

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Keltic (Prior) Development Limited
Partnership v. Van Renesse Investment
Company Ltd.*,
2026 BCSC 883

Date: 20260513
Docket: S242650
Registry: Vancouver

Between:

Keltic (Prior) Development Limited Partnership and 1232616 B.C. Ltd.

Plaintiffs

And

**Van Renesse Investment Company Ltd., Traute Van Renesse and Jasmin Van
Renesse**

Defendants

And

**2727 Industrial Management Services Ltd., Keltic Canada Development Co.
Ltd., Li Lei and Rui Wang**

Third Parties

Before: Associate Judge Nielsen

Reasons for Judgment

Counsel for the Plaintiffs and Third Parties,
Keltic Canada Development Co. Ltd., Li Lei
and Rui Wang:

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Place and Date of Hearing:

Vancouver, B.C.
April 17, 2026

Place and Date of Judgment:

Vancouver, B.C.
May 13, 2026

[1] There are two applications in this matter. An application by the plaintiff's for an order striking out the entirety of the Amended Response to Civil Claim pursuant to *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR] 9-5(1), without leave to amend, and an application by the defendant's for an order granting leave to file their counterclaim within 14 days pursuant to SCCR 3-2.

[2] By way of background, the plaintiff's seek to recover their costs of remediating a contaminated property purchased from the corporate defendant. The plaintiffs seek full indemnity pursuant to an indemnity clause in the contract for purchase and sale, or pursuant to *the Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA") which has a "polluter pay" regime.

[3] The plaintiff is a limited partnership that carries on business as a real estate developer. The defendants are a corporation that imported and sold European specialty foods and household items, and the individual defendants were directors and shareholders of the corporate defendant.

[4] In 2019 the defendant sought to sell an industrial property at 220 Prior Street in Vancouver B.C. that it had owned since 1981 ("the property"). Prior to listing the property, the defendant obtained a report to provide itself, and potential purchasers, with details concerning any pollution and contamination of the property. The report identified an underground fuel storage tank but otherwise reported the risk of contamination was low.

[5] The plaintiffs sought to purchase the property and negotiations through legal counsel for both parties, and the defendant's realtor took place. The plaintiff was provided with the defendant's pollution report as part of that process. The parties entered into an agreement to purchase the property for \$31,650,000. The purchase agreement provided in part:

4.1 Environmental

- (a) The Purchaser hereby waives any entitlement to site profiles in respect of the Property under the *Environmental Management Act* (British Columbia) and the Vendor shall not be obligated to deliver any site profiles to the Purchaser.

- (b) Subject to the limitations set forth in Section 4.1(c) below, after the Closing Date the Vendor shall be and remain responsible for the presence of any Hazardous Substance on, in or within the Property arising from any Hazardous Discharge onto the Property occurring prior to the Closing Date.
- (c) The Vendor shall indemnify and save harmless the Purchaser and its shareholders, directors, officers, employees, advisors and agents from all Claims incurred, suffered or sustained in connection with, or as a direct or indirect result of the presence of any Hazardous Substance on, in or within the Property arising from any Hazardous Discharge onto the Property prior to the Closing Date; provided however that the obligations of the Vendor to indemnify and save harmless the Purchaser pursuant to this Section 4.1(c) shall expire and be of no force and effect on the date which is five (5) years after the Closing Date.

This Section 4.1 will survive Closing.

The purchase agreement further defined the terms “claim”, “hazardous discharge” and “hazardous substance” as follows:

“Claim” means all past, present and future claims, suits, proceedings, liabilities, obligations, losses, damages, penalties, judgments, costs, expenses, fines, disbursements, legal fees on a solicitor and client basis and other professional fees and disbursements, interest, demands and actions of any nature or any kind whatsoever;

“Hazardous Discharge” means any and all leaks, spills, releases, discharges, emissions or disposal of Hazardous Substances or any migration of Hazardous Substances;

“Hazardous Substance” means any contaminant, pollutant) dangerous or potentially dangerous substance, noxious substance, toxic substance, hazardous waste or material, flammable or explosive substance, radioactive material, or any other waste, substance or material whatsoever, which is or is deemed to be, alone or in any combination, hazardous, hazardous waste, special waste, toxic, radioactive, a pollutant, a deleterious substance, a substance capable of causing a significant adverse effect or a contaminant or a source of pollution or contamination under any Environmental Law, whether or not such substance is defined as hazardous under any Environmental Law;

[6] The purchase agreement envisioned the plaintiff doing its own due diligence investigations of the property. The plaintiff commissioned their own report which disclosed the property was more polluted than suggested by the defendant’s report. It is common ground that the plaintiffs did not share their environmental reports with the defendants prior to their purchase and remediation of the property.

