IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Roeder v. Pinchin,*
2016 BCSC 2012

Date: 20161101
Docket: C993056
Registry: Vancouver

2016 BCSC 2012 (CanLII)

Between:

John Roeder

Plaintiff

And

Tim Pinchin and
NCG Asset Management Ltd.

Defendants

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:	Glen P. Forrester
Counsel for Defendant Tim Pinchin:	Allan A. Macdonald
Place and Date of Hearing:	Vancouver, B.C. August 9-10, 16, 2016
Place and Date of Judgment:	Vancouver, B.C. November 1, 2016

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INTRODUCTION

[1] The defendant, Tim Pinchin, applies to dismiss this action for want of prosecution.

[2] The genesis of the action is a complicated share purchase agreement between two businessmen, Pinchin and the plaintiff John Roeder, in 1993. The action initially involved many issues concerning this agreement; it also included a claim by Roeder for recovery of monies he alleges was loaned to Pinchin. By reason of a settlement agreement between the parties in October 2014, only the allegations concerning the loan remain.

[3] This action has been outstanding since 1999, some 17 years, and is only now possibly on the cusp of being finally determined by way of summary trial. I say “possibly” both because of this application and because of issues that may arise as to ability of this court to determine the issues in such a fashion.

BACKGROUND FACTS

[4] This litigation has a long and complex history and is tied to other litigation which has since been disposed of. I will briefly summarize the relevant history below.

The SPA Transactions (1993)

[5] On April 29, 1993, Roeder and Pinchin entered into a share purchase agreement (the “SPA”) by which Roeder agreed to sell his shares to Pinchin in Keywest Resources Ltd. (“Keywest”). Other parties to the SPA who were also selling Keywest shares to Pinchin included Larry Mashburn, James Mashburn and William Buchanan (collectively, the “Mashburn Parties”).

[6] Andrew Chamberlain was a lawyer acting for Roeder and the Mashburn Parties in respect of the various transactions contemplated under the SPA. Another lawyer, Donald Lyons, was acting for Pinchin. The law firm Morton & Company (per Robin Blues) agreed to act as the escrow agent/trustee under a trustee agreement with respect to the delivery of the Keywest shares to Pinchin after payment of the share price in accordance with the SPA.

[7] In broad terms, the SPA provided that Pinchin was to purchase 701,150 free-trading shares in Keywest along with 1,088,850 escrow shares. Pinchin agreed to make installment payments totalling $850,000 for these shares.

[8] In February 1993, Keywest and Roeder, as president of Keywest, received warning letters from the Vancouver Stock Exchange (“VSE”) advising that no change of control in Keywest would be allowed without VSE approval. These letters were ignored by all recipients and the SPA was finalized.

[9] Between May 1993 and June 1993, Pinchin paid $850,000 to Roeder and the Mashburn Parties (through Mr. Chamberlain) and Pinchin received the free-trading shares in Keywest from Morton & Company.

[10] In addition, on June 15, 1993, Roeder issued a cheque, through his broker, in the sum of $192,000 payable to the defendant NCG Asset Management Ltd. (“NCG”), a company controlled by Pinchin (the “Loan”). This transaction is the central issue remaining between the parties at this time.

[11] Eventually, Roeder refused to approve the transfer of control of Keywest to Pinchin under the SPA after the regulatory authorities got wind of these transactions and a cease trading order was issued in respect of Keywest in July 1993. The Keywest transaction collapsed, apparently leaving Roeder and the Mashburn Parties with the $850,000 purchase money paid by Pinchin and also leaving Pinchin with certain shares in Keywest (which did not provide him with control of Keywest).

