IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0081092 BC Ltd. v. Callahan,* 2024 BCSC 864

Date: 20240514
Docket: S190277
Registry: Vancouver

Between:

0081092 BC Ltd., formerly known as Shasta Properties Ltd.

Plaintiff

And:

Robert Callahan, Bruce Callahan, Douglas Callahan, and Callahan Property Group Ltd.

Defendants

Docket: S235344
Registry: Vancouver

Between:

Edward James Callahan

Plaintiff

And:

Robert Callahan, Bruce Callahan, Douglas Callahan, Bruce Callahan as trustee for the Callahan AE#3 Trust, Ernst & Young Inc. (as Liquidator), and 0081092 BC Ltd.

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for Ernst & Young Inc., in its capacity as Liquidator of 0081092 BC Ltd.: A.T. Paczkowski

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Counsel for Bruce Callahan, Robert Callahan and Callahan Property Group Ltd:	T.M. Young
Counsel for Douglas Callahan:	A.H. Sabur
Representative for Ernst & Young Inc.	H. Palmer
Place and Date of Hearing:	Vancouver, B.C. May 7 and 8, 2024
Place and Date of Judgment:	Vancouver, B.C. May 14, 2024

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[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] The defendants each seek that the trial of action number S190277 (the “Derivative Action”), currently scheduled for 30 days commencing May 27, 2024, be adjourned generally and that the Derivative Action then be tried at the same time as action number S235344 (the “Differential Action”), with the usual ancillary relief as to the treatment of evidence for the purpose of the joint trials. The applications are opposed by the plaintiffs in the two actions.

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<u>Background</u>

[3] Edward “Ted” Callahan (“Ted”), the plaintiff in the Differential Action, is the brother of the defendants in the Derivative Action, Doug Callahan, Bob Callahan, and Bruce Callahan (the “Defendant Brothers” and collectively with Ted the “Callahan Brothers”). Given the common surnames, I will refer to the parties by their first names when I am referring to them individually but mean no disrespect in doing so.

[4] The plaintiff in the Derivative Action is 0081092 BC Ltd., formerly Shasta Properties Ltd. (“Shasta”), which is a family company started by the Callahan Brothers' late father, Thomas Lloyd Callahan (“Lloyd”). Currently the Callahan Brothers, as the Callahan AE#3 Trust (the “Family Trust”) are the shareholders of that Shasta.

[5] Shasta was one of various companies that was part of a larger trucking, then construction and real estate development, enterprise started by Lloyd in the late 1950s that was by all accounts a financial success. However, as noted by the Court of Appeal in reasons indexed at 2022 BCCA 387 at paras. 2 to 10, that success has been significantly lessened as a result of the ongoing disputes since the death of the Callahan Brothers’ mother in 2002 as between Ted on the one side, and initially Lloyd and the Defendant Brothers, and now the Defendant Brothers alone since Lloyd's passing, on the other.

[6] The resolution of the dispute has been the subject of various proceedings, commencing with a 14-year long mediation/arbitration, which culminated with the severance of Ted's interest in several of the companies in the Callahan group of companies, formulated on the parties' stated wishes to retain land interests rather than see the properties sold, relying on the family credo "land is king", in a tax efficient way as based upon professional advisors' advice in that respect.

[7] The severance of the Callahan Brothers' interest has not, however, had the effect of ending the disputes between the parties generally and specifically in respect of Shasta, that being the remaining corporation which the parties' interests have not been divided.

[8] Shasta is the owner of five contiguous parcels making up 18.5 acres of waterfront land in Kelowna (the "Kelowna Lands"), which the parties agree is a prime development property believed to be worth more than 14 million, although currently operating as a mobile home park.

