SUPREME COURT OF NOVA SCOTIA

Citation: *Medjuck v. Medjuck*, 2023 NSSC 206

Date: 20230627
Docket: Hfx No. 461806
Registry: Halifax

Between:

Harold L. Medjuck

Plaintiff/Applicant

v.

Hedda Medjuck
(in her capacity as the Executrix of the Estate
of the late Franklyn D. Medjuck, Q.C.)
Medjuck and Medjuck, a law firm,
Ralph M. Medjuck, Q.C. and
51/56 Investments Limited

Defendants/Respondents

Corrected Decision: The text of the original decision has been corrected June 28, 2023 and replaces the previously distributed decision.

Judge: The Honourable Justice James L. Chipman

Heard: June 5 and 6, 2023, in Halifax, Nova Scotia

Written Decision: June 27, 2023

Counsel: John T. Shanks and Calvin DeWolfe, for the Plaintiff/Applicant
Gavin Giles, K.C. and Robert G. Belliveau, K.C., for the Defendants/Respondents, Ralph M. Medjuck, Q.C. and Hedda Medjuck, in her capacity as Executrix of the Estate of the late Franklyn D. (Frank) Medjuck, Q.C.
Augustus (Gus) M. Richardson, K.C., for the Defendants/ Respondents, Franklyn Medjuck/Medjuck & Medjuck (a law firm)
Matthew McEwen and Matthew Kuzack (law student), for the Defendant/Respondent, 51/56 Investments Limited

Details: The following is the reviewed version of 2023 NSSC 206 and replaces the original decision.

By the Court:

INTRODUCTION

[1] By Notice of Motion filed May 17, 2023 the Plaintiff/Applicant, Harold L. Medjuck (Harold) moves for Orders permitting the amendment of his Notice of Action and Statement of Claim along with disclosure of documents from the Defendants/Respondents and other entities.

[2] By Order dated December 16, 2020 I was appointed case management judge (CMJ) and in the years since have presided over case management meetings (CMM) and rendered a prior motions decision, *Medjuck v. Medjuck*, 2021 NSSC 269.

BACKGROUND

[3] Harold commenced one lawsuit on March 24, 2017 and a second related one on July 6, 2017. On January 18, 2018 Harold and the Defendants consented to a consolidation Order combining the two lawsuits.

[4] On December 17, 2018 the parties appeared before Justice Rosinski on two motions brought by Harold and one by the Defendants. The first motion concerned amendments to the second Statement of Claim. In *Medjuck v. Medjuck*, 2018 NSSC 321 at para. 13, Justice Rosinski stated:

> 13 In his Amended Notice of motion filed November 23, 2018, Harold seeks to amend the Statement of Claim contained within his Notice of Action filed July 6, 2017. None of the other parties oppose his motion, and I grant it, without costs.

[5] The Court file discloses that the amended pleading was never filed. In the result, Harold in the within Notice of Motion again seeks to amend his Statement of Claim along with seeking further disclosure. The Defendants resist the motion on both fronts and seek a dismissal, with costs.

[6] As noted in Rosinski, J's decision of late 2018, none of the parties then opposed the motion to amend and so it was granted, without costs. Accordingly, and quite apart from all of what might be said about the failure to present a timely, accurate Order with respect to the amendments, I am of the overriding view that what was agreed to four and a half years ago must be confirmed.

[7] Resort to the recording from December 17, 2018 does not assist in clarifying exactly what amendments were granted by Justice Rosinski. In this regard, the lawyers did not verbalize the changes to the pleaded paragraphs on the record. There was correspondence in the lead-up to the December 17, 2018 motion and this is appended to Mr. Giles, K.C.'s affidavit sworn and filed with these motions on May 26, 2013 (Giles' affidavit).

[8] At tab 3 of Giles' affidavit is a September 26, 2018 email from Harold's (then) lawyer, Ian Gray along with the attached proposed pleadings amendments. Notwithstanding the consolidation Order of eight months earlier, the amendments are shown as new paragraphs in two separate actions; i.e., paras. 41 – 49 of the Statement of Claim filed on March 24, 2017 and paras. 17 – 25, 65 and part of 66 in the Statement of Claim filed July 6, 2017. There is further correspondence contained in Giles' affidavit but nothing definitive on the pleadings until Mr. Gray's November 2, 2018 email when he states:

> As we gear up for our motions in a month and a half, I did just want to confirm that you are in fact opposing our motion to amend our pleadings – I don't think we'd ever been definitive on that point.

[9] Harold filed an affidavit on his within motions on May 17, 2023 which he subsequently affirmed on May 29 and was filed on May 31, 2023 (Harold's affidavit). At tab D he attaches a "Response To Demand For Production" on the second lawsuit signed by his present counsel on August 28, 2020. Each of the seven answers contained in the Response reference the "Demand for Production issued on behalf of the Defendants Ralph Medjuck and Hedda Medjuck as Executrix of the Estate of Franklyn Medjuck" on July 7, 2020. The answers reference paras. 18 – 24 of Harold's "Second Amended Statement of Claim herein." On fair reading of the complete questions and answers, I am satisfied that they line-up perfectly with the amendments set forth in the second amended Statement of Claim attached to Mr. Gray's September 26, 2018 email (attached to Giles' affidavit). In the result, I hereby allow Harold to amend his pleadings to include these paras.:

> 17. Beginning at or around the time that Harold ceased to be an active executive in OSPL, both Ralph and Frank Medjuck began to take money from OSPL's coffers and direct it to other enterprises they controlled.
>
> 18. In 1981, Frank Medjuck, with Ralph Medjuck's acquiescence, directed $661,700.00 of OSPL's money to his development company Kinsac Lake Estates Limited ("Kinsac Lake"). Kinsac Lake Estates is now named St. Andrews Village Estates Ltd.

> 19. In 1982 Frank Medjuck, with Ralph Medjuck's acquiescence, directed $69,000.00 of OSPL's money to Kinsac Lake.
>
> 20. In or before 1982, Ralph Medjuck's acquiescence, directed that OSPL's extend a $300,000 loan to his company Commercial Developments. The loan was made with no security, and had a contractual provision calling [f]or an interest rate of 12% annually. The loan was never repaid.
>
> 21. In 1984, Frank Medjuck, with Ralph Medjuck's acquiescence, directed $78,768.99 of OSPL's money to his development at Kinsac Lake.
>
> 22. In 1994, Frank Medjuck, with Ralph Medjuck's acquiescence, directed $123,187.00 of OSPL's money to his development at Kinsac Lake.
>
> 23. In 1994, Ralph Medjuck, with Frank Meduck's acquiescence, directed $400,000 of OSPL's money to his company Scotia Energy, as well as directing $200,000 of OSPL's money to his company Citadel Properties.
>
> 24. In 1995, Frank Medjuck, with Ralph Medjuck's acquiescence, directed $64,227.00 of OSPL's money to his development at Kinsac Lake.

[10] In the Amended Statement of Claim proposed on this motion the above paragraphs are added beginning as para. 19 on account of two earlier additional paragraphs which read:

> 15. Harold's dividend, however, was reduced by $221,568 to compensate OSPL for monies it had advanced to him through the years. No such reduction was made to either Frank or Ralph's dividend although they had caused OSPL to advance substantial sums to them of affiliated entities in prior years.
>
> 16. All of the monies advanced to Harold by OSPL had been done with the knowledge and approval of Ralph and Frank, subject to the requirement that it be paid back into the company in due course, which it was when the dividend was issued.

