IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McCaw v. JDS Energy & Mining Inc.,* 2024 BCSC 1810

Date: 20241002
Docket: S237384
Registry: Vancouver

Between:

Devon McCaw

Plaintiff

And

JDS Energy & Mining Inc.

Defendant

Before: Associate Judge Bilawich

Reasons for Judgment

Counsel for the Plaintiff:	M. Nied
Counsel for the Defendant:	P. Bychawski S. Rafieian
Place and Date of Hearing:	Vancouver, B.C. July 4, 2024
Place and Date of Judgment:	Vancouver, B.C. October 2, 2024

Introduction

[1] In this action, the plaintiff, Mr. McCaw, seeks a variety of relief against the defendant ("JDS") arising from its alleged breach of a drilling and blasting business joint venture and alleged wrongful dismissal from his employment as chief operating officer of JDS' drilling and blasting division.

[2] In this application, the defendant JDS applies for orders:

a) Striking Mr. McCaw's amended notice of civil claim ("Amended NOCC"), filed June 26, 2024;

b) Adjourning Mr. McCaw's applications filed on April 2, 2024 [production of financial records] and May 21, 2024 (cross-examination of a JDS representative on her affidavit), pending the determination of this application, if required; and

c) Special costs.

[3] Mr. McCaw opposes all of the relief sought.

Background

[4] Mr. McCaw resides in Kelowna. His professional background involves provision of drilling, controlled blasting and related services, including for quarries, roads, pipelines, pilings, anchor installation, specialized drilling, curtain grouting, industrial site development and mine development. He has worked in this field since about 1996. He has an extensive network of industry connections, business relationships and relevant technical knowledge. Both his father and brother also work in this sub-specialized field.

[5] JDS is a private BC company which carries on business in several provinces and territories in Canada. It conducts its business through various internal divisions.

[6] On or about June 14, 2021, Mr. McCaw and JDS entered into a Letter of Intent (the "LOI") concerning creation of a new company, JDS McCaw ("NewCo"), with ownership of 49% to Mr. McCaw and 51% to JDS. The LOI states that their intent was to establish an agreement to guide the creation of NewCo, which would

become a leading supplier of drill and blast services in the mining, energy, heavy civil construction and railroad markets in western and northern Canada. It provided that they would both contribute intellectual capital, tangible capital, reputation and industry connections to help develop NewCo. It states that until NewCo had obtained contracts to generate revenue, or as determined by management, JDS would provide the platform for bidding, marketing and providing general corporate functions. JDS would maintain cost accounting functions and provide working capital, which would be transferred to NewCo as a debt upon its incorporation. It also provided that an NWT company which was owned by Mr. McCaw could be used as the corporate shell for the creation of NewCo.

[7] On June 16, 2021, JDS and Mr. McCaw entered into an employment agreement (the "Employment Agreement"). It provided that JDS employed Mr. McCaw as Chief Operating Officer ("COO") of a new drilling and blasting division ("D&B Division").

[8] On November 18, 2021, JDS increased Mr. McCaw's gross salary from its starting level, $180,000, to $300,000 and provided for certain additional benefits and potential bonuses.

[9] Mr. McCaw alleges that in or about 2023, JDS received one or more offers and/or expressions of interest to purchase the D&B Division, but it did not disclose the particulars to him.

[10] Mr. McCaw says that in or about February 2023, JDS began excluding him from meetings and refusing his requests for financial and other information about the D&B Division.

[11] On February 7, 2023, JDS sent Mr. McCaw a proposed new form of employment agreement, which included a 3-month probationary period and changed his title to "Executive Vice President", changed the reporting structure for his position and removed him from D&B Division meetings and Executive meetings. Mr. McCaw says his continued employment was threatened if he failed to "voluntarily" terminate

the LOI and re-negotiate a lesser role within the modified D&B Division, amongst other changes.

[12] JDS alleges that in early 2023 it implemented an internal reorganization of its business. It merged its "Underground Division" with the D&B Division, creating a consolidated "Mine and Civil Contracting Division". It says the D&B Division was significantly under-performing under Mr. McCaw's leadership, was causing significant and unsustainable financial losses and operational disruptions of JDS' business, amongst other issues.

[13] On April 17, 2023, Mr. McCaw wrote to JDS, taking the position that he had been constructively dismissed and demanding that JDS pay him damages of $100,000. JDS rejected the demand and took the position that Mr. McCaw had voluntarily resigned, effective May 1, 2023.

[14] On May 16, 2023, Mr. McCaw wrote to JDS, taking the position that it had repudiated the LOI, indicating that he accepted the repudiation and demanding that JDS (a) provide him with a copy of all financial and operational documents so he could conduct an independent assessment of the fair value of their joint venture (the "D&B Joint Venture"); and (b) pay him the fair market value of his percentage share of the D&B Joint Venture.

[15] JDS rejected his demands. It takes the position that the LOI was non-binding. Alternatively, if it was a binding agreement, JDS says it was subject to certain conditions precedent or conditions subsequent. Before Mr. McCaw had satisfied those conditions, JDS learned that certain representations Mr. McCaw had made to it were untrue, inaccurate, misleading and/or negligently made. As a result, the potential venture never came into effect, was terminated before performance by JDS was possible or required, or alternatively Mr. McCaw fundamentally breached the agreement.

Procedural Background

[16] On November 2, 2023, Mr. McCaw filed his notice of civil claim ("NOCC").

[17] On January 12, 2024, JDS filed its response to civil claim.

[18] On January 22, 2024, Mr. McCaw filed a reply.

[19] On April 2, 2024,

a) Mr. McCaw filed an application seeking an order that JDS produce an amended list of documents which lists various categories of financial and accounting records, contracts, financial projections and the like, relating to the D&B Joint Venture and/or the D&B Division;

b) JDS filed applications seeking production of unredacted copies of certain of Mr. McCaw's documents, and leave to file a counterclaim against Mr. McCaw and his company, Devon R. McCaw Consulting Inc. ("DRMC"); and

c) JDS filed an amended response to civil claim, which added allegations that Mr. McCaw had breached the terms of his Employment Agreement and had breach fiduciary duties, duties of loyalty, confidentiality, honesty and good faith which he owed to it, including by copying confidential and proprietary information and documents belonging to JDS and using them to compete with it, amongst other allegations.

[20] On May 21, 2024, Mr. McCaw filed an application to cross-examine Ms. Viveash, JDS' Chief Financial Officer, on affidavits she swore in support of JDS's application response opposing Mr. McCaw's document production application. Mr. McCaw's application was initially returnable June 3, 2024, but was later re-scheduled to June 25, 2024.

[21] On June 6, 2024, JDS filed an application to adjourn Mr. McCaw's applications for document production and to cross-examine Ms. Viveash on her affidavits.

[22] On June 10, 2024, JDS filed an application to strike Mr. McCaw's NOCC, with leave for him to file an amended notice of civil claim within 30 days.

[23] On June 20, 2024, Mr. McCaw filed an application response to JDS' application to strike. It attached as an Appendix a draft Amended NOCC. It was

intended that these amendments would address issues that JDS raised in its application to strike.

[24] On June 25, 2024, the various applications came on for hearing before Associate Judge Robinson. He ordered that:

a) JDS's application to adjourn Mr. McCaw's applications was granted;

b) If Mr. McCaw was inclined to file an Amended NOCC, he was to do so and serve it on JDS by June 26, 2024;

c) If JDS was inclined to proceed with its application to strike the [now Amended] NOCC:

i. It was to file and serve an amended application on Mr. McCaw by June 28, 2024;

ii. Mr. McCaw was to file and serve his amended application response by July 2, 2024; and

iii. The hearing was re-set for July 4, 2024 for a full day.

[25] On June 26, 2024, Mr. McCaw filed and served his Amended NOCC. The amendments are substantial. On June 28, 2024, JDS filed its amended application to strike the Amended NOCC. On July 2, 2024, Mr. McCaw filed his application response. The application came before me on July 4, 2024.

