IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Besler v. What the Fungus,* 2025 BCSC 1454

Date: 20250729
Docket: S45001
Registry: Penticton

Between:

Vicki J. Besler, Bradley H. Besler, Darren W. Besler

Plaintiffs

And

What the Fungus, Thorsten Clausen, Brian Callow, King Campbell, Faith Arroyo Callow, Arlene Fenrich, Clayton Fenrich, Garnet Valley Holdings Ltd., Agricultural Land Commission, The Corporation of the District of Summerland

Defendants

Reasons for Judgment

Appearing on his own behalf and on behalf of the Plaintiffs Vicki J. Besler and Darren W. Besler:	B. Besler
Counsel for the Defendants, What the Fungus, Thorsten Clausen, Brian Callow, King Campbell, Faith Arroyo Callow, Arlene Fenrich, Clayton Fenrich and Garnet Valley Holdings Ltd.:	D. Horvath
Counsel for the Defendant, Agricultural Land Commission	J.K. Yamashita
Counsel for the Corporation of the District of Summerland	N. Krueger
Place and Date of Hearing:	Kelowna, B.C. November 5 – 8, 2024
Place and Date of Judgment:	Kelowna, B.C. July 29, 2025

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Introduction

[1] By way of introductory overview, these are the second of three reasons for judgment resulting from a multi-day hearing involving numerous applications in two separate but related actions:

a) Supreme Court of British Columbia, Penticton Registry, Action No. 45001 (the “Primary Action”); and

b) Supreme Court of British Columbia, Penticton Registry, Action No. S49713 (the “MP Action”).

[2] This particular set of reasons address certain issues and makes resulting orders in respect of the Primary Action. My reasons for judgment in respect of an application to dismiss the MP Action in its entirety are indexed at 2025 BCSC 1353 (the “MP Striking Reasons”). I will, for efficiency, refer back to the MP Striking Reasons as required to avoid unnecessary factual repetition.

[3] As I also did in the MP Striking Reasons, I will refer to certain individual parties by their first names only and certain individual parties with reference to their surnames. I mean no disrespect in this regard. Given the number of parties involved, it is simply most practicable to adopt the naming nomenclature most commonly used in the materials before the court.

Overview of the Individuals and Entities Involved

[4] Vicki Besler (“Ms. Besler”), is the sole registered owner of the property civically known as 18816 Garnet Valley Road, Summerland, British Columbia (the “Besler Property”).

[5] Bradley Besler (“Brad”) and Darren Besler (“Darren”), are the sons of Ms. Besler.

[6] I will refer in these reasons to Ms. Besler, Brad and Darren collectively as the “plaintiffs” in the Primary Action. Ms. Besler is not a plaintiff in the MP Action.

[7] Currently Brad is the only one of the plaintiffs who resides on the Besler Property. Both Ms. Besler and Darren previously resided on the property at times material to the claims in the Primary Action.

[8] Garnet Valley Holdings Ltd. (“Garnet Valley”) is a company incorporated pursuant to the laws of British Columbia. The shareholders of Garnet Valley are the defendants, Brian Callow (“Mr. Callow”) and Thorsten (“Thor”) Clausen. Garnet Valley does business under the trade name “What the Fungus Mushrooms” (“WTFM”).

[9] WTFM operates a boutique mushroom growing business on the lands and premises civically known as 18420 Garnet Valley Road, Summerland, British Columbia (the “WTFM Property”).

[10] Thor is the sole registered owner of the WTFM Property. Thor is an arborist by training. Thor resides on the WTFM Property.

[11] The Besler Property and the WTFM Property are adjoining and share a property line. This is the most important background fact to understanding the relevant factual matrix underlying the dispute between the stakeholders.

[12] The Besler Property and the WTFM Property are located within the municipal boundaries of the district locally governed by the Corporation of the District of Summerland (the “District”). This is the second most important fact to understanding the relevant factual matrix underlying the dispute between the relevant stakeholders.

[13] King Campbell (“Mr. Campbell”) was an investor in WTFM between 2016 and 2019. Mr. Campbell is Thor’s brother-in-law. Mr. Campbell never resided on the WTFM Property.

[14] Faith Arroyo Callow (“Ms. Callow”) is the spouse of Mr. Callow and lives on the WTFM Property with Mr. Callow. Ms. Callow assists, or at least had assisted previously, with WTFM operations from time to time.

[15] Clayton Fenrich (“Mr. Fenrich”) has been an employee of WTFM since 2016.

[16] Bartlett Tree Experts (“Bartlett”) is, I accept, a federally incorporated company which has a registered and records office within the province of British Columbia. Bartlett is a defendant in the MP Action. In the MP Striking Reasons, I address the lack of precision in naming Bartlett: see para. 14. In accordance with a previous court order, Bartlett was provided notice of the plaintiffs’ application, addressed below, to add Bartlett as a defendant in the Primary Action.

[17] Bartlett did not, however, file an application response opposing it being added as a party.

[18] Thor is an employee of Bartlett. Thor holds a managerial position and has done so since in or about 2010. Prior to this, Thor ran his own independent tree-trimming business in the south Okanagan region. It was after Thor sold his independent business to Bartlett that Thor became an employee of Bartlett.

[19] Bartlett leases a portion of the WTFM Property for the purposes of conducting Bartlett’s business operations in the south Okanagan region of the province. It has done so since in or about 2010.

