COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jiashan County Agri-Commerce Joint Small-Sum Co. Ltd. v. Cao*, 2025 BCCA 141

Date: 20250501
Docket: CA49879

Between:

Jiashan County Agri-Commerce Joint Small-Sum Loan Co. Ltd.

Appellant
(Plaintiff)

And

Lian Cao

Respondent
(Defendant)

Before: The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated April 22, 2024 (*Jiashan County Agri-Commerce Joint Small-Sum Co. Ltd. v. Cao*, Vancouver Docket S2110858).

Counsel for the Appellant:	A.R. Hudson J.C. Faner
Counsel for the Respondent:	B. La Borie R. LaPlante
Place and Date of Hearing:	Vancouver, British Columbia February 5, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 1, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Horsman
The Honourable Justice Fleming

Summary:

The appellant appeals from the order dismissing its application under Rule 9-5(1)(a) to strike certain portions of the respondent's response to civil claim. The underlying claim is for the enforcement of judgments obtained by the appellant against the respondent in China. The chambers judge concluded that the impugned portions of the response pleaded defences that were not bound to fail and declined to strike them. The appellant says that he erred in his interpretation and application of the law governing the defences to the enforcement of foreign money judgments.

Held: Appeal allowed in part. The respondent's defence of public policy based on the non-application of limitations periods under the foreign law is bound to fail and should be struck. However, it is not plain and obvious that any other defences are bound to fail, and the appeal is otherwise dismissed.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal arises out of proceedings initiated by the appellant, Jiashan County Agri-Commerce Joint Small-Sum Loan Co. Ltd., in the Supreme Court to enforce two judgments issued by courts in China against the respondent, Lian Cao, who has resided in British Columbia since March 2014.

[2] The appellant appeals from an order made by the chambers judge that dismissed its application to strike certain portions of Mr. Cao's response to civil claim (the Response) under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The judge found it was not plain and obvious that the impugned paragraphs of the Response disclosed no reasonable defence.

[3] The appellant challenges that order. It says the judge erred in finding that the impugned paragraphs were capable of supporting defences to the enforcement of their judgments. It also asks this Court to strike additional paragraphs of Mr. Cao's amended response to civil claim, (the Amended Response) which was filed after the judge made his order.

[4] Mr. Cao's position is that pleadings should only rarely be struck under Rule 9-5(1)(a), and that the Response must be read generously to ensure that only defences or claims that are "certain to fail" are struck before trial. He also argues

that the appellant should not be permitted to seek an order from this Court striking the new portions of the Amended Response which he says amounts to an application at first instance, which this Court should not adjudicate.

[5] For the reasons that follow I would allow the appeal to the limited extent that it is plain and obvious that the defence of public policy, to the extent that it is grounded on a limitations defence, cannot succeed and should be struck. I would also conclude that the chambers judge made no reviewable errors in his assessment of the remainder of the impugned portions of the Response.

Background

[6] The events giving rise to the Chinese judgments are of limited significance to the issues on this appeal. The appellant is a Chinese company in the business of commercial lending. Mr. Cao was a founding contributor and chair of the appellant company's board of directors until December 2014. The appellant brought two actions against Mr. Cao in Chinese courts, alleging that he had perpetrated a scheme that constituted unlawful withdrawal of capital under Chinese law. Mr. Cao was found liable in the successive Chinese actions, and his liability was upheld in respect of each on appeal to the Zheijiang Province Jiaxang City Intermediate People's Court (the "Intermediate Court").

[7] In respect of the first Chinese action, on December 12, 2018, the Intermediate Court ordered Mr. Cao to pay CNY 23.9 million (approximately CAD $4.6 million) plus interest. In respect of the second Chinese action, on September 14, 2021, the Intermediate Court ordered Mr. Cao to pay CNY 5.5 million (approximately CAD $1.06 million) plus interest.

[8] As part of enforcement proceedings in China in respect of these judgments, Mr. Cao's shares in the appellant corporation were sold at auction for approximately CNY 12 million, (approximately CAD $2.3 million) and the appellant received these funds. It has since received an additional CNY 21,000 (approximately CAD $4,000) from ongoing enforcement efforts.