Applicable Law

[26] Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg, 168/2009 ("*SCCR*") sets out the basis on which a pleading may be struck out:

> **Scandalous, frivolous or vexatious matters**
>
> (1) 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
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

> (d) it is otherwise an abuse of the process of the court,
>
> 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.

[27] Sub-rule (2) provides that no evidence is admissible on an application under sub-rule (1)(a). Evidence is admissible for applications under sub-rules (1)(b), (c) and (d).

9-5(1)(a) - Discloses No Reasonable Claim or Defence

[28] The approach under this sub-rule is summarized in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17:

> **17** …. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: …. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: …
>
> [citations omitted]

[29] In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [*Nevsun*] at paras. 64 and 66, the Supreme Court summarized as follows:

> [64] A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success ... When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven" ….
>
> . . .
>
> [66] This Court admonished in *Imperial Tobacco* that the motion to strike
>
> > is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. . . . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]
> >
> > [citations omitted]

[30] A claim should not be struck where, if amended, it could disclose a reasonable cause of action: see *Olumide v. British Columbia (Human Rights Tribunal)*, 2019 BCCA 386 at para. 10 and *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 133.

Rule 9-5(1)(b) - Unnecessary, scandalous, frivolous or vexatious

[31] In *Willow v. Chong*, 2013 BCSC 1083 [*Willow*], at para. 20, the court summarized sub-rule (b):

> [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

Rule 9-5(1)(c) - It may prejudice, embarrass or delay the fair trial or hearing of the proceeding

[32] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160, at para. 47, the court summarized principles related to sub-rule (c):

> [47] Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: …. An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: …. An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: …. A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: …. A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: …. A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: ….
>
> [citations omitted]

[33] An embarrassing pleading is one that is so irrelevant that, to allow it to stand, would involve useless expense and also prejudice the trial of the action by involving the parties in a dispute apart from the issues: *Sahyoun* at para. 59.

[34] In *Canadian Federation of Students v. Simon Fraser Student Society*, 2010 BCSC 1816, at paras. 40, Justice Grauer, as he then was, summarized as follows:

> [40] Rule 9-5(1)(c) and (d) involve a number of considerations. These include whether the pleadings are unintelligible, confusing and difficult to understand, whether they are so irrelevant ("embarrassing" and "scandalous") that they will involve the parties in useless expense and prejudice the trial by involving them in a dispute that strays far from the issues, and whether they do not advance any defence known to law ("unnecessary" or "vexatious"). See, for instance, *Moulton Contracting Ltd. v. British Columbia*, 2010 BCSC 506, and the cases cited therein by Hinkson J., as he then was. These considerations also encompass a pleading that is made for an improper purpose, such as to harass and oppress the other parties, as opposed to raising a bona fide defence.

Rule 9-5(1)(d) - Otherwise an abuse of the process of the court

[35] This sub-rule allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37 and *Canadian Federation of Students v. Simon Fraser Student Society*, 2010 BCSC 1816, at paras. 41. In *Willow* at para. 21, the court noted a claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided.

Analysis

Preliminary Comment – Substantially Expanded Written Argument

[36] JDS's amended application filed on June 28, 2024 is roughly 12 pages in length. Mr. McCaw's amended application response filed July 2, 2024 is 16 pages. At the start of the full-day hearing on July 4, 2024, JDS handed up a 54-page written argument which was dated the same day. The parties tendered a joint book of authorities, in three volumes, which included 102 cases, 3 statutory authorities and 4 secondary authorities. One additional secondary authority was handed up during argument.

[37] Counsel for Mr. McCaw indicated that his opportunity to review and respond to JDS' amended application was already abbreviated by the accelerated schedule ordered by Robinson AJ. Counsel said he did not have adequate time to review and respond to JDS' expanded written argument. Despite that, Mr. McCaw wished to proceed with the hearing on the merits.

[38] While written arguments are permissible for hearings which exceed two hours in length [see Rule 8-1(16)], I am concerned that JDS did not give Mr. McCaw adequate notice of its new and expanded arguments. In some cases, the expanded argument appears to be an attempt to provide pin-point references for some of the cases mentioned in JDS' amended application. In other instances, it appears significant new argument had been added. For example, the written argument has a roughly 10-page section arguing that the Amended NOCC is, as a whole, embarrassing. The roughly equivalent section in JDS' amended application is about half a page; three paragraphs.

[39] In my view, it would not be fair or appropriate in these circumstances to allow JDS to tender new and significantly expanded argument which goes beyond what is set out in its amended application, which was filed just a matter of days earlier. I am accordingly going to restrict my consideration to the issues and arguments raised in JDS' amended application filed June 28, 2024 and Mr. McCaw's amended application response filed July 2, 2024.

Fraudulent Misrepresentation

[40] JDS argues that Mr. McCaw's claim in fraudulent misrepresentation is plainly and obviously defective because it fails to set out all of the essential elements for that cause of action. In particular, it says the alleged misrepresentations at para. 7 of the Amended NOCC are not statements of past or present fact; they are pleaded as constituting covenants and promises regarding future events and as such are not actionable as misrepresentations. They rely on *Demichelis v. Vancouver Canucks Limited Partnership*, 2014 BCSC 1368 at paras. 32-34 and say Mr. McCaw's

misrepresentation allegations are very similar to the ones which were struck out in that case.

[41] Another authority that JDS relies on is *Gill v. Basi*, 2014 BCSC 1972. At paras. 187-188, it notes that while a representation must normally be one of existing or past fact, in certain circumstances statements about future events can be actionable:

> **187** Whether alleged to be fraudulent or negligent, a representation must normally be one of existing or past fact: *PD Management Ltd. v. Chemposite Inc*., 2006 BCCA , 489 at paras. 14-15. Promises or opinions about future events are normally not actionable, but may be if the person making a prediction about matters, such as future profitability or future value, has special skill or knowledge. Lord Denning's words in *Esso Petroleum v. Mardon*, [1976] 2 All E.R. 5 (C.A.) at 16 are referenced by the Court of Appeal in *PD Management* and cited in *Hayes v. Schimpf*, 2005 BCCA 568 at para 19:
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> > ... It seems to me that *Hedley Byrne* [[1963] 2 All E.R. 575, [1964 AC 465]] properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be it advice, information or opinion - with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable.
>
> **188** In *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72, the court says at para. 43:
>
> > Sometimes representations are made about the future that depend on the facts as they exist at the time of the representation. If those existing facts are inaccurately and negligently stated, the words may be actionable, as in *Cognos*. Sometimes people are retained to give opinions about the future, and if those predictions are negligent (having due regard that perfection in future projections cannot be expected) they may be actionable ...
> >
> > [underlining added]

[42] Mr. McCaw says that statements about future conduct or events are actionable if the party making them did not have the stated intention at the time they made the representation. A statement of future intention is a statement of fact which is actionable if it was false at the time it was made. See *Pan v. Dong*, 2024 BCSC 869 at para. 107:

> **107** Allegations of fraudulent misrepresentation pertaining to future conduct or future events may be actionable at law if the party making the statement did not in fact have the intention at the time of the utterance: *Galaxy Sports Inc. v. Umbro Holdings Limited et al*, 2005 BCSC 278 at paras. 77-78.

