IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kapila v. Merit Interior Designs (Duncan) Ltd.,*
2023 BCSC 1076

Date: 20230623
Docket: S214076
Registry: Vancouver

2023 BCSC 1076 (CanLII)

Between:

Raj Kumari Kapila

Petitioner

And

Merit Interior Designs (Duncan) Ltd.

Respondent

-and-

Docket: S183292
Registry: Vancouver

Between:

Merit Interior Designs (Duncan) Ltd.

Plaintiff

And

Rajinder Parsad Kapila

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for Rajinder Parshad Kapila:	R.J. Morton J. Jutras
Counsel for Merit Interior Designs (Duncan) Ltd.:	D.P. Church, K.C. E. Dolinsky

Place and Date of Hearing:	Vancouver, B.C. January 18, 2023 March 9, 2023
Place and Date of Judgment:	Vancouver, B.C. June 23, 2023

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I. INTRODUCTION

[1] This decision is concerned with the pleadings in two proceedings between Merit Interior Designs (Duncan) Ltd. ("Merit Duncan") and Rajinder ("Raj") Parshad Kapila, a minority shareholder and former employee of the company.

[2] Merit Duncan is a closely-held private company. It currently operates two stores in Duncan, one selling furniture and mattresses and the other appliances. Without meaning any disrespect, I will refer to the individuals involved in the business by their chosen names.

[3] The two proceedings are set for trial together starting November 20, 2023. They are:

a) a petition commenced by Raj in December 2017 alleging oppression and seeking relief against Merit Duncan under s. 227 of the *Business Corporations Act,* S.B.C. 2002, c. 57; and

b) an action commenced by Merit Duncan in March 2018 alleging fraud and breach of fiduciary duty and seeking damages against Raj (the "Merit Duncan Action").

[4] Raj applies to substantially rewrite his pleadings in both proceedings. Some of the proposed amendments are technical or stylistic in nature, and serve to define the issues more clearly. These amendments are largely unopposed by Merit Duncan. Some of the amendments are more substantive in nature, and give rise to issues based on limitation periods, delay and prejudice, as well as inconsistent pleading.

[5] Merit Duncan consents to an order that the petition proceeding be converted to an action. I will refer to the converted proceeding as the "Shareholder Action" to distinguish it from the Merit Duncan Action. Merit Duncan also consents to an order that Raj be substituted as the plaintiff in the Shareholder Action.

[6] Merit Duncan opposes amendments in the Shareholder Action that would add a claim in damages for wrongful dismissal which, it argues, is a new cause of action being advanced well after the limitation period expired. It also opposes the addition of a director and shareholder of the company as a defendant.

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[7] In the Merit Duncan Action, Merit Duncan opposes amendments to Raj's response to civil claim that would allege knowledge, approval and participation by the company's late founder and majority shareholder which, Merit Duncan submits, would add new allegations of wrongdoing against a dead man who can no longer defend himself. Merit Duncan also opposes amendments that would add a claim of set-off for wrongful dismissal and a plea of estoppel.

II. BACKGROUND

[8] For many years, Chanan ("Sandy") Singh Sandhu owned and operated a number of Merit Home Furniture stores on Vancouver Island. Sandy started Merit Duncan in 2001.

[9] Raj was a salesperson at the Nanaimo Merit store. Sandy appointed Raj to manage the first Merit store in Duncan when it opened in 2001.

[10] Sandy owned 50 shares of Merit Duncan, representing 50% of the company. Initially, the remaining shares were owned by Raj's mother, Raj Kamari Kapila, who was issued 40 shares, and Sandy's wife, Charn Kaur Sandhu, who was issued 10 shares.

[11] The first board of directors of Merit Duncan was Sandy, Charn and Raj.

[12] In 2008, Raj's mother transferred 25 of her shares to Raj, and 15 of her shares to Raj's wife.

[13] In 2014, Charn transferred all 10 of her shares to her son, Jeet Singh Sandhu. Jeet also became a director of the company in the place of Charn.

[14] Charn passed away on January 31, 2015.

[15] Jeet became more actively involved in the management of Merit Duncan in about 2017. In March 2017, KPMG, who had recently been appointed as Merit Duncan's accountants, reported that the company was not making any money. Under Jeet's direction, Merit Duncan investigated and discovered a number of issues with Raj's management of the business.

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[16] In May 2017, Sandy appointed Jeet's wife, Satinder Kaur Sandhu as his alternate director.

[17] On August 31, 2017, Merit Duncan notified Raj that it did not consider his shareholder's loan to the company valid.

[18] On October 24, 2017, Merit Duncan terminated Raj's employment as the manager of the Duncan store.

[19] On December 19, 2017, Raj filed a petition seeking relief against Merit Duncan under s. 227 of the *Business Corporations Act* on the basis the powers of the directors had been exercised in a manner oppressive to Raj as a shareholder of the company.

[20] In the petition, Raj alleged that he was one of the founders of Merit Duncan and that the original shareholders were aware of his beneficial interest in his mother's shares and agreed that each shareholder would be a director and he would operate the Duncan store.

[21] Raj alleged that the directors denied his shareholder loan and terminated his employment with the intent of ousting him from corporate governance and his earning capacity. Amongst other relief, he sought a direction that Merit Duncan compensate him for lost employment and provide a compensation package in an amount to be determined through agreement or arbitration.

[22] In its response to petition, Merit Duncan alleged that it became known to the company in April or May 2017 that Raj had failed to manage the business in a prudent and effective manner and that Raj had engaged in various unlawful acts,

including a double invoicing scheme, unauthorized cash sales and misappropriation of assets. Merit Duncan denied that the directors had any knowledge of these unlawful acts prior to April 10, 2017. Merit Duncan further denied any knowledge of the alleged shareholder loan.

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[23] On March 2, 2018, Merit Duncan commenced an action against Raj seeking damages for fraud, breach of fiduciary duty, breach of employment contract, unjust enrichment and rescission of the alleged shareholder loan.

[24] In the notice of civil claim, Merit Duncan alleged that, between April and May 2017, it discovered that Raj had mismanaged the business and engaged in various unlawful acts, including the double invoicing scheme, unauthorized cash sales and misappropriation of assets.

[25] In his response to civil claim, Raj denied all of the facts alleged in the notice of civil claim and specifically denied the allegations of fraud. Raj further alleged that, if the acts alleged under the heading of ‘Fraud’ “existed”, which he denied, then he acted under the specific instructions of Merit’s board of directors and its shareholders, whom he alleged had full knowledge of all material facts.