The B.C. Securities Commission (1994-2007)

[12] In November/December 1994, Roeder was busy dealing with proceedings brought against him at the British Columbia Securities Commission (the “Commission”). The Commission ultimately found that there had been various breaches of the relevant legislation by both Roeder and Keywest, as caused by Roeder, under the *Company Act*, R.S.B.C. 1979, c. 59 and the *Securities Act*, S.B.C. 1985, c. 83: *Re Keywest Resources Inc. and Roeder et al.* (April 4, 1995), Vancouver, COR #95/068, BCSECCOM.

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[13] Pinchin also faced proceedings at the Commission by reason of his involvement in the Keywest transactions.

[14] These proceedings before the Commission resulted in various penalties being assessed against both Roeder and Pinchin:

a) on April 4, 1995, Roeder was banned from being an officer or director of a reporting issuer for 17 years; and

b) on October 11, 1996, Pinchin was banned from being an officer or director of a reporting issuer for 25 years.

[15] The matter of the Loan advanced by Roeder was also the subject of comment by the Commission. The Commission determined that Roeder made this advance on behalf of Keywest and that he expected that Keywest would reimburse him. Further, the Commission determined that Roeder made the $192,000 advance in order to avoid the regulatory requirement that the VSE approve the use of Keywest treasury funds in any new business Keywest might undertake. The Commission stated in its decision in relation to Roeder:

> [Page 14] Roeder says he had a telephone conversation with Pinchin in early to mid June and described the conversation as follows. The discussion concerned a proposed deal involving Tel-Net Systems Inc., a Delaware company based in Utah, and Comm-Tech. Roeder understood that Pinchin controlled Tel-Net. Pinchin said he needed $150,000 U.S. to prepurchase long distance phone time from Comm-Tech as a down payment and he wanted to get the money from Keywest. Roeder told Pinchin he could not use Keywest's money without regulatory approval. Instead Roeder agreed to personally advance Pinchin the money and to recover it from Keywest following regulatory approval. Subsequent to the conversation, Roeder paid $192,500 (Canadian) to Pinchin on June 15, 1993.
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> …
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> [Page 20] On June 15 Pinchin made the final payment. On the same date Roeder lent Pinchin $192,500 for the Tel-Net deal. Given that Roeder expected to recover the money from Keywest, the only purpose of the loan was to evade the requirement to obtain Exchange approval prior to Keywest paying any money for Tel-Net. The loan was never disclosed by Keywest.
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> …
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> [Page 23] Effective June 15, Pinchin had paid the full purchase price and received all of the shares and documents. Obtaining regulatory approval was

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(under the agreement) Pinchin's responsibility. Shareholder approval was a foregone conclusion given that the parties to the agreement held 85 per cent of Keywest's shares. Shortly after this date, Keywest's books were moved to Pinchin's office and Pinchin and Poulos became sole signing authorities on Keywest's bank account. Roeder was still, of record, president and a director but his only remaining involvement in Keywest was that he retained sole signing authority over the Yorkton account, where most of Keywest 's money was held. This provided his security for the $192,500 loan he made to Pinchin for the Tel-Net deal.

Keywest did not disclose the change in management that occurred in early May, the change in control that occurred on June 15, or the $192,500 advance for the Tel-Net deal, which Roeder expected to recover from Keywest. Each of these events constituted a material change in Keywest's affairs and ought to have been disclosed by news release. We find that, in failing to disclose these material changes in its affairs, Keywest contravened section 67 of the Act.

[Page 24] Furthermore, Keywest failed to disclose them in its quarterly report for the year ended January 31, 1993, signed by Roeder and Buchanan and filed on June 18. … Keywest's quarterly report failed even to mention the share purchase agreement, much less to disclose the change in management and control or the $192,500 potential liability. We find that, in omitting to disclose these material changes in Keywest 's affairs, the quarterly report was false and misleading and did not comply with section 145 of the Regulation.

