

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sanovest Holdings Ltd. v. Matthews*,  
2026 BCSC 551

Date: 20260327  
Docket: S223937  
Registry: Vancouver

Between:

**Sanovest Holdings Ltd.**

Plaintiff

And

**Daniel Matthews, Tomosun (Tom) Kusumoto,  
Ecoasis Bear Mountain Developments Ltd.  
and BM Mountain Golf Course Ltd.**

Defendants

And

**Tomosun (Tom) Kusumoto**

Third Party

And

**Sanovest Holdings Ltd., Tomosun (Tom) Kusumoto  
and Tian Kusumoto**

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice P. Walker

## **Reasons for Judgment**

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Place and Dates of Hearing:

Vancouver, B.C.  
March 2 and 10, 2026

Place and Date of Judgment:

Vancouver, B.C.  
March 27, 2026

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**Introduction**

[1] This action is one of four actions, falling under the umbrella of a receivership, being tried together (the trial was previously adjourned to January 2027 from its original January 2026 start date). Those actions (VA S234047, VA S234048, and VA S226218), along with this action, and the receivership proceeding (VA S243389) arise from highly contentious and intractable disputes between two partners, Sanovest Holdings Ltd. (“Sanovest”) and 599315 B.C. Ltd. (“599”), and their respective principals, Tian Kusumoto and Daniel Matthews, in their business venture in the Bear Mountain Resort community located near Langford, British Columbia.

[2] In addition to being partners in Ecoasis Bear Mountain Developments Ltd. (“EBMD”), Sanovest and 599 each own 49.75% of the shares of a related entity, Ecoasis Developments LLP (the parties refer to it as the “Partnership” or “Developments”, and for the sake of consistency with prior reasons, I will refer to it by the latter). EBMD is the managing partner of Developments, which in turn owns various corporate entities, directly or indirectly, including Ecoasis Resort and Golf LLP (the parties refer to this entity as “Resorts”) which in turn owns BM Mountain Golf Course Ltd. (“BMGC”). A comprehensive discussion of the parties, their tiered ownership structure of various entities included in their business venture, and their disputes and competing claims is contained in my reasons for judgment indexed at 2025 BCSC 1504 and 2026 BCSC 141.

[3] The claim in the instant action brought by Sanovest, for wrongs done to EBMD and BMGC, and thus indirectly, to Developments, is grounded on allegations that Mr. Matthews and Tom Kusumoto (Tian Kusumoto’s father) engaged in self-interested transactions which they failed to disclose, in breach of their obligations in the disclosable interest provisions in Part 5, Division 3, ss. 147-153 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [BCA]. Tom Kusumoto was formerly a principal of Sanovest and a director of some of the entities related to Developments and EBMD. Amongst the relief sought are claims against Mr. Matthews and Tom Kusumoto to pay equitable compensation (“Equitable Compensation Claim”), not to

Sanovest, but to EBMD and BMGC, or alternatively, an accounting for profits they have or will enjoy (“Accounting Claim”).

[4] Mr. Matthews brings this application per Rule 9-5(1)(a) of the *Supreme Court Civil Rules* [Rules]. It is supported by Tom Kusumoto. If successful as it is framed in the notice of application, Sanovest’s claim would effectively be gutted. Part way through his oral submissions, Mr. Matthews decided to narrow the focus of his application, seeking to strike only the Equitable Compensation Claim. Except for costs, he abandoned the remainder of the relief sought. For the Accounting Claim, Mr. Matthews’ position is that there is nothing to account for as no profits have been made from any of the impugned transactions. I took it from his submissions that he also contests any obligation under the *BCA* to account for potential future profits and in any event, says there will be no future profits or none that can be ascertained.

[5] The premise of Mr. Matthews’ application to strike the Equitable Compensation Claim is that it is essentially a statute-based derivative claim for specific relief under the *BCA*, for which leave has not been sought, and offends the common law rule in *Foss v. Harbottle* prohibiting a shareholder from suing for a loss suffered by the company, and is thus bound to fail: citing *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.*, 2017 BCCA 405 at para. 1; *Sonic Holdings Ltd. v. Savage*, 2021 BCCA 441 at para. 27.