[20] Arlene Fenrich (“Ms. Fenrich”) is an employee of Bartlett. Ms. Fenrich is an administrative assistant and has held such a position with Bartlett since in or about

2015. Ms. Fenrich is Mr. Fenrich's mother.

[21] Collectively, I will refer to WTFM, Thor, Mr. Callow, Mr. Campbell, Ms. Callow, Ms. Fenrich, Mr. Fenrich, and Garnet Valley as the "WTFM defendants".

[22] The Agricultural Land Commission (the "Commission") is a corporation established pursuant to s. 4 of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 [*ALC Act*] and its predecessor statutes. Section 7 of the *ALC Act* provides that the Commission is an agent of the government.

[23] The Commission administers the Agricultural Land Reserve (the "ALR"). Land in the ALR is subject to certain restrictions imposed by the *ALC Act* and its regulations which affect, for example, the ability of property owners and others to construct and use additional residential dwellings, engage in non-farm uses of land or to subdivide land. Owners of land in the ALR may apply to the Commission under the *ALC Act* for permission to engage in restricted uses.

[24] The third most important fact to understanding the factual matrix between the relevant stakeholders is that both the Besler Property and the WTFM Property are located within the ALR and are therefore subject to restrictions imposed by the *ALC Act* and its regulations.

[25] Vern Sopow, Nicole Cressman, Karen Needham, Anthony Haddad, Marnie Manders and Brad Dollevoet are or were senior employees of the District (the "Proposed Employee Defendants"). The material dates of employment of the Proposed Employee Defendants are, according to the pleadings, as follows:

a) Vern Sopow – some date prior to 2019 to April 2022;

b) Nicole Cressman – some date prior to 2019 to June 2020;

c) Karen Needham – October 2019 to July 2021;

d) Anthony Haddad – August 2019 to November 2020;

e) Marnie Manders – unknown to current date; and

f) Brad Dollevoet – October 2020 to current date.

Procedural History

[26] On October 24, 2019, the plaintiffs filed their original notice of civil claim initiating the Primary Action (the "NOCC").

[27] All of the currently named defendants filed responses to civil claim in the Primary Action as follows:

a) The District filed its original response on February 11, 2020;

b) The WTFM defendants filed their original response on August 28, 2020; and

c) The Commission filed its original response on November 2, 2020.

[28] In December 2019, Brad and Darren were charged with two offences in the Provincial Court of British Columbia under file number 46826 (the "Criminal Proceedings").

[29] The Criminal Proceedings are relevant to both the Primary Action and the MP Action. I outlined certain material details of the Criminal Proceedings in the MP Striking Reasons: see paras. 18 to 23. Ultimately, the Criminal Proceedings terminated on March 25, 2022, upon a successful appeal by Brad and Darren.

[30] Going back in the chronology, a case planning conference in the Primary Action was conducted by Mr. Justice Gomery on February 22, 2021, wherein the plaintiffs were ordered to amend the NOCC by June 1, 2021.

[31] The deadline for filing the amended NOCC was extended, by consent, on multiple occasions while the Criminal Proceedings were ongoing.

[32] On November 10, 2021, the plaintiffs filed their amended NOCC (the "ANOCC").

[33] On November 29, 2021, the WTFM defendants and the Commission each filed their respective amended responses to the ANOCC. The District filed its amended response to the ANOCC on December 16, 2021.

[34] On November 30, 2021, the WTFM defendants served the plaintiffs with a demand for particulars pursuant to Rules 3-7(18) and (21) of the *Supreme Court*

Civil Rules [*Rules*].

[35] The plaintiffs provided a response to the demand for particulars on February 3, 2022. It is some 33 pages in length.

[36] On March 21, 2022, the WTFM defendants delivered an application to strike the ANOCC (the "Original Striking Application").

[37] Between March 21, 2022 and November 15, 2022, there were multiple filings in the Primary Action. From my review of CEIS, there were some 61 filings.

[38] I heard the Original Striking Application in Penticton over the course of two days in late November 2022: namely November 24 and 25, 2022. Importantly, neither the District nor the Comission appeared at the hearing of the Original Striking Application as no relief was being sought as against them. There was also no cross application by the plaintiffs to amend the ANOCC before me at that time.

[39] I dismissed the relief sought in Original Striking Application in oral reasons for judgment originally delivered on January 4, 2023, and subsequently published and indexed at 2023 BCSC 2590 (the "Original Striking Reasons"). As set out therein, I ordered that the plaintiffs file and serve a further amended notice of civil claim which complied with the *Rules,* including the relevant rules with respect to liable and slander, by March 1, 2023 (the "January 4, 2023 Order"). I further ordered that the further amended notice of civil claim would be a "fresh" claim which simply appended the ANOCC as Appendix "A".