[26] Merit Duncan applied for an order that the petition be referred to the trial list and joined for trial together with the notice of civil claim. Master Bouck granted the order on May 29, 2018, finding that “the issue of [Raj’s] alleged fraud permeates both the petition and the [notice of civil claim]”. Master Bouck continued:

> [2] It is nonsensical that on the one hand the court is asked to find that the actions of the directors have been wrong and that monies ought to have been paid or repaid to [Raj], but at the same time ignoring the fact that [Raj] might have obtained those monies by fraud in the first place. There is simply too much intertwining of the two actions to allow the petition to proceed independently of the action.

[27] Despite this order, Raj applied independently in the petition proceeding for relief under section 227 of the *Business Corporations Act,* including an order removing Sandy as a director, an order restraining Merit Duncan from engaging in any transactions outside the ordinary course of business, a forensic accounting, an order appointing a valuator to determine the value of the business or the shares and

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an order that the disputed amount of the shareholder's loan be paid into court or a trust account.

[28] On June 20, 2018, Justice Bracken denied the relief sought under section 227 of the *Business Corporations Act*, citing Master Bouck's order that the petition be put over to the trial list to be heard with the action and agreeing with her assessment that Raj's allegations of oppression could not be determined separately from Merit Duncan's allegations of fraud and unlawful conduct.

[29] Sandy passed away on December 20, 2018.

[30] The proceedings progressed slowly following the decision by Justice Bracken in June 2018. Both parties changed counsel, Raj more than once.

[31] Merit Duncan issued a list of documents in February 2020. An order was necessary for Merit Duncan to obtain a list of documents from Raj. Merit Duncan sought to examine Raj for discovery on a number of occasions, which for various reasons did not proceed. Merit Duncan issued several notices to admit and, based on his responses, obtained leave of the court to deliver interrogatories to Raj.

[32] The trial of the two proceedings was originally set down for August 2022. In April 2022, Raj delivered an application seeking, among other things, to amend the petition. He did not proceed with the application. In July 2022, the trial was adjourned. It was eventually reset to the current trial date of November 20, 2023.

III. ANALYSIS

A. The Form of the Draft Amended Pleadings

[33] Raj seeks leave to file amended pleadings in the form of the schedules attached to his notices of application. The schedules to not identify the amendments in accordance with Rule 6-1(3). Instead, the schedules would replace the existing pleadings in their entireties. This is because Raj's counsel, who did not draft the original pleadings, says he has determined that the pleadings need to be completely rewritten to put the real issues in dispute and comply with the guidelines for proper pleadings.

[34] Merit Duncan's counsel prepared schedules which identify the amendments to which their client objects. In my view, Merit Duncan should not have been put to the task of identifying the proposed amendments.

[35] It makes sense, for readability purposes, in cases where amendments have been substantial, for a party to seek a consent order or leave of the court to file a clean document without underlining and hash marks. However, effort also needs to be made to work with an existing pleading. It is rare that a pleading must be replaced in its entirety to comply with the objectives of proper pleadings. Starting "fresh" at any stage of the proceeding increases the time and expense for all parties. While it may seem tedious in a case like this, it is still necessary for a party seeking to substantially amend their pleadings to identify all of the proposed amendments in accordance with Rule 6-1(3). Opposing parties and the court should be able to see clearly what has changed without conducting their own line-by-line analysis.

[36] While I would not deny the current applications for non-compliance, the concern is relevant to costs. A better practice in a case like this would be for counsel to deliver a properly marked up draft of the proposed amended pleading, together with a clean copy and then to obtain consent, or an order granting leave, to file the fresh pleading once the amendments have been resolved.

B. The Test for Amendments

[37] Generally, amendments will be granted liberally, to ensure that the real issues between the parties are identified and tried. Justice G.P. Weatherill summarized the general principles in *Peterson v. Seymour Arm Hotel & Restaurant,* 2014 BCSC 1531, at para. 37:

> (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17.
>
> (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.

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> (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.* 2008 BCSC 719.
>
> (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.
>
> (e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.,* 2006 BCSC 1567.

[38] In this case, Merit Duncan argues that some of the amendments raise a new cause of action after the expiry of a limitation period and give rise to presumed and actual prejudice. Raj disputes that the impugned amendments raise any new cause of action or add anything that is truly new. He argues that there is no prejudice because the amendments arise from the same basic, albeit convoluted and imprecise, facts alleged in the original pleadings.

[39] In the alternative, Raj relies on s. 22(5) of the *Limitation Act*, S.B.C. 2012, c. 13, which authorizes the court to allow an amendment to raise a new claim even though a separate proceeding on that claim would be barred by the expiry of a limitation period:

> In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.

[40] The existence of a limitation defence is a relevant, but not determinative factor in deciding whether to allow an amendment that raises a new cause of action, since the effect of the amendment may be to extinguish that defence. In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, [1996] B.C.J. No. 234 (C.A.) and *Letvad v. Fenwick*, 2000 BCCA 630, the Court of Appeal identified the following factors to be considered on an application to add new parties or claims after the expiry of a limitation period:

> a) the extent of the delay;
>
> b) the reasons for the delay;

c) any explanation put forward to account for the delay;

d) the degree of prejudice caused by delay; and

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

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[41] In *Chouinard v. O'Connor*, 2011 BCCA 161, the Court of Appeal confirmed that this list of factors is not exhaustive. The overriding concern is whether it would be "just and convenient" to grant leave to amend the pleading.

C. Wrongful Dismissal Claim in the Shareholder Action

[42] Raj seeks to add a claim of wrongful dismissal to the Shareholder Action. The issues raised by these proposed amendments are whether they raise a new cause of action, and whether it would be just and convenient to allow the amendments even if they do raise a new cause of action.

i. Do the Amendments Raise a New Cause of Action?

[43] In *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, the Court of Appeal, at paras. 27-28, adopted both parties' suggested descriptions of a "cause of action", seeing "little difference" between them:

> a) every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court; and
>
> b) a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

[44] The Court held that an amendment does not raise a new cause of action simply because it "take[s] the cause of action from being one entirely in contract to being one also in tort", or where "a party merely pleads a new or alternative remedy based on the same facts already pleaded" (para. 31). More generally, the Court said that an amendment will not be taken to raise a new cause of action so long as it does not "change the substance of the issues" (para. 30).

[45] Wrongful dismissal is a shorthand expression for a claim in contract for a breach of an express or implied term of an employment contract that the employer

will provide the employee with reasonable or agreed notice of a termination of their employment, and damages in lieu of that notice. Common defences to a claim of wrongful dismissal include just cause for summary dismissal without notice and failure by the employee to mitigate their damages.

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[46] The petition that Raj filed in this proceeding on December 19, 2017, does not plead a claim for wrongful dismissal. The petition alleges an agreement between Raj and the original shareholders of Merit Duncan which included an agreement that Raj would manage the Duncan store. It does not allege an employment contract between Raj and Merit Duncan; nor does it allege that Merit Duncan breached a term of a contract by failing to provide reasonable notice of Raj's dismissal.