[9] In the underlying enforcement action, the appellant seeks payment from Mr. Cao of the remainder of the amount owing, in the minimum amount of approximately CAD $6.5 million, in respect of both the principle and owing interest on the Chinese judgment amounts. The appellant also advances claims in unjust enrichment for disgorgement and restitution of funds that it alleges Mr. Cao diverted into property in British Columbia.

[10] The appellant filed its notice of civil claim in the underlying action on December 10, 2021, and an amended notice of civil claim on October 18, 2022. The Response was filed on February 17, 2023. The application under Rule 9-5(1)(a), which gave rise to the order under appeal, was filed by the appellant on February 13, 2024. It was heard on April 22, 2024, and the chambers judge gave his oral reasons for judgment the same day. On May 22, 2024, Mr. Cao filed the Amended Response, as authorized by the judge's order.

The Chambers Application

[11] The Response pleaded a number of defences to the appellant's enforcement action. Mr. Cao pleaded that the proceedings giving rise to the Chinese judgments were contrary to natural justice, and contrary to public policy on a number of discrete grounds which I will address below. The Response also pleaded facts which related to the merits of the Chinese action, the proceedings before the Chinese courts, and the subsequent enforcement, in China, of the Chinese judgments.

[12] The appellant's application sought to strike these defences, as well as the majority of the facts pleaded in support of the Response. It argued at the hearing of the application that it was plain and obvious that none of these defences could succeed, given the narrow scope of the defences to the enforcement of a foreign money judgment as articulated in the applicable authorities.

[13] The chambers judge gave brief oral reasons for dismissing the application which were not published. He noted the high bar for striking pleadings under Rule 9-5 and the principle that "novel but arguable claims or defences should be permitted to proceed": at para. 7, citing *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at

para. 19. He found that all the defences pleaded by Mr. Cao were arguable and not bound to fail.

[14] With respect to the impugned paragraphs pleading facts, the judge considered that the challenge to these paragraphs were “part and parcel of the challenge to the defences”: at para. 18. Having found that the defences were not bound to fail, and finding a “plausible nexus” between the facts pleaded in the impugned paragraphs and the defences advanced, he declined to strike those paragraphs: at para. 19.

[15] The parties also made submissions regarding an additional issue, being a proposed plea of *res judicata*, but the judge found that this defence had not been pleaded in the Response. He thus declined to rule on the issue: at para. 9.

On Appeal

[16] The appellant submits that the chambers judge erred in law by finding that the paragraphs in the Response were not bound to fail and by declining to strike those paragraphs. As contemplated by the chambers judge’s order, Mr. Cao filed the Amended Response. The appellant asks this Court to consider and strike paragraphs from that pleading which include additions and amendments to the paragraphs that were before the chambers judge, and new paragraphs pleading the defence of *res judicata*, which were not before the judge.

[17] Mr. Cao’s position is that the judge was correct in finding that the Response should not be struck. He agrees that the amended version of the impugned defences identified in the Amended Response should be considered by this Court. However, he also argues that this Court should not strike the *res judicata* pleadings contained in the Amended Response, as he says this is not only a new argument on appeal but amounts to a new remedy being sought for the first time on appeal.

[18] In light of the parties’ agreement that the amended versions of the defences that were argued before the judge should be considered on appeal, I will consider the appellant’s arguments on those issues in light of the Amended Response. As I

shall explain, I would not strike the *res judicata* defence from the Amended Response.

The amended pleadings

[19] The appellant seeks an order under Rule 9-5(1)(a) striking the following paragraphs in Part 1 and Part 3 of the Amended Response:

- Paragraphs 5–22 of Part 1, which plead the facts giving rise to the Chinese actions;
- Paragraph 25 and the last sentence of paragraph 28 of Part 1, which plead the alleged bases on which the Chinese courts breached natural justice;
- Paragraphs 33–34 of Part 1, which plead facts relating to the enforcement proceedings in China;
- Paragraphs 4–6 of Part 3, which plead the defence of natural justice; and
- Paragraphs 7–19 of Part 3, which plead the defence of public policy.

