

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Callahan v. Callahan*,
2025 BCSC 1107

Date: 20250618
Docket: S235344
Registry: Vancouver

Between:

Edward James Callahan

Plaintiff

And

**Robert Callahan, Bruce Callahan, Douglas Callahan, Bruce Callahan as trustee
for the Callahan AE #3 Trust, and 0081092 B.C. Ltd.**

Defendants

Before: The Honourable Justice K. Loo

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.
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Place and Date of Judgment:

Vancouver, B.C.
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Introduction

[1] This is an application to strike or dismiss claims in this action under R. 9-5 and R. 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[2] The claims advanced by the plaintiff, Ted Callahan, are primarily claims in contract, although he also advances claims in unjust enrichment and proprietary claims in respect of the lands owned by the subject company.

Background

[3] This action is one of many legal disputes, both past and ongoing, between Ted Callahan and his three brothers — Douglas, Bruce and Robert (in these reasons, the “defendant brothers”).

[4] In a different but related matter (*Callahan v. Callahan*, 2022 BCCA 387 [*Callahan 2022 BCCA*]), the Court of Appeal described the background to these legal disputes, in part, as follows:

[2] The four sons of Lloyd and Marjorie Callahan — Douglas, Edward, Bruce and Robert — received from their parents what should have been a legacy of financial security that could have been expected to extend into at least the next generation. But while the enterprises they were given have been largely successful, the extreme disaffection that has plagued the relationship between Edward (“Ted”) Callahan on the one hand and his three brothers on the other has overshadowed that success.

...

[4] The “disputes and litigation” involving Ted, his brothers, and their father had begun by the date of death of Marjorie Callahan in 2002. For the most part, the chambers judge observed, Ted was the “outlier” in these disputes, as his brothers normally aligned with their father.

[5] Over the last twenty years, the enmity in the family has resulted in a series of long and costly proceedings of which this oppression action is only the most recent example. The past proceedings include a mediation/arbitration led by the late Mark Andrews, that lasted 14 years and finally achieved the separation of Ted’s interests in several of the Callahan companies from those of Bob and Bruce; the “Hywood Proceedings”, an oppression action brought by Ted which was dismissed in 2011 by Madam Justice Gerow (see 2011 BCSC 40); the “Chilkoot JV Proceeding,” concerning certain properties in Yukon that were ultimately subdivided among the brothers; and in 2015, an unsuccessful application by the three brothers for the court-ordered winding-up of Shasta Properties Ltd. (“Shasta”) under

the "just and equitable" ground in s. 324 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "Act").

[5] Shasta Properties Ltd., which is referred to in the passage above, is now 0081092 B.C. Ltd. That company (the "Company," or "Shasta") is the subject of this action and is one of the defendants herein.

The Company's assets

[6] The Company owns five contiguous parcels of land in Kelowna, at 3745 Lakeshore Road (the "Lands"). The Lands occupy approximately 18.5 acres. For many years, the Company has owned and operated a mobile home park on the Lands.

[7] On November 6, 2020, the shareholders of the Company resolved to appoint a liquidator to assist in the liquidation of the Company's assets, including the Lands, while operating the Company as a going concern. They also resolved to authorize the Company to commence a dissolution upon completion of the liquidation.

[8] This action was first filed on July 28, 2023. It was substantially amended to plead the Incentive Agreement on March 25, 2024.

[9] In December 2024, I approved a process to market and sell the Company's assets in a proceeding styled *In the Matter of 0081092 B.C. Ltd., In Liquidation*, Vancouver Registry no. S232641 (the "liquidation proceeding"). The process that I approved required potential purchasers to submit, and the Court to review and assess, sealed bids.

[10] On May 5, 2025, following the completion of the sales process and the assessment of sealed bids by the Court, this Court approved the sale of the Company's assets to a company owned or controlled by the defendant brothers for approximately \$43 million. Assuming the sale completes, the proceeds net of closing costs and other specified amounts will be held by the liquidator on behalf of the Company pending further order of this Court.

The claims in this action

[11] Although the four brothers are equal shareholders of the Company, Ted Callahan claims that there are two agreements which entitle him to a greater share of the value of the Company or its assets. They are referred to in the pleadings as the Differential Contract and the Incentive Contract.

