IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Katz v. Kosikar,*
2025 BCSC 34

Date: 20250109
Docket: S228836
Registry: Vancouver

Between:

Karen Marie Katz

Plaintiff

And

Terrance Joseph Kosikar

Defendant

- and -

Docket: S234520
Registry: Vancouver

Between:

Karen Marie Katz

Plaintiff

And

Catrina M. Chisholm and Kahn Zack Ehrlich Lithwick

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment

Conduct of Proceedings

Counsel for the Plaintiff:	A.A. MacDonald
Counsel for the Defendant, Terrace J. Kosikar in Action No: S228836:	F. Qamar
Counsel for the Defendants in Action No: S234520:	D. Rondeau

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Place and Dates of Hearing:	Vancouver, B.C. November 19-20 and November 24, 2024
Place and Date of Judgment:	Vancouver, B.C. January 9, 2025

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I. Overview

[1] There are five applications before me, which implicate three actions and a counterclaim. The applications primarily relate to the conduct of the underlying proceedings – specifically: (1) whether the actions should be tried at the same time; or alternatively, (2) if parties in one action should be added to the other action; and (3) whether one action should be stayed pending determination of the other actions.

[2] The Plaintiff, Karen Marie Katz, and the Defendant, Terrance Joseph Kosikar, were once friends. Early in their friendship, Ms. Katz paid $290,000 to purchase property from Mr. Kosikar's former common-law spouse. Located on the Property was Mr. Kosikar's personal residence and a camp operated by Mr. Kosikar (Camp My Way). The Camp offered retreats and other programs for first responders experiencing post traumatic stress disorder (PTSD). Even though the entirety of the purchase funds for the Property came from Ms. Katz, the Property was registered solely in Mr. Kosikar's name. The real estate transaction was completed by a lawyer retained by Mr. Kosikar, Catrina M. Chisholm, and her law firm Kahn Zack Ehrlich Lithwick (collectively the "Lawyers").

[3] The Katz-Kosikar friendship ended a year after it started. Its demise spawned three lawsuits and a counterclaim. The civil actions are all brought by Ms. Katz. The first action is against Mr. Kosikar, seeking an order vesting title to the Property in the sole name of the Plaintiff (the "Kosikar Action"); the second action is against Mr. Kosikar and Camp My Way, seeking approximately $135,000 representing cash and personal property ostensibly belonging to Ms. Katz (the "Camp Action"); and the third action is against Ms. Chisholm and her law firm for solicitor's negligence (the "Lawyer Action"). In response to the Camp Action, Mr. Kosikar and the Camp have brought a Counterclaim alleging defamation by Ms. Katz (the "Counterclaim").

[4] In the proceeding before me, the Lawyers ask that the action against them be stayed pending determination of the other actions (the "Stay Application").

[5] Mr. Kosikar supports the Stay Application. Ms. Katz opposes it, and has also brought her own applications as follows:

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a) mirror applications in the Kosikar Action and the Lawyer Action which would result in an order that the Lawyer Action be heard at the same time as the other actions (the "Joint Trial Applications"); and

b) mirror applications in the Kosikar Action and the Lawyer Action for an order to amend pleadings and to add the defendants in one action as a party to the other action in which they are not currently named (the "Applications to Add Parties").

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[6] Near the conclusion of this hearing, Ms. Katz abandoned the part of her relief in the Applications to Add Parties which related to an amendment of the pleadings in the Kosikar and Lawyer Actions.

[7] The overarching purpose in the Plaintiff's four applications is to have all of her available claims against all of the Defendants determined at the same time before the same judge. In contrast, the Lawyers would like the action against them to be determined separately and after all of the other matters have been resolved.

[8] The issues raised in the five applications are intertwined. There is also considerable cross-over in terms of the facts, arguments, and applicable legal principles. Thus, while I have addressed the three sets of applications separately, to fully appreciate the basis on which the following Order is made, these Reasons should be read as a whole.

II. Applications for the Actions to be Tried Together

[9] The Plaintiff brings the Joint Trial Applications pursuant to Rule 22-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], which permits a party to apply to have separate legal proceedings tried at the same time, as follows:

> **Consolidation**
>
> (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

[10] In this case, the Plaintiff is not seeking to consolidate the Lawyer Action with the Kosikar Action. Nor, despite the Plaintiff's counsel's repeated use of the term

"joinder", is the Plaintiff asking to have the two actions joined. Rather the Plaintiff asks for an order that:

a) the trial of the Lawyer Action be heard at the same time as the trial of the Kosikar Action; and

b) the evidence, including discovery transcripts, adduced in one action be admitted into evidence in the other action.

[11] In *Wang v. Niu*, 2022 BCSC 1027, Justice Ahmad canvassed the relevant legal principles which apply to whether separate proceedings should be tried at the same time:

> [79] Under R. 22-5(8), the court may order that proceedings be tried at the same time or on the same day. The purpose of having actions heard together is to avoid multiple proceedings: *Shah v. Bakken,* 1996 CanLII 2522 (BC SC) [*Shah*].
>
> [80] The case of *Merritt v. Imasco Enterprises Inc.,* 1992 CarswellBC 600 (BC SC) [*Merritt*] sets out the questions to be determined on an application under Rules 22 and 5(8) as follows: First, do common claims, disputes and relationships exist between the parties? Next, are they so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense?
>
> [81] The Court in *Merritt* set out at para. 19 the following factors to consider with regards to the second question:
>
> > (1) Will the order sought create a saving in pre-trial procedures, (in particular, pre-trial conferences)?;
> >
> > (2) Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?;
> >
> > (3) What is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest?; and
> >
> > (4) Will there be a real saving in experts' time and witness fees?
>
> [82] The Court in *Shah* added two more factors for consideration:
>
> > 15. […]
> >
> > (5) Is one of the actions at a more advanced stage than the other? […]
> >
> > (6) Will the order result a delay of the trial of one of the actions, and, if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits which a combined trial might otherwise have?

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> [83] To those factors, counsel for Mr. Niu added “whether there is a substantial risk that separate trials will result in inconsistent findings on identical issues”.

[12] The *Merritt* and *Shah* cases suggest a two-part test that considers first, the commonality between the claims, disputes, and parties, and second, the balance of convenience. I have distilled those considerations down to the following two-part analysis when determining an application under Rule 22-5(8):

1) Do common claims, disputes and relationships exist between the parties? If so,

2) Are the common claims, disputes, and relationships so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense? Specifically:

    a) Will the order sought create a saving in pre-trial procedures, (in particular, pre-trial conferences)?

    b) Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?

    c) What is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest?

    d) Will there be a real saving in experts' time and witness fees?

    e) Is one of the actions at a more advanced stage than the other?

    f) Will the order result in a delay of the trial of one of the actions, and, if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits which a combined trial might otherwise have?

