IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Esegbona v. Ortega,*
2026 BCSC 304

Date: 20260225
Docket: S15786
Registry: Rossland

Between:

Unuakpor Esegbona and Karen Thompson

Plaintiffs

And

Christopher Thomas Ortega, Erica Ortega and Crispar Investments Inc.

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Plaintiffs:	J.A. Rost
Counsel for the Defendants, Christopher Ortega and Erica Ortega:	T.W. Pearkes
Place and Dates of Hearing:	Nelson, B.C. September 23 and November 4, 2025
Place and Date of Judgment:	Nelson, B.C. February 25, 2026

Introduction

[1] There are two applications before the court in this matter. The two personal defendants, Christopher Ortega and Erica Ortega, apply to strike the plaintiffs' notice of civil claim and to discharge the certificates of pending litigation ("CPLs") that the plaintiffs have caused to be filed against five properties owned by the Ortegas. The plaintiffs, Unuakpor Esegbona and Karen Thompson, apply for an order that they, and the Ortegas, each receive an interim release of $250,000 from funds held in trust, on a without prejudice basis.

[2] This action arises out of a failed business venture between the individual parties. They incorporated the corporate defendant, Crispar Investments Inc. ("Crispar"), on June 30, 2016 to manage real estate investments in the Castlegar area. Mr. Ortega and Mr. Esegbona were both directors and shareholders of Crispar. Ms. Ortega and Ms. Thompson, their then respective spouses, were shareholders.

[3] Crispar acquired three properties in Castlegar: a commercial strip mall, the Twin Rivers Motel ("Twin Rivers" or the "Motel"), and a restaurant. Twin Rivers was held through a wholly owned Crispar subsidiary, Twin Rivers Motel Inc.

[4] In circumstances that are highly in dispute, the business relationship between the parties broke down.

[5] On November 18, 2021, the Ortegas filed a petition in this court, seeking to address the breakdown in the parties' relationships, and seeking orders including a forensic accounting of Crispar and the liquidation of its assets (Nelson file #21978, the "Petition Proceedings").

[6] On January 21, 2022, the court made a consent order in the Petition Proceedings which provided, among other things, that the parties would list Crispar's assets for sale, have the Motel valued, and engage an accountant to conduct a forensic accounting of Crispar (the "Consent Order").

[7] In April and May 2022, I heard competing applications in the Petition Proceedings relating to issues that had arisen under the Consent Order. On May 13, 2022, I made an order in which I varied the Consent Order in certain respects, including requiring the parties to disclose documents relating to the management of Crispar. I made an order restraining Mr. Esegbona and Ms. Thompson from managing the Motel and granting the Ortegas the power to manage it pending its sale. Mr. Esegbona was ordered to take all steps necessary to facilitate the timely transfer of Motel operations to the Ortegas.

[8] On or about June 28, 2022, Crispar sold the strip mall. The restaurant was also sold at or about that time. The net proceeds of sale of both the mall and the restaurant were put in trust.

[9] On August 24, 2022, Justice Hori heard and decided an application filed by the Ortegas in the Petition Proceedings. Among other things, he held Mr. Esegbona in contempt for failing to provide the username and password to a GoDaddy.com account related to the Motel and ordered him to provide same to the Ortegas. He ordered payment of a number of debts of the Motel out of funds held in court, with the remainder following payment of those debts to be paid back into court, pending the parties' agreement or further court order.

[10] On October 19, 2023, Mr. Esegbona and Ms. Thompson filed the notice of civil claim against the Ortegas and Crispar that initiated the proceeding now before

the court. I will return to the specifics of the notice of claim later in addressing the application to strike. In general terms, the plaintiffs allege that the individual defendants have misappropriated funds from Crispar and Twin Rivers to acquire, preserve, maintain and improve the Ortegas' own properties and assets. The plaintiffs allege shareholder oppression. They seek damages for oppression, breach of fiduciary duty, unjust enrichment, and a declaration that the plaintiffs hold an equitable interest in the form of a constructive trust over the Ortegas' properties.