[12] The Differential Contract is described in the Amended Notice of Civil Claim (“ANOCC”) with reference to the “Ted Differential,” which is described at para. 11 as “a larger profit or value of Shasta than his brothers, both as the company grew, and upon any dissolution of Shasta if the Ted Differential had not been fully paid to Ted by that time.”

[13] The Differential Contract is described in para. 60 of the ANOCC as:

... an agreement between Ted, Bruce, Bob and Doug to pay Ted the Ted Differential through cash compensation and and/or equity. The amount to be paid was to be proportionate to the opportunities, equities and cash flow that Ted brought in going forward. Bob, Bruce and Doug were also to receive proportionate cash or equity payouts for opportunities and cashflow that they brought in (if any). The agreement was made, in part orally, in part written, and in part by conduct ...

[Emphasis omitted.]

[14] The Incentive Agreement is described at paras. 3, 6, 24 and 25 as follows:

In the 1980s, Ted, Marge and Lloyd agreed that Ted would be substantively compensated by way of a distribution of assets by the Callahan Family Companies including Shasta for Ted’s contributions to all Callahan family companies ... including Shasta (the “Incentive Agreement”).

...

Pursuant to the Incentive Agreement, Marge, Lloyd and Ted agreed that in consideration for Ted saving and growing the Callahan Family Companies (if he was able to), including Shasta and the properties Shasta owned, any growth would be to Ted’s account, and Ted would be substantively compensated (and by default differentially) through entitlement to the assets he helped save, acquire and grow.

...

Lloyd, Marge and Ted on behalf of themselves and the various Callahan Family Companies including Shasta agreed to the Incentive Agreement. In particular, Lloyd, Marge and Ted and [the Company] agreed that Ted would receive a differential entitlement to the assets (and land or property therein)

that Ted helped save, acquire (if applicable) and grown through his efforts, contributions and sacrifices.

The Incentive Agreement was entered into in or about early 1986 and was made partly orally, partly in writing and is evidenced by conduct.

[Emphasis omitted.]

[15] The breaches of these agreements are said to be anticipatory, as pleaded at paras. 4, 5 and 89 of the ANOCC:

The obligation to differentially and substantively compensate Ted through entitlement to a differential portion of the [Lands] has been triggered as Shasta intends to distribute [the Lands] and dissolve Shasta.

Shasta has anticipatorily breached the Incentive Agreement by refusing to compensate Ted through distribution of a portion of the [Lands] despite the fact that Ted helped save the [Lands] and acquire and grow the assets of Shasta. ...

By refusing to recognize the Ted Differential, Bob, Bruce and Doug are in anticipatory breach of the Differential Agreement.

[16] The trial of this action and another action known as the “Derivative Action” (styled as *Shasta Properties Ltd. v. Callahan*, Vancouver Registry no. S190277) are set to proceed to trial in October of this year and are to be heard together before me.

[17] Although Douglas Callahan is a respondent to this application, all three of the defendant brothers and Bruce Callahan as in his capacity as trustee for the Callahan AE #2 trust made submissions in support of the application. Accordingly, I will refer to these parties in these reasons as the “applicants.”

[18] The applicants seek out to strike out the plaintiff’s claims under R. 9-5 on the basis that they disclose no reasonable claim or that they constitute an abuse of this Court’s process. Alternatively, they seek to have the claims dismissed under R. 9-6 on the basis that there is no genuine issue to be tried because the claims are barred by the applicable limitation statute.

Issues

[19] The four primary arguments being advanced on this application are that:

- a) the action ought to be struck because the pleadings are so defective that they disclose no reasonable claim under R. 9-5(1)(a) or constitute an abuse of process under R. 9-5(1)(d), and that leave ought not to be granted to amend;
- b) the claims ought to be struck because the claims are unnecessary, frivolous, vexatious, or otherwise an abuse of the Court's process within the meaning of R. 9-5(1)(b) or (d);
- c) the claims ought to be dismissed or struck pursuant to R. 9-6 on the basis that there is no genuine issue to be tried because the claims are barred by the applicable limitation statute; and
- d) the *in rem* claims — in particular the claims for the imposition of a constructive trust and for specific performance — ought to be struck on the basis that they are a collateral attack on orders that this Court made in the liquidation proceeding.