[11] Additionally, para. 25 is not (re) presented; however, these paras. are proposed to follow:

> 27. Including and in addition to these transactions, the defendants Ralph and Frank Medjuck diverted a total of $5,212, 514.07 away from or out of OSPL into various business ventures of their own, always without the knowledge or approval of the company's other directors and shareholders, including Harold.
>
> 28. These appropriations of funds properly belonging to OSPL took place between 1962 and the company's winding up in 1997. Virtually all of it took place after 1982, when Harold moved to Toronto.

> 29. In addition to direct cash transfers from OSPL to companies they controlled, Ralph and Frank also directed money from OSPL to other enterprises of theirs by extending loans from OSPL to their companies, before forgiving the loans.
>
> 30. At no time was Harold Medjuck aware of any of these transfers of money out of OSPL to companies controlled by his brothers. Harold only became aware of them in 2018, when disclosures were made to him as part of this litigation.

[12] As well, Harold requests a new heading and two paras., as follows:

> **Corporate Governance**
>
> 33. Ralph and Frank, in Harold[’s] absence, failed to call annual shareholders’ meetings, failed to provide annual financial reports of OSPL to Harold and destroyed company records, such as the company’s minute book, without advising Harold that this was to be done.
>
> 34. Ralph and Frank also failed to advise Harold that OSPL’s registration with the Registry of Joint Stocks was allowed to lapse, and eventually struck off the register.

[13] Further, under the next section, “The Property”, Harold seeks this additional para.:

> 40. On being told by Frank that the Property was being foreclosed, Harold asked Frank how much money was required. Frank told him that it would be around $200,000 from each partner. No further information ever arrived from Frank.

[14] In the next para. (41) Harold asks that the final sentence be amended as shown by my underlining:

> ... While the amount was <u>roughly $1,000</u> less than Harold’s prior drawings on OSPL’s income, it was in line with the drawings, and Harold did not question the explanation as he had no reason to do so.

[15] Next, Harold seeks a new heading and para. to appear before “Damages”:

> Fraudulent Concealment
>
> 72. Harold claims that at all material times, the defendants both individually and together acted to fraudulently conceal their wrongful conduct, described above, from him. He claims that he had no knowledge whatsoever of these actions at the time they were committed.

[16] Finally, it is requested that the "Damages" section be amended to reflect the addition of a new party as an additional Plaintiff. In Harold's affidavit he provides his rationale for the request to add the new Plaintiff:

> 11. In this motion I am seeking to amend my statement of claim to include OSPL as a Plaintiff. Previously reference was made to bring a derivative action on behalf of OSPL in this proceeding, but as I have now been able to reactivate that company and act as its sole current officer and director, I have consented to its participation as a plaintiff in this proceeding, should the amendment be permitted. As an alternative I am seeking leave to bring this action in the name of OSPL as a derivative action pursuant to s. 4(1) of the Third Schedule of the *Companies Act*. This relief is sought only in the alternative to the amendment of the pleadings to add OSPL as a plaintiff in it[s] own right.

[17] Earlier in Harold's affidavit he provides background, as follows:

> 4. My actions were commenced in 2017 resulting from my discovery that my two brothers and partners in business, one of whom also acted as my legal counsel, wrongly usurped funds, assets and a business opportunity by diverting them from a company which we jointly owned into separate corporate entities in which I held no shares.
>
> 5. The specifics of my allegations against the Defendants relate to the diversion of ownership of the building known as 5151 Terminal Road away from our jointly held company One Sackville Place Limited ("OSPL") and ultimately to corporate entities owned and controlled by the individual defendants or their immediate family members.
>
> 6. OSPL subsequently changed its name to OSP Investments Limited; for convenience I will refer to it as OSPL throughout my Affidavit.

[18] In this decision I refer throughout to the entity Harold wishes to have added as a Plaintiff as OSP, or the company. As well, I refer to Ralph M. Medjuck, K.C. as Ralph, the late Franklyn D. Medjuck, Q.C. as Frank and Hedda Medjuck as Hedda.

[19] During the motion, Harold was thoroughly and effectively cross-examined on Harold's affidavit by Mr. Giles, K.C. Below I am providing my summary of Harold's evidence gleaned from the cross-examination.

HAROLD'S *VIVA VOCE* EVIDENCE

[20] Harold testified that he had an interest in OSP as a shareholder beginning in 1962. He agreed that he ceased being active in the company when he moved to

Toronto in January, 1983. In the result, he acknowledged that it had been over 40 years since he was involved in the management of OSP. Shown para. 17 of his Statement of Claim, Harold agreed that in 1981 he ceased being an officer and director of OSP.

[21] Harold reactivated OSP in 2016 and he agreed this was about six months after Frank's death on March 14, 2016. As well, he acknowledged that he did this almost 23 years after Ralph assigned his OSP shares to the Royal Bank of Canada (RBC).

[22] From reading David J. Nunn's affidavit (affirmed and filed on this motion on May 26, 2023), Harold said that he became aware that in 1995 Ralph assigned his interests in OSP to RBC. It was put to Harold that since early 1995 Ralph had no involvement in OSP; Harold, referring to his move to Toronto, replied that "from 1000 miles away" he had no idea what Ralph did.

[23] Harold was taken through his September 16, 2016 Application to the Registrar of Joint Stock Companies. In the Application he stated that OSP "continued to be in operation" on February 7, 2008 when it was struck off the Registry; however, he acknowledged that there was no support for the statement. He said that the error "was just brought to my attention", adding that he was not aware of the error and that there were "some corrections I would have made" to his documents filed with the Registrar.

[24] It was brought to Harold's attention that he signed a September 19, 2016 affidavit swearing that OSP was operational at the time. Asked what changed in the nearly seven years to cause him to alter his view, he replied that he had the time to review the records and he learned that OSP had been struck in 1996-97. It was then brought to his attention that in the 2016 Application that he stated that OSP had been revoked in 1997 and struck off in 2008. He then confirmed that in 2016 he swore to information that he knew was incorrect; i.e., that OSP had not been in business since 1996 and, "I admit an error was made."

[25] It was put to Harold that when he submitted the Application in 2016 he knew "upon your own review the company had to be in business continually"; he denied knowing this, adding, "I was 1000 miles away dealing with two different lawyers in Halifax and Toronto."

[26] When it was suggested to Harold that by his actions that he "got to restore OSP as an operating company", he responded; "it's all unclear to me, I'm totally surprised by the things that were said." Harold similarly expressed no knowledge

that he had represented to the Registrar that OSP was a going concern for some twenty years when he made his application; "I was unaware until you brought it up, thank-you."

[27] It was also pointed out that Harold appointed himself as sole director and officer of OSP and that there are no documents produced in the lawsuit to support these appointments. Harold replied by stating that he sent registered letters to Ralph and Frank requesting a meeting to be called. He said that he did not receive responses, "so I just carried on." Reminded that Ralph had assigned his interest in OSP to RBC in 1995, Harold responded, "I had forgotten." He conceded that he did not put RBC on notice regarding any of his requested changes to OSP.

[28] Harold acknowledged that he did not call any meetings and that is why there are no Minutes produced.

[29] It was put to Harold that from 1995 onwards, Frank was the sole director of OSP yet Harold had himself appointed to this position in 2016. He replied, "everything was revealed two months after Frank passed away …I was the director *pro temp*." He then acknowledged that it was "fair to say" that he knew he was not president and secretary when he completed and submitted the application attesting to this.