[43] The portions of Mr. McCaw's Amended NOCC which address the fraudulent misrepresentation claim include:

a) Part 1 [Factual Basis], paras. 7 and 8:

> 7. The LOI was preceded by various discussions between Jeff Stibbard ("Stibbard"), Chief Executive Officer or JDS, and McCaw and his father commencing in or around November 2020, during which Stibbard advised McCaw that:
>
> (a) JDS had been exploring opportunities to establish a drilling and blasting business as part of its current mining, engineering, and construction offerings;
>
> (b) in exchange for McCaw contributing his expertise, reputation existing business relationships, existing operational systems (including safety, training and other programs) he had developed over the years, and his industry knowledge, JDS would establish a drilling and blasting business and would contribute the necessary capital to fund the business until it was self-sustaining;
>
> (c) McCaw would own an equity stake in the new drilling and blasting business and would be President and Chief Operating Officer of the new drilling and blasting division in which the business would be housed; and
>
> (d) McCaw's father would contribute certain drilling, grouting and other equipment he owned to the new division at below-market rates in order to ensure the business had the necessary equipment to operate during its formative years.
>
> 8. McCaw was induced to enter into the LOI, perform his obligations thereunder, and make significant contributions to the drilling and blasting business, as described further below, in reliance on representations made by Stibbard to McCaw that JDS intended that McCaw would own an equity stake in the drilling and blasting business. Such representations were made orally by Stibbard to McCaw during meetings in Rocky Mountain House and Calgary, Alberta on or around November 23, 2020, orally by Stibbard to McCaw during a meeting at Stibbard's home in Kelowna, British Columbia on or around April 10, 2021 and orally by Stibbard during a meeting in Stibbard's office in Kelowna, British Columbia on or around April 12, 2021, among other instances.
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> [underlining added]

b) Part 1, para. 21 of the Amended NOCC:

> 21. JDS' assertions that McCaw did not own any equity interest in the drilling and blasting business are inconsistent with Stibbard's representations, as described above, that JDS intended that McCaw would own an equity stake in the drilling and blasting business. If McCaw did not own any equity interest in the drilling and blasting business, which is not admitted but is expressly denied, then the representations were false because at the time of the making of the representations neither Stibbard nor JDS had any intention for McCaw to own an equity interest in the drilling and blasting business. In that case, the representations were made with knowledge that they were false or made recklessly without knowing whether they were true or false and the representations were made with the intention McCaw would act on the representations. McCaw suffered damages as a result of acting on the representations, including but not limited to forgoing the opportunity to utilize the significant contributions which made to the drilling and blasting business to advance a different drilling and blasting business in which he could have an equity interest.
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> [underlining added]

c) In Part 3 [Legal Basis], para. 41:

> 41. If McCaw did not own any equity interest in the drilling and blasting business, which is not admitted but is expressly denied, then JDS is liable to McCaw for fraudulent misrepresentation. Stibbard represented to McCaw that JDS intended that McCaw would own an equity interest in the drilling and blasting business. The representations were false at the time they were made because at the time neither Stibbard nor JDS had any intention to permit McCaw to own equity interest in the drilling blasting business. The representations were made with knowledge that they were false or made recklessly without knowing whether they were true or false and the representations induced McCaw to enter into the LOI, perform his obligations thereunder, and make significant contributions to drilling and blasting business which has caused him damages.
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> [underlining added]

[44] The elements of fraudulent misrepresentation are summarized in *Chow v. Pang*, 2021 BCSC 1599 at paras. 40-43:

> **40** The elements of fraudulent misrepresentation are set out in *Froese v. Sharif*, 2020 BCSC 1914:
>
> > [160] The elements of fraudulent misrepresentation that a plaintiff must prove in order to establish a claim for damages are set out in *Wang v. Shao*, 2019 BCCA 130, leave to appeal refused 38704, [2019] S.C.C.A. 225, (14 November 2019) at para. 24:
> >
> > > (a) the wrongdoer must make a representation of fact to the victim;
> > >
> > > (b) the representation must be false in fact;

> (c) the party making the representation must have known the representation was false at the time it was made;
>
> (d) the misrepresentor must have intended the victim act on the representation; and
>
> (e) the victim must have been induced to enter into the contract in reliance upon it.
>
> [161] One key difference between fraudulent and negligent misrepresentation is that, in fraudulent misrepresentation, the plaintiff must prove that the defendant actually knew the representation to be false (or at least was so reckless as to not care whether it was true or not) and intended that the plaintiff act upon it: *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 at paras. 56-57; *Neidermayer v. Gillies*, 20102 BCSC 143 at paras. 75-77.

41 The plaintiff must prove that he or she relied on the representation but does not need to prove their reliance was reasonable: *Froese* at para. 162. The representation must have induced the plaintiff to enter the contract, but it does not have to be the only reason the plaintiff entered the contract. It only has to be one reason: *Sidhu Estate v. Bains*, [1996] 10 W.W.R. 590 at 603. The maker of the representation must have intended that it would induce the other party to enter the contract: *The Law of Contract in Canada*, 5th ed., by G.H.L. Fridman (Toronto: Thomson Carswell, 2006) at 291.

42 A lack of diligence on the plaintiff's part, even if it clearly would have been prudent to make their own investigation, is not a defence to fraudulent misrepresentation: *Neidermayer v. Gillies*, 2012 BCSC 143 at para. 54; *Froese* at para. 162. The misrepresentation must have been one of fact as opposed to one of opinion or "puffing": Fridman at 288-89.

43 Fraudulent misrepresentation amounts to the tort of deceit, for which the injured party will receive damages. A contract induced by fraud is voidable at the election of the defrauded party, but not void *ab initio*: Fridman at 293. The equitable remedy of rescission is discretionary: Fridman at 294. Damages may be awarded as well as rescission, and will be calculated on the basis of the loss suffered through the deceit, to put the injured party in the position he or she would have been in had the fraud not occurred: Fridman at 294; *Froese* at para. 207. The plaintiff is only entitled to be put in the position he or she would have been in had the fraudulent misrepresentation not been made, not in the position he or she would have been in if it was true: *Froese* at para. 221.

[45] In *Punto e Pasta Manufacturing Inc. v. Henderson Development (Canada) Ltd.*, 2009 BCSC 37 at para. 146, Justice Slade reviewed circumstances under which a statement of future intention, if falsely made, could constitute fraud:

> **146** A statement of future intention, if falsely made, may constitute fraud. In *Sanghera v. Danger Figure Centre (Burnaby) Ltd. (c.o.b. Orient Retreat)*, 2007 BCSC 1308 Garson J. explained the circumstances in which a

statement of future intention may be treated as a fraudulent misrepresentation. She said, at paras. 11-13:

> [11] A statement of future intention, if false, can be treated as a fraudulent misrepresentation. Waddams in *The Law of Contract*, 5th ed. (Toronto: Canada Law Book, 2005) says at para. 418 (footnotes omitted):
>
> > [A]lthough a promise as to the future conduct of the promisor or a third party is not a misrepresentation, it has been held that such a promise implies a statement that the present intention of the promisor is to carry out the promise, or that the promisor's belief is that the third party will act as stated, and this statement of fact, if false, can be treated as a misrepresentation.
>
> [12] For example, in *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167 (SCC), the plaintiff contracted to buy shares in an insurance company on condition that within a fixed time the company would be in business in Vancouver and the plaintiff would be made the medical examiner of the company for that city. When this did not happen, it was held that the contract could be rescinded for fraudulent misrepresentation. Fitzpatrick C.J. said at p. 171:
>
> > The existence or non-existence of that intention is a fact, and, if [the plaintiff] signed the application and parted with his cheques and notes on the faith of the statements made with respect to it, his position is the same as if he acted on a representation of the existence of any other fact.
>
> [13] Bowen L.J. puts it most vividly in *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459 at 483 (C.A.):
>
> > ... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

[46] Mr. McCaw's fraudulent misrepresentation plea is somewhat awkward, in that it appears at first glance to be framed conditionally. It says that if Mr. McCaw does not own an equity interest in the drilling and blasting business, then the representations that Mr. Stibbard made to him were false at the time he made them. I understand Mr. McCaw's intent here is to frame this as a claim in the alternative.

[47] Mr. McCaw alleges that when Mr. Stibbard / JDS represented to him that he would own an equity stake in the new drilling and blasting business, they never intended to permit that to occur. On an application to strike under sub-rule (1)(a), the

court assumes that the facts alleged in the impugned pleading are true, unless they are manifestly incapable of being proven. In my view, Mr. McCaw has pled a reasonable claim in fraudulent misrepresentation. It is not plain and obvious that it is bound to fail. I accordingly dismiss JDS' application to strike Mr. McCaw's fraudulent misrepresentation claim.