[47] While the petition seeks compensation for "lost employment", it does so in a shareholder oppression claim and the remedies for which a shareholder may make an application pursuant to s. 227 of the *Business Corporations Act.* Compensation is one of the available remedies, but with a view to bringing an end to the oppressive conduct. Subsection 227(3)(m) provides:

> (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of … make any interim or final order it considers appropriate, including an order …
>
> …
>
> (m) directing the company … to compensate an aggrieved person,
>
> [emphasis added]

[48] The legal grounds for compensation as a remedy for oppression are different from the legal grounds for damages as a remedy for breach of contract. The oppression remedy is concerned with reasonable expectations amongst corporate stakeholders: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, para. 56 and 62. The remedy is focused on concepts of fairness and equity rather than on legal rights: para. 71. Shareholder agreements are relevant, not as the basis of a claim of breach of contract, but because they "may be viewed as reflecting the reasonable expectations of the parties": para. 79.

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[49] Generally, wrongful dismissal is not considered grounds for an oppression remedy because the termination targets the claimant's interest as an employee, and not as a shareholder or other corporate stakeholder: *Abbasbayli v. Fiera Foods Company*, 2021 ONCA 95, at para. 41.

[50] That said, exceptions have been made in cases involving private companies where the relationship between employment and investment may be closer and may give rise to expectations beyond those of a regular employee: *Luebke v. Manluk Industries Inc.*, 2013 ABQB 264, at para 28-30.

[51] Still, it is not sufficient for a terminated employee/shareholder to plead that a company or its directors acted oppressively and claim damages for that conduct. First, the complainant must identify the reasonably held expectations they claim to have been violated by the conduct at issue. Second, the complainant must allege that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to their interests as corporate stakeholder: *Abbasbayli,* at para. 44, citing *Wilson v. Alharayeri*, 2017 SCC 39.

[52] In short, damages for wrongful dismissal is not a remedy from oppression under s. 227 of the *Business Corporations Act.*

[53] Moreover, Raj could not have claimed damages for wrongful dismissal in the petition he filed on December 19, 2017. To claim damages for wrongful dismissal, he needed to file a notice of civil claim.

[54] Unless a proceeding falls within Rule 2-1(2) of the *Supreme Court Civil Rules*, or within another rule providing for a petition, or an enactment otherwise provides, the proceeding must be commenced by notice of civil claim. This is set out in Rule 2-1(1) which provides that:

> Unless an enactment or these the Supreme Court Civil Rules otherwise provide, every proceeding must be started by the filing of a notice of civil claim under Part 3.

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[55] A claim in damages for wrongful dismissal is not a proceeding within the scope of Rule 2-1(2)(b) that may be brought by way of petition because it is not a remedy from oppression under s. 227 of the *Business Corporations Act.* No other category under Rule 2-1(2) would authorize a petition that seeks damages for wrongful dismissal.

[56] On May 29, 2018, Master Bouck referred the petition in this case to the trial list. The order, as drawn up by counsel, purports to have been made pursuant to both Rule 22-1(7)(d) and Rule 16-1(18). This is confusing, because the two rules are different in terms of their effect on the form of proceeding.

[57] Referring a petition proceeding to the trial list pursuant to Rule 22-1(7)(d) is shorthand for converting the proceeding to an action, where the full scope of discovery applies and where the issues can be determined at a trial involving live witnesses: *Cepuran v. Carlton,* 2022 BCCA 76, at para. 50.

[58] On the other hand, an order under Rule 16-1(18) does not convert the petition to an action. Instead, Rule 16-1(18) provides flexibility to order some of the tools of an action to be used within a petition proceeding. However, the proceeding remains a petition proceeding: *Edward Chapman, Limited v. FS Property Inc.*, 2022 BCCA 213, at para. 18-20.

[59] A proceeding must be one or the other, either a petition proceeding, or an action. As Justice Griffin put it: "If a petition is breakfast, and an action is lunch, R. 16-1(18) does not create brunch": *Edward Chapman*, at para. 31.

[60] For reasons that are unclear, the parties did not speak to the corollary relief in the notice of application before Master Bouck, which had sought directions on the filing of pleadings, and they did not include any directions in the order.

[61] Raj further confused matters by bringing an application as a petitioner under s. 227 of the *Business Corporations Act* for "interim" relief that could only be claimed by petition.

[62] In the present application, Raj seeks an order that "this proceeding is hereby converted for all purposes to an action". Merit Duncan does not oppose this order or the related order that the evidence in one proceeding be evidence in the other, because, it says, this relief was "largely granted" by Master Bouck in May 2018.

[63] Despite the confusion, I think Master Bouck made the order referring the petition to the trial list pursuant to Rule 22-1(7)(d) and converted the petition proceeding to an action in May 2018. Notably, in para. 3 of her reasons and para. 2 of the order, she said "this action is joined for the purposes of trial with [the action commenced by Merit Duncan]" (emphasis added).

[64] As of May 29, 2018, then, the proceeding was an action and Raj could have filed a notice of civil claim, or at least obtained directions for the same. Because the limitation period had not expired, he also could have amended the notice of civil claim without leave to advance a claim in damages for wrongful dismissal.

[65] However, the order converting the proceeding to an action did not rewrite the procedural history, as if the matter had been commenced by notice of civil claim from the outset. Prior to May 29, 2018, the proceeding was still a petition for relief under s. 227 of the *Business Corporations Act* that did not, and could not, advance a claim in damages for wrongful dismissal.

[66] I return to the question of whether the amendments raise a new cause of action. In my view, they do. Although Raj now alleges wrongful dismissal on the same factual matrix as oppression, the substance of the issues is different. It is only in the proposed amendments that Raj alleges the essential elements of a breach of contract claim. The proposed amendments allege an "oral employment contract" made in or around May 2001. The petition does not allege an employment contract with Merit Duncan, but rather an agreement with the original shareholders in which the shareholders acknowledged that Raj would manage the Duncan store. Moreover, the petition does not allege that Merit Duncan terminated Raj's employment without notice, but rather that the directors exercised their powers with the intent of ousting Raj from corporate governance and earning capacity.

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[67] This is not a case where a party merely pleads a new or alternate remedy based on the same facts. As I have sought to explain, a remedy in damages for breach of contract is a fundamentally different legal claim from compensation as a remedy for oppression. The remedy that Raj seeks by way of the proposed amendments is not one that he could have claimed in the petition.

[68] In summary, the impugned paragraphs have "changed the substance of the issues", thereby meeting the test for a new cause of action in *Swiss Reinsurance.*

ii. Is it Just and Convenient to Allow the Amendments?

