

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blankstein v. Hayes Davis Investments  
Inc.*,  
2026 BCSC 686

Date: 20260416  
Docket: S212777  
Registry: Vancouver

Between:

**Gordon Blankstein**

Plaintiff

And

**Hayes Davis Investments Inc.**

Defendant

Before: The Honourable Madam Justice Tucker

## **Reasons for Judgment**

Counsel for the Plaintiff:

T. Boyar  
S. Arrandale

Counsel for the Defendant:

J.C. MacInnis, KC  
C. Chen

Place and Date of Hearing:

Vancouver, B.C.  
June 19, 2025

Place and Date of Judgment:

Vancouver, B.C.  
April 16, 2026

**Table of Contents**

**I. INTRODUCTION ..... 3**

**II. BACKGROUND ..... 3**

    A. Option Agreement ..... 3

    B. Pleadings..... 6

    C. Oroco Claim ..... 8

    D. Evidence on Application ..... 9

**III. LEGAL FRAMEWORK – SUMMARY JUDGMENT ..... 10**

**IV. ANALYSIS ..... 12**

    A. Whether an Independent Unilateral Contract ..... 13

    B. Even if Option Agreement Involves Bilateral Obligations ..... 19

**V. DISPOSITION ..... 28**

**I. Introduction**

[1] This is an application for summary judgment under R. 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The defendant, Hayes Davis Investments Inc. (“Hayes Davis”), seeks dismissal of the entire claim.

[2] The plaintiff, Gordon Blankstein, claims regarding an option agreement. There is a dispute as to enforceability by reason of failure of consideration, but Hayes Davis says that even if the option agreement is enforceable, all of the options under it expired, unexercised, before or on May 17, 2022. Hayes Davis asserts that Mr. Blankstein cannot obtain any remedy – specific performance, damages in lieu of specific performance, or common law damages – given that the options under the agreement expired without having been exercised.

**II. Background**

**A. Option Agreement**

[3] Oroco Resource Corp. (“Oroco”) is also relevant to the claim. Oroco is a public corporation. Craig Dalziel was, at all times material to the claim, the President and Chief Executive Officer (“CEO”) of Oroco.

[4] Hayes Davis is a closely held corporation controlled by the Dalziel family.

[5] Mr. Blankstein and Hayes Davis entered a written agreement dated May 17, 2019, and entitled the “Contingent Share Purchase Option Agreement” (“Option Agreement”). Under the Option Agreement, Mr. Blankstein was granted options to purchase, from Hayes Davis, Oroco shares owned by Hayes Davis.

[6] There are timelines under the Option Agreement that run by reference to a date defined as the “Oroco Exercise”. The Oroco Exercise involved Oroco exercising a separate option it held to purchase shares in yet another company. The Oroco Exercise had not taken place yet when the Option Agreement was entered. However, on the evidence on this application, it appears that Oroco exercised the option on February 28, 2020, and purchased shares under that option on March 2, 2020. Accordingly, Hayes Davis asserts (and it appears undisputed for purposes of

this application) that March 2, 2020, is the date of the defined “Oroco Exercise” for purposes of the Option Agreement.

[7] The Option Agreement includes the following terms:

WHEREAS:

..

B. In the event Oroco exercises the Oroco Option, Hayes will own and possess not less than 2,500,000 common shares of Oroco; and

C. Hayes desires to grant to Blankstein an exclusive and irrevocable conditional option to purchase up to 2,500,000 shares of Oroco (the “Hayes Shares”) following Oroco’s exercise of the Oroco Option, upon the terms and conditions hereinafter set out.

...

## 2.OPTION

### 2.1 Grant of Option

Hayes hereby grants to Blankstein the sole and exclusive right and option to purchase the Hayes Shares (the “Blankstein Option”) for the price of \$0.30 per Hayes Share (the “Purchase Price”) subject to the terms of section 2.3 below.

### 2.2 Vesting

The Option shall vest in five tranches of 500,000 Oroco Shares each as follows:

- (a) the first tranche upon the signing of this Agreement;
- (b) the second tranche on the three month anniversary of the Oroco Exercise;
- (c) the third tranche on the nine month anniversary of the Oroco Exercise;
- (d) the fourth tranche on the fifteen month anniversary of the Oroco Exercise; and
- (e) the fifth tranche on the twenty-one month anniversary of the Oroco Exercise.

### 2.3 Exercise of Option

Blankstein may exercise:

- (a) the first tranche of the Blankstein Option for 500,000 Hayes Shares, as cited in section 2.2 (a) above, at any time between the signing of this Agreement and the three month anniversary of the Oroco Exercise; and
- (b) subject to the respective tranche of the Blankstein Option having vested in accordance with section 2.2 above, the second through fifth tranches at any time between the Oroco Exercise and the

thirty-six (36) month anniversary of this Agreement (the “Option Period”),

by providing written notice to Hayes of his intention to exercise the Blankstein Option, specifying the number of Hayes Shares with regard to which he is exercising the Blankstein Option and paying the associated Purchase Price to Hayes.

#### 2.4 Partial Exercise

Blankstein may, in his absolute discretion, exercise in whole or in part that portion of the Blankstein Option as has vested in accordance with section 2.2 above, provided that he purchase a minimum of 250,000 of the Hayes Shares with each exercise of the Blankstein Option. In the event that there are fewer than 250,000 Remaining Hayes Shares, Blankstein may exercise the Blankstein Option to purchase all, but not less than all of the Remaining Hayes Shares. The Blankstein Option shall survive a partial exercise and remain effective during the Option Period with regard to the Remaining Hayes Shares.

#### 2.5 Payment of Purchase Price

The aggregate Purchase Price payable with regard to an exercise of the Blankstein Option shall be paid and satisfied by Blankstein delivering a wire deposit or certified cheque in such amount to the account Hayes instructs in writing.

#### 2.5 [sic] Delivery of the Purchased Shares

Upon an exercise of the Blankstein Option in whole or in part, and the receipt by Hayes of the Purchase Price payable with regard thereto, Hayes shall deliver to Blankstein the Hayes Shares being purchased thereby.