Unjust Enrichment – Juristic Reason for the Enrichment

[48] The elements required to make out a claim for unjust enrichment include [*Kerr v. Baranow*, 2011 SCC 10 at paras. 36 and 40]:

a) The defendant was enriched;

b) The plaintiff suffered a corresponding deprivation; and

c) The defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

[49] At Part 1 [Factual Basis], para 27-29:

> 27. In the alternative, if the LOI is not enforceable, which is not admitted but is expressly denied, then JDS has been enriched by the benefit of, among other things:
>
> (a) McCaw's efforts to create, preserve, maintain, improve and grow the drilling and blasting business, which efforts continued and continue to yield strong results for the drilling and blasting business following JDS' constructive dismissal of McCaw and its repudiation of the LOI;
>
> (b) McCaw's industry knowledge, relationships, name, picture and reputation, upon which JDS continued and continues to rely following JDS' constructive dismissal of McCaw and its repudiation of the LOI;
>
> (c) Various contracts with third parties secured with the benefit of McCaw's industry knowledge, relationships and reputation, both before and after JDS' constructive dismissal of McCaw and its repudiation of the LOI;
>
> (d) McCaw's operational systems, safety programs, estimating techniques, vendors, clients, specialized contracts, training programs and other programs, materials, trained and experienced personnel, and processes developed by McCaw which were transferred to the drilling and blasting business and rebranded in the name of the drilling and blasting business, upon which JDS continued and continues to rely following JDS' constructive dismissal of McCaw and its repudiation of the LOI; and

> (e) All revenues and other such financial benefits to JDS resulting from the foregoing.
>
> 28. There is no juristic reason for JDS' enrichment. McCaw's significant contributions were made in reliance on the understanding that he would own an equity interest in the drilling and blasting business. McCaw's contributions were beyond the scope of the Employment Agreement which comprised only one aspect of the parties' relationship and was premised on the understanding that McCaw would own an equity interest in the business.
>
> 29. McCaw has suffered a corresponding detriment including by not receiving an equity interest in the drilling and blasting business or adequate compensation for his significant contributions and by forgoing the opportunity to utilize the benefits which he conferred on JDS to advance a different drilling and blasting business in which he would have had an equity interest. McCaw has also suffered a corresponding detriment by JDS' infringement of his interests through JDS' continuing use of and reliance upon his industry knowledge, relationships, name, picture and reputation as well as upon his operational systems, safety programs, estimating techniques, vendors, clients, specialized contracts, training programs and other programs, materials, trained and experienced personnel, and processes which were transferred to the drilling and blasting business for its use and benefit and which were rebranded in the name of the drilling and blasting business.

[50] At Part 3 [Legal Basis], para. 36, Mr. McCaw pleads:

> 36. If the LOI is not enforceable, which is not admitted but is expressly denied, then JDS has been enriched, there is no juristic reason for JDS' enrichment and McCaw has suffered a corresponding deprivation.

[51] JDS argues that Mr. McCaw has failed to plead each of the three elements necessary for a claim in unjust enrichment and that what he has pled is obviously defective. Its argument is based, in part, on items which appeared in the original NOC which were deleted from the Amended NOCC. As such, it appears that some aspects of JDS' argument have been overtaken by the amendments.

[52] Firstly, JDS argues that the various categories of enrichments alleged were provided pursuant to the LOI of June 14, 2021 and the Employment Agreement of June 16, 2021. If these were both valid contracts, then collectively they constitute a juristic reason for the alleged enrichment. If the LOI is not found to be a binding agreement, as JDS asserts, then the Employment Agreement alone would still constitute a juristic reason for any enrichment.

[53] JDS also says that Mr. McCaw's plea that "*McCaw's contributions were beyond the scope of the Employment Agreement which comprised only one aspect of the parties' relationship and was premised on the understanding that McCaw would own an equity interest in the business*" is objectionable, as it is a bald and conclusory legal statement rather than a material fact.

[54] Mr. McCaw says that his unjust enrichment claim is made in the alternative; in the event the LOI is found to not constitute a binding agreement. The suggestion that the Employment Agreement, standing alone, could constitute a juristic reason for all the alleged enrichment /deprivation he alleges is simply wrong. He has expressly pled that his contributions went beyond the scope of the Employment Agreement. It was just one aspect of the broader D&B Joint Venture. He relies on *Bear Creek Contracting Ltd. v. Premium Exploration Inc.*, 2020 BCSC 1523 at paras. 93-94 for the proposition that, in appropriate circumstances, an unjust enrichment claim can be advanced while also alleging the existence of a contract, or as a claim made in the alternative:

> **93** It is also permissible for a plaintiff to advance a claim in unjust enrichment while also pleading the existence of a contract that could serve as the juristic reason for the enrichment alleged. The circumstances in which a contract may serve as a juristic reason precluding a successful claim of unjust enrichment were discussed by Kelleher J. in *Tyk v. Graham*, 2017 BCSC 920, as follows at para. 101:
>
> > [101] While the existence of a contract can be a sufficient juristic reason for enrichment, the benefit obtained must be within the scope of the contract. This was noted by Myers J. in *Noh v. Plaza 88 Developments Ltd.*, 2010 BCSC 1491, aff'd 2011 BCCA 461 as follows:
> >
> > > [55] . . . Whether a contract [exists] is certainly a major part of the juristic reason analysis, but it is not the ending point. Where a valid and enforceable contract requires the plaintiff to benefit the defendant, the contract is, no doubt, a sufficient juristic reason for the enrichment. On the other hand, where the benefit is bestowed outside the scope of the contract, or where a contract has failed for lack of consideration or frustration, the contract might not constitute a sufficient juristic reason
>
> **94** For that reason, this Court has held that a plaintiff should be permitted to seek damages in unjust enrichment and restitution in the alternative to those in breach of contract, particularly where it is possible that the claim in contract

> could fail while that in unjust enrichment could succeed: see, for example, *Murray Market Development Inc. v. Casa Cubana*, 2018 BCSC 568.

[55] This was approved in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at paras. 47 and 50-51:

> **47** There are several recent decisions in which courts have allowed unjust enrichment claims to be brought in the alternative to contract claims. For example, this Court distinguished *Kosaka* in *Noh v. Plaza 88 Developments Ltd.*, 2011 BCCA 461. In *Noh*, this Court upheld the trial judge's determination that a claim in contract had failed, but that a claim in unjust enrichment had succeeded. This Court noted that "the central question is whether the services that Mr. Noh undoubtedly provided fell outside the scope of the fee agreement": at para. 67. The Court concluded that they did, as the contract placed no obligation on the plaintiff to perform the services that he rendered. *Noh* has been relied on for the proposition that a plaintiff may validly plead breach of contract and unjust enrichment in the alternative to one another, particularly where it is possible that a claim in contract could fail while a claim in unjust enrichment could succeed: *Bear Creek Contracting Ltd. v. Pretium Exploration Inc.*, 2020 BCSC 1523 at paras. 93-94; *Tyk v. Graham*, 2017 BCSC 920 at para. 101. See also *Murray Market Development Inc. v. Casa Cubana*, 2018 BCSC 568 at para. 13.
>
> **…**
>
> **50** The common theme in cases where claims in unjust enrichment have been allowed to proceed in the presence of a contractual arrangement is that in each case, the purported benefit was found (or, at the certification stage, pleaded) to have been provided to the defendant extra-contractually, or beyond the scope of the contract. This is consistent with the underlying principle of respecting the contractual allocations of benefits and burdens. Where a benefit is conferred beyond the scope of the negotiated terms of a contract, there is no concern that the contractual allocation of benefits and burdens will be disturbed.
>
> **51** The second broad set of circumstances where claims in contract and unjust enrichment can be pleaded concurrently is where some issue in relation to the validity or enforceability of the contract in question is raised. This may arise, for example, when issues of illegality, capacity, or frustration are raised. See *Kosaka* at para. 17; *Ileman* at para. 66; McInnes at 901.