[30] Harold was reminded of his proposed added paragraphs (referenced at para. 9 of this decision). He agreed that the allegations that his "brothers ripped you off in 1985" surfaces for the first time almost 40 years later. Shown other proposed amendments he agreed that some of his allegations date back more than 60 years but, "I've agreed only to start the claim from 1977." He went on to say that the proposed para. 22 amendment should read 1977 rather than 1982.

[31] He was taken to his (then) lawyer's letter of December 16, 2016 which attached a draft Statement of Claim. Harold agreed that the $7M claimed in the draft pleading related solely to the 5151 Terminal Road building. In this regard, the letter states as follows in the fourth paragraph:

> In short, Harold's position is that, as a result of wrongful steps taken by Ralph with his late brother Frank, Harold did not receive his one-third share of the profits and increase in value of the commercial office building at 5151 Terminal Road in Halifax (the "Property"), estimated at approximately $7 million.

[32] Harold agreed that there were no allegations about OSP loaning money "because they were not known, we found out when we went through the statements,

months later." He was then reminded of para. 22 of this proposed amended Statement of Claim which reads:

> In or before 1982[1977], Ralph Medjuck, with Frank Medjuck's knowledge or acquiescence, directed that OSP extend a $300,000 loan to his company Commercial Developments. The loan was made with no security, and had a contractual provision calling or an interest rate of 12% annually. The loan was only partially repaid.

[33] It was put to him that he knew of this alleged claim in 2016 because he had provided his (previous) lawyer with a balance sheet from 1962 which showed that OSP was lending money. Harold responded by saying that at the time it was not an issue and only became one after "analyzing all of the statements …an aggregate." Harold was then shown further documents (that were attached with his lawyer's letter) and he agreed that he knew of the $300,000 account receivable almost 50 years ago. He further agreed that the claim for this sum is being proposed for the first time in 2023.

[34] Harold was reminded of para. 30 of the proposed amended pleading which reads:

> At no time was Harold Medjuck aware of any of these transfers of money out of OSPL to companies controlled by his brothers. Harold only became aware of them in 2018, when disclosures were made to him as part of this litigation.

[35] He then conceded that he had the December 31, 1978 balance sheet showing the transfers as at the end of March, 1979, such that he knew about them and was aware of them in 1979. It was also acknowledged by Harold that on May 24, 1979 he sent a memorandum to the Medjuck companies comptroller, (the late Robert Foster) wherein he made inquiries about OSP and that these were addressed by Mr. Foster.

[36] Harold agreed that by 1990 that OSP no longer appeared to be carrying a commercial development receivable and that he had no problem with that back in 1991. When it was put to him that he routinely received OSP financial information Harold would only concede "on a very irregular basis." It was then suggested that he could have asked for financial information. Harold replied that his queries "never went anywhere, Ralph was very autocratic …I didn't get them, I moved on, I didn't suspect anything." Later when he was reminded that Mr. Foster had written to him about difficulties with the Discovery Centre and that Harold did not follow up regarding OSP, he admitted, "I made no demands or inquiries."

[37] Harold was stepped through a number of the proposed amended paragraphs and challenged regarding the alleged transfers of money out of OSP. It was pointed out that in close proximity to the dates that he had the financial statements and balance sheets which provided answers; however, he maintained that at the time he did not do a "comparative analysis."

[38] Harold agreed that the derivative action was first raised in his lawyer's December 16, 2016 letter. Harold also agreed that he would bring the action on behalf of OSP on the basis that it would be in OSP's interests and his own interests. On further questioning, Harold acknowledged that:

- on February 20, 1996 by Quit Claim Deed OSP "handed the keys" to 5151 Terminal Road back to Prudential Company of England (Properties) Ltd;
- he did no know if OSP had a bank account;
- he did not know of RBC's position as he had no communication with the bank regarding a derivative action – he never asked for RBC's consent;
- he similarly had no communication with Frank's Estate on a derivative action – he never asked for Hedda's consent;
- the Canadian Revenue Agency (CRA) has a judgment of approximately $1.2 M against OSP that has been outstanding for almost 20 years (albeit, he said that this was "quite stunning" news from what he learned from Mr. Nunn's affidavit and cross-examination in the context of this motion);
- years ago he made no attempt to follow-up regarding any issues because he "trusted Frank so much" and "assumed everything sorted out"; and
- his wife "eventually started to receive a cheque" which he assumed was related to 5151 Terminal Road (and Frank allegedly told him this) even though he knew the cheques were from Universal Properties, which he knew to be a company controlled by Menachem Suissa and not Ralph or Frank.

[39] Harold added that it was because of a May 10, 2016 conversation with Mr. Suissa where he first learned of the "mistreatment" regarding both OSP and 5151 Terminal Road that he began to initiate his legal claim.

[40] On re-direct examination Harold stated, "I know a lot of these figures but I had trust in my brothers, my partners …I had no reason to think concealment or

fraud." He elaborated that based on his May 10, 2016 conversation with Mr. Suissa that "I was wiped out 20 years ago," regarding Terminal Road and OSP.

FURTHER AMENDMENTS

[41] Having reviewed Harold's evidence, I now return to the requested amendments. The process by which a party may amend its Notice of Action and Statement of Claim is set out in Civil Procedure Rules 83. More particularly, Rule 83.02, 83.04 and 83.11 state as follows:

> **83.02 Amendment of notice in an action**
>
> (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> (2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> (3) A pleading respecting an undefended claim in an action may be amended at any time, but the party claimed against is entitled to receive notice of the amended pleading in the manner provided in Rule 31 - Notice for notice of an originating document.
>
> **83.04 Amendment to add or remove party**
>
> (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
>
> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
>
> (b) the expiry precludes the claim;
>
> (c) the person protected by the limitation period is entitled to enforce it.
>
> (3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.
>
> **83.11 Amendment by judge**
>
> (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

> (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

[42] Notwithstanding that the pleadings closed nearly six years ago, the parties are still at the document production stage and no discovery examinations have been scheduled. Despite my appointment as CMJ and the CMMs, the progress of this proceeding has been slow. I might add that I have repeatedly said to counsel that the Court is available to assist in establishing deadlines and whatever else that may be required to move the matter forward. I have consistently added that I do not regard my role as a "babysitter" and I will not impose unsolicited requirements on the parties represented by very senior, able counsel.

[43] The issue of amendments to pleadings generally was canvased by Justice Rosinski in *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99 where he stated at para. 41 of his decision (later affirmed on appeal):

> 41 Nova Scotia courts have held that, in spite of the introduction of new Civil Procedure Rules effective January 1, 2009, the general rule regarding amendments to pleadings has been maintained, subject to specific authority in the Rules. In *Altschuler v Bayswater Construction Limited*, 2019 NSSC 197, Bodurtha J., speaking in the context of whether "new claims" should be permitted as amendments to an existing claim, said (some citations omitted):
>
> The law of amendments generally
>
> 14 Justice Rosinski in *Oldford v. Canadian Broadcasting Corp*., 2011 NSSC 49, summarized the relevant law in relation to adding amendments:
>
> [4] Counsel agree on the proper legal test that the Court should use. The test is found in *Stacey v. Consolidated Fund Corp.* or Canada Ltd. (1986), 76 N.S.R. (2d) 182 (C.A.) per Clarke, C.J.N.S.:
>
> "... **the amendment should have been granted unless** it was shown to the Judge that the Applicant was acting in **bad faith** or that by allowing the amendment, the other party would suffer **serious prejudice that could not be compensated by costs.**" [emphasis added]
>
> ...
>
> [8] The only reported cases which have considered this issue under the new Rules are *Canada Life Assurance v. Saywood et al* (2010), 288 N.S.R. (2d) 273 (NSSC) and *M5 Marketing*

> *Communications v. Ross* 2011 NSCC 32, both decisions of McDougall, J.
>
> [9] As Justice McDougall concluded, I also do not believe the new Rules intended to alter, and I accept that they therefore have not altered, the appropriate legal test regarding when leave will be granted to amend court documents.