[6] Mr. Matthews distinguishes Sanovest’s action from a claim that his company, 599, has brought (as a partner) in the names of Developments and Resorts against Sanovest (VA S234047) for similar relief without first obtaining leave, on the basis that it is a common law derivative claim which, unlike a claim under the *BCA*, does not require leave (citing *1115830 B.C. Ltd. v. Treasure Bay HK Limited*, 2022 BCCA 380 at para. 6). Mr. Matthews also contends that allowing Sanovest’s Equitable Compensation Claim to proceed opens the floodgates for parties to avoid the statutory requirement in the *BCA* to seek leave before commencing an action to obtain relief under the *BCA* in the name of or for the benefit of the company.

### Accounting and Equitable Compensation Remedies

[7] In *Southwind v. Canada*, 2021 SCC 28, the Supreme Court explained that accounting for profits is a gains-based remedy measured by the fiduciary's gain; equitable compensation is a loss-based remedy available when it is not possible to restore the plaintiff's assets *in specie*. An accounting is intended to undo the fiduciary's gain; equitable compensation is the remedy for the loss caused by the breach. Both are restitutionary in nature. Their purpose is to deter wrongdoing:

[66] As I shall explain, equitable compensation is a loss-based remedy that deters wrongdoing and enforces the trust at the heart of the fiduciary relationship. It differs from common law damages because of the "unique foundation and goals of equity" (*Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 543, per McLachlin J.). The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations owed by the fiduciary. The loss must be caused in fact by the fiduciary's breach, and the causation analysis is not limited by foreseeability (to use the language in *Canson*, at p. 552, where foreseeability was used synonymously with remoteness in this context).

[67] This Court's decision in *Guerin* explained that, although a fiduciary relationship is different than a traditional trust relationship, breach of the Crown's fiduciary duty gives rise to the same equitable remedies as breach of trust (p. 376; see also *Wewaykum*, at para. 94). The available equitable remedies include, among others, accounting for profits, constructive trust, and equitable compensation (*Canson*, at p. 588, per La Forest J.) Accounting for profits and constructive trust are gains-based remedies, meaning they are measured by the fiduciary's gain rather than the plaintiff's loss. The purpose is to *undo* the fiduciary's gain. Equitable compensation, on the other hand, is a loss-based remedy; the purpose is to *make up* the plaintiff's loss (S. L. Bray, "Fiduciary Remedies", in E. J. Criddle, P. B. Miller and R. H. Stikoff, eds., *The Oxford Handbook of Fiduciary Law* (2019), 449, at pp. 449 and 456).

[68] When the Crown breaches its fiduciary duty, the remedy will seek to restore the plaintiff to the position the plaintiff would have been in had the Crown not breached its duty (*Guerin*, at p. 360, citing *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399 (S.C.); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 440) When it is possible to restore the plaintiff's assets *in specie*, accounting for profits and constructive trust are often appropriate (see *Guerin*, at pp. 360-61; *Hodgkinson*, at pp. 452-53). When, however, restoring the plaintiff's assets *in specie* is not available, equitable compensation is the preferred remedy (*Canson*, at p. 547). The LSFN seeks equitable compensation in this case because what it lost — its land — cannot be returned. It is therefore unnecessary to consider gains-based remedies.

[69] Equitable compensation is equity's counterpart to common law damages (see *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321, at para. 48). It is discretionary and restitutionary in nature, aiming to restore the actual value of the thing lost through the fiduciary's breach, referred to as the plaintiff's lost opportunity (*Canson*, at pp. 547-48, 551-52, 555 and 585).

[Italics emphasis in original; underlining emphasis added]

[8] The importance of equitable principles in the corporate context, particularly the avoidance of a conflict of duty and self-interest, is apparent from this passage from the reasons of Justice Laskin (as he then was) in *Can. Aero v. O'Malley*, [1974] S.C.R. 592 (rev'g in part [1972] 1 O.R. 592, 1971 CanLII 46 (C.A.)):

[at 609]

The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction....

[at 610]

What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.

[Emphasis added]

### **Rule 9-5**

[9] Rule 9-5, excerpted below, provides a gate-keeping function to weed out hopeless claims that are bound to fail and avoid squandering judicial resources (see, e.g., *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, 2011 SCC 42 (CanLII) at para. 19):

**Scandalous, frivolous or vexatious matters**

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[Bold in statute]

[10] Since Mr. Matthews' application is brought per Rule 9-5(1)(a), the issue for this application is whether the Equitable Compensation Claim discloses no reasonable claim.