[11] On March 14, 2024, I heard competing applications relating to both proceedings and made a number of orders. By consent, the petition was converted into an action and the petition and action were ordered to be consolidated and heard together. I further ordered that Twin Rivers be listed for sale and sold forthwith. I made additional orders related to the sale and an accountant being engaged for Crispar to address issues, including outstanding tax liabilities.

[12] The shares in Twin Rivers were sold in or about June 2025, and the net sale proceeds were put in trust.

[13] As matters stand, there is approximately $1,300,000 held in trust as a result of the sale of all of Crispar's assets. Crispar has ceased to operate in any meaningful sense.

Application to Strike and to Discharge CPLs

[14] The Ortegas apply pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 to strike the notice of civil claim, with leave to amend. They do so on the basis of the rule in *Foss v. Harbottle*, [1843] J.C.J. No. 1, 67 E.R. 189 [*Foss v. Harbottle*]. In essence, they submit that the wrongs alleged in the notice of civil claim are wrongs done to Crispar, not to the plaintiffs individually, and that the plaintiffs therefore have no personal claim with respect to these alleged wrongs. They acknowledge that the plaintiffs could apply for leave to file a derivative action on behalf of Crispar, but note that they have not done so.

[15] In respect of the CPLs, the Ortegas further submit that the plaintiffs have not pleaded an *in rem* claim to land, and that the proper remedy for any claim the plaintiffs might have would be damages, and not specific performance. They submit that the CPLs must be discharged pursuant to s. 215 of the *Land Title Act,* R.S.B.C. 1996, c. 250 [*LTA*] on the basis that no interest in land has been pleaded.

[16] In the alternative, the Ortegas apply to have the CPLs discharged on the basis of hardship pursuant to s. 256 of the *LTA*.

Notice of Civil Claim

[17] I will begin by reviewing the notice of civil claim as it relates to the Ortegas' applications.

[18] The statement of facts pleads the basic facts of the parties' relationships: the Ortegas and the plaintiffs are the shareholders in Crispar, and they do not have a shareholder agreement. It pleads the facts related to Crispar's purchase of the real properties I have already described, including that Twin Rivers Motel Inc. was a wholly owned subsidiary of Crispar.

[19] At paragraph 10 of the statement of facts, the plaintiffs plead that "the Defendants misappropriated income and assets of Crispar Investments Inc. and excluded the Plaintiffs from active participation in the company". It is noteworthy that "the Defendants" named in the notice of civil claim include Crispar itself. It may be assumed that "the Defendants" intended to be referred to here do not include Crispar, but are solely the Ortegas. If so, that is not what is pleaded. In any event, the Ortegas submit that the wrong alleged here is against Crispar, and not the plaintiffs in their individual capacities. The same is true for a number of other paragraphs of the statement of facts, including paragraph 11, which alleges that "the Defendants failed to provide complete or accurate accounting for Crispar to the Plaintiffs".

[20] A number of paragraphs of the statement of facts refer to allegations that Mr. Ortega, or "the Defendants", wronged Twin Rivers. An example would be paragraph

19(d), in which it is alleged that “the Defendants have caused Twin Rivers to pay inflated salaries to the Defendants and to closely related family members of “the Defendants”. All of the allegations contained in paragraph 19 are defined to be “Oppressive Conduct”, and in paragraph 20, the plaintiffs allege that “the affairs of Crispar… are being and have been conducted in a manner oppressive to the Plaintiffs.”

[21] In relation to the CPLs, it is alleged in paragraph 22 that “the Defendants have used funds misappropriated from Crispar… and Twin Rivers… to acquire, preserve, maintain and improve their own properties and assets, including but not limited to” five named properties, which are defined as the “Ortega Properties”. The plaintiffs further allege that, by doing so, “the Defendants have been unjustly enriched to the detriment of the Plaintiffs”. At paragraph 25, the plaintiffs claim that they are entitled to a constructive trust over the Ortega Properties, proportionate to the unjust enrichment.

[22] At paragraph 27, the plaintiffs allege that Mr. Ortega, as a director of Crispar, owed a fiduciary duty to the plaintiffs.

[23] In part 2 of the notice of civil claim, the plaintiffs claim damages for oppression, breach of fiduciary duty and unjust enrichment, a declaration of a constructive trust over the Ortega Properties, and CPLs over same.