[40] Given that the Original Striking Reasons and the resulting January 4, 2023 Order now play a central role in respect of many of the orders presently being sought in the Primary Action, I am going to highlight certain portions of certain paragraphs in the Original Striking Reasons:

> **Litigation History**
>
> [9] As noted, this proceeding was commenced back in October of 2019. That was more than three years prior to the hearing of this application before me.
>
> [10] In February of 2021, Mr. Justice Gomery of this court held a case planning conference. The key order arising from that conference is that the plaintiffs were ordered to amend their notice of civil claim by June 1, 2021, that being some six months after the case management conference…
>
> [11] The amended notice of civil claim was ultimately not filed until November 10, 2021. It is lengthy to say the least…

[12] At present, and this may have been clear from my above comments, the pleadings are prolix and will ultimately be very challenging for the trier of fact to understand when this matter proceeds on its merits in the event that the parties cannot resolve it outside of the court process. This is a key concern as pleadings are fundamental to the trial process. Amongst other things, pleadings set the parameters for relevance of evidence and must set out the material facts which are sought to be proven. Bradley Besler, who represents himself and the other two plaintiffs but is a notably sophisticated and articulate self-represented litigant, effectively acknowledged as much during his oral submissions.

[13] The question for this court, as I will come back to, is whether the plaintiffs should be given yet further opportunity to amend the pleadings or whether, as sought by the defendants, the action should be dismissed or certain paragraphs as enumerated above be struck.

Overview of the Claims

[14] Upon a scrutiny of the pleadings as they presently stand, they allege claims based on the following torts: negligence and defamation. I will briefly summarize the claims currently made in the pleadings relating to these torts as best [as] I can having regard to my earlier comments about the prolix nature of the pleadings as they presently stand and the challenges that presents for the court in understanding what is actually being pled.

Negligence

[15] Violation of certain bylaws of the defendant, the District of Summerland, including construction of structures without proper building permits and failure to comply with zoning bylaws.

Defamation

[16] The claims in defamation consume much of the amended notice of civil claim. These include allegations of defamation of the plaintiffs to the Regional District, the RCMP, the District of Summerland, the media and other agencies including WorkSafeBC and the B.C. Mental Health Authority.

[17] Even with the response to demand for particulars, it is hard to discern from the pleadings the core elements necessary to plead the tort of defamation….

. . .

Harassment and Conspiracy

[22] There is also a reference in Part 1 of the amended notice of civil claim to harassment, namely paragraphs 15 and 16 as presently drafted. However, there is no relief sought on this basis. In relation to this tort, I have ultimately concluded that the reference to harassment is simply made in the part of the overall factual narrative and that the tort of harassment is not actually being specifically pled at present.

[23] Similarly, there is reference at paragraphs 8 and 188 of the amended notice of civil claim to claim conspiracy. Again, there is no relief sought based on the tort of conspiracy, and as such I find that this reference is again part of the factual matrix and that the tort of conspiracy is not being specifically pled.

> [24] An additional challenge that arises is as to whether or not the tort of conspiracy to commit the tort of defamation is actually viable at law. However, I am choosing not to weigh into that argument on the basis that I do not conclude that on the basis of the pleadings, as presently drafted, that there is actually a claim based on the tort of conspiracy but rather simple reference to it in passing in the pleadings.
>
> [25] If these two above-noted torts were specifically pled, the amended notice of civil claim is wildly deficient to set forth the material facts and the relevant legal basis, as well as failing to seek any substantive relief sought.

[41] I did not expressly quote the 4 paragraphs of the ANOCC that referred to "conspiracy" and "harassment" in the Original Striking Reasons. For context, they provided as follows:

> 8. (5) In 2019 the Defendant District of Summerland conspired with the Defendant Thor Clausen to support Development Variance Permit DVP19-010 (herein referred to as "DVP19-010").
>
> . . .
>
> 15. (10) in 2019 the Defendants Thor Clausen, Brian Callow, Faith Callow, Arlene Fenrich and Clayton Fenrich repeatedly harassed the Plaintiffs.
>
> 16. In June 2019 the Defendant Thor Clausen threatened to kill the plaintiffs Brad and Darren Besler.
>
> . . .
>
> 188. The Defendant District of Summerland conspired with the Defendant Thor Clausen to approve Building Permits 10771 and 10775

[42] The plaintiffs filed the Second Amended Notice of Civil Claim on February 22, 2023 (the "SANOCC"). Part 1, the Statement of Facts, of the SANOCC contains 359 paragraphs. The "fresh" pleading is 73 pages long. This does not include the ANOCC which is appended per my January 4, 2023 Order.

[43] Simply put, the plaintiffs interpreted the January 4, 2023 Order to mean that I effectively gave them *carte blanche* to file a further amended notice of civil claim "provided it complied with the *Rules*", including not previously plead claims for conspiracy, harassment, intentional infliction of emotional distress and malfeasance in public office.

[44] In stark contrast, WTFM defendants and the District have interpreted the January 4, 2023 Order as confining the plaintiffs to amending their pleadings for the torts of negligence and defamation only and take the position that the various

paragraphs of the SANOCC constitute a breach of my order and further amount to an abuse of process under R. 9-1(5)(d).

[45] All of the currently named defendants filed further amended responses to the SANOCC. The Commission filed on March 9, 2023, the WTFM defendants filed on March 21, 2023, and the District filed on April 3, 2023.

[46] The plaintiffs' demands for document disclosure were the focus of the proceedings in the spring/summer of 2023, with the plaintiffs filing three separate disclosure applications in May of 2023.

[47] On September 20, 2023, the plaintiffs filed a notice of application to add Bartlett as a defendant in the Primary Action (the "Bartlett Application").