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g) Is there is a substantial risk that separate trials will result in inconsistent findings on identical issues?

(the "*Merritt/Shah* test")

[13] I turn now to providing some background about the various proceedings affected by these Applications.

A. The Claims

[14] The Joint Trial Applications implicate three separate court proceedings which all originate in the Vancouver Registry (collectively, the "Actions"): the Kosikar Action (SCBC Action No. S228836); the Lawyer Action (SCBC Action No. S234520); and the Camp Action and related Counterclaim (SCBC Action No. S233949).

[15] No trial dates have been set in any of the Actions; nor have the parties conducted any examinations for discovery.

1. Kosikar Action

[16] The Plaintiff commenced the Kosikar Action on November 3, 2022, in which she alleges the following:

a) In November 2021, she provided $290,000 (the "Purchase Funds") to buy the Property.

b) Though Mr. Kosikar did not pay any consideration for the Property, it was registered solely in his name.

c) Ms. Katz did not intend to give the Purchase Funds as a gift. She also did not intend for Mr. Kosikar to be the sole legal and beneficial owner of the Property.

d) Mr. Kosikar manipulated Ms. Katz and she was under duress when title was registered in Mr. Kosikar's name.

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e) Ms. Katz did not receive any independent legal advice regarding the transaction.

f) Ms. Katz paid for improvements to the Property, including repairs, maintenance supplies, and the installation of a new hot water tank.

[17] Consequently, Ms. Katz seeks a resulting trust, and an order vesting the Property in her name.

[18] Ms. Katz filed a certificate of pending litigation against title to the Property around November 3, 2022 (the "CPL"). The CPL sits as a first charge upon title to the Property, which is otherwise unencumbered.

[19] There is no dispute that the Plaintiff's funds were used to purchase the Property. In his Response to Civil Claim filed on November 28, 2022, Mr. Kosikar asserts that the Purchase Funds and/or the Property were a gift. This pleading was filed while Mr. Kosikar was without legal representation. Though he has subsequently retained counsel, he has not amended his Response to Civil Claim to advance any other defence to this action.

[20] The main issue in the Kosikar Action is whether the Purchase Funds were a gift. Because the CPL fully secures the Plaintiff, if the court finds that there was no gift, Ms. Katz will obtain title to the Property.

2. Camp Action and Counterclaim

[21] The Plaintiff commenced the Camp Action on May 29, 2023. She amended her Notice of Civil Claim on September 14, 2023.

[22] In her Amended Notice of Civil Claim, the Plaintiff alleges that she paid for various expenses for the Camp, for which she has not been reimbursed (the "Expenses"). She seeks $65,324.11 in damages for the outstanding expenses. Ms. Katz further claims that she brought personal items to the Property (the "Items") and that Mr. Kosikar and the Camp misappropriated and converted the Items for

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their own use. She seeks $70,007.08 in damages for misappropriation and wrongful conversion.

[23] In their Response to Amended Notice of Civil Claim filed October 16, 2023, Mr. Kosikar and the Camp say that the Plaintiff gifted or donated the Items, and that all “approved” expenses were reimbursed to the Plaintiff.

[24] In their Amended Counterclaim filed on August 29, 2023, the Defendants claim that Ms. Katz defamed them in a text message and on various social media platforms. They seek general, aggravated, and punitive damages for the alleged defamation, damages for loss of earnings and earning capacity, and injunctive relief.

[25] Although the Camp Action was not the subject of this hearing, the parties agreed mid-way through their submissions that the Kosikar Action and the Camp Action should be tried together, as there is significant overlap between the parties and the issues raised in each proceeding, such that a separate trial is undesirable.

[26] On November 19, 2024, I ordered, by Consent, that the trial of Action No. S-233949 be heard at the same time as the trial of Action No. S-228836; and the evidence, including discovery transcripts, adduced in one action constitutes admissible evidence in the other action (the “Consent Order”). By virtue of the Consent Order, any discussion of the commonality between the Kosikar Action and the Lawyer Action must include discussion of the Camp Action and Counterclaim.

3. Lawyer Action

[27] The Plaintiff commenced the Lawyer Action on June 22, 2023, and through it, made the following allegations:

a) The Plaintiff is a retired RCMP officer who has experienced “serious” PTSD.

b) In August 2021, Ms. Katz met Mr. Kosikar when she attended an event at the Camp for PTSD education and wellbeing. Mr. Kosikar told her that the

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future of the organization was at stake because his ex-spouse wanted to sell the Property.

c) Ms. Katz told Mr. Kosikar that she wanted to “save” the Camp. She said she was possibly interested in buying the Property as an investment.

d) On September 17, 2021, Ms. Katz attended a meeting with Mr. Kosikar and Ms. Chisholm. At this meeting, they discussed the nature of the Camp, Ms. Katz’s status as a retired RCMP officer with PTSD, the fact that the Property was subject to a family law matter between Mr. Kosikar and his ex-spouse, and the Plaintiff’s interest in “saving” the Camp. They also discussed an appraisal of the Property.

e) Ms. Chisholm did not tell the Plaintiff that there could be a conflict of interest between her and Mr. Kosikar. She also failed to advise Ms. Katz to seek independent legal advice about the real estate transaction.

f) Following the initial meeting, Ms. Chisholm gave legal advice to Ms. Katz, directed her to deposit the Purchase Funds in a trust account, billed both Ms. Katz and Mr. Kosikar for legal fees, and accepted payment from Ms. Katz (the “Accounts”). Ms. Chisholm also shared privileged information with Mr. Kosikar. Throughout these interactions, Ms. Katz believed Ms. Chisholm was acting as her lawyer.

g) Ms. Chisholm breached her duty of care and fiduciary duty to Ms. Katz by taking instructions from Mr. Kosikar to obtain the Purchase Funds, use them to purchase the Property, and transfer title solely to him. This went against the Plaintiff’s interests and caused harm to Ms. Katz.

[28] The Plaintiff seeks damages in respect of the Purchase Funds and Accounts.

