IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Metro-Can Construction (AT) Ltd. v. Alderbridge Way Limited Partnership,* 2024 BCSC 369

Date: 20240301
Docket: S218110
Registry: Vancouver

Between:

Metro-Can Construction (AT) Ltd.

Plaintiff

And

Alderbridge Way Limited Partnership, Alderbridge Way GP Ltd., 0989705 B.C. Ltd., Samuel David Hanson, Jason Ratzlaff, Graham Thom, South Street (Alderbridge) Limited Partnership, South Street (Alderbridge) GP Ltd., South Street Development Managers Ltd., Rev Investments Inc., Gatland Development Corporation, and Brent Taylor Hanson

Defendants

Before: The Honourable Justice Majawa

Reasons for Judgment on Application to Strike Plaintiff's Claim

Counsel for the Plaintiff/Respondents on the application:	C. Moore
Counsel for the Defendants Samual David Hanson, Jason Ratzlaff, Graham Thom, Rev Investments Inc., Gatland Development Corporation, Brent Taylor Hanson, South Street (Alderbridge) Limited Partnership, South Street (Alderbridge) GP Ltd., and South Street Development Managers Ltd./Applicants on the application:	M. Burris A. Laurino
Place and Dates of Hearing:	Vancouver, B.C. October 30-31, 2023
Place and Date of Judgment:	Vancouver, B.C. March 1, 2024

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OVERVIEW

[1] Certain defendants to this action apply to dismiss claims made against them by the plaintiff, Metro-Can Construction (AT) Ltd., pursuant to Rules 9-5(1)(a) and 9-6(5) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009. In the alternative, a subset of the applicants seek that claims against them for breach of trust should be dismissed pursuant to R. 9-7(15).

[2] The plaintiff's underlying action arises from the insolvency of a large, mixed-use development project located in Richmond, BC (the "Project"). In 2019, the plaintiff was hired by Alderbridge Way Limited Partnership through its general partner, Alderbridge Way GP Ltd. (collectively, "Alderbridge") to perform excavation and related civil works on the Project. In March 2020, Alderbridge experienced financial difficulties and its senior construction lender suspended further draws under the lending facility. On April 1, 2022, Alderbridge sought and obtained protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, in B.C. (the "CCAA Proceeding").

[3] On September 13, 2021, the plaintiff commenced the underlying action against Alderbridge and the registered legal owner of the Project lands, 0989705 B.C. Ltd. (the "Owner") for $8.6M in damages arising from unpaid work performed on the Project. The plaintiff is also seeking damages in the same amount against the applicants, who are directors, shareholders and investors of the Project. The plaintiff's claims against the applicant's are in misrepresentation, breach of trust and unjust enrichment. A stay of proceedings was ordered in the CCAA Proceeding in respect of all proceedings against Alderbridge. The parties have agreed to a consent order to lift the stay of proceedings as it applies to the applicants.

[4] I agree with the applicants that the plaintiff's claims against them should be dismissed because the plaintiff has failed to plead the necessary facts in support of the claims made and that the claims are bound to fail as pleaded. In the alternative, on the evidence before me, I find that there is no genuine issue for trial and the claims in breach of trust and unjust enrichment should be dismissed under R. 9-6.

[5] It appears that in trying to access individuals and entities that may have resources and are not subject to the CCAA Proceeding, the plaintiff has cast its net too wide. In doing so, it has brought claims against the applicants which have no reasonable prospect of success. I have come to this conclusion based upon the plaintiff's amended notice of civil claim ("ANOCC") which was filed a few short days before this application was heard. Given that the plaintiff has been unable to maintain a legally tenable claim on two occasions, I do not grant the plaintiff leave to make further amendments.

[6] In addition to the relatively late filing of the ANOCC, on the second day of this hearing the plaintiff brought an application to adjourn the applicant's application and to compel production of certain records. However, given my conclusion on the applicant's application that there is no merit to the plaintiff's claims, it would not be in the interests of justice for the defendants to be put to the cost of further defending these claims by making the requested discovery.

THE UNDERLYING CLAIMS AND THE RELEVANT PARTIES

[7] The defendant applicants, Sam Hanson, Jason Ratzlaff and Graham Thom are the directors of Alderbridge's general partner (collectively, the "Directors"). The defendant applicants, South Street Development Managers Ltd. ("South Street Development"), REV Investments Inc. ("REV") and Gatland Development Corporation ("Gatland") are the shareholders of Alderbridge's general partner (collectively, the "Shareholders").

