

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *BC General Employees' Union v
Vancouver City Savings Credit Union,*
2026 BCCA 382

Date: 20260917
Docket: CA50947

Between:

BC General Employees' Union

Appellant
(Plaintiff)

And

Vancouver City Savings Credit Union

Respondent
(Defendant)

Before: The Honourable Mr. Justice Riley
The Honourable Justice MacNaughton
The Honourable Justice Brundrett

On appeal from: An order of the Supreme Court of British Columbia, dated
August 7, 2025 (*BC General Employees' Union v Vancouver City Savings
Credit Union*, 2025 BCSC 1510, Vancouver Docket S223482).

Counsel for the Appellant: C.F. Gusikoski

Counsel for the Respondent: N.V. Tzemis
E.F. Main

Place and Date of Hearing: Vancouver, British Columbia
June 19, 2026

Place and Date of Judgment: Vancouver, British Columbia
September 17, 2026

Written Reasons by:

The Honourable Mr. Justice Riley

Concurred in by:

The Honourable Justice MacNaughton

The Honourable Justice Brundrett

Summary:

The appellant, BC General Employees' Union (the "Union"), appeals from an order dismissing its application to amend its notice of civil claim against Vancouver City Savings Credit Union ("Vancity"). The Union sought to add a plea for specific performance, compelling Vancity to meet its alleged contractual obligation to set up a jointly administered defined benefit pension plan. The chambers judge refused the amendment on the basis that (i) the Union's claim for damages in its earlier pleadings amounted to an irrevocable election to accept Vancity's repudiation of the pension plan commitment, and (ii) the delay in seeking the amendment caused prejudice to Vancity, who, by the time of the application, had expended resources setting up a separate pension plan for its non-union employees.

HELD: Appeal allowed and the Union is granted leave to file an amended notice of civil claim to include a plea for specific performance. The chambers judge (i) erred in law in finding that the proposed plea for specific performance was bound to fail because it was inconsistent with the prior pleadings, and (ii) erred in principle in finding that Vancity would be prejudiced by the amendment.

Reasons for Judgment of the Honourable Mr. Justice Riley:

Introduction

[1] This is an appeal from a chambers judge's decision refusing the appellant, BC General Employees' Union (the "Union")'s, application to amend its notice of civil claim against the respondent, Vancouver City Savings Credit Union ("Vancity"), to include a plea for specific performance.

[2] The underlying litigation arises from a letter of agreement ("LOA") signed by the Union and Vancity in the course of labour negotiations. In the LOA, the parties agreed to make good faith efforts to set up a defined benefit employee pension plan ("DBPP"), to be jointly sponsored by Vancity and the Union. The design costs were to be divided equally between Vancity and the Union. When the design process took longer than expected, Vancity took the position that the LOA had expired and was, in any event, a mere agreement to agree as opposed to an enforceable contract. The Union disagreed and commenced an action alleging breach of contract and fraudulent misrepresentation. In the meantime, Vancity proceeded to set up a single sponsor pension plan for its non-union employees.

[3] Almost 18 months after the original notice of civil claim was filed, having already used its right to amend once without leave, the Union applied for leave to amend its claim to include a plea for specific performance, to enforce what the Union alleged was Vancity's contractual obligation to establish a jointly administered DBPP. (By consent, the application to amend was subsequently adjourned for a further 18 months.) When the application proceeded, a judge in chambers refused it, finding that (i) the claim for damages in the Union's prior pleadings amounted to an irrevocable election to accept Vancity's repudiation of the jointly administered pension plan commitment, and (ii) the delay in seeking the amendment caused prejudice to Vancity, who, by the time of the application, had expended considerable resources setting up the single sponsor pension plan for its non-union employees.

[4] On appeal, the Union argues that the judge erred in law in interpreting its claim for damages in the prior pleadings as an election to accept Vancity's repudiation of the LOA. The Union says the claim for damages in its pleadings relates to its misrepresentation claim, or alternatively, that the pleadings are ambiguous and therefore do not evince a clear election to accept Vancity's repudiation. The Union also says the chambers judge erred in finding Vancity would be prejudiced by the amendment.

[5] For the reasons that follow, I would allow the appeal, set aside the chambers judge's order, and grant the Union leave to file a further amended notice of civil claim that includes a plea for specific performance.

Factual Background and Procedural History

[6] The Union is the bargaining agent for approximately 30% of Vancity's employees. On or about 28 October 2019, the Union and Vancity commenced collective bargaining to renew the terms of their collective agreement.