[69] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.,* 2010 BCCA 329, at para 47, the Court of Appeal adopted a three part analysis for considering a possible limitation defence in the context of an application to join new defendants. Justice Milman restated the analysis slightly in *Manterra Technologies Inc. v. Verathon Medical (Canada) ULC,* 2022 BCSC 98, at para. 32, in the context of an application to add a new cause of action:

> a) if it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to allow the amendment to be made, notwithstanding the defendant will lose that defence, applying the *Letvad* non-exhaustive list of factors;
>
> b) if the parties disagree as to whether there is an accrued limitation defence, and the court cannot determine this issue on the application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to allow the amendment, even though the result will be the elimination of that defence; and
>
> c) alternatively, when the limitation issue cannot be determined on the application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Act [now s. 22], judicial discretion may be exercised to permit the amendment on terms that the limitation defence would be preserved and determined at trial.

[70] In my view, this case falls within category (a) above. The limitation period has clearly expired for a separate claim in damages for wrongful dismissal. Raj pleads that his employment was terminated on October 24, 2017. He has not raised any argument relating to when he discovered a potential claim of wrongful dismissal. In

the absence of any evidence to the contrary, it is reasonable to infer that the claim was discovered before he filed the petition on December 19, 2017, at the very latest.

[71] The question then becomes whether it is nevertheless just and convenient to allow the amendment to raise a claim in damages for wrongful dismissal, notwithstanding Merit Duncan will lose a limitation defence.

[72] The first factor to consider is the length of delay. The "proper period of delay to consider" is the elapsed time following the expiry of the limitation period plus one year for service of the writ (now the notice of civil claim): *Amezcua v. Taylor,* 2010 BCCA 128, at para. 36.

[73] The case law establishes that, until the time for service of a filed notice of civil claim expires, parties connected to the claim can still expect to be sued and should govern themselves accordingly. Until that time, no presumed or actual prejudice to the defendant from the passage of time can be attributed to the plaintiff's delay. This was explained by Lambert J.A. in *McIntosh v. Nilsson Bros. Inc.,* 2005 BCCA 297, at paragraph 8:

> [8] … The prejudice that must be presumed should surely be restricted to situations where the period which has passed since the cause of action arose is the length of the limitation period plus one year for service of the Writ. Because, within that time, a Writ could have been filed within the limitation period and served after the limitation period expired for up to a year, without any prejudice to the defendant. And the same is true, as pointed out by Mr. Justice Macdonald, with respect to actual prejudice by destruction of evidence or failure of recollection. If these occur within the limitation period plus the year allowed for service of the Writ, then any prejudice to the defendant sought to be added is not caused by the plaintiff. The defendant should not have conducted himself, herself, or itself in such a way as to pass the detriment caused by the passage of time on to the plaintiff.

[74] Put another way, where prejudice is said to arise from the plaintiff's failure to apply to amend a pleading sooner, the delay only becomes prejudicial and necessary for the plaintiff to explain following the expiry of a limitation period plus one year.

[75] The limitation period for a separate action for wrongful dismissal expired by December 19, 2019, at the latest. One year after that date was December 19, 2020.

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[76] The present applications were filed on November 14, 2022, a delay of about two years. Although not as long as the total delay asserted by Merit Duncan, this is a significant lapse of time.

[77] Raj says that the delay is the result of his reliance on his two previous lawyers and the time he needed to get back on his feet with a new business he established in 2018. He deposes that he suffered a lot of anxiety and was often feeling depressed for up to about two years after he lost his employment of 30 years.

[78] Blaming previous counsel is not an acceptable explanation for the delay in this case. There is no evidence, for example, that Raj intended to commence an action in damages for wrongful dismissal within the limitation period, and only failed to do so because counsel did not carry out his instructions or recommended that he confine his claims to an oppression proceeding.

[79] Being busy with establishing a new business is also not an acceptable explanation for the delay. All plaintiffs are expected to take reasonable steps to mitigate their damages. This often involves starting a new job or establishing a new business. Moreover, Raj was not too busy in June of 2018 to bring an application for relief under s. 227 of the *Business Corporations Act.*

[80] Likewise, depression and anxiety are not an adequate explanation in most cases. Many plaintiffs suffer grief or depression after being injured or losing a job.

[81] More to the point, being busy in 2018 and feeling depressed for up to about two years does not explain Raj's inaction between October 2019 and November 2022.

[82] The lack of any explanation for this relatively lengthy delay of two years is a factor weighing against leave to amend the pleadings to claim wrongful dismissal.

[83] The next factor to consider is prejudice to the opposing party. Prejudice is presumed when a plaintiff seeks to bring a new claim after the expiry of a limitation period: *Teal,* at para. 44.

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[84] In addition, Merit Duncan submits that it will suffer actual prejudice, in two ways. First, Sandy died on December 20, 2018. By delaying this claim until late 2022, Merit Duncan submits, Raj ensured that he will be the only living witness to the alleged oral employment contract.

[85] However, as explained above, the relevant delay is from late 2020, not late 2017. Sandy died within the the limitation period for service of a separate claim of wrongful dismissal. While prejudice may arise from Sandy's passing, it is not prejudice resulting directly from Raj's failure to advance a claim of wrongful dismissal within the limitation period.

[86] Second, Merit Duncan submits that, by "completely reinventing" his claim some five years after it was commenced and ten months before the current trial date, Raj has impaired the company's ability to defend itself and prepare for trial.

[87] While I agree that wrongful dismissal is a new cause of action, I do not agree that it completely reinvents the claim. The basic facts surrounding Raj's appointment as manager of the Duncan store, his management of the store and the reasons for his dismissal are already in the pleadings. Merit Duncan's allegations of just cause are pleaded in the response to petition and the notice of civil claim in the Merit Duncan Action.

[88] I <u>do</u> agree with Merit Duncan that a claim of wrongful dismissal raises new issues of reasonable notice and whether Raj failed to mitigate his damages. These issues are not part of the existing facts of the oppression proceeding. However, these are relatively confined issues relative to the proceedings as a whole.

[89] When these reasons for judgement are issued, the trial will be just five months away. The parties have yet to conduct examinations for discovery. There is some evidence that Raj has delayed Merit Duncan's efforts to obtain discovery and prosecute its action. However, the current state of affairs is not directly related to Raj's delay in bringing his application to amend the pleadings. If Raj has obstructed the proceedings, Merit Duncan's remedy is in costs.

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[90] At this point, no party is asking for an adjournment of the trial. If an adjournment is necessitated by the claim of wrongful dismissal, it seems reasonable there should be consequences for Raj in costs.

[91] The final factor in the non-exhaustive list from *Letvad* is the extent of the connection between the existing claims and the proposed new cause of action.

[92] The proposed cause of action in wrongful dismissal is closely connected with the existing claims that the directors terminated Raj's employment with the intent of ousting him from corporate governance and his earning capacity. The proposed damages in lieu of reasonable notice are closely connected to the existing application for compensation for lost employment.