[48] On October 3, 2023, the WTFM defendants filed a notice of application to strike specific portions of the SANOCC and sever the defamation claims against the WTFM defendants from the other claims in the Primary Action (collectively, the "WTFM New Striking Application").

[49] On October 12, 2023, the District filed a notice of application to strike portions of the SANOCC (the "District Striking Application").

[50] On October 23, 2023, there was an appearance in the Primary Action before Justice Kent. Justice Kent made a number of directions regarding, *inter alia*, scheduling, service and timing. Ultimately, due to various circumstances, the only direction that has ongoing significance was Justice Kent's direction that the plaintiffs were not permitted to add any further parties to the Primary Action until the hearing and determination of the Bartlett Application, the WTFM New Striking Application and the District Striking Application with the exception that the plaintiffs were given leave to bring an application to add certain employees/former employees of the District as parties in their personal capacities in relation to a claim for misfeasance in public office provided that such application was served by November 6, 2023.

[51] On November 6, 2023, the plaintiffs filed a notice of application to add the Proposed Employee Defendants as parties to the Primary Action as permitted by Justice Kent and, in addition, to further amend the SANOCC. Although the relief sought is contained in a single notice of application, I am independently defining

them as the “Proposed Employee Defendants Application” and the “Further Amendment Application”.

[52] The Further Amendment Application appends as Appendix “A” the proposed Third Amended Notice of Civil Claim (the “PTANOCC”). It is 55 pages long. Part 1 includes 358 paragraphs, excluding various subparagraphs.

[53] The direction of Justice Kent that the Bartlett Application, the WTFM New Striking Application and the District Striking Application be heard during the week of December 4, 2023, did not come to fruition.

[54] On March 4, 2024, the plaintiffs commenced the MP Action.

[55] On August 6, 2024, I was assigned as the both the judicial case management judge and trial judge in both the Primary Action and the MP Action.

[56] Following my assignment, I conducted a judicial management conference (“JMC”) on August 16, 2024. As a follow up to this JMC, I issued a judicial Memorandum to Counsel/Parties dated August 22, 2024. That memorandum specified which portions of which applications were going to be heard during the 5-day hearing on the assize week set aside for this matter and allocated hearing time in a manner intended to ensure equal opportunity for submissions and for the court to make inquiries. I also directed, pursuant to my discretion as the case management judge under the *Rules* to control and manage complex proceedings, that no further applications be brought pending the hearing of the applications referred to above.

[57] That direction has been adhered to pending the release of my multiple sets of reasons for judgments addressing the various and, at times, intersecting issues requiring determination.

[58] Finally, for the purposes of submissions in respect of the Further Amendment Application, the plaintiffs proffered a proposed Fourth Amended Notice of Civil Claim (the “PFANOCC”). It is now 57 pages long. Part 1 still includes 358 paragraphs – some paragraphs are simply longer. The PFANOCC does importantly remove various paragraphs from the relief sought in Part 2, including, but not limited to, all declaratory relief.

Issues To Be Determined In These Reasons

[59] The issues to be determined in these reasons for judgment are as follows:

a) Severance of the defamation claims against the WTFM defendants from all other claims in the Primary Action;

b) The interpretation of the January 4, 2023 Order;

c) The addition of Bartlett as party; and

d) The addition of the Proposed Employee Defendants as parties.

Severance

[60] One discrete component of the WTFM New Striking Application is an order for separate trials of the claims between the plaintiffs and the WTFM defendants as they relate to the plaintiffs' claims against the WTFM defendants based upon the tort of defamation and all other claims between the District and the Comission as may be found to be allowed to proceed.

[61] This relief is opposed by the plaintiffs, the District and the Commission.

[62] Whether to sever proceedings is a discretionary decision to be made in the context of the trial court managing its own process: see *Johnston Estate v. Johnston*, 2017 BCCA 59 at para. 41.

[63] The factors to consider on an application for severance outlined by the chambers judge were adopted by the Court of Appeal in *Johnston* at para. 46:

> [46] I would endorse the judge's non-exclusive summary of the key considerations relevant to an application to sever and the general principles governing severance:
>
> > [68] The key factors engaged in a general sense on an application to sever were canvassed in *Schaper v. Sears Canada*, 2000 BCSC 1575 [*Schaper*] at para. 19:
> >
> > 1. ...the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
> >
> > 2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the

complication, the delay, or the inconvenience alleged by the party applying? If this found [*sic*], that would strengthen the argument to sever.

3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.

4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.

5. Does the prejudice to the party applying, prejudice based on undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?

[69] Guidelines that focused attention more keenly on the efficacy of the trial process were helpfully laid out in *O'Mara v. Son, Kim et al.,* 2007 BCSC 871 [*O'Mara*] at para. 23:

1. whether the order sought will create a saving in pre-trial procedures;

2. whether there will be a real reduction in the number of trial days taken up by the trial being heard at the same trial;

3. whether a party may be seriously inconvenienced by being required to attend a trial in which the party may have a marginal interest;

4. whether there will be a real saving in expert's time and witness fees;

5. whether one of the actions is at a more advanced stage than the other;

6. whether the order sought will result in delay of the trial of any one of the actions and, if so, whether any prejudice which a party might suffer as a result of that delay outweighs the potential benefits which a consolidated trial might otherwise have;

7. the possibility of inconsistent findings and common issues resulting from separate trials.