[8] The defendant applicants, South Street (Alderbridge) LP through its general partner, South Street (Alderbridge) GP Ltd. (collectively "South Street LP") is a limited partner or investor of Alderbridge.

[9] The defendant applicants, Sam Hanson and Brent Hanson are directors of South Street LP's general partner. Brent is also the director of the development manager engaged by Alderbridge to advance and manage the Project.

[10] The plaintiff is seeking judgment against Alderbridge for approximately $8.6M for its unpaid invoices, and in damages for negligent misrepresentation and breach of trust. Alderbridge is not one of the applicants for this application, and as mentioned earlier, other than this application, the CCAA Proceeding has resulted in a stay of these proceedings. The applicants do not dispute that Alderbridge was unable to pay any of the $6.6M the plaintiff invoiced it between February and July 2020, nor do they dispute that Alderbridge did not retain any further holdback funds in respect for the work performed by the plaintiff during that period.

[11] The applicants' notice of application was based upon the plaintiff's original pleading filed in September 2021. After the plaintiff received the applicants' notice of application and supporting materials, the plaintiff filed its application response on October 25, 2023, to which it attached the ANOCC as its attempt to remedy the issues identified in the applicants' notice of application. The plaintiff is not defending the application on the original notice of civil claim ("NOCC"); rather it is relying on the ANOCC which was provided to the applicants merely a few days before the application was scheduled to be heard. Nonetheless, the applicants were prepared to proceed and have taken the position that the amendments made in the ANOCC do not cure the fatal deficiencies that they say existed in the original NOCC.

[12] The claims in the ANOCC against the applicants are in misrepresentation, breach of trust, and unjust enrichment. I will describe the claims more fully later in these Reasons. For present purposes, I will briefly summarize each of them.

[13] The plaintiff makes allegations of misrepresentation against Sam Hanson, Brent Hanson, South Street LP, South Street Development, REV and Gatland. In essence, the plaintiff claims that these applicants, either personally, or as agents for certain affiliated business defendants, represented that they would "ensure the plaintiff would be paid so long as the plaintiff continued to perform work on the project site." While the plaintiff's claim for relief refers to damages for negligent misrepresentation, the plaintiff has claimed that certain of the Project's investors made misrepresentations in what would amount to fraudulent circumstances.

[14] The plaintiff is also seeking damages against each of the applicants for breach of trust. Specifically, the plaintiff says that the applicants are "remedial constructive trustees" in relation to two trusts: a statutory trust under the *Builders Lien Act*, S.B.C. 1997, c. 45 (the "*BLA*"), and a "substantive constructive/construction trust", and are personally liable for breaches of both of these trusts.

[15] In addition to breach of trust, the plaintiff is seeking a declaration that the applicants were unjustly enriched in the amount of $8.6M and seeking a remedial constructive trust in the amount of $8.6M or any part of that amount.

RELEVANT LEGAL PRINCIPLES

[16] The applicants seek to have the plaintiff's claims in misrepresentation, breach of trust and unjust enrichment dismissed pursuant to R. 9-5(1)(a), or in the alternative, pursuant to R. 9-6(5). In the further alternative, the applicants seek to have the breach of trust claims dismissed pursuant to R. 9-7.

[17] Rule 9-5(1)(a) states that:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> > (a) it discloses no reasonable claim or defence, as the case may be,
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> > …
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> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[18] In *Homma v. University of British Columbia (School of Music),* 2023 BCSC 1926, I recently set out the test for dismissing an action for disclosing no reasonable claim:

> [46] No evidence is admissible in an application under R. 9-5(1)(a). The application under R. 9-5(1)(a) proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven. A claim will only be struck under R. 9-5(1)(a) if it discloses no reasonable claim or defence, which has been variously described as "plain and obvious", "beyond a reasonable doubt", and having "no reasonable prospect of success". In its analysis, the court should be generous and err on the side of permitting a

> novel, but nonetheless arguable claim, to proceed to trial: *Krist v. British Columbia,* 2017 BCCA 78 at paras. 21-22; *Gaucher v. British Columbia Institute of Technology,* 2021 BCSC 289 [*Gaucher*] at paras. 55-56; *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para 21.
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> …
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> [48] In determining whether a claim should be struck under R. 9-5(1), the pleadings are to be read liberally and, generally, should not be struck if amendments could remedy the deficiency. Justice D. Macdonald put it this way in *Goel v. Dhaliwal*, 2021 BCSC 2382 at para. 49:
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> > In an application to strike, pleadings are read liberally. The test for striking pleadings is high: *Drummond v. Moore*, 2012 BCSC 496 at para. 21. The pleadings should not be struck if they are inadequate but could be amended to disclose a cause of action: *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 30. A court should be reluctant to strike pleadings if they can be amended: *Drummond* at paras. 22-23.