[24] In part 3 of the notice of claim, the plaintiffs rely on the law of unjust enrichment and shareholder oppression both at common law and under the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

The Ortegas’ Position

[25] The Ortegas rely on the comprehensive discussion of the rule in *Foss v. Harbottle* provided by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. CIBC World Markets Inc.*, 2008 BCCA 276. The holding in *Foss v. Harbottle* was summarized as follows at paras. 15–16 of *Everest*:

> [15] It will be recalled that in *Foss v. Harbottle*, the wrongs alleged were wrongs to a joint-stock company called "The Victoria Park Company", which had been incorporated by special act. (The *Joint Stock Companies Act, 1844* (U.K.), 7 & 8 Vict., c. 110, was one year away, and *Salomon v. Salomon* [1897] A.C. 22 (H.L.) still lay 50 years in the future.) The plaintiffs were individual shareholders who sought to sue on behalf of themselves and the other shareholders (other than the defendants) for harm allegedly done to the company by some of its directors. The defendants were alleged to have purchased their own land for the company at an inflated price and to have borrowed money by an *ultra vires* transaction, using the proceeds of the loan to pay themselves as sellers of the property. The plaintiffs contended that the directors were trustees for them to the extent of their shares in the company, and that the corporate form of the organization should not deprive them, as *cestuis que trust,* of a remedy against their trustees for abuse of their powers.
>
> [16] The Vice-Chancellor ruled that the company was the proper plaintiff in such a suit, except in exceptional circumstances. In his words:
>
> > The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals from the corporation entrusted with powers to be exercised only for the good of the corporation …
> >
> > It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves - the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative. [At 490-1; emphasis added.]

[26] At para. 21 of *Everest*, the Court referred to the decision of the English Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. et al. (No. 2),* [1982] 1 All E.R. 354 at 367, in which the Court stated that the rule is "the consequence of the fact that a corporation is a separate legal entity", and that "the company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder".

[27] At para. 23 of *Everest*, the Court referred to the decision of the Supreme Court of Canada in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 62, where Mr. Justice La Forest noted that where a "separate and distinct claim" can be raised by a shareholder, with respect to a wrong done to them

qua individual, then a personal claim may be made. At para. 24 of *Everest*, the Court referred further to La Forest J.'s decision in *Hercules* at paras. 62–63, where he stated that nothing in his decision should be taken as detracting from the principle that "where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action". Justice La Forest went on to say that he had "found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in *Foss v. Harbottle*."

[28] At para. 28 of *Everest*, the Court referred to *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61 at paras. 33–37 where Madam Justice Levine stated that the "Loss reflective of a loss suffered by the company is not the shareholder's personal loss". Justice Levine continued that:

> …consistent with the legal theory of *Foss v. Harbottle*, the loss in value of shares of a company is a loss of all of the shareholders, not just one or some of them… A single shareholder cannot claim that the loss in value of the shares, *per se*, is a personal, direct loss.

[29] The Ortegas' essential position is that the losses claims by the plaintiffs in the notice of civil claim are all wrongs done to Crispar, or in some cases, Twin Rivers, and that the plaintiffs have no personal cause of action against the Ortegas for any harms they might have done to Crispar or Twin Rivers. They make the further submission in respect of Twin Rivers in particular that Crispar sold its shares in Twin Rivers, and Crispar did not retain any documentation relating to Twin Rivers, or the right to pursue any wrongs done to Twin Rivers, making it impossible for there to be any claim by the plaintiffs for wrongs done to Twin Rivers.

[30] The Ortegas further submit that that the majority of the notice of civil claim is an oppression claim. They acknowledge such a claim could proceed under the *BCA*, but say that such a claim must be made by way of a petition, not a notice of civil claim. They submit that this irregularity is fundamental, and that the notice of civil claim should never have issued. They suggest that the plaintiffs should be invited to

redraft their pleading as a petition, in which they could plead oppression and seek standing to make a derivative claim, should they wish to do so.

The Plaintiffs' Position

[31] The plaintiffs rely on ss. 227 and 324 of the *BCA*. Section 227 describes the powers of the court where a director's power is alleged to have been exercised in an oppressive manner. Section 324 provides the court with the power to wind up a company and provide other relief. In other words, they rely on the oppression remedy, rather than seeking to assert a derivative action.