[8] Using March 2, 2020 as the date of the Oroco Exercise, the following schedule lists the vesting and expiry dates for each tranche of shares under the Option Agreement:

	<u>Vesting date</u>	<u>Expiry date</u>
First tranche	Upon the signing of the Agreement (May 17, 2019)	Three month anniversary of the Oroco Exercise (June 2, 2020)
Second tranche	Three month anniversary of the Oroco Exercise (June 2, 2020)	Thirty-six month anniversary of the Agreement (May 17, 2022)
Third tranche	Nine month anniversary of the Oroco Exercise (December 2, 2020)	Thirty-six month anniversary of the Agreement (May 17, 2022)

Fourth tranche	Fifteen month anniversary of the Oroco Exercise (June 2, 2021)	Thirty-six month anniversary of the Agreement (May 17, 2022)
Fifth tranche	Twenty-one month anniversary of the Oroco Exercise (December 2, 2021)	Thirty-six month anniversary of the Agreement (May 17, 2022)

[9] On December 2, 2019, Hayes Davis wrote Mr. Blankstein advising it was terminating the Option Agreement effective immediately. Hayes Davis observed that the First tranche had vested. The letter stated that the vested share options would be cancelled if not exercised in accordance with paragraphs 2.3(a) and 2.4 of the Option Agreement.

[10] On March 18, 2020, plaintiff’s then counsel (not present counsel) wrote back to Hayes Davis. The letter asserted that Hayes Davis was not entitled to terminate the Option Agreement, and that purporting to do so was a material breach. The letter asserted that Mr. Blankstein’s options “will vest” and that Mr. Blankstein “will be in position to exercise those in accordance with clause 2.3(b) and 2.4” of the Option Agreement. The letter goes on to demand that Hayes Davis affirm, in writing, that the Option Agreement remains in force.

[11] Hayes Davis did not respond to the March 18, 2020, letter.

**B. Pleadings**

[12] On March 24, 2021, Mr. Blankstein filed notice of civil claim (“NOCC”) in this proceeding, seeking specific performance of the Option Agreement or, in the alternative, damages in lieu of specific performance. Neither repudiation nor acceptance are raised in the NOCC.

[13] On May 17, 2021, Hayes Davis filed a response to civil claim (“RCC”) asserting that the Option Agreement was unenforceable. The facts set out in Part 1 of the RCC include the following:

4. In or about March 2019, Craig Dalziel was introduced to the plaintiff by a mutual contact. In their initial meetings, the plaintiff held himself out to Craig Dalziel as a person who could provide mentorship and support to Craig Dalziel in his role as President and CEO of Oroco.
5. In or about May 2019, the plaintiff committed to provide mentorship and support to Craig Dalziel to assist him in his role as President and CEO of Oroco (the “Services”) in exchange for options to acquire shares of Oroco. As consideration for the Services, Craig Dalziel arranged for the defendant to enter into a written agreement dated May 17, 2019 with the plaintiff to acquire by way of option up to 2,500,000 common shares of Oroco (the “Option Agreement”).
6. The plaintiff’s commitment to provide the Services to Craig Dalziel represented the sole consideration provided by the plaintiff in exchange for the Option Agreement.
7. It was an implied term of the Option Agreement that the plaintiff would perform the Services honestly and in good faith. Further, or in the alternative, it was an implied term of the Option Agreement that the options could not be exercised if the plaintiff failed to deliver the Services honestly and in good faith.
8. The plaintiff failed to provide the Services honestly, in good faith, or at all, ....

[14] Under Legal Basis, the RCC asserts that failure of consideration renders the Option Agreement unenforceable. It further asserts that there was a “fundamental breach” by the plaintiff of his obligation to provide support services (“Services”), and that the plaintiff has “no legal entitlement to be provided with shares under the Option Agreement”, and thus cannot seek specific performance. Finally, Hayes Davis denies that it breached the Option Agreement.

[15] On December 1, 2023, Hayes Davis filed an amended response to civil claim (“ARCC”). Division 1 of Part 1 remains as it was, but new allegations of facts are added (as Division 2) asserting that no options were exercised prior to their expiry.

[16] The ARCC adds a pleading that, even if the Option Agreement were enforceable, Mr. Blankstein failed to exercise any options, and all options expired on or by May 17, 2022. The following underlined language was added to the Legal Basis part:

4. The defendant has not breached any term of the Option Agreement. More specifically, if the Option Agreement remained enforceable at all material times as alleged by the plaintiff, the plaintiff never exercised any of

the options despite claiming specific performance of the Option Agreement, and all of the options have now expired in accordance with the express terms of the Option Agreement.

[17] On December 16, 2024, Mr. Blankstein filed an amended notice of civil claim (“ANOCC”). The ANOCC amends the relief sought to add: “in the further alternative, damages for breach of contract”, and amends the Legal Basis by adding “unlawful breach and repudiation of the Option Agreement”.

[18] The ANOCC also adds several paragraphs to Part 1. The new paragraphs allege that Mr. Blankstein began providing Services in March 2019, providing Services to the President and CEO of Oroco, and later to the Oroco “leadership team”.

### **C. Oroco Claim**

[19] On December 1, 2022, Mr. Blankstein filed a separate notice of civil claim (“Oroco Claim”) against Oroco and another company, ATM Holding Corp. (“ATM”), as the defendants.

[20] In the Oroco Claim, Mr. Blankstein alleges that he and Oroco entered an oral agreement in March 2019 (“March 2019 Agreement”) under which he agreed to provide consulting and advisory services (i.e, the “Services”) to Oroco in exchange for options to purchase up to 4,000,000 Oroco shares as follows:

- a) 750,000 share options to be provided by Oroco;
- b) 750,000 share options to be provided by ATM; and
- c) 2,500,000 share options to be provided by Hayes Davis.

[21] The Oroco Claim also alleges that on or about May 17, 2019, Oroco and Mr. Blankstein entered a written agreement (“Oroco Agreement”) under which Mr. Blankstein was provided with options to purchase up to 750,000 Oroco shares from Oroco. The Oroco Claim also alleges that Mr. Blankstein and ATM entered an oral agreement giving Mr. Blankstein options to purchase 750,000 Oroco shares

from ATM (“ATM Agreement”). Mr. Blankstein pleads that he provided Services to Oroco in reliance on the March 2019 Agreement, Oroco Agreement and ATM Agreement. The Oroco Claim seeks specific performance and, in the alternative, damages for breach, in respect of the March 2019 Agreement, Oroco Agreement and Option Agreement.