[7] On 27 February 2020, in the course of collective bargaining, the Union and Vancity signed the LOA, in which both parties committed to take all reasonable steps to design a jointly sponsored DBPP for all employees, both unionized and non-

unionized, by 1 September 2021. They agreed that the Union would pay 50% of the design costs.

[8] For the next 18 months, the parties pursued the design of a jointly sponsored DBPP as contemplated in the LOA. The Union alleges that the dialogue between the parties carried on past the 1 September 2021 deadline for completion of the plan's design. Vancity disputes this.

[9] On 1 December 2021, Vancity advised the Union that because the deadline for finalizing the pension plan had passed, it no longer considered itself bound by the terms of the LOA. Vancity stated its intention to proceed with a single sponsor DBPP for its non-union employees.

[10] On 27 April 2022, the Union filed a notice of civil claim, naming Vancity and its directors as defendants. In it, the Union pleaded breach of contract in relation to Vancity's alleged failure to meet its commitments under the LOA, and fraudulent misrepresentation in relation to Vancity's stated commitment to set up the jointly sponsored DBPP.

[11] On 27 May 2022, Vancity filed its response to civil claim, taking the position that (i) Vancity took all reasonable steps in good faith to complete the design of the pension plan within the time period contemplated in the LOA; (ii) the LOA was a mere agreement to agree, not a contract under which Vancity was bound to provide a jointly administered pension plan; (iii) the LOA was spent and no longer enforceable after the 1 September 2021 completion deadline had passed; and (iv) thereafter, Vancity made no representations or warranties that a jointly sponsored DBPP would be created.

[12] On 11 October 2022, the Union filed an amended notice of civil claim, removing Vancity's directors as defendants. The amended notice also added a claim of conversion in relation to Vancity's alleged wrongful appropriation of "joint property" (obtained from the joint efforts to design a DBPP), allegedly diverted to Vancity's own use in the creation of a single sponsor pension plan.

[13] On 17 October 2022, the Union filed an injunction application seeking to enjoin Vancity from implementing a single sponsor DBPP for its non-union employees.

[14] On 25 October 2022, Vancity filed its amended response to civil claim.

[15] On 22 and 23 November 2022, the Union's injunction application was heard by a judge in chambers. On 6 December 2022, the judge dismissed the application, in reasons indexed as *BC General Employees' Union v Vancouver City Savings Credit Union*, 2022 BCSC 2222. Applying the well-known tripartite test for injunctive relief, she found that at least some of the Union's claims met the relatively low merits threshold. However, the application failed on the irreparable harm and balance of convenience parts of the test, due to a lack of evidence that the Union's ability to secure a jointly sponsored DBPP was jeopardized by Vancity's intent to implement a single sponsor pension plan for its non-unionized employees.

[16] In her reasons, the injunction judge noted an apparent lack of connection between some of the causes of action advanced in Part 2 of the Union's notice of civil claim and the relief sought in Part 3. Although her comments were focused specifically on the Union's claim for conversion, they are worth repeating here given their apparent role in the Union's subsequent application to further amend the pleadings:

[83] In the legal basis section of the amended notice of civil claim, BCGEU pleads the tort of conversion. However, in Part 2, relief sought, BCGEU's amended notice of civil claim does not seek relief relating to conversion. It seeks damages for misrepresentation, including the financial and human resources spent on the design process. On this application, BCGEU has not addressed issues pertaining to the tort of negligent misrepresentation.

[84] On an application for prejudgment relief, it is important that the prejudgment remedies be based on pleadings that are clear, so that the defendants have notice of the claims that are said to give rise to a prejudgment remedy, and the court can consider whether evidence that supports the claims meet the requisite thresholds: *Fernandes v. Legacy Financial Systems, Inc.*, 2020 BCSC 885 at para. 31; *RBD Victoria Homes Inc. v. 0717227 B.C. Ltd.*, 2021 BCSC 774 at para. 25. I conclude that for the purposes of this application, BCGEU has not raised a serious issue to be tried on the tort of conversion, because it has not sought relief for damages for that tort.

[17] Later in her reasons, the injunction judge made similar comments about the “lack of connection” between the relief the Union sought on the application and the relief it could claim at trial:

[90] I conclude that BCGEU has not established irreparable harm because the relief it seeks on this application is not related to the relief it could claim at trial, regardless of whether damages will be an inadequate remedy if it is successful at trial.

...

[92] However, my primary concern on the balance of convenience is the lack of connection between what the BCGEU seeks to enjoin and its claims in the underlying action.

[18] On 1 January 2023, Vancity’s single sponsor DBPP took effect for its non-union employees only.

[19] On 6 September 2023, the Union filed its application to further amend the notice of civil claim, to include a claim for specific performance.