[19] The rule governing summary judgment is R. 9-6, the relevant parts of which read as follows:

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
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> …

[20] In *Homma,* I also set out the principles in relation to granting summary judgment under R. 9-6:

> [78] Among other things, R. 9-6(4) permits a party to apply for judgment to dismiss all or part of a claim. Rule 9-6(5) provides that on hearing such an application, the court, if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly.
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> [79] Summary judgment is to be decided on the pleadings and evidence that is before the court. Each party must put their "best foot forward" with respect to the existence of a material issue to be tried. Unlike applications to strike under R. 9-5, affidavit evidence may be considered. However, the application cannot be defeated by a party responding to the application by suggestions of evidence that might be adduced or amendments that might be made to the pleadings if the matter were permitted to proceed…
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> [Emphasis added, citations omitted.]

[21] I disagree with the plaintiff that it is premature to decide this matter summarily. *Xiao v. Fan,* 2020 BCSC 69, does not change the general rule that summary judgment applications are to be determined on the evidence actually before the Court. As Justice Crerar stated at paras. 48-49, the ability of a respondent to resist a summary judgement application on the grounds that it is premature because material evidence may exist that has yet to come to light is an exception to the general rule. Moreover, more than suggestions or bald allegations are required in order to meet the exception: as the Court stated in *Xiao* at para. 49:

> … the respondent must articulate 'some specificity' for the claim that the discovery process may uncover relevant evidence… In other words, the respondent must demonstrate there is a reasonable prospect further discovery will reveal the existence of a triable issue.…

[22] The plaintiff has not demonstrated any such reasonable prospect in this case. In *Xiao,* the respondent provided a lengthy affidavit in support of some the allegations it made in the notice of civil claim and conversely, the applicants (defendants in the lawsuit) were silent in response to many of the allegations made. In this case, as will be discussed later, the plaintiff has offered no evidence in support of its claims in the allegations, no evidence in response to the defendants' evidence, and points to no evidence that would enable it to prove its case. The evidence it submits consists of suspicions and conjecture.

[23] I agree that in the circumstances, the plaintiff's prematurity argument boils down to a claim that the information on which the action is based is controlled by the defendants, and therefore, the plaintiff cannot be expected to have more evidence. As submitted by the applicants, this is not a sufficient reason to deviate from the general rule that summary judgement applications are to be determined on the evidence before the Court. The plaintiff is in a position to provide evidence in support of its claims. For example, it could have provided evidence denying receipt of the funds it says were diverted or misappropriated but it has not done so. Permitting the plaintiff's demand for discovery in these circumstances would be to sanction a fishing expedition.

THE CLAIMS IN MISREPRESENTATION

[24] In my view, the plaintiff's claim against the applicants for misrepresentation should be struck as disclosing no reasonable claim pursuant to R. 9-5.

[25] I find the applicants' summary of the plaintiff's claim in misrepresentation to be of assistance and that it accurately describes the pleading. As the applicants set out in their written submissions, the ANOCC alleges the following:

a) between January and September 2020, Sam Hanson, Brent Hanson, and another individual who passed away last year and is not named in this action – either personally, or as agents for certain of the affiliated business defendants – South Street LP, South Street Development, REV, or "*other corporate entities unknown to the plaintiff*" – represented that they would "ensure the Plaintiff would be paid so long as the Plaintiff continued to perform work on the project site.";

b) the plaintiff reasonably relied on the representations made by the applicants, and that but for the representations, the plaintiff would have ceased work and avoided incurring the further costs of continuing the construction work; and

c) the representations made by the applicants were "knowingly false and/or negligently made" for the purpose of inducing the plaintiff to continue to perform additional work.

[26] While on its face, it appears that the plaintiff has pleaded the essential elements of misrepresentation, the pleading as a whole is deficient.