[93] This factor weighs in favor of granting leave.

iii. Conclusion

[94] Overall, I find that it would be just and convenient to allow the amendments to add the claim of wrongful dismissal in the Shareholder Action. While the claim of wrongful dismissal will add some new issues, its inclusion serves to better define the real issues between the parties. The dispute has always involved an employment aspect, and this amendment properly frames the issue as a breach of contract claim.

[95] Raj's delay in making this amendment will give rise to the presumed prejudice that arises on the expiry of any limitation period, as well as some actual prejudice, including a risk the trial will be adjourned. However, much of the prejudice appears to result from the overall conduct and pace of the litigation to date, and not directly from the expiry of a limitation period or the proposed amendment itself. In my view, the prejudice does not outweigh the benefit of these particular amendments.

[96] Merit Duncan submits, in the alternative, that if Raj is permitted to bring a claim of wrongful dismissal, it should be without prejudice to a limitation defence.

[97] Sometimes, it may not be clear on the application to amend whether the limitation period for a new cause of action has expired. For example, the plaintiff

may argue that they did not discover the claim until recently and the issue cannot be decided on affidavits alone.

[98] Applications of this nature fall within category (b) or (c) in the analysis from *John A. Neilson Architects* set out above. The discretion to preserve a limitation defence was endorsed by the Court of Appeal with regard to category (c) - when the limitation issue cannot be determined on the application, and the applicant has not established that considerations of justice and convenience justify extinction of the limitation defence.

[99] For example, in *Manterra,* where the question of a postponement of the running of the limitation period and the extent of the prejudice from the delay could be explored more fully at trial, Justice Milman allowed the amendments with the limitation defence preserved to be determined at trial.

[100] As stated, my view is that this case falls within category (a) from *John A. Neilson Architects*. It is clear that the limitation period has expired for a separate claim in damages for wrongful dismissal. There is no issue of postponement or discoverability to be determined at trial. I have found that it is just and convenient to allow the amendments to raise a claim in damages for wrongful dismissal, notwithstanding Merit Duncan will lose a limitation defence.

[101] The full extent of any prejudice from the delay may be clearer at trial. However, limitation bars are not discretionary. A claim is not barred by the *Limitation Act* based on a judge's view of the plaintiff's conduct. A more appropriate way to address the prejudice in this case is in costs.

[102] For example, the trial judge may determine that it is appropriate to award Merit Duncan increased costs of the wrongful dismissal claim, or the trial judge may deny Raj costs of the wrongful dismissal claim in any event of the overall outcome of the Shareholder Action.

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[103] For these reasons, I would grant leave for Raj to amend the pleadings in the Shareholder Action to add a claim of wrongful dismissal, with the costs relating to that claim to be determined by the trial judge.

D. Addition of Jeet as a Party in the Shareholder Action

[104] Raj applies to add Jeet as a party in the Shareholder Action.

[105] Merit Duncan and Jeet oppose Jeet's addition and related amendments to the (now) notice of civil claim in the Shareholder Action.

[106] The relief that Raj seeks against Jeet is closely connected with the oppression claims and remedies against Merit Duncan. In one of the unopposed amendments, Raj alleges that, by about late 2016, Jeet effectively assumed control of Merit Duncan's board of directors and became its primary decision maker along with his wife, Satinder. In other unopposed amendments, Raj substitutes "Jeet and Satinder" in the place "the directors" in the original petition.

[107] The amendments that Jeet and Merit Duncan oppose are:

a) In paragraph 35(a), Raj seeks a declaration that Jeet has conducted the affairs of Merit Duncan in a manner that is oppressive or unfairly prejudicial to him, and "such orders … as are necessary to provide a remedy to the plaintiff under s. 227(3) of the *Business Corporations Act".*

b) In paragraph 35(b)(iv), Raj seeks an order that Jeet, or alternatively Merit Duncan, purchase his shares and his wife's shares at a price to be determined. (Jeet and Merit Duncan oppose the inclusion of Jeet in this prayer for relief.)

i. The Test for Adding Parties

[108] Raj relies on Rule 6-2(7)(c), which provides:

> 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) [which are not relevant here],

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> . . .
>
> (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.

[109] There are two requirements that an applicant must meet to obtain an order joining a new defendant under Rule 6-2(7)(c): there must be a question or issue relating to or connected with any relief or subject matter of the proceeding; and, it must be just and convenient to determine that question or issue in the existing proceeding. *Smithe Residences Ltd. v. Boffo Investment Corp.,* 2019 BCSC 2185, at paras. 73-74, 75.

[110] The factors to consider in determining whether it is just and convenient to add a defendant are the same as those for adding a new cause of action. These include the expiry of any limitation period for a separate proceeding, the extent of the delay, the reasons and any explanation for the delay, any prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated. The overriding question is what is just and convenient in the circumstances of the particular case. *John A. Neilson Architects,* at para. 46.

[111] As stated, the relief that Raj seeks against Jeet is closely connected with the existing oppression claims and remedies Raj seeks against Merit Duncan. The question is whether it would be just and convenient for the relief against Jeet to be sought in this action.

ii. Is it Just and Convenient to Add Jeet?

[112] Raj submits that there is no limitation period issue in adding Jeet, because the cause of action has not changed, merely the particulars of the claim and the relief sought. I disagree.

[113] The existing pleading alleges oppression by “the directors” and seeks relief against Merit Duncan. Jeet is a separate legal person from Merit Duncan or its board

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of directors. The limitation period for a separate oppression proceeding against Jeet personally has expired.

[114] As discussed above, the relevant delay in bringing the application to add Jeet is the time following the expiry of the limitation period plus one year. The limitation period for a separate oppression proceeding against Jeet expired by December 19, 2019, at the latest. One year after that date was December 19, 2020.

[115] As discussed above, Raj's explanation for the delay is unacceptable.

[116] There is presumed prejudice from the expiry of the limitation period. However, subject to a potential conflicts issue discussed below, any actual prejudice is nominal. Jeet was likely to be Merit Duncan's primary witness in these proceedings, regardless of whether or when he was named as a defendant. Jeet has important knowledge of the investigations and decisions taken by Merit Duncan in 2017. It is inconceivable that he has not been closely involved in Merit Duncan's case from the start.

[117] The claims against Jeet are intertwined with the existing claims that Merit Duncan or its directors failed to give Raj notice of meetings, revoked his banking privileges, denied his shareholder loan and terminated his employment.

[118] Merit Duncan argues that additional prejudice will arise if it becomes necessary for Jeet to retain separate legal counsel.

