

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *AFX Mixing & Pumping Technologies Inc.*
v. McKinon,
2026 BCSC 1412

Date: 20260728
Docket: S253992
Registry: Vancouver

Between:

AFX Mixing & Pumping Technologies Inc.

Plaintiff

And:

**Shaune McKinon, Vanessa McKinon, Kirsty McKinon, Kent McKinon, and
Macworx Inc.**

Defendants

Before: The Honourable Justice Marzari

On appeal from: An order of the Supreme Court of British Columbia, dated March 18, 2026 (*AFX Mixing & Pumping Technologies Inc. v. McKinon*, 2026 BCSC 522, VA S253992).

Reasons for Judgment

Counsel for the Plaintiff:

S. Coulson

Counsel for Mixtec North America Inc.:

S. Marescaux

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
May 12, 2026

Place and Date of Judgment:

Vancouver, B.C.
July 28, 2026

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INTRODUCTION

[1] AFX Mixing & Pumping Technologies Inc. (“AFX”) appeals the decision of Associate Judge Bilawich made March 18, 2026, in which Bilawich A.J. refused AFX’s application to add Mixtec North America Inc. (“Mixtec”), a Utah-based company, as a defendant to this action, and for leave to file an amended notice of civil claim (“NOCC”) in the form attached to its application. AFX argues that Bilawich A.J. committed an error of law by misapplying the test to add a party and in concluding that AFX had not met the threshold to add a party under R. 6-2(7)(c) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[2] Before Bilawich A.J., Mixtec opposed the application, and Mixtec opposes this appeal before me, arguing that Bilawich A.J. made no error of law and was not clearly wrong. They also argue, as they did below, that the application to add them as a party is entirely tactical, and that it would not be just and convenient to add them as a defendant in any event.

[3] The existing defendants took no position on this application, either before the Associate Judge or before me.

[4] The background of this application is neatly set out in Bilawich A.J.’s reasons, indexed at 2026 BCSC 522, as follows:

Background

[3] AFX is a BC company which offers services involving solving specific engineering and industrial problems and applications which require agitators and peristaltic pumps, including ancillary services such as sourcing replacement parts, repairs and servicing warranties for its products. AFX is owned 80% by AFX Holdings Proprietary Limited (“AFX Holdings”), a South African company.

[4] The defendant Shaune McKinon (“Shaune”) was formerly a director and employee of AFX from 2014 to March 8, 2025. The defendant Vanessa McKinon (“Vanessa”) is his wife. The defendants Kent McKinon (“Kent”) and Kirsty McKinon (“Kirsty”) are their adult children. Vanessa, Kent, and Kirsty are also all former employees of AFX.

[5] Shaune and Kirsty incorporated the defendant Macworx Inc. (“Macworx”) on May 31, 2019. They are both directors and each holds 50% of its shares. AFX says that, unbeknownst to its majority shareholder and its board of directors:

- a) Macworx was being operated out of AFX's premises from 2019 onwards;
- b) Macworx competed with AFX and provided services to AFX's clients; and
- c) Macworx partnered with AFX's largest global competitor, Mixtec.

[6] Mixtec describes itself as a manufacturer of industrial mixing equipment, based in Utah. It has no facilities, assets, employees, or property in Canada. It sells its products in North America, including Canada.

[7] AFX uses a proprietary software which is owned by AFX Holdings and operated by an affiliated company. The software generates product specifications which provide custom solutions for AFX customers. The software and its outputs give AFX a competitive advantage. The claim alleges Shaune used these outputs for his personal advantage and to AFX's detriment, including by providing AFX Confidential Information to Mixtec. It is alleged that each of the individual defendants worked for Macworx, and that this was in breach of their respective employment agreements with AFX. In Shaune's case, it was also in breach of his duties as a director of AFX. They regularly blended their roles with AFX with their roles with Macworx, and arranged it so that the customers and suppliers regularly worked with both companies while they were accessing and using AFX Confidential Information.

[8] Shaune has sworn an affidavit in which he says Mixtec reached out to him about one month after he left AFX, on March 8, 2025. He ceased being a director of AFX on April 8, 2025.

[9] On May 30, 2025, AFX filed its notice of civil claim. On July 9, 2025, it filed an amended notice of civil claim.

[10] On August 28, 2025, AFX was granted an interim injunction against the defendants prohibiting them from using, possessing, distributing, or selling AFX Confidential Information. See Justice Coval's reasons, at 2025 BCSC 1717.

[11] On October 14, 2025, an order was granted directing the defendants to produce a range of documents relating to negotiations between Shaune and Mixtec and between Macworx and Mixtec, as well as agreements between Shaune and Mixtec and between Macworx and Mixtec.

[12] On November 10, 2025, the defendants produced an agreement between Macworx and Mixtec which was effective March 18, 2025, which provides that Macworx would provide Mixtec the same services for the same products in the same territory as Shaune's role with AFX, for which Macworx would be paid a monthly retainer of USD \$6,000 plus commissions.