[56] In my view, Mr. McCaw has adequately pled the necessary elements for a claim in unjust enrichment. Mr. McCaw's primary claim is based on the LOI and Employment Agreement being enforceable. He is clearly alleging that the Employment Agreement is just one part of a broader contractual relationship contemplated by the LOI. His unjust enrichment claim is made in the alternative, in the event his primary claim fails because LOI is not enforceable. He has pled a

sufficient factual basis to establish that the scope of the LOI exceeds that of the Employment Agreement. There is a factual basis set out which supports of his allegation that JDS' enrichment and his corresponding deprivation went beyond the scope of the Employment Agreement. I do not agree that this latter plea is bald and conclusory. In my view, Mr. McCaw's unjust enrichment plea does disclose a reasonable claim.

[57] JDS also argues the unjust enrichment claim is embarrassing, that it has been constructed to confuse JDS and the court. It says Mr. McCaw has conflated the LOI and Employment Agreement in the Amended NOCC and has not provided a basis for distinguishing between the two agreements and obfuscates the dates during which alleged enrichments occurred. It argues that each of the Employment Agreement, the LOI and the alleged oral terms of the LOI should be separately pleaded. It is entitled to know what Mr. McCaw asserts to be the terms of each of the three agreements.

[58] There are only two agreements alleged – the LOI (partly oral and partly in writing) and the Employment Agreement. Both Mr. McCaw and JDS argued that the text of both agreements has been incorporated by reference into the Amended NOCC. If the oral terms of the LOI are not sufficiently set out in the Amended NOCC, this can be addressed by having Mr. McCaw particularize those either in a Further Amended NOCC or by providing particulars. Neither of those are being sought on this application.

[59] I also do not agree that it is essential in the present circumstances for Mr. McCaw to plead specific dates for when each alleged enrichment occurred. Even if that was a requirement, much of that detail appears to be exclusively within JDS' knowledge. If particulars were to necessary, it would not be appropriate to require Mr. McCaw to provide them until after he has received documents from and examined JDS for discovery. I do not agree that Mr. McCaw's unjust enrichment claim is embarrassing or unduly confusing.

[60] I dismiss JDS' application to strike Mr. McCaw's unjust enrichment claim.

Constructive Trust

[61] Part. 1, para. 30 of the ANOCC provides as follows:

> 30. The appropriate remedy for JDS' unjust enrichment is a proprietary remedy in the form of a constructive trust over a portion of the drilling and blasting business proportionate to JDS' unjust enrichment. There is a substantial and direct link between McCaw's significant contributions and the creation, preservation, maintenance and growth of the drilling and blasting business. A monetary award would be inadequate, insufficient or inappropriate in the circumstances because it is appropriate to grant McCaw the additional rights that flow from recognition of a right to property. It is appropriate in the circumstances that McCaw have the right of a property holder in order that increases in the value of the drilling and blasting business as a result of his significant contributions to the business accrue partially to his account rather than exclusively to JDS.

[62] JDS argues that Mr. McCaw's constructive trust claim is bound to fail. This remedy is intended to determine beneficial entitlement to specific property when a monetary award is considered to be inappropriate or insufficient: citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 and *Harding v. Harding*, 2024 BCSC 185. It complains that Mr. McCaw has failed to set out in the Amended NOCC why a monetary award is inappropriate or insufficient, nor does he identify a link to specific property. Mr. McCaw effectively seeks what amounts to a floating charge over all of JDS' assets, which is not an appropriate application of a constructive trust remedy.

[63] Mr. McCaw says it is not necessary to plead that a monetary award is inappropriate or insufficient, or that there is a link to specific property. These points must be proven in due course in order for a constructive trust remedy to be granted, but not pleading them is not fatal. He argues that a plaintiff is not required to elect between alternative remedies until after the evidence is in and he can make an informed choice, relying on *Treasure Bay HK Limited v. 1115830 BC Ltd.*, 2024 BCSC 294 at paras. 97-116 and *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 [*BNSF Railway*] at paras. 61-68. The last three paragraphs of the latter citation provide:

> **66** La Forest J.'s reference to the fact that a right to a constructive trust "can only arise once a right to relief has been established" is important for our

> purposes. It suggests that it may be inappropriate to strike out a claim to proprietary relief prior to the determination of the cause of action itself. The same may be true in respect of the requirement that damages provide an inadequate remedy: why should this question be decided before the exact parameters of the claim (and, perhaps, the defendant's liability) have been determined?
>
> **67** In *Tracy*, this court suggested that where damages and constructive trust are sought as alternative remedies, the plaintiffs need not elect between the two until they are able to make an "informed choice" prior to the pronouncement of final judgment. (See para. 49 and see *Waxman v. Waxman* (2002) 25 B.L.R. (3d) 1 (Ont. S.C.), *aff'd.* [2004] O.J. No. 1765 (C.A.), *lve. to app. ref'd.* [2006] S.C.C.A. No. 486, [2005] 1 S.C.R. xvii.) Similar reasoning was employed by Myers J. in *First Majestic Silver Corp. v. Davila* 2013 BCSC 717. After a review of the authorities, he concluded that generally, "a plaintiff is required to make the election when it has adequate information to allow it to make an informed choice. That does not entail a judgment of the court quantifying the alternative remedies." (At para. 214.)
>
> **68** I know of no reason why the same approach would not be taken to the question of whether a monetary remedy would be adequate where a constructive trust is also pleaded. Aside from the consideration that all the facts are not known until the evidence is in, the facts may change during the litigation. A defendant may find itself in bankruptcy or insolvent, making a monetary award against it much less "appropriate" than a proprietary one. (This, of course, depends on the interpretation of the word "trust" in s. 67(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.) The defendants in the case at bar purported to forestall any argument that a monetary remedy would be inadequate by reminding the chambers judge that CN is a large company, but it does not follow that CN will be perpetually solvent. In any event, it is arguable that the court should not be required to reach a determination as to whether the conditions for constructive trust have been met at the early stages of the proceeding in this case. Put another way, it is not "plain and obvious" that the plaintiff would as a matter of law be unable to satisfy the two prerequisites for a constructive trust should it succeed in establishing unjust enrichment. These conditions require evidence and factual findings. They cannot at this stage be said to be bound to fail *as a matter of law*.

[64] Mr. McCaw also notes there are numerous cases in which the court has granted constructive trusts over a portion of a business. These include *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 838, 841 and 852, aff'g 1978 CanLII 50 (ONCA) at pp. 13-14, which confirmed a constructive trust which was awarded in respect of a beekeeping business (amongst other property and assets), *Kawana v. Shemal*, 2011 BCSC 377 at paras. 246 and 286, in respect of a retail shoe business, *D.M. v. A.J.S.*, 2002 MBQB 117 at paras. 1 and 43, in respect of a taxi cab business and

Maloney v. Maloney, 1993 CanLII 5559 at paras. 41, 59-61, in respect of a pet shop business.

[65] In this case, Mr. McCaw has identified JDS' drilling and blasting division as the "property" over which he seeks a constructive trust remedy. That appears to be an identifiable sub-set of JDS' overall business. As set out in *BNSF Railway* above, it cannot be said at this stage that a constructive trust remedy is bound to fail as a matter of law. I accordingly dismiss JDS' application to strike Mr. McCaw's constructive trust claim.

Value Survived Damages

[66] At Part 1, para 31:

> 31. In the alternative, the appropriate remedy for JDS' unjust enrichment is a monetary award on a value-survived basis which reflects the current value of the drilling blasting business which was created and advanced with the benefit of McCaw's significant contributions.

[67] JDS argues that Mr. McCaw has not pled any material facts or a legal basis on which the exceptional relief of "value survived" damages could be awarded.

[68] Mr. McCaw says there is no obligation for a plaintiff to plead entitlement to a value survived damages award. As seen with regard to the constructive trust remedy section above, the question of what remedy is appropriate is appropriately determined after the court has heard evidence and argument. He relies on the excerpt from *BNSF Railway* and *Galbraith v. Kinsley*, 2023 ONSC 3332 at paras. 11-12. The latter excerpt is as follows:

> **11** As indicated, Ms. Galbraith claims a trust interest in 150 Dundalk. Mr. Kinsley argues that the court may not make a monetary award. He points to Ms. Galbraith's pleading, which does not request damages or monetary relief. He argues at page 37 of his factum that "what they have not asked for they cannot obtain as relief." Mr. Kinsley also notes at page 2 of his factum that Ms. Galbraith did not claim joint family venture or the value-survived approach as a remedy.
>
> **12** These limitations in the pleading do not prevent the court from awarding monetary relief instead of a declaration of a constructive trust. The possibility of a monetary award did not take Mr. Kinsley by surprise. The application also seeks an order for a valuation of 150 Dundalk, and McSweeney J.