[27] First, the ANOCC is vague and does not contain the particulars required by R. 3-7(18) when a party relies on misrepresentation as a basis for their claim. For example, there are no particulars as to whether the representations were made in person or in writing or precisely when they were made. Instead, the plaintiff has alleged that each of the applicants has made the same misrepresentation with no

reference to when or how the statements were made or how they were differentiated from one another. The plaintiff has made no attempt to identify what each of the applicants said or did or what their relationship was to the plaintiff. This is information that should be within the knowledge of the plaintiff as the recipient of the alleged misrepresentation.

[28] Both the existence of a duty of care and a breach of that duty are required in order to establish negligent misrepresentation. In a pleading, the plaintiff is required to plead facts that establish these elements: *Ridge-Meadows Realty Ltd. v. 670206 B.C. Ltd.,* 2013 BCSC 637 at para. 17. Yet, there is nothing in the ANOCC that particularizes why the plaintiff is pursuing the applicants for misrepresentation, other than that they are the directors and shareholders of Alderbridge. Nothing in the ANOCC explains why the plaintiff would rely upon the statements allegedly made by the applicants.

[29] The ANOCC does not disclose any facts that explain why those alleged to have made misrepresentations would personally owe a duty of care to the plaintiff, or how any of these defendants breached that duty of care. No facts are pleaded which would explain how the applicants have a relationship with the plaintiff separate and apart from their capacity as representatives of Alderbridge. No explanation or facts are provided as to why the applicants would potentially be liable in their personal capacities.

[30] If the alleged misrepresentations were made, there are no facts pleaded that would lead one to conclude that they were made by the applicants other than in their capacity as representatives of Alderbridge. I agree with the applicants that a director of a company cannot be held personally liable for simply controlling the activities of the corporation. Piercing the corporate veil and attracting personal liability requires the plaintiff to establish that the principal engaged in actions that exhibit a separate identity or interest from that of the corporation: *Bell v. River Rock Lodge Corp*., 2011 BCSC 9, para. 35; *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121, paras. 14-22. No facts are pleaded which are capable of establishing this.

[31] Even if the plaintiff was permitted to amend their pleadings for a third time to plead facts in support of the existence of a duty of care, the nature of the misrepresentation pleaded does not appear to be actionable in any event. That is because the alleged misrepresentations are in respect of a future occurrence not a matter of fact: i.e. the alleged assurance that the plaintiff would be paid so long as it continued to perform work on the Project. As counsel for the plaintiff conceded during oral submissions, representations that relate to a future occurrence are not actionable unless the promisor never had an intention to fulfill that representation, in which case it would be a fraudulent, not negligent misrepresentation: *Colter Developments Ltd. v. Squamish JV Ltd*., 2016 BCSC 354, paras. 21, 48-51. Thus, any claim in negligent misrepresentation on the facts pleaded is bound to fail.

[32] It should also be noted that although the plaintiff's prayer for relief claims damages for negligent misrepresentation only, under part 3 of the ANOCC, the plaintiff has claimed that the project investors (i.e. the applicants) made the misrepresentations with the "knowledge that they were false, or with reckless disregard for their truth, and were made to induce the plaintiff to continue working to the plaintiff's detriment". Thus, it appears that the plaintiff is alleging that the misrepresentations were fraudulent as opposed to negligent.

[33] Indeed, counsel for the plaintiff acknowledged that, in light of the subject matter of the misrepresentation claim as pleaded, and in light of the decision in *Colter Development*, the only way in which its misrepresentation claim about future promises could succeed at law is if it was a fraudulent misrepresentation. However, the plaintiff has failed to plead sufficient particulars of fraudulent behaviour, which is required by R. 3-7(18). I agree with the applicants that a plaintiff claiming fraud without any evidence cannot resist a claim for dismissal on the ground that they should be entitled to use the discovery process to "fish" for that evidence first: *Ridge-Meadows* at paras. 24-26.

[34] Assuming the facts pleaded by the plaintiff are true, and giving them the most liberal and generous reading, it is clear to me that the plaintiff's claim in

misrepresentation discloses no reasonable cause of action and has no reasonable prospect of success. Given that this is the plaintiff's second attempt at remedying what it evidently recognized as being a deficient pleading, I decline to grant the plaintiff leave to amend their pleading to try again.

THE CLAIMS IN BREACH OF TRUST

[35] In my view, the plaintiff has failed to plead the facts that would be capable of supporting a finding of a wrongful act on behalf of the applicants that would give rise to an action for breach of trust against them. Thus, the claim should be dismissed pursuant to R. 9-5 as disclosing no reasonable cause of action. Alternatively, I would dismiss the claim under R. 9-6 as disclosing no genuine issue for trial.