15 In *Canada Life Assurance Co. v. Saywood*, 2010 NSSC 87, McDougall J. summarized the law as follows:

> [7] Apparently there are no written decisions regarding the new Rule 83.02. There are, however, a number of cases pertaining to the predecessor Rule 15 (1972 Rules). In the case of *Global Petroleum Corp v. Point Tupper Terminals Co*. (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:
>
> > [15] The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (*Baumhour et al. v. Williams et al*. (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564 (C.A.))
>
> [8] This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of *Shea v. Whalen* (2008), 250 N.S.R. (2d) 65 at para. 6.
>
> [9] In the case of *Garth v. Halifax (Regional Municipality)* (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:
>
> > [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs:
> >
> > ...
>
> [10] While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

16 In *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:

> 33 ... That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time.

17 In *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 241, the Ontario Court of Appeal said the following about non-compensable prejudice at para. 25:

> * There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: ...
>
> * The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: ...
>
> * Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: ...
>
> * At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: ...
>
> * The onus to prove actual prejudice lies with the responding party:
>
> ...

18 In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2001 NSSC 178, the defendant asserted prejudice of a similar nature to that claimed by the defendant in this case. Justice Wright concluded that the defendant had failed to demonstrate prejudice that could not be compensated in costs:

> 32 The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

19 These are the principles that are applied on an ordinary motion to amend. The analysis becomes more complicated, however, where the amendment is sought after the expiry of a limitation period.

[emphasis added by Justice Rosinski]

[44] It is possible in late 2018 that further amendments were agreed to; however, I have scoured the Court file and found nothing to demonstrate this. For example, the Notice of Motion filed on November 21, 2018 merely says "moves for a order allowing him [Harold] to amend his Notice of Action." Although Mr. Gray's November 23, 2018 brief states that "A copy of the envisioned new pleadings has been filed with the proposed draft order", there is nothing on file. In (then) counsel for 51/56's November 30, 2018 brief, he states:

> Generally, 51/56 Ltd. takes no position on the motion and note that the proposed amendments on the draft provided to us do not materially affect or implicate 50/56 Ltd. We have not been provided with a copy of the draft amendments filed with the Court, but presume it is the same.

[45] I note that in argument on this motion that Mr. Shanks acknowledged that paras. 41 – 57 of what was proposed by Mr. Gray "line up with paras. 20 – 27 of the current proposal." There was no argument advanced by Harold's counsel that any of the other now proposed amendments were previously consented to by the parties.

[46] In any event, I have examined the totality of the proposed amendments (leaving aside the request to add OSP as a Plaintiff) against the backdrop of the Rules and caselaw (referenced above). I am of the view that the Court routinely allows proposed pleadings amendments. As Mr. Giles, K.C. stated in his November 23, 2018 brief on the subject:

> [then co-counsel] and I are familiar with the discretionary standard applicable to the consideration of amendments to Pleadings: prejudice not amenable to compensation by way of costs. As Officers of then Court, we cannot argue, let alone establish, that the proposed amendment to the Plaintiff's Statement of Claim will expose Defendants. Ralph M. Medjuck, Q.C. and the Estate of the late Franklyn D. Medjuck, Q.C. in Hfx No. 465448, to prejudice Defendants Ralph M. Medjuck, Q.C. and the Estate of the late Franklyn D. Medjuck, Q.C. in Hfx No. 461806.

[47] In the result, I have no difficulty permitting Harold to amend so as to add, in addition to paras. 20- 27, paras. 15, 16, 19, 28, 29, 30, 33, 34, 40, part of 41 and 72. In addition, where applicable, "1977" shall replace "1982".

ADDING OSP AS A PLAINTIFF

[48] Motions to add parties to existing proceedings are regulated pursuant to Rules 35.08 (Judge joining party), and 83.04 (Amendment to add or remove party). These Rules provide:

35.08 Judge joining party

(1) A judge may join a person as a party in a proceeding at any stage of the Proceeding.

…

(5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

83.04 Amendment to add or remove party

(1) A notice that starts a proceeding, … may be amended to add a party, except in the circumstances described in Rule 83.04(2).

(2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:

(a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;

(b) the expiry precludes the claim;

(c) the person protected by the limitation period is entitled to enforce it.

[my underlining added]

[49] In *Wamboldt Estate v. Wamboldt*, 2018 NSSC 163, Justice Lynch provided this background at para. 3:

> 3 On January 31, 2018, the plaintiff filed a notice of motion to amend the style of cause and statement of claim to add Kathleen Hartley, the defendant's sister, as a party. The plaintiff seeks to amend the action and statement of claim to add new causes of action against the defendant, plead new material facts in support of the new causes of action and add Kathleen Hartley as a party.

[50] With respect to the relationship between amendments to pleadings and limitation periods, Justice Lynch held as follows, at para. 30:

> 30 The motion to amend the notice of action and statement of claim was filed on January 31, 2018. If the limitation period was two years from September 1, 2015, it is statute barred. However, the plaintiff argues fraudulent concealment, wilful concealment, and discoverability, which could extend the limitation period. The burden is on the plaintiff to establish these claims.
>
> [my underlining added]

[51] On this motion Harold or OSP faces two applicable limitation periods pursuant to the *Limitations of Actions Act*, R.S.N.S., 2014, c. 35: commencement not more than two years from discovery (s. 8(1)(a)), and 15 years from the alleged events (s.8(1)(b)). The Defendants/Respondents submit that the motion to add OPS as a party should be refused, on the basis that:

(a) the Plaintiff has no right or ability to cause OSP to be joined; and

(b) any such claim by OSP is barred pursuant to the provisions of ss. 8(1)(a) and 8(1)(b) of the *Limitation of Actions Act*.

[52] On this motion the parties have presented competing views on how the limitation periods should be treated. I will have more to say about this in my analysis to follow. In any event, I reject the part of Harold's motion to add OSP as a Plaintiff for the reasons set out below.

[53] Having permitted the above-referenced amendments, I specifically reject the aspect of Harold's motion to allow OSP as a Plaintiff. Accordingly, paras. 70 and 73(d) of the proposed amended pleading shall be struck and the opening of para. 73 shall revert back to Harold as the proposed "plaintiffs" shall not be allowed.

THE DERIVATIVE ACTION – WHY IT MUST FAIL

[54] Once again, these proceedings are the consolidation of two separate claims:

- Hfx No. 461806, in which Harold commenced proceedings rooted in alleged professional negligence against the late Frank and against the former law firm, Medjuck and Medjuck. Those claims were filed on March 24, 2017. There was no mention in the related Statement of Claim of any forms of derivative action; and

- Hfx No. 465443 in which Harold commenced proceedings against the Medjuck Defendants and against 51/56 Investments Limited on July 6, 2017.