> ordered Mr. Kinsley to obtain a valuation in 2021. These would be unnecessary if a monetary award was not an option. In this case the claim for monetary relief is subsumed within the constructive trust claim. Furthermore, Mr. Kinsley cites no authority to suggest there is a requirement to use the labels "joint family venture" or "value-survived approach" in a pleading when a party wishes to argue that these concepts arise from the pleaded facts. The application *does* allege that the parties "cohabited in a relationship resembling marriage." The pleaded facts in the application *and* in the answer make it obvious that the parties were alive to the legal concepts in play.

[69] He also says that the court may award damages on a value survived basis where the parties were involved in a joint enterprise or where there was a direct and substantial contribution to the acquisition, preservation and maintenance of property. He has pled both of these elements. He relies on *BCI Bulkhaul Carriers Inc. v. Wallace*, 2017 BCCA 180 at paras. 63-65:

> **63** In our view, *Kerr* need not be taken to stand for the proposition that a monetary award on a value survived basis can *only* be awarded where a joint family venture is proven. The concentration in *Kerr* on the concept of a joint family venture, however, makes it clear that something beyond simply an unjust enrichment is necessary to justify the granting of a value survived remedy.
>
> **64** A joint family venture will be sufficient to satisfy the requirement, but other non-family joint ventures may also do so. In *Haigh*, for example, if a monetary remedy had been found to be adequate, it would have been on a value survived basis. The situation in *Haigh*, while not involving a domestic relationship between the parties, did include a number of features analogous to a joint family venture: the parties were jointly engaged in a venture characterized by mutual effort, economic integration, and an intent to work together to ensure the economic success of the enterprise, to the benefit of the parties. Despite the absence of a domestic relationship between the parties, the case called for the granting of a proprietary interest.
>
> **65** It may be that there are other circumstances, beyond close economic integration and mutual effort in a joint enterprise that will justify the granting of a proprietary interest or a value survived monetary award. We need not determine, in this case, the full range of circumstances that might, in the interests of fairness, require such an award. For the present purposes, it is sufficient to say that, absent a joint enterprise, factors such as the degree of direct and substantial contribution to the acquisition, preservation and maintenance of the property and the reasonable expectations of the parties may be relevant in making a value survived award. The critical point is that there must be something in the nature of an investment in the value of the property -- something more than a loan -- looked at in a holistic manner.

[70] I accept Mr. McCaw's submissions on this point. There do appear to be some facts on which a possible claim for value survived damages could be argued. It

cannot be said at this stage that a value survived remedy is bound to fail as a matter of law. I dismiss JDS' application to strike Mr. McCaw's claim for value survived damages.

Conversion

[71] Part 1, para. 22 of the ANOCC is as follows:

> 22. By refusing to pay McCaw his share of revenues generated from the Joint Venture's operations being carried out by the Drilling and Blasting Division and using such funds for JDS' own purposes, JDS engaged in a wrongful act involving McCaw's property which had the effect of denying McCaw's right or title to his property.

[72] Part 3, para. 37 is as follows:

> **Conversion and Unlawful Retention of and Interference with McCaw's Property**
>
> 37. JDS's unlawful retention and use of McCaw's share of revenues realized by the Joint Venture, which funds are the property of McCaw, constitutes a wrongful act involving McCaw's property which had the effect of denying McCaw's right or title to his property.

[73] JDS argues that the tort of conversion involves a wrongful interference with the goods of another, such as taking or destroying them in a manner inconsistent with the owner's right of possession. It argues that the revenues are not "goods". They are pleaded as intangible contractual interests arising under the LOI. It says conversion does not encompass intangible contractual interests. It relies on *Sarzynick v. Skwarchuk*, 2021 BCSC 443 at para 260 for the proposition that one noted legal scholar has concluded that conversion only applies to tangible personal property such as goods. In reviewing that passage, it became apparent that it was critical to consider the broader section of the court's reasons to put that in its proper context. That case actually notes that there is unresolved conflicting authority on this point. At paras. 256-263:

> **256** The plaintiffs plead the tort of conversion. They seek a declaration that Leonard "converted funds" from Mary and the Estate, and the damages that flow from the alleged conversion. The plaintiffs submit that Leonard's "withdrawals from the joint accounts...constitute conversion of the Deceased's funds." They rely on *Egger v. Dessureault*, 2010 BCSC 880 at para. 109, which in turn cites *Ast v. Mikolas*, 2010 BCSC 127 at para. 126, for

the proposition that funds held in a bank account "can be the subject of conversion and that a defendant who takes money without the plaintiff's consent and uses it for his or her own purposes has committed the tort of conversion."

257 I have trouble accepting that funds held in a bank account are capable of giving rise to a tort claim for conversion for three reasons.

258 First, and foremost, the tort of conversion only applies to "goods". As Justice Iacobucci held in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31, the tort of conversion "involves a wrongful interference with the goods of another, such as taking, using these goods in a manner inconsistent with the owner's right of possession" [emphasis added]. The requirement that conversion applies to the "goods" of another has been subsequently reaffirmed by the Supreme Court of Canada in 3*73409 Alberta Ltd. v. Bank of Montreal*, 2002 SCC 81 at para. 8 and *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51 at para. 3.

259 Second, it is well-established that bank accounts do not fall within the ambit of "goods". A bank account is legally classified as a debt: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 at para. 29. As Justice Newbury aptly noted in *Bergen v. Bergen*, 2013 BCCA 492 at para. 39, "[o]bviously, a depositor's interest in a bank or investment account is a *chose in action*: the depositor is a creditor, and the bank or other depository is a debtor that is bound, subject to the terms of the agreement between them, to pay over the balance in the account on demand." A bank account, as a chose in action, is undoubtedly a species of property: *Lipkin Gorman v. Karpnale Ltd.*, [1991] 3 W.L.R. 10 at 28-29 per Lord Goff of Chieveley [U.K.H.L], cited with approval by the Supreme Court of Canada in *Citadel*, at para. 29. However, it is a form of intangible property and intangibles have historically fallen outside the ambit of "goods."

260 According to legal scholar, Philip Osbourne, the "accepted position in Canada" is that conversion "only applies to tangible personal property such as goods" and it "does not apply to intangible property such as contractual rights or other choses in action": *The Law of Torts*, 6th ed. (Toronto: Irwin Law, 2020) at 330-331. A similar conclusion was reached in England by the House of Lords in *OBG v. Allan*, 2007 UKHL 21, wherein the majority upheld that the tort of conversion is confined to tangible chattels and does not apply to choses in action or other intangible property.

261 Third, if bank accounts were directly convertible, there would have been no need for the common law to carve out a principled analytical exception for cheques and other negotiable instruments as the proper subject of a conversion claim. In *Arrow Transfer Company Limited v. Royal Bank of Canada* (1971), 19 D.L.R. (3d) 420 at 435 (B.C.C.A.), the Court of Appeal reproduced the following passage from Lord Denning (then L.J.) in "The Recovery of Money":

> An action for conversion is now allowed to the person whose account a cheque is drawn without his authority. Wherever a man's cash at a bank is misappropriated by means of cheque drawn on his account, he has an action for conversion of the cheque.... In such cases the plain fact is that the owner of the money -- the cash at the

> bank -- is suing for conversion of the money: but as the common law knows of no action for conversion of money, resort is had to the device of an action for conversion of the cheque by which the money is obtained. [emphasis added]

It is trite law that a cheque and other bills of exchange are classified as chattel: *Boma*, at para. 82. Accordingly, the rightful holder of a cheque can bring a conversion claim if the cheque is wrongfully disposed of: 3*73409 Alberta*, at para. 8. While a cheque is clearly a chattel and within the ambit of goods, there would be no need for this exception if the bank account itself could be the subject of a conversion claim.