[22] In its response to the Oroco Claim, Oroco denies being party to any March 2019 Agreement. Oroco admits that it is party to the Oroco Agreement, and that Services were to be provided to Oroco by Mr. Blankstein as consideration for the Oroco Agreement. It says that Oroco gave notice terminating the Oroco Agreement effective December 6, 2019, at which time only a limited number of share options had vested. Oroco pleads that Mr. Blankstein failed to exercise any of the options under the Oroco Agreement.

[23] For its part, ATM denies being party to any agreement with Mr. Blankstein.

**D. Evidence on Application**

[24] Mr. Blankstein filed his own affidavit sworn February 12, 2025. Hayes Davis filed an affidavit sworn February 5, 2025, by Spencer Dalziel. Spencer Dalziel is the President of Hayes Davis, and the person who signed the Option Agreement on behalf of the defendant. The affidavits filed attach the written agreements, the correspondence described in these reasons, and a series of text messages.

[25] Mr. Blankstein attests that he met Craig Dalziel, President and CEO of Oroco, in early 2019 and they discussed the possibility of Mr. Blankstein’s investing in Oroco. Mr. Blankstein declined to invest, but offered some management insights. He attests that after that conversation, Craig Dalziel asked him if he would provide Services to support him in his role as Oroco’s President and CEO, and that he agreed to do that. Mr. Blankstein says he was offered a salary, but preferred to be remunerated with shares. He attests that around March 2019 he and Craig Dalziel reached an agreement under which Mr. Blankstein would be provided with options to purchase up to 4,000,000 Oroco shares in exchange for providing Services.

[26] Mr. Blankstein attests that he subsequently entered into the Oroco and Option Agreements on the basis that Oroco and Hayes Davis were providing options to him in furtherance of the March 2019 oral agreement he and Craig Dalziel made regarding his Services, and as compensation for providing Services.

[27] Mr. Blankstein attaches the Oroco Agreement to his affidavit filed February 13, 2025. Notably, the Oroco Agreement is quite different from the Option Agreement. The Oroco Agreement is entitled “Services Agreement”. Its terms expressly retain Mr. Blankstein to provide “consulting and advisory services” to Oroco, and the option provisions are expressly stated to be “compensation for Services under this Agreement”. The Oroco Agreement also includes express provisions for terminating the agreement, and express terms addressing how a termination will impact the vesting of options.

[28] In neither Mr. Blankstein’s pleading or his affidavit is it asserted that Mr. Blankstein exercised options in accordance with the terms of the Option Agreement governing exercise. Rather, Mr. Blankstein attests that he had concerns about tendering payment to Hayes Davis given that Hayes Davis had purported to terminate the Option Agreement, and given that Hayes Davis declined to respond to his counsel’s correspondence regarding the option following the purported termination. He attests that it made little sense to him to send money to Hayes Davis in the circumstances, as he understood that Hayes Davis had already “clearly communicated” to him that it did not intend to comply with the Option Agreement.

[29] In his affidavit, Spencer Dalziel clarifies the date of the Oroco Exercise. He also attests that Hayes Davis has never received written notice or tendered payment as required under the exercise terms in the Option Agreement.

**III. Legal Framework – Summary Judgment**

[30] Hayes Davis applies under R. 9-6. Rule 9-6(4) permits an “answering party” to seek summary dismissal of all or part of a claim against it.

[31] Rule 9-6(5) states:

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
  - ...
  - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
  - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[32] While the parties cited a variety of different cases, there was no dispute between them with respect to the basic governing principles. Under R. 9-6, judgment may be pronounced or a claim dismissed if the court is satisfied that there is no *bona fide* triable issue. A defendant can succeed on a summary judgment application by showing that the plaintiff's case is unsound, or by adducing evidence that is a complete answer to the plaintiff's case: *Beach Estate v. Beach*, 2019 BCCA 277 [*Beach*] at para. 48.

[33] The bar for success is a high one. The threshold has been variously described as requiring it to be "manifestly clear" or "beyond reasonable doubt" that there is no genuine issue for trial: *Wang v. Lu*, 2024 BCSC 126 at para. 63; *Trowbridge v. Connelly*, 2017 BCSC 2336 at para. 4.

[34] The applicant has an evidentiary burden to establish there is no genuine issue of material fact requiring trial: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 [*Lameman*] at para. 11. Rule 9-6 permits only a limited review of the evidence. The court is not to weigh evidence beyond determining whether it is incontrovertible: *Beach* at para. 49.

[35] The chambers judge may make inferences of fact based on undisputed facts, but only where the inferences are strongly supported: *Lameman* at para. 11. The chambers judge is not permitted to weigh evidence, assess credibility or draw unfavourable inferences against the party defending the application: *Zheng v. Bank*

*of China (Canada) Vancouver Richmond Branch*, 2023 BCCA 43 at para. 34 (citing *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27).

[36] Summary judgment may be available where there are disputed facts in the pleadings, as the court must consider the *evidence* before it on the application: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at paras. 35-36 [*McLean*]. A respondent to an application is obliged to put its “best foot forward” with respect to the existence of material facts, and cannot rely solely on the allegations set out in its pleadings: *McLean* at para. 38.

[37] Finally, under R. 9-6(5)(c), the court may pronounce judgment where it is satisfied that the only genuine issue arising is a question of law, provided the court is satisfied that it is a question of law appropriate for resolution under a summary judgment application. Questions of law should only be determined under R. 9-6 where:

- a) there is no real dispute about the material facts,
- b) the legal issue is “well-settled by authoritative jurisprudence”, and
- c) determining the question of law will enable the court to dispose of at least part of the claim.

(See, *Haghdust v. British Columbia Lottery Corporation*, 2011 BCSC 1627 at paras. 16-18.)

#### **IV. Analysis**

[38] Hayes Davis says this case is suitable for summary judgment because it suffers from a “fatal flaw”. Hayes Davis says that because he never exercised any options under the Option Agreement prior to the expiry of the last of them (i.e., May 17, 2022), Mr. Blankstein cannot specifically enforce the options (because they are expired), and cannot claim common law damages based on loss or injury (because the options were never exercised).