[13] On December 3, 2025, Mixtec produced email documentation to AFX which AFX says included evidence showing that Mixtec knowingly assisted Shaune in breaching his fiduciary duties owed to AFX. It says the emails show that Shaune commenced negotiations with Mixtec as early as December 2024, entered into an agreement with Mixtec on March 8, 2025, and provided Mixtec with AFX Confidential Information. The emails show Mixtec requested AFX's technical software output from Shaune to build a

spare impeller for one of AFX's clients while Shaune was still a director of AFX.

[14] AFX notes that documents provided by Mixtec were ordered to be produced by Shaune by November 15, 2025, but he failed to produce them in his court-ordered production.

[5] In his reasons at para. 15, Bilawich A.J. also noted the findings of Justice Coval in reasons indexed at 2025 BCSC 2573 in relation to an application for injunctive relief brought by AFX, and quoted the following passage from Coval J.'s reasons:

[52] On December 3, 2025, Mixtec produced documents not yet produced by the defendants, despite the October 14, 2025 order. They showed the parties' negotiations began as early as mid-December 2024, and included two trips by Mr. McKinon to Salt Lake City for meetings (January and March 2025). They also showed Mr. McKinon's Mixtec email account being activated on March 26, 2025 and Macworx receiving its initial retainer payment on April 3, 2025. They showed Mr. McKinon introducing Vanessa and Kent as part of the Macworx administration and sales and marketing team on April 11, 2025.

[53] The Mixtec documents also disclosed:

- February 16, 2025: Emails between Mr. McKinon and AFX executives, regarding his intention to leave AFX and work with Mixtec. This included his statement:

I will take on the responsibility to call on all engineering (EPC) houses across Canada, of which many I currently have relationships with, in order to ensure your product is included in any current and upcoming RFQs for mixing equipment in all industries, coupled with this, call on and develop capable and established resellers across Canada to penetrate more localized markets and industries in their respective territories. This will include onsite end user calls for technical support, equipment assessment, sales and marketing visits/opportunities ... I believe we require 4-6 weeks before advertising our association, however there may very well be a need to direct some clients to you during this period.

- March 23, 2025: Mr. McKinon's email to Mixtec, attaching AFX copyrighted technical plans for an AFX client Cru Brewing Systems, for which he orders a replacement part from Mixtec.
- April 3, 2025: Mr. McKinon orders an impeller part from Mixtec, similar to those of AFX clients.

...

[65] In my view, AFX has demonstrated a strong initial case of Mr. McKinon's breaches of fiduciary duty by acting against its interests in service of his own.

[66] The current record appears to indicate that, while still a director, he: (a) negotiated and signed the Mixtec Agreement to go into business with AFX's primary competitor; (b) sent AFX's software output containing technical client information to Mixtec (March 23, 2025); (c) ordered parts for a client from Mixtec rather than AFX; and (d) departed with copies of his AFX email account and the company hard drive; and (e) concealed all of this from AFX until revealed in this litigation.

[67] There is also strong initial evidence of a pattern of ongoing concealment:

- a) Mr. McKinon's initial affidavits were not forthright about his dealings with Mixtec;
- b) the Mixtec Agreement was not disclosed until November 10, 2025;
- c) his negotiations and disclosure of client information to Mixtec were not disclosed until Mixtec's production on December 3; and
- d) the sales ledgers, ordered to be produced on October 14, were redacted so as not to reveal that many of the sales were to AFX clients.

[68] I agree with AFX that this pattern of breaches of duty and concealment creates concerns of ongoing non-disclosure and misuse of AFX confidential information.

THE APPLICATION

[6] On January 12, 2026, AFX filed its application to add Mixtec as a defendant and to amend its NOCC to plead equitable breaches and remedies against Mixtec, including seeking injunctive relief and damages or disgorgement against Mixtec. The proposed additional facts pertaining to Mixtec are as follows:

Mixtec

63. In or about December, 2024, Mixtec commenced negotiations with Shaune McKinon to acquire his services to market and sell Mixtec agitators, including to AFX clients. The negotiations ultimately took the form of a contract between Macworx and Mixtec in which Macworx would agree to sell and market Mixtec agitators in Canada. The agreement encompassed lines of business, industries, and territories identical to AFX.

64. Mixtec and Macworx entered into a contract effective March 18, 2025.

65. Mixtec knew, ought to have known or was deemed to know that Shaune McKinon was a director of AFX when it commenced negotiations and when it entered into the Macworx Agreement.

66. Mixtec requested pricing information from Shaune McKinon in or about January, 2025.

67. Mixtec agreed with Shaune and Macworx to trade on AFX Confidential Information and knowingly received AFX Confidential Information from Shaune McKinon, including in or about February to March, 2025 to build an impeller part for an AFX client using AFX Confidential Information.

68. From December, 2024 to the present Mixtec knowingly assisted Shaune McKinon breach his fiduciary duties to AFX, including by:

- a. Requesting and receiving from Shaune AFX Confidential Information for the benefit of Macworx and Mixtec;
- b. Delivering competing services to AFX clients introduced to Mixtec by Shaune, including by using AFX Confidential Information to do so.