[9] In terms of the proceedings that have arisen since the arbitration, they can be summarized as follows.

a) In 2010, Ted commenced an oppression remedy action against the Defendant Brothers in respect of one of the other family companies, which was dismissed with reasons being indexed at 2011 BCSC 40.

b) In 2015, the Defendant Brothers filed a petition seeking a court-appointed Liquidator of Shasta under s. 324 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"). Ted opposed the relief being sought and the proceedings were dismissed largely on the basis that the Defendant Brothers held a majority interest such that there was no "deadlock" which necessitated such an order to be made, as summarized in reasons indexed at 2015 BCSC 663.

c) In 2019, this Derivative Action was commenced with Ted being authorized to pursue the action on behalf of Shasta pursuant to s. 232 of an *BCA* by

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order pronounced that same date. In the Derivative Action, Ted claims that the Defendant Brothers breached their duties to Shasta by paying themselves excessive and unreasonably directors' and management fees, which Ted estimates to be approximately $3 million. A company owned by a Bob and Bruce, Callahan Property Group Ltd. (“CPG”), was later added as a defendant in this action as an alleged recipient of such remuneration.

d) Upon the Defendant Brothers passing a shareholders' resolution on November 6, 2020, appointing Ernst & Young Inc. (the ”Liquidator”, and collectively with the Defendant Brothers and CPG, the “Defendants”), as the liquidator of Shasta on November 27, 2020, Ted filed a petition under the *BCA* seeking to set aside the shareholders' resolution on the basis that it was oppressive to him. In reasons indexed at 2022 BCSC 87, the shareholders' resolution was set aside. That decision was successfully appealed with the Court of Appeal issuing reasons on November 18, 2022, which are the previously referenced reasons. Ted sought leave to appeal to the Supreme Court of Canada, which was recently denied.

e) On March 30, 2022, the Liquidator filed a petition under s. 325 of the *BCA* (the “Liquidation Proceedings”) seeking declarations and orders in respect of the liquidation of Shasta given the level of acrimony between the parties. Specifically, the Liquidator sought the court's supervision of the liquidation and including sales processes. In reasons indexed at 2023 BCSC 1567, the court initially dismissed an application for a sales process order which appeared to be primarily aimed at selling the shares in the company, commenting on various procedural issues that had been raised by the parties. Subsequently by order pronounced April 10, 2024, a sales process order was granted in favour of the Liquidator. The reasons for that decision are indexed at 2024 BCSC 586.

f) On July 28, 2023, Ted brought the Differential Action against the Callahan Brothers, the Family Trust, the Liquidator, and Shasta, in which he seeks

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a disproportionate share of Shasta's equity based on allegations by Ted that there were agreements for a differential to his interest. The Defendant Brothers and the Family Trust filed a notice of application on November 14, 2023 to have the claim struck under R. 9-5. That application was originally scheduled to be heard for two days commencing December 20, 2024. However, by agreement the application was then adjourned to be heard on June 17 and 18, 2024. After the new hearing date was secured Ted filed an amended notice of civil claim on March 25, 2024 whereby he expanded the nature of his claims and agreements being alleged by him to support the alleged differential to his interest, which will be detailed further below.

g) On March 26, 2024, the day after the amended notice of civil claim and the Differential Action was filed by Ted and on the day the Liquidator's application for approval of its sale process was heard, Ted filed a petition under s. 324 of the *BCA* in which he is now seeking a court-ordered liquidation of Shasta or alternatively a share buy out.

[10] There are also two actions arising from Lloyd's estate, one being the probate action in which notices of dispute have been filed such that, I believe, probate has not yet been granted, and the other being an action brought by Ted for a declaration the proceeds of sale from Lloyd's personal residence, which had been registered in the name of the Family Trust, were held in trust for the estate. I may have the full details of the probate matters incorrect, however nothing turns on those actions for the purpose of this application.

[11] As noted, this Derivative Action has been extant since 2019.

[12] An initial notice of trial was filed in 2019 by which trial was scheduled to commence September 8, 2020. That trial did not proceed given the interruption of COVID and the failure of both parties to file their trial briefs. A second trial was scheduled for October 2022 but upon Ted seeking an adjournment, the parties consented to an adjournment, which was then granted by court order.

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[13] In that court order, Justice Funt directed the parties to "act reasonably with dispatch to secure in Vancouver a trial date starting on May 6, 2024, and proceeding for 30 days unless all parts agree that the trial requires fewer than 30 days" and to compete discoveries by August 31, 2023, unless the parties otherwise agreed.

[14] The Defendant Brothers argue that such language was, in fact, sought by them as they were concerned with the delay from the loss of the October 2022 trial date and actions that they believed were being taken by Ted to delay matters.

[15] The plaintiffs argue that the Derivative Action is now ready to proceed. In this respect, the parties have largely completed document discovery with over 650 documents being produced, completed expert report exchanges with nine reports as to the obligations of directors, and economist reports being exchanged, and some examinations for discovery being concluded.