[55] A possible derivative claim was mentioned at para. 53 of Harold's original Statement of Claim, in Hfx No. 465448. This reads identically to what was placed in the draft pleadings enclosed with the December 16, 2016 demand letter:

> Harold has standing as a shareholder of [OSP] and leave ought to be granted to him, if necessary, to pursue the wrongs set out herein against the defendants. Neither

> Ralph nor Frank personally or through his executor, would have or did cause [OSP] to bring such a claim when they were in control of [OSP], as they were personally implicated, as pleaded herein. Harold has given reasonable notice to Ralph nor Frank's executor, has brought this claim in good faith and the claim appears to be in the interests of [OSP]. Harold relies on Sections 4 and 7 to the Third Schedule 3 to the Nova Scotia *Companies Act*.

[56] The above passage is para.70 in the proposed amended pleading and I repeat that it shall be struck for the reasons herein. Indeed, when he commenced action in the second lawsuit nearly six years ago, Harold plead that he may at some future time seek leave to commence a derivative claim on behalf of OSP. A motion for leave was never filed until the within May 17, 2023 motion.

[57] In *Link v. Link*, 2020 NSSC 293, Justice Rosinski referenced "statutory preconditions" to derivative forms of action. In this regard, I refer to the provisions of s. 4 of the Third Schedule of the *Companies Act* as follows:

> 4 (1) Subject to subsection (2) of this Section, a complainant may apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.
>
> (2) No action may be brought and no intervention in an action may be made under subsection (1) of this Section unless the court is satisfied that
>
> (a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) of this Section if the directors of the company or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
>
> (b) the complainant is acting in good faith; and
>
> (c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.
>
> [my underlining added]

[58] "Unless the court is satisfied that …" casts a definitive burden on Harold which, for reasons I will explain, he has not met. Indeed, given Harold's affidavit, cross-examination and re-direct examination, he has not provided any evidence of properly carrying out any of the three requirements specified.

[59] Harold submits that the above three prerequisites are satisfied, citing *Budd v. Bertram*, 2018 NSCA 95. However, *Budd* only addresses the third criterion, i.e.,

whether the proposed derivative claim "appears to be in the interests of the company…". *Budd* is silent on the first two criteria.

[60] The most recent and comprehensive appellate treatment of s. 4(2) of the Third Schedule in Nova Scotia is the Court of Appeal's decision upholding Justice Rosinski in *Link v. Link*, 2022 NSCA 14, which I will canvass below.

A. "[T]he complainant has given reasonable notice to the directors of the company…"

[61] At para. 61 of *Link*, Bourgeois, JA said the following regarding the requirement of "reasonable notice":

> …
>
> - Whether an applicant has provided "reasonable notice" (s. 4(2)(a)) is a finding of fact. An applicant is required to establish on a balance of probabilities that notice was provided and it was "reasonable" in the circumstances;

[62] The purpose of the "reasonable notice" criterion is for the company to be given an opportunity to commence the proceeding in its own name before the complainant's application for leave is heard by the Court (*Intercontinental Precious Metals Inc. v. Cooke*, [1993] BCJ No. 1903 at para. 32 (BCSC)).

[63] Importantly, the statutory requirement to give reasonable notice to the directors of the company prior to seeking derivative leave is not lessened if the applicant is of the view that the directors' position on the proposed action is a foregone conclusion. This was confirmed by the British Columbia Supreme Court in *Daon Development Corp., Re*,[1984] BCJ No. 2945:

> 19 It is apparent that this letter is a demand that the company either "join in the writer's application" or "carry on that action". No other effort was made by or on behalf of the applicant to cause the directors of the company to commence the action. In my opinion such a letter, written after the motion was filed, does not constitute "reasonable efforts" on the part of the applicant "to cause the directors of the company to prosecute the action". Rather it reflects the view of the applicant, or his counsel, that one would be naive to expect that the directors would accede to a request that they sue themselves for damages for having authorized the payment of dividends contrary to the provisions of the B.C. Company Act. Mr. Wilder submitted that the law should not compel a person to perform a futile act before granting the relief to which one would otherwise be entitled.

> 20 I do not accept this proposition as applied to the facts of this case. Firstly, it is a statutory requirement that the applicant make reasonable efforts to cause the directors to prosecute the claim and that, in my view, at the very least involves giving reasonable notice to the directors of the request together with details of the nature of the claim it wishes the directors to prosecute. Secondly, the condition can be easily performed without undue expense or effort and, if performed, any suspected futility in making the request, if such exists, would be readily exposed.
>
> 21 I consider it would be an error to relieve the applicant of the obligation to comply with the requirements of the statute simply because counsel presumed that the directors would decline to bring an action, designed to benefit the company, because they might be personally involved - I adopt this view particularly in the circumstances of this case when such speculation could have been easily resolved by an appropriate and timely request.
>
> [my underling added]

B. "[T]he complainant is acting in good faith"

[64] At paras. 50-51 of *Link* Justice Bourgeois approvingly cited the statements of Justice Hamilton in *L & B Electric Ltd. v. Oickle*, 2006 NSCA 41 regarding the requirement of "good faith":

> 50 With respect to the issue of good faith, Justice Hamilton, writing for the Court, noted the onus identified by the application judge:
>
> > [53] I will deal first with their argument relating to good faith. The judge found that the "onus" on Mr. Oickle to prove that he was acting in good faith was to satisfy the court by a preponderance of evidence, not some higher burden:
> >
> > > [52] In my respectful opinion, it is not appropriate to require the applicant to meet a burden that is any higher than what the statute provides. The statute provides "No action may be brought ... under subsection (1) unless the court is satisfied that. . . (b) the complainant is acting in good faith". This text is consistent with the ordinary rules on onus and burden. The proponent bears the onus of satisfying the Court. The Court will be satisfied by a preponderance of evidence. I have already discussed the history of this legislation towards ascertaining its purposes and scheme (see para. 34 to 42 above). With great respect for the contrary view expressed by Puddester, J. in *Tremblett*, the history, purposes and scheme of this legislation do not support the imposition of a higher burden than the statutory text provides. Particularly, there is no indication of Parliamentary or Legislative intent to restrict access to the derivative action out of deference to the principles of indoor management or majority rule.

> [54] The appellants have not argued that the judge erred in applying the ordinary burden. Accordingly, for the purposes of this appeal I have assumed, without deciding, that this is the correct burden.

51 In concluding the application judge had not erred in finding Mr. Oickle was acting in good faith, Justice Hamilton noted:

> [59] As set out by *D.H. Peterson, Shareholder Remedies in Canada* (Markham, ON: LexisNexis, 1989) at p. 17.22 "**good faith" is a question of fact**:
>
> > s.17.39 Good faith is said to exist where there is prima facie evidence that the applicant is acting with proper motives, such as a reasonable belief in its claim, and **is ultimately a question of fact to be determined on all of the evidence** and the particular circumstances of the case.
>
> [60] This principle is restated in *Winfield v. Daniel* (2004), 352 A.R. 82:
>
> > ¶16 Section 240(2)(b) of the *Act* requires that the Court be satisfied that the complainant is acting in good faith. Good faith is said to exist where there is prima facie evidence that the complainant is acting with proper motives such as a reasonable belief in the merits of the claim. Good faith is a question of fact to be determined on the facts of each case. **The typical approach by the Courts is not to attempt to define good faith but rather to analyse each set of facts for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met**: *D.H. Peterson, Shareholder Remedies in Canada*, (Markham, ON: LexisNexis, 1989) at 17.39.
>
> [61] The determination as to whether Mr. Oickle was acting in good faith was for the judge as the trier of fact. He made his determination after reviewing the pleadings and the affidavits and after hearing the cross-examination and submissions. In ¶ 30 of his decision he commented on his advantage in hearing cross-examination of the affiants. This court will not interfere with a finding of fact unless there is palpable and overriding error. *Housen v Nikolaisen*, [2002] 2 S.C.R. 235.
>
> [62] In reaching his decision the judge considered relevant factors. There was evidence before him from which he could conclude that Mr. Oickle was acting in good faith. The appellants have not satisfied me that this finding by the judge was a palpable and overriding error.
>
> [emphasis added by Justice Hamilton]