[20] On 11 April 2025, the chambers judge heard Vancity’s application to amend. On 7 August 2025, she dismissed the application, in reasons indexed as *BC General Employees’ Union v Vancouver City Savings Credit Union*, 2025 BCSC 1510 (“Reasons”).

The Chambers Judge’s Reasons

[21] After reviewing the factual background and summarizing the outcome of the injunction application, the chambers judge identified the three issues she had to decide on the Union’s application to further amend the claim: (i) whether, in its first amended notice of civil claim, the Union “irrevocably elect[ed] damages for breach of contract, over a claim for specific performance”; (ii) if so, whether this precluded the Union from now seeking specific performance, such that the application to amend ought to be refused on the basis that it “discloses no reasonable claim”; and (iii) if not, whether the amendment ought to be refused in any event, based on “actual prejudice” or “an abuse of process”: Reasons at para 8.

[22] The judge then reviewed the legal principles governing amendment of pleadings. She instructed herself that amendments ought to be generously permitted to allow for the determination of the real questions between the parties, and that it is only in the clearest of cases that a claim could be struck as disclosing no reasonable cause of action: Reasons at paras 9-10.

[23] In this case, the proposed amendment required an examination of the legal options available to a contracting party faced with another party's repudiation. The judge referred to the summary of the law on this issue set out in *Dosanjh v Liang*, 2015 BCCA 18 at paras 33, 35, 37: Reasons at paras 11-12. In a nutshell, the non-breaching party has the option to (i) accept the repudiation, in which case the contract is at an end, and the non-breaching party can sue for damages; or (ii) affirm the contract and sue for specific performance. Once an election to accept repudiation and sue for damages is made, it is irrevocable. The non-breaching party must make its election known to the other party and is entitled to a reasonable amount of time to do so. During that time, the court must be cautious in its assessment of any equivocal acts and statements of the non-breaching party.

[24] The chambers judge observed that while the non-breaching party is required to make the election known to the other party, "the law does not dictate" how this must be done: Reasons at para 14. She surveyed some of the cases considering whether such an election was made: Reasons at paras 15-17.

[25] The chambers judge cited *Beauchamp v Coastal Corporation*, [1984] 1 FC 833 at 836-37, for the proposition that while one may first elect specific performance and then later elect to seek damages for breach of contract, the converse is not true. In other words, after the non-breaching party opts to "accept the breach" and claim damages, it is no longer open to later change positions and demand specific performance: Reasons at para 19.

[26] The chambers judge distinguished the cases relied upon by the Union, because none of them stood for the proposition that once a party has claimed for damages, they could later seek specific performance. The case law was clear that

“what is dead is dead” (citing *James v Klaus*, 14 BCLR (2d) 124, 1987 CanLII 2657 (CA), in turn citing *Johnson v. Agnew*, [1979] 1 All ER 883; [1980] AC 367 (HL) at 894), such that a party cannot later “breathe life into the contract for the purpose of making a claim for specific performance”: Reasons at para 28.

[27] The chambers judge interpreted the Union’s argument to be that if its pleadings were “less than clear”, certainty could be provided through conduct, as evidenced in “communications and documents outside of the four walls of the pleading”: Reasons at para 30. On the issue of prejudice, the Union argued that since Vancity decided to establish a single sponsor pension plan before the action began, Vancity could not have been prejudiced by an election that is said to be found in the Union’s notice of civil claim.

[28] For its part, Vancity emphasized that the first amended notice of civil claim only sought declarations and damages. Thus, even if the LOA was a legally enforceable contract, the Union’s claim for damages was an irrevocable election to accept Vancity’s repudiation. Vancity also pointed to the fact that the Union, having been made aware of Vancity’s intent to implement a single sponsor pension plan, did not include a claim for specific performance in its notice of civil claim. Rather than seeking specific performance to enforce the alleged obligation, the Union sought an injunction to prevent Vancity from implementing a single sponsor pension plan until the claim was determined or the Union had the opportunity to negotiate a new plan. In Vancity’s submission, the application to amend the pleadings to include a claim for specific performance was a “late-breaking attempt by the Union to re-cast its case” which should be viewed as an “abuse of process”: Reasons at para 40.

[29] On the question of prejudice, Vancity argued that it relied on the original notice of civil claim, the first amended notice, and the injunction decision in “moving forward” with implementing its single sponsor defined benefits pension plan: Reasons at para 44. Allowing the Union to seek specific performance would cause actual and meaningful prejudice, because requiring Vancity to “unwind” its pension plan would involve a “significant amount of additional work and expense”, on top of

the \$1.2 million Vancity had already spent to implement the plan: Reasons at para 44.