[70] Severance may well be appropriate where the determination of one issue will render another one moot: *Lawrence v. ICBC*, 2001 BCSC 1530 [*Lawrence*].

[71] The judicial discretion to sever trials or hearings is to be exercised sparingly: *Morrison Knudsen Co. v. British Columbia*

> *Hydro & Power Authority*, 1972 Carswell B.C. 62, 24 D.L.R. (3d) 579 (S.C.); Lawrence at para. 43. The test for severance is not applied in a vacuum; it is to be considered against the backdrop of the nature of the particular case at hand: *Wirtz v. Constantini*, 137 D.L.R. (3d) 393, 1982 CarswellBC 588 (S.C.). Because the determination involves an individualized assessment of the unique case before the Court, there is no closed list of uniformly applied considerations that inform the exercise of the Court's discretion.

[64] The severance portion of application fails on the very first hurdle. Namely, I am not satisfied that the WTFM defendants can show that hearing the claims together would unduly complicate matters, delay the hearing, or otherwise be inconvenient.

[65] Moreover, not one of the *O'Mara* factors listed favours severance. I am both the case management judge and the trial judge in the Primary Action. Severance is not going to make my case management any more efficient. All the claims in the Primary Action are at effectively the exact same stage. There is no reasonable basis to believe that running two separate trials for the claims in the Primary Action, irrespective of what I conclude regarding the pleadings, will result in a real reduction of the overall number of court days required.

[66] Moreover, the severance order sought would not address the fact that some of the named parties do, I find, have more marginal interests in the litigation than others.

[67] In conclusion, I dismiss the relief sought at para. 2 of the WTFM New Striking Application.

The Proper Interpretation of the January 4, 2023 Order

[68] The next discrete issue I shall address is the controversy I alluded to above regarding the January 4, 2023 Order.

[69] Neither position is correct.

[70] Under no circumstances was the January 4, 2023 Order intended to provide *carte blanche* authority to make wholesale amendments to the ANOCC, including adding causes of action that I had specifically identified as not actually being presently plead or entirely different causes of action not even referred to. Such an interpretation of the January 4, 2023 Order runs directly contrary to my finding in

the Original Striking Reasons that the ANOCC was prolix, as specifically quoted above.

[71] Nor would I have granted such *carte blanche* authority to the potential prejudice of the District and the Commission who were on notice that the WTFM defendants had applied to strike the plaintiffs' claims as against them but not on notice that the outcome of the Original Striking Application would be judicial permission of wholesale amendments to the pleadings as against all parties given that the plaintiffs had already expended their right to a "free" amendment under the *Rules* and required either consent or court order.

[72] Simply put, in the face of an application to strike their ANOCC in its entirety or in part, I permitted the plaintiffs the opportunity to amend their pleadings to cure the defects as the law recognizes is appropriate in certain circumstances: see paras. 30-32 of the Original Striking Reasons.

[73] However, the WTFM defendants are incorrect in asserting that the January 4, 2023 Order precludes the plaintiffs from bringing on an application to obtain leave from the court to further amend their pleadings, including to add parties. Had I intended to so significantly curtail the plaintiffs in this regard, I would have needed to make a specific order in that regard. I did not.

[74] Consistent with same are the directions made by Justice Kent on October 23, 2023, which placed parameters on and time limits in relation to applications made to add additional parties to the Primary Action but did not contemplate that the scope of the pleadings were definitively fixed by the January 4, 2023 Order.

[75] In the result, I will not summarily dismiss the Further Amendment Application which seeks to advance claims for conspiracy, harassment and intentional infliction of mental suffering (either in the PTANOCC or the PFANOCC) on the basis that they are abuse of process by virtue of being brought in breach of the January 4, 2023 Order.

[76] Rather, subject to my below orders regarding the Bartlett Application and the Proposed Employee Defendants Application, I will consider the WTFM New Striking Application (excluding severance), the District Striking Application, and the Further Amendment Application on their respective merits in my forthcoming final set of reasons for judgment in this trilogy.

Bartlett Application

Overview

[77] Bartlett operates internationally. This is a fact deposed to by both Brad and Thor in their affidavits filed in respect of the Bartlett Application. According to Thor, Bartlett specializes in preventative health care for trees and shrubs.

[78] As already outlined above, the connection between Bartlett and the WTFM defendants can generally be summarized as follows:

a) Thor is an employee of Bartlett. Thor holds a managerial position and has done so since in or about 2010. Thor's management role is limited to Bartlett's operations in the south Okanagan region of the province of British Columbia;

b) Ms. Fenrich is an employee of Bartlett. Ms. Fenrich holds an administrative position and has done so since in or about 2015; and

c) Bartlett leases a portion of the WTFM Property for the purposes of conducting Bartlett's business operations in the south Okanagan region of the province. It has been doing so since in or about 2010. The District and the Commission are aware Bartlett uses a portion of the WTFM Property for its business operations.