[29] The Lawyers filed their Response to Civil Claim on August 24, 2023. Through it, they say the following:

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a) The Lawyers deny that they were ever retained by Ms. Katz. Rather, they submit that they were retained solely by Mr. Kosikar and only took instructions from him.

b) The Lawyers deny that they had a solicitor-client relationship with Ms. Katz at any point. They say that the Plaintiff did not seek legal advice from them, nor did they provide her with any legal advice or assistance; they deny the Plaintiff was vulnerable to Mr. Kosikar; and they deny that they encouraged or pressured the Plaintiff to give the Purchase Funds to Mr. Kosikar or to pay the Accounts.

c) The Lawyers deny that Ms. Katz ever expressed an interest in purchasing the Property for herself or in her name.

d) The Lawyers admit that Ms. Katz attended the meeting with Ms. Chisholm and Mr. Kosikar in September 2021, and that throughout November 2021 Ms. Chisholm copied Ms. Katz on her communications with Mr. Kosikar and sometimes "communicated with the plaintiff directly as agent for Mr. Kosikar to obtain Mr. Kosikar's instructions."

e) The Lawyers further admit they received the Purchase Funds from the Plaintiff and deposited them into the trust account for Mr. Kosikar. They then delivered the Funds to counsel for Mr. Kosikar's ex-spouse and transferred title to Mr. Kosikar's name with Ms. Katz' knowledge.

[30] For clarity, the Lawyers do not assert that Ms. Chisholm or any other member of the firm advised the Plaintiff to seek independent legal advice.

[31] On August 29, 2023, Counsel for the Lawyers wrote to Plaintiff's Counsel requesting that the Plaintiff voluntarily stay the Lawyer Action and prosecute the Kosikar Action to conclusion. The Plaintiff did not respond to this request.

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[32] On March 1, 2024, the Lawyers filed the Stay Application, seeking a stay of proceedings pending a determination in the Kosikar Action. The Stay Application was set to be heard on July 18, 2024.

[33] On June 19, 2024, the Plaintiff brought an application in the Lawyer Action, for an order that the Lawyers serve their list of documents within 10 days from the date of the order ("Production Application").

[34] Associate Judge Bilawich adjourned the Production Application, and ordered that it not be reset for hearing until after the Stay Application was determined on its merits.

4. Proposed Claims

[35] The Plaintiff is not seeking to amend her pleadings at this time. Nor has the Plaintiff committed that she will in fact move to amend the pleadings in the manner indicated in the proposed amended notice of civil claim. However, she asks this Court to consider the proposed amendments to the Kosikar Action and the Lawyer Action in order to support her Joint Trial Applications.

[36] The proposed amendments include the following additions to the Notice of Civil Claim in the Kosikar Action:

a) A claim against Mr. Kosikar for breach of trust on the basis that he holds the Property in a resulting trust for the Plaintiff and, despite the Plaintiff's demand, he has failed to transfer title to the Property to her in breach of his duties as a trustee of the Property.

b) A claim against the Lawyers for "knowing assistance" in a breach of trust on the basis they knowingly assisted Mr. Kosikar in a "scheme" to use the Purchase Funds to purchase the Property and put it in his name, contrary to the Plaintiff's intentions.

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c) Alternatively, a claim against the Lawyers that they breached a trust duty owed to the Plaintiff by using the funds provided to them, in trust, to effect the purchase of the Property in Mr. Kosikar's name.

d) A repeat of many of the claims already advanced against the Lawyers in the Lawyer Action, such as the allegation that the Lawyers owed fiduciary and trust duties to the Plaintiff (which they breached) in relation to the Purchase Funds and the Purchase.

e) A claim for damages in respect of these additional proposed causes of action.

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[37] In the Lawyer Action, the Plaintiff seeks to add a claim that Mr. Kosikar is liable for the Lawyers' alleged negligence, on the basis that the Lawyers were acting as his agents, and, as the Lawyers' principal, he is liable for their wrongs.

[38] According to the Plaintiff, the "most important feature of the pleading examples as drafted is that they illustrate that the Plaintiff can particularize her claims, which give rise to joint and several liability between the defendants, given the defendants' alleged overlapping and/or mutual unlawful conduct that caused her damages".[1] It is submitted that the proposed amendments clarify "that joint liability arises between the respective defendants, which is an issue that should be determined in a single trial".[2]

[39] The Lawyers say that the proposed amendments do not assist in the Joint Trial Applications because:

a) There is no basis in law for allegation (a), as a resulting trust does not arise until it is declared by the court*: Leclair v. Leclair Estate*, 48 B.C.L.R. (3d) 245, 1998 CanLII 4805 (B.C.C.A.).

[1] Plaintiff's Brief of Argument, at para. 28.
[2] Plaintiff's Brief of Argument, at para. 57.

b) Allegation (b) does not include all material facts necessary to advance a claim of “knowing assistance”.

c) Allegation (c) does not include all material facts necessary to advance a claim of “breach of trust”.

d) The proposed amendments at allegation (d) are an abuse of process because they are identical to claims already brought in the Lawyer Action.

e) The Court can place no weight on the proposed amendments because the Plaintiff has indicated that she may not in fact amend her pleadings in this manner.

[40] Mr. Kosikar agrees with the Lawyers that the proposed amendments are flawed for the reasons articulated above.

B. Commonality

[41] The first question arising from the *Merritt/Shah* test relates to commonality. As the Camp Action has already been ordered to be tried at the same time as the Kosikar Action, the question to ask is whether common claims, disputes and relationships exist between the parties in the Kosikar/Camp Actions on the one hand, and the Lawyer Action on the other hand. For the following reasons, I conclude that the answer to this question is no.

[42] It is instructive to first look at the connections between the Kosikar Action and the Camp Action. Both these actions implicate the same parties – Ms. Katz, Mr. Kosikar, and Camp My Way. While the Camp is not a defendant in the Kosikar Action, Mr. Kosikar’s connection to the Camp plays a central role in the Kosikar action. The two actions also arise out of the same relationship dynamic between Ms. Katz and Mr. Kosikar, share a strong temporal connection, and raise the same central legal issue of whether the impugned money or items were gifted to the Defendants. It is not a surprise then that the parties agreed during the hearing that the Kosikar Action and the Camp Action should be heard at the same time.

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[43] The Counterclaim also arises out of same claims, disputes and relationships. Even though it raises an added element of defamation, the Counterclaim is inextricably connected with the Kosikar Action and Camp Action. The alleged defamatory statements relate to Ms. Katz's view that Mr. Kosikar and the Camp took advantage of her, and that she did not intend to gift the Property, expenses she paid for the Camp, or her personal property, to either of them. Further, some of the alleged defamatory statements mirror the allegations made in the Kosikar Action and the Camp Action.