…

… No disclosure was provided of the terms of the share purchase agreement; of the free trading shares that Pinchin had already purchased under that agreement; of the signed resignations of the directors, which were then held by Pinchin; of the role that Pinchin was already playing in Keywest's management; or of the $192,500 that Roeder had advanced to Pinchin for the Tel-Net deal, which Roeder expected to have repaid by Keywest. …

…

[Page 26] Roeder advanced money to Pinchin to assist him in securing the Tel-Net deal for Keywest. In doing so, he facilitated a change in Keywest's business, despite the warning of the Exchange and contrary to the representations in the prospectus that Keywest would continue in the oil and gas business. His loan also permitted Keywest to evade the requirement for prior Exchange approval of the Tel-Net deal. [26]

[Emphasis added]

[16] To similar effect, the Commission's decision in relation to Pinchin was that Roeder's advance to NCG/Pinchin was to be repaid by Keywest: *Re: Timothy James*

Pinchin, NCG Capital Group Ltd., and NCG Asset Management Ltd., (October 11, 1996), Vancouver, COR # 96/222, BCSECCOM at p. 25.

[17] Roeder was clearly unhappy with the Commission's imposition of penalties against him in 1995 and he launched various court proceedings to challenge that decision.

[18] On July 25, 1995, he unsuccessful applied for leave to appeal the Commission's decision: *Keywest Resources Ltd. v. British Columbia (Securities Commission)*, [1995] B.C.J. No. 1883 (C.A.).

[19] On October 20, 2000, Roeder commenced an application to the Commission pursuant to s. 171 of the *Securities Act*, R.S.B.C. 1996, c. 418 to revoke its earlier decision. On May 20, 2003, the Commission dismissed that application on the grounds of undue delay (2003 BCSECCOM 331 at para. 67). Roeder then sought and obtained leave to appeal the Commission's dismissal (*Roeder v. B.C.S.C.*, 2003 BCCA 648) although the appeal itself was ultimately dismissed: *Roeder v. British Columbia Securities Commission*, 2005 BCCA 189.

[20] In addition, in March 2003, Roeder filed the action against the Commission's lawyers alleging, among other things, that the Commission had, through its lawyers, committed the torts of conspiracy and abuse of public office in relation to the Commission's decision not to revoke its 1995 decision. This would also prove to be a fruitless exercise. On December 21, 2005, that action was dismissed on the basis that the action constituted a collateral attack against the Commission's decision not to revoke and that it was abuse of process: *Roeder v. Lang Michener Lawrence & Shaw, a partnership et al.*, 2005 BCSC 1784. An appeal from this Court's decision was upheld: *Roeder v. Lang Michener Lawrence & Shaw*, 2007 BCCA 152.

Pinchin Action Filed (1999-2000)

[21] It is somewhat common ground that the causes of action by Roeder would have arisen upon the collapse of the Keywest transactions in the summer of 1993 and that the applicable limitation period at that time was six years. Roeder's counsel suggested, however, that a longer limitation period might have applied but was

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unclear how long that might have been. Any further period, however, does not reach across the overall timeframe here.

[22] Indeed, Roeder's filing of the claim does suggest that the limitation period was six years. On the eve of this date (by which his contractual claims would have been statute barred), and in the midst of the proceedings brought by him to challenge the Commission's 1995 decision, Roeder himself filed a handwritten writ of summons to commence this action on June 15, 1999. The claim was for recovery of the $192,000 Loan and damages for breach of contract relating to the SPA. It is not clear why Roeder was the only plaintiff in this action since, as discussed below, the Mashburn Parties were also named as plaintiffs in similar litigation relating to the Keywest transaction commenced that very same day.

[23] In a later examination for discovery held in July 2008, Roeder described that he didn't immediately file an action against Pinchin after 1993 since: "[t]ime was not necessarily of the essence. I felt that time was on my side as opposed to being against me".

[24] On June 9, 2000, Roeder's former lawyer, John Frank, filed the statement of claim in this action. Again, there are allegations concerning the Loan and also allegations that Pinchin had improperly taken possession of the free-trading Keywest shares without the pre-conditions being satisfied (approvals by both Keywest shareholders and the VSE).