[11] The case authorities are clear that courts must be cautious when striking a claim and should err on the side of permitting a novel but arguable claim to proceed to trial. An application to strike is unsuitable where there is a fit question to be tried, where the claim as framed or as might reasonably be amended raises a question of statutory interpretation that has not been definitively decided (unless it is so plain and obvious that it is bound to fail), where there are serious questions of law raised on the pleading, or where the claim is not certain to fail. The court has the discretion to decline to strike a claim where a complex question of statutory interpretation is raised: *Aubichon v. Grafton*, 2022 BCCA 77 at paras. 25–26, 46–48 and 52; *Imperial Tobacco* at para. 21; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 64; *NHK Spring Co., Ltd. v. Cheung*, 2024 BCCA 236 at para. 68; *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 46; *WestJet v. Gauthier*, 2025 BCCA 134 at para. 64; *Jiashan County Agri-Commerce Joint Small-Sum Co. Ltd. v. Cao*, 2025 BCCA 141 at para. 24; *Carley Estate v. Allied Signal Inc.* (1997), 35 B.C.L.R. (3d) 54, 1997 CanLII 2870 (C.A.) at paras. 3, 6, 8, 10.

[12] Mr. Matthews acknowledges that the case authorities are clear that he must meet a high bar on a Rule 9-5 application, and I must look solely at the notice of civil claim and assume that the facts pleaded in Sanovest’s notice of civil claim are true. Evidence is not to be weighed, credibility is not to be assessed, and no inferences may be drawn: see, e.g., *Aubichon* at paras. 25-27; *Imperial Tobacco* at para. 22; *Nevsun Resources* at para. 64.

**The Impugned Disclosable Transactions**

[13] Sanovest’s notice of civil claim describes the disclosable “self-interested” transactions at issue in this way:

The Self-Interested Transactions

30. Between January 2016 and June 2022, and as described below, Matthews and/or Tom Kusumoto, in breach of their fiduciary duties and while having disclosable interests in the transactions for which no proper shareholder approval was sought or obtained, cause EBMD and BMOC to sell, assign or transfer valuable assets to BMA [Bear Mountain Adventures Ltd.], a corporation they controlled during the material time period, or to Matthews personally, for no or inadequate consideration.

[Underline in original; insertion in square brackets added]

[14] Particulars of the specific transactions are also set out. They are alleged to involve: (a) an improper assignment of reimbursements from the Capital Regional District totalling over \$3.3 million to BMA (an entity controlled by Mr. Matthews and Tom Kusumoto); (b) sale of property called the “Gondola Property” to BMA for wholly inadequate consideration; (c) improper diversion of loan proceeds, from a \$8.125 million construction loan for, and property sale proceeds from, the “Pinehurst Project”, used in part by or for BMA to acquire a recreation centre; (d) improper diversion of other funds to acquire that recreation centre; and (e) improper diversion of loan proceeds and other funds to Mr. Matthews personally.

**BCA****Disclosable Interest Provisions**

[15] The disclosable interest provisions and the scope of persons having the right to sue are contained in the conflicts of interest provisions in Part 5, “Management”, Division 3, ss. 147–153 of the *BCA*.

[16] Section 147(1) sets out the ambit of a disclosable interest:

**Disclosable interests**

**147** (1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if

- (a) the contract or transaction is material to the company,
- (b) the company has entered, or proposes to enter, into the contract or transaction,
- (c) either of the following applies to the director or senior officer:
  - (i) the director or senior officer has a material interest in the contract or transaction;
  - (ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction, and
- (d) the interest is known by the director or senior officer or reasonably ought to have been known.

[Bold in statute]

[17] The category of persons who have the right to bring an action in s. 150(1) is broad: it is available to the company as well as a director, senior officer, shareholder, or beneficial owner of the shares of the company:

**Powers of court**

**150** (1) On an application by a company or by a director, senior officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the company, ...

[Bold in statute]

[18] Where the court finds the contract or transaction was fair and reasonable to the company, the director or senior officer is not liable to account for profit; the court may also make any other order it considers appropriate: *BCA* s. 150(1)(a) and (b).

[19] Unless the contract or transaction has been approved in accordance with s. 148(2) – e.g., approved by the directors following disclosure or by special resolution – the court may, per s. 150(2), enjoin the company from entering into the contract or transaction, order the director or senior officer to account for profit, or make any other order it considers appropriate:

(2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:

- (a) enjoin the company from entering into the proposed contract or transaction;
- (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
- (c) make any other order that the court considers appropriate.