[44] To succeed in the Kosikar Action, Ms. Katz must establish that the Defendant holds the title to the Property in trust for her. This involves consideration of the following legal principles.

a) A presumption of a resulting trust arises where the party who holds legal or equitable title to property was the recipient of a gratuitous transfer and gave no value for it. If the person who holds title does not rebut the presumption, then they are obliged to return it to the person who gave value: *Kerr v. Baranow*, 2011 SCC 10, at paras. 19-20; *Pecore v. Pecore*, 2017 SCC 17, at para. 20.

b) This presumption of a resulting trust rests on the principle that equity presumes that parties intend to bargain, rather than to gift: *Kerr*, at para. 19, citing *Pecore*, at para. 24.

c) The party claiming that a gratuitous transfer has been made has the burden of proving that the grantor intended to make a gift: *Kerr*, at para. 19; *Pecore*, at para. 25. This must be shown on a balance of probabilities: *Pecore*, at para. 43.

[45] To determine whether the presumption has been rebutted, the trial judge must consider all of the evidence relating to intent: *Pecore* at para. 55.

[46] To prove a claim in defamation, the following principles apply:

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a) The plaintiff must establish that: the impugned words were defamatory; the words referred to the plaintiff; and the words were published (i.e. communicated) to at least one person other than the plaintiff: *Grant v. Torstar Corp*., 2009 SCC 61, at para. 28.

b) If the above elements are established on a balance of probability, falsity and damage are presumed, and the onus shifts to the defendant to establish a defence: *Grant*, at para. 28.

c) Defamation is a strict liability tort. The plaintiff is not required to show that the defendant was careless or intended to cause harm: *Grant*, at para. 28.

[47] In her Response to Counterclaim, Ms. Katz argues that her words were not defamatory but that, if they were, she is not liable because they were true or fair comment. Thus, the success of one party or the other in the Camp Action or the Kosikar Action could have direct bearing on the Counterclaim.

[48] The situation in relation to the Lawyer Action is very different. There are material differences in the parties, claims and issues between the Kosikar/Camp Actions and the Lawyer Action which cause me to conclude that they do not pass the first part of the *Merritt/Shah* test.

[49] First, the defendants in the two actions are different. The Lawyers are not parties to the Kosikar Action or the Camp Action, and, as explained later in these Reasons, it is not appropriate to add the Lawyers as parties to the Kosikar Action.

[50] Second, the issues raised in the two trial proceedings are materially different. The Kosikar Action relates to whether there was a gift. The Lawyer Action relates to whether the Lawyers breached a fiduciary duty to the Plaintiff or were negligent.

[51] To succeed in her claim against the Lawyers, the Plaintiff must show that: (a) the relationship between her and the Lawyers was one which created fiduciary obligations or a duty of care to her; (b) the Lawyers breached their fiduciary duty or duty of care; and (c) the breach of fiduciary duty or negligent breach of duty of care

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resulted in loss to the Plaintiff. These issues require different legal considerations and different evidence than what is needed to prove the Kosikar/Camp Action claims.

[52] Third, the witnesses for the two actions will be materially different.

[53] In *TNR Gold Corp. v. MIM Argentina Exploraciones S.A*., 2011 BCSC 243, the defendants sought an order combining two actions. In the first action, the plaintiff mining companies alleged that the defendant mining companies unilaterally inserted a term into a contract and asked the Court to rectify the contract or find a breach of an implied term: *TNR Gold Corp.*, at paras. 13-15. The plaintiffs also commenced what the court referred to as "the Solicitor's Action" against their law firm: *TNR Gold Corp.*, at para. 24. The Court dismissed the application to have the actions heard together, finding that "the legal issues between the parties in that lawsuit are quite different from those existing between the plaintiffs and the defendants in this action": *TNR Gold Corp*., at paras. 47, 50.

[54] I come to a similar conclusion in this case. In my view, the legal issues in the Kosikar and Camp Actions are significantly different than those raised in the Lawyers Action.

[55] In concluding that the Lawyer Action lacks commonality with the Kosikar/Camp Actions, I have considered the Plaintiff's argument that the proposed amended pleading supports the prospect for determining joint liability as between the respective parties. This was held to be a factor in favour of granting an application to have two actions tried together in *Trustee in Bankruptcy of Mannix Resources Inc. v. Mondial Corp. et al*, 2006 BCSC 170 [*Mannix*], at paras. 3-5, 11.

[56] I do not accede to this argument. Even if the Plaintiff was to amend her Notice of Civil Claim in accordance with the proposed amended pleading (which she has not committed to doing), the proposed amendments do not disclose a claim that has any reasonable prospect of success.

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[57] As the court held in *Robson Bulldozing Ltd. v. Royal Bank of Can*., 1985 CanLII 432 (B.C.S.C.) at para. 8, “joinder” cannot be granted in respect of proposed pleadings which do not disclose a cause of action.

[58] The Plaintiff is required to plead material facts necessary to support all of the elements of a cause of action. If a material fact is omitted, a cause of action is not effectively pleaded and the claim will fail to disclose a reasonable cause of action: *Testar Estate v. Leslie*, 2023 BCSC 611, paras. 29 – 34.

[59] I agree with the Defendants that to succeed in a claim for “knowing assistance” in breach of trust, the Plaintiff must establish: (a) the existence of a trust involving others; (b) that the trustee of that trust perpetuated a dishonest or fraudulent breach of trust; and (c) that the defendant, stranger to the trust, participated in and had knowledge of the dishonest and fraudulent breach of trust by the trustee: *Gold v. Rosenberg,* 1997 CanLII 333 (SCC), [1997] 3 S.C.R. 767 at para. 34. This test was recently cited in *Wood v. Bevan*, 2024 BCSC 1401, at para. 52.

[60] The Plaintiff is thus required to plead material facts establishing: (a) the existence of a trust in respect of which Mr. Kosikar was trustee; (b) dishonest or fraudulent breach of such trust by Mr. Kosikar; and (c) that the Lawyers had knowledge of and participated in such breach. She has not done so.

[61] Ms. Katz has not pleaded a breach of trust in the Kosikar Action which is capable of anchoring a claim for knowing assistance against the lawyers. The only trust that is alleged to exist between Ms. Katz and Mr. Kosikar relates to the Property which is held by Mr. Kosikar. The breach of trust by Mr. Kosikar which Ms. Katz proposes to add, is his refusal to transfer title of the Property to the Plaintiff. On this point, I reject the Defendants’ assertion that this claim is legally flawed because a resulting trust does not arise unless and until the court declares it exists. The *Leclair* case which they rely on concerns a constructive trust, and not a resulting trust.

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[62] However, even if I reject the Defendants' argument on this point, the proposed breach of trust claim in the Kosikar Action falls short as it does not allege that Mr. Kosikar's conduct has been dishonest or fraudulent. Rather, it alleges that the ongoing failure to return the Property constitutes the breach of trust. The claim does not allege - nor could it allege – that the Lawyers participated in Mr. Kosikar's failure to return the Property. Only Mr. Kosikar can return the Property.