262 It is difficult to reconcile *Egger*, as well as more recent cases such as *Reliable Mortgages Investment Corp. v. Chan*, 2016 BCSC 405 and *McKnight v. Hutchison*, 2019 BCSC 944, where funds in bank accounts have been held to be convertible, with appellate authorities and first principles. Moreover, I am hesitant to engage in an analysis to determine whether I am bound by the *Egger* line of authorities, since it unnecessary for me to do so in this case. I have already found that the plaintiffs are entitled to equitable compensation for breach of fiduciary duty.

263 The question of whether our Court is bound by the more recent line of authorities is best left for another day and another court: see *Re Hansard Spruce Mills Limited*, 1954 CanLII 253 (B.C.S.C.).

[74] Mr. McCaw notes that the bulk of JDS' arguments in relation to striking his conversion claim are based on language in the original NOCC. Those issues were addressed via the amendments made to the Amended NOCC and are no longer relevant. He has maintained a claim based on the tort of conversion. It is based on the parties having formed a D&B Joint Venture. He says its revenues were roughly equally owned by the parties and JDS improperly converted his share of them for its own purposes. He argues that funds and money can be the subject of a conversion claim, relying on 6*85946 B.C. Ltd. v. 0773907 B.C. Ltd.*, 2024 BCSC 997 at paras. 86-88 and *Egger v. Dessureault*, 2010 BCSC 880 at paras. 109-110. The former case's excerpt is as follows:

86 However, the courts in British Columbia now recognize that the subject matter of a claim in conversion may properly "take the form of either 'goods' or 'funds'": *Ishrat* at para. 247. Other cases of conversion involving funds include *Ast*; *Kassam v. Dream Wines Corporation*, 2022 BCSC 1069; *Pang v. Zhang*, 2021 BCSC 591; *0923063 B.C. Ltd. v. JM Food Services Ltd.*, 2019 BCSC 553; *Reliable Mortgage Investment Corp. v. Chan*, 2016 BCSC 405; and *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248.

87 Additionally, in *Canivate Growing Systems Ltd. v. Brazier*, 2020 BCSC 232, Justice Baker recognized that "intangible property" can be the subject of

> conversion, and went so far as to find that the defendant in that case was liable for conversion of a "website and email addresses": at paras. 72-76.
>
> **88** In other words, under the test for conversion, "goods of the plaintiff" may encompass funds or intangible property.

[75] In *Ngo v. Go*, 2009 BCSC 1146 at paras. 50-52, the court considered whether someone who held shares in a company could advance a conversion claim based on them claiming an interest in the underlying company's funds. He concluded that a beneficial interest in funds can be a chattel for purposes of a conversion claim, at least on the good arguable claim standard, and this was sufficient to allow the cause of action to stand:

> **50** The plaintiff alleged that the respondent sold the Santa Ana Property and placed the proceeds in a bank account in California. She argued that she has a legal and beneficial interest in a portion of those proceeds. She also alleged that the respondent disbursed SPI's funds to British Columbia lawyers in this province, depriving her of her interest in the proceeds of the sale of the Santa Ana Property.
>
> **51** In ***Ohoven v. Vince Estate***, 2009 BCSC 1052 [***Ohoven***], I dealt with a similar conversion claim in the context of an application to amend a statement of claim. Mr. Ohoven, one of the plaintiffs in that case, was a shareholder in a company. He argued that the late Mr. Vince, another shareholder and the company's sole director for much of the relevant time period, had deprived him of his share of the company's funds. Specifically, Mr. Ohoven alleged conversion on the ground that he had a beneficial interest in the company's funds. Other courts had found that a beneficial interest in funds can be a "chattel" for a conversion claim, and consequently, I found that the proposed paragraphs disclosed a sufficient cause of action to stand.
>
> **52** In this case at this stage of the proceedings, the plaintiff must only make out a "good arguable case". I am satisfied that she has a sufficiently arguable case of conversion of her beneficial interest in SPI's funds to ground jurisdiction under s. 10(g) of the ***CJPTA***.

[76] As noted in *Ngo*, it appears Mr. McCaw has made out a good arguable claim for conversion. To the extent there is conflicting authority regarding whether funds in an account can be the subject of a conversion claim, as noted in *Sarzynick*, this is not an issue that ought to be resolved on a preliminary application to strike; it should be addressed by the trial judge. It cannot be said at this stage that a claim in conversion concerning revenues generated by the D&B Joint Venture is "bound to fail" as a matter of law.

[77] I dismiss JDS' application to strike Mr. McCaw's claim in conversion.

Passing Off

[78] JDS argues that Mr. McCaw's claim for passing off is obviously defective.

[79] The portions of the Amended NOCC which are relevant to the claim for passing off are in Part 1 [Factual Basis], paras. 23-24:

> **JDS Continues to Benefit from McCaw's Reputation, Expertise and Relationships to his Detriment**
>
> 23. Notwithstanding JDS's constructive dismissal of McCaw and its repudiation of the LOI, JDS has continued to unlawfully benefit from McCaw's reputation, expertise and relationships, all to his detriment. JDS has continued, without the consent or permission of McCaw, to use his name, picture, experience, and relationships in their marketing materials as though McCaw's experience, knowledge and relationships are available to benefit the clients and potential clients of the drilling and blasting business. In addition, JDS's marketing materials continue to falsely reference a "Collaborative Acquisition" (as opposed to the "Collaborative Partnership" referenced in the earlier version) between McCaw and JDS, as if JDS had acquired McCaw's ownership interest in the Joint Venture and was entitled to the benefit of same. The marketing materials further falsely allege that a company wholly owned by McCaw (McCaw North) was acquired by JDS. No such acquisition ever transpired. JDS has issued and continues to issue such marketing materials to potential clients in conjunction with proposals or bids for new contracts for the drilling and blasting business.
>
> 24. JDS' marketing activities have impaired McCaw's ability to pursue his livelihood of providing drilling and blasting services following his constructive dismissal by JDS and its repudiation of the LOI. At all material times, members of the drilling and blasting industry and clientele of the industry recognize McCaw's name, picture, experience and relationships as being distinctive and as distinguishing the provision of McCaw's drilling and blasting services from the services provided by others. There was at all material times goodwill or a reputation attached to McCaw's name, picture, experience and relationships and the provision of McCaw's drilling and blasting services in the minds of members of the drilling and blasting industry and clientele of the industry. McCaw has significant goodwill in the industry both as a result of his long time involvement in the industry through various wholly owned companies and as a result of his close association with his family which has been involved in the drilling and blasting industry since the 1970s. Through its marketing activities, JDS has willfully or negligently misrepresented and continues to misrepresent its drilling and blasting services as and for the drilling and blasting services of McCaw, as having acquired McCaw's ownership interest in the Joint Venture and entitled to the benefit of same, as having acquired a drilling and blasting company wholly owned by McCaw, and/or as continuing to be associated or connected with the business of

> McCaw. These activities have confused or have been likely to confuse members of the drilling and blasting industry and clientele of the industry. This has harmed and continues to harm McCaw's reputation and goodwill among members of the drilling and blasting industry and clientele of the industry, impaired McCaw's ability to pursue his livelihood in the industry, and caused McCaw financial harm including but not limited to lost business opportunities.

[80] In Part 3 [Legal Basis], para. 40:

> **Passing Off**
>
> 40. JDS is liable to McCaw for the common law tort of passing off. McCaw had and has a reputation or goodwill, JDS has made and continues to make misrepresentations to the public which has led it to believe that there is a business association or connection between JDS and McCaw, and those misrepresentations have caused harm to McCaw.