[20] I will address these arguments in order.

Discussion

[21] For the reasons that follow, I have concluded that, except for the application to strike the *in rem* claims, which was ultimately not seriously contested, and the application to strike individual paragraphs of the ANOCC, which is adjourned, this application shall be dismissed. In my view, none of the other arguments made on this application is sufficient to overcome the high thresholds that are required to be met on applications to strike under R. 9-5 and dismissal applications under R. 9-6.

Should the action be struck under R. 9-5 because the pleadings are defective?

[22] Broadly speaking, the applicants make two arguments in support of their application under R. 9-5. They submit that the plaintiff has “failed to plead the material facts essential to formulate a complete cause of action in breach of

contract,” and they submit that many of the plaintiff’s pleas are comprised of evidence rather than material fact.

The alleged failure to plead material facts

[23] In support of the submission that the plaintiff has failed to plead all of the necessary material facts, the applicants cite the Court of Appeal’s decision in *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57 at para. 84, for the propositions that a breach of contract claim must plead facts to support two elements — (1) the existence of a contract; and (2) the breach of a term of that contract — and that the existence and terms of the contract should be explicitly stated.

[24] These propositions are undoubtedly correct, but I do not agree that the ANOCC runs afoul of them, at least to the degree necessary that would warrant the striking of the claim.

[25] The applicants also rely on the decision in *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 [*Frazier*] for the proposition that if sufficient pleadings with material facts are not provided, R. 9-5(1)(a) will allow the pleadings to be struck.

[26] However, that case provides that a pleading will only be struck for failure to disclose a reasonable claim under R. 9-5(1)(a) if it is "plain and obvious" that no claim exists, and that pleadings will not be salvageable if they are *incapable* of disclosing a reasonable claim: paras. 18 and 71–72.

[27] Further, the authorities are clear that pleadings are to be read generously and as a whole: see *Lee v. G. Y. Lee & Associates Ltd.*, 2014 BCCA 400 at para. 14, cited with approval in *Rhema Health Products Ltd. v. Martin & Pleasance North America Inc.*, 2024 BCSC 1896 at para. 28.

[28] The applicants argue that the pleas in the ANOCC in support of the two alleged agreements are vague, unclear, and ambiguous, but in my view, those pleas are reasonably clear.

[29] In my view, the ANOCC adequately pleads that the alleged Differential Agreement is that Ted Callahan would be compensated, by way of cash and/or equity, an amount proportionate to the opportunities, equities, and cash flow that Ted brought in going forward.

[30] Further, in my view, the ANOCC adequately pleads that the Incentive Contract claim is that Ted exerted efforts and made sacrifices, described at length in the pleadings, and that in turn it was agreed that he would be “substantively compensated” by way of a distribution of assets from the Callahan family companies, including the Company (and by default differentially) through entitlement to the assets he helped save, acquire, and grow.

[31] The applicants submit that Ted Callahan admits in the pleading that there was no agreement on the amount by which Ted was to be compensated, citing a passage from Ted’s evidence that “Lloyd [the brothers’ father] would not commit to the amount of payment of land or property to Ted that Ted earned as a result of saving and growing the Callahan Family Companies including Shasta.”

[32] However, while the applicants’ submissions regarding the vagueness of the alleged agreement might be made in support of an argument at trial that the contractual terms are too uncertain to be enforceable, I have been provided with no authority for the proposition that a plaintiff’s contractual claim will be struck if he does not plead a specific amount that a party is entitled to receive in accordance with its terms.

[33] The plaintiff’s claim is that the Differential Agreement entitles him to “an amount proportionate to the opportunities, equities and cash flow that Ted brought in going forward,” and that the Incentive Agreement entitles him “to be substantively compensated (and by default differentially) through entitlement to the assets he helped save, acquire and grow.”