[63] While the Plaintiff seeks to amend her Notice of Civil Claim in the Kosikar Action to allege that the Lawyers knowingly assisted Mr. Kosikar in a 'scheme' to obtain the Property, knowing assistance in a scheme is not a cause of action, nor does it constitute any element of the cause of action. The Plaintiff has not plead material facts that could establish a claim for knowing assistance in a breach of trust.

[64] In conclusion, the Plaintiff has failed to meet the first part of the *Merritt/Shah* test. In my view, there is insufficient nexus between the parties, disputes, and claims in the Kosikar/Camp Actions on the one hand, and the Lawyer Action on the other hand.

[65] I decline to order that the Lawyer Action be tried at the same time as the Kosikar/Camp Actions.

C. Balance of Convenience

[66] Even if I was to conclude that the Plaintiff had met the first part of the *Merritt/Shah* test, I would still reject the application on the second part of the test, which relates to the balance of convenience.

1. Cost and Time Savings

[67] The parties agree that the Kosikar Action alone will require about 4-5 days of trial time, but disagree on the amount of trial time for the Lawyer Action and how much time will be saved if the proceedings are tried together.

[68] The Plaintiff submits that the Lawyer Action will take 4 to 5 days if it is heard on its own, while the joint Kosikar/Lawyer trial will take only 6 days, yielding a net

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savings of about 2 to 4 days. The Defendants submit that the Lawyer Action will take 10 to 15 days on its own, and the combined Kosikar/Lawyer trial "will at least double and may triple the trial time required to adjudicate the issues". I find both the parties' estimates to be unreliable.

[69] First, insofar as the standalone Lawyer Action is concerned, I find the 10 to 15 day estimate of the Defendants to be more realistic. Based on the nature of the issues raised, and how long it took the parties to argue the relatively straightforward applications before me (2.5 days), it is highly unlikely that they could complete a lawyers negligence trial in anything less than 2 weeks. However, I place no reliance on the Defendants' combined trial estimates. If they are using the Kosikar Action (which they agree will require about 4 to 5 days) as the baseline to "double" or "triple", it would mean that the combined Kosikar/Lawyer trial could take from 10 to 15 days – which places it squarely within the time estimate they provide for the standalone Lawyer's Action trial, with no increase in time to account for the Kosikar Action issues. If they are using the Lawyer Action as the baseline, then double or triple that amount would put the combined trial anywhere from 20 to 45 days. There is no rationale provided that would support such an exorbitant increase.

[70] Second, neither party has accounted for the Camp Action. No submissions were made on how long the Camp Action would take on its own or in conjunction with the Kosikar Action. However, based on the issues raised and the time estimates provided for the Kosikar Action, I find it reasonable to infer that the Camp Action will add another 2 to 3 days to the Kosikar Action, such that the combined Kosikar/Camp Trial will take approximately 7 to 8 days to complete. Any discussion about time savings needs to use this figure as the baseline trial estimate.

[71] If the Lawyer Action is heard with the Kosikar/Camp Actions, I anticipate that the total trial time will be approximately 14 to 21 days. In other words, the parties might at most save 2 to 3 days of trial time if the matters are heard together. This is because of the limited duplication in the evidence between the two sets of trials.

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[72] The Defendants' estimate of legal costs for the various actions is consistent with the "rough and ready" estimate of $10,000 per trial day. Using this approach, a decrease of 2 to 3 overall trial days translates to about $20,000 to $30,000 in cost savings. While this figure is not insubstantial, its significance is tempered by the impact on Mr. Kosikar and the Lawyers of having to sit through the trial of the other parties.

[73] The Lawyers have nothing to do with the Camp Action and play only a small role as witnesses to the issues raised in the Kosikar Action. Yet they would be forced to sit through an additional 7 to 8 days of trial if the actions are all heard together. This translates to a cost burden of about $70,000 to $80,000 in legal fees. In addition, Mr. Kosikar, who also plays only a small role as a witness in the Lawyer Action, would have to sit through 7 to 13 days of trial time, which translates to $70,000 to $130,000 in legal fees.

[74] In addition, I do not foresee any tangible savings in pre-trial procedures if the Lawyer Action is heard with the Kosikar/Camp Actions. The current iteration of the Rules only requires a trial management conference in specific situations, such as for matters that exceed 15 days of trial: see Rule 12-2. There is no evidence that the Kosikar/Camp matter would require a trial management conference; nor would the Lawyer Action. However, the parties would likely have to attend a trial management conference if the matters were all set to be heard together, as they would likely surpass the minimum threshold of 15 days. This would add to the costs, rather than reduce them.

[75] Similarly, the amount of time required for examinations for discovery would not appreciably decrease, as the witnesses in the Lawyer Action will be focused on addressing different issues than those raised in the Kosikar/Camp Actions. For the same reasons, I also do not see any tangible savings in terms of the expert and witness fees.

2. Prejudice Due to Delay

[76] All actions are currently at the same stage of proceedings.

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[77] If the Actions are all set to be heard together, I foresee a significant and unjustifiable delay in the resolution of the issues raised in the Kosikar Action and the Camp Action. Based on current trial availability in Vancouver, a 7 to 8 day trial could be heard within a year. However, it is much more challenging to secure early trial time for matters exceeding 15 days, which would likely result in a delay of another year before the combined trials can be heard. This is particularly concerning in relation to the Counterclaim, which raises issues of reputational harm due to alleged defamation.

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3. Inconsistent Findings

[78] The concern about inconsistent findings is perhaps the strongest point in the Plaintiff's favour. However, it is not significant enough to outweigh the other factors and considerations.

[79] The Plaintiff argues that that there is overlap between the Kosikar Action and the Lawyer Action in relation to the question of a gift and the lack of independent legal advice. I agree that there will likely be some overlap in the evidence on this issue, but it is not substantial.

[80] To that end, the following comments of Justice Ballance in *Johnston Estate v. Johnston*, 2016 BCSC 1388, aff'd at 2017 BCCA 5, have application in this case:

> [86] In turning my mind to the considerations outlined in *Schaper* and *O'Mara* and the other factors germane to the analysis, I conclude that, while features of the factual matrix are relevant to the Proof of Will Action and David's other claims, the issues are not so tightly interconnected as to make separate trials, at different times and before different judges, fraught with extra expense or inefficiencies, or overly prejudicial to David. The issues relevant to the Proof of Will Action are sufficiently distinct from the issues raised in David's remaining claims.