[16] However, and in what Shasta and Ted argue is contrary to the order of Justice Funt, discovery of the defendants which had been scheduled by consent to take place in April 2024 were unilaterally cancelled by the Defendant Brothers.

[17] The Defendant Brothers argue that those discoveries were cancelled due to the amendments to the notice of civil claim being filed in the Differential Action on March 26, 2024, which raised issues directly in issue and intertwined with those in the Derivative Action, and in their view supported a joinder of the trial of the two actions.

[18] In terms of those discoveries, given these new allegations, the Defendant Brothers submit that their clients could no long attend for examination without those new issues also being addressed, which supported their adjournment so that they could properly prepare. Accordingly, on April 3, 2024, the Defendant Brothers advised the plaintiffs that the discoveries would not be proceeding as scheduled, and on April 5, 2024, they gave notice as to their intention to bring the applications that are now before the court, which were then filed on April 16, 2024.

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[19] Turning then to the amendments to the pleadings which the Defendant Brothers argue change the character of the dispute in the Differential Action, the original notice of civil claim plead that there was an agreement whereby, to compensate Ted for his efforts in preserving and growing the value of Shasta, the Defendant Brothers agreed that he would have a larger share as the company grew.

[20] The March 26, 2024 amendments added further claims by which Ted takes issue with the proposed sale in the Liquidation Proceeding, seeks a CPL against the Kelowna Lands, and pleads a further agreement referred to as "an incentive agreement," whereby Ted alleges that his parents, on behalf of the various family companies and Shasta, agreed that he would receive a larger interest in Shasta. This alleged agreement goes back a significantly longer period in time than the agreement alleged to have been in place between Ted and the Defendant Brothers. Ted also now claims for damages for breach of contract and unjust enrichment in respect of the operations of Shasta.

[21] The factual basis in the notice of civil claim went from 38 paragraphs and five pages to 90 paragraphs and 13 pages. In the original response to civil claim in the Differential Action, the Defendant Brothers denied any agreement between themselves and Ted by which he would have any entitlement to a larger share or profit in Shasta. They have not yet filed a response to notice of civil claim to address these new allegations.

[22] In their response to the civil claim in the Derivative Action, the Defendant Brothers deny any breach with respect to their management of Shasta or their own remuneration. In doing so, they also raise the historical management practices, namely those put in place by Ted when he managed the operations from 2000 to the point in time he was replaced, which was around the end of 2008. In particular, they plead as follows:

a) Historically in the period prior to 2009, Shasta at the direction of Ted paid significant directors' fees to the directors;

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b) Between 2000 and 2008, Ted established a past practice of drawing disproportionate directors' fees and wages from Shasta for his own benefit; and

c) In setting directors' fees, the defendants considered those historical practices with a view to equalizing the compensation taken by each of the Callahan Brothers and were unreasonable in light of those practices and the duties then undertaken by each of them.

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[23] In addition, in the trial brief filed by Shasta in the Derivative Action in March 2024, Shasta disclosed for the first time the intention to call a witness who is identified as having given evidence specific to the Differential Action.

[24] In particular, this witness has sworn an affidavit, although it has never been filed, as to the alleged agreements that give rise to the claims in the Differential Action. As such, the Defendant Brothers argue that it seems that the plaintiffs intend to bring and lead evidence in the Derivative Action regarding the facts in issue in the Differential Action given this witness.

<u>Joinder of Trials</u>

[25] As a joinder of the actions will have a direct bearing on the adjournment application, I will consider that element of the applications first.

[26] There is no dispute as to the principles applicable to the subject applications in terms of joinder of trials. Firstly, as to having the Differential Action and Derivative Action heard together pursuant to R. 22-5(8), the court must address two questions as referenced in *Callan v. Cooke*, 2020 BCSC 290, at para. 123; and *Grewal v. Grewal*, 2017 BCSC 291, at para. 15.

a) Do common claims, disputes, and relationships exist between the parties? And

b) Are the actions so interwoven that separate trials at different times before different judging would be undesirable and fraught with problems and expense.

[27] In both cases, the applicants bear the onus of establishing that the answers to these questions are in the affirmative.