[30] The judge found it necessary to “examine [the Union’s] pleading to see first of all, whether it contain[ed] a claim for damages for breach of contract, and second, if specific performance [was] not pleaded, whether such a claim is nevertheless available on the pleading as framed”: Reasons at para 45. The judge set out portions of Parts 2 and 3 of the Union’s first amended notice of civil claim. She reasoned that while the pleading was “not a model of clarity”, at its “core”, it was a “claim for damages for breach of contract”: Reasons at para 47. She concluded that, based on the law she had summarized earlier in her ruling, the Union was barred from pursuing a “subsequent plea for specific performance”: Reasons at para 47.

[31] The judge rejected the Union’s argument that its prior pleadings “encompass[ed] a claim for specific performance without using those words”, finding that the “pleading on its face makes the opposite election”: Reasons at para 48. Nor was the judge convinced by the Union’s argument its pleaded intent to seek an injunction encompassed a plea of specific performance, because in her view the injunction sought was “interlocutory, and in aid of the preservation of the Union’s right to strike”: Reasons at para 48. Finally, the judge found that the misrepresentation claim did not assist in “making out a claim for specific performance”: Reasons at para 48.

[32] The chambers judge went on to reason that even if the prior pleading could be interpreted as not including a plea for damages in breach of contract, the delay in seeking specific performance and resulting prejudice to Vancity would make it unfair to permit the amendment. The judge rejected the Union’s argument that there was no prejudice because Vancity decided to proceed with a single sponsor pension plan before the Union filed a notice of civil claim. In her view, the question was not whether Vancity committed to a new pension plan before the action commenced, but whether there was actual prejudice caused by the Union’s delay in seeking an amendment to include a plea for specific performance. She held that after the claim

had been filed, Vancity was “entitled to rely on the Union’s election as set out in the pleadings”, in taking further steps toward implementation of the single sponsor pension plan: Reasons at para 54.

[33] Having declined to grant the amendment based on both (i) the Union’s irrevocable election to accept the breach and sue for damages, and (ii) the prejudice to Vancity due to the Union’s delay in seeking specific performance, the judge found it unnecessary to deal with Vancity’s argument that the proposed change in the Union’s position was an abuse of process: Reasons at para 55.

Issues on Appeal

[34] The appeal raises two issues. The first is whether the chambers judge erred in denying the proposed amendment on the basis that the Union’s prior pleadings contained an irrevocable election to accept repudiation and sue for damages, such that the proposed plea for specific performance was bound to fail. The second is whether the judge erred in denying the proposed amendment on the basis that the delay in seeking it caused prejudice to Vancity.

Analysis

Legal Principles Governing Amendment of Pleadings

[35] Under R 6-1(1) of the *Supreme Court Civil Rules*, BC Reg 168/2009, a party may amend its pleadings once without leave of the court, prior to the service of a notice of trial. Subsequent amendments to do anything but remove a party can only be made with leave of the court or consent of the other parties. In this case, the Union used its “free” amendment when it filed the first amended notice of civil claim which, among other things, added a claim of conversion. Thereafter, absent Vancity’s consent, the Union required leave of the court to file a further amended notice of civil claim adding a plea for specific performance.

[36] The “general approach to amendments is generous and non-technical”, and the court should strive to “permit amendments as are necessary to determine the real question between the parties, considering always the interests of justice”: *Swiss*

Reinsurance Company v Camarin Limited, 2018 BCCA 122 at para 22, quoting from *Century Services Inc. v LeRoy*, 2015 BCCA 120 at para 10.

[37] A judge of the trial court has broad discretion in deciding whether to grant or refuse a proposed amendment. The “overriding concern” is whether it would be “just and convenient” to allow the amendment: *Preferred Steel Construction Inc. v M3 Steel (Kamloops) Ltd.*, 2015 BCCA 16 at para 36; *Teal Cedar Products (1977) Ltd. v Dale Intermediaries Ltd.*, 19 BCLR (3d) 282, 1996 CanLII 3033 (CA) at paras 38, 74. In *Teal Cedar* at para 67, Justice Finch, as he then was, identified a list of factors to be considered in answering that overriding question: the extent of the delay, the reason for the delay, the expiry of a limitation period, any prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed amendment.