[32] The plaintiffs submit that an oppression action and a derivative action are not mutually exclusive. In this connection, they rely on *Furry Creek Timber Corp v. Laad Ventures Ltd.*, 1992 CanLII 328 (BC SC) at p. 14, where Madam Justice Newbury, then of this court, stated that the same breach of a director's duty to act in the best interests of the company may be the basis both for an action by the company, and a shareholder's oppression action, "provided the complaining shareholder has been affected by the breach in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally".

[33] The plaintiffs rely on the decision of the Ontario Court of Appeal in *Malata Group (HK) v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36, which held at para. 30 that there is a degree of overlap between claims that could be made out as derivative actions and those that could fall under the oppression remedy. One such situation, as stated at para. 31, is "where directors in closely held corporations engage in self-dealing to the detriment of the corporation and other shareholders or creditors". At para. 39, the Court stated that in disputes involving closely held companies with relatively few shareholders, there is less reason to require the plaintiff to seek the leave of the court to bring a derivative action. The plaintiffs submit that is the situation in the case at bar.

[34] The plaintiffs also rely on *Chen v. Dang*, 2023 BCSC 564. At para. 5, Justice Kirchner described the issue to be decided as: should the Dang Action and the claims of oppression in the Dang Petition be struck as disclosing no reasonable

claim. Ms. Chen argued that the Dang Action offended the rule in *Foss v. Harbottle* because any claim to enforce the investment obligation in issue needed to be brought by the company. Ms. Chen also argued that the petition disclosed no peculiar harm to Mr. Dang that was unique to other shareholders.

[35] Justice Kirchner declined to strike the Dang Action. At para. 39, he held that it was not plain and obvious that the Dang Action offended the rule in *Foss v. Harbottle* or was otherwise bound to fail. This was because the obligation on Ms. Chen's part to invest the $500,000 was found only in the investment agreement alleged to exist between Mr. Dang and Ms. Chen, and the company was not a party to that agreement. Only Mr. Dang could sue Ms. Chen on that alleged agreement.

[36] This aspect of *Chen* does not assist the plaintiffs in the case at bar. It is not alleged that there was an agreement between the Ortegas and the plaintiffs separate and apart from Crispar that the Ortegas are alleged to have breached.

[37] Turning to the application to strike the oppression claims in the Dang Petition, as recounted at para. 45, Ms. Chen claimed that the alleged acts of oppression were not acts of the company, which she submitted were required for an oppression claim. She argued the alleged harms were to the company, and were not peculiar to Mr. Dang, as required for an oppression claim.

[38] At para. 50 of *Chen*, the court stated, citing *BCE Inc v. 1976 Debentureholders*, 2008 SCC 69 at para. 68, that to be entitled to relief under s. 277 of the *BCA*, the applicant "must first show that it had a reasonable expectation with respect to the conduct of the affairs of the company and secondly that the reasonable expectation was violated by oppressive or unfairly prejudicial conduct". At para. 51, citing *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258 at paras. 53–54, the court noted that an oppression action is clearly a "personal" one and not a derivative or representative one. The oppression must be suffered by the shareholder as a shareholder. At para. 52, citing paras. 72–74 of *CSA Building*, the court further noted that the claimant must have suffered some "peculiar harm" that is "separate and distinct to harm suffered by all shareholders".

At para. 53, citing *Dubois v. Milne*, 2020 BCCA 216 at para. 108, the court noted that a person that suffered some particular harm might be entitled to bring an oppression claim, notwithstanding that parts of that claim might theoretically have been pursued as a derivative action. At para. 110 of *Dubois*, Mr. Justice Groberman further suggested that "in the context of a closely held corporation it may not be productive to require the claimant to pursue a derivative action if an individual action for oppression is available".