[20] More specifically, in support of the defences advanced in the Amended Response, Mr. Cao pleads that:

- He was not given an adequate opportunity to be heard and lead evidence in the Chinese proceedings (the natural justice defence);
- The Chinese statute was contrary to public policy because it provided for a claim outside the ordinary three-year limitation period (the limitations defence);
- The appellant is barred from enforcement based on the doctrine of laches at equity (the laches defence);
- The Chinese actions were the result of a conspiracy targeting Mr. Cao (the conspiracy defence); and

- The doctrine of *res judicata* applies to the second Chinese action (the *res judicata* defence).

The issues

[21] I would frame the issues on appeal as being whether:

1. the judge was correct in concluding that the natural justice, limitations, laches and conspiracy defences as further articulated in the Amended response were not bound to fail;

2. this Court should consider the appellant's application to strike the new paragraphs of the Amended Response and, if so, whether the respondent's *res judicata* defence is bound to fail; and

3. the judge erred in declining to strike the paragraphs in Part 1 of the Response.

Applicable legal framework

[22] The judge's order made under Rule 9-5(1)(a) is reviewable on a standard of correctness: *Qualcomm Incorporated v. Barroqueiro*, 2025 BCCA 65 at para. 38; *Kamoto Holdings Ltd. v. Central Kootenay (Regional District)*, 2022 BCCA 282 at para. 37.

[23] Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[24] On an application under Rule 9-5(1)(a), no evidence is admissible. The question is whether, assuming the facts pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action or defence. Pleadings are to be read generously, and the Court is to consider the pleadings as they stand and as they might reasonably be amended. As the chambers judge also noted, a pleading will not be struck simply because the claim or defence advanced is novel. Novel but arguable claims should be permitted to proceed to trial: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at paras. 41–42; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21.

[25] As the judge recognized, the authoritative case on the enforcement of a foreign judgment is the Supreme Court of Canada's decision in *Beals v. Saldanha*, 2003 SCC 72. In general, where a foreign court is properly seized of a matter and makes a judgment, that judgment is presumptively enforceable in Canada. However, a Canadian defendant can redress any unfairness in the foreign proceedings through the defences to enforcement in Canada: at para. 35. These defences aim to guard against the enforcement by Canadian courts of judgments that are the product, procedurally or substantively, of foreign law that is contrary to the basic principles of Canadian policy and morality.

[26] However, the principle of comity must be balanced against the principle of fairness; as the Supreme Court of Canada held in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, "the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement": at para. 53. Accordingly, the defences to enforcement are narrow in scope, to ensure that the principle of comity is given due weight in the analysis.

Issue #1: Did the judge err in his conclusions regarding the impugned defences in the Amended Response?

The natural justice defence

[27] At paras. 4–6 in Part 3 of the Amended Response, Mr. Cao pleads that the Chinese judgments should not be enforced because the procedure and process of

the Chinese actions were contrary to natural justice. He pleads that, although he participated in the Chinese proceedings, the Chinese courts refused to hear and consider potentially relevant evidence going to his liability, and to the joint and several liability of other participants, including the principal and other shareholders of the appellant company. Other alleged breaches of natural justice are raised, but the pleaded refusal to hear and consider evidence is, in my view, sufficient to dispose of this ground of appeal.

[28] Where foreign proceedings were "contrary to Canadian notions of fundamental justice," the domestic court may refuse enforcement of any resulting judgment: *Beals* at para. 59. The defendant bears the burden of proof in establishing that the "minimum Canadian standards of fairness" were not applied: at paras. 61–63. *Beals* identifies two common indicia of natural justice—that the defendant was given adequate notice of the claim, and an opportunity to defend—but explicitly notes that this is not a closed list: at para. 65.