[7] The relief sought against Mixtec in Part 2 of the proposed amended NOCC is as follows:

- 8. Damages or disgorgement against Mixtec for knowing assistance of breach of fiduciary duty and breach of trust.
- 9. A permanent injunction against Mixtec prohibiting it from using, possessing, distributing, or selling AFX Confidential Information.

[8] The following is also proposed to be added to the Legal Basis:

33. The Defendant Mixtec had actual knowledge and deemed knowledge of Shaune's Fiduciary Duties as a director and knowingly assisted Shaune in the breach of those Fiduciary Duties, including the duties listed above at paragraph 27 and the Additional Fiduciary Breaches.

[9] The proposed amendments to the NOCC reference terms already defined in the NOCC including the defined terms "Confidential Information", "Fiduciary Duties" and "Additional Fiduciary Breaches." These are already defined in the NOCC as follows:

23. In the scope of their employment, the Individual Defendants had access to confidential and proprietary information that was the exclusive property of AFX and that AFX derived value from, or the disclosure of which would cause harm to AFX ("Confidential Information").

24. This Confidential Information included, but was not limited to, the following:

- a. the outputs of the AFX Software;
- b. details of AFX's contracts with suppliers, manufacturers and customers;
- c. AFX product specifications, including the specifications generated by AFX's proprietary software program;

- d. information regarding AFX's prospective customers;
- e. bids, proposals and/or other cost calculations AFX had prepared for customers, suppliers and/or manufacturers;
- f. AFX's financial information, including but not limited to pricing, margins, budgets and revenues;
- g. technical, manufacturing and general arrangement drawings;
- h. marketing material and strategies; and
- i. business document templates.

...

28. Shaune owed fiduciary duties to AFX, including but not limited to:

- a. a duty to exhibit good faith and to avoid conflicts of interest in the performance of his duties with AFX;
- b. a duty to act in the best interests of AFX;
- c. a duty not to compete with AFX during his employment;
- d. a duty not to compete with AFX unfairly following the conclusion of his employment, including by misusing the Confidential Information;
- e. a duty not to appropriate corporate opportunities of AFX; and
- f. a duty to refrain from using the Confidential Information for personal or self-interested purposes, except where expressly authorized by AFX.

(collectively, the "Fiduciary Duties")

...

58. Shaune additionally breached [his] fiduciary duties to AFX by:

- a. Failing to update the company board about company business, finances, and operations.
- b. Failing to attend company meetings in South Africa;
- c. Failing to attend training sessions and regular project meetings;
- d. Failing to call and attend board meetings;
- e. Failing to compile and submit company expense reports;
- f. Failing to follow AFX selection criteria for technical equipment selection and failure to coordinate with the AFX application team in South Africa, resulting in faulty installations and resulting warranty claims; and
- g. using his personal address as the AFX address in client quotes, communication with clients, and bank statements.

(the "Additional Fiduciary Breaches")

[10] The NOCC also pleads material facts and legal bases that are arguably also relevant to AFX's proposed claims against Mixtec, as noted at para. 17 of Bilawich A.J.'s reasons. However, for the most part, the proposed amended NOCC does not include any proposed amendment to the existing pleadings in the NOCC, making it unclear which existing material facts are intended to be relevant to AFX's new proposed claim against Mixtec. This is perhaps most significant where the NOCC pleads facts, legal bases and relief by reference to the "Defendants" generally, which, if Mixtec were to be added as a Defendant, would include Mixtec. These include claims in civil conspiracy and "knowing receipt of money and property appropriated by Shaune in breach of trust" (at Part 3, para. 31).

THE LEGAL FRAMEWORK TO ADD A PARTY

[11] Associate Judge Bilawich set out the legal test for adding a party, relying on *Madadi v. Nichols*, 2021 BCCA 10 at paras. 22–24, and *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16, as follows:

[18] AFX relies on Rule 6-2(7)(c) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("SCCR"):

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[19] In *Madadi v. Nichols*, 2021 BCCA 10 at paras. 22–24, the Court of Appeal described the approach to this sub-rule as follows:

[22] Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45 [*Neilson Architects*]; *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578

[*Acastina*]; and *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.) [*Binstead*]. I would define a frivolous issue as an issue that does not go to establishing the cause of action, does not advance a claim known to law, or serves no useful purpose and would be a waste of the court's time and public resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-5(1)(b): see, for example, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65, citing in *Willow v. Chong*, 2013 BCSC 1083 at para. 20.

[23] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the proposed defendants. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendants: *Neilson Architects* at paras. 60, 62, and 75.

[24] If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. In *Letvad*, this court adopted a list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A), a decision that addressed the amendment of pleadings after the expiry of a limitation period. These factors include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed new cause of action: *Teal Cedar* at para. 67; *Letvad* at para. 29; see also *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 21. In the context of adding parties, the last *Letvad* factor may be more accurately described as the extent of the connection, if any, between the existing claim and the parties to be added.