[38] In *Teal Cedar*, the Court borrowed the operative phrase — “just and convenient” — from a separate rule governing amendment of pleadings to add parties and applied it in the context of an application to amend pleadings to add a cause of action after the expiry of a limitation period. Thus, the *Teal Cedar* framework appears to have been developed to cover situations in which an amendment is sought to add a party or add a new cause of action in circumstances that raise limitations issues. The majority of this Court’s decisions applying the “just and convenient” framework arise in a context with one or both of these features. By my count there are more than a dozen decisions of this Court considering the *Teal Cedar* framework in that context. Examples include *Chouinard v O’Connor*, 2011 BCCA 161 at paras 17-18; *Amezcuca v Taylor*, 2010 BCCA 128 at paras 1, 63; *Letvad v Fenwick*, 2000 BCCA 630 at paras 16-20.

[39] There is also a collection of cases in which this Court has applied the *Teal Cedar* “just and convenient” analysis to the amendment of pleadings more generally. In *Swiss Reinsurance*, the Court applied the “just and convenient” analysis in considering an amendment that did not involve a new cause of action. In *Preferred Steel*, the framework was applied to assess a proposed amendment of pleadings in

response to a motion to strike. In *Century Services*, it was applied in considering the proposed amendment of a response to civil claim to add a new defence.

[40] In this case, the Union was not seeking to amend its pleadings to add a party or a new cause of action after the expiry of a limitation period. The Union sought an amendment to add a plea for relief not explicitly sought in its earlier pleadings. Nevertheless, on the authority of *Swiss Reinsurance*, *Preferred Steel*, and *Century Services*, I proceed on the basis that the *Teal Cedar* framework applies. Thus, the overriding consideration is whether it would be “just and convenient” to allow the amendment having regard to the factors identified in *Teal Cedar*. I would add that where the proposed amendment does not involve a fresh cause of action that raises limitations issues, the court may well be more generous in the exercise of its discretion to permit an amendment that will facilitate a determination of the real questions at issue between the parties.

[41] A judge’s exercise of discretion in deciding whether to allow an amendment is subject to deference on appeal. Nevertheless, the discretion must be exercised “judicially and in accordance with the legal principles governing applications to amend”, such that “[a]ppellate interference is warranted if there is an error in principle, a palpable and overriding error as to facts, or a demonstrated injustice”: *Swiss Reinsurance* at para 24; *Preferred Steel* at para 33.

[42] A judge may refuse a “useless” amendment: *Victoria Grey Metro Trust Co. v Fort Gary Trust Co.*, 30 BCLR (2d) 45 at 46, 1982 CanLII 227 (SC). Where the underlying reason for this conclusion is that the claim or relief sought is not legally viable, then in my view the judge’s decision is reviewable on a standard of correctness. This is analogous to striking out a claim on the basis that it discloses no reasonable cause of action, which raises a “pure question of law”: *Situmorang v Google, LLC*, 2024 BCCA 9 at para 51. A judge cannot strike a claim on this basis unless this conclusion is “plain and obvious” on the pleadings: *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, 1990 CanLII 90; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42.

**Issue 1: Whether the Chambers Judge Erred in Denying the Amendment
on the Basis that the Union Made an Irrevocable Election to Accept
Vancity's Repudiation**

[43] At the hearing of this appeal, a great deal of argument was devoted to delineating the legal options available to a party faced with repudiation of a contract. In my view, the law in this area is not controversial, and the outcome of this appeal does not depend on any nuance in its application.

[44] The fundamental point is that a party faced with repudiation of a contract has two options. One is to accept the repudiation, in which case the contract is at an end, and the non-breaching party may immediately sue for damages. The other is to affirm the contract, in which case the contract is still alive, both parties continue to be bound by it, and the non-breaching party may sue to enforce the contract through specific performance, assuming the remedial preconditions for such an order can be satisfied: *Dosanjh* at para 33.

[45] Where the non-breaching party elects to accept the repudiation and sue for damages, that election is irrevocable: *Dosanjh* at paras 33-34; *Homestar Industrial Properties Ltd. v Philips*, 72 BCLR (2d) 69, 1992 CanLII 570 (CA). This is a logical implication of the fact that once the repudiation is accepted, the contract is dead: *James* at para 6, citing *Johnson* at 894.

[46] The non-breaching party is required to make their election known. This may be effected by express language, or it may arise by implication through the non-breaching party's words or conduct. For such a deemed election to have effect, the words or conduct must be "clear and unequivocal": *Homestar* at para 14; *Ching v Pier 27 Toronto Inc.*, 2021 ONCA 551 at paras 34, 37; *Brown v Belleville (City)*, 2013 ONCA 148 at paras 45, 53.

[47] The non-breaching party is entitled to a "reasonable period of time" to decide whether to affirm the contract or accept the repudiation: *Dosanjh* at para 37; *Ching* at para 40. The court should be "slow to treat equivocal statements or acts as affirmations of the contract": *Dosanjh* at para. 37. Prolonged inaction may,

depending on the circumstances, tell against the non-breaching party's subsequently asserted election: *Ching* at paras 40-41.