[7] The original offer to purchase lapsed, however, a subsequent agreement was entered into and closed February 28, 2020. The final agreement included all the clauses of the former agreement, except the price was reduced from \$31,650,000 to \$25,000,000. The development was to build a medical building next to the future site of St. Paul's hospital.

[8] In preparation for development of the property, the plaintiff retained an environmental company to conduct further investigations. Those investigations disclosed the existence of a wide range of pollutants. As the contamination exceeded the standards set by the *EMA*, the property was defined as a "contaminated site" and the plaintiffs were required to remediate the property at a cost of \$2,800,000 to obtain a certificate of compliance under the *EMA* regime. The plaintiff's obtained the certificate on October 10, 2024.

[9] In June of 2023, the plaintiff made a claim for the payment of its remediation costs pursuant to s. 4.1 of the purchase agreement. Despite multiple attempts to secure indemnity, the defendant has not paid the amount demanded, and has advised it was not able to pay as the \$25,000,000-purchase price was paid out to its shareholders. This was done despite the indemnity clause having a five (5) year term pursuant to s. 4.1 (c) of the purchase agreement.

[10] In addition to the remediation costs, the plaintiffs allege they have suffered damages due to the delay in the development of the property, associated lost profit, and increased costs. The plaintiff's allege they have tried to move the litigation along for the last five years, but the defendant's have employed a strategy of delay, which they submit is further apparent by their recent amendments to their response to civil claim, and their proposed counterclaim.

[11] The plaintiff alleges the amended response to civil claim and the proposed counterclaim attempt to raise a host of new immaterial and irrelevant facts, and vague allegations, which the plaintiffs allege are meritless, difficult to understand, and are prejudicial as they would expand the scope of the litigation without any legal

basis. The plaintiff's submit they are designed to waste the parties time and delay the proceeding.

[12] SCCR 9-5(1) provides that the court may strike pleadings if: (a) it discloses no reasonable claim or defense, 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.

[13] The test for striking a pleading under SCCR 9-5(1)(a) as disclosing no reasonable defence is whether it is "plain and obvious", assuming the facts pleaded are true, that the defense has no reasonable prospect of success or is bound to fail. In *R. v. Imperial Tobacco Ltd.*, 2011 SCC 42 the SCC states in paras. 17, 21 and 22.

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. 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: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at p. 980. 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: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.

[21] Valuable as it is, 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. Before *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. 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.

- [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.
- [14] Pleading are “unnecessary” or “vexatious” pursuant to SCCR 9-5(1)(b) where they do not go to establishing any claim, or defense known in law and are “embarrassing” or “scandalous” where they are so irrelevant that they will involve parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues. A pleading may also be unnecessary, frivolous or vexatious if it is so confusing that it is difficult to understand what is pled. See *Citizens for Foreign Aid v. Canadian Jewish Congress*, 1999 CarswellBC 2111 (S.C.) at para. 47, and *Willow v. Chong*, 2013 BCSC 1082 at para. 20.
- [15] Pursuant to SCCR 9-5(2) evidence is generally not admissible. An exception is when the pleadings reference documents. Where referenced, the contents and effect of those documents are proper matters for consideration on the application. See *Pacific Shower Doors (1995) Ltd. v. Osler, Hoskin & Harcourt, LLP*, 2011 BCSC 1370 at para. 6 where the court states;
- While Rule 9-5(2) of the *Rules of Court* states that no evidence is admissible on an application for an order that a pleading discloses no reasonable claim, if the pleading in question refers to any document or documents, the contents and effects of those documents are proper matters to consider on such an application. Applications made on the other grounds may be based on evidence as well as on the pleading.
- [16] The contents and effect of the agreement to purchase is therefore a proper matter for consideration.