[20] In *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16, the Court summarized general principles for interpretation of Rules 6-2(7)(b) and (c):

- 1) A party should be added where that party's participation is necessary for the proper determination of the case ...;

- 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters ...;
- 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined ...;
- 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties ...;
- 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action ...;
- 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried....

[Citations omitted.]

[12] This statement of the applicable law is not contested by the appellant AFX (or Mixtec). Indeed, the appellant relies on both of these decisions. I find no error in Bilawich A.J.'s statement of the relevant and applicable law.

THE ANALYSIS UNDER APPEAL

[13] What AFX argues is in error is Bilawich A.J.'s application of that law to the pleadings and filed evidence in this case. Relevant portions of Bilawich A.J.'s analysis include the following:

[24] Mixtec characterizes AFX's proposed claim as including both knowing assistance in breach of fiduciary duty and knowing receipt of AFX Confidential Information provided to Mixtec by Shaune.

....

[26] Mixtec says the proposed claim against it does not show that Mixtec willingly received confidential information or that it willingly assisted in relation to the breach of fiduciary duty by Shaune. A claim for knowing assistance requires that it have actual knowledge of Shaune's breach of fiduciary duty or his misuse of confidential records or customer information. There is no evidence Mixtec knew Shaune was a director of AFX, and Mixtec waited until after Shaune indicated he would be leaving AFX to enter into an agreement with Macworx. There were no suspicious circumstances in Mixtec's dealings with Shaune. Those dealings were in keeping with the Manufacturer's Representation Agreement and reflect the fact that he had worked in the industry for a long time.

[27] The proposed pleading also suggests a claim against Mixtec in conspiracy. Mixtec says the proposed pleading does not include specific

allegations against it which would allow it to give sufficient answer to the claim, and it merely makes general allegations against “all defendants.”

[28] The general tenor of some of Mixtec’s arguments is to the effect that AFX has failed to tender evidence supporting the proposed claims. As noted in *Madadi, supra*, at para. 23, it is sufficient for the threshold requirement to be met solely on the basis of the proposed pleadings. Affidavit evidence can be provided, but it is not strictly necessary.

[14] Associate Judge Bilawich went on to consider the elements required to make out claims for knowing assistance in breach of trust and knowing receipt of trust property and at para. 29 quoted the following passage from *Wood v. Bevan*, 2024 BCSC 1401:

Knowing Assistance in a Breach of Trust

[52] The elements of knowing assistance in a breach of trust are summarized in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 1997 CanLII 333 (SCC) at para. 34. A stranger to a trust can be found liable for a breach of trust if:

- a) A trust is found to exist;
- b) The trustee perpetrated a dishonest or fraudulent breach of trust; and
- c) The stranger participated in and had knowledge of the dishonest and fraudulent breach of trust.

[53] The knowledge requirement also includes recklessness or willful blindness: see *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, 1993 CanLII 33 (SCC) at paras 39-41.

Knowing Receipt of Trust Property

[54] Knowing receipt arises where a stranger to a trust has received trust monies or property for his [or] her personal benefit: see *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 SCR 805, 1997 CanLII 334 (SCC). The elements include:

- a) Property the defendant has received was subject to a trust in favour of the plaintiff;
- b) The property was taken from the plaintiff in a breach of trust;
- c) The defendant had knowledge of the facts sufficient to put a reasonable person on notice or inquiry regarding the breach of trust (constructive knowledge); and
- d) The defendant received the trust property and applied it for their own use and benefit.

[55] See the summary in *Kherani v. Bank of Montreal*, 2012 ONSC 2230 at para. 128.

[15] Associate Judge Bilawich then went on to quote the following passage at para. 30, from *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 1997 CanLII 334, in relation to the knowledge requirements and the distinction made between knowing assistance and knowing receipt cases, only the latter of which allows for a pleading of constructive knowledge:

[48] Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In “knowing assistance” cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in “knowing assistance” cases; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 811-13. However, in “knowing receipt” cases, which are concerned with the receipt of trust property for one’s own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff’s expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in *Gold*, *supra*, where he finds, at para. 46, that a stranger in receipt of trust property “need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice”.

[16] The key paragraphs of Bilawich A.J.’s decision in which he applies the law with respect to adding parties and the elements of the causes of action of knowing assistance in breach of trust and knowing assistance in breach of fiduciary duties owed to AFX are as follows:

[31] With respect to AFX’s proposed knowing assistance claim, AFX alleges that Mixtec knew or ought to have known or was deemed to know that Shaune was a director of AFX when it commenced negotiations and when it entered into the Mixtec-Macworx agreement. Knowing Shaune was a director of AFX appears to be directed at him being in a position of trust vis-à-vis AFX, but does not extend to knowledge about him allegedly committing a dishonest or fraudulent breach of trust, presumably relating to misuse of AFX Confidential Information. It alleges Mixtec requested pricing information from Shaune in or about January 2025, but does not particularize in the proposed draft pleading that it was AFX pricing information that was requested, as opposed to Macworx pricing information.