[48] A non-breaching party who elects to affirm the contract and sue for specific performance may keep its options open by including a claim for damages in the alternative. So long as the pleadings evince an intent to keep the contract alive, the non-breaching party may "claim all of these remedies in the alternative and is not required to elect among them until judgment": *Inmet Mining Corp. v Homestake Canada Inc.*, 2003 BCCA 610 at paras 203-205; see also *Dobson v Winton and Robbins Ltd.*, [1959] SCR 775 at 779, 1959 CanLII 19.

[49] In this case, the chambers judge effectively found that, through its earlier pleadings, the Union made an implied election to accept Vancity's repudiation of the LOA. That finding rested on the judge's interpretation of the amended notice of civil claim. The central question on appeal is whether the chambers judge committed any reviewable error in finding that the reference to "damages" in the amended notice of civil claim was a plea for contractual damages, which in law had to be taken as an irrevocable election to accept Vancity's repudiation.

[50] The Union argues that the trial judge erred in law in interpreting the reference to "damages" in the amended notice of civil claim as an unequivocal plea for contractual damages, an election that would be inconsistent with a subsequent plea for specific performance.

[51] As Justice Fisher explained in *Yoshikawa v Dilon*, 2022 BCCA 180 at para 18, "[t]he standard of review with respect to a judge's interpretation of pleadings generally depends on whether the interpretation raises an extricable question of law". At least in the circumstances of this case, the question of whether specific performance is unavailable because the prior pleadings gave rise to an unequivocal acceptance of the opposing party's repudiation raises an extricable question of law. The chambers judge effectively acceded to Vancity's argument that the amendment could not be allowed because the Union's prior pleadings left it in a position where

the claim for specific performance stood no reasonable chance of success. This was a question of law reviewable on a standard of correctness.

[52] The judge was required to read the pleadings “generously, with a view to accommodating inadequacies in form attributable to deficient drafting”: *Bhatti v Grewal*, 2025 BCCA 138 at para 23, citing *Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361 at para 17. The judge appeared to acknowledge this point in stating at the beginning of her analysis that she had to determine “whether the Union has clearly accepted Vancity’s repudiation”. However, as explained below, the judge lost sight of this generous approach in her subsequent analysis.

[53] The judge began her pleadings analysis by setting out the entirety of Part 2: Relief Sought, and the final three paragraphs in Part 3: Legal Basis of the amended notice of civil claim. The Union contends, among other things, that the chambers judge erred by examining particular paragraphs of the pleadings “in isolation”. The Union relies on *Monenco Ltd. v Commonwealth Insurance Co.*, 2001 SCC 49 at para 34, for the proposition that courts should “look behind the literal terms of the pleadings in order to assess which of the legal claims put forward by the pleader could be supported by the factual allegations”. While accepting the Union’s submission that the pleadings must be read as a whole, I am not convinced that the chambers judge failed to do so. It is evident from the judge’s reasons that she examined the pleadings in their entirety. Her focus on specific paragraphs of Parts 2 and 3 does not mean she disregarded the remainder.

[54] The judge acknowledged that the claim did not include an express plea for specific performance. She then considered and rejected the Union’s submission that the amended notice of civil claim could be interpreted to encompass a plea for specific performance based on the stated intention to seek injunctive relief in Part 2 at paragraph 7. In the judge’s view, the pleadings contemplated an interlocutory injunction, “in aid of the preservation of the Union’s right to strike”. With respect, I disagree that this is the only viable interpretation of the pleadings. On the Union’s view of the case as stated in its pleadings, it had been deprived of the right to a

jointly sponsored DBPP. An injunction to “preserve the right of the Union and its members” was at least arguably consistent with an intent to seek specific performance to secure that right. The fact that the legal basis section of the pleadings referred, in Part 3 at paragraph 6, to the right to strike and an intention to “revisit the issue” in subsequent collective bargaining does not mean that the plea for injunctive relief was limited to an effort to somehow preserve the right to strike. Without passing judgment on the question of whether the amended notice of civil claim could be read to include an implicit plea for specific performance, the references to injunctive relief and the intent to preserve the Union’s rights certainly did not foreclose a subsequent plea for specific performance.