[36] In the ANOCC, the plaintiff alleges that the applicants are remedial constructive trustees in relation to a statutory trust under the *BLA* and a common law substantive constructive trust. The plaintiff alleges that the applicants are personally liable for breaches of both of these trusts.

The Alleged Breach of Statutory Trust

[37] Once again, I find that the applicants have accurately summarized the plaintiff's allegations with respect to the alleged breaches of trust in their written submissions. In support of the breach of statutory trust, the plaintiff has alleged that:

a) under the *BLA*, holdbacks were to be held by Alderbridge and/or the Owner pursuant to a statutory trust for the plaintiff;

b) for their own use or for uses not permitted by the statutory trust, the applicants directed and facilitated the payment of the holdbacks to parties who were not beneficiaries; and

c) the applicants knowingly assented to, directed and/or acquiesced in the breach of trust and/or knowingly received or applied the trust funds or property to their own benefit.

[38] Pursuant to s. 5(2) of the *BLA,* holdback funds retained by Alderbridge were held in trust for the benefit of the plaintiff and the potential lien holders claiming through the plaintiff. I agree with the applicants that the ANOCC does not plead any facts that would support a claim that any individual or entity other than Alderbridge was the trustee in respect of the holdback funds. On this basis alone, the claim for breach of statutory trust against the applicants should be dismissed pursuant to R. 9-5(1) as disclosing no reasonable claim. I note that the plaintiff's claims against Alderbridge for breach of a statutory trust may be able to be maintained, but as referenced earlier, those proceedings are stayed pursuant to the order made in the CCAA Proceeding.

[39] In any event, if I was to look beyond the pleadings, I would find that the plaintiff's claim of breach of statutory trust against the applicants discloses no genuine issue for trial and would dismiss it pursuant to R. 9-6.

[40] As this Court held in *Mars v. Dowell,* 2004 BCSC 1351 at para. 52, to find directors of a corporate entity personally liable for a breach of trust under the *BLA,* there must have been an appropriation or use of trust funds for a purpose inconsistent with the trust. However, the uncontroverted evidence on this application is that the holdback funds in the amount of $888,283 were retained by Alderbridge from the amounts payable to the plaintiff as required by the *BLA* and then paid to the plaintiff or to its subcontractor on the request of the plaintiff. In particular, a payment of $577,500 was paid to the plaintiff's subcontractor, Rush Contracting Ltd. ("Rush") on April 24, 2020. On May 20, 2020, a payment of $222,376 was paid to the plaintiff in satisfaction of a holdback release. A further $88,360 was paid to the plaintiff's or Rush's subcontractor Storm Guard. There is no evidence submitted by the plaintiff to contradict that these payments were made or that such payments were for a purpose inconsistent with the holdback trust.

[41] The applicants have provided evidence that the plaintiff, Rush, and Storm Guard were all owed money from work done on the project at the time the payments referenced above were made and the plaintiff has provided no evidence to the

contrary. There is no need to weigh evidence to decide the matter because the evidence is uncontested that Alderbridge used the holdback funds it retained from the amounts due to the plaintiff to pay the plaintiff and to pay the invoices of the plaintiff's subcontractors for work performed on the Project. Consequently, there is no genuine issue for trial and the plaintiff's claim for breach of statutory trust against the applicants is dismissed pursuant to R. 9-6.

The Alleged Breach of Constructive Trust

[42] The plaintiff alleges that the funds advanced to Alderbridge by its lenders in the amount of approximately $8.6M (the "Financing Funds") is impressed with a substantive constructive trust with the plaintiff being the beneficiary. The plaintiff alleges that the lenders advanced the funds to Alderbridge on account of the plaintiff's supply of work and materials under the contracts it had with Alderbridge, for the purpose and intent of paying the plaintiff for the work performed on the Project.