[79] All of the foregoing was within the knowledge of the plaintiffs when the NOCC was filed. Indeed, there are seven specific references to Bartlett in the NOCC. Those include, *inter alia*, the following:

a) "On August 18, 2018 the Defendant Thor Clausen ordered the company he represents, Bartlett Tree Experts, to cut down trees on private land at the Woodbridge Nature Preserve in Summerland without written permission" (Part 1, para. 36);

b) "The land use complaint [made to the Commission on May 17, 2019] also outlined how US-based company Bartlett Tree Experts uses the agricultural property at 18420 Garnet Valley Road as an office and storage for their industrial vehicles and equipment in violation of ALC

land use regulations; the company Bartlett Tree Experts does not own the property" (Part 1, para. 148); and

c) "The Defendant Thor Clausen also had several Bartlett Tree Experts employees filming and harassing the Plaintiff Brad Besler at the same time [namely, August 2019]" (Part. 1, para. 324).

[80] In the ANOCC, para. 36 and para. 324 of the NOCC are struck out. Bartlett is again referred to though, most specifically at para. 219 of Part 1 of the ANOCC where it is asserted that "Bartlett Tree Experts is not a farm-related business". This assertion is made in relation to the claims of negligence and defamation as against the Commission.

[81] In the SANOCC, Bartlett is referenced some approximately 82 times (including at Parts 1, 2 and 3). Certain of these paragraphs are the subject to the WTFM New Striking Application and the District Striking Application. Importantly, as Bartlett is not a party to the Primary Action there is no relief sought as against Bartlett in the SANOCC. Rather, Bartlett simply forms part of the lengthy and frequently rambling narrative that purports to set out the material facts giving rise to the various causes of actions plead.

[82] On May 23, 2023, the plaintiffs filed a notice application to compel documents from the WTFM defendants, specifically Thor, that relate to Bartlett. Bartlett was not given notice of the application under R. 7-1(18) – the third-party document production provision contained within the *Rules*.

[83] Said application to compel documents that Bartlett may have in its possession and/or control was adjourned generally. It has never been adjudicated upon its merits.

[84] On September 20, 2023, as noted above, the plaintiffs filed the Bartlett Application.

[85] The basis of the Bartlett Application is that Bartlett should be added as a party to the Primary Action as Bartlett is vicariously liable for the actions of Mr. Thor Clausen and Arlene Fenrich as they relate to: conspiracy, negligence and defamation.

[86] In this regard, the theory of the plaintiffs' proposed case is perhaps best articulated in the plaintiffs' written submissions dated November 4, 2024 (the "Plaintiffs' November 2024 Submissions") at para. 177:

> The facts in the SANOCC describe how Bartlett Tree Expert's employees, acting on behalf of the company, engaged in defamation, negligence and conspiracy. Further, the SANOCC describes how the Plaintiffs suffered damages, how Thor Clausen and Bartlett Tree Experts were unjustly enriched, and how Bartlett Tree experts' employees repeatedly acted with malice towards the Plaintiffs.

The Law: Adding a Party and Vicarious Liability

[87] Rule 6-2(7) of the *Rules* provides as follows:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> (a) …
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c)order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i)any relief claimed in the proceeding, or
>
> (ii)the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[88] Rule 6-2(7)(b) has been interpreted narrowly to be concerned with remedying defects in the proceedings, as such a plaintiff applicant must establish either: (a) that the proposed defendant "ought to have been joined as a party"; or (b) that their "participation in the proceeding is necessary": see *Madadi v. Nichols*, 2021 BCCA 10 at para. 21.

[89] Comparatively, R. 6-2(7)(c) is broader, whereby a plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy or subject matter of the proceeding. While the threshold of this test is low, the test is generally

expressed as establishing a real issue between the parties that is not frivolous or that the plaintiff has a possible cause of action: see *Madadi* at para. 22.

[90] A frivolous issue is an issue that does not go to establishing the cause of action, does not advance a claim known in law or serves no useful purpose and would be a waste of the court's time and resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-1(5)(b): See *Madadi* at para. 22.

[91] In this regard, I refer to *Willow v. Chong*, 2013 BCSC 1083 at para. 20, wherein Justice Fisher stated, in part, when summarizing the test for striking pleadings under Rule 9-5(1)(b) on the basis that the pleading in question is unnecessary, scandalous, frivolous or vexatious as follows:

> [20] . . . If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. . . .

[92] The threshold for the addition of a party under R. 6-2(7)(c) is usually met solely on the basis of pleadings, but evidence may be led. If evidence is led, it is not to be weighed but only considered as to whether the required issue exists. The pleadings must set out the material facts sufficient to establish a real and not frivolous issue between the plaintiffs and the proposed defendants: see *Madadi* at para. 24; and *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc*, 2010 BCCA 329 at paras. 60, 62 and 75.

[93] The next step in this analysis, if the above threshold is met, is to determine whether it would be just and convenient to decide the issue(s) between the parties in this proceeding. This is a discretionary decision by the court, which discretion must be exercised judicially and in accordance with the evidence adduced and the guidelines established by the governing authorities. Specifically, in determining how to exercise its discretion, the court should consider the following list of factors:

a) The extent of the delay;

b) The reasons and explanation for the delay;

c) The expiry of a limitation period;

d) The degree of prejudice caused by the delay; and

e) the extent of the connection, if any, between the existing claims and the proposed new cause of action.

See *Madadi* at para. 24.

Analysis

[94] The plaintiffs have not satisfied me, as required under R. 6-2(7)(b), either: (a) that Bartlett "ought to have been joined as a party"; or (b) that Bartlett's "participation in the proceeding is necessary".