[55] The judge reasoned that while the pleading was “not a model of clarity”, it was “at its core a claim for damages for breach of contract”, and that it was “clear” that the Union’s “primary position is a claim for breach of contract damages”. I agree with the Union that this was not the only rational interpretation of the pleadings, for the following reasons:

- (a) In paragraph 1 of the Relief Sought, the Union sought a declaration that Vancity breached the contract when it wrongfully declared that the LOA was no longer in force after 1 September 2021. This aligns with paragraph 1 of the Legal Basis, in which the Union pleaded that Vancity was liable for breach of contract, by breaching its commitment to develop and implement a jointly sponsored DBPP. I agree with the Union that this plea for a declaration that Vancity breached the contract could not be taken to forestall a subsequent claim for specific performance.
- (b) In paragraph 2 of the Relief Sought, the Union pleaded that Vancity was “estopped” from treating the LOA as no longer in force after 1 September 2021. This marries with paragraph 2 of the Legal Basis, where the Union pleaded its reliance on Vancity’s subsequent conduct. These pleadings of estoppel and reliance are not at all inconsistent with an intent on the Union’s part to keep the contract alive.

- (c) Paragraph 3 of both the Relief Sought and the Legal Basis plead that Vancity “waived” the 1 September 2021 deadline through its subsequent conduct. Again, these pleadings are not inconsistent with an intent by the Union to keep the contract alive.
- (d) In paragraph 4 of the Relief Sought, the Union alleges that Vancity misrepresented its intentions in the course of collective bargaining. The pleading goes on to state the Union’s intent to place itself back in the position it occupied before the misrepresentation, by allowing the members to decide if they will exercise their right to strike. This appears to be a reference to some kind of labour law remedy as a form of relief connected with the tort of fraudulent misrepresentation. I cannot accept that this particular pleading, either alone or in conjunction with any others, must be interpreted to limit the Union’s breach of contract case to a claim for contractual damages.
- (e) Paragraph 5 of both the Relief Sought and the Legal Basis allege fraudulent misrepresentation. Again, I fail to grasp how these pleadings limit the remedies available to the Union in connection with its breach of contract claim.
- (f) Paragraph 7 of the Relief Sought refers to an intention to seek injunctive relief. As I have already explained, this pleading is not necessarily inconsistent with an intent by the Union to affirm the contract and seek its enforcement.
- (g) Paragraph 8 of the Relief Sought is an express claim for damages based on misrepresentation. From the pleadings as a whole, I interpret the Union’s claim to be that Vancity misrepresented its intent to design and implement a jointly sponsored DBPP, when Vancity had no intention to do so. This aligns with paragraph 8 of the Legal Basis, in which the Union alleges that it suffered damages by relying on Vancity’s conduct, which I interpret to mean Vancity’s conduct in misrepresenting its intentions. It is at least possible to interpret this plea for damages as being tied solely to the claim of fraudulent

misrepresentation, not dependent on any acceptance of Vancity's repudiation of the LOA.

- (h) Paragraph 9 of both the Relief Sought and the Legal Basis are pleas for punitive and aggravated damages. Although the pleadings do not specify the cause or causes of action to which these damages claims are tied, it would not be irrational to interpret them as relating solely to the claim for fraudulent misrepresentation, given that this is the only cause of action for which a claim of damages is sought elsewhere in the pleadings.

[56] The pleadings as a whole do not support the judge's legal conclusion that the Union's claim could only be read as seeking damages for breach of contract. Interpreting the pleadings generously in favour of the party advancing them — as one must when considering whether a claim is bound to fail — in my view they cannot be taken to foreclose a plea for specific performance. The interpretation adopted by the chambers judge — that the Union was accepting Vancity's repudiation and advancing a claim for damages for breach of contract — is by no means the only reasonable interpretation of the pleadings. The plea for damages can at least arguably be linked to the fraudulent misrepresentation claim. And the pleadings do not necessarily disclose a clear and unequivocal election by the Union to accept Vancity's repudiation. There is at least an arguable basis for interpreting the Union's pleadings as affirming Vancity's obligation to establish a jointly sponsored DBPP. The pleadings cannot, in my view, be interpreted to forestall the Union from taking that position in its proposed amendment.

[57] Vancity argues that the Union's claim for damages for fraudulent misrepresentation must be taken as an acceptance of repudiation. In Vancity's submission, damages for misrepresentation would only be payable if the resources expended by the Union in the design of a jointly sponsored DBPP came to naught following acceptance of Vancity's repudiation. By contrast, if Vancity's obligation to establish a jointly sponsored DBPP was still alive and ultimately enforced by an order of specific performance, the resources expended by the Union in the design of

the jointly sponsored plan would not have been wasted. In this way, Vancity submits that the Union's plea for damages — whether tied to a claim of fraudulent misrepresentation, or a claim for breach of contract — must be interpreted as an acceptance of Vancity's repudiation.