[29] The chambers judge held that the natural justice defence as pleaded was "novel but arguable," and that it was not possible on the pleadings to determine that the defence could not succeed. He held that "a qualitative assessment is required to consider whether [Mr. Cao] was given an opportunity to meet the case against [him]": at para. 14.

[30] The appellant submits that "[a]ll that is required to meet the requirements of natural justice is that the respondent was made aware of the case he had to meet and was given an opportunity to meet it in the foreign court". It relies on this Court's decision in *Wei v. Li*, 2019 BCCA 114, for this proposition. In *Wei*, Justice Newbury, writing for a majority of the Court, held that, as she read *Beals*, "as long as the defendants were made aware of the case they had to meet and were given an opportunity to meet it, the requirements of natural justice will be met": at para. 27. The appellant says that, since Mr. Cao has conceded that he received notice and actively participated in the Chinese actions, these admissions foreclose his reliance on the defence of natural justice.

[31] Mr. Cao says this is the same argument the appellant made before the chambers judge and notes, correctly, that the chambers judge was aware of and adverted to the passages from *Beals* and *Wei* relied on by the appellant, and that he found that "despite the commentary in those passages", the defence as pleaded was not bound to fail: at para. 14.

[32] In my view, the chambers judge correctly interpreted the cases he relied upon. The appellant seeks to draw an absolute proposition from *Wei*, but the statement of Newbury J.A. cited above must be considered in light of the facts and context of the case then before her. As *Beals* makes clear, the parameters of the defence of natural justice are not closed. "Participation" is not a merely technical requirement; it has, as the chambers judge held, a qualitative element. Nothing in *Beals* or *Wei* supports a purely technical approach to assessing whether Mr. Cao was given an opportunity to defend the case against him.

[33] Read generously, the pleadings at issue suggest that the Chinese courts failed or refused to consider potentially relevant evidence advanced by Mr. Cao. I see no error in the chambers judge's conclusion that the defence of natural justice was not bound to fail. If a defendant is not permitted to lead evidence, or if the foreign court refuses or fails to consider the defendant's evidence, it may be that the minimum standards of fairness as they are recognized in Canadian law are not met. It is not plain and obvious that Mr. Cao's natural justice defence is bound to fail.

The public policy defence

[34] The public policy defence turns on whether the foreign law that underpins the foreign judgment is itself contrary to the basic view of morality in Canada: *Beals* at para. 71. Accordingly, the defence must be directed at some aspect of the underlying law itself that is "contrary to the fundamental morality of the Canadian legal system", not merely the result of the application of that law to the facts: *Beals* at paras. 72–73. As the appellant notes, the Court in *Beals* was clear that this defence was to be applied sparingly, since it connotes a condemnation of the foreign law. A narrow approach to the defence of public policy is necessary to maintain the balance between comity and fairness: *Beals* at para. 75.

[35] The Amended Response pleads that the Chinese judgments should not be enforced because they arose out of laws or procedures that are contrary to Canadian public policy and offend the basic morality of Canadian law. Mr. Cao advances the public policy defence on a number of bases.

The limitations defence

[36] The first basis for the pleaded public policy defence is Mr. Cao's limitations defence. This is pleaded at paras. 8–9 and 11–12 of Part 3 of the Amended Response, where Mr. Cao sets out that the Chinese actions were not brought until 2017, despite the fact that the "alleged debts… arose in 2012". He pleads that:

- "[i]t is a principle of Canadian law that debt obligations and other actions have a limitation period", but that the Chinese law applied in the Chinese courts provided "that in an action for recovery of shareholder capital… a limitation period is no defence"; and

- the "normal limitation period for civil claims in China is 3 years" and that "[t]he Judgments seek to legitimize legislation that is contrary to Canadian public policy".

[37] The judge's reasoning that the limitations defence was not bound to fail was extremely brief. He simply found that he was "not able to conclusively apply the public policy defence test in the plaintiff's favour on this application in order to resolve that issue": at para. 16.

[38] The appellant submits that the judge erred. It says that the approach to limitations under the impugned Chinese legislation "reflects, at most, a somewhat different approach to limitations law than usually applies in British Columbia" and is not contrary to the "essential morality" of the Canadian legal system.