[34] The applicants also argue that Ted Callahan “fails to plead the specific conduct of his brothers that constitutes an anticipatory breach of the Differential

Agreement” and that “the pleadings fail to establish how and when any conduct of Bruce, Bob or Doug amounted to an anticipatory repudiation.” As stated above, the relevant plea in support of the claim that the defendant brothers anticipatorily breached the Differential Agreement states:

By refusing to recognize the Ted Differential, Bob, Bruce and Doug are in anticipatory breach of the Differential Agreement.

[35] However, in respect of the applicants’ submission that there are no material facts pled grounding the refusal of the defendant brothers to recognize the Ted Differential, I am again unable to find that the pleadings are incapable of disclosing a reasonable claim.

[36] In *Frazier*, there were no material facts pleaded to ground a proximity analysis in tort between the defendant government and the plaintiff, and plaintiff’s counsel candidly conceded that Ms. Frazier was hoping the material facts underpinning her claim would emerge from the pre-trial discovery process. Therefore, in that case, there were no material facts *capable* of being pled at the time of the application that would underpin the plaintiff’s proximity claim.

[37] In this case, by contrast, it appears obvious that the defendant brothers refuse to recognize the Ted Differential. Indeed, Bruce and Bob say so at para. 30 in their Amended Response to Civil Claim:

In the further alternative, and in specific response to paragraphs 60 through 65, the defendants deny the existence of any agreement, in any form, between the parties. In particular, there is no agreement between the plaintiff and Doug, Bruce, and Bob that the plaintiff would:

- a. be compensated for his efforts in preserving and growing Shasta’s value, including any alleged Ted Differential, through cash compensation or equity;
- b. receive a larger profit or value of Shasta than Doug, Bruce, and Bob as Shasta grew or upon and dissolution of the company;
- c. receive any amount proportionate to the opportunities, equities, and cashflow Ted allegedly brought in; and

- d. be owed a disproportionate amount upon the dissolution or winding-up of Shasta other than as required by his minority pro rata shareholdings in Shasta.

[Emphasis omitted.]

[38] Finally, in support of their argument under R. 9-5, the applicants submit that the claims are speculative, but, in my view, this submission is also met by the responsive plea and Ted Callahan's plea of anticipatory breach, set out above.

[39] I understand a speculative claim to be one that relies on hypothetical facts that may or may not occur. However, in this case, this Court has now ordered that the Company's assets be sold, and both the distribution of its assets and its dissolution are expected, if not certain. As indicated above, the Differential Agreement is described in the ANOCC as an agreement to pay the Ted Differential, which in turn is described as "a larger profit or value of Shasta than his brothers, both as the company grew, and *upon any dissolution of Shasta if the Ted Differential had not been fully paid to Ted by that time*" (emphasis added).

[40] In this context, as indicated above, the defendant brothers deny the existence of the alleged agreements and oppose a differential share being paid to Ted Callahan. In these circumstances, in my view, there is nothing speculative or hypothetical about the dispute between the brothers regarding the proportions in which the proceeds of the Company's assets ought to be distributed.

The pleading of evidence rather than material facts

[41] As stated, the second broad argument advanced by the applicants in relation to alleged defects in the pleadings is that many of the pleas in the ANOCC are comprised of evidence rather than material facts. Rule 3-7(1) provides:

Pleading must not contain evidence

(1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

[42] In my view, certain paragraphs of the ANOCC run afoul of this rule. As one example, in para. 16(b) regarding the defendant trust, the plaintiff pleads:

A trust settled by Lloyd holds the remaining 1.54% of the shares. Bruce is now the trustee of this Trust. No information is available on the ownership of these shares despite repeated requests. Lloyd died without a will. Ted requested information related to the estate. This is subject to a separate Supreme Court proceeding.

[Emphasis added.]

[43] In my view, the underlined words in this plea are evidence as opposed to material facts in support of the claim. Further, I observe that they do not appear to be relevant to the relief sought.

[44] Similarly, it is my view that a section in the ANOCC entitled “Context for the Incentive Agreement,” which describes the financial struggles of the Company and the brothers’ father prior to the alleged making of the Incentive Agreement, is evidence as opposed to material fact.