[32] It alleges Mixtec agreed with Shaune and Macworx to trade on AFX Confidential Information, but does not particularize what specific AFX Confidential Information this pertains to, beyond mentioning that it included using some to build a new impeller for an unidentified AFX client. This allegation is not sufficiently clear given the seriousness of the allegation.

- [33] AFX alleges that from December 2024 to present, Mixtec knowingly assisted Shaune in breach of his fiduciary duties to AFX, including by requesting and receiving from Shaune AFX Confidential Information for the benefit of Macworx and Mixtec and by delivering competing services to AFX clients introduced by Mixtec to Shaune, including by using AFX Confidential Information to do so. These allegations are also inappropriately vague, in that they fail to specify what AFX Confidential Information and what AFX clients were involved.
- [17] Associate Judge Bilawich also considers a claim by AFX against Mixtec for knowing receipt of trust property, with respect to which Bilawich A.J. indicates that while it is not entirely clear what the trust property is, he assumes it to be the defined “Confidential Information” at para. 24 of the NOCC. Associate Judge Bilawich concludes that the trust property is not sufficiently particularized for the purposes of a knowing receipt of trust property claim as against Mixtec.
- [18] He concludes at para. 36:
- In my view, the current form of the proposed knowing assistance and knowing receipt claims are inappropriately vague and fail to set out all the necessary elements for a claim against Mixtec in particular.
- [19] Associate Judge Bilawich then considered the elements of civil conspiracy on the basis that the claim is plead against all named defendants, which would include Mixtec if Mixtec is added as a defendant. He notes at para. 38, citing *Pan v. Kelly*, 2023 BCSC 208 at paras. 22–23, that such pleadings must be “as specific as possible” and that “[f]acts must be stated with precision and clarity; bald or speculative conclusions or **lumping all defendants together into a general allegation of conspiracy are insufficient**, and must be struck” [emphasis added by Bilawich A.J.; citations omitted].
- [20] On this point, Bilawich A.J. concludes:
- [40] It appears the inclusion of Mixtec in the civil conspiracy claim may well have been accidental. If AFX does wish to pursue such a claim against Mixtec, it is not sufficient to do so by simply lumping it in with the existing defendants in a general allegation conspiracy, as noted in *Pan* at para. 22.
- [41] In my view, AFX’s proposed claims against Mixtec do not set out a viable claim in their current form and they are destined to fail. AFX’s

application is dismissed, but with liberty to reapply based on a modified draft pleading which addresses the foregoing concerns.

[21] On the issue of costs, Bilawich A.J. awarded costs to Mixtec as a non-party in the action but, after further submissions, declined to make those assessable forthwith, and instead suspended any assessment of costs for 90 days “to allow AFX time to make a new application to add Mixtec as a defendant”: at paras. 42–43.

STANDARD OF REVIEW

[22] The first issue I must decide is the standard of review of Bilawich A.J.’s decision. Both parties agree that if I find Bilawich A.J. made an error of law, the standard is correctness. However, with respect to questions of mixed fact and law, the parties disagree. Mixtec argues that the standard is “clearly wrong”, whereas AFX argues that, because this is a determination that is vital to a final issue in the case, the hearing is to be considered *de novo*: *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188, 1990 CanLII 1352 (S.C.).

[23] I am not convinced that Bilawich A.J. made an extricable error of law in his application of the test to add a party. He did not do so expressly, nor do I consider that he did so implicitly. I find that the cases referenced by AFX in this regard, where the application of a test to specific circumstances were found to involve an extricable error of law, are all distinguishable from this case.

[24] Decisions regarding pleading amendments and the addition of a party are frequently reviewed on the “clearly wrong” standard: *Thomson v. A.R. Thomson Group*, 2018 BCSC 322 at paras. 39–40; *WIT Management Corp. v. Aulakh*, 2025 BCSC 1628 at para. 14; *Berthin v. Berthin*, 2018 BCSC 2104 at para 25.

[25] With respect to AFX’s argument that Bilawich A.J.’s determination is vital to a final issue such that the clearly wrong standard would not apply, I find that the order is not a final one and was not intended to be. By expressly allowing AFX to reapply on a modified draft pleading that addresses the concerns stated in the reasons, it is clear Bilawich A.J. was not intending to preclude AFX from adding Mixtec as a

defendant with respect to any of its equitable claims or relief against it, but only that he found that the existing pleadings were confusing (as to what claims were being advanced against Mixtec), “inappropriately vague”, and did not plead all necessary elements. While he was prepared to assume or presume that some material facts not expressly related in the pleadings to the claims against Mixtec might be intended, he ultimately found that there was a fatal lack of clarity, which he clearly considered might be addressed by revised pleadings.