[119] Initially, Raj took the position Merit Duncan's counsel should not act for Jeet if Jeet was added as a party. Raj withdrew this objection by letter from his counsel dated January 13, 2023. However, he has not conceded that Merit Duncan's interests are necessarily aligned with Jeet's interests.

[120] Raj's agreement that Merit Duncan and Jeet may be represented by the same counsel does not foreclose on the possibility that a conflict may arise in the future, requiring separate counsel. Merit Duncan argues that, had Raj named Jeet as a

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respondent in the original petition, Jeet may have retained separate counsel from the outset.

[121] In my view, Merit Duncan's concern is only speculation. There is no apparent conflict between Jeet and Merit Duncan on the face of the pleadings. Merit Duncan does not take the position there is any conflict. As I understand it, Raj's concern is more with the company paying Jeet's legal expenses, not with common representation *per se*.

iii. Conclusion

[122] I find that it would be just and convenient to add Jeet as a defendant and allow the amendments that claim relief against Jeet personally. However, the relief that is sought against Jeet in paragraph 35(a) must be particularized. As drafted, paragraph 35(a) is too general.

[123] As discussed above, I would not make an order preserving a limitation defence. It is clear the limitation period for a separate proceeding against Jeet has expired. Instead, I expect that any prejudice from the delay in adding Jeet will be addressed by the trial judge in a costs award.

[124] For these reasons, I would grant leave for Raj to add Jeet as a defendant in the Shareholder Action and amend the notice of civil clam accordingly, with the necessary particulars to paragraph 35(a). Costs relating to the claim against Jeet will be determined by the trial judge.

E. The "Sandy Amendments"

[125] Raj seeks to amend his notice of civil claim in the Shareholder Action and his response in the Merit Duncan Action to add allegations concerning Sandy's knowledge and approval of a cash diversion scheme, as well as Sandy's active participation in the scheme (the "Sandy Amendments").

[126] Raj proposes to allege that Sandy was the primary beneficiary and the author of a diversion of money from Merit Duncan's cash sales using the double invoicing

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scheme alleged in Merit Duncan's pleadings. He proposes to allege that Sandy agreed both personally and on behalf of Merit Duncan to permit Raj to participate in the scheme, from which Sandy was already benefitting personally.

[127] Merit Duncan opposes the Sandy Amendments because, it submits, they are inconsistent with Raj's previous pleadings, inconsistent with Raj's sworn evidence and prejudicial.

i. Do the Amendments Violate the Rule Against Inconsistent Pleadings?

[128] Merit Duncan submits that the "gist" of the Sandy Amendments is that, contrary to his previous denials, Raj now admits he acted fraudulently, but asserts that he did so with the knowledge and approval of Sandy.

[129] Rule 3-7 governs pleadings. The relevant sub-rules provide:

> (6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
>
> (7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.

[130] The rule against inconsistent pleadings does not prevent inconsistent claims or defences from being pleaded alternatively within the same pleading. Moreover, it does not bar amendments to raise new alternative claims or defences.

[131] In *Gabbs v. Bouwhuis*, 2005 BCSC 1782, Justice Bennett, then a judge of this Court, rejected the submission that a party cannot "make alternative allegations by way of amendment that are fundamentally inconsistent with the allegations first pleaded." Justice Bennett quoted with approval the following passage from W.B. Williamson and R.J. Rolls' The Law of Civil Procedure, vol. 2 (Toronto: Butterworths, 1970) at pp. 666-668 (at para. 23 of *Gibbs*):

> "A subsequent pleading shall not raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."
>
> The rule simply means that a party's second pleading must not contradict the first. A plaintiff must not set up in his reply a new cause of action which is not raised in his statement of claim. The reply must not contradict or depart from

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> the statement of claim. A departure in pleadings exists where a party quits or departs from the case or defence which he has first made, and has recourse to another. This rule against departure applies only to pleadings in the same action.
>
> Examples:
>
> In an action on a policy of insurance where the plaintiffs allege in the statement of claim that all conditions in the policy have been fulfilled and in their reply say that these conditions were waived, there is a departure. If a statement of claim alleges a negligent breach of trust, the reply cannot properly allege that the breach of trust was fraudulent.
>
> Inconsistent claims should be pleaded, if at all, alternatively in the statement of claim. If the defence raises an issue which causes the plaintiff to change his mind, the proper course is for him to amend his statement of claim. He may do so once without leave before replying."

[132] Justice Bennett concluded:

> [24] Thus a party may plead inconsistent claims in the statement of claim and defence. The party cannot, however, make an alternative claim that is inconsistent in reply or in a defence to a counterclaim. See also *Hebert v. Vaughan*, [1972] 3 All E.R. 122 (Ch.D.).
>
> [25] I conclude that the two amendments sought are proper alternative claims and there is no violation of Rule 19(7) [now Rule 3-7(6)].

[133] The Sandy Amendments do not violate Rule 3-7(6) or the rule against inconsistent pleadings. In the original response to civil claim, Raj generally denied all of the facts alleged by Merit Duncan and specifically denied the facts alleged under the heading "Rajinder's Fraud". In the alternative, he alleged that his actions were approved by the board of directors and the shareholders. In the proposed amended response, he continues to deny the facts alleged under the heading "Rajinder's Fraud". The difference is that he now advances Sandy's knowledge and approval as his primary defence, rather than as an alternative to a general denial.

[134] Contrary to Merit Duncan's submissions, Raj does not admit that he acted fraudulently. The real "gist" of his new pleading is that what Merit Duncan alleges as fraud against him was in fact a form of mutually beneficial profit-sharing scheme between Sandy and Raj to avoid income tax on cash sales. Whatever one thinks of this business practice, it is not an admission of fraud against the company.

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[135] The Sandy Amendments do seem to admit some of the unauthorized or unlawful acts alleged in the notice of civil claim, and raise Sandy's knowledge and approval as a defence to those allegations. Even if one were to interpret some of these amendments as an admission of wrongdoing by Raj, the admission would not be an impermissible inconsistent pleading, but rather a permissible alternative pleading to a denial. It will be for the trial judge to decide whether Sandy's knowledge or approval provides a defence to any wrongdoing proved by Merit Duncan.

ii. Should the Amendments be Denied Because They Are Inconsistent with Sworn Evidence?

[136] Merit Duncan argues that the Sandy Amendments should be denied because they are inconsistent with an affidavit Raj swore in the Shareholder Action and relied on in his application for relief under s. 22 of the *Business Corporations Act.*

[137] In preparation for the application before Justice Bracken in June 2018, Merit Duncan obtained affidavits from Jeet and three employees that set out their evidence of Raj's management skills and his involvement in cash transactions, double invoicing and misuse of First Nations status cards.