[81] In *Johnston Estate*, the defendant brought an action against his deceased father's lawyer, as well as others, alleging undue influence and misrepresentation. The lawyer brought an application to have the claims against him severed and stayed, pending resolution of the remaining issues in the litigation. Although the

application to sever in *Johnston Estate* was brought under Rules 22-5(6) and (7) – versus the Plaintiff's reliance here on Rule 22-5(8) – the case is still instructive.

[82] There is no dispute that Ms. Katz did not get independent legal advice before she transferred the Purchase Funds to the Lawyers' trust account. Ms. Katz argues that because she did not have independent legal advice, she did not realize the legal implications of her actions, including giving the Purchase Funds to the Lawyers. As such she did not form the requisite intent for a gift. I agree with Ms. Katz that insofar as she is advancing this argument, some evidence about her relationship and meetings with the Lawyers may be relevant to the Kosikar Action. However, even if the court was to find in the Kosikar Action that Ms. Katz may have benefitted from independent legal advice, that is but one factor amongst many in determining whether she formed the requisite intent.

[83] Further, the question of how Ms. Katz's lack of independent legal advice may have affected her intention to gift the Property raises a different issue than that which arises in the Lawyer Action. In the Lawyer Action, the focus is on what duty the Lawyers may have owed to the Plaintiff, including whether they should have referred the Plaintiff out for independent legal advice.

[84] Thus, I am not swayed that there is a substantial risk that separate trials will result in inconsistent findings on identical issues.

4. Conclusion

[85] In summary, even if I was to find sufficient commonality as between the Kosikar/Camp Actions and the Lawyer Action in terms of their claims, disputes, and relationships, I do not find them to be so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense. The balance of convenience weighs against granting the Joint Trial Applications.

[86] The Joint Trial Applications are dismissed.

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III. Applications to Add Parties

[87] In the event that I dismiss the Joint Trial Applications, the Plaintiff seeks to have parties from one proceeding added into the other.

[88] The Applications to Add Parties were both filed on April 18, 2024. The relief sought in the Kosikar Action is as follows:

> 1. That Catrina M. Chisholm and Kahn Zack Ehrlich Lithwick be added as defendants in the within action and that the style of cause should be amended accordingly;
> 2. The plaintiff may file an Amended Notice of Civil Claim in the form attached as Schedule "A"; and
> 3. Costs.

[89] The relief sought in the Lawyer Action is identical, except that Term 1 seeks to add Mr. Kosikar as a defendant.

[90] At the start of the hearing, the Plaintiff sought to adjourn both the Applications to Add Parties, with the view to setting them for hearing on another day. I denied the adjournment request.

[91] Midway through the hearing, the Plaintiff raised the issue again, this time asking that Term 2 on both Notices of Application be adjourned. Counsel advised that they wished to abandon the applications to amend the pleadings on the grounds that: (1) pursuant to Rule 6-1(1)(a), the Plaintiff has “one free amendment as of right” and does not require leave of the Court; and (2) counsel is unsure of what further amendments they wish to make, and the Plaintiff requires additional time to consider her position.

[92] The Defendants oppose the adjournment of the relief at Term 2. They say that to prevent an abuse of process, I should pronounce an order preventing the Plaintiff from amending the pleading pursuant to Rule 6-1(1)(a), without obtaining leave of the Court. I do not agree that such an order should be made. First, the Defendants have not provided me with any authority that would support the Court making this order. In my view, it would be unjust for me to pronounce such an order

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in a pre-emptive manner and on the basis of the material before me. Second, there are other legal remedies available to the Defendants if the Plaintiff makes amendments which the Defendants say are duplicative or an abuse of process. For example, they could seek to have those pleadings struck on grounds of *res judicata* or abuse of process.

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[93] However, I also do not consider it appropriate to grant the requested adjournment. Rather than adjourning the relief sought at Term 2, it is appropriate to dismiss it as abandoned.

[94] The Plaintiff's position regarding the application to add the parties also evolved over the course of the 2.5 day hearing. By the conclusion of the hearing, the Plaintiff conceded that her case to add Mr. Kosikar to the Lawyer Action was weak. Further, the Plaintiff now sought to add the Lawyers to the Kosikar Action for the narrow issue related to independent legal advice. More particularly, the Plaintiff conceded that both the Kosikar Action and the Lawyer Action raised separate issues, with the exception of the issues set out in the Notice of Civil Claim in the Lawyers Action at paragraphs 26, 27, and 45-48 of Part 3: Legal Basis. The Plaintiff argues that these specific paragraphs concern issues in common between the two proceedings, such that those issues should be joined into the Kosikar Action.

[95] Rules 6-2(7)(b) and (c) permit the court to add parties. The relevant portions of Rule 6-2(7)(b) are set out below:

> **Adding, removing or substituting parties by order**
>
> **…**
>
> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> …
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[96] I will first address the main issue, which is the application to add the Lawyers to the Kosikar Action.

[97] The Plaintiff relies first on Rule 6-2(7)(b). It is submitted that the Lawyers ought to have been originally joined as parties to the Kosikar Action, and that their participation is necessary to ensure that the issues related to joint and several liability are resolved. This argument is without merit.

[98] Subrule (b) has been interpreted narrowly: *Madadi v. Nichols*, 2021 BCCA 10, at para. 21. To succeed under this provision, Ms. Katz must establish either that it is necessary to join the Lawyers to remedy a defect in the Kosikar pleadings; or that their participation in the Kosikar Action is necessary in the sense that the issues raised cannot be adjudicated without them: *Madadi*, at para. 21; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15.

[99] The word ‘proceeding’ in subrule (b) refers to the proceeding as it existed before the proposed new party is joined: *Canada (Attorney General) v. Aluminum Co. of Canada Ltd.,* 10 B.C.L.R. (2d) 371, 1987 CanLII 162 (B.C.C.A.) at 10; and *Surrey (City) v. British Columbia (Ministry of Public Safety),* 2024 BCSC 506 at para. 18.

[100] The Plaintiff has failed to meet the test under rule 6-2(7)(b). I agree with the Defendants that there is no basis to argue that the Lawyers should have been added to the Kosikar Action at the outset, or that their presence is necessary to adjudicate the claim. The Kosikar Action is a standalone claim of resulting trust. All issues raised in it can be effectively adjudicated without adding the Lawyers as parties.

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[101] This brings me to the Plaintiff's argument under Rule 6-2(7)(c). This rule has broader application. To succeed, the applicant must establish that there is a question or issue between her and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. As noted by the Court in *Madadi*, at para. 22, this is a low threshold.