[26] AFX argues that, even if Bilawich A.J. did not intend his decision to be final, it nevertheless is final because it requires them to plead details of clients stolen by Mixtec, and specific confidential information misappropriated by Mixtec, when they do not have access to the specific information needed to do so because it remains in the control of the existing defendants (who continue to conceal evidence improperly as found by Coval J.) and Mixtec, who has no obligation to disclose the information as a non-party. They argue therefore that, while it was perhaps not meant to be a final decision, the reasons preclude their ability to plead their claim in a manner that would satisfy the improperly high threshold requirements set out by Bilawich A.J. in his reasons.

[27] I am sympathetic to the dilemma faced by AFX to the extent that greater particularization of some aspects of its claim against AFX may well not be possible in the absence of the disclosure already ordered by Coval J. from the existing defendants. Additional information, such as client relationships brought to Mixtec by Mr. McKinon and its profits therefrom, can be attained only through disclosure from Mixtec itself. However, in my view, that level of particularization, though it would be helpful, is not strictly required by Bilawich A.J.’s order. For the reasons that follow, I am satisfied that AFX is in a position, largely based on its submissions before me, to satisfy the requirements of a clear and sufficient pleading in knowing assistance of fiduciary duty and breach of trust, and I am therefore not persuaded that the appealed order is in the nature of a final decision.

[28] The standard of review of Bilawich A.J.'s decision is therefore whether it was clearly wrong.

DETERMINATION ON APPEAL

[29] I find that Bilawich A.J.'s decision was not clearly wrong.

[30] AFX argues four misapplications of the test for adding a party as follows:

- a) making AFX establish a question or issue between AFX and Mixtec at a higher threshold than required;
- b) failing to consider evidence relevant to establishing the threshold requirement;
- c) requiring AFX to plead particulars that are outside its knowledge; and
- d) assessing "knowing receipt" as a cause of action when this was not pleaded.

[31] I will address the last first.

[32] One of the reasons that Bilawich A.J. found the proposed pleadings insufficient was his finding that the claim in "knowing receipt" of trust property was unclear and the specific trust property at issue was insufficiently plead. AFX clarifies on appeal that it is not seeking to advance that claim at all. This is supported by the relief claimed at their proposed para. 8 of Part 2, stating the relief sought against Mixtec, but it is not at all clear on the proposed amended NOCC as a whole.

[33] For example, at Part 1, para. 67, the proposed amended NOCC pleads that "Mixtec agreed with Shaune and Macworx to trade on AFX Confidential Information and knowingly received AFX Confidential Information from Shaune McKinon" [emphasis added]. At Part 1, para. 68, the material facts of knowing assistance of breach of fiduciary duty alleged include Mixtec requesting and receiving Confidential Information belonging to AFX for Mixtec's benefit. Paragraph 31 of the stated Legal

Basis for the claim refers to “all of the Defendants” in relation to “knowing receipt of money and property appropriated by Shaune in breach of trust.”

[34] AFX argues that I can disregard those aspects of the pleading or substitute “obtained” for “knowingly received” so as to avoid the suggestion that knowing receipt of trust property is alleged. That may be so, but Bilawich A.J. was not wrong to be concerned about the clarity of this pleading, which must be clear enough that both Mixtec and the Court can understand what equitable claims and remedies must be answered by Mixtec.

[35] By clarifying on appeal that AFX has no intention of pursuing this claim, at least at this stage and on the information in their possession, AFX has shown it can address a substantial concern of Bilawich A.J.’s as set out at paras. 34 and 35 of his reasons. It is not difficult to imagine changes to the proposed amended NOCC that would provide this clarity, including ones that AFX itself has already identified during arguments on this appeal.

[36] The same is true of the confusion in the proposed amended NOCC about whether AFX is advancing a civil conspiracy claim against Mixtec.

[37] These changes would go a long way to addressing the lack of clarity noted by Bilawich A.J. in his reasons.

[38] In my view, the order of Bilawich A.J., and the reasons supporting that order, do not require the provision of particulars outside the knowledge of AFX. What they do require is specificity in relation to the claims that are being made against Mixtec in particular.

[39] AFX argues on appeal that it should have been obvious to Bilawich A.J. that certain material facts not expressly plead in relation to Mixtec (like Part 1, para. 59 which pleads Mr. McKinon’s competition with AFX by working with Mixtec) related to its claim against Mixtec and not just the existing defendants, and that other claims (like those related to civil conspiracy or knowing receipt of trust property that captured Mixtec by definition) did not. None of this is obvious on the pleadings.

[40] However, in my view these allegations can be made clear through further changes to the amended NOCC, not just by the addition of the proposed Mixtec paragraphs, but by AFX completing a thorough review of the NOCC as a whole to determine where the addition of the proposed claims against Mixtec are engaged, and to expressly clarify those, and how they relate to Mixtec (or do not). Providing clarity in that regard is essential to a pleading seeking equitable remedies for dishonest or fraudulent behaviour.

[41] I am also of the view that Bilawich A.J. did not improperly disregard the evidence filed by Mixtec setting out examples of evidence that tended to flesh out some of AFX's allegations. It is clear from reading the decision that the Associate Judge did consider that evidence. However, evidence on an application to add a party cannot replace clear pleadings, particularly for claims in knowing assistance relating to dishonest or fraudulent activity. The pleadings provide the reference point for what is relevant and not relevant, not the evidence.