[138] Raj swore an affidavit in reply, which he put before the Court and relied on in support of his application. In it, he denied any wrongdoing:

> 3. I have reviewed the Affidavits filed by the Respondent in relation and deny any wrongdoing as alleged and / or implied by the affiants in the said affidavits. Throughout my association with the Plaintiff, either as a shareholder, director, and employee, I have acted in accordance with, and knowledge of, the Board of Directors of Merit.

[139] To the extent the Sandy Amendments admit some of the allegations in the affidavits filed by Merit Duncan, those amendments may be inconsistent with the blanket denial of any wrongdoing in Raj's affidavit.

[140] However, Merit Duncan has not cited any authority for the proposition that a party cannot amend a pleading to allege facts inconsistent with a sworn affidavit.

[141] While there is a rule that a party cannot plead something known by the pleader within their knowledge to be false, there is no rule requiring a party to plead only what the pleader knows to be true: *Gabbs,* at para. 17-18.

[142] Raj's affidavit evidence may be relevant to his credibility, but it does not bar the Sandy Amendments.

iii. Should the Amendments be Denied Because They Are Prejudicial?

[143] Merit Duncan argues that the Sandy Amendments should be denied because they are prejudicial. The amendments appear to be based on verbal and informal arrangements between Raj and Sandy and undocumented cash transactions. Sandy, of course, can no longer provide his version of events or conversations with Raj. Moreover, Jeet deposes that he does not know where his parents kept their banking records.

[144] The allegations of Sandy's knowledge and approval are not entirely new. Raj has always alleged he acted with the knowledge and approval of the board of directors, including Sandy. In the original response to civil claim, Raj alleged that he:

> … acted under the specific instructions of Merit's Board of Directors and its shareholders who had full knowledge of all material facts and were aware of all activity now complained of, and consented thereto; upon which combined acts, the Defendant relied.
>
> [as written]

[145] Raj further alleged that:

> At all material time, the Defendant acted under the directions of [Sandy] and other shareholder's and directors who approved of the Defendant's management style and related business activity at the Duncan Store.
>
> [as written]

[146] And:

> At all time, the Plaintiff and [Sandy] were aware of the business efficacy of the Defendant, his management style, his successes and / or lack thereof, and approved of all matters regarding management of the Duncan Store.
>
> [as written]

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[147] In the course of his oral reasons for judgement in these proceedings on June 20, 2018*,* Justice Bracken noted:

> [12] … The allegations of Merit have been responded to in some way, but [Raj] essentially says that all the conduct that is now alleged to be unlawful or fraudulent was not only known to [Sandy], but approved by him. …
>
> [emphasis added]

[148] Many of the Sandy Amendments are simply particulars of the previous allegations of knowledge and approval and clarification of statements in the original pleading like "all activity now complained of" or "the Defendant's management style and related business activity".

[149] What is new is the allegation that Sandy was the primary beneficiary and the author of a diversion of money from Merit Duncan's cash sales. There is no allegation in the existing pleadings that Sandy was an active participant in any scheme involving Raj. More importantly, there is no allegation that Sandy was the beneficiary of any scheme predating Raj's involvement.

[150] Justice Bracken noted the serious nature of any allegation that Sandy participated in a fraud, and highlighted the importance of proper pleading and strict proof of such allegations:

> [12] … If I were to presume on the basis of [Raj's] evidence that [Sandy] was a participant of fraud, it seems to me that would be a highly improper presumption to make, and not just on the law, as fraud must be proved strictly, and secondly, given the evidence about [Sandy], it is not the presumption that I would make even in the absence of law directing me not to.

[151] I agree with Merit Duncan that the full scope of the Sandy Amendments would expand the scope and expense of the litigation. In particular, the allegation that Sandy was the original architect and primary beneficiary of the cash diversion scheme would extend the scope of discovery. It could invite an investigation into Sandy's business practices beyond his knowledge and oversight of Raj's management of the Duncan store.

[152] As discussed above, Raj's explanation for the delay in making these amendments is unacceptable.

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[153] Raj argues that Merit Duncan will not suffer any actual prejudice from the delay because it ought to have known from the outset that evidence needed to be preserved to the effect that Sandy did not approve any cash diversion and did not participate in any cash diversion. Raj notes that the affidavits referred to above included statements by Merit Duncan's affiants to the effect they did not observe Sandy handling any large amounts of cash.

[154] I agree with Raj that the existing pleadings put in issue Sandy's knowledge and approval of the cash diversion scheme. I disagree with him that the existing pleadings put in issue Sandy's active participation in the scheme. I disagree with his suggestion that Merit Duncan ought to have anticipated the need to preserve evidence about Sandy's business practices beyond his knowledge and oversight of Raj's management of the Duncan store.

[155] In my view, the allegation that Sandy was the author and primary beneficiary of a cash diversion scheme does not have a sufficiently close connection to the existing issues to justify its late addition to these proceedings.

[156] The material issues between the parties are whether Raj acted on instructions from Sandy and whether Sandy approved Raj's actions. Sandy's alleged participation in a scheme with Raj is relevant to Sandy's knowledge and approval of that scheme. However, Sandy's own conduct independent of Raj is of questionable probative value. In my view, it is a collateral issue in the exiting proceeding.

iv. Conclusion

[157] Overall, the Sandy Amendments will bring some needed clarity and legal rigour to the proceeding. The amendments relating to Sandy's knowledge and approval of Raj's actions will clarify the defence and better define the real issues between the parties.

[158] However, the the allegation that Sandy was the author and primary beneficiary of a cash diversion scheme risks causing undue prejudice to Merit Duncan.

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[159] I appreciate that Sandy’s active participation in a scheme with Raj may be relevant to his knowledge and approval of that scheme. However, some guardrails are needed given Raj’s unexplained delay in amending his pleadings. In my view, the amendments must be confined to Sandy’s knowledge and approval. Accordingly, Raj will need to demonstrate that any evidence of Sandy’s participation in any scheme is relevant to the material issues of knowledge and approval.

[160] I also appreciate that it may be difficult to redraft the proposed Sandy Amendments to confine them neatly to Sandy’s knowledge and approval. An effort will need to be made to reach an agreement between counsel on the acceptable Sandy Amendments. If counsel cannot agree, they may submit the draft pleadings to me to resolve the scope of the permissible amendments.

[161] For these reasons, I would grant leave for Raj to make the Sandy Amendments, but confined to the allegations of Sandy’s knowledge and approval.

F. Set-off for Wrongful Dismissal in the Merit Duncan Action

[162] Raj seeks leave to amend his response to civil claim in the Merit Duncan Action to allege that he is entitled to “an equitable set off … for his damages arising from the termination of [his] employment contact.”

[163] I would not grant leave for this amendment. It is doomed to fail.