[43] The relevant allegations are found in various places in the ANOCC. The allegations, and some of the problems with them, are again accurately summarized by the applicants in their written submissions:

> At paras. 30, 31 and 40 of part 1 of the [ANOCC], the plaintiff states that the Financing Funds were advanced to Alderbridge on account of the plaintiff's supply of work and materials under the contracts, and for the purpose and intent of paying the plaintiff for the work performed.
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> At para. 49, the plaintiff alleges that the Alderbridge and/or the Owner were obligated as debtors under their lending agreements to pay the plaintiff amounts advanced on account of work performed and that the plaintiff was entitled to immediate payment of such funds advanced.
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> Paragraph 42 claims that Sam Hanson, Jason Ratzlaff and Graham Thom act as trustees of the trusts. However, paragraphs 44 and 45 allege that each of the applicants directed the payment of the trust property to parties who were not beneficiaries in breach of the trust. These allegations are further contradicted by paragraphs 50 and 52, which also contradict each other.
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> According to para. 50, it was the alleged trustees, Sam Hanson, Jason Ratzlaff and Graham Thom who directed Alderbridge to wrongly divert the constructive trust funds to certain (but not all) of the applicants, namely South Street LP, South Street Development, REV, Gatland, Sam Hanson and/or Brent Hanson. Paragraph 52 goes on to allege that some or all of these

> recipients, South Street LP, South Street Development, REV, Gatland, Sam Hanson and Brent Hanson, wrongfully converted the trust funds.

[44] Similar to the plaintiff's claims against the applicants for breach of statutory trust, the claims that the Financing Funds, or any other funds, were impressed with a constructive trust for the benefit of the plaintiff with the applicants acting as trustees, is not supported by the law.

[45] The plaintiff has not alleged that a fiduciary relationship exists between it and the applicants, nor has it alleged the existence of any of the equitable duties referenced in *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217 at para. 45, to establish that a constructive trust existed in favour of the plaintiff. Instead, the plaintiff's claim for the creation of a constructive trust rests on an entirely novel argument: that by contributing to the improvement of the Project, the plaintiff earned an equitable interest in the funds advanced to Alderbridge by its lenders for the purpose of constructing the Project.

[46] While I am not deciding whether claims against Alderbridge for breach of trust, or anything else, can proceed at this time, I note that the plaintiff has not provided any jurisprudence in support of its position that funds advanced from a developer's lender are impressed with a trust at common law in favour of the developer's contractor.

[47] Furthermore, even if one accepts the viability of the plaintiff's novel argument as against Alderbridge, considering that the Financing Funds were received by Alderbridge, it is very problematic that the plaintiff has provided no facts, and no basis in law, to explain why the applicants, or a subset of the applicants, would be the trustees of those funds instead of, or in addition to, Alderbridge. Moreover, I agree with the applicants that no particulars are pleaded as to how each of the applicants caused Alderbridge to wrongfully divert the trust property, or how they were in a relationship in which Alderbridge would have sought their assent or acquiescence in breaching the alleged trust.

[48] While the Court is to err on the side of permitting a novel claim to proceed at this stage, that novel claim must be arguable. It is impossible for me to see how the plaintiff's argument could succeed because success would mean that the contractor, in this case the plaintiff, would be entitled to priority before the lender over the Financing Funds advanced to Alderbridge by that same lender. This is not the kind of incremental change in the law in which a novel claim can go forward as discussed by the Court of Appeal in *BNSF Railway Company v. Teck Metals Ltd.,* 2016 BCCA 350 at para. 55. In my view, it is plain and obvious that the claim in constructive trust against the applicants cannot succeed as a matter of law and should be struck under R. 9-5(1)(a).

[49] In any event, even if I am wrong with respect to the application of R. 9-5(1)(a), I would grant the application for summary judgment under R. 9-6 and dismiss the plaintiff's claim for breach of constructive trust upon consideration of the evidence. In my view, there is no evidence that the funds advanced to Alderbridge by its lenders were diverted or otherwise misappropriated by the applicants. There is nothing to controvert the evidence submitted on behalf of the applicants that the funds were disbursed by Alderbridge in the way that Brent Hanson, Alderbridge's principal, has attested.

[50] The evidence before me supports a finding that the as of January 31, 2020, the plaintiff had issued invoices to Alderbridge in the amount of approximately $8.8M. The uncontroverted evidence is that these invoices were paid, subject to the statutory holdback under the *BLA*. The plaintiff takes the position that the lender advanced approximately $8.074M to Alderbridge in respect of the Project. Contrary to the position advanced on behalf of the plaintiff, I do not find that the evidence merely shows what was recommended to happen with the funds. Rather, the principal of Alderbridge has attested that the funds Alderbridge received from its lenders were paid in accordance with the approved Project budget referred to in his affidavit. I agree with the applicants that the evidence shows that the balance of the Financing Funds was used to pay the invoices of other legitimate service providers.