[102] The Court in *Madadi* articulated a two-part test under Rule 6-2(7)(c). The first part of the test requires that the Plaintiff establish "a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant": *Madadi*, at para. 22. The "real and not frivolous" analysis engages considerations similar to those applicable to striking pleadings pursuant to Rule 9-5(1)(b): *Madadi*, at para. 22.

[103] If this first requirement is met, then under second part of the test, the plaintiff must establish that it would be just and convenient to decide this issue between the parties in the proceeding: *Madadi*, at para. 24. This is a discretionary decision and may entail the consideration of evidence: *Madadi*, at para. 24. Some of the factors to consider are: the extent of the delay; reasons for the delay; the applicable limitation period and if it has expired; degree of prejudice caused by the delay; and the extent of any connection between the existing claim and the parties to be added: *Madadi*, at para. 24, citing *Letvad v. Fenwick,* 2000 BCCA 630, at para. 29, and *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, 19 B.C.L.R. (3d) 282, 1996 CanLII 2022 (B.C.C.A.) at para. 67.

[104] I pause here to note that the existence of a limitation defence is an important factor, but it is not determinative. Even if the defendant may lose a limitation defence by addition of a party after the limitation period has expired, the question remains as to whether it will nevertheless be just and convenient to add the party to the proceeding: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.,* 2010 BCCA 329, at para. 47, as cited in *Madadi*, at para. 25.

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[105] Determining whether to add a party "requires no assessment of the relative chances of success other than determining that the claim is not 'entirely frivolous'': *Mannix*, at para. 8.

[106] The threshold requirement on the first part of the test is usually met on the basis of the proposed pleadings: *Madadi*, paragraph 23.

[107] The application under Rule 6-2(7)(c) fails at this first stage. For the reasons set out earlier, I find that the Plaintiff's proposed claims against the Lawyers are frivolous. Adding the Lawyers as parties to the Kosikar Action would also create an abuse of process by adding unnecessary and contingent claims, which already exist, to another proceeding. It would also needlessly complicate the Kosikar Action in which the core issue can be efficiently determined without the Lawyers participation.

[108] In coming to the conclusion, I have considered the authorities relied on by the parties, including *Mannix*, which I find distinguishable. In *Mannix*, the plaintiff, a bankruptcy trustee, sought to add a lawyer and law firm to its civil claim. The plaintiff alleged that the lawyer was one of the "architects" of a fraud scheme that also involved the other defendants. The plaintiff further alleged that the firm was vicariously liable for the lawyer's acts and omissions: *Mannix*, at paras. 4, 11. The Court found it would be just and convenient to add the lawyer and firm as defendants: *Mannix*, at para. 26. Unlike the case before me, there was no separate existing action against the lawyer in *Mannix* and adding the parties did not add any further "complex issues": *Mannix* at para. 26.

[109] The *Gengenbacher v. Smith,* 2016 BCSC 1164*,* case is also distinguishable. In *Gengenbacher*, the Court granted an application to add the plaintiff's former lawyer and the lawyer's firm as defendants. In the original claim, the plaintiff alleged that an investment advisor caused him to lose $600,000. Seeking to add the lawyer and firm, the plaintiff further alleged that the proposed additional defendants breached a duty of care towards him in the course of representing him in a settlement for a motor vehicle accident, and subsequently investing the settlement funds. The court found that the lawyer should have properly been named as a party

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when the claim was filed, as “it seems reasonably clear that most if not all the dealings” took place between the lawyer, acting as the plaintiff’s agent, and the investment advisor: *Gengenbacher*, at para. 25. There was also no other action existing against the Lawyers in *Gengenbacher*, unlike in the case before me.

[110] Further, in contrast to *Gengenbacher*, where there was no prospect of retrieving the $600,000, Ms. Katz maintains the possibility of retrieving the Property that is the subject of the Kosikar Action. Mr. Kosikar continues to hold the Property and the CPL is the only encumbrance on it. If the court were to find that Ms. Katz did not intend to gift the Property to Mr. Kosikar, then the Plaintiff is left with a straightforward claim of resulting trust against Mr. Kosikar.

[111] The decision in *1014864 Ontario Ltd. v. 1721789 Ontario Inc*. 2010 ONSC 3306, also does not assist the Plaintiff. The plaintiff in *1014864 Ontario Ltd.* sued their neighbour for nuisance for allegedly putting up a sign without a permit. The neighbour then sued the vendor who sold them the property, as well as their lawyer, for failing to ensure the sign was lawful and failing to inquire about planned or pending expropriations. The Court ordered that the action against the lawyer and the vendor be heard together, given the overlap in damages claimed. Here, there is no overlap in the damages Ms. Katz seeks against the Lawyers and the Property, cash, and personal property she seeks from Mr. Kosikar. Furthermore, as explained below, a resolution in the Kosikar Action could render the Lawyers Action moot or significantly narrow the issues. This was not the case in *1014864 Ontario Ltd.*

[112] In conclusion, I find that the Plaintiff has failed to satisfy the requirement under Rule 6-2(7)(b) or (c) with respect to the application to join the Lawyers into the Kosikar Action. Neither the existing allegations in the Kosikar Action, or the proposed amendments, disclose any sustainable claims against the Lawyers. Consequently, that application is dismissed.

[113] I come to the same conclusion regarding the Plaintiff’s request that only the relief sought in the in the Lawyers Action at paragraphs 26, 27, 45-48 under Part 3: Legal Basis should be joined into the Kosikar Action. Acceding to this request would

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mitigate against judicial economy and create the very problem that the Plaintiff said she was trying to avoid by seeking the order to have the actions heard together. Having only part of the Lawyer Action proceed with the Kosikar Action, and the remaining issues determined at a different time, would compound concerns about inconsistent findings of fact and fragmenting of proceedings. This is the worst of all options.

[114] I turn to the application to add Mr. Kosikar as a defendant to the Lawyer Action. Even without the Plaintiff's concession that the case to add Mr. Kosikar to the Lawyers Action is weak, I would not accede to this request.

[115] There is simply no factual or legal basis in the existing Lawyer Action that would support an application under Rule 6-2(7)(b) or (c). Nor has the Plaintiff articulated any legal or factual basis upon which a claim against Mr. Kosikar could be sustained in the Lawyer Action on the basis of the proposed pleading. In the proposed pleading against Mr. Kosikar, the Plaintiff relies on what she says is an admission by the Lawyers that they acted as Mr. Kosikar's agents. On the strength of this, she argues that the law of agency applies, such that the Plaintiff has a negligence claim against Mr. Kosikar in his capacity as the principal providing instructions to the Lawyers. Putting aside any concerns about the expiry of a limitation period (which is in dispute), the allegations against Mr. Kosikar as proposed are frivolous and unsustainable.