[39] Applying these principles, Kirchner J. held that it was not plain and obvious that Mr. Dang's oppression claims could not succeed. At para. 64, he held that it was not plain and obvious that Ms. Chen's alleged fraudulent activity was a harm solely to the company or that Mr. Dang had not suffered a peculiar loss as a result. To the extent Ms. Chen enjoyed some personal benefit from the alleged fraud unique to her, that benefit may offset any losses she suffered as a shareholder. Mr. Dang would have suffered the same loss, but without any offsetting personal benefit. As a result, he would have suffered some peculiar harm, or at least it was not plain and obvious that he would not have done so.

[40] With respect to Mr. Dang's allegations regarding Ms. Chen's alleged breach of the investment agreement, Kirchner J. held at para. 77 that *CSA Building* does not limit oppression claims to exercises of corporate governance. Justice Kirchner found at para. 81 that the claims regarding Ms. Chen's failure to invest as agreed upon were not bound to fail.

[41] The plaintiffs rely on *Yen v. Ghahramani*, 2023 BCCA 403, a decision of our Court of Appeal that addresses, as stated at para. 2, "to what extent, if any, may a shareholder advance a claim in *oppression* for alleged misappropriations of resources belonging to the corporation?". At para. 56, the Court began to address this question, beginning by restating the effect of the rule in *Foss v. Harbottle* in these terms:

> … Ordinarily, a breach of the duty of directors to use a corporation's resources only for the advancement of its own interests would not result in a direct injury to *one or more shareholders* other than by diminishing the value

> of the corporation's shares. Since *Foss v. Harbottle* was decided in 1843, courts have held that this type of harm gives rise to a claim on the part of the corporation itself, which must be brought by the corporation or on its behalf.

[42] At para. 59 of *Yen*, the Court observed that Canadian courts have differed with respect to the degree of rigour with which they have applied the rule in *Foss v. Harbottle*. The Court reviewed many of the authorities already canvassed in this decision, including *CSA Building*, *Dubois* and *Malata*. In respect of *Malata*, the Court described it as taking a "softer" approach to the "particular loss" requirement, and observed that *Malata* was not adopted in a later decision by the same court, *Rea v. Wildeboer*, 2015 ONCA 373.

[43] The Court answered the question as to whether the chambers judge was correct to conclude that it was plain and obvious that no oppression action could be brought with respect to the alleged misappropriation of corporate assets at para. 71 of *Yen*, stating:

> …In my view, there are sufficient Canadian authorities that essentially blur the line between oppression and derivative actions in cases involving the misappropriation of assets of closely-held corporations, that it is no longer correct to say these assertions would be 'bound to fail', at least in a case like this.

[44] In this regard, the Court referred to, among other authorities, *Chen v. Dang* at paras. 73–81.

Should the notice of civil claim be struck?

[45] I have concluded that not all claims made in the notice of civil claim are bound to fail.

[46] I reach this conclusion on the basis that the claim is, in its essence, an oppression claim. I agree with the Ortegas' submission that many of the allegations made are of harm done to Crispar, which could be brought by way of a derivative action with leave of the court. However, this is a closely-held company, with the individual parties being its sole shareholders. As held in *Yen* at para. 71, there are sufficient Canadian authorities blurring the line between derivative actions and

oppression actions that in a case of alleged misappropriation of company assets in a closely-held company, it cannot be said that claims such as those brought by the plaintiffs are bound to fail. Insofar as the notice of civil claim alleges that Mr. Ortega, or Mr. Ortega and Ms. Ortega, acted in an oppressive manner in relation to the affairs of Crispar, it is not bound to fail.

[47] That said, the notice of civil claim is far from perfectly drafted. As acknowledged by counsel on this application (not counsel of record), this claim is in substance an oppression claim and, therefore, ought to have been brought by petition, not a notice of civil claim. The same would appear to have been true in *Yen*, which, as noted at para. 1, was an oppression claim brought within a notice of civil claim. The Court did not comment further on that defect in its decision.

[48] In my view, this is a procedural irregularity, and not a fatal flaw. Rule 22-7(3) provides that the court must not set aside a proceeding on the basis that it was required to be started by an originating pleading other than the one employed.

[49] The notice of civil claim was filed on October 19, 2023. On March 14, 2024, by consent, the Ortegas' petition was converted into an action and the two actions were consolidated and to be heard together. Recognizing that counsel for the Ortegas has changed since that hearing, one would have thought that any concerns with respect to the nature of the originating pleading would have been raised at that time. They were not. Indeed, given the nature of the claims made in the notice of civil claim, it is almost certainly the case that, had they been initially brought by way of petition, the matter would have been referred to the trial list in any event.