[25] Pinchin, through his former lawyer, Larry Gold, filed a statement of defence on July 28, 2000. In respect of the Loan, Pinchin asserted was that neither he nor NCG were responsible to repay the Loan.

Morton & Company Action (1999-2004)

[26] On June 15, 1999, the same day that this action was commenced, Roeder and the Mashburn Parties filed an action against Morton & Company/Mr. Blues, alleging a breach of the trustee agreement under which the Keywest shares were delivered to Pinchin.

[27] It does not appear that there were any delays in the prosecution of the Morton & Company action. The trial in the Morton & Company action was heard by Justice Pitfield in April 2003, approximately four years after it started.

[28] Most of the cast of characters involved in the Keywest transaction also participated in the Morton & Company trial. The plaintiffs included not only Roeder, but the Mashburn Parties. Mr. Frank was counsel for the plaintiffs. Pinchin was joined as a third party but the third party proceeding was not heard at the time of the trial. Nevertheless, Pinchin was called as a witness at the trial by Morton & Company and he was cross-examined by Roeder's counsel in respect to all aspects of the Keywest transaction, including the facts pertaining to the $192,000 advance which is the basis upon which Roeder now seeks to recover the Loan from Pinchin.

[29] Lastly, it is of some significance on this application that Mr. Chamberlain, Roeder and Keywest's former lawyer involved in the Keywest transaction, was called by Roeder as a witness at the Morton & Company trial. On a later application in the Chamberlain litigation (discussed below), Justice Voith would describe the evidence from Mr. Chamberlain to the effect that Mr. Frank took steps to meet with him to prepare him in respect of his evidence at the Morton & Company trial. Mr. Chamberlain was asked by Mr. Frank to not only provide assistance and evidence in relation to the Morton & Company action and trial, but also provide his recollection of his conduct and events in relation to the issues raised in this action, which were essentially the same: see Justice Voith's decision in *Roeder v. Chamberlain*, 2010 BCSC 920 [*Chamberlain 2010*] at paras. 8-12.

[30] Reasons for judgment in the Morton & Company action were issued on August 8, 2003 and the claim was dismissed: *Roeder v. Morton & Co.*, 2003 BCSC 1259. In substance, the Court found that the plaintiffs, through their lawyer Mr. Chamberlain and otherwise, had acquiesced in the actions of Morton & Company in delivering the Keywest shares and related documentation to Pinchin after receipt of the final installment on June 15, 1993 toward the $850,000 purchase price (see

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paras. 65-71). One aspect of the Court's finding that there had been acquiescence was that Roeder had:

> [71] …[omitted] to take any legal proceedings against Pinchin to recover property to which he was not entitled until the eve of the expiry of the limitation period six years after the events in question ...

[31] In respect of the $192,000 advance (described in his reasons as its US$150,000 equivalent), Pitfield J. made the following findings of fact:

> [59] I find Roeder agreed to lend US $150,000 to accommodate Pinchin in respect of the Comm-Tech transaction. The loan was not conditional on a closing, with or without approval of the change of control, but it was conditional on the acceleration of the payment of the remainder of the $850,000. That is evident from Chamberlain's notes of June 15, 1993 recording that Roeder asked him to confirm that Blues had received the balance of the funds and his advice that he would lend Pinchin US $150,000. I conclude that if payment of the balance were made, Roeder had every reason to expect Pinchin would proceed to obtain the necessary shareholder and regulatory approvals for the change in the use of the funds. I accept Roeder's evidence that he was confident regulatory approval for the change of business would be obtained so that Keywest could use its funds to purchase the Comm-Tech venture from Pinchin whereupon Roeder would be repaid the amount he would lend to Pinchin.
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> [Emphasis added]

[32] In December 2004, the dismissal of claims against Morton & Company/Mr. Blues was upheld on appeal (*Roeder v. Blues*, 2004 BCCA 649) on the basis that the plaintiffs had acquiesced in the breach of the trustee agreement.