[39] Hayes Davis also says this is not a case in which the evidence establishes that Mr. Blankstein attempted to exercise options, but did so imperfectly, but rather a

case in which Mr. Blankstein never attempted to provide notice and tender payment in accordance with the Option Agreement. Hayes Davis says this is a line of distinction between *deficient* performance and *non*-performance of preconditions. Hayes Davis says the court can only extend the time for performance of the conditions precedent to the exercise of an option where there is a deficient performance to be “cured”.

#### A. Whether an Independent Unilateral Contract

[40] Hayes Davis asserts that the Option Agreement is a unilateral contract, and that it is trite law that an optionee must exercise an option under unilateral option agreement in order to acquire a cause of action and, moreover, it must exercise the option in strict compliance with the contract terms: *Baughman v. Rampart Resources Ltd.*, [1995] BCJ No. 752 (C.A.) at para. 31 [*Baughman*]; *Hungry Hill Geological Ltd. v. TTM Resources Inc.*, 2012 BCSC 268 at paras. 350-357. Accordingly, Hayes Davis says Mr. Blankstein’s claim here is bound to fail.

[41] Hayes Davis submits that the present case is virtually identical to that before the court in *Baughman*. *Baughman* involved an option agreement entered further to an employment contract between the same contracting parties. In *Baughman*, the Court of Appeal, *per* Justice Southin, summarized the law as follows:

29 Unilateral “contracts” come in different types. Some, such as this, are offers, usually to sell, which, because the optionee has given consideration, must be kept open by the offeror for the time specified. Others, if there be no consideration, impose no obligation on the offeror unless and until the offeree performs according to the offer or at least commences performance. Thus, in *Daulia Ltd. v. Four Millbank Nominees Ltd.*, [1978] 2 All E.R. 557, in which the offeror offered to sell, if the offeree came with a bank draft for the purchase price and an executed contract of sale, and the offeree did so, Goff L.J., as he was, said at 560-61:

The concept of a unilateral or ‘if’ contract is somewhat anomalous, because it is clear that, at all events until the offeree starts to perform the condition, there is no contract at all, but merely an offer which the offeror is free to revoke. Doubts have been expressed whether the offeror becomes bound so soon as the offeree starts to perform or satisfy the condition, or only when he has fully done so. In my judgment, however, we are not concerned in this case with any such problem, because in my view the plaintiffs had fully performed or satisfied the condition when they presented themselves at the time

and place appointed with a banker's draft for the deposit and their part of the written contract for sale duly engrossed and signed, and the retendered the same, which I understand to mean proffered it for exchange. Actual exchange, which never took place, would not in my view have been part of the satisfaction of the condition but something additional which was inherently necessary to be done by the plaintiffs to enable, not to bind, the defendants to perform the unilateral contract.

Accordingly in my judgment, the answer to the first question must be in the affirmative. Even if my reasoning so far be wrong the conclusion in my view is still the same for the following reasons. Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.

30 Where the offer is as it was in *Daulia Ltd. v. Four Millbank Nominees Ltd.*, the offeror is at liberty before the offeree embarks on performance to revoke the offer. He is entitled to revoke because the offeree has given him no consideration.

31 An option is simply an offer supported by consideration. It gives the offeree a choice to accept or not accept in accordance with its requirements. He may only accept it in accordance with its requirements. See, for the principle, *Pierce v. Empey*, 1939 CanLII 1 (SCC), [1939] S.C.R. 247, and, for illustrations of the strictness of the principle, *Lewes Nominees v. Strang* (1983), 49 A.L.R. 328 (H.C.A.) and the judgment of Bergman J.A. in *Mus v. Matlashewski*, 1944 CanLII 273 (MB CA), [1944] 3 W.W.R. 358 at 387.

[42] Mr. Blankstein disputes Hayes Davis' characterization of the Option Agreement as an independent, unilateral agreement. Further, he submits, in reliance on *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265, 1999 CanLII 708 [*Sail Labrador*], that the question of whether the Option Agreement is an independent, unilateral agreement or, instead, an element of a larger multilateral contractual arrangement is itself a *bona fide* triable issue.

[43] In *Sail Labrador*, Justice Bastarache (for the majority) noted that earlier courts had generally categorized option agreements as unilateral contracts automatically

(paras. 32 and 34). He then commented on the difference between the historical approach taken to bilateral contracts as opposed to option agreements:

31 Both Treitel and Waddams recognize that, as a general rule, parties to a contract must perform their obligations specifically as dictated by the contract. However, if the performance is deficient, for example in quality, quantity or timeliness, it is accepted that the defect in performance must attain a certain minimum degree of seriousness to entitle the non-offending party to rescind the contract. The failure in performance must substantially deprive the other party of what was bargained for. This concept is referred to as substantial non-performance or as a requirement that a breach go to the “root” of the contract. In English legal literature, the expression “substantial failure” is used. If this minimum standard is not met, rescission will not be available to the non-offending party. This party will be forced to settle for a remedy in damages. Thus, courts are concerned with the consequences of the deficient performance and the nature of the prejudice caused to the non-offending party when determining whether rescission is available (Treitel, at pp. 685-86; Waddams, at pp. 394-96). The case of *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.), stands for the proposition that courts will apply this type of substantial non-performance test to determine if rescission is available in cases involving charter party contracts like the one in question.

32 The important point for the purposes of this case is the fact that, in the past, courts have distinguished deficient performance in bilateral contracts from deficient performance of options, which have generally been categorized as unilateral contracts. A brief review of basic contract law principles may be in order.

33 A bilateral contract is a contract in which both parties undertake obligations through an exchange of promises. Acceptance of a bilateral contract, as a general rule, occurs when the offeree communicates its counter-promise to the offeror. In contrast, a unilateral contract is one in which a party makes a promise in return for the performance or forbearance of an act. There is no counter-promise to perform this act or forbearance. In this way, a unilateral contract is a contract in which only one party undertakes a promise. This promise takes the form of an offer which can only be accepted by performance of the required act or forbearance. Such performance provides the other party’s consideration, allowing it to enforce the original promise (Treitel, at pp. 35-36; Waddams, at p. 111; *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.*, [1968] 1 All E.R. 104 (C.A.)).

[Emphasis added.]

[44] At para. 37, Bastarache J. noted that the historical basis for requiring strict performance of conditions precedent before liability could arise on the part of an optionor (citing *Pierce v. Empey*, [1939] S.C.R. 247 at 252, 1939 CanLII 1), rests on the assumption that an option is necessarily a “separate, unilateral contract”. He

observed that one of the effects of this approach was to preclude the substantial non-performance doctrine from relieving an optionee of deficient performance of conditions precedent in option contracts because the courts were *automatically* categorizing option contracts as unilateral in nature (para. 39).