[164] The Court of Appeal set out the requirements for a claim of equitable set-off in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (BCCA), at para. 23:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands…
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed…
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim…
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract…

> 5. Unliquidated claims are on the same footing as liquidated claims.
>
> [cites omitted]

[165] In *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 at para. 11, the Court of Appeal noted that an equitable set-off is a substantive right:

> [11] … An equitable set-off, as distinct from a procedural set-off, is a substantive right held by a debtor that constitutes a charge against a chose in action for his debt.

[166] In this case, the proposed set-off does not constitute an equitable ground for being protected from the plaintiff's claims. The claims by Merit Duncan are for damages for mismanagement, a double invoicing scheme, unauthorized cash transactions and misappropriation of assets. The claim by Raj is for damages in lieu of reasonable notice.

[167] These are, for the most part, mutually exclusive claims. If Merit Duncan proves all, or the most serious, of its allegations against Raj, the trial judge will most likely find that the misconduct was irreconcilable with the continuation of an employment relationship and Merit Duncan had just cause to terminate Raj's employment without any notice.

[168] Even assuming some part of Merit Duncan's claims can be allowed and the trial judge still finds that Raj was entitled to reasonable notice, the cross claims are not sufficiently connected that it would be manifestly unjust to allow Merit Duncan to enforce its claims without taking into consideration Raj's claim.

[169] For example, assuming Raj took unauthorized cash payments but those payments did not justify his summary dismissal, it cannot be maintained that damages in lieu of notice constitute a charge against Merit Duncan's recovery of the misappropriated funds. They are separate claims.

[170] In my view, the claim of wrongful dismissal is properly viewed as a potential counterclaim in the action by Merit Duncan, and not as an equitable set-off. Raj chose not to seek leave to issue a counterclaim in the Merit Duncan Action. Instead,

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he sought leave to amend his pleadings in the Shareholder Action. That is where the claim of wrongful dismissal should remain.

G. Estoppel in the Merit Duncan Action

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[171] Raj seeks to amend his response to civil claim in the Merit Duncan Action to allege estoppel or waiver.

[172] As I understand the draft pleading: first, Raj alleges that he relied on Sandy's knowledge and approval of the cash diversion and use of Merit Duncan assets such that Merit Duncan cannot now complain about those matters; and second, he alleges that Sandy, by his knowledge and approval, abandoned on behalf of Merit Duncan any right to recover any diverted cash or assets, or else acquiesced in Raj's conduct.

[173] In addition to its arguments opposing all of the Sandy Amendments, Merit Duncan argues that estoppel cannot be raised as a defence to wrongful conduct. It cites the following passage from the decision of the Ontario Court of Appeal in *Tonks et al. v. Reid et al.* (1965), 50 DLR (2d) 674:

> To allow this plea to stand would be to make the estoppel not only a cloak to cover Tonks' wrongful and fraudulant acts, but would in addition give him the advantage of his deceitful behavious towards the plaintiffs. It has often been said that estoppel is not a sword but a shield. It has never been said, nor held by the Court that it was a shield for the defence of a wrongdoer. The cases appear to hold consistently with that view.

[174] In my view, the availability of estoppel or waiver as a defence in this case should be determined by the trial judge after having heard all of the evidence. Subject to the limits I have placed on the Sandy Amendments, I would allow the amendments to plead estoppel and waiver.

H. Costs

[175] Raj ought to have amended his pleadings a long time ago. Prior to the expiry of a limitation period, he could have brought separate proceedings or amended the existing pleadings without leave. He also could have sought leave to issue a counterclaim in the Merit Duncan Action. Had he proposed the amendments earlier

in the proceedings, more of the amendments may have gone by consent. When he finally applied for leave, Raj essentially rewrote the pleadings and put Merit Duncan to expense it would not have incurred had the pleadings been drafted properly in the first place.

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[176] Raj's unexplained delay has caused Merit Duncan a degree of prejudice. His late addition of a claim of wrongful dismissal deprives Merit Duncan of a limitation defence it could have raised in a separate action. While I have concluded that it is just and convenient to allow many of the amendments, it is also appropriate to address the delay with costs.

[177] For these reasons, I would award Merit Duncan costs of these applications in any event of the cause in the two proceedings.

IV. CONCLUSION

[178] In the Shareholder Action:

a) the proceeding is converted to an action, and the style the cause shall be amended accordingly;

b) Rajinder Parshad Kapila ("Raj") is substituted as plaintiff in the place of the petitioner Raj Kumari Kapila;

c) Jagjit Singh Sandhu a.k.a. Jagjit Sandhu a.k.a. Jeet Sandhu ("Jeet) is added as a defendant;

d) Raj is granted leave to file a notice of civil claim in the form attached as Schedule A to the notice of application, with the following exceptions:

   i. the Sandy Amendments must be confined to the allegations of knowledge and approval as discussed in these reasons for judgement;

   ii. Raj must particularize any relief sought against Jeet in paragraph 35(a) of the draft notice of civil claim;

e) within 7 days of this order, and prior to filing the notice of civil claim, counsel for Raj shall provide a draft to counsel for Merit Duncan, identifying the changes from Schedule A, and counsel for Merit Duncan shall respond to the changes within 7 days;

f) if the parties cannot agree on whether the draft pleading complies with these reasons for judgement, they may submit a request to appear before Justice Elwood to resolve the disagreement;

g) Raj shall file the notice of civil claim forthwith following an agreement on the draft pleading or a resolution by the Court;

h) Merit Duncan and Jeet shall file a response or responses to civil claim within 21 days after service of the filed notice of civil claim;

i) evidence in this action shall be admissible as evidence in the Merit Duncan Action, and evidence in that action shall be admissible as evidence in this action, subject to the right of any party to dispute the admissibility of any evidence;

j) entitlement to costs relating to the claim for wrongful dismissal will be determined by the trial judge;

k) entitlement to costs relating to the claims against Jeet will be determined by the trial judge; and

l) Merit Duncan will have costs of this application in any event of the cause.

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[179] In the Merit Duncan Action:

a) Raj is granted leave to amend the response to civil claim filed May 24, 2018, in the form attached as Schedule A to the notice of application, with the following exceptions:

    i. the Sandy Amendments must be confined to the allegations of knowledge and approval as discussed in these reasons for judgement; and

    ii. the amendments shall not include a set-off for damages for wrongful dismissal;

b) within 7 days of this order, and prior to filing the amended response to civil claim, counsel for Raj shall provide a draft to counsel for Merit Duncan, identifying the changes from Schedule A, and counsel for Merit Duncan shall respond to the changes within 7 days;

c) if the parties cannot agree on whether the draft pleading complies with these reasons for judgement, they may submit a request to appear before Justice Elwood to resolve the disagreement;

d) Raj shall file the amended response to civil claim forthwith following an agreement on the draft pleading or a resolution by the Court; and

e) Merit Duncan will have costs of this application in any event of the cause.

"Elwood J."

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