[28] The answer to the first question is to be done based on a review of the pleadings.

[29] The plaintiffs argue that although the parties are similar and both actions involve the affairs of Shasta, the issues in dispute are distinct given that, they argue, the agreements which give rise to the differential claims are not being relied upon by them in the Derivative Action. The Derivative Action is based on breaches of duties and the practices of the parties.

[30] The plaintiffs argue that the application ought to be dismissed on this basis alone as the Defendants have failed to meet the onus upon them to show there are common issues, disputes, and relationships on the pleadings. However, on the face of the pleadings, including the response to civil claim, it is clear that there will be significant overlap in the factual evidence, particularly as to the remuneration paid to both parties both up to 2009 and thereafter when Ted was no longer part of the management team. Whether there were agreements between the parties in that respect will be relevant in both actions given that the historical dealings of Ted, then the Defendant Brothers, in setting remuneration, and will be in issue in both actions.

[31] The answer to the second question is based upon the following factors as set out in *Callan*:

> [124] The factors to consider when making a determination on consolidation or ordering that actions be heard together include whether the consolidation will:
>
> 1) create a saving in pre-trial procedures;
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> 2) reduce the number of trial days taken up by the actions heard together;

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3) avoid serious inconvenience to a party being required to attend a trial in which they only have a marginal interest;

4) save the time and witness fees of experts;

5) dispose of all actions at the same time due to common issues of fact or law;

6) avoid a multiplicity of proceedings; and

7) whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the party opposing consolidation;

bearing in mind:

8) the relative stages of the actions;

9) whether the trial will be delayed and prejudice one or some of the parties; and

10) whether the refusal to consolidate risks inconsistent results.

(See: *Merritt*; *Insurance Corporation of British Columbia v. Sam* (1998), 24 C.P.C. (4th) 338; *Liu v. Tsai*, 2017 BCSC 221 (Master))

[32] I will address each of those factors in turn.

1) Savings in pre-trial procedures.

[33] Given the advance stage of the Derivative Action as compared to the Differential Action, there is likely that any savings in the pre-trial procedures will be nominal. While there may be some savings as a result of the Defendant Brothers' failure to appear at their discoveries, meaning that the discoveries could then be combined, given that this is essentially a benefit caused or created by the Defendant Brothers' own refusal to attend the scheduled discovery, the factor is not a persuasive one in favour of the joinder on its own.

2) Reducing trial time, saving trial time and witness fees of experts.

[34] The Defendant Brothers argue that there will be reduction of trial days and that the trial of both actions will likely involve the same witnesses giving much of the same testimony given the factual commonalities.

[35] Having regard to the pleadings, such overlap in witness testimony is evident. It is not clear, however, what the full extent of that overlap will be given the Differential Action is not as advanced. For example, no trial briefs are before the

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court to compare the witnesses expected in that matter. However, given the pleadings, it is apparent that there will be some overlap and duplication that would be avoided through a joinder.

3) Serious inconvenience of a party attending a trial in which they only have a marginal interest.

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[36] The parties who a different in the two actions are CPG in the case of the Derivative Action, and Ted, the Family Trust, and Liquidator in the case of the Differential Action. However, it is notable that Ted, as the party directing the Derivative Action on behalf of Shasta, will be fully involved in the Derivative Action despite not being a party in his personal capacity. Similarly, the Defendant Brothers are the directing minds of CPG and the Family Trust and will be fully participating in the proceedings on that basis.

[37] The Liquidator will be moderating both proceedings, although to a lesser degree in respect of the Derivative Action, on behalf of Shasta.

[38] There may be an argument that if the Derivative Action proceeded and the Differential Action's trial was delayed that perhaps the liquidation would be sufficiently advanced, and the sales process complete, that the Liquidator may not be needed to participate in the later action. However, that is a minor inconvenience and one that the Liquidator did not raise as an issue.

[39] Thus, while the parties are technically different and have different interests to advance, there will be no inconvenience by virtue of their attendance in a joint trial in respect of matters to which they would otherwise not be participating.

4) Common issues of fact or law.

[40] As noted above, I have found that there are common issues of fact and law between the two actions. While there may be differences in the legal arguments, including as to the nature of agreements as to remuneration and/or re-apportionment of interests, those factual issues will be in issue in addressing the historical practices in that respect. As such, the factual matrix and evidence to be led in the two actions

have significant overlaps. In short, historical practices are likely to provide important context for the alleged agreements, and the alleged agreements and discussions that are the basis for them provide important context for the alleged historical practices.