[50] In the words of counsel for the plaintiffs, this ship has sailed. I would not strike the notice of civil claim, in whole or in part, on the basis that the claim was wrongly brought by notice of civil claim rather than petition.

[51] There are other problems with the notice of civil claim. There is ambiguity throughout with respect to whom "the Defendants" are that are alleged to have wronged the plaintiffs. One assumes that it is the individual Ortegas, and not

Crispar, but that is never made clear. I have made my decision on the basis of that assumption, but the notice of civil claim needs to be amended to address this issue.

[52] A number of wrongs are alleged to have been done by Mr. Ortega to Twin Rivers. These are itemized in some of the subparagraphs of paragraph 19 of part 1 of the notice of civil claim. The allegations contained in paragraph 19 are collectively defined as the “Oppressive Conduct”. For example, in paragraph 19(b), it is alleged that Mr. Ortega instructed the office manager to alter and destroy Twin Rivers’ financial ledger to eliminate all reference to defalcated cash payments. In paragraph 19(d), it is alleged that “the Defendants” have caused Twin Rivers to under-declare its income and over-declare its expenses. In paragraph 19(f), it is alleged that the Ortegas took up personal residence at the Motel on a gratuitous basis while renting out their own properties for a profit. There is no clear pleading that the plaintiffs, as opposed to Crispar, suffered any particular harm as a result of these alleged wrongs. Twin Rivers, unlike Crispar, is not named as a defendant to the plaintiffs’ notice of civil claim.

[53] Crispar sold the shares in Twin Rivers in the spring of 2025. The proceeds from its sale are held in trust. Recognizing that they are not exhaustive, the remedies for oppression enumerated in s. 227(3) of the *BCA* generally speak to the regulation of a company’s affairs, such as appointing directors or directing the company to purchase a shareholder’s shares or liquidating the company. Section 227 provides that a shareholder may make an oppression claim. The plaintiffs were never shareholders in Twin Rivers. There is no allegation that they were the beneficial owners of the shares in Twin Rivers. I am unable to see how the plaintiffs can have an oppression claim with respect to conduct related to a subsidiary company formerly owned by Crispar. Twin Rivers is a stranger to this litigation. I strike the claims related to Twin Rivers on the basis that it is clear and obvious that they cannot succeed.

[54] The plaintiffs allege in paragraph 27 of part 1 of the notice of civil claim that Mr. Ortega “as a director of Crispar, stood in a position of trust and owed fiduciary

duties to the Plaintiffs" and, at paragraph 30, the plaintiffs claim damages for breach of fiduciary duty. The same is pleaded at paragraph 3 of part 2 of the notice of civil claim.

[55] At para. 57 of *Yen,* the Court said the following with respect to the question of to whom directors owe a fiduciary duty:

> [57]. In *BCE*, the Supreme Court warned against the conflation of fiduciary duties owed *to the corporation* with duties owed *to shareholders*:
>
> > The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be advised to consider the impact of their decisions of on corporate stakeholders, such as the debenture losing these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the Corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation. [At para. 66; emphasis added.]
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> [italics in the original.]

[56] This passage speaks directly to the allegation that Mr. Ortega breached fiduciary duties to the plaintiffs. As a director of Crispar, Mr. Ortega owed fiduciary duties to Crispar, not to the plaintiffs. It is plain and obvious that these pleadings do not have a reasonable prospect of success and I strike them on that basis.