[33] As Justice Kelleher would later note in this action in August 2007, it is unclear why Roeder did not seek to litigate this action in conjunction with the Morton & Company action, since both dealt with the same subject matter (ie. the Keywest transaction, the SPA and the Loan) and it would have been more "efficient" to have had them heard together: *Roeder v. Pinchin*, (16 August 2007) Vancouver Registry, C993056 (B.C.S.C.) at para. 10.

The Chamberlain Action (2007-2013)

[34] Despite a complete failure to obtain any recovery through his various actions in the 14 years after the collapse of the Keywest transaction, as above (re the

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Commission, the Commission's lawyers and Morton & Company), Roeder wasn't done yet.

[35] In May 2007, Roeder and the Mashburn Parties filed another action against Mr. Chamberlain, alleging that Mr. Chamberlain had been in breach of his retainer agreement by delivering the Keywest shares to Pinchin in 1993. As was noted by Voith J. in *Chamberlain 2010*, this was a complete and unpleasant surprise to Mr. Chamberlain, who had earlier been assisting Roeder in the Morton & Company action and this action, all the while blithely unaware that he was the next target. As I will note below, this is another example of extreme delay on Roeder's part in prosecuting his claims, something that would have an impact on his ability to prosecute this claim. No explanation was advanced for the extraordinary delay in commencing the action against Mr. Chamberlain.

[36] Further litigation ensued in the Chamberlain action. In May 2008, Mr. Chamberlain brought an unsuccessful jurisdictional challenge: *Roeder v. Chamberlain*, 2008 BCSC 624. In April 2010, Mr. Chamberlain successfully obtained an order removing the plaintiffs' counsel, Mr. Frank, for acting in a conflict against the "near client", namely, Mr. Chamberlain: *Chamberlain 2010*.

[37] On July 23, 2013, the parties agreed to dismiss the Chamberlain action by filing a consent dismissal order.

The Pinchin Action (1999-Present)

[38] As regards this action, I have already mentioned the filing of the writ of summons in 1999 and the later exchange of the statement of claim and statement of defence in 2000. I will discuss the later steps in this action in the context of my discussion of the relevant test for dismissal.

RELEVANT TEST FOR DISMISSAL

[39] The test for dismissal for want of prosecution pursuant to Rule 22-7(7) was articulated in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535, such that four main issues must be addressed:

> [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:
>
> > (1) the length of the delay and whether it was inordinate;
> >
> > (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
> >
> > (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
> >
> > (4) whether, on balance, justice requires dismissal of the action.

[40] I accept that such applications are exceptional and if accepted, run counter to the ideal objective of deciding matters on their merits. The court in *Country West Construction* also notes at para. 19 that applications such as these - which result in a dismissal other than on the merits - are to be approached with “considerable caution”.

THE SETTLEMENT AGREEMENT

[41] One of the issues to be addressed is the effect of a settlement agreement reached between Roeder and Pinchin in October 2014.

[42] By the summer of 2014, an October 14, 2014 trial date was looming. The trial was scheduled to last 15 days, involving numerous witnesses. The issues to be addressed at the trial were essentially as before, with allegations concerning the Keywest transaction, the parties’ conduct under the SPA and also, Roeder’s allegation that he had advanced the Loan to Pinchin who was the person to repay it.

[43] By early September 2014, counsel appeared ready to proceed. Pinchin’s counterclaim against the Mashburn Parties had been disposed of, leaving Roeder as the only party who would be raising issues concerning the Keywest transaction and the Loan. Roeder’s counsel prepared a witness list that included John Fraser

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McColl. Roeder's counsel specifically advised that he would not be calling Mr. Chamberlain because of advice from Pinchin's lawyer that Mr. Chamberlain was terminally ill and unable to attend.