[17] The plaintiff's submit that "the sophistication and contra proferentum" pleadings at paragraphs 18 to 30 of Part 1 of the amended response to civil claim must be struck as they allege that the plaintiff's lawyers were superior to those of the defendants which is a defence unknown to the law, and further that the contra proferendum doctrine applies only in circumstance where both parties did not have a meaningful opportunity to negotiate the terms of the contract. In this regard the plaintiff's rely on *Karim v. Seo*, 2010 BCSC 746 at paras. 17 and 18 where the court states;

[17] Before turning to the words of Clause 6, I will deal briefly with the petitioners' submission that the *contra proferentum* rule applies in this case. Clause 6 of the June 2006 agreement was drafted by the respondent's solicitor. The petitioner submits that if the court finds Clause 6 ambiguous, then it should apply the *contra proferentum* rule to resolve the ambiguity in favour of the petitioner and against the respondent. Under the *contra proferentum* rule, where the court is unable to resolve an ambiguity in the terms of a contract, the language of the contract will be construed against its author where the other party has had no meaningful opportunity to modify the wording: *Consolidated-Bathurst* at p. 901; *Scanlon v. Castlepoint Development Corp. et al.* (1992), 1992 CanLII 7745 (ON CA), 11 O.R. (3d) 744 at 771 (C.A.), leave to appeal ref'd [1993] 2 S.C.R. x. Where the rule applies, the author of the contract "must live with the consequences": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59 at para. 25.

[18] However, the *contra proferentum* rule does not apply where both parties have had a meaningful opportunity to negotiate the term of the contract in issue. As the Alberta Court of Appeal stated in *Ironside v. Smith*, 1998 ABCA 366, [1999] 6 W.W.R. 256 at para. 67:

Contra proferentum should not be used to construe an agreement against its drafter unless it is clear that the non-drafting party had no meaningful opportunity to participate in the negotiation of the instrument. In most commercial situations each party will bargain, insisting on certain concessions and giving up others. Although one party may take charge of drafting, the agreement is a product of negotiations. The use of contra proferentum is contingent on an absence of meaningful negotiating ability. So long as a party is permitted to participate in real negotiations, even if he chooses not to do so, it is inappropriate to invoke the rule.

[18] I agree with the submissions of the plaintiff in this regard. This matter involves a commercial real estate contract. As in *Karim*, both parties were represented by counsel. It is clear that there were back and forth discussions and negotiations surrounding the purchase of the property, including the negotiation of the

comprehensive agreement to purchase, and the subsequent price reduction, resulting in the final purchase and sale. Paragraphs 18 through 30 of Part 1 of the amended response to civil claim are ordered struck pursuant to SCCR 9-5(1)(a) and (c).

[19] The plaintiffs submit that paragraphs 31 to 35 of Part 1, and paragraph 40 of Part 3 of the amended response to civil claim must be struck, as those paragraphs rely upon s. 6.5 of the agreement to convolute the indemnity and *EMA* claims, to allegedly bar both the *EMA* and the indemnity claims, when both are distinct. Section 6.5 provides;

6.5 “As Is, Where Is” Sale

The Purchaser acknowledges and agrees to and with the Vendor (it being acknowledged that the Vendor is relying on such acknowledgements and agreements in entering into this Agreement) as follows:

- (a) expect as expressly set out in this Agreement (including for greater certainty, Section 4.1), the Property is being sold by the Vendor, and is being purchased by the Purchaser, on an “as is, where is” basis;
- (b) except as expressly set out in this Agreement, no representations or warranties of any nature or kind have been made or will be made by the Vendor, or anyone acting on behalf of the Vendor, whether before or after execution of this Agreement or the Closing Date, to or for the benefit of the Purchaser with respect to the Property, including any representation or warranty relating to any of the following matters: the physical condition of the Property (which includes environmental condition and soil condition), merchantability, habitability, quantity, quality, lawful use or fitness for any particular use or purpose or its compliance with Applicable Laws, or the availability of lawful access to or from the Property; and
- (c) The Purchaser is relying solely on its own due diligence, title searches, and other searches, inspections and investigations in purchasing the Property.

This Section 6.5 will survive Closing.