[45] As a more general observation, it is also my view that the ANOCC is, in parts, prolix and repetitive. As one example, the agreements are pled in the overview and then those pleas are repeated, in slightly different ways, later in the document. Further, regardless of whether much of the text is comprised of evidence or material fact, it is my view that much of the pleading contains unnecessary content which offends R. 3-1(2)(a), which requires a notice of civil claim to “set out a *concise* statement of the material facts giving rise to the claim.” These defects make the pleading more difficult to understand than it otherwise would be.

[46] All of this said, however, it is my view that these pleading defects are not so egregious that the entire claim is unsalvageable, and I advised counsel during the course of the hearing that I was not prepared to strike out the entire claim on the basis that the pleadings are defective. Although it is certainly within this Court’s authority to strike entire actions on the basis of defective pleadings in appropriate circumstances, the defects must be much more severe and pervasive than in this case for that outcome to be justified.

[47] The applicants were particularly critical of the parts of the ANOCC detailing the “sacrifices” that the plaintiff allegedly made and that allegedly gave rise to his

entitlements under the Incentive Agreement. However, in my view, that criticism does not adequately take into account the fact that both alleged agreements are said to have been made, in part orally, in part written, and in part by conduct. Given that the agreement is to be proven, at least in part, by conduct, it is my view that pleas describing Ted's alleged sacrifices are material facts to the claim.

[48] Further, I note that some parts of the ANOCC, while not stating material facts directly relevant to the contractual or unjust enrichment claims, appear to be statements of material facts which may ground responses to anticipated limitation defences. In my view, such pleas are appropriate.

[49] Following my conclusion that the entire action would not be struck for defective pleadings, I also concluded during the course of the hearing that it would not be an effective or judicious use of the Court's time to embark on a paragraph by paragraph assessment of the pleadings as they now stand. The plaintiff advises that he intends to seek to amend his pleading. Counsel for the applicants indicated that they expect to oppose any such application. In the context of that application, and in light of these reasons, I expect that both counsel and the Court will be in a better position to assess whether the striking of any further pleadings is necessary or appropriate.

Other arguments regarding defective pleadings

[50] Before concluding this section regarding defective pleadings, I will briefly address two other arguments advanced by the applicants under R. 9-5.

[51] First, they submit that Ted fails to plead any material facts relating to the defendant Trust, identified in the style of cause as "Bruce Callahan as trustee for the Callahan AE #3 Trust." However, in my view, the key material fact pleaded in respect of the Trust is simply that it holds 1.54% of the shares of the Company.

[52] My understanding is that the Trust has been included as a defendant to the action because it is an interested party to the claim, in the sense that if the plaintiff succeeds in his claims for a larger share of the proceeds from the Company's assets

than he would be entitled as a result of his legal shareholdings, the Trust's share will be reduced proportionately, together with the shares of the defendant brothers. In my view, the naming of the Trust as a defendant is appropriate for this reason.

[53] Second, the applicants submit that the plaintiff's unjust enrichment claims are bound to fail because the pleaded detriment in the unjust enrichment analysis is "premised on the existence of both the Incentive Agreement and the Differential Agreement." However, in my view, that is not what the ANOCC states. Paragraph 49 provides:

Further, and in the alternative, should Shasta not distribute land or property to Ted, Shasta will have been unjustly enriched by Ted's successful efforts to save the [Lands] and Shasta. Such enrichment is to the detriment of Ted as he will not be compensated for his efforts to save and develop Shasta and the [Lands]. Such enrichment has no juristic reason.

[54] Although it is not ideally worded, the unjust enrichment claim is pleaded in the alternative to the contractual claims. In my view, it is common for a plaintiff to plead that, first, that there was a contract in existence but, in the alternative, if there was no contract, that the consideration that he allegedly paid or conveyed to the other party unjustly enriched that party. In my view, that is what the plaintiff is doing here, and there is nothing unusual or defective about the plea.

Should the claims be struck because they constitute an abuse of process?