[39] Mr. Cao submits that "limitation periods are a fundamental component of Canadian law", and that, in the absence of any caselaw specifically addressing limitations issues in the context of the public policy defence, the question of whether the law at issue would "shock the conscience of the reasonable Canadian or offend

fundamental morality" should be left to the trier of fact at trial. In his submissions at the hearing of the appeal Mr. Cao's counsel submitted that whether the defence of public policy could be raised on this limitations issue in the circumstances of this case required some evidence of the procedure and law applied in China, which was absent on the record before the chambers judge.

[40] The appellant's argument on this point was that since applications to strike under Rule 9-5(1) are applications on the pleadings, it would be contrary to established principles to say that the court cannot strike the limitations defence until the evidence that would be raised at trial is known. I agree. A substantially similar argument was advanced and rejected by the Court in *Imperial Tobacco*:

> [23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.
>
> [Emphasis added.]

[41] The task for this Court is to consider whether, on the basis of the pleaded facts and assuming them to be true, it is plain and obvious that the limitations defence advanced by Mr. Cao is bound to fail. The onus is on Mr. Cao to plead the material facts necessary to support the defences he advances in the Amended Response. It is no response to an application under Rule 9-5(1)(a) to say that facts not pleaded are necessary to determine if the claim or defence is viable.

[42] I agree with the appellant that the limitations defence cannot succeed. The public policy defence is narrow. A merely different approach to a limitations issue, which, as the appellant submits, can be approached in a variety of ways under British Columbia's own limitations legislation, cannot be sufficient, at law, to justify non-enforcement by a British Columbia court of an otherwise valid foreign judgment.

[43] *Beals* stands for the proposition that the defence of public policy involves a condemnation of the law itself, not merely its application to the particular circumstances of the defendant's case—the public policy defence is directed at "repugnant laws and not repugnant facts": *Beals* at para. 71, citing J.G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at 14–28. To state the issue somewhat differently, Mr. Cao must establish that the law itself is "repugnant". It is not enough for him to say that, in the context of his case, the application of the Chinese law has produced an unjust result measured against the fundamental morality of Canadian law.

[44] In my view, it is plain and obvious that the Chinese law in question is not "contrary to the fundamental morality of the Canadian legal system". Like the Chinese law at issue here, the *Limitations Act*, S.B.C. 2012, c. 13, in this province provides that a number of causes of action are not subject to any limitations period at all. For example, there is no limitations period that applies to a claim for possession of land under various circumstances, or for a claim to realize on collateral in possession of the claimant, or for claims relating to sexual assault: ss. 3(1)(b)–(d), (f), (j). Under the impugned Chinese law as pleaded, there is no limitation period that applies to an action for the recovery of shareholder capital. While that is not one of the enumerated causes of action under s. 3(1) of the *Limitations Act* in this province, it is plain and obvious that it is not "repugnant" to the "fundamental morality" of our legal system that a different cause of action be exempted from limitations legislation in China.

[45] In other words, if certain causes of action are not subject to limitations periods in British Columbia, the mere fact that they attach to different causes of action than those which resulted in the Chinese judgments is not sufficient to "shock the conscience of the reasonable Canadian".

[46] I find further support for this conclusion in s. 4(1) of the *Limitations Act*, which provides:

> **Conflict of laws**
>
> 4 (1) If the substantive law of another jurisdiction is to be applied by the court in deciding a claim, the law of that other jurisdiction respecting limitation periods must be applied in relation to the claim.

As the appellant noted in oral argument, while this provision does not strictly apply to the case at bar, it strongly supports the view that Canadian public policy, as it is expressed in the laws of British Columbia, can accommodate different approaches to limitations in foreign jurisdictions.

[47] This is not to say that a limitations-based defence grounded in public policy considerations could *never* succeed. On the facts of this case, however, when considered in the context of the impugned Chinese law, I would conclude that this pleading should be struck. It is plain and obvious on the facts as pleaded that the defence of public policy, to the extent that it is based on the limitations defence, is bound to fail.