5) Avoiding a multiplicity of proceedings.

[41] Given the ongoing acrimony, there is a multiplicity of proceedings in respect of various issues between these parties. Unfortunately, having the Differential Action and Derivative Action tried together will not address all of those.

[42] Nonetheless, even with a joinder, the Liquidation Proceedings, including those recently commenced by Ted, will remain outstanding. The probate actions obviously will not be affected.

[43] However, while it will only address the issues as to the parties' interests in Shasta, that issue is a significant one. The determination of the issues raised in both the Derivative Action and the Differential Action will assist with the final windup and distribution following the liquidation of Shasta, whether that be by way of a sale to a third party or to one of the Callahan Brothers, or their companies.

6) Balance of prejudice given degree of commonality.

[44] As noted, this factor requires consideration of the relative stages of the action, whether the trial will be delayed, the extent of the prejudice the parties may experience, and whether the refusal to consolidate risks inconsistent results.

[45] There is little dispute that the Derivative Action is farther along than the Differential Action, which means that the trial date in the Derivative Action will be sacrificed if there is a joinder resulting in a delay to its resolution.

[46] Both parties argued that the other previously have or is now using the Rules of Court in a way that constitutes an abuse, in order to delay matters when convenient to do so.

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[47] In the case of the plaintiffs, the Defendant Brothers point to, among other things, the various actions commenced by Ted along with the timing of such steps, including those involving the recent petition filed by him after it was clear that the sales process order was being sought by the Liquidator, or in the case of the recent amendments to the Differential Action, to defeat the application to strike that action.

[48] In the case of the Defendant Brothers, the plaintiffs point to, among other things, the timing of this application on the eve of the trial and the unilateral refusal to attend discoveries.

[49] It is arguable that all parties have used the rules to their advantage from time to time in the various proceedings. Determining whether one side has done so more than the other, or in a way that is determinative is not possible on this application.

[50] Given the level of allegations raised against each other, I find the delay in the history of these proceedings to be a neutral factor in that it appears that both parties have acted in such a manner so as to use the Rules of Court, or seek delays, that are in their own advantage.

[51] As to prejudice, the plaintiffs argue that they will suffer significant prejudice if the trial of the Derivative Action does not proceed as scheduled. Ted's evidence in this respect includes the following:

a) A risk that the Defendant Brothers could commence or terminate the liquidation process at any time given that it is a voluntary liquidation at this point. This argument, however, is a result of Ted's own decision to oppose the court appointment when it was originally sought. Further, if that were to happen, Ted could proceed with the petition he has now filed for that purpose.

b) A delay in the trial may result in Shasta's assets being sold, presumably under the sales process order pronounced in the Liquidation Proceedings, before the Derivative Action is heard, thereby extinguishing Shasta's claims. Given the level of court involvement and proceedings that have

been brought, it is unlikely that Shasta's assets could or would be distributed to any shareholders absent a court order. It belies belief that the Liquidator, regardless of whether the Liquidator is court appointed or not, would make a distribution and disregard Ted's claims such that his interest would be defeated. Even if there was a risk of that occurring, injunctive relief could be sought if it were a valid risk.

c) Ted's ability to finance a proposed purchase of the Kelowna Lands could be impaired if his interest in Shasta is unknown at the time the bids are made to the Liquidator in accordance with the sales process order, which contemplates a mechanism for a related party purchase in that any one of the Callahan Brothers is entitled to make a bid under the second phase of that bidding process. The Defendant Brothers argue that there is insufficient evidence to support the bold assertion by Ted that he must have his interest in Shasta calculated to participate, pointing to his significant financial holdings, although no clear financial evidence is before the court in that respect other than some evidence given by Ted as to his interests, which I address further below Regardless, the Defendant Brothers argue that given Ted’s holdings, he has a clear ability to fully participate in the sales process without knowing his interest in Shasta. The offers will ultimately be considered based upon fair market value of the offers themselves.