[45] *Sail Labrador* reset the law by clarifying that option agreement are *not* always independent, unilateral contracts. Option agreement may form one element of a larger contractual arrangement if there is an “intimate connection” between the agreements. Justice Bastarache went to discuss facts that may suggest that two ostensibly separate agreements should be considered to be intimately connected for purposes of assessing bilateral performance:

40 ... [W]hile an option may be a unilateral contract, not all options are unilateral contracts. *Pierce, supra*, has been interpreted as establishing that all options are unilateral contracts. I disagree and would add that any previous case law which restricts the interpretation of options in this way must not be followed. That an option may be an element of a bilateral contract in which it is contained rather than an independent, unilateral contract is supported by this Court’s decision in *Monk Corp. v. Island Fertilizers Ltd.*, 1991 CanLII 95 (SCC), [1991] 1 S.C.R. 779, where it was recognized that a single contract can contain terms which relate to different subject matters.

41 Whether a contract which contains an option clause establishes a single, bilateral contract or two separate contracts, one bilateral and the other unilateral, is a matter of construction. Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed: *Dawson v. Helicopter Exploration Co.*, 1955 CanLII 45 (SCC), [1955] S.C.R. 868, at p. 874, per Rand J.

42 In the case at bar, the option and the charter party in which it is contained are intimately connected to one another. For example, an examination of the issue of consideration reveals such a connection. Without consideration, an option is treated like a simple offer. In such a case, the offeror can withdraw the option at any time prior to acceptance, a power clearly running contrary to the very nature of the option. See for example Annotation, “The Law of Options”, [1930] 1 D.L.R. 1, at p. 2; M. J. Cozzillio, “The Option Contract: Irrevocable Not Irrejectable” (1990), 39 Cath. U. L. Rev. 491; P. M. Perell, “Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land” (1991), 70 Can. Bar Rev. 1, at p. 3; V. Di Castri, *The Law of Vendor and Purchaser* (loose-leaf), vol. 1, at pp. 6-16.1 to 6-18. In his article, *supra*, Cozzillio notes that in the case of options contained in lease agreements, American courts have been willing to presume that the rental payments under the lease serve as consideration for

the option (at p. 509). In his book, *supra*, Di Castri notes that Canadian courts, like those in the United States, are also willing to presume that options contained in lease agreements gain consideration through the payment of rent under the lease (at p. 6-17). In his article, *supra*, Perell confirms that this is the practice in Canada (at p. 4). For Canadian cases which found that options contained in lease agreements gain consideration through the payment of rent under the lease, see for example *Daku v. Daku* (1964), 1964 CanLII 373 (SK CA), 49 W.W.R. 552 (Sask. C.A.); *Friesen v. Bomok* (1979), 1979 CanLII 2156 (SK QB), 95 D.L.R. (3d) 446 (Sask. Q.B.); *Nieckar v. Sliwa* (1976), 1976 CanLII 1253 (SK QB), 67 D.L.R. (3d) 378 (Sask. Q.B.); *Nilsson v. Romaniuk* (1984), 1984 CanLII 1339 (AB KB), 59 A.R. 39 (Q.B.).

43 The option in the present case requires consideration to be binding on both parties, but it can be assumed that it is based on the same consideration as the underlying lease, namely the lease payments. In this way, the charter party and the option in this case are specially connected.

44 Another connection between the option and the charter party is the fact that the option is specifically made dependent on the performance of the terms of the charter party. An option is not always made dependent on the performance of the underlying contract.

[Emphasis added]

[46] Here, Mr. Blankstein has attested that the Option Agreement was entered into in furtherance of the earlier oral agreement regarding Services and as compensation for his provision of Services under that agreement. Mr. Blankstein also relies on Craig Dalziel’s texts as evidence of there having been a shared understanding of the connection between the two agreements at the time the Option Agreement was executed. (In the texts, Craig Dalziel states that if Mr. Blankstein is “withdrawing” from his involvement with Oroco, it “brings up the question of how your various option agreements should be treated”.)

[47] The facts set out in Hayes Davis’ own pleadings assert that Mr. Blankstein “committed” to provide the Services and that, as “consideration” for the Services, Craig Dalziel arranged for Hayes Davis to enter the Option Agreement. These factual assertions are consistent with Mr. Blankstein’s attestations.

[48] I am satisfied that there is evidence to support the assertion that the alleged oral agreement regarding Services and the Option Agreement are intimately connected in the manner contemplated by *Sail Labrador*, and that Services were in fact provided by Mr. Blankstein.

[49] That factual portion of Hayes Davis pleading also alleges that it was an implied term of the Option Agreement that “the options could not be exercised if the plaintiff failed to deliver the Services honestly and in good faith”. That assertion aligns with the indicator of connection identified by Justice Basterarche at para. 44 of *Sail Labrador*. No affiant has attested to that factual assertion. However, while the law provides that an application respondent cannot simply rely on facts asserted in their *own* pleadings to fend off summary judgment, I can see no reason why the factual allegations set out in the pleadings of the *applicant* for summary judgment should be entirely disregarded. This is not to say that the applicant’s factual pleadings are necessarily deemed admissions (see paras. 26-31 of *Sumas Environmental Services Inc. v St. Alcuin College for the Liberal Arts Society*, 2024 BCSC 1109 at paras. 26-30 for a discussion of pleadings and deemed admissions), but only that the applicant for summary judgment should not be able to rely on a lack of evidence to support a fact that the applicant simultaneously asserts the existence of. (That said, the result here does not depend on this additional connection under the alleged implied term. The evidence of connection attested to by Mr. Blankstein is sufficient in and of itself.)

[50] Finally, Hayes Davis made this further (single paragraph) submission:

68. The defendant does not dispute that the plaintiff agreed to provide services to Craig Dalziel as consideration for the Option Agreement. But there is no evidence to support an inference that the plaintiff made any promise to the defendant pursuant to the terms of the Option Agreement, and the plaintiff does not say that he did. He says his “promises” were all made to Craig Dalziel, who is not a party to this action. As this is a summary judgment application, it must turn on evidence.