[55] In support of their assertion that the claims should be struck because they constitute an abuse of process, the applicants cite the decision in *Acumar Consulting Engineers Ltd. v. The Association of Professional Engineers and Geoscientists of British Columbia (APEGBC)*, 2014 BCSC 814 [*Acumar*], for a "non-exhaustive list of principles and characteristic indicia of vexatious legal proceedings and conduct." Those principles and indicia are as follows:

[27] The Court of Appeal has regularly endorsed the non-exhaustive list of principles and characteristic indicia of vexatious legal proceedings and conduct set out in Henry J.'s decision in *Re Lang Michener et al and Fabian et al* (1987), 37 D.L.R. 4th 685 at 691 (Ont. H.C.J.):

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[56] See also *Dawson v. Dawson*, 2014 BCCA 44 at para. 16.

[57] At least some of these indicia appear to be applicable in this case. As the applicants point out, Ted Callahan has taken unsuccessful appeals from two judicial decisions in the liquidation proceeding. Further, the Court of Appeal remarked in *Callahan v. Ernst & Young (as Liquidator)*, 2024 BCCA 269 at para. 17, that Ted Callahan's "litigious history and failure to respond to previous costs orders is problematic."

[58] However, I note that most of the submissions made in support of the applicants' abuse of process claims relate to proceedings other than this one. In his written argument, Douglas Callahan recounts "Ted's history of opposing the liquidation" and sets out various steps taken by Ted Callahan in the liquidation proceeding.

[59] It must be emphasized that this is not an application for Ted Callahan to be declared a vexatious litigant. In order to succeed on this part of the application, the applicants must establish that Ted Callahan's commencement and prosecution of *this* action was and is vexatious.

[60] In this regard, the applicants argue that "Ted brought the Differential Claim and the Amended Claim tactically to delay and obstruct the Liquidation," thus alleging that this action was advanced for an improper purpose.

[61] However, the liquidation has now reached its penultimate step, and the sale of the Company's assets has been approved. It may be that Ted Callahan will seek to hold up some or all of the distribution of the proceeds of sale on the basis of his outstanding claims in this action, but that has not yet happened. Whether some or all of the proceeds ought to be held pending the action's determination will be decided on another day in the liquidation proceeding.

[62] It is relevant to this issue that in *Callahan v. Ernst & Young Inc. (as Liquidator)*, 2025 BCCA 11 at paras. 58–60, the defendants unsuccessfully invited the Court to award increased costs on the basis that Ted had brought the appeal solely to delay and obstruct the voluntary liquidation. This was described by the Court of Appeal as the defendant brothers' "principal argument" in respect of increased costs. Although the Court of Appeal held that the appeal before them had "little merit" and that one of Ted Callahan's arguments was "specious," the Court declined to adopt the defendant brothers' argument that the proceedings were advanced for an improper purpose, and it declined to award increased costs.

[63] In relation to the claim of abuse of process, *Acumar* directs the Court to assess whether it is obvious that the action cannot succeed, and it is my view that this threshold is not met in this case. I observe that in earlier arbitration reasons, Ted Callahan was awarded a larger share of other properties or companies than his brothers, which is at least some historical support for the idea that differential contributions to the family assets might result in differential shares of those assets.

[64] Finally, I will address the argument made by Douglas Callahan that the claims made in this action are inconsistent with positions taken by Ted Callahan previously in this Court.

[65] In 2015, Ted Callahan opposed a petition advanced by his brothers to wind up the Company. On that application before Justice Skolrood (as he then was), which was the subject of reasons cited as *Callahan v. Shasta Properties Ltd.*, 2015 BCSC 663 [*Callahan 2015 BCSC*], Ted acknowledged his minority position and said that he was “content with his role as a ‘passive minority shareholder’,” but that he “only [wished] to preserve the opportunity for [his] own children... to share in the substantial future value of these properties”: para. 85.

[66] In a later oppression proceeding, Ted Callahan said that “his reasonable expectations [were] that Shasta would continue to hold the [Lands]... and eventually develop them for the benefit of the Callahan family and that he would be able to participate, along with his brothers, in the financial upside of any development”: *Callahan v. Callahan*, 2022 BCSC 87 at para 84 [*Callahan 2022 BCSC*], rev’d *Callahan 2022 BCCA*.