To the extent an offer is made by any one of the Callahan Brothers that is an equity bid as part of the consideration, I am satisfied that accommodations can be made to allow for that to be done and that proper professional advice as to how that can be achieved having regard to tax implications can be given even in the absence of knowing the exact amount of the equity to be pledged. In this respect, based on my review of the reasons for judgment in respect of the sales process, the due diligence, and market period is expected to take six and a half months for

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the first phase, to be followed by a second phase whereby sealed bids are to be undertaken, at which time the Callahan Brothers can participate.

Any sale will be subject to court approval, and the closing period after any such approval will be some time after that. There is sufficient time for professionals to advise and provide advice based on variables that may be available given the potential outcomes from those proceedings, and again, I am satisfied that those variables can be worked into any offer being presented. In addition, this factor affects all of the parties equally, as Ted is not the only Callahan brother who has expressed interest in making such an offer themselves, and it is equally affected by the fact that the claims in the Differential Action will not have been resolved.

d) A further delay of the $3 million which is stated to be owing to Shasta in the Derivative Action is prejudicial to Shasta because the lack of access to those funds is preventing Shasta from updating infrastructure and furthering the land's development potential, including in respect of a trailer buy-back program in respect of the mobile home park on the Kelowna lands. The Defendant Brothers dispute that there has been any such impairment. I note that Ted appears to have made detailed submissions at the sales process order application as to these steps that he felt ought to be taken before any sales process is undertaken. However, the Liquidator's experts opined that such steps were not necessary given the circumstances of this case and what are presumably going to be sophisticated purchasers or in the case of the Callahan Brothers, ones who are already well aware of these issues.

e) Since December 2022, Ted has worked hard to clear his personal and business schedules to ensure that he can be present for the entirety of the trial and that he will suffer if this trial does not proceed. With respect, even if this trial is not adjourned, there is no assurance that the trial will proceed given a risk of court unavailability. This is a risk that Ted appears to have

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chosen to make. Although I note that it strains credulity that Ted would, if his business is as significant as he deposes with him overseeing 700 employees as president of the Argus Group of Companies, with "numerous company ins the business of property acquisition, development, leasing, and management" choose to walk away from its operations for six weeks sometime ago such that he has refused business opportunities during this time period without delegating to any third parties and with an intention to essentially shutter his business altogether such that there will be a significant loss of opportunity that cannot be regained if there is an adjournment.

In addition, this evidence as to the nature, size, and value of his business in this respect is also inconsistent with his argument that the inability to know his interests in Shasta prejudices his ability to form an offer in the sales bid process he apparently has sufficient resources through his business undertakings that can be looked to for the purpose of making that offer regardless of the equity interest he has in Shasta.

f) F) In addition, Ted argues that it is very important to both Shasta and hiimself that the Derivative Action be resolved on the merits and "Bob and Bruce's credibility is tested in court as soon as possible." I have concern with this argument as it illustrates the risk that the plaintiffs hope to use the resolution of the Derivative Action to form a resolution of the Differential Action, which is prejudice based on litigation strategy, which is not prejudice of the type that ought to be considered on applications such as this.

[52] The plaintiffs also note an important factor for consideration, as referenced above, is the timing of this application being brought, citing para. 14 of *Simmonds v. Victoria (City)*, 2016 BCSC 951 where the court commented that the reason why the application was not brought sooner was an important factor. The plaintiffs argue that

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the lateness of this application being brought, given the prejudice to the plaintiffs in any further delays, is significant.

[53] I am, however, satisfied with the Defendant Brothers' explanation as the timing given the recent amendments to the Differential Action. Notwithstanding that there was some overlap of issues that existed prior to those amendments, the significant change in character as a result of those amendments is such that it reasonably changed the analysis being made by the Defendant Brothers.

[54] The Defendant Brothers argue that the most significant factor is the risk of inconsistent results, which could cause an embarrassment to the court. They argue that this outweighs the prejudice of any delay.

[55] I agree that there is a risk of inconsistent results between the two actions as to the historical dealings of the parties in fixing the remuneration and the context of what agreements were in place between the Callahan Brothers and their parents, and in the context of their overall dealings with each other.

[56] In my view, it is the over all interests of justice that the actions be heard together. The issues are so intertwined so as to make the separate trials at different times before different judges undesirable and fraught with unnecessary expense and risk. There is a serious risk of inconsistent findings that, despite a delay to the Derivative Action's resolution, the benefit of having the actions joined for trial to prevent such a risk outweighs the prejudice of the plaintiffs as a result of the delay.