[51] First, I do not read Mr. Blankstein’s pleadings or his affidavit as saying the oral agreement regarding Services was between Craig Dalziel in his personal capacity and Mr. Blankstein. Mr. Blankstein describes the Services as specifically being in support of Craig Dalziel’s role as President and CEO.

[52] Second, while this submission correctly notes that here the parties to the alleged oral agreement and the parties to the Option Agreement are not identical (unlike the case in *Sail Labrador*), Hayes Davis has not pointed to any caselaw to

support an assertion that this distinction is critical and dispositive. It appears to be open to Mr. Blankstein to argue that the reasoning in *Sail Labrador* extends to the facts alleged here. There is no authority before me holding that the intimately connected agreements analysis set out *Sail Labrador* cannot apply where the benefit of consideration did not flow directly to the optionor. Nor has Hayes Davis produced any authority holding that the *Sail Labrador* analysis cannot extend to multilateral contractual arrangements.

[53] I am satisfied that there is a *bona fide* triable issue as to whether the Option Agreement is sufficiently connected to the agreement regarding Services to enable Mr. Blankstein to invoke the doctrine of substantial non-performance as discussed in *Sail Labrador* (see para. 39).

**B. Even if Option Agreement Involves Bilateral Obligations**

[54] Hayes Davis' written submissions state:

69. In the alternative, even if the Option Agreement could be characterized as a bilateral contract, it is clear that the plaintiff has no claim. The plaintiff elected to affirm the contract following the alleged anticipatory breach, but subsequently failed to perform his own obligations (i.e., exercise the options) before the Blankstein Option lapsed, and thereby never crystallized his right to specific performance or damages.

[55] Mr. Blankstein argues that there is a triable issue here as to whether the Option Agreement is an element of a larger bilateral or multilateral contractual arrangement so as to enable him to rely on his substantial performance of the oral agreement for Services to excuse his non-compliance with the Option Agreement exercise terms.

[56] The cases put before me show that little consideration given post-*Sail Labrador* to the question of how or to what extent relief can be granted based on substantial performance of the non-option agreement. The scope of the remedy available in such circumstances cannot be said to an area of settled and well-established law. In my view, that alone warrants dismissal of the alternative argument.

[57] I will nevertheless consider the specific propositions and the authorities put forward in support of them under Hayes Davis' alternative argument.

[58] Hayes Davis says it is trite law that an affirmed bilateral option agreement is kept "alive" for all purposes by affirmation, and that it necessarily follows from that that Mr. Blankstein's specific performance claim effectively lapsed into nonviability the moment the contractual option periods expired. Hayes Davis further says that the ANOCC could not operate to "revive" the expired options, and so Mr. Blankstein cannot accept any pre-expiry breach of the Option Agreement by Hayes Davis further to the ANOCC.

[59] Hayes Davis cites *Zoehner v. Algo Communication Products Ltd.*, 2023 BCSC 224 at para. 99 [*Zoehner*], and *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926 at para. 185 [*Shaw*], for the proposition that a plaintiff has no legal remedy once an option has been permitted to expire without even an attempted exercise. These cases cite, in turn, Lord Asquith's statement in *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417 at p. 421, that an "unaccepted repudiation" is a "thing writ in water".

[60] In *Zoehner*, the defendant employer claimed the plaintiff employee abandoned his employment by refusing to perform essential duties. The trial judge found there was no abandonment and that the employer had dismissed the employee without cause or reasonable notice. On the damages assessment, the employer argued that the employee could have rightly taken the position that the employer had constructively dismissed him several months prior to date when the employer expressly dismissed him. The court agreed, but found it was irrelevant to damages (para. 99), as in choosing to continue in employment, the employee rendered the constructive dismissal an "unaccepted repudiation".

[61] Nothing in *Zoehner* speaks to the facts at hand, let alone provides an authoritative basis for dismissing the claim.

[62] In *Shaw*, Shaw and Sunvault made an agreement for Shaw to receive preferred shares in Sunvault in exchange for transferring a debenture it held over to

Sunvault. Sunvault delivered the preferred shares, but Shaw (wrongly) claimed its obligation to transfer the debenture was not crystallized. Another term of the same agreement entitled Shaw to, upon the happening of certain events, tender the preferred shares to back to Sunvault for conversion into common shares.

[63] Ultimately, Shaw sued Sunvault. The portion of *Shaw* relied upon by Hayes Davis is found at paras. 184-187, and addresses Shaw's allegation that Sunvault breached the agreement by failing to convert the preferred shares:

[184] Sunvault says that Shaw's failure to transfer and deliver the Stealth Debenture in exchange for the preferred shares – the very consideration Sunvault was entitled to receive under the Preferred Share Agreement – is a breach of a sufficiently important term that there was a substantial failure of performance, and therefore a repudiation by Shaw of the Agreement. I agree.

[185] However, I am not persuaded that Sunvault's actions in no longer making interest payments were sufficient to constitute acceptance of Shaw's repudiation. In the memorable words of Asquith, L.J. in *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417 (C.A.) at p. 421: "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind." Acceptance of a repudiation must be clear and unequivocal, and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. Sunvault's first communication that it was accepting what it considered Shaw's repudiation of the Preferred Share Agreement was its statement in para. 1 of the Legal Basis (Part 1) of its original response to civil claim filed August 28, 2015.

[186] As of August 28, 2015, the preferred shares had not yet been tendered for conversion into common shares, although (as noted above), by letter dated August 6, 2015, Shaw's solicitor advised of Shaw's intention to tender the preferred shares for conversion. Those shares were not in fact tendered until September 5, 2015, along with (in the same correspondence) an offer to consent to registration of the Stealth Debenture in Sunvault's name. I find, however, that the Preferred Share Agreement had been terminated as of August 28, 2015, by Sunvault's communication of its acceptance of Shaw's repudiation of that Agreement. At that stage, neither party was obliged to perform.

[187] ... Shaw has failed to prove that Sunvault breached the Preferred Share Agreement by refusing, in September 2015 to convert the preferred shares into 2,700,000 common shares. At that point, the Preferred Share Agreement had been terminated, and Sunvault was no longer obligated to perform.

[64] Shaw's claim based on Sunvault's refusal to convert the preferred shares was not based on a finding that the obligation to convert had expired under the terms of the agreement, but rather the fact that Shaw had only tendered the shares for

conversion after Sunvault had unequivocally accepted Shaw's failure to transfer the debenture as a repudiation of the contract.