[20] The plaintiff’s further submit that the amended response to civil claim does not acknowledge that s. 6.5 is subject to the indemnity clause in s. 4.1, or that the defendant cannot contract out of their statutory obligations under the *EMA*. The plaintiff therefore submits this portion of the pleading does not disclose any

reasonable defence and must be struck pursuant to *SCCR* 9-5(1)(a) and (b) as disclosing no reasonable defence, and are otherwise unnecessary, scandalous, frivolous, or vexatious. I agree. Paragraphs 31 to 35 of Part 1 and paragraph 40 of Part 3 are struck pursuant to *SCCR* 9-5(1)(a) and (b).

[21] The plaintiffs submit that paragraph 38 of the pleading entitled “Notice” must be struck as it does not provide any essential factual foundation for what notice was required and not given, or how any legal obligations are allegedly established by the agreement, or the *EMA*, to provide any such notice. I agree with the submissions of the plaintiff. Paragraph 38 is struck pursuant to *SCCR* 9-5(1)(b).

[22] The plaintiff submits that paragraphs 39 to 59 which concern contracts of insurance and the duty of utmost good faith should be struck pursuant to *SCCR* 9-5(1)(a), (b) or (c). In these paragraphs the defendant pleads that the commercial contract for the purchase of the property is a contract of insurance governed by the *Insurance Act*, R.S.B.C. 2012, c.1, subjecting the plaintiff to a duty of utmost good faith to the defendant. Given the alleged duty of the utmost good faith, the defendant alleges that the plaintiff was obliged to share their pollution reports concerning the contamination of the property, and to consult with them prior to expending any money on remediation.

[23] The plaintiff submits it was under no obligation to disclose their reports, nor to consult with respect to the remediation required and done. The plaintiff concedes however, that whether the costs incurred were reasonable, is a matter properly in issue pursuant to the indemnity clause in the agreement.

[24] The plaintiff also submits that a commercial real estate contract for purchase and sale of property is not an insurance contract on the plain reading of the *Act* itself.

[25] Section 1 of the *Insurance Act* defines “insurer”, “contract” and “policy” as follows:

"insurer" means the person who undertakes, agrees or offers to undertake, a contract;

"contract" means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement;

"policy" means the instrument evidencing a contract;

[26] Section 11 of the *Insurance Act* provides a policy must contain all the following:

Contents of Policy

11. (1) A policy must contain all of the following:

- (a) the name of the insurer;
- (b) the name of the insured;
- (c) the name of the person to whom the insurance money is payable;
- (d) the amount, or the method of determining the amount, of the premium for the insurance;
- (e) the subject matter of the insurance;
- (f) the indemnity for which the insurer may become liable;
- (g) the event on the happening of which the liability is to accrue;
- (h) the date the insurance takes effect;
- (i) the date the insurance terminates or the method by which that date is established;
- (j) the following statement:

Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in the *Insurance Act*.

[27] I agree with the submissions of the plaintiff that the pleadings in this regard disclose no reasonable defence. No facts are plead that can establish that the agreement for purchase and sale is, a contract of insurance for the purposes of the *Insurance Act*, nor can a clause with respect to indemnity morph a commercial real estate contract into one of insurance. The purpose of the agreement for purchase was to transfer ownership of a commercial property.

[28] In the course of argument, the defendant submitted the contract can be “likened to a contract of insurance”, thereby giving rise to the duty of the utmost good faith. In my view, a defence based upon the purchase agreement being a contract of insurance, or one which incorporates insurance principles is bound to fail. As a result, paragraphs 39 to 59 of Part 1 and 25 through 32 of Part 3 are struck pursuant to SCCR 9-5(1)(a), (b), and (c).

[29] The plaintiff’s submit that paragraphs 60 to 64 of Part 1 of the amended response to civil claim must be struck. These paragraphs allege that any representations and warranties arising from s. 6.3 of the agreement, given by the defendant, and later found to be untrue, require the plaintiff to give notice to the defendant of any subsequently discovered untruths, which they did not do, prior to closing.

[30] The defendants plead that the plaintiffs failed to do so in respect to two environmental representations made by the defendants, under ss. 6.1 (n) and 6.1 (o) of the agreement for sale which provide:

(n) except as set forth in the Environmental Report, there are no contaminants, including asbestos and urea formaldehyde foam insulation located on, at or under the Property;

(o) the Property has never been used as a waste disposal site or as a landfill, and no asbestos-containing materials, PCBs, radioactive substances or ~~aboveground or underground storage systems, active or abandoned~~, has ever been located on at or under the Property.