[67] In *Callahan 2022 BCSC*, the Court stated that, in *Callahan 2015 BCSC*, Justice Skolrood had “agreed with Ted that a winding-up was not appropriate because it was clearly contrary to Ted’s reasonable expectations that Shasta’s assets would be held and developed by the Callahan family”: para. 100; see also paras. 87–88, 102. While *Callahan 2022 BCSC* was reversed on appeal, the Court of Appeal did not take issue with the sincerity of Ted’s expectations as expressed therein: *Callahan 2022 BCCA* at para. 46.

[68] The applicants argue that the reasonable expectations stated by Ted Callahan, as memorialized in the decisions described above, are inconsistent with the existence of an agreement that he be differentially compensated upon its dissolution. However, in my view, that argument is not so clear as to persuade me that Ted’s assertion of the Differential Agreement in this proceeding constitutes an

abuse of process. I note that in *Callahan 2022 BCCA*, Ted Callahan's position was described by the Court of Appeal as follows:

[18] Clearly, however, his preference was to maintain the *status quo*, which he said would allow the parties to (a) continue operating Shasta as a "strong and profitable" company, or (b) agree to subdivide the "Crown Jewel" amongst the four brothers. Alternatively, if the *status quo* was not restored, he said he would consider a shotgun process whereby his brothers, "each acting individually without knowledge of each others' offers, are the ones making an offer."

[69] It is evident that in the context of the oppression proceeding, Ted Callahan's preferences and expectations were stated less definitively than in the windup proceeding. In any event, in my view it is arguable that both expectations could co-exist: that his expectation at the time of the windup proceeding was that the family would continue to operate the Company and to own the Lands, but that he would be entitled to a differential share upon dissolution, whenever that might be.

Should the action be dismissed under R. 9-6 because it is statute-barred?

[70] Under R. 9-6(5), the Court may dismiss a claim on the basis of an expired limitation period, but the applicant must establish that there is no genuine issue to be tried in this regard.

[71] In *Rooney v. Galloway*, 2024 BCCA 8, the Court of Appeal held:

[167] Nor are limitation issues readily determined under a summary judgment application brought under R. 9-6 of the *Rules*, where the question is whether there is a "genuine issue of material fact requiring trial" (*Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11, citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 1999 CanLII 664, at para. 27). Thus, on an application under R. 9-6, "if the evidence needs to be weighed and assessed, then...the application is to be dismissed"...

[72] In *Robinson v. Kuypers*, 2020 BCSC 770 at para. 47, this Court cited with approval from the decision in *Tinaburri v. North Vancouver (District)*, 2014 BCSC 661, wherein Justice Baker noted:

[107] Although caution must be exercised in dismissing an action on a summary basis because of the expiry of a limitation period, where an action

has clearly been commenced out of time, dismissal pursuant to Rule 9-6 is warranted.

[73] As indicated above, I have concluded that the application for an order under R. 9-6 dismissing the claims on the basis of an expired limitation period ought to be dismissed because, in my view, there is a genuine issue to be tried. However, the limitation defence will remain a live issue at trial. So as not to prejudice the trial of this action, I will be careful in these reasons not to reach any definitive conclusions in respect of the limitation issues. For the reasons below, those conclusions ought to await a full evidentiary record.

[74] In respect of this issue, the applicants cite previous instances in which assets of the Company have been sold and therefore the issue of the distribution of funds from the Company has arisen. The applicants submit that if there were a Differential Agreement, it has been breached on previous occasions when the brothers denied its existence and when funds from the sale of Company assets were distributed equally, and not differentially, among the brothers.

[75] The applicants cite well-known authority for the proposition that when a contract is breached, the non-repudiating party is required to reject or accept a repudiation within a reasonable period and cannot adopt a “wait and see” approach. On the basis of these authorities, they argue that Ted unequivocally accepted any repudiation of the Incentive Agreement, that the limitation period started to run when he did so, and that he has therefore failed to sue in time.