[Emphasis added]

### **Oppression and Derivative Proceedings**

[20] Separately, the *BCA* in Part 8, “Proceedings”, Division 1, s. 227 permits a shareholder or any other person the court considers to be appropriate to seek relief on the ground that the affairs of the company are or have been conducted in an oppressive manner. Leave is not required.

[21] Sections 232–233, also in in Part 8, Division 1, permit, with leave, a shareholder or director of the company, or any other person the court considers appropriate, to prosecute a legal proceeding (known as a statutory “derivative action”) in the name and on behalf of the company to enforce a right, duty or obligation owed to the company that could be enforced by the company itself or obtain damages for any breach of a right, duty, or obligation owed to the company.

## Discussion

[22] The issue on this application – the scope of the relief available under s. 150(2)(c) – engages, at a minimum, the following questions (there is no significance to the order in which they are set out below).

[23] What is the remedial purpose of the disclosable interest provisions in the *BCA* (see, e.g., *Canada v. Canada North Group Inc.*, 2021 SCC 30 at para. 21)?

[24] Is, as Mr. Matthews contends, the relief in s. 150(2)(c) – to “make any other order that the court considers appropriate” – supplementary to the injunctive or accounting relief in s. 150(2)(a) and (b)? Or is 150(2), as Sanovest argues, another, separate form of statutory carve-out from the common law rule in *Foss v. Harbottle*, authorizing a further range of equitable remedies, distinct from the oppression and derivative action provisions in ss. 227 and 232–233?

[25] Did the legislature intend liability for breach of the disclosable interest provisions in Part 5 to be treated separately from the provisions in Part 8? For example, why is the class of persons who can bring a claim for breach of the disclosable interest provisions (in Part 5, ss. 150(1)(2)) broader than those seeking relief for oppression or a statutory derivative action (in Part 8, ss. 227, 232-233)? Why is the right to bring a claim for damages for an obligation owed to the company in Part 8, ss. 232-233 conferred upon a narrower class of persons without any stated connection with the disclosable interest obligations owed to the company in Part 5?

[26] An earlier section in the same division as s. 150 – s. 148(1) – imposes liability on the director or senior officer to account for profit unless otherwise ordered by the court in the relieving provisions in s. 150(1):

### **Obligation to account for profits**

**148** (1) Subject to subsection (2) and unless the court orders otherwise under section 150 (1)(a), a director or senior officer of a company is liable to account to the company for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

[Bold in statute]

What is the purpose of a seemingly duplicative provision in s. 150(2)(b) authorizing the court to order an accounting?

[27] Does the absence of a hierarchy to the court's authority to order relief in s. 150(2) – i.e., “any one or more of the following orders” – mean that the ambit of potential relief in s. 150(2)(c) is broad enough to include a claim for equitable compensation? Is it also broad enough to authorize the court to set aside the impugned transaction even though that remedy is not specifically authorized? If neither remedy is available, and there are no profits to account for in a transaction that has already completed, and no potential future profits that can be ascertained, does it mean the directors or officers who breached the disclosable interest provisions can escape liability and retain any potential future benefit(s) from their breach?

[28] If the point raised is truly a novel question, should the claim be dismissed where, as I discuss below, no definitive case authority has been cited?

[29] Does Justice Laskin's treatment of the award in *Can. Aero* at 621–622 (excerpted below) as a possible damages award founded on unjust enrichment, in a self-dealing case not tied to any specific section of a corporate statute, inform the scope of the equitable remedies available in s. 150(2)(c)?

Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. The appeal is, accordingly, allowed against all defendants save Wells, and judgment should be entered against them for \$125,000. The appellant should have its costs against them through-out. I would dismiss the appeal as against Wells with costs.

[Emphasis added]

[30] These questions illustrate why Mr. Matthews' challenge to the Equitable Compensation Claim raises a complex question of statutory interpretation.

**No Definitive Case Authority**

[31] There is no case authority definitively deciding the issue (a point acknowledged by Mr. Matthews).