[51] The same can be said of the funds that Alderbridge's limited partners and investors advanced to Alderbridge to pay for the necessary on-going costs to maintain the project site, and to pay for the costs associated with the sale and investment solicitation process and restructuring. There is no evidence before me that would support the plaintiff's allegation that these funds were misappropriated in some way by either being retained by Alderbridge, or paid to the applicants, as alleged. One would expect evidence from the plaintiff that the funds it was entitled to receive were not received. There is no such evidence. Similarly, there is no evidence that the plaintiff was promised a certain amount from the funds advanced to Alderbridge by its limited partners.

[52] Consequently, on the evidence before me, even if the plaintiff's novel claim as against the applicants was permitted to proceed, there is no genuine issue to be tried that a constructive trust was breached.

THE CLAIM IN UNJUST ENRICHMENT

[53] As with the claims in misrepresentation and breach of trust, the plaintiff's claim in unjust enrichment against the applicants should also be struck pursuant to R. 9-5, or dismissed pursuant to R. 9-6.

[54] Like its claim with respect to the alleged breaches of trust, the plaintiff's claim in unjust enrichment is based upon the receipt and use of the Financing Funds that were advanced to Alderbridge by its lenders. In the ANOCC, the plaintiff claims that the applicants were unjustly enriched in the amount of $8.6M and that a remedial constructive trust should be imposed on the Financing Funds in the amount of $8.6M or any part of that amount.

[55] The facts pleaded by the plaintiff in support of these claims are found at paras. 48-53 of the ANOCC. The applicant's have accurately summarized the basis of the plaintiff's claim in their written submissions. In summary, the plaintiff claims that:

a) Alderbridge and/or the Owner as debtors were obligated to pay to the plaintiff amounts advanced by the lenders on account of work performed and the plaintiff was entitled to immediate payment of such funds;

b) South Street Development, REV, Gatland, Sam Hanson and/or Brent Hanson were unjustly enriched without juristic reason as a result of the wrongful payment to them, or conversion by them, of the Financing Funds; and

c) it was "concurrently" deprived of its entitlement to payment of the Financing Funds.

[56] I agree with the applicants that as a matter of law, the plaintiff did not have an interest in the funds advanced to Alderbridge by its lenders (see discussion re: alleged breach of trust above). As it did not have an interest in those funds, the plaintiff could not suffer a deprivation as a result of the use of those funds. The claim should be dismissed under R. 9-5(1) as disclosing no reasonable cause of action.

[57] Furthermore, on the evidence before me, it is clear that the plaintiff's claim does not reveal a genuine issue for trial and should be dismissed under R. 9-6. As discussed above, the evidence is that the Financing Funds were used to pay the plaintiff and its contractors pursuant to the Project's contracts. To the extent that the Financing Funds were paid to the plaintiff, there was no deprivation of any entitlement to the Financing Funds, if such an entitlement could exist. Even if the plaintiff was entitled to payment of the Financing Funds, there was juristic reason for the payments that were made to the contractors that provided services on the Project pursuant to the contracts.

[58] Like with the breach of trust claims, the plaintiff is essentially making a bald assertion that the applicants have wrongfully diverted the Financing Funds for their own purposes. However, no material facts are pleaded in respect of the wrongful diversion of these funds, and as discussed above, the evidence does not support such an allegation. Even if the evidence showed that Alderbridge had failed to use

the Financing Funds to pay amounts owed to the plaintiff for work done on the Project, such an enrichment of Alderbridge would not be sufficient to ground an action against the applicants (i.e. its stakeholders) in their personal capacities. While Alderbridge's stakeholders may have had a personal interest in the Project as, for example, shareholders, I agree with the applicants that such a personal interest is not sufficient to pierce the corporate veil without material facts to support the claim: *Colter Developments Ltd. v. Squamish JV Ltd.*, 2015 BCSC 415, para. 44.

THE PLAINTIFF'S ADJOURNMENT APPLICATION

[59] At the beginning of the second day of the hearing before me, the plaintiff brought an application to adjourn the applicants' application to permit what it describes as "limited discovery" to take place in order to ascertain the facts and documentary evidence the plaintiff needs to prove its case. Thus, while characterized as an adjournment application, the application is both an application for adjournment and for disclosure or discovery.

[60] While I agree that I have a wide discretion to grant an adjournment, I decline to exercise that discretion in the circumstances of this case.