[95] Further, for the reasons that follow, I conclude that the proposed claims against Bartlett are frivolous and a waste of the court's time and resources and that Bartlett should not be added as a party pursuant to R. 6-2(7)(c).

[96] Very simply stated, it is well established in tort law that the principle of vicarious liability may impose strict liability on a party responsible for the misconduct of others because of the relationship between them. The traditional test for imposing vicarious liability on employees is the "*Salmond*" test whereby employers are vicariously liable for:

a) An employee's acts authorized by the employer; and

b) Unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act: see *Samuev v. Handley*, 2021 BCSC 1449 at paras. 18-20.

[97] It is not disputed, as noted, that Thor and Ms. Fenrich are employees of Bartlett. Thus, the potential for the imposition of vicarious liability exists at law.

[98] However, the potential claims sought to be advanced against Bartlett include numerous bald conclusory statements leading to sweeping legal conclusions. Those sweeping legal conclusions extend so far as to assert that Bartlett ought to be liable in damages for its role along with the other WTFM defendants to "conspire to defame the plaintiffs on various occasions".

[99] Moreover, what is missing in all of the various paragraphs proposed to be plead by the plaintiffs are material facts which support a claim that:

a) Thor or Ms. Fenrich's alleged tortious conduct was authorized by Bartlett; or

b) The unauthorized acts of Thor and Ms. Fenrich are so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.

[100] This alone is sufficient to dismiss the relief sought in the Bartlett Application.

[101] However, even if I am incorrect in my conclusion that the primary threshold, low as it is, for adding Bartlett as a party under R. 6-2(7)(c) is not met due to the frivolous nature of the claims, I still would not exercise my discretion to allow the addition of Bartlett and the consequential amendments to the pleadings.

[102] As a starting point, the Bartlett Application was filed approximately 47 months after the NOCC was filed. That, I find, is an inordinate delay when one considers that Bartlett was referenced in the NOCC and was again referenced in the ANOCC (which was filed some approximately 22 months before the Bartlett Application was filed).

[103] Moreover, there is no explanation for the delay beyond the plaintiffs being self-represented. Brad, who self-represents on his own behalf and primarily represents on behalf of Darren and Ms. Besler, is a sophisticated self-represented litigant. I have commented on this previously, including in the Original Striking Reasons. I am not satisfied that the plaintiffs were unaware of the need to name Bartlett as a party in the Primary Action if they sought to seek relief as against Bartlett.

[104] Rather, for the first almost four years of the litigation, the plaintiffs were entirely content to pursue the claims against Ms. Fenrich and Thor personally. In making the latter statement, I recognize the claims against Thor include related claims concerning Garnet Valley. However, that is an entirely different scenario. Thor is a shareholder in and director of Garnet Valley. In contrast, Thor is but one employee of out of thousands (possibly tens of thousands) of employees of Bartlett.

[105] In relation to the existence of a possible limitation defence, this is usually an important factor given that such a defence is extinguished if the proposed

defendant is added: see *Limitation Act*, S.B.C. 2021, c. 13, s. 22(1)(d) and *Anonson v. North Vancouver (City)*, 2017 BCCA 205 at para. 23. However, this is not determinative: see *Madadi* at para. 25.

[106] The core events underlying the original claims in the NOCC all occurred in 2019. Specifically, prior to October 24, 2019. Even factoring in the postponement of any limitation period(s) as a result of the COVID-19 pandemic, the presumptive basic limitation period for all claims would have expired by, at minimum, the end of 2022: see s. 6(1) of the *Limitation Act.* The Bartlett Application was not filed until September 20, 2023.

[107] However, as the pleadings in the Primary Action are somewhat akin to a shrub that keeps flowering, the discoverability analysis required by s. 8 of the *Limitation Act* is not simple. Further, as Bartlett elected to not file an application response and effectively take no position on its being added as a party to the Primary Action, I do not have the benefit of specific submissions in this regard. I, accordingly, have considered this a neutral factor in considering how to exercise my discretion.

[108] Further, as a result of Bartlett's election to take no position on its being added as a party to the Primary Action, I have no evidence of any possible prejudice arising as a result of delay. If there was any such actual prejudice, or even possible asserted prejudice, it was incumbent upon Bartlett to provide evidence of same. They did not do so. This would favour exercising my discretion in favour of the plaintiffs.

[109] Finally, to the extent that I am incorrect that the claims sought to be advanced against Bartlett are frivolous, they are obviously directly connected with the existing claims in the Primary Action. If the claims by the plaintiffs against Bartlett were to be allowed to proceed, the Primary Action is where those claims should be advanced. It is not in a separate proceeding. This would also favour exercising my discretion in favour of the plaintiffs.

[110] In conclusion, in weighing how to exercise my judicial discretion in the manner required as described above, I conclude that the inordinate delay in applying to add Bartlett, which delay is not adequately explained, outweighs the consideration of the issues of possible limitation defences, prejudice and

connection to the existing claims which are either neutral or favour exercising my discretion in favour of the plaintiffs.

[111] The relief sought in the Bartlett Application is dismissed accordingly.

The Proposed Employee Defendants Application

Overview

[112] The SANOCC includes, *inter alia*, a claim for damages as against the District for the tort of misfeasance of public office. As noted, those claims form part of the District Striking Application. However, for the purposes of the Proposed Employee Defendants Application, those amendments form part of the SANOCC which was filed pursuant to the January 4, 2023 Order and represent the current state of the pleadings in the Primary Action.