[57] I also note in this regard that a resolution of the Derivative Action will not, if tried alone, resolve the issues sufficiently to enable the final liquidation and windup of Shasta, such that much of the prejudice will remain even if the Derivative Action proceeds in isolation. Specifically, prior to any final distribution and severance of the parties' interests, Shasta's assets must be sold under the sales process order in the Liquidation Proceedings, which will likely take until the end of this year, if not into the beginning of next year, and the Differential Action will need to be determined so as

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to settle the interests arising from the agreements, damages and unjust enrichment alleged by Ted.

Adjournment of the Trial

[58] Turning, then, to the adjournment applications, the court in *Navarro v. Doig River First Nation*, 2015 BCSC 2173, at paras.18 to 20, set out the factors to be considered on an adjournment application:

> [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 1992 CanLII 1815 (BC CA), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).
>
> [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).
>
> [20] Other factors or considerations include (in no particular order of priority):
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> - the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); *Sidoroff* at para. 10);
> - the reasonableness of the request (*Dhillon* at para. 16);
> - the grounds or explanation for the adjournment (*Dhillon* at para. 16; *Toronto-Dominion Bank* at para. 38);
> - the timeliness of the request (*Dhillon* at para. 16);
> - the potential prejudice to each party (*Dhillon* at paras. 16-17);
> - the right to a fair trial (*Dhillon* at para. 16);

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- the proper administration of justice (*Dhillon* at paras. 16 and 39; *Toronto-Dominion Bank* at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (*Toronto-Dominion Bank* at para. 38); and
- the fact of a self-represented litigant (*Toronto-Dominion Bank* at para. 39).

[59] Ultimately, the paramount consideration is the interests of justice in ensuring that there be a fair trial on the merits.

[60] One of the more significant concerns as to the adjournment request is the length of time that this matter has been outstanding.

[61] I agree with the plaintiffs that some of the duplication in issues being raised now did in fact exist prior to the March 2024 amendments to the notice of civil claim in the Differential Action, as I have previously commented upon.

[62] However, as noted I am satisfied that change in the proceedings was sufficiently significant to reasonably change that analysis. As such, I find that the request has been made in a timely way since those changes were agreed and that the request, in conjunction with the joinder of the matters, is a reasonable one.

[63] Overall, the factors for consideration largely mirror the interests of justice that were considered when considering the joinder application. Further, as I have previously noted, both parties have used the Rules of Court to their advantage in the various proceedings such the history of conduct is in that respect a neutral factor.

[64] Given my decision to join the trials, there is an argument that the Differential Action cannot be determined fairly on the merits given the inability to complete discovery and properly prepare if the matter proceeds to trial as scheduled. That impairment to the fair trial which interferes with the proper administration of justice outweighs the prejudice to the plaintiffs.

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Conclusion and Orders Made

[65] For the reasons set out above, I grant the orders as sought by the Defendants in their notice of application filed April 16, 2024.

[66] I will hear quick submissions on costs. In addition there is an application to set aside the appointments for discovery that were set, but no argument was made on that application. What is the intention with that application?

(SUBMISSIONS)

[67] THE COURT: In my view it is not appropriate to award costs thrown away given my findings regarding timing, and that all parties were, prior to those March 26, 2024 amendments, well into preparation. It was within a matter of business days that notice of this application was given thereafter.

[68] In my view, while the applicants have been successful, the appropriate order given the issues in dispute is that the costs of the parties shall be in the cause. The Liquidator, however, shall be entitled to its costs for its participation, including on behalf of Shasta in the Differential Action, in the ordinary course of the liquidation.

[69] With respect to the terms for the adjournment of the trial of the Derivative Claim, some of them in my view appear to be reasonable, but we unfortunately do not have sufficient time to consider whether or not those ought to go as sought or with some other variation of them. It seems to me that those issues can be addressed in a case planning conference, which the parties indicate they would like to schedule. The parties have my leave to seek to have the CPC set before me if it would be more advantageous to do so given my history with the matter through this application, and the previous case planning conference over which I presided, but I am not seized for that purpose. The application to set aside the appointments for discovery is adjourned generally.

“Associate Judge Robertson”