[65] Nothing in *Shaw* speaks to the question of whether the remedies sought under the ANOCC are legally available on the facts of this application.

[66] In *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 [*Inmet*], the Court of Appeal stated as follows:

[203] The law is clear that an innocent party to a breach of contract may accept the breach, treat the contract at an end and sue for damages, or not accept the breach, keep the contract open and sue for specific performance, or in the alternative, damages in lieu thereof. It is also clear that the innocent party may claim all of these remedies in the alternative and is not required to elect among them until judgment.

[Citations omitted]

[67] Mr. Blankstein says the ANOCC preserves his options under it, options permitted under *Inmet*, until trial. He says argues that Hayes Davis has presented no case law that authoritatively holds that, notwithstanding what is said in *Inmet*, he cannot rely on the ANOCC and reserve his final election until trial in the present circumstances.

[68] In arguing against this proposition, Hayes Davis emphasizes the fact that the contractual exercise period expired *while the NOCC was extant*. Hayes Davis says the NOCC was unequivocally affirming the Option Agreement at and after the moment of expiry, and thus expiry rendered the NOCC nonviable. Again, I find that Hayes Davis has not provided any authority indicating that this proposition is authoritatively established and is dispositive of the action. I will make a further comment on this aspect of Hayes Davis' argument after discussing *Fletton Ltd. v. Peat Markwick Ltd.*, [1988] B.C.J. No. 479, 1988 CanLII 2860 (C.A.) [*Fletton*].

[69] Hayes Davis' written submission on its alternative argument continues as follows:

79. In the face of an election to affirm a contract, the plaintiff's reciprocal obligation to perform (i.e., exercise the Blankstein Option before expiry) is

illustrated by the decision of the BC Court of Appeal in *Fletton Ltd. v. Peat Markwick Ltd.*, [1988] BCJ No. 479 (CA). The plaintiff sued for specific performance of a sale of goods contract, or alternatively damages. Ultimately, the plaintiff's claim failed because, while the contract remained afoot, the plaintiff failed to perform its part of the contract by performing certain conditions.

[70] *Fletton* involved a contract for purchase and sale of some appliances. The plaintiff was the proposed buyer, and the defendant, a receiver, the proposed seller. The trial judge found they had made a completed contract the terms of which obliged the receiver to sell to the plaintiff provided the plaintiff satisfied two performance conditions: (1) to either provide evidence that it had obtained product liability insurance coverage adequate to the receiver or, alternatively, an unqualified legal opinion stating there was no liability; and, (2) removal of the appliance units from Canada by August 31, 1984.

[71] The plaintiff opted to satisfy the first condition by getting insurance. The receiver advised the plaintiff that \$100 million coverage for a 20-year term was the minimum coverage it would consider adequate. On August 15, 1984, the plaintiff provided a policy providing \$10 million coverage for a three-year term to the receiver for consideration, but the receiver rejected it as inadequate. On August 23, 1984, prior to the performance date under the contract, the receiver repudiated the contract. The plaintiff immediately filed its action, but also continued to try to satisfy the first condition under the contract.

[72] At trial, the plaintiff elected specific performance. The trial judge (in reasons for judgment reported as 1986 CanLII 1203 (BC SC)) dismissed the plaintiff's action, stating:

[7] The plaintiff must prove that it satisfied the condition of providing insurance acceptable to the defendants. It did not do that. ...

[8] In response to the defendants' solicitor's letter of August 23, 1984, the plaintiff did not accept the proffered repudiation of the contract. Instead its then solicitor's actions clearly affirmed the contract and sought specific performance. ... By seeking specific performance the plaintiff has preserved its options to trial and in the months intervening between the issuance of its writ and the trial has sought to improve its position by obtaining counsel's opinion that there will be no liability on the defendants arising from the sale of the machines provided they are sold through the original manufacturer. ... It is

possible that if this matter were to continue unresolved the plaintiff could, over a period of time, perfect its position by producing insurance or satisfying the terms of counsel's opinion in a way which would be acceptable to the defendants. But the matter has been tried and must be decided upon the facts as they stand at trial. As of the date of trial the defendants say they do not accept either the insurance proffered or the buy-back scheme which has been designed to fit counsel's opinion. Thus the conditions precedent for performance have not been met. ... They have been rejected in a way which I do not find to be dishonest, indeed I find it to be within reason. The plaintiffs counsel cited a number of cases for the proposition that a defendant cannot rely upon non-performance where it has itself hindered the plaintiff's performance, relying on [cites omitted]. Those cases are distinguishable because in none of them was the test of performance reserved to the defendant by the terms of the contract.

[Emphasis added.]

[73] On appeal, the plaintiff argued that the trial judge ought to have moved on to consider common law damages once he dismissed the claim for specific performance. The Court of Appeal disagreed:

[17] In the present case the trial judge concluded that the contract was kept alive by the plaintiff after the repudiation by the defendant on 23rd August 1984, but at no time up to trial was the plaintiff able to perform its part of the contract and that fact excused performance on the part of the defendant.

[18] The appellant also cited Fry J., *Specific Performance of Contracts*, 6th ed. (1921). The learned author accurately states that a plaintiff can claim alternate relief provided it is based on the same set of facts. The choice the plaintiff has in face of a repudiation is:

- (1) to affirm the contract, in which case the repudiation would have no effect unless there were a continued refusal to perform or,
- (2) to accept the repudiation, which would mean that the contract is at an end and the plaintiff can sue for damages for the breach.

[19] Here there was no continued refusal by the defendant to perform after repudiation. The plaintiff had to perform its part of the contract by meeting the conditions set out in its letter of 24th July 1984, but never did.

[20] In support of the proposition advanced by the plaintiff that the trial judge erred in failing to assess common law damages, it relies upon the decision of the Supreme Court of Canada in *Dobson v. Winton & Robbins Ltd.*, 1959 CanLII 19 (SCC), [1959] S.C.R. 775, 20 D.L.R. (2d) 164 [Ont.]. ...