[81] The elements of the common law tort of passing off are set out in *Greystone Capital Management Inc. v. Greystone Properties Ltd.*, [1999] B.C.J. No. 514, 1999 CanLII 5690 (BC SC) at para 27:

> [27] The tort of passing-off concerns misrepresentations by one party which damage the reputation or goodwill of another party. It is necessary to establish three components to succeed in a passing-off action, either at common law or pursuant to statute. Those components were set out in *Ciba-Geigy Canada Ltd. v. Apotex Inc.* (1992), 1992 CanLII 33 (SCC), 44 C.P.R. (3d) 289 (S.C.C.):
>
> > 1. The existence of reputation or goodwill at the relevant time. This includes consideration of whether the plaintiff was recognized by the trade name and whether the trade name was distinctive within the relevant field of activity.
> >
> > 2. A misrepresentation leading the relevant public to believe there is a business association or connection between the parties. This includes consideration of whether the defendants' use of the trade name is likely to deceive the relevant public. Any misrepresentation need not be deliberate and proof of intent is not necessary. Evidence of likelihood of confusion, leading to the possibility of lost business opportunity, is relevant. However, the establishment of actual confusion is not required.
> >
> > 3. Damage or potential damage flowing to the plaintiff as a result of any misrepresentation due to loss of control over its reputation is presumed.

[82] See also *Vancouver Community College v. Vancouver Career College (Burnaby) Inc.*, 2017 BCCA 41 at paras. 27 *et seq*.

[83] Firstly, JDS argues that Mr. McCaw has not pled facts capable of supporting a claim of passing off, including (a) whether he is recognized by the trade name "McCaw" after April 17, 2024 and whether that trade name is distinctive within the drilling and blasting industry; and (b) the identity of the business or other economic interests of Mr. McCaw that are alleged to have been injured. Absent these material facts, the plea of passing off is "entirely *in vacuo*".

[84] Secondly, it says Mr. McCaw has not pled that (a) he is engaged in any trade, whether under the name "McCaw" or at all, (b) he has economic or other business interests that are being affected by the wrongs, (c) he is in competition with JDS, (d) the name "McCaw" is associated with him in the relevant business community, or (e) that the name McCaw is distinctive either to him personally or in the drilling and blasting industry. It notes that Mr. McCaw's brother trades under the name "McCaw" and that name is associated with the brother's and their father's drilling and blasting business, "McCaw's Drilling & Blasting Ltd."

[85] Thirdly, JDS says Mr. McCaw's pleading that "McCaw North" is wholly owned by him is contradicted by certain evidence it has tendered. A company named "McCaw North Drilling & Blasting Ltd.", which it acknowledges was associated with Mr. McCaw at one time, sold its assets in February 2020 as part of a bankruptcy proceeding and the company was subsequently involuntarily dissolved in March 2023.

[86] Mr. McCaw says he has pled material facts which satisfy all three elements in the *Ciba-Geigy* (SCC) case. He also says JDS's assertion in certain of its marketing materials that it acquired "McCaw North" is false, and that even if that company was dissolved in March 2023, that is irrelevant to the fact that JDS' marketing materials misrepresent the true facts.

[87] There are three aspects to Mr. McCaw's passing off claim:

a) First, that JDS has continued to use his "name, picture, experience, and relationships in their marketing materials" in a manner which misleads

clients and potential clients into believing his “experience, knowledge and relationships” are available to benefit them;

b) Second, that JDS’s marketing materials falsely alleged there was a “Collaborative Acquisition” (as opposed to a “Collaborative Partnership”, which is how the relationship was referred to in earlier versions of the marketing materials) between him and JDS, as though JDS had acquired his ownership interest in the Joint Venture and was entitled to the benefit of same;

c) Third, that JDS’s marketing materials falsely allege that his former company, McCaw North, was acquired by JDS, when no such acquisition occurred.

[88] JDS relies on Rule 9-5(1)(a) to argue that Mr. McCaw’s Amended NOCC discloses no reasonable claim of passing off. Sub-rule (2) provides that no evidence is admissible on an application under sub-rule (1)(a). As such, the evidence that JDS and Mr. McCaw have tendered, including a sample of JDS’ advertising materials, a company search indicating the dissolution of McCaw North and a search showing that a different McCaw company controlled by the plaintiff’s brother registered its interest in a graphic version of the “McCaw” name, cannot be considered for purposes of this analysis. It is based solely on the language used in the Amended NOCC.

[89] Mr. McCaw does appear to plead each of the three elements required for a passing off claim in relation to JDS allegedly utilizing his personal name, picture and background in its promotional materials. He has pled that he is recognized, has a reputation and associated goodwill within the drilling and blasting industry. He has pled that JDS is making misrepresentations to the public which can cause the public to believe there is an association or connection between him and JDS via JDS having acquired certain of his business interests. He has also alleged he has suffered and continues to suffer damage as a result of this appropriation of his goodwill / reputation. The utility of allegations relating to JDS acquiring McCaw North

and associations with Mr. McCaw's family are limited, considering that McCaw North and his family members are not parties, but they do appear to provide context to Mr. McCaw's claim.

[90] I conclude that Mr. McCaw has pled a reasonable claim in passing off. It is not plain and obvious that it will fail. I dismiss JDS' application to strike Mr. McCaw's claim in passing off.

Disgorgement

[91] JDS argues that Mr. McCaw's claim for "disgorgement of profits earned by JDS" is plainly and obviously defective. It says he has not provided any material facts to support this exceptional form of relief, and it does not set out a legal basis upon which it is claimed.

[92] Mr. McCaw says that a disgorgement of profits remedy is commonly available where a plaintiff advances a claim based on the tort of passing off, which he has pled. He relies on *Ray Plastics Ltd. v. Dustbane Products Ltd.* (HCJ), [1990] O.J. No. 1569 (QL), 1990 CanLII 6842, aff''d [1994] O.J. No. 2050, 1994 CanLII 1241 (ONCA).

[93] Given that I have dismissed JDS' application to strike Mr. McCaw's claim for passing off, I also dismiss its application to strike his claim for a disgorgement remedy.

Is the Amended NOCC Embarrassing?

[94] JDS argues generally that the Amended NOCC fails to provide a succinct and clear correlation between the facts alleged and the claims pleaded. It fails to define with clarity and precision the question in controversy between the parties, give fair notice of the precise case which is required to be met and the precise remedy sought and assist the court in its investigation of the truth in the allegations made.

[95] It says that the Amended NOCC is intentionally vague and rests in large part on legal argument and legal conclusions rather than material facts. It suggests the

claim in breach of contract is internally inconsistent and contradictory. It complains Mr. McCaw seeks to mask this inconsistency through additional vague pleading of a contract which is alleged to be "partly oral and partly written", without specifying which is which.

[96] It says the Amended NOCC is an embarrassing pleading which is constructed in a way that is intended to confuse JDS and make it difficult or impossible to answer. Any attempt to "reform" it by striking some portions and amending others is likely to result in more confusion as to the real issues. The pleading should be struck out in its entirety, with leave for Mr. McCaw to file an amended notice of civil claim which is drafted in accordance with the principles identified in its application.

[97] With respect, I disagree with JDS' characterization of Mr. McCaw's pleading. An embarrassing pleading is one which is so confusing that it is difficult to understand what is being pleaded, and so irrelevant that it would involve the parties in useless expense if it is allowed to stand. While the Amended NOCC is by no means a "model" pleading, I have concluded that its Factual Basis does set out adequate material facts which support the causes of action which have been addressed in this application, to the "good arguable claim" standard.

[98] To the extent that JDS may wish to pursue particulars of the alleged oral terms of the LOI, it has the option of demanding and applying for those. In terms of the LOI-related facts set out in the Amended NOCC, the parties have the written LOI document available, so that should assist with the task of distinguishing written terms from oral terms.

[99] I dismiss JDS's application to strike the Amended NOCC on the basis that it is embarrassing.

Adjournment

[100] It is my understanding that Mr. McCaw's applications have been adjourned pending a decision on JDS's application to strike the Amended NOCC. It is not necessary for me to address this item.

Conclusion

[101] For the reasons set out above, I dismiss JDS' application to strike Mr. McCaw's Amended NOCC.

[102] Mr. McCaw has been successful in resisting this application. He is entitled to costs from JDS, in any event of the cause.

"Associate Judge Bilawich"