a relatively limited purpose, namely to allow a CPL to be registered on title to Vancouver Property, presumably to prevent Ms. Gu from transferring or encumbering it.

[82] In my view, it is not in the interests of justice that the BC Action be used to tie up the Vancouver Property for what will end up being a period of at least 11 years, possibly more, assuming the Alberta Action does proceed to a trial. Goldenkey is responsible for inordinate and inexcusable delay in prosecuting its claims. I conclude that the interests of justice require that the BC Action be dismissed for want of prosecution.

**Orders Made**

[83] This action is dismissed for want of prosecution. This dismissal is without prejudice to Goldenkey / LJ Resources' right to continue prosecuting the claims Goldenkey has made in the Alberta Action. It is also without prejudice to their ability to register any Alberta judgment they may eventually be granted with the BC Court for execution and enforcement purposes.

[84] The defendants also requested an order that the CPL be discharged from title to the Vancouver Property. It is not necessary to make such an order, as that will follow in the ordinary course from the dismissal of the action: See s. 254 of the *LTA*.

[85] The defendants are entitled to costs of the action from the plaintiff.

“Associate Judge Bilawich”