The laches defence

[48] Mr. Cao pleads that the appellant was aware of and acquiesced to his actions, and that he should be entitled to rely on the appellant's delay in acting on its claim as a bar to enforcement under the doctrine of laches. At paras. 8, 10 and 13 of the Amended Response, Mr. Cao pleads that the appellant did not pursue actions to recover the debts until five years after they allegedly arose. He says the appellant "was in all circumstances aware of [Mr. Cao's] capital contribution and its management participated and approved the removal of capital". He says the appellant, accordingly, "is barred from enforcement based upon the doctrine of laches".

[49] This doctrine provides an equitable defence to a claim in equity where the plaintiff, by delaying bringing the claim, has either acquiesced to the defendant's conduct or "caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo": *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 77, citing Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984) at 755.

[50] The judge addressed this defence briefly, concluding that it was not bound to fail, "particularly having regard to the observation that the plaintiff's claim includes an unjust enrichment claim": at para. 16.

[51] The appellant, relying on *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 28, submits that laches is not a defence to the enforcement of a foreign money order, although it can be a defence to the enforcement of a foreign *equitable* judgment. While acknowledging that its claim pleads equitable remedies for unjust enrichment, the appellant says that those claims are entirely separate from the enforcement of the Chinese judgments, and that the laches defence, as pleaded, is responsive solely to enforcement.

[52] I agree with the appellant, and Mr. Cao did not dispute, that the defence of laches is not ordinarily available as against the enforcement of a foreign money order. Laches is an equitable defence to an equitable claim: *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 145. However, Mr. Cao's position is that the appellant's claim is not confined to the enforcement of the Chinese money order; it also seeks equitable remedies for unjust enrichment, and the defence of laches is not bound to fail to the extent that it responds to these equitable claims.

[53] At the hearing of the appeal, counsel for the appellant accepted that the defence of laches was available as against a claim in unjust enrichment. Reduced to its essentials, the submission was to the effect that Part 3, para. 13 of the Amended Response made it clear that the pleas of laches related only to the enforcement of the money judgment. The appellant notes that laches is pleaded under the heading of the public policy defence, and that the Amended Response provides that "…the Company is barred from <u>enforcement</u> based upon the doctrine of laches" [emphasis added].

[54] I disagree with the appellant's submission on this point. An application to strike under Rule 9-5(1)(a) requires that the pleadings be read generously, and as they might reasonably be amended: *British Columbia/Yukon Association of Drug*

War Survivors v. Abbotsford (City), 2015 BCCA 142 at para. 15; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 143, per Brown and Rowe JJ., dissenting in part and not on this point. This results, in my view, in the conclusion that a pleaded defence that is conceded to apply to one portion of the claim cannot be struck under Rule 9-5(1)(a) because it is misplaced in the pleading itself. While there may well be deficiencies in how the laches defence is pleaded in the Amended Response, they are not sufficient to bring them within the scope of Rule 9-5(1)(a): *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22.

[55] Since the appellant has advanced a claim in unjust enrichment and seeks equitable remedies—pleaded in Part 2, paras. 8–12 of its amended notice of civil claim—it is not plain and obvious that the defence of laches cannot properly respond to these equitable claims. I would order, however, that the Amended Response be further amended to clarify that the defence of laches is pleaded only in response to the appellant's claims for equitable relief.

The conspiracy defence

[56] At paras. 14–16 of the Amended Response, Mr. Cao pleads that the Chinese actions were brought by the appellant company, "controlled by individuals who participated in the very scheme that [Mr. Cao] was accused of". This pleading is supported by material facts that assert that Mr. Cao was just one party to the alleged unlawful scheme, and that the other participants caused the appellant to bring the Chinese actions against him, notwithstanding their own participation in and acquiescence to his alleged misconduct. Mr. Cao pleads that, given "the origination of the alleged debts" the Court should refuse to enforce the Chinese judgments "on the balance of equities".