[65] In *Link v. Link*, the applicant Jay Link brought a motion for derivative leave to bring an action on behalf of Jack Link's Canadian Company (Link Canada) against his father, brother, Link Canada's parent company (Link Snacks), and a

director of Link Snacks (Hermeier). Justice Rosinski rejected Jay's application for derivative leave concluding, among other things, that Jay did not bring his application in good faith:

> 59 I conclude that Jay is seeking leave before this Court, as part of a pattern of vengeful conduct he has unremittingly evinced since at least 2005, as against his father Jack, his brother Troy, and, incidentally, John Hermeier. A review of the extensive evidence of the history of the parties vis-à-vis the various corporations that were part of the Link group of companies, the origins of these disputes reaching back to at least 2005, and the evolution of that dispute, suggests there is long-standing enmity by Jay against the Individual Respondents. However, that factor by itself is not determinative of the "good faith" dispute herein.
>
> 60 The uncontradicted evidence also reveals that only Jay personally has to gain from a grant of leave to proceed with the derivative action. There are no other shareholders who could complain. Jay has pledged to the Receiver that he will personally pay the legal fees of the derivative action throughout.28 Similarly, while the Respondents include Link Snacks Inc., Jay's focus has clearly been on the Individual Respondents. At all material times, the only shareholders of Link Snacks have been Jack, Troy and Jay. The only shareholders of Link Global (and effectively Link Canada) were Troy and Jay. Even the unjust enrichment claim vis-à-vis Link Snacks is premised on the breaches of fiduciary duty by the Individual Respondents. Therefore, the litigation is fairly characterized as, in essence, a personal dispute with the trappings of corporate structures -- it is really Jay versus Jack, Troy, and John Hermeier.
>
> 61 I further conclude that Jay is, and has been, acting only in his own personal interest throughout. Only he and Troy are shareholders of Link Global. The proposed derivative action is not intended to benefit Link Canada in any real sense. It could have been seen to benefit if it was truly conceived to be an independent entity, and to otherwise have been on an independent path as a "going concern", but the circumstances of this case cause me to conclude that is not so. It is primarily intended to benefit Jay, and to incidentally prejudice Jack, Troy, and John Hermeier.
>
> …
>
> 69 Jay could have filed an application for leave to proceed with the derivative action in Nova Scotia at any time after December 2010 (Transfer Pricing Claims) and May 2016 (Theft of Link Canada), respectively. He decided not to bring an application for leave to file a derivative action in Nova Scotia until 2020. His primary motivation for now doing so is for his personal benefit, and because he has been foreclosed from personally benefiting in the Wisconsin proceedings.
>
> 70 Jay has not asserted that he was unaware of the limitation period implications of his delay in filing for leave to proceed with a derivative action in

> Nova Scotia. I conclude that he was aware that there was a real risk that he would be foreclosed from proceeding by virtue of a limitation period.

[66] Justice Bourgeois for a unanimous Court of Appeal concluded that Rosinski, J's analysis was based on correct legal principles and did not disclose any palpable or overriding error. The Court of Appeal cited the following passage from *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 with approval regarding the "good faith" criterion:

> Good Faith Requirement
>
> 29 The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at paras. 27-30.
>
> 30 The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Discovery Enterprises Inc. v. Ebco Industries Ltd*. (1997), 40 B.C.L.R. (3d) 43 at paras. 117-118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 50 B.C.L.R. (3d) 195 at para. 5 (C.A.) [*Discovery Enterprises* (C.A.)].
>
> 31 The evidence that may be considered by the court in determining the good faith requirement includes the applicant's stated belief in the merits of the proposed action. If this evidence is accepted by the court, it is a prima facie indication of good faith, but it is not necessarily determinative: Jordan Enterprises at para. 29; *Discovery Enterprises* (S.C.) at para. 117. The court must also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties.
>
> 32 A conclusion that there is an absence of "good faith" simply means that the applicant has not met the onus of showing that the primary purpose of the action is to benefit the company. There is no requirement that the respondent show the applicant is acting in bad faith.
>
> 33 A finding of good faith, or of a failure to prove good faith, is a finding of fact in the purview of the trial judge, typically based on inferences drawn from the record, and the appeal court will not interfere absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Discovery Enterprises* (C.A.) at para. 7.

[67] Justice Bourgeois then provided the following summary of principles applicable to the "good faith" criterion at para. 61:

> …

- Section 4(2)(b) is not ambiguous. Whether a complainant is acting in good faith is a finding of fact. The burden rests upon an applicant to adduce evidence that establishes on a balance of probabilities (not some lesser standard) that they are acting in good faith. In assessing this criterion, a judge should look to the entirety of the record, including the pleadings, submissions and evidence adduced by all parties. There is no need to attempt to define good faith, but rather a judge should analyse the evidence for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met. Like any other finding of fact that must be made, a judge can use the tools at their disposal, including drawing inferences from the evidence and making assessments of credibility;
- Determining whether an applicant is acting in good faith is a necessary pre-condition to granting leave. It must be resolved at the leave stage--it is not an issue for trial. Therefore, the admonition against assessing credibility does not apply here. If an applicant has not established they are acting in good faith on a balance of probabilities, there is no "benefit of the doubt" that applies in his favour; …

[68] In my view, both decisions in *Link v. Link* are highly instructive regarding the application of the "good faith" element to the facts of this case. Having regard to the evidence, I must conclude that Harold did not bring the present action in good faith.

[69] Here, as in *Link*, OSP is not currently an independent going concern. It has always been a closely held family company, and it has not been operating as a going concern since 1996, as detailed in the supporting affidavits and exposed in the cross-examination. OSP was completely dormant for almost two decades when Harold purported to resurrect the company by way of what I can only conclude (given the cross-examination evidence and documents within the Giles' affidavit) were misrepresentations by Harold to the Registrar of Joint Stock Companies.

[70] Given all of the evidence, I have great difficulty with Harold's claim that he applies for derivative leave for the "primary purpose" of advancing the interests of OSP. The cross-examination exposed Harold for resurrecting OSP in an attempt to advance his longstanding grudge against his brothers. In my view, the evidence discloses that the primary purpose of the proposed derivative action is for Harold's sole benefit.

[71] Here, as in *Link*, the dispute is properly characterized as a "personal dispute with the trappings of corporate structures." (Justice Rosinski at para. 60). From the evidence, I am left to find that Harold has attempted to use the derivative action as

a means of continuing and expanding the scope of the current litigation. In my view, the only conceivable beneficiary of the proposed derivative action is Harold.

C. "[A]ppears to be in the interests of the company or its subsidiary that the action be brought…"

[72] The third and final criterion described in s. 4(2) of the Third Schedule, that the proposed derivative claim "appears to be in the interests of the company" was the sole issue addressed in *Budd*.

[73] *Budd* establishes that the primary consideration in determining whether the proposed action "appears to be in the interests of the company" is the strength of the proposed cause of action. The applicant must, at minimum, satisfy the Court that the proposed derivative action is not "frivolous or vexatious" or "bound to fail" (see *Budd* at para. 35, cited by Justice Bourgeois at para. 55).