[21] The plaintiff relies upon that decision as a new departure in this area of the law. In my view, it does not stand for the proposition that a plaintiff may elect to pursue a right and, when it fails to establish that right, to then pursue an inconsistent right. In the *Dobson* case the plaintiff had sued for specific performance with a claim for common law damages in the alternative. Before

trial, in order to mitigate his loss, the vendor sold the property to a third party. At that point the plaintiff had extinguished his claim to specific performance; however, he might still pursue his alternative remedy of damages, if he had claimed that alternative remedy in his pleadings. The effect of selling the property was to compel the plaintiff to pursue the alternative remedy of common law damages. That is not the situation in the present case. The plaintiff here was unable to perform its part of the contract and therefore was not entitled to a decree of specific performance. In these circumstances no right to claim common law damages can be said to arise on the basis of the decision in *Dobson*.

[Emphasis added.]

[74] In *Fletton*, the plaintiff elected specific performance even though it was not, even as of the time of trial, able to satisfy the first performance condition under the contract. Judgment was given based on the election and based on the plaintiff's failure, even as of trial, to satisfy its own obligations under the contract. To create a parallel situation here, it would be as if Mr. Blankstein went to trial, elected specific performance as a remedy, but also admitted at that trial that he could not pay the tender amount payable under the Option Agreement, and his claim was dismissed on that basis.

[75] Notably, the contract in *Fletton* did set a date for performance. The facts indicate that the date for performance in *Fletton* passed after the action was filed, but before the time of trial. Although this is the same timing that Hayes Davis stresses here, nothing in either the trial or appeal decisions in *Fletton* attributes any significance to that timing. The reasons in *Fletton* also speak of the possibility of the plaintiff satisfying the first performance condition right up until the time of trial, and that is notwithstanding the contract setting a performance date. Accordingly, *Fletton* is not an case authoritatively establishing that Mr. Blankstein's remedial claims must fail due to the expiry of the exercise period under the Option Agreement. If anything, *Fletton* suggests the door is open for argument.

[76] As noted, Hayes Davis also asserts that the court lacks the jurisdiction to relieve Mr. Blankstein from *non*-performance (as opposed to attempted but deficient performance) of the exercise requirements under the Option Agreement. Hayes

Davis has not provided any authoritative support for the existence or import of this distinction.

[77] In any event, in my view it would be, at least in this case, impossible to draw the line between intended exercise and the effects of hinderance, bad faith or other preclusive conduct under an application for summary judgment.

[78] Interestingly, the trial decision in *Fletton* contemplated that the plaintiff there might have been excused for *non*-performance had the defendant had *wrongfully hindered* his ability to perform the performance conditions (para. 8), even though there was no evidence of the plaintiff's having attempted to satisfy the second performance condition, and it is difficult to characterize its failure to obtain the stipulated insurance as "deficient" performance of the first condition.

[79] In one of the cases relied upon by Mr. Blankstein, *Armex Mining Corp. v. Huakan International Mining Inc.*, 2018 BCSC 1418 [*Armex*], Justice Burke found that evidence of bad faith regarding the termination of an option agreement was sufficient to enable the plaintiff to proceed to trial and seek to be excused from non-compliance the exercise terms:

[27] There is also disagreement between the parties concerning Armex's compliance with the terms of any purported option, the effect of non-compliance on the validity of the option or Armex's ability to claim damages, the reasons for the lack of compliance, and an allegation by Armex that Huakan changed the terms of the agreement or terminated it in bad faith and so compliance by Armex was not required. All of these issues require an assessment at trial about the parties' duties under the contract, if any, and intentions, which necessitates a close examination of the facts. This is not suitable for summary judgment. A trial is necessary to determine whether the Letter of Intent constituted a valid option, whether Huakan acted in bad faith in using the Termination clause and if so, what the appropriate remedy is.

[Emphasis added.]

[80] Here, the ANOCC does not expressly allege "bad faith" in terminating the Option Agreement. However, it does describe the December 2, 2019, letter as a "purported" termination and asserts the options were "irrevocable". Aggravated and punitive damages are sought on the basis that the purported termination was arbitrary and high-handed. Mr. Blankstein attests that he did not exercise the options

in accordance with the terms of the Option Agreement because of the circumstances of Hayes Davis' purported termination and Hayes Davis' failure to respond to his March 2020 correspondence regarding the options. He attests that he took from this conduct that Hayes Davis had no intention of complying with the Option Agreement. In my view, this is sufficient to align the present case with that in *Armex*.

[81] Finally, Mr. Blankstein also relies on Justice Branch's finding in *AD General Partner Inc. v. Gill*, 2019 BCSC 980, that relief from forfeiture may be available to an optionee who has failed to comply with conditions precedent to the exercise of an option (paras. 43-52). At para. 52, Branch J. concluded:

52 I draw the following principles from the above case law. In general, an optionee's failure to satisfy a pre-condition to an option, or to exercise the option within the option period, will not attract equitable relief from forfeiture. However, there are circumstances in which the court may exercise equitable jurisdiction to assist an optionee. These include cases where the optionor's own conduct provides equitable grounds for intervention, for example, by preventing the optionee from properly exercising the option: *Pierce* [*v. Empey*, [1939] S.C.R. 247]. Ambiguity with respect to a term of an option agreement may also support the exercise of the court's equitable jurisdiction to relieve from forfeiture: *Illidge* [*v. Sona Resources Corporation*, 2019 BCCA 368]. As discussed further below, I find both of these circumstances are present in this case.

[Emphasis added.]

[82] Hayes Davis objects that the ANOCC does not presently plead the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Hayes Davis had notice of Mr. Blankstein's intention to rely on *AD General Partner Inc.* in response to the application, and also had Mr. Blankstein's affidavit explaining his basis for not exercising in accordance with the Option Agreement terms. Hayes Davis was in a fair position to respond to Mr. Blankstein's position on this application, and given the early stage of the litigation, it would not be prejudicial to allow Mr. Blankstein to amend to include reliance on the *Law and Equity Act*.

[83] Hayes Davis has not satisfied me that it has been authoritatively determined that Mr. Blankstein claim is bound to fail because he did not comply, or make a formal attempt to comply, with the exercise terms under the Option Agreement. In

particular, there is no authority foreclosing Mr. Blankstein from arguing that his non-compliance should be excused in the circumstances. The points raised by Hayes Davis are arguments for trial.

**V. Disposition**

[84] In view of the above, I am satisfied that the application for summary judgment must be dismissed.

“Tucker J.”