[42] Finally, in imposing a threshold of ensuring that pleadings are not "inappropriately vague" and that all of the elements of a cause of action are set out not just generally, but specifically in relation to the proposed new defendant, Mixtec, Bilawich A.J. was not clearly wrong.

[43] While the reasons of the Associate Judge note areas where there is a lack of clarity in the proposed pleadings, in my view the reasons do not require that all of these areas be fully delineated to meet the overall threshold of sufficient pleadings. The overall conclusion that the pleadings are inappropriately vague is not clearly wrong. In requiring clearer pleadings overall, the threshold set was not inordinately high, particularly in relation to the nature of the equitable claims and the relief sought to be advanced against Mixtec. Indeed, I find that the threshold set by Bilawich A.J.'s reasons can be substantially met by providing the clarifications made by AFX during the course of this appeal, at the very least with respect to the claim in knowing assistance of breach of fiduciary duty.

[44] For example, the following submissions made in the appellant's written submissions on appeal provide the kind of information that Bilawich A.J. noted as lacking in the current proposed pleadings, but which, in my view, would go a long way to addressing the concerns he raised:

- a) "Mixtec knew Shaune was a key employee and director [of AFX] and [Mixtec] helped him take AFX Confidential Information and compete against [AFX], including by having Mixtec use that information".
- b) "Mixtec actively and knowingly participated in Mr. McKinon's competition against AFX [both] when Mr. McKinon was a key employee and director [of AFX] and shortly after he resigned."
- c) "(a) Mr. McKinon was a fiduciary [of AFX]; (b) Mr. McKinon breached his fiduciary duty to AFX, including by doing business with Mixtec; (c) Mixtec knew or was reckless or willfully blind that Shaune was in a fiduciary relationship with AFX; (d) Mixtec knew about Mr. McKinon's breach [of fiduciary duty]; and (e) Mixtec participated in the breach."
- d) "Mixtec asked Mr. McKinon to provide AFX pricing information when Mr. McKinon was employed by AFX. ... [Mixtec] also requested AFX technical information, which was AFX Confidential Information".
- e) "Mr. McKinon breached his fiduciary duties [to AFX] in part [by]: (a) he negotiated and signed the Mixtec Agreement to go into business with AFX's primary competitor; (b) sent AFX's software output containing technical client information to Mixtec; and (c) ordered parts for a client (Custom Breweries) from Mixtec rather than AFX when employed by AFX."
- f) "[T]he full list of [AFX] clients and AFX Confidential Information sent to Mixtec is outside of AFX's knowledge and in the knowledge of the defendants and Mixtec."

- g) “AFX does not know the full extent of what AFX Confidential Information Mr. McKinon provided to Mixtec as that evidence has been concealed from AFX.”

[45] I am not suggesting that AFX should plead these facts in the exact form above, but AFX’s allegations against Mixtec were substantially more spelled out on appeal than they were plead before the Associate Judge, including better and more specific allegations of what Mixtec is alleged to have known and participated in vis-à-vis the allegations of knowing assistance of breach of fiduciary duty and breach of trust advanced against Mr. McKinon. Key to that clarification are pleadings that identify Mixtec’s knowledge about Mr. McKinon’s fiduciary and trust relationship with AFX, and not just MacWorx.

[46] In addition, clearer language is still needed to distinguish AFX’s intended claim in knowing assistance of breach of trust (which appears to involve the alleged knowing use of AFX Confidential Information) from a claim (not being pursued at this time) in knowing receipt of trust property, which is also plead to relate to the AFX Confidential Information in relation to the other defendants. If the knowing assistance in breach of trust alleged by AFX against Mixtec is not intended to capture knowing receipt of AFX trust property, then the distinct elements of that claim without reference to alleged trust property need to be set out. Language like “knowing receipt” of AFX Confidential Information should not be used in relation to Mixtec if that is not a claim being advanced at this time, and if there is a distinction to be made between AFX “trust property” and AFX “Confidential Information”, that must also be specified in the pleadings. Similarly, if AFX is relying on recklessness or wilful blindness and not constructive knowledge, the current language of “knew or ought to have known” should be removed and more specific language employed.

[47] In addition, the entirety of its NOCC requires review by AFX to ensure that not only the proposed additional paragraphs relating to Mixtec are properly plead, but that the entire NOCC properly considers the addition of Mixtec as a defendant, including when referencing the “Defendants” and any of the material facts that are relevant to the claims made by AFX against Mixtec in particular. What Mixtec is

alleged to have known, or been reckless or wilfully blind to, must be made clear in the pleadings (if only in relation to categories that clearly relate to AFX), and Mixtec's participation in those breaches must also be clearly plead.

[48] While it is acceptable to rely on defined terms in a pleading, the use of such defined terms must be used with specificity when introducing a new defendant and a wholly new cause of action with distinct elements.