[74] In doing so, the judge must not wade into genuine factual disputes between the parties regarding the merits of the proposed derivative action (similar to a summary judgment motion); it is sufficient for the applicant to establish that the proposed action appears to have a minimum sufficient amount of merit. Nevertheless, if there is clear and undisputed evidence which demonstrates that the proposed derivative action is unlikely to succeed, this will militate against a finding that the proposed action is in the interests of the company.

[75] Justice Rosinski made the following statement regarding the effect of a possible limitations defence on whether a proposed derivative action was in the interests of the company:

> 90 Under the rubric of whether "it appears to be in the interests of the company" to grant leave, it is appropriate for me to consider the strength of the proposed derivative action. This factor includes a consideration of whether there is an arguable case to be made, and, incidentally, an inquiry into the costs and benefits to the company of the derivative action proceeding, though this is arguably less important where the issue is whether directors are in breach of their fiduciary duties due to conflict of interest.
>
> 91 Furthermore, regarding the strength of the proposed derivative action, I will next examine the Respondents' claim that the action is statute-barred by the Limitation of Actions Act.40
>
> 92 In essence, if I conclude on the basis of undisputed or indisputable evidence, that there is a reasonable prospect of success to the Respondents' limitation of

> actions defence, then it militates against me finding the derivative action "is in the interests of the company."
>
> …
>
> 140 In summary, I conclude that Nova Scotia law is the proper choice of law. The Nova Scotia *Limitation of Actions Act* should apply, absent compelling reasons to the contrary. I see none in this case. Moreover, I conclude that it is likely the proposed limitations defence to the proposed derivative action is "bound to be accepted by a trial judge" (*Budd* at para. 38).
>
> Conclusion
>
> 141 Jay has not satisfied me, more likely than not, that permitting the derivative action to proceed "appears to be in the interests of the company."
>
> 142 Jay knew the material facts underlying claims by December 2010 and May 2016. To the extent that he may wish to rely on improvident legal advice or assert that he was unaware of the relevant law, this has no bearing on the limitation period issue - *Milbury v Nova Scotia (Atty. Gen.)*, 2007 NSCA 52, at para. 27; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.
>
> 143 Furthermore, according to Nova Scotia law, there is no basis to claim any suspension of the running of the limitation period.
>
> 144 Pursuant to section 23 of our *Limitation Act*, the limitation period in relation to Jay's proposed claims discovered before September 1, 2015 (the effective date), i.e., the "Transfer Pricing Claims", is the earlier of September 1, 2017, or under the previous Limitation of Actions Act, RSNS 1989, c. 258, sometime in December 2016 - therefore at the latest by December 2016; and for claims discovered after September 1, 2015, (the "Theft of Link Canada Claims"), pursuant to s. 8 of the *Act*, the limitation period is two years from the day on which the claim is discovered (May 2016 at the latest), therefore at the latest by May 2018.
>
> 145 The Application for leave to proceed with the derivative action was filed March 12, 2020.
>
> 146 Jay has not satisfied the Court, more likely than not, that he is "acting in good faith", or that the proposed derivative action is "in the interests of the company."

[76] Importantly, Rosinski, J. found that the undisputed facts must merely disclose a “reasonable chance of success” to weigh against a finding that the proposed action is in the interest of the company.

[77] In my view, upon considering all of the arguments and evidence, OSP would face prohibitive limitation barriers if permitted to join this litigation in a direct or derivative capacity. Surely it is not in OSP’s interests to involve itself in prosecuting claims which are likely to fail.

[78] Furthermore, it is certainly not in the interests of OSP for it to be dragged out of its long period of dormancy to serve as a vehicle for Harold in his personal vendetta against the Defendants. I am all the more convinced of this when I factor in the CRA judgment in the order of $1.2 M. Having regard to David Nunn's evidence (canvassed at paras. 90 – 103 of this decision), this judgment has not been pursued. It is possible that a reactivated OSP, were it to become a Plaintiff in this lawsuit, might attract CRA's interest.

[79] I have reflected on this matter, given to my role as CMJ for two and a half years, and having reviewed all of the file, evidence and authorities filed on these motions. I have determined that had Harold acted properly when deciding to resurrect OSP, he would have early on after the pleadings closed:

- honestly acknowledged he lacked the authority; and
- asked those with actual authority to re-animate the company.

[80] They would likely have refused but at least would have had the opportunity to explain what was in OSP's (not Harold's) best interests. Armed with that refusal, Harold could have applied for leave to bring a (much more timely) derivative action to:

- first, restore OSP's corporate status; and
- second, amend the action on behalf of OSP to add the company as a Plaintiff.

[81] Here again, those with actual authority could have resisted this application and perhaps provided sufficient reasons (inclusive of limitation arguments) to justify not allowing Harold to proceed. In any event, at least the proper process would have been followed.

[82] As matters presently stand, I view this aspect of Harold's motion as a desperate, belated attempt to side-step the proper procedure. To permit this aspect of Harold's motion would allow a wrong-doer to effectively pursue a derivative action under the guise of a pleadings amendment. Ultimately, this approach would reward Harold's deception. In the result, I dismiss Harold's motion to add OSP as a Plaintiff. At the same time, I deny leave for Harold to proceed alternatively to bring a derivative action.

PRODUCTION MOTION

[83] The other part of the motion deals with Harold's request for further production from the parties along with production from several non-parties. In the main, Harold seeks records of transactions between OSP and each of the Defendants and specified non-parties.

[84] In his motion Harold relies on these Rules:

> 14.08 Presumption for full disclosure
>
> (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.
>
> 15.02 Duty to make disclosure of documents
>
> (1) A party to a defended action or a contested application must do each of the following:
>
> (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
>
> (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
>
> (c) acquire and disclose relevant documents the party controls but does not actually possess.

[85] The Defendants acknowledge the governing Rules and well-established principles from the caselaw. The issue for the Court is whether the Defendants have complied with their ongoing obligations.

The Applicable Test on Motions for Production for Parties and Non-Parties

[86] Civil Procedure Rule 14.12(1) covers motions for production:

> 14.12 Order for production
>
> (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding if the moving party provides all of the following representations:
>
> (a) the party is in compliance with Rule 15 - Disclosure of Documents and Rule 16 - Disclosure of Electronic Information;
>
> (b) the party believes the delivery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief;

> (c) the party will pay the reasonable costs of making the delivery, unless a judge directs otherwise.
>
> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.

[87] "Relevance" is defined in Rule 14.01:

> 14.01 Meaning of "relevant" in Part 5
>
> (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.

[88] Notwithstanding the above definition of "relevance", the Court of Appeal held in *Laushway v. Messervey*, 2014 NSCA 7 at para. 49 that pre-trial disclosure must be treated with a "somewhat more liberal view of the scope of relevance" than would be afforded at trial."

[89] Before coming to my decision on Harold's production motion, I wish to review Mr. Nunn's evidence.

DAVID NUNN'S *VIVA VOCE* EVIDENCE

[90] David Nunn became associated with the Medjuck companies beginning in 2001 when he was hired as Chief Financial Officer. Mr. Nunn was cross-examined on his affidavit and exhibit 1, the index to the Affidavit Disclosing Documents (ADD) of Ralph and Hedda Medjuck.

[91] Mr. Nunn is presently the Chief Executive Officer and Chief Financial Officer of Emscote ULC, an entity as of 2018. Emscote ULC consists of shareholders from within the Medjuck family, not including Ralph's son. Over the years Mr. Nunn has worked for 46 separate Medjuck entities.