[57] There are a number of allegations in the notice of civil claim referring to properties owned by the Ortegas. The plaintiffs allege in paragraph 19(c) that cash payments defalcated from Crispar, seemingly from Twin Rivers although that is not clearly pleaded, were used by "the Defendants" to pay their debts, to improve their real properties and to enrich "the Defendants" in other ways. At paragraph 22, they

allege that “the Defendants” misappropriated funds from Crispar and Twin Rivers to acquire, preserve, maintain and improve their own properties and assets, including the five named properties over which the plaintiffs now hold a CPL. At paragraph 22, the plaintiffs allege that by reason of the misappropriation of Crispar assets, and using these funds to acquire, preserve, maintain and improve their properties, “the Defendants” have been unjustly enriched to the detriment of the plaintiffs. At paragraph 25, the plaintiffs allege that they are entitled to a constructive trust in their favour over a share of the Ortegas’ properties, proportionate to the unjust enrichment. At paragraph 4 of part 2 of the notice of civil claim, the plaintiffs seek a declaration that they hold an equitable interest in the form of a constructive trust over the Ortegas’ properties.

[58] I find that any constructive trust over the Ortegas’ properties would be for the benefit of Crispar, not the plaintiffs. Assuming, as I must for the purposes of the application to strike, that the Ortegas used Crispar funds to acquire, preserve, maintain and improve their properties, the funds used belonged to Crispar, and it would be Crispar that might be able to claim an equitable interest in those properties. The plaintiffs’ claim that the Ortegas engaged in oppressive conduct in relation to Crispar cannot go so far as to give the plaintiffs an equitable claim over the Ortegas’ properties. I strike these claims as bound to fail.

[59] While I have not struck all allegations in the notice of civil claim, it will require substantial amendments to conform with these reasons for judgment. I order that the plaintiffs file an amended petition to conform with these reasons for judgment within 30 days.

Should the CPLs be discharged?

[60] The Ortegas’ primary position with respect to the CPLs is that they must be discharged pursuant to s. 215 of the *LTA* as the plaintiffs do not plead a claim to an interest in land.

[61] In this connection, the Ortegas rely on *Shi v. Duan*, 2017 BCSC 2002 and *Biggar v. Tran*, 2024 BCSC 50. In *Biggar*, the court considered whether the notice of

civil claim asserted an interest in land such that CPLs that had been filed against properties owned by what were called the “Sunshine Companies” could be maintained. At paras. 13–17, the court provided a helpful summary of the basic principles that apply to an application to cancel a CPL under s. 215 of the *LTA*. In brief, the court has the inherent jurisdiction to cancel a CPL where the pleading does not meet the requirement of s. 215 of claiming an interest in land. Such an application is based on the pleadings, and assumes the facts pleaded to be true. The test is whether the facts pleaded, assuming them to be true, are capable of supporting an interest in land. Unlike on an application to strike pleadings, the court is not to consider the possibility of amending the pleadings. If the defendants’ challenge to a CPL is that the claim is without merit, they must bring a summary judgment application. Otherwise, the analysis is limited to the pleadings.

[62] At para. 31, the court in *Biggar* held that the plaintiffs did not buy fractional interests in pieces of real estate, but rather purchased shares in the Sunshine Companies. At para. 32, the court noted, relying on a number of decisions, including *Shi*, that a shareholder does not have a proprietary interest in the assets of the company.

[63] In the case at bar, the plaintiffs plead that the defendants, by which I understand them to mean the Ortegas, have misappropriated funds from Crispar and Twin Rivers to acquire, preserve, maintain and improve their own properties. They allege that in so doing the Ortegas unjustly enriched themselves to the detriment of the plaintiffs. They allege that as a result they are entitled to a constructive trust over a share of the Ortegas’ properties. On this basis, they caused a CPL to be registered as against the five properties listed at paragraph 22 of the notice of civil claim.

[64] As in *Biggar* and *Wai v. Chung*, 20202 BCSC 34, referred to at paras. 42–43 of *Biggar*, I have concluded that the notice of civil claim does not properly plead an interest in the five Ortega properties. This conclusion largely flows from my finding that the notice of civil claim is bound to fail insofar as it asserts that the plaintiffs are

entitled to a constructive trust over the Ortegas' properties. There are further reasons why the notice of civil claim does not properly plead an interest in the Ortegas' properties. The plaintiffs do not assert a specific interest in any specific property. They do not assert that any particular funds were used to acquire or to preserve or to maintain or to improve any particular property. They simply assert that the Ortegas misappropriated funds from Crispar and Twin Rivers, and in some unspecified way used those funds to acquire, preserve, maintain and improve their properties. There are insufficient material facts pleaded to support a claim in unjust enrichment and thus to establish an interest in land.