[44] In late September 2014, the parties entered into settlement discussions. This led to a later agreement dated October 1, 2014, where the parties agreed to dismiss all other claims, save and except those relating to the Loan. The agreement provides:

> 1. The trial scheduled to commence October 14, 2014 is adjourned;
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> 2. The plaintiff's claims with respect to the April 29, 1993 Share Purchase Agreement as set out in paragraphs 11-18 of the Amended Statement of Claim filed February 3, 2005 are dismissed without costs;
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> 3. The plaintiff may amend his claim in respect to the $192,000 loan as set out in paragraphs 4-10 of the Amended Statement of Claim (the "Loan Claim"), except that the amendments:
>
> > a. shall not be contrary to the spirit of the agreement of the parties that this matter is to be determined by summary trial; and
> >
> > b. are subject to the Rules of Court and the applicable authorities;
>
> 4. The defendant Tim Pinchin dismisses his counterclaim as against the defendant John Roeder without costs;
>
> 5. The defendant Tim Pinchin may amend his defence to the Loan Claim as currently pleaded in his Further Amended Response to Civil Claim filed May 3, 2012, except that the amendments:
>
> > 1. shall not include any claim of set off in respect of the issues raised in the dismissed counterclaim;
> >
> > 2. shall not be contrary to the spirit of the agreement of the parties that this matter is to be determined by summary trial; and
> >
> > 3. are subject to the Rules of Court and the applicable authorities;
>
> <u>6. The parties agree that the remaining issues should be resolved [by] summary trial and:</u>
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> > 1. <u>The parties will be permitted cross examination on affidavits; and</u>
> >
> > 2. <u>The parties agree that this matter is appropriate for summary trial and will confirm that in a joint submission to the court. In the unlikely event that the court dismisses the summary trial application on the basis that it is not appropriate for summary trial (i.e. without deciding the claim on its merits), and then</u>

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> exercises its discretion to dismiss Mr. Roeder's claim in its entirety rather than send the matter to trial, the parties will submit this matter to binding arbitration.

[Emphasis added]

[45] As a preliminary point, Roeder suggests that by entering into this settlement, and agreeing that a summary trial is "appropriate", Pinchin agreed to forego any right or ability to bring forward an application to dismiss for want of prosecution in relation to the delay to that point in time. Roeder argues that Pinchin is estopped by reason of the settlement agreement from alleging that the delay and prejudice to that time is such that he cannot receive a fair trial.

[46] I disagree. I see nothing in the settlement agreement by which Pinchin has agreed to do so and thereby waive his right to employ the *Rules* in terms of not only his ability to bring this application, but also raise any other argument under the *Rules* as might apply to the resolution of the remaining issues relating to the Loan (such as the admissibility issues that were argued here). I do not see that in bringing this application, Pinchin has "resiled" from this agreement, as alleged by Roeder. If Pinchin is unsuccessful on this application, the agreement will apply in relation to any further proceedings.

[47] I do, however, agree that the settlement agreement and its effect are relevant factors in terms of the application of the test on this application, as I will discuss below.

DISCUSSION/ANALYSIS OF ISSUES

[48] I will address each of the relevant enquiries as follows.

(1) Was there Inordinate Delay?

[49] Pinchin has referred to a number of authorities which are of assistance in approaching this issue.

[50] As the *Supreme Court Civil Rules* make clear, the object is to secure the "just, *speedy* and inexpensive" determination of the proceeding on its merits: see Rule 1-3. "Speedy" can be a relative term, depending on the circumstances of the

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proceeding, including the complexity of the issues and the evidence. As Justice Hall noted in *Rhyolite Resources Inc. v. CanQuest Resource Corp.*, 1999 BCCA 36 at para. 16, the key word is "reasonable".

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[51] In *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38, the court agreed with the approach found in *Cal Coast Spas Inc. v. Coast Spas Inc.*, 2008 BCSC 846 at para. 64 that, in determining whether the delay was inordinate, the court should focus on any delay in the prosecution of the action after it has been commenced.