[116] The application to add Mr. Kosikar to the Lawyer Action is also dismissed.

IV. Application for a Stay

[117] The Lawyers apply to stay the Plaintiff's action against them on the grounds that the claims advanced are contingent and premature, and will be rendered moot by the adjudication of the Plaintiff's claims in the Kosikar Action.

[118] The Plaintiff initially opposed this application in its entirety. But by the close of the hearing, the Plaintiff conceded that a partial stay of the Lawyer Action should occur, such that only the relief in relation to paras. 26, 27, and 45-48 of the Lawyer

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Action claim should proceed. These paragraphs all relate to the issue of independent legal advice ("ILA"). However, as the Plaintiff couched this position in the context of the application to have the proceedings heard together and the application to add parties, I have considered the entire application for a stay on its merits, without regard to the concession made by the Plaintiff.

[119] For the reasons that follow, the application for a stay of the Lawyer Action pending resolution of the Kosikar Action is allowed.

[120] The court has jurisdiction to stay proceedings by operation of Rule 9-5(1); s.8(2) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253; and its inherent jurisdiction to control its own process: *Johnston Estate,* at paras. 39-41, 91.

[121] In exercising its discretion regarding whether to grant a stay, the court must weigh the potential benefits and prejudice associated with the stay. The court must consider if issues in other related litigation will have a material or conclusive impact on the issues in the action sought to be stayed, and other factors which are relevant to issues of fairness and prejudice. Those factors include: delay; balance of convenience; irreparable harm if the stay is granted or if it is denied; the motivation of the defendants for seeking a stay; the conduct of the parties; and the strength of the applicant's position: *Peh v. The Owners, Strata Plan LMS 3837*, 2008 BCSC 291, at paras. 60 – 67.

[122] If the outcome of another proceeding could have a material impact on the case, could "substantially reduce the issues to be determined" or could render the issues moot, then it may be appropriate to grant a stay pending resolution of that related proceeding: *Peh*, at para. 66.

[123] A stay will also be appropriate to avoid unnecessary inefficiency and inconsistent findings: *Roeder v. Lang Michener Lawrence & Shaw et al.,* 2004 BCSC 80, at para. 33.

[124] Generally, it is preferable for claims of negligence against a lawyer to be heard after there has been a determination in any underlying case: *Zymtech*

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Development Inc. v. Sports Central Enterprise Ltd., 2004 BCSC 309, at para. 23 [*Zymtech*]; *Robak Industries Ltd. v. Gardner*, 2006 BCSC 1628, at para. 7. This is because of the unique nature of professional negligence or breach of duty cases: *Zymtech* at para. 23.

[125] Plaintiff's Counsel submits that the general rule set out in *Zymtech* is not a "hard and fast" principle and notes that, in both *Mannix* and *Gengenbacher*, the Court cited *Zymtech* but went on to nevertheless allow lawyers to be added to the existing claims. I agree that the rule in *Zymtech* is not an absolute rule, and exceptions are possible. However, as I have explained above, neither *Mannix* nor *Gengenbacher* assist the Plaintiff in this case.

[126] Furthermore, the professional liability claim in the Lawyer Action is more complex than the issues in the Kosikar/Camp Action. Hearing the simpler matters first prevents unnecessary complication: *Zymtech*, at para. 24. It also serves the object of the Rules to "secure the just, speedy and inexpensive determination of every proceeding on its merits": Rule 1-3.

[127] I agree with the Defendants that the existing and proposed claims against the Lawyers are contingent upon adjudication of the existing Kosikar Action. To that end, this case is similar in facts to *Johnston Estate.*

[128] Justice Ballance noted the following in *Johnston Estate*:

> [85] The validity of the Impugned Wills is the centerpiece issue of this litigation. If they are not valid, David will inherit the entirety of his father's estate, including the Family Residence, in one of two ways: either pursuant to his father's 2007 will or by application of the laws of intestate succession. In either scenario, substantially all of David's other claims will fall by the wayside, leaving no claim to advance, except possibly for the negligent infliction of mental suffering and to recover the legal costs David incurred in successfully defending the Proof of Will Action. These factors also weigh in favour of severing the Proof of Will Action from the balance of David's claims.

[129] Those comments are apt in this case, and support my view of the benefits of granting the stay.

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[130] There are significant potential benefits of granting the stay of the Lawyer Action pending the trial of the Kosikar Action. These relate to time savings and costs savings. If the Purchase Funds were not a gift, then Ms. Katz will be able to obtain the Property. If they were a gift, she will lose in her bid to have the Property transferred to her. Either way, resolution of the Kosikar Action will likely do away with much of the Lawyer Action, which will largely be reduced to a dispute over legal costs.

[131] This narrowing of the issues mitigates the concern that a stay of the Lawyer Action could result in a delay of that proceeding coming to full resolution. Once the Kosikar Action is concluded, that determination will help to significantly narrow the remaining issues in the Lawyer Action. Narrowing the issues remaining in the Lawyer Action will have a direct impact downstream – it will reduce the number of days required for trial of the remaining issues in the Lawyer Action, which in turn will result in earlier trial dates.

[132] Further, there is no evidence of irreparable harm if the stay is granted. While there is some risk of inconsistent findings of fact, I find that this is minimal. As discussed earlier, there is little cross over between the issues raised in the Lawyer Action and the Kosikar/Camp Actions.

[133] I also do not see any *mala fide* motive on the part of the Defendants when seeking a stay.

[134] In the result, when balancing the potential benefits of granting the stay, versus the potential prejudice, I find that the facts of this case weigh overwhelmingly in favour of exercising my discretion to grant the stay.

V. Orders Made

[135] I order as follows:

1. The relief sought at Term 1 of the Notice of Application filed by the Plaintiff on April 18, 2024 in SCBC File No. S228836 (Kosikar Action) and Notice

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of Application dated April 18, 2024 in SCBC File No. S234520 (Lawyer Action) is dismissed, and the relief sought at Term 2 of these Applications, is dismissed as abandoned.

2. The Notice of Application filed by the Plaintiff in SCBC File No. S228836 (Kosikar Action) on April 18, 2024 and Notice of Application in SCBC File No. S234520 (Lawyer Action), filed on April 18, 2024 is dismissed.

3. The relief sought at Terms 1 and 2 of the Notice of Application filed by the Defendants Catrina M. Chisholm and Kahn Zack Ehrlich Lithwick, in SCBC File No. S234520, on March 1, 2024, is granted.

VI. Costs

[136] If the parties are unable to resolve the question of costs, they may seek leave of the Court to make submissions.

"Shergill J."

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