[32] Mr. Matthews concedes that “some aspects of Sanovest’s claim are arguable”, but says that I must infer from the cases he cited that s. 150(2) does not permit a claim for equitable contribution under the *BCA* without leave per ss. 232-233: *Sonic Holdings*; *Bhuthal v. Sahsi*, 2024 BCCA 73; *EY Holdings*; *Hougen Co. Ltd. v. Su*, 2023 BCSC 1743 and 2024 BCSC 74; *Treasure Bay*; *De Cotiis v. De Cotiis*, 1995 CanLII 1044 (B.C.S.C.).

[33] I am unable to draw that inference from those authorities.

[34] The Court of Appeal’s statement in *Sonic Holdings* (at paras. 70 and 80) that the legislature intended the *BCA* “to serve as a complete code governing the contracts or transactions contemplated in Division 3”, displaces, at least *prima facie*, the notion that the common law rule in *Foss v. Harbottle* applies to the disclosable interest provisions.

[35] *Buthal* does not stand for the proposition that the derivative action provisions in Part 8 inform the scope of relief in s. 150(2). The issue in that case was whether Rule 20-3(15) of the *Rules* as opposed to the derivative action provisions of the *BCA* could be used to appoint a person to represent a corporation in legal proceedings. Importantly for Mr. Matthews’ application, and to support Sanovest’s submission that the disclosable interest provisions are not governed by what it says are the general provisions in Part 8, Sanovest points to the Court of Appeal’s *dicta* at paras. 18–19 that even in the same statute, special legislation overrides general legislation because it demonstrates the legislature has given attention to the particular subject matter and made provision for it.

[36] Sanovest’s position is that the special legislation governing disclosable interests and the powers granted to the court by s. 150(2) override any general legislation in Part 8.

[37] Some support for that point is found in *Brown v. Boyar*, 2009 BCSC 1300, cited by Sanovest, where Justice Grauer (as he then was) drew a distinction between the disclosable interest provisions from those in Part 8:

[105] In any event, Mr. Boyar relies on the relief provision set out in ss. 150 and 234 of the *BCA*. Section 150 applies specifically to transactions in which a director has a disclosable interest, and which the Court determines was fair and reasonable to the company. Section 234 [in Division 8] applies more generally to proceedings against a person who is a director where it appears that the person is or may be liable in respect of “negligence, default, breach of duty or breach of trust”. The Court is to have regard to all of the circumstances of the case. Where it appears to the Court that the director has acted “honestly and reasonably and ought fairly to be excused”, the Court may relieve that person either wholly or partly from liability on such terms as the Court considers necessary.

[Bold in original; underlining and italics emphasis and notation in square brackets added]

[38] *EY Holdings* also does not deal with the specific point in issue on Mr. Matthews’ application. The issue in *EY* was whether a shareholder could, without leave, advance a claim for personal loss or advance a cause of action said to belong to an individual member of the corporation personally, on the basis that the loss to the company flowed through to shareholders. Three claims were advanced: misrepresentation; mismanagement; and return of fees. The chambers judge declined to strike the claim on a Rule 9-5 application on the basis that it was not plain and obvious that the rule in *Foss v. Harbottle* applied to a mortgage investment corporation. The Court of Appeal rejected that reasoning and allowed the appeal concerning the mismanagement and return of fees claims because they were claims of the company and not reflective of loss to the shareholders (see paras. 43-48). The disclosable interest provisions of the *BCA* were not in issue or considered. Mr. Matthews’ reliance on the Court of Appeal’s statement that, “The rule in *Foss v. Harbottle* [citation omitted] that a shareholder of a corporation does not have a personal cause of action for a wrong done to the corporation is one of the bedrock principles of corporate law” must be viewed in the context of the specific issues in that case, including the Court’s treatment of s. 232 of the *BCA* as a carve-out from *Foss v. Harbottle*: see paras. 1, 15, 27–33, 46–49.

[39] *Hougen* also offers no guidance. Section 150(2) was not in issue. The reasons centered on a leave application to prosecute a derivative action (per ss. 232–233) for claims for breach of fiduciary duty, knowing assistance, fraud, and civil conspiracy. Nor does *Treasure Bay* offer assistance, as the issue there was whether a common law derivative action requires leave.

[40] *De Cotiis* is the only authority that Mr. Matthews took me to that touches on the issue. However, it is not, as Mr. Matthews contends, definitive authority for his position that the scope of relief available in s. 150(2)(c) is merely supplementary to injunctive relief or an accounting for profits in either s. 150(2)(a) or (b).