[52] In addition, the exercise is not a totting up of specific delays in the proceedings. The onus is always on the plaintiff to bring his or her claim forward for disposition with reasonable dispatch; the defendant has no corresponding obligation to do so. In that light, the court in *Ed Bully Ventures* confirms that overall delay should be considered "holistically":

> [38] With respect to the issue of calculating delay, in my view, the chambers judge was overly generous to Ventures when he focused on the time "between the last step in the proceeding and service of the plaintiff's notice of intention to proceed". I agree with Madam Justice Ballance in *Cal Coast Spas Inc.* that what matters is a plaintiff's delay in prosecuting the action once it has been commenced. This was the approach articulated by this Court in *Pacific Hunter Resources Inc. et al. v. Moss Management Inc.*, 2004 BCCA 40 at para. 36, and is an accurate reflection of the law. Additionally, delay in an action should not be considered piecemeal. The proper approach is to consider it holistically; that is, whether the overall delay in prosecuting an action is inordinate.
>
> [Emphasis added]

[53] The Court of Appeal has stated that "[a]n inordinate delay is one that is uncontrolled, immoderate or excessive": *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9.

[54] Here, there has been an almost 17 year delay between the filing of the claim in June 1999 and when Roeder filed his *third* notice of intention to proceed in April 2016.

[55] Pinchin describes the course of the action, including the delays, as follows:

a) after filing his statement of claim in June 2000, Roeder took no steps for two-and-a half years until December 2002, when he filed his *first* (of three) notice of intention to proceed;

b) in February 2003, Roeder made his first request to conduct a discovery of Pinchin, more than three-and-a-half years after commencing the within action. I would add that one might speculate that this was done in anticipation of Pinchin giving evidence at the upcoming Morton & Company trial;

c) in any event, Roeder cancelled Pinchin's examination for discovery set for April 4, 2003 because of his counsel's need to prepare for the trial of the Morton & Company Action which was heard in April 2003. At that trial, Roeder's counsel cross-examined Pinchin about all of his claims raised in this action, including relating to the Loan;

d) Roeder could have proceeded in this action so that this action was ready for trial at the same time as the April 2003 trial in the Morton & Company action or even possibly heard at or around the same time. This observation is consistent with Kelleher J.'s comments, as above, that this would have been an "efficient" means of disposing of both actions which essentially involved the same issues and also involved the same witnesses, such as Roeder, the Mashburn Parties, Mr. Chamberlain and Pinchin;

e) an examination for discovery of Pinchin took place on November 9, 2004;

f) on February 3, 2005, Roeder filed his Amended Statement of Claim, almost five years after the action began;

g) In May 2005, almost six years after first commencing this action, Roeder made his first attempt to set down a trial date which resulted in the trial being scheduled for October 30, 2006. The October 30, 2006 trial date was later adjourned by consent, and a March 2007 trial date was set;

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h) a second examination for discovery of Pinchin took place on September 7, 2006;

i) in early 2007, Pinchin retained new counsel, Mr. Macdonald, who had previously acted for the defendants in the Morton & Company action and appeal. Among other things, this resulted in the following: the March 27, 2007 trial date was adjourned to September 2007 and on August 14, 2007, Pinchin filed an amended statement of defence;

j) in August 2007, in the course of dismissing Pinchin's application for a stay application of proceedings on the basis of issue estoppel/*res judicata*, Kelleher J. ordered that the September 17, 2007 trial date be adjourned. The trial was rescheduled for October 6, 2008;

k) an examination for discovery of Roeder took place in July 2008;

l) in August 2008, Pinchin brought an application to consolidate this action and the Chamberlain action;

m) also, in August 2008, Roeder waited more than nine years before delivering his draft consent order and draft amended pleadings to join the Mashburn Parties as plaintiffs in this action. That consent was reasonably provided by Pinchin's counsel in September 2008;