[58] I do not agree that this is the only way to read the pleadings. Even if Vancity's obligation to establish a jointly sponsored DBPP were kept alive and ultimately enforced by an order of specific performance, it is logically possible that some or all of the resources previously expended by the Union in the initial design of such a plan — resources which the Union alleges were then converted or redirected by Vancity to its single sponsor plan — would end up being sunk costs because the whole design process would have to be redone based on changed circumstances. In this way, the plea for damages for fraudulent misrepresentation is not necessarily inconsistent with an effort to keep alive Vancity's underlying obligation to establish a jointly sponsored plan.

[59] I conclude that the chambers judge erred in law in denying the proposed amendment of the pleadings on the basis that the claim for specific performance could not succeed because the Union had, through its prior pleadings, irrevocably elected to accept Vancity's repudiation and sue for damages in contract.

Issue 2: Whether the Chambers Judge Erred in Denying the Amendment on the Basis that it would Cause Prejudice to Vancity

[60] The judge reasoned that even if the pleadings could not be read to include an election to accept Vancity's repudiation and sue for damages in contract, it would be "unfair" to allow the amendment because the Union's delay in bringing the application resulted in prejudice to Vancity. The judge held that Vancity was "entitled to rely on the Union's election" to accept repudiation of the contract and sue for damages, and that the Union's subsequent delay in seeking an amendment prejudiced Vancity, as it continued to expend resources on the implementation of its single sponsored pension plan.

[61] The Union argues that the judge made two reviewable errors in her prejudice analysis. First, the Union relies on *Chouinard* at para 23 to say that in assessing whether it is “just and convenient” to grant an amendment as contemplated in *Teal Cedar*, the concept of “prejudice” should be limited to matters affecting one’s ability to defend the case, such that “[m]ere inconvenience or annoyance will not necessarily amount to prejudice”. Second, and more fundamentally, the Union says the trial judge’s analysis in this case turned more or less entirely on her view that Vancity was “entitled to rely on the Union’s election” when it chose to continue spending money on the rollout of its alternate pension plan.

[62] I do not need to deal with the former submission because I agree with the latter. Properly interpreted, the Union’s prior pleadings did not so clearly evince an intent to accept Vancity’s repudiation of the LOA as to preclude a subsequent claim for specific performance. The pleadings were at most ambiguous. To the extent that Vancity relied upon a narrow and self-serving interpretation of the Union’s pleadings, it did so at its own peril. If Vancity was concerned about delay in knowing the relief being sought against it, it could have sought clarification in writing or applied for particulars.

[63] The judge’s finding that Vancity suffered prejudice due to the Union’s delay in seeking to add a claim for specific performance was tainted by the same error as her finding that the claim for specific performance was bound to fail based on the prior pleadings. The error at the heart of both conclusions was the judge’s conclusion that the prior pleadings could only possibly be read as evincing an unequivocal election to accept Vancity’s repudiation.

Remedy

[64] The judge’s discretionary decision denying the amendment is set aside. The sole question that remains is whether it would be just and convenient to grant the Union’s application to amend its claim to include a plea for specific performance.

[65] As I have said, courts should generally permit amendments necessary to determine the real question between the parties, taking into account the interests of

justice. I agree with the chambers judge that the Union's prior pleadings were not a model of clarity, but this does not mean the Union should be denied an amendment that would clarify its position on the relief it seeks.

[66] One of the concerns identified by the injunction judge was that in the Union's earlier pleadings, the causes of action did not appear to line up with the relief sought. The Union sought to rectify that by adding a plea for specific performance of Vancity's alleged contractual commitment to introduce a jointly sponsored DBPP. Vancity denies that the LOA gave rise to any binding legal obligations. There are triable issues in that regard. The amendment sought by the Union merely sought to keep alive one of the potential remedies for a breach of contract.

[67] Since the proposed amendment does not add a new party or cause of action, there is no limitation period concern.

[68] Although the Union's delay in bringing the application is not irrelevant, it does not appear to be tactical, and there is no indication that the delay has prejudiced Vancity's ability to answer the claims. Thus, the delay itself should not deprive the Union of its ability to add an additional plea for relief.

[69] In my view, it is just and convenient to allow the Union to amend its claim to include a plea for specific performance.

Conclusion

[70] I would allow the appeal, set aside the judge's order dismissing the application to amend, and grant an order allowing the Union to amend its pleadings to include a plea for specific performance.

"The Honourable Mr. Justice Riley"

I AGREE:

"The Honourable Justice MacNaughton"

I AGREE:

"The Honourable Justice Brundrett"