[31] The plaintiff submits that even assuming the facts as plead are true, they establish no reasonable defence. The effect of failing to notify the other party of a breach of any representation it gave is a waiver with respect to only that breach. The plaintiffs do not seek to rely on either s. 6.1(n) or 6.1 (o) as a basis for liability in respect of the remediation costs. The plaintiff’s indemnity claim alleges the defendant has failed to fulfil its obligation under the indemnity clause 4.1, and the *EMA* claim relies on statutory liability. I agree that these paragraphs establish no reasonable defence and must be struck pursuant to SCCR 9-5(1)(a).

[32] The plaintiff submits the pleading advancing a limitation defence at paragraphs 32 to 34 of Part 3 of the amended response to civil claim should be struck pursuant to SCCR 9-5(1)(a). The defendant pleads the action is barred on the basis that two-year limitation expired on August 23, 2021. The plaintiff submits this defence is bound to fail as the action is in contractual and statutory liability for recovery of the remediation costs, and the defendant's subsequent failure to indemnify the plaintiff according to those obligations. The limitation period would therefore not commence until two years after all costs associated with remediation had been incurred. See *J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.*, 2014 BCSC 1619 at paras. 51 and 52; and, *J.I. Properties Inc. v. PPG Architectural Coatings Canada Ltd.*, 2015 BCCA 472 at paras. 83 and 84. I agree with the plaintiff's submission that the facts as plead by the defendants does not establish that the plaintiffs incurred all remediation costs two years prior to August 23, 2021. Paragraphs 32 to 34 of Part 3 are therefore struck.

[33] The plaintiffs submit that paragraphs 65 to 69 of the amended response to civil claim dealing with "damages and losses" should be struck. The defendants plead that the plaintiffs did not suffer any losses, as subsequent to the purchase of the property, the plaintiffs entered into a purchase and sale agreement with a third party who did not complete, and as a result, the plaintiffs retained the deposit on the failed sale which exceeds the remediation costs. No legal basis or principle is plead to support the theory that a plaintiff's net costs can be calculated based on its use of the property subsequent to its purchase and ownership, or its losses being somehow offset against an otherwise valid claim against the former owner.

[34] The defendants also plead that the plaintiffs cannot seek damages as they did not involve or inform the defendants about what remediation was conducted and why. The plaintiff submits that the *EMA* and its accompanying regulation do not require a prior owner's approval or participation, nor can a contractual indemnity be invalidated as a result.

[35] I agree with the submissions of the plaintiffs that paragraphs 65 to 69 of Part 1 do not go to establishing a defence known to law. Therefore, paragraphs 65 to 69 are struck pursuant to *SCCR* 9-5(1)(a) and (b).

[36] Finally, the plaintiffs submit paragraphs 36 to 39 of Part 3 which merely plead the style of causes of four BC cases under the heading “Equitable set off and counterclaim” must be struck as there is no accompanying pleading to explain the relevance or legal basis for the reference to those cases. The pleading is entirely unclear in this regard, and the plaintiffs should not be required to guess the defendant’s purpose in referring to them. I agree. Paragraphs 36 to 39 of part 3 are struck.

[37] The plaintiffs submit that given the circumstances involving the defendant’s conduct in delaying the resolution of the Action for over two years, followed by the defendants bringing an amended response and counter claim, both of which are convoluted, vague, irrelevant, poorly plead, and in part, having no basis in law, the court should not permit the defendants a further opportunity to amend their response to civil claim. I was not referred to any cases on the subject, nor was there argument beyond what’s been paraphrased. In the circumstances, I am not prepared to make an order denying the defendants further opportunity to amend their response to the notice of civil claim.

[38] I turn now to the second application brought by the defendants to extend the time limit for them to bring a counterclaim.

[39] *SCCR* 3-4(1) provides that a defendant in an action who wishes to pursue a counter claim within that action against the plaintiff must, within the time set out for filing of a response to civil claim under *SCCR* 3-3(3), file a counter claim in Form 3 that accords with *SCCR* 3-7. *SCCR* 22-4(2) allows the court to extend or shorten any time period provided for in the *SCCR*’s, even though the application for extension of time is made after the period of time has expired.