[113] The Proposed Employee Defendants were all employed by the District during the material times as articulated above. The District does not dispute this.

[114] All of the alleged tortious conduct by the Proposed Employee Defendants occurred in the course of their employment. The District also does not dispute this.

[115] Accordingly, none of the Proposed Employee Defendants were independently represented at the hearing of the Proposed Employee Defendants Application and no affidavit evidence was tendered on behalf of any of the Proposed Employee Defendants.

The Law: Adding Parties and Vicarious Liability

[116] I set out the legal framework regarding the addition of a party (or parties) pursuant to R. 6-2(7) and the key principles regarding the legal principle of vicarious liability in tort law above. As a starting point, that same law applies here.

Analysis

[117] As admitted in the Plaintiffs' November 2024 Submissions, the Proposed Employee Defendants Application may have been an overreach based upon a misunderstanding of the law. Specifically, I refer to paras. 429 and 430 wherein the plaintiffs submitted as follows:

> In accordance with the authorities described above [*Madadi* and *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308], the

> Plaintiffs believed they were required to individually name all District staff that are alleged to have intentionally acted unlawfully to harm the Plaintiffs.
>
> However, in *Greengen 2023*, [*British Columbia v. Greengen Holdings Ltd.* 2023 BCCA 24], para. 5 clarified that individual tortfeasors do not need to be named as Defendants if the Plaintiff is seeking damages from the public body as a whole, but the pleadings must describe the individual's malfeasance:
>
> > [5] The issue raised on this appeal, namely whether the pleadings are fatally deficient because Greengen has not sued the particular public officials whose conduct is impugned, was not addressed by this Court in *Greengen 2018*. For the reasons that follow, I would not give effect to this ground. While Greengen would be required to claim against the particular public officials as defendants if they sought a remedy against them, it is not a requirement that a plaintiff do so when the misfeasance claim is made directly against public authorities. In such a claim, the plaintiff must identify the relevant public officials, to the extent that their identity is known, in order to ensure that the defendant knows the case it has to meet, and to ensure that the public officials whose conduct is questioned can be defended by the public authority for which they worked. That was done in this case through the vehicle of particulars.

[118] Notwithstanding this acknowledgement, the plaintiffs still seek to justify the addition of the Proposed Employee Defendants in the Plaintiffs' November 2024 Submissions on the basis that:

a) "If the individual District staff are not added as defendants, then the Plaintiffs' oral discovery will be limited to only one representative of the District, in accordance with Rule 7-2(5)"; and

b) "Knowing this, the Plaintiffs' view is that it would still be just and reasonable to add the individual District staff as Defendants. Oral discovery of the individual tortfeasors is important because it allows the Plaintiffs to obtain information and the individual tortfeasors defend their actions. This will allow all parties better to prepare for trial."

[119] *British Columbia v. Greengen Holdings Ltd.*, 2023 BCCA 24, which is a decision of a five-member panel of our Court of Appeal, authored by Mr. Justice Hunter and concurred in by the remaining four justices, clearly stands for the proposition that individual officials must be named as defendants in a misfeasance of public office action only when a remedy is sought against those individuals personally: see para. 72.

[120] There is no relief sought as against any of the Proposed Employee Defendants individually in the PTANOCC or, looking generously upon the pleadings, even in the PFANOCC.

[121] Accordingly, the plaintiffs have not satisfied me, as required under Rule 6-2(7)(b), either: (a) that the Proposed Employee Defendants "ought to have been joined as a party"; or (b) that the Proposed Employee Defendants' "participation in the proceeding is necessary".

[122] Further, the addition of the Proposed Employee Defendants as parties to the Primary Action pursuant to R. 6-2(7)(c) is not appropriate as their participation is clearly unnecessary: see *Madadi* at para. 22.

[123] Given the foregoing conclusion is based upon the application of the law in *Greenberg*, there is no need to conduct a comprehensive further analysis, in these circumstances, as to whether I would or would not exercise my judicial discretion to allow the addition of the Proposed Employee Defendants.

[124] In this regard, I will state the addition of parties to an action solely, or even predominately, for the purposes of obtaining additional discovery rights is improper and inconsistent with the purposes of the *Rules*.

[125] Rather, the appropriate approach to obtaining evidence from a person who is "not a party of record to an action" but who "may have material evidence relating to a matter in question in the action" is through an application brought pursuant to R. 7-5 for the pre-trial examination of a witness.

Costs

[126] Having regard to the number of applications before me and the differing positions in respect of different applications, I am not making any orders to costs with respect to any of the applications in the Primary Action at this time except to state that Bartlett is not entitled to its costs of the Bartlett Application given Bartlett filed no application response and took no position.

[127] Rather, I direct that a 30-minute judicial management conference shall be held to determine a schedule for delivery of written submissions and, if necessary, an oral hearing to deal with the issue of costs.

[128] I am generally prepared to make myself available at 9:15 AM for said conference unless I have a previously scheduled matter. Accordingly, for efficiency, I direct that all counsel and Mr. Besler have discussions offline regarding availability so that they can contact Supreme Court Scheduling with a list of their proposed dates for review as against my calendar. This must occur, by necessity, after I deliver the final set of reasons in this trilogy as set forth above.

"Hardwick J."