[57] The judge's reasons on this issue are, again, brief, and restricted to the finding that he was:

> [17] …not able to conclude that the proposed conspiracy plea is bound to fail and should be struck. This plea, which has an equitable flavour, appears to be novel, but I cannot say that it is plain and obviously bound to fail.

[58] The appellant characterizes Mr. Cao's conspiracy defence as an attempt to relitigate the merits of the foreign action. It argues the defence is not available at law on an application to enforce a foreign judgment. Mr. Cao responds by arguing that this defence, while pleaded under the public policy heading, also engages natural justice considerations. He concedes that this defence is novel, but says that the judge was correct to conclude that it was not plain and obvious that it could not succeed.

[59] The essence of the pleading, in my view, is that the appellant should not be permitted to enforce a judgment against Mr. Cao for his participation in an alleged scheme in which the appellant's controlling shareholders were also active participants.

[60] I would consider this pleading in light of the facts pleaded in support of Mr. Cao's natural justice defence to which I referred above, where he alleges material facts which are to the effect that the principal and other shareholders of the appellant company were participants in the scheme, but the Chinese courts refused to consider the joint and several liability of these other parties to the unlawful scheme.

[61] I agree with the chambers judge that, at this stage, and on a motion to strike, it is not plain and obvious that the conspiracy defence is bound to fail. There are, as Mr. Cao submits, various ways to view this admittedly novel argument. It is arguable that, within the context of natural justice, this pleading supports the assertion that the procedure adopted in the Chinese courts was contrary to natural justice, since it is alleged that evidence capable of supporting the joint and several liability of the appellant's own directors was not considered.

[62] I also would not accept the appellant's submission that the conspiracy defence is a relitigation of the merits of the underlying Chinese judgments. Read generously, the pleaded defence is grounded in the assertion that the Chinese courts had evidence before them that the appellant's own directors were participants in the alleged scheme, and potentially jointly and severally liable, but awarded the

judgments in any event. Accepting this assertion as true, as a judge is required to do on an application under Rule 9-5(1)(a), this is sufficient, in my view, to ground an arguable claim that the applicable law, under which such a conspiracy was apparently not a bar to the appellant's recovery of significant monetary judgments, is contrary to the fundamental morality of the Canadian legal system.

Issue #2: The *Res Judicata* defence

[63] At paras. 17–19 of the Amended Response, Mr. Cao pleads that the second Chinese judgment is inconsistent with the first, and the claim advanced in the second Chinese action could have been brought in the first Chinese action and so was obtained contrary to the principles of *res judicata*.

[64] This pleading is first raised in the Amended Response and was not before the chambers judge. The appellant submits that this Court should consider and strike this pleading in any event, as the issue raises a pure question of law, and Mr. Cao will not be prejudiced if it is first considered on appeal. It says that requiring the appellant to return to the Supreme Court and bring a fresh application to strike the *res judicata* defence would be inefficient and further delay the resolution of these proceedings.

[65] Mr. Cao says the appellant seeks new relief on appeal, in effect transforming the appeal into an application at first instance. He says this Court lacks the jurisdiction to make an order at first instance, citing *Park v. FinancialCAD Corporation*, 2009 BCCA 7, where the Court held that it lacked jurisdiction to hear what amounted to an application under s. 154(1) of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, at first instance: at paras. 35–37.

[66] The appellant submits that *Park* is distinguishable, because here the appellant is not attempting to make a new application under a new rule not raised before the chambers judge. It points to *Al-Islam v. Valley Street Property Ltd.*, 2019 BCCA 48, as a case where this Court considered an application to strike amendments to a petition that were made after the hearing in the court below.

[67] Section 24 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, provides the jurisdiction to consider this issue. In my view, it is in the interests of justice to consider the appellant's arguments on this point on their merits. Judicial economy militates in favour of avoiding the possibility that the appellant will pursue yet another application on this limited portion of the Amended Response. Furthermore, because, as I will explain, I am not persuaded that the *res judicata* defence should be struck, there is no prejudice to either party if this portion of the pleadings is considered at this stage. The merits of the issue were fully argued before us, and as the appellant points out, the question is one of law on which the standard of review would be correctness in any event.