[61] First, it appears to me that a significant part of the accounting that the plaintiff seeks in respect of the use of the holdback and Financing Funds has already been provided in the affidavit material provided by the applicants in this application. As discussed above, the plaintiff has provided no evidence to deny its receipt of these funds or to support its claims of diversion of those funds.

[62] Second, as I have discussed, the plaintiff's claims against the applicants are bound to fail. Putting the applicants to the time and expense of participating in a discovery process in circumstances where there is no chance of success would be antithetical to the purpose of the rules at issue. The applicants should not be required to expend more funds to defend claims that have no chance of success.

[63] Third, I refer to these Reasons at paras. 21-23 above in respect of my rejection of the plaintiff's argument that this application is premature. These reasons are also applicable to the adjournment application.

COSTS AND DISPOSITION

[64] I find the Court of Appeal's decision in *Merit Consultants International Ltd. v. Chandler,* 2014 BCCA 121, to be particularly applicable to the case at hand. In that case, the Court of Appeal upheld the trial judge's decision to dismiss a plaintiff's case against the directors of a corporate defendant in circumstances where the action against the corporate defendant was stayed pursuant to CCAA proceedings. At para. 24, the Court held:

> I see the case at bar as an example of a claim made against the directors of a corporation "in circumstances which give the appearance of the desire for ... leverage in the litigation process." (*ADGA* at para. 9.) It cannot be doubted that the Directors were sued because Merit's actions against Redfern and Redcorp were the subject of a stay under the *CCAA*. I see no principled basis on which, if defamation were proved, liability should be shifted to the Directors.…

[65] I come to a similar conclusion with respect to the plaintiff's case against the applicants. The circumstances of its claim suggest that the plaintiff has commenced the actions against the applicants because of the stay ordered in the CCAA Proceeding. The plaintiff is attempting to hold Alderbridge's directors and investors personally liable for the alleged breaches of Alderbridge because Alderbridge is insolvent and subject to the stay of proceedings. This is a case where a contractor has unfortunately not been paid for all of the work it completed and it is attempting to shift liability from the party it contracted with to that party's directors and shareholders. However, as discussed, there is no basis in the law, or in the evidence before me, to hold any of the applicants liable for the alleged wrongdoing of Alderbridge as pleaded in the ANOCC.

[66] As a result of the foregoing, the plaintiff's claims against the applicants are dismissed under R. 9-5(1)(a) as disclosing no reasonable cause of action. Alternatively, the claims in breach of trust and unjust enrichment are dismissed

pursuant to R. 9-6 as disclosing no genuine issue for trial. Given these conclusions, it is unnecessary for me to consider whether any of the plaintiff's claims should be dismissed under R. 9-7.

[67] The applicants seek special costs of the applications. They rely on this Court's decision in *Ridge-Meadows* at paras. 36-37, which in turn relied upon other decisions of this Court. Those decisions stand for the proposition that allegations of fraud should not be lightly made given the serious pall they cast over a person's reputation. Such allegations must only be made with very careful consideration, and at the very least, must be supported by a *prima facie* case. If not, an award of special costs may be appropriate.

[68] As discussed above, the plaintiff has made allegations that the applicants made statements that were "knowingly false and/or negligently made" for the purpose of inducing the plaintiff to continue to perform additional work on the Project. While it does not specifically seek damages for fraudulent misrepresentation, that is the essence of the misrepresentation claim made by the plaintiff. The other claims against the applicants allege serious wrongdoing on behalf of the applicants by misappropriating or diverting funds held in trust. As discussed above, no material facts were pleaded in support of these serious allegations and the plaintiff did not tender any evidence in support these claims.

[69] I would not be inclined to award special costs simply because the plaintiff's case was weak. In my view, although weak, "I would not characterize it as wholly without merit, such that no reasonable solicitor would think it appropriate to proceed": *Ridge-Meadows* at para. 45.

[70] However, I am rather concerned with the plaintiff's decision to amend its NOCC to affirm and repeat its very serious allegations that some or all of the applicants misappropriated trust funds and/or made fraudulent representations without any evidence to support such claims. Such pleadings are scandalous and, in my view, this is an appropriate case to make an award of special costs in favour of the applicants.

[71] The application to dismiss the plaintiff's claims against the applicants pursuant to Rules 9-5(1)(a) and 9-6(5) is granted, without leave for the plaintiff to make any further amendments. The applicants are awarded their special costs of the application.

"Majawa J."