[41] The case involved four actions tried at the same time arising from a falling out of family members who worked in a successful real estate business. A considerable portion of the decision dealt with winding-up and oppression remedies. Part of the claim involved conflict of interest provisions in the *Company Act* in force at that time (*Company Act*, R.S.B.C. 1979, c. 59). Sections 144–146 contained language similar to the conflict of interest provisions in the *BCA*. Justice Tysoe (as he then was) rejected the notion that the disclosure provisions in the *Company Act* were in conflict with those authorizing injunctive relief and an accounting of profit. When discussing the scope of judicial discretion in determining appropriate relief, he made the following observation that includes the (underlined) passage relied upon by Mr. Matthews:

142 In this case the three remaining brothers did make a profit from the development of the three properties and I note that s. 145 is mandatory in its language requiring a director with a sufficient conflict of interest to account for any profits unless one [of] the two exceptions contained in s. 145 is applicable. Section 146 does grant the Court a discretion to make any order it considers appropriate but I am doubtful that s. 146 was intended to override the mandatory language of s. 145. I believe that in s. 146 the Legislature intended that the court could enjoin or set aside the transaction or order that the director account for any profit and make any other supplementary order appropriate in the circumstances. If the transaction is enjoined or set aside, the director will not make any profit and, in this sense, sections 145 and 146 are not contradictory. ...

[Underlining added]

[42] The issues raised on Mr. Matthews' application were not raised or argued in *De Cotiis*. Justice Tysoe's comments regarding the scope of relief are *obiter dicta*, framed tentatively as a belief, and predate *Boyar*. In these circumstances, I am not bound to follow that characterization as a matter of *stare decisis*: see *Hansard Spruce Mills Ltd., Re*, [1954] 4 D.L.R. 591 at 592, 1954 CanLII 253 (B.C.S.C.). Justice Tysoe's remarks are but one of many factors to consider when determining the arguable point raised by Sanovest.

[43] No legislative debates from *Hansards* or law reform commission reports that might aid in determining the issue were cited in submissions.

[44] Lastly, no case authority was cited supporting Mr. Matthews' submission that relief sought per s. 150(2) can only be pursued on an "application", as opposed to an action or proceeding. I view it as implicit from Mr. Matthews' decision to abandon his objection to the Accounting Claim, that he does not object to that relief under that same section being pursued in an action. Thus, I would not strike the Equitable Compensation Claim per Rule 9-5(1)(a) simply on that basis.

### **Summary**

[45] In summary, the interpretative exercise is not straightforward, and is, in my determination, complex. There is no definitive case authority on point. No legislative debates or law reform commission papers that may be helpful were cited in submissions. As I explain in the next section, a factual record is necessary to determine reliance/estoppel issues (discussed below) and whether there is any merit to the no profits to account for submission, and why, in any event, I should decline to exercise my discretion to strike the Equitable Compensation Claim.

[46] These comments from the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 990–991, 1990 CanLII 90, cited in *Nevsun* at para. 131, and from the Court of Appeal in *NHK* at paras. 67–68, are particularly instructive for this application:

[*Hunt*]

The fact that a pleading reveals “an arguable, difficult or important point of law” cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law ... will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[NHK]

[67] *Babstock* did not alter the applicable test. A claim should only be struck if it is plain and obvious that it cannot succeed. As Justice Doherty explained in *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813 at para. 42, *Babstock* reinforced the notion that when the validity of a claim turns exclusively on the resolution of a legal question, and resolution of the question is unlikely to be further informed by a more extensive factual record, it is open to a judge on a pleadings motion to decide whether it is plain and obvious that the claim discloses no cause of action, “even if the answer to the legal question is complex, policy-laden and open to some debate.”

[68] While *Babstock*, which was decided before *WestJet*, permits a judge to resolve contentious legal issues on a pleadings motion, it does not require a judge to do so. Rather, the judge has the discretion to decline to resolve questions of statutory interpretation in the absence of binding caselaw squarely on point or in circumstances where the interpretive exercise is complex and not so straightforward as to yield a plain and obvious answer: see also *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 at para. 15; *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 66; *Aubichon v. Grafton*, 2022 BCCA 77 at paras. 44–47, 52–53; *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at paras. 99–101. In our view, it cannot be said there is binding case law making it plain and obvious that the claim is bound to fail. We are also of the view that the issue is not so straightforward as to yield a plain and obvious answer. Indeed, there is scant jurisprudence directly on the point. To the extent that the issue has received judicial consideration, it is, as we shall see, at least arguable that the authorities support the position of the respondents.