[92] On May 17, 2023, Mr. Nunn filed a Litigation Guardian's statement pursuant to Rule 36.07(3). Mr. Nunn consented to be the Litigation Guardian of Ralph, who is *non compos mentis*.

[93] When Mr. Nunn started with the Medjuck companies over 20 years ago he went through their records. Upon his arrival nobody carried out this role; he took it on given CRA's requirements. Mr. Nunn determined that there were records stored in three locations:

1. at the Medjuck and Medjuck law offices located at 1601 Lower Water Street;
2. in the attic of the offices located at 1601 Lower Water Street; and
3. at a building known as Granbury Place.

[94] Mr. Nunn said that he and his staff "now and again" came across documents referring to a Medjuck company known as OSP but that there were no financial records, minute books or the like, pertaining to OSP.

[95] In 2013 the CRA put OSP on notice that there was an outstanding assessment regarding a "substantial amount owing." Although OSP was not under Mr. Nunn's mandate, he asked staff to look for OSP documents and once again, "…we did not come across OSP minute books, documents…" He added that he did review some OSP documents, but he did not consider them to be corporate records. Again, he stressed that there were "very little documents" noting the absence of anything in filing cabinets and that there were no minute books. Mr. Nunn recalled speaking with Frank's assistant, Carmel Degen and, "she had no idea where the [OSP] records were."

[96] The year 2013 also was when the Medjuck companies sold the majority of their hotels to Temple. In the lead-up, Mr. Nunn "did an extensive review of all documents." As part of a general downsizing, he and staff determined what documents needed to be kept and what could be discarded. Iron Mountain was retained and all documents pre-dating seven years prior to 2013 were shredded. To Mr. Nunn's recollection there were no OSP documents identified in 2013. He added that the paperwork referrable to Ralph's assignment of his shares in OSP was earlier located and retained. He stated that had any other OSP documents been found in 2013, that they would have been destroyed (given that they pre-dated seven years before 2013). Mr. Nunn confirmed that he did not have access to any documents kept by Frank.

[97] Mr. Nunn was shown exhibit 1 and he said that he provided some of the 35 indexed documents. He said that since he was not the source of all of the documents in the ADD, he would not have sworn (the ADD has Mr. Nunn noted as the representative of Ralph and Hedda for the purpose of the disclosure of documents in the matter; however, it is not signed or sworn).

[98] By the time of the assembly of the ADD in 2018, Mr. Nunn had access to Ralph's personal documents because Ralph closed his 1601 Lower Water Street offices and divested. Mr. Nunn thought that some of the ADD materials could have come from that process.

[99] Mr. Nunn was shown exhibit C of his affidavit, a June 26, 2016 email from Harold to Ms. Degen, copied to Ralph, which reads:

> Without Prejudice
>
> Carmel; RMM has informed me a few hours ago that upon alleged instructions from our late brother frank, you destroyed the Minute Book belonging to One Sackville Place Limited. Given your legal experience, you should have known this was not Frank's personal property.
>
> Please cease and desist from destroying any further Company records belong to One Sackville Place Limited without the written permission of ALL the shareholders of which I am one and equal to the other two including heirs.

[100] Mr. Nunn testified that because Frank had died (on March 14, 2016) that, "Carmel would have addressed that to me." He said that, "we knew we had no records, we knew we had nothing… I knew we hadn't come across anything." Mr. Nunn added that he did not know whether Ms. Degen would have reviewed the personal files of Frank or Ralph. He added that at the time he would have discussed Harold's email with Ralph and; "he gave me no direction regarding a search for OSP corporate records." It was Mr. Nunn's understanding that Harold controlled all of the OSP records.

[101] Mr. Nunn was asked about Kinsac Lake Estates and St. Andrew's Village Estates; he stated that these entities were not under his control. He stated that Frank was the sole officer and director of the latter entity.

[102] Mr. Nunn said that when documents were destroyed that he was made aware of what they were, and he had "no awareness" of OSP documents having been shredded.

[103] Since learning of the threat of a lawsuit by Harold in 2016, Mr. Nunn has not attempted to obtain OSP records from third parties. He had no conversation with Ralph about providing consents to Harold so he could attempt to obtain OSP documents from others.

DISCLOSURE – ANALYSIS AND DISPOSITION

[104] Harold details his production requests at paras. 23 – 58 of his affidavit. Mr. Nunn's affidavit filed on these motions is responsive as is his earlier affidavit deposed on March 30, 2023, and Hedda's affidavit sworn on May 30, 2023 and filed the next day. Furthermore, I find that Mr. Nunn's cross-examination answers confirm that Ralph and Hedda have made an exhaustive and, in my view, entirely satisfactory responses to Harold's disclosure demands. Having said this, I am alive to the January 18, 2019 Order of Justice Rosinski referable to Frank's computer; the production ordered continues to be a work in progress.

[105] With regard to Frank/Medjuck and Medjuck, I am similarly satisfied, based on Mr. Nunn's evidence (subject to the computer caveat) that these parties have been responsive to their production obligations.

[106] With respect to 51/56, I note that this motion prompted them to prepare and deliver their ADD in the lead-up to the Court dates. I did not receive anything from Harold directed specifically at 51/56 in the wake of this production suggesting any deficiencies. As for the non-party represented by Mr. McEwen, having regard to all of the evidence, I accept the arguments presented at paras. 28 – 34 of his pre-motion brief:

> 28. The request seems based on the suggestion that funds paid to a non-party (the Plaintiff's wife) by another non-party (Universal) are related to 5151 Terminal Road" because of an undocumented statement by the deceased Defendant Frank Medjuck.
>
> 29. The Plaintiff states at paragraph 49 of his affidavit that he requires bank statements, minute books, and tax return filings for a 20-year period to evaluate "the course of the funds paid to my wife" and so that he may "determine the degree to which [Universal] may have benefitted" from 51/56's ownership of 5151 Terminal Road.
>
> 30. The Plaintiff has failed to provide the Court with any reason at all why payments to his wife from a non-party are relevant to this claim.

> 31. Unlike the other non-parties of which documents are being sought in this motion, there is no allegation that loans were made from OSP to Universal. At no time did either of the Defendant Medjucks have any role with Universal.
>
> 32. Universal was contracted by various owners of 5151 Terminal Road to provide property management services. These contractual relationships are irrelevant to the Plaintiff's claim, and in no conceivable way could make 20 years of minute books, bank statements, and tax return filings producible to him.
>
> 33. Furthermore, even in the hypothetical that Universal somehow improperly benefitted in this situation in a manner in which the Plaintiff could possibly hope to recover, the limitation period for which the Plaintiff could bring a claim against Universal is long past.
>
> 34. The Plaintiff's motion seeking minute books, bank statements, and tax return filings from Universal should be dismissed with costs.

I would add that I similarly find Harold's request for documents from the other non-party entities to be without foundation, particularly given Mr. Nunn's evidence.

CONCLUSION

[107] In the result, I allow Harold's motion to make certain amendments but deny others as detailed herein. Further, I deny his motion to add OSP as a party. I also deny Harold leave to proceed with the derivative action. Finally, I entirely dismiss Harold's production motion.

[108] I would ask counsel for Hedda and Ralph to provide an Order consented as to form, reflective of this decision. I order costs to the largely successful parties, the Defendants/Respondents. If the parties cannot agree on costs (and disbursements) within 30 days of this decision, I will look forward to scheduling an appearance to deal with this.

[109] There was mention of a further motion; should any of the parties wish to schedule dates for motions or a CMM, please contact my judicial assistant at the earliest opportunity.

Chipman, J.