[40] In *Naudi Investments v. 0899809 BC Ltd*, 2021 BCSC 1121 at para. 18 the court stated that two questions needed to be canvassed when deciding whether to extend the time for filing a counter claim after the time for doing so has expired; first, is the claim in the proposed counter claim related to or connected to the subject matter of the plaintiff's claims? And second, should the court exercise its discretion to extend the time period for the issuance of a counter claim? When addressing the second question, the court directed that it should consider the following factors when deciding whether to exercise its discretion:

- (a) The length of time between receiving the statement of claim and proposing the draft counter claim;
- (b) The reasons for the delay;
- (c) Whether the counter claim would be time barred but for s. 22 of the *Limitation Act*, S.B.C. 2012, c. 13;
- (d) The connection between the proposed counter claim and the plaintiff's claims;
- (e) The degree of prejudice to the defendant seeking to file the counter claim by preventing; them from making full answer and defence to the claim brought against them;
- (f) The degree of prejudice to the plaintiff, such as the requirement for further investigation and potential delay of the trial of the matter.

[41] The defendants have the onus of convincing the court to exercise its discretion in the defendant's favor, and the application must be based upon the clearest and best evidence. See *Phaneuf v. 0896459 B.C. Ltd*, 2024 BCSC 1343 at paras. 60 and 62. Further, the defendants bear the burden of explaining their delay. See *Phaneuf* at para. 73.

[42] Addressing the first question, the action and counter claim both involve the same parties and the purchase agreement. The action seeks to enforce the remediation costs pursuant to the indemnity clause in the purchase agreement, and pursuant to the *EMA*. The plaintiff seeks to recover its costs of cleaning up the property so it could secure a certificate under the *EMA* in order to begin the development of the property. The counter claim construes the purchase and sale agreement as an insurance contract, to which insurance principles apply, and seeks essentially to set aside the agreement or renegotiate it to do away with the reduction

in price. Although the counter claim is related, the subject matter of both actions is markedly different.

[43] In terms of the length of time in proposing the counter claim, and the reasons for the delay, it has been roughly two years since the defendants could have brought a counter claim as a matter of right. The explanation is that the defendants recently hired new counsel who came up with a new theory of the case. However, it must be noted that the defendants have been represented by counsel throughout.

[44] The defendants concede that the counter claim would be barred if not for s. 22 of the *Limitation Act*.

[45] In terms of the connection of the counterclaim, the parties, if the counter claim was permitted, would be two ships passing in the night. The plaintiff would be arguing indemnity for remediation costs under the purchase and sale agreement and the *EMA*, whereas the defendants would be arguing insurance principles in an attempt to either effectively set aside the agreement or to reset the purchase price. It is likely that the legal arguments and evidence within the action and counter claim would not align.

[46] In terms of prejudice to the defendants, this question comes down to whether the agreement for purchase and sale can be characterized as an insurance contract. If so, there would be notional prejudice as the defendant would be foreclosed from making this argument. If not, the defendant is still able to challenge the remediation costs in terms of their reasonableness, and can challenge its liability, if any, under the *EMA*.

[47] The defendants argue the plaintiffs would suffer no prejudice if the counter claim was allowed to proceed as the same key documents and facts are at issue, and the plaintiff is in receivership.

[48] Arguably, the counter claim would change the nature of the case and expand the scope of the litigation, both in terms of legal argument and evidence in support of that argument. The fact that the plaintiffs are in receivership is, in my view,

irrelevant. The action currently involves the application of the indemnity agreement within the agreement of purchase and sale, and the application of the *EMA*. Allowing the counter claim would change this dynamic. The plaintiff's submit that to allow the defendants to advance a vague claim to recover a price reduction, on an argument unsupported by law, nearly two years after the pleadings closed, merely because they have retained new counsel, would be highly prejudicial to the plaintiffs, and ultimately immaterial to the action. I agree. Having considered the factors, the application for an order that the time limit be extended to permit the defendants to file a counter claim is dismissed.

[49] As the plaintiff's have been successful on both applications, they will have their costs of both, at scale B.

"Nielsen A.J."