[Emphasis added]

[47] As the Court of Appeal points out in its recent decision in *Gauthier* (at para. 64), where the question turns on statutory interpretation, the court “need not reach a conclusion on the proper interpretation of the provision in issue”.

[48] Sanovest has demonstrated that it is arguable whether the legislature intended the disclosable interest provisions of the *BCA*, including whether the ambit of relief in s. 150(2)(c) includes an equitable compensation claim, to stand separately from the derivative and oppression provisions, particularly where

injunctive relief and an accounting are moot because the transaction has completed, the assets are no longer available (*in specie*, per *Southwind*), and there is no actual profit to account for and no future profit capable of being ascertained.

### **Decline to Exercise Discretion to Strike**

[49] I would also decline to exercise my discretion, as per the *dicta* in *NHK* (at para. 68), *Sather v. Sather Ranch Ltd.*, 2025 BCCA 464 (at paras. 106–107 concerning gains-based equitable remedies), and in the other case authorities (see paras. 11–12 of these reasons) in the circumstances of this case for the following reasons.

### **Settlement Agreement**

[50] Sanovest advances a compelling submission that striking the Equitable Compensation Claim would gut the purpose of the holdback provisions contained in the settlement agreement (“Settlement Agreement”) it reached with 599, Mr. Matthews, and the Receiver which caused Sanovest to back away from its competing bid to purchase lands falling within the receivership and to support a bid from Groundplay Developments Ltd. (“Groundplay”), an entity in which Mr. Matthews is directly involved, that led to my approving Groundplay’s purchase on January 21, 2026.

[51] The parties agreed in the Settlement Agreement to set aside, and for the Receiver to hold in trust, \$1.4 million from the overall purchase proceeds, pending the determination of Sanovest’s claims in *this* action.

[52] The holdback provision is excerpted below:

10. From the tax distributions and unsecured claims otherwise payable to 599 or Matthews from the Net Proceeds, the first \$3.4 million (the “**Excluded Litigation Funds**”) shall be held in trust by the Receiver or its counsel on account of and as security for the following claims:
  - a. as to the sum of \$1.4 million, on account of and as security for amount allegedly owing from Daniel Matthews to the Developments Partnership as asserted in the Sanovest Action (collectively, the Sanovest Claims”); and

- b. as to the sum of \$2 million, on account of and as security for amounts allegedly owing from Daniel Matthews to Tom Kusumoto asserted in the Debt Action (the **“Tom Claims”**).

[Bold in original; underlying emphasis added]

[53] According to Sanovest, and a point not disputed by Mr. Matthews, when it entered into the Settlement Agreement, the only prior notice it had of Mr. Matthews’ Rule 9-5 application was his intention to strike certain undefined portions of the claim. Sanovest maintains that it agreed in good faith to support the Groundplay bid on the clear understanding that the funds would be held back as security for its claims in this action and that it would be “sandbagged” (Sanovest’s term) if the Equitable Compensation Claim is struck, especially if it is true that the Accounting Claim is moot.

[54] I do not need to determine at this juncture the merits of Sanovest’s reliance argument (which I took to be somewhat akin to an estoppel argument). Nor should I make that determination based solely on submissions without an appropriate evidentiary record. The point, however, is another reason why the claim should not be struck on a Rule 9-5 application.

[55] Nonetheless, in looking at the face of the Settlement Agreement, striking the Equitable Compensation Claim would gut the clear purpose of the holdback if, as Mr. Matthews says, there is nothing to account for; the funds held back would be released, leaving Mr. Matthews and Tom Kusumoto to enjoy potential future benefits of their breach.

### **Unjust Benefit**

[56] Injunctive relief under s. 150(2)(a) is not available because the impugned transactions have completed. If the Equitable Compensation Claim is struck, and if s.150(2)(c) allows for only “ancillary” relief as Mr. Matthews contends, there would be no authority for the Court to set the impugned transactions aside. If Mr. Matthews and Tom Kusumoto did not and will not, as Mr. Matthews submits, profit from any of the disclosable transactions, and no potential future profit can be ascertained, so that they have nothing to account for, EBMD and BMGC will be left with a hollow

remedy. In those circumstances, for any assets Mr. Matthews and Tom Kusumoto hold (directly or indirectly) or obtained from those transactions, they would retain the fruits of their breach of the *BCA* and breach of their fiduciary duties, retain the prospect of potential future benefits, and circumvent the deterrence purpose of equitable remedies discussed in *Southwind*.