[65] Further, if the Ortegas misappropriated funds from Crispar or Twin Rivers, and used those funds to acquire, preserve, maintain or improve their properties, it would be one of those companies that would have been wronged, and potentially, assuming the necessary materials facts were pleaded, could have a claim in unjust enrichment and constructive trust. As held in *Biggar* at para. 32, a shareholder does not have a proprietary interest in the assets of the company. Still less does a shareholder have a proprietary interest in the assets purchased or improved with assets of the company.

[66] Twin Rivers is no longer owned by Crispar; it is quite impossible that any of these parties could make a claim based on any wrong done to it. Assuming the plaintiffs sought and were granted leave to make a derivative claim on behalf of Crispar, it is possible that a valid pleading could be made that Crispar has an interest in land. There is no basis on the pleadings as currently framed that the plaintiffs could do so.

[67] In essence, I find that the plaintiffs may have a claim for damages, which they have improperly sought to secure by causing the CPLs to be filed against the Ortegas' properties.

[68] For these reasons I conclude that the five CPLs must be struck.

[69] In the circumstances, it is not necessary to consider the Ortegas' alternative submission relying on hardship under ss. 256 and 257 of the *LTA*.

Application for Payment Out of Funds Held in Trust

[70] The plaintiffs apply for an order that $250,000 be paid out of the funds held in trust to the two individual plaintiffs and the two individual defendants, for a total of $500,000. This is intended to address the financial hardship asserted by each of the parties.

[71] In their submissions in response, the individual defendants were prepared to consent to such an order on a without prejudice basis, on the condition that all five of the CPLs are discharged, and the funds are paid out as the repayment of outstanding shareholder loans owing to Mr. Esegbona and Mr. Ortega.

[72] In reply, the plaintiffs were agreeable to the individual defendants' proposal, provided it was done an a without prejudice basis.

[73] In light of the parties' submissions, it is not necessary to consider the parties' submissions and evidence with respect to their asserted financial hardship at any length. I have ordered that the five CPLs be discharged. I order, on consent, and on a without prejudice basis, that $250,000 be paid out of the funds held in trust to each of Mr. Esegbona and Mr. Ortega in partial repayment of their shareholder loans. Given that this order is based on counsels' agreement achieved in the course of their submissions, counsel have leave to craft the details of this order in the manner they deem appropriate, with leave to seek further directions from the court should that prove necessary.

Summary of Orders Made

[74] I have struck parts of the notice of civil claim pursuant to Rule 9-5(1). I order the plaintiffs to file an amended notice of civil claim that conforms to these reasons on the application to strike within 30 days.

[75] Pursuant to s. 215 of the *LTA*, I order the five CPLs on the following Ortega properties discharged:

> Parcel Identifier: 016-241-410
> Legal Description:
> LOT 4 BLOCK 39 DISTRICT LOT 181 KOOTENAY DISTRICT PLAN 650
>
> Parcel Identifier: 016-241-401
> Legal Description:
> LOT 3 BLOCK 39 DISTRICT LOT 181 KOOTENAY DISTRICT PLAN 650
>
> Parcel Identifier: 011-413-620
> Legal Description:
> PARCEL A (SEE 1469941) OF DISTRICT LOT 12660 KOOTENAY DISTRICT
>
> Parcel Identifier: 010-230-696
> Legal Description:
> LOT 1 DISTRICT LOT 183 KOOTENAY DISTRICT PLAN 2652
>
> Parcel Identifier: 005-732-425
> Legal Description:
> LOT 10 DISTRICT LOT 4598 KOOTENAY DISTRICT PLAN 2796

[76] I order, on consent, and on a without prejudice basis, that $250,000 be paid out of the funds held in trust to each of Mr. Esegbona and Mr. Ortega as partial repayment of their shareholder loans. The parties have leave to seek further direction should counsel be unable to agree on the precise wording of this order.

[77] I have not heard from the parties on costs. Should counsel be unable to agree on the costs of these applications, they may request to appear before me for the purpose of make oral submissions on costs, such request to be made via Supreme Court Scheduling within 30 days.

"L.M. Lyster J."

LYSTER J.