[76] I draw no definitive conclusions about this issue here and I do not intend to preclude this argument being made again at trial in a broader factual context, but in my view, it is at least arguable that the acceptance of a repudiation in respect of a previous breach of contract precludes only an action from being advanced with respect to *that* breach if the limitation period in respect of that breach has expired. There is at least a viable argument that these circumstances do not necessarily preclude the commencement of legal actions in respect of subsequent breaches of the same contract.

[77] In the course of submissions, the applicants referred to the principle of continuing breach, and the possibility that all of the alleged breaches of the purported differential agreement should be treated as one continuing breach for the purpose of the limitation analysis.

[78] Again, it would not be appropriate to express any views regarding the cogency of this argument; nonetheless, I am able to conclude that this argument ought not to be dealt with on a summary judgment application. In this regard, the Court of Appeal held as follows in *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63:

[56] One difficulty I see with WestJet's argument is that the breach of contract is alleged to be a continuing breach. Whether that is maintainable and how the operation of the limitation period affects that allegation is an issue that, in these circumstances, should not be answered solely on the pleadings. It strikes me as an issue, together with any potential discoverability issue, that is better dealt with in a proper factual matrix. In that context, a court would have a more secure foundation to determine to what extent the metes and bounds of the action, if it survived for this plaintiff at all, would be affected by limitations issues.

[79] In my view, the arguments advanced by the applicants, including that previous breaches of the alleged agreements started the limitation period running in respect of this claim, engage factual and legal issues which are genuine issues to be tried, and cannot appropriately be answered on an application under R. 9-6. Those factual and legal issues include such matters as whether there were separate breaches or whether there was one continuing breach, whether those breaches of the agreement constituted repudiations, whether those repudiations (if that is what they were) were accepted, and what the legal consequences of any of those issues are.

[80] At the end of the day, I am unable to find that there is no genuine issue to be tried in respect of the limitation period defence, as pled by the applicants.

Should the equitable *in rem* claims be struck because they constitute a collateral attack on orders made in the liquidation proceedings?

[81] As stated, there are proprietary or *in rem* remedies over the Lands sought in the ANOCC.

[82] In my view, the pleas seeking those remedies are incompatible with the sales process orders that I made in December 2024, and the sales approval order that I made on May 5, 2025, in the liquidation proceeding. In other words, the plaintiff cannot have any proprietary right to the Lands that this Court has ordered to be sold. In my view, it is clearly appropriate to strike the prayers of relief *in rem*, on the basis that the maintenance of those prayers of relief would otherwise be a collateral attack on the sales process orders made by this Court in December 2024, and its sale approval order made on May 5, 2025.

[83] I note that the date for the submission and assessment of sealed bids in the liquidation proceeding was the next business day after the hearing of this application. Nonetheless, neither Ted Callahan nor anyone else sought to stop the sealed bid process from going ahead because of the claims in this action against the Company's Lands.

[84] For these reasons, paras. 1 (specific performance), 3 (constructive trust), 4 (certificates of pending litigation), and 8 (tracing and constructive trust) of the ANOCC are struck.

[85] In my view, it is also appropriate to strike the factual pleas made in support of the *in rem* claims in the body of the ANOCC. However, since I have not heard detailed submissions from the parties regarding which of those pleas ought to be struck and which might be sustainable, I am not prepared to identify in these reasons which pleas ought to be struck. I am hopeful that counsel may be able to determine between themselves which pleas are advanced in support of the relief struck and which are not, but, if not, the parties are at liberty to apply in respect of this issue. In my view, this issue would be appropriately addressed when or if this Court is required to determine whether any other individual paragraphs in the ANOCC ought to be struck, as described above.

Conclusions and costs

[86] Paragraphs 1, 3, 4, and 8 of the prayers for relief in the ANOCC are struck.

[87] The application regarding the striking of individual paragraphs in the ANOCC is adjourned generally.

[88] The balance of the application is dismissed.

[89] With regard to costs, it is my view that the parties on both sides of this dispute bear some fault. On one hand, most of the application was dismissed. On the other hand, this application was necessitated at least in part by the plaintiff's pleading of the *in rem* claims, and, in my view, by the somewhat prolix and repetitive nature of the ANOCC.

[90] For these reasons, there shall be no costs of this application payable to any party.

“The Honourable Justice Loo”