[57] Whether there is any merit to the lack of profits submission must be determined on an appropriate evidentiary record.

[58] I will also observe that Mr. Matthews' Rule 9-5 application is brought at a late stage in this action and was heard after the case was scheduled to proceed to trial in January 2026. Mr. Matthews explained in oral submissions that the decision to bring the instant application was made when new counsel were retained, which I took from his submissions to be in the latter part of 2025. Mr. Matthews points out that Rule 9-5 provides that the application to strike may be brought at any time in the proceeding, and submits the timing of his application does not offend the *Rules*. Mr. Matthews also objects to the alternative relief sought by Sanovest (in its notice of application) in the event leave is required to bring the Equitable Compensation Claim, i.e., to amend this action to substitute EBMD and BMGC as plaintiffs in Sanovest's place or to grant Sanovest leave to commence a statutory derivative action on the basis that Mr. Matthews is not prejudiced. Mr. Matthews' position is that Sanovest must formally apply to amend the claim or to seek leave under Part 8 of the *BCA* to commence a derivative action. He also says that either step, as well as a common law derivative action, are time-barred and that he would rely on all available limitation defences should Sanovest attempt to seek relief on any of those grounds. In the face of the hold-back provisions of the Settlement Agreement, Mr. Matthews' position is that Sanovest must bear the consequences of its failure to take any of those steps prior to this point.

[59] When the parties appeared before me in late November 2025 through to January 27, 2026, on a prior application to determine whether this action and the other related actions (which they called the "Excluded Litigation") should be brought

within the ambit of the Receivership proceeding, I took it from their submissions that except for VA S226218, the actions falling within the Excluded Litigation were predominantly derivative actions. During the hearing, I questioned whether it mattered that leave had not been sought in the separate actions brought by Sanovest and 599 (see 2026 BCSC 141 at paras. 20–21). I took it from their submissions that leave was not an issue. Mr. Matthews did not raise any objection at that time to Sanovest’s claim in this action as falling afoul of the leave requirement in ss. 232-233 of Part 8 of the *BCA*. I also did not take Sanovest to be conceding at that time that the Equitable Contribution Claim was a statutory derivative action requiring leave. The nature of its claim in this action per the disclosable interest provisions of the *BCA* and the specific issue raised on this Rule 9-5 application were not addressed.

[60] Considering the nature and purpose of equitable relief discussed in the case authorities, I would not, at least not on a Rule 9-5(1)(a) application, strike the Equitable Compensation Claim in these circumstances, where the Accounting Claim is asserted to be moot and all other potential relief to hold Mr. Matthews and Tom Kusumoto to account for their breach of the *BCA* and their fiduciary duties is time-barred, leaving them to retain any benefits from their misconduct.

[61] A result that allows Mr. Matthews and Tom Kusumoto to retain the benefits from their breach of the disclosable interest provisions of the *BCA*, and their corresponding breach of fiduciary duties would defy the restitutionary and deterrence purposes of the equitable remedies discussed in *Southwind*.

**Disposition**

[62] In summary, it is not plain and obvious that the Equitable Compensation Claim discloses no reasonable cause of action, nor that it is bound or certain to fail. In the circumstances of this case, I would not strike the claim on account of Mr. Matthews’ stated concern that if it is allowed to proceed, it will open the floodgates for end-runs around the derivative action provisions of the *BCA*. To do so requires me to accept Mr. Matthews’ interpretation of legislative intent in

circumstances where there is no definitive case authority and where I have not been provided with legislative debates from *Hansards* and law reform commission reports. Further, to strike the claim now, in circumstances where the Accounting Claim is said to be moot, would gut the holdback provision of the Settlement Agreement and leave Mr. Matthews and Tom Kusumoto to enjoy future benefits of their self-interested transactions, resulting in an impermissible escape from the purposes of the disclosable interest provisions of the *BCA*, their fiduciary duties, and the deterrence purpose of equitable remedies (as discussed in *Southwind*).

[63] The application is dismissed.

“P. Walker J.”