[68] The appellant's position is that *res judicata*, like limitations periods, is not a fundamental part of Canadian legal morality, and that it is plain and obvious that the *res judicata* defence cannot succeed. I do not agree. Unlike the limitations defence, where the delay in bringing the Chinese actions did not exceed some of the lengthier limitations periods in force in British Columbia, it is clear, in my view, that a Canadian court would not ordinarily permit a party to recover twice in respect of the same events, or give effect to inconsistent judgments: *Ahmed v. Canna Clinic Medicinal Society*, 2018 BCCA 319 at paras. 9–10.

[69] The doctrine of *res judicata* is "one of the oldest techniques the law has developed to prevent abuse of the decision-making process" and engages considerations of fundamental fairness to the parties: *Ahmed* at para. 9; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 20. It is not plain and obvious at this stage that the doctrine of *res judicata* is not a core feature of Canadian legal morality, and that the enforcement of duplicate or inconsistent foreign orders in respect of the same facts would not "shock the conscience of the reasonable Canadian": *Beals* at para. 77. Accordingly, in my view, the *res judicata* defence is not bound to fail.

Issue #3: The Facts Pleaded in the Amended response

[70] The appellant seeks to strike portions of the facts pleaded by Mr. Cao in Part 1 of the Amended Response. The chambers judge observed that the application was

brought under Rule 9-5(1)(a) and not 9-5(1)(b) but considered that the challenge to the factual pleadings was "part and parcel" of the challenge to the defences. He declined to strike paras. 5–22 of Part 1 of the Response, which pertained to the facts underlying the Chinese actions, on the basis that there was a "plausible nexus" between these facts and the defences he had already declined to strike: at para. 19.

[71] With respect to paras. 32–33 of Part 1 of the Response, which related to the enforcement proceedings in China, the judge found that these pleadings were responsive to pleadings in the ANOCC and that on this basis they should not be struck: at para. 20.

[72] In addition to these paragraphs, the appellant now also asks this Court to strike para. 25 and the last sentence of para. 28 of the Amended Response. These paragraphs pertain to the procedure followed before the Chinese courts, and plead that Mr. Cao was denied natural justice in a variety of ways.

[73] I would agree with the judge that the facts about the parties and the alleged scheme that formed the basis of the Chinese actions which are pleaded in paras. 5–22 of the Amended Response are connected to the defences of natural justice and public policy. The same is clearly true of para. 25 and the impugned portion of para. 28. Given my conclusion that these defences should not be struck, I would not strike these portions of the Amended Response. I note that although I have concluded that the limitations defence should be struck, there is a nexus between all the facts pleaded in paras. 5–22 and the other defences, such that none of those paragraphs need be struck.

[74] As to the facts about the enforcement proceedings in China pleaded at paras. 32–33 (which are now paras. 33–34 of the Amended Response), I agree with the judge that these are responsive to facts pleaded in the notice of civil claim. As Mr. Cao submits, it is inconsistent for the appellant to argue that it should be permitted to allege facts which relate to the enforcement proceedings, but that the same issue cannot be addressed by Mr. Cao in his response. Furthermore, the facts

at paras. 33–34 of the Amended Response seem plausibly connected to the natural justice and conspiracy defences advanced by Mr. Cao.

[75] For these reasons, I would not strike any of the paragraphs in Part 1 of the Amended Response.

Disposition

[76] I would allow the appeal in part. It is plain and obvious that the limitations defence pleaded in Part 3, paras. 8–9, and 11–12 of the Amended Response is bound to fail. It follows that I would order that Mr. Cao amend Part 3, paras. 8–13 of the Amended Response to remove any reference to the limitations defence as it has been defined in these reasons.

[77] I would otherwise dismiss the appeal.

[78] In my view Mr. Cao has been substantially successful on this appeal and I would award him his costs in this Court.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Fleming"