[49] In conclusion, I am of the view that it is within the ability of AFX to adequately plead knowing assistance of breach of fiduciary duty and breach of trust, and also to clarify what causes of action and remedies it is *not* seeking against Mixtec. While I agree that AFX should not have to plead evidence or particulars of the specific clients or Confidential Information that Mixtec is alleged to have knowingly procured from Mr. McKinon, it is not sufficient to only plead details of Mr. McKinon's alleged breaches without also pleading the specific knowledge and assistance of Mixtec in some or all of those breaches, for AFX to add Mixtec as a defendant to its claim.

JUST AND CONVENIENT

[50] I heard submissions from both parties on the second part of the test to add a party, which were primarily advanced in the event that I considered this application *de novo*. While I did not find that the standard of review required a *de novo* hearing on the first part of the test pursuant to which Bilawich A.J. dismissed the application, the same arguments were also made before Bilawich A.J., and I am of the view that it would do no good to require the parties to advance their arguments on the second part of the test a third time before this Court.

[51] I am satisfied that, while the pleadings are currently deficient, these deficiencies can be addressed with pleadings of clarified material facts and legal arguments already advanced before me. In my view, Bilawich A.J. was of a similar view, in that he expressly granted leave to AFX to return with clarified pleadings and suspended the assessment of costs against AFX.

[52] Assuming that AFX will be able to meet the requirements of clarity with the assistance of its own submissions on appeal and these reasons, I propose to deal with the second element of the test to add a party which requires the Court to consider whether it would be just and convenient to determine the issues between the parties.

[53] Mixtec argues that, even if the first element of the test was met, it would not be just and convenient to allow AFX to add them as a party because their addition is essentially a tactical one, designed to obtain documentary disclosure. They argue that AFX's real complaint remains with the existing defendants, not themselves, and that the issues between AFX and the existing defendants can be adjudicated without Mixtec as a party, particularly given the Court's finding of a strong *prima facie* case of breach by McKinon. Instead, Mixtec argues that AFX should be required to engage in a letters rogatory process to obtain third party discovery from them, which is the proper process for obtaining disclosure from a third party in this case.

[54] Mixtec points to correspondence between their counsel and AFX's counsel to the effect that it was only in the face of Mixtec's refusal to voluntarily provide further requested documents that AFX stated it would need to seek to add Mixtec as a defendant to the action.

[55] AFX says that the possibility that it would seek to add Mixtec as a defendant was always contemplated, including in its correspondence with Mixtec. It says that the addition of Mixtec as a defendant is critical to its ability to seek the damages and/or disgorgement of profits it seeks against Mixtec for what it says is its knowing assistance and involvement in Mr. McKinon's breach of fiduciary duty and use of AFX Confidential Information and clients to compete with it unfairly.

[56] Whether AFX was immediately prepared to add Mixtec as a party, or would have preferred more information before making the serious allegations it now seeks to make against Mixtec, I am satisfied that its application to add Mixtec is not for the purely tactical purpose of getting documents to advance its claims against the existing defendants. To the contrary, I am satisfied that AFX is seeking to advance a

claim that may result in substantial damages or disgorgement of profits, and injunctive relief, if it is successful in its claims against Mixtec.

[57] Furthermore, by alleging knowing assistance of breach of fiduciary duty and breach of trust against Mixtec, even before it has received the full ordered disclosure from the existing defendants (which appears still not to have been forthcoming), AFX is exposing itself to potentially significant costs awards to Mixtec in the event that it is unable to prove these claims, and is clearly aware of this risk.

[58] Overall, I am satisfied that the claim that AFX is seeking to advance against Mixtec is not merely a strategic end run around out of jurisdiction third party discovery requirements. It is a serious claim, and I find that, provided AFX can get its pleadings in order, it would be just and convenient to allow AFX to add Mixtec to its claim as a defendant to address Mixtec's alleged knowledge and participation in the breaches of fiduciary duty and/or trust already alleged against Mr. McKinon, and to pursue its proposed remedies against Mixtec.

CONCLUSION

[59] In conclusion, the decision of Bilawich A.J. dismissing AFX's application to add Mixtec as a defendant, with leave to reapply, is not clearly wrong.

[60] AFX may still make that application, and with the assistance of these reasons, together with those of Bilawich A.J., may clearly plead its claims against Mixtec, as distinct from its claims against the existing defendants.

[61] I am aware that the parties have had some difficulty in having this application heard, first before an associate judge and that they were bumped once before appearing before me on appeal. I am therefore prepared to seize myself on the issue of any amended pleadings proposed by AFX, provided I am available to hear that application.

[62] Mixtec is entitled to their costs on this appeal, but I would suspend any assessment of those costs for 90 days to allow AFX to re-apply, as was

contemplated in the reasons of the Associate Judge. Should Mixtec oppose future amended pleadings that comply with these reasons, there may be an order for costs against Mixtec that may be set off against the costs of this appeal payable by AFX.

“Marzari J.”