n) in September 2008, Mr. Chamberlain brought his application in the Chamberlain action to disqualify Mr. Frank as Roeder's counsel, which Roeder opposed. At the same time, Pinchin filed third party proceedings in this action against Chamberlain. Ultimately, counsel determined that the disqualification application had to be heard before Pinchin's application to consolidate the actions. This resulted in the adjournment of the October 2008 trial date;

o) after obtaining the endorsed consent order from Pinchin in early September 2008 (to add the Mashburn Parties), Roeder waited another 15

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months before attempting to file it in the registry, at which time it was rejected on January 19, 2010. The order was rejected because, among other things, there was no evidence that the Mashburn Parties had consented to be named as parties;

p) on January 18, 2010, as a result of failing to take a step in the action for over a year, Roeder was required to file his *second* notice of intention to proceed;

q) the disqualification decision by Voith J. in relation to Mr. Frank was issued in April 2010 and Mr. Frank was removed as counsel. The trial of this action was then reset for April 2012;

r) in March 2011, Pinchin's third party notice against Mr. Chamberlain was struck by consent;

s) as of January 2012, Roeder had still not amended his pleadings to add the Mashburn Parties which he had indicated he was going to do some three-and-a-half years earlier in August 2008;

t) on February 28, 2012, Roeder delivered a new consent order for endorsement by Pinchin in order to add the Mashburn Parties. In response to this second attempt to do so, Pinchin immediately demanded that Roeder provide proof that the Mashburn Parties had consented to be added as parties, as required by the *Rules*. Roeder never did provide such proof;

u) by the spring of 2012, there was still confusion arising from Roeder's still apparent continuing intention to add the Mashburn Parties as plaintiffs, and his ability to do so. In addition, on April 24, 2012, Pinchin obtained an order to file a further amended response to civil claim and further amended counterclaim, by which the Mashburn Parties were added as defendants by counterclaim. These respective efforts to amend the

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pleadings resulted in the adjournment of the April 2012 trial, which was rescheduled to October 14, 2014 for 15 days;

v) for unknown reasons, Roeder never did file his pleadings to add the Mashburn Parties, despite having made efforts to do so in both August 2008 and February 2012;

w) on July 23, 2013, Roeder and Chamberlain agreed to a dismissal of the Chamberlain action; and

x) on August 13, 2014, Pinchin's counterclaim against the Mashburn Parties was dismissed by consent, along with certain allegations against Roeder in Pinchin's counterclaim.

[56] As I have noted above, prior to the October 14, 2014 trial date, the parties settled all of their respective claims in respect to the Keywest transaction and the SPA save and except those relating to Roeder's claim for recovery of the Loan from Pinchin (NCG had by that time been struck from the corporate registry). As the settlement agreement indicates, there was agreement that the Loan issue was appropriate for a summary trial, with cross-examinations on affidavits.

[57] Even with the October 2014 settlement in hand, Roeder continued to delay in bringing the matter forward. It was only in January 2016, some fifteen months later, when he delivered summary trial application materials to Pinchin's counsel. The difficulty Roeder then faced was that he had not served and filed a further notice of intention to proceed as required by the *Rules*. Pinchin's counsel advised that he would not take further steps in the proceeding until after the expiration of 28 days after Roeder served such a notice.

[58] On March 30, 2016, Pinchin delivered his materials in respect to his application for dismissal for want of prosecution.

[59] On April 12, 2016, Roeder filed and delivered his *third* notice of intention to proceed.

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[60] In reviewing the overall delay, I readily conclude that the delay has been inordinate.

[61] As can be seen, there was little activity in the first years of this litigation. There is no evidence from either Roeder or his counsel, Mr. Frank, as to the reason why this action was not prosecuted in a diligent fashion from the time of its commencement in June 1999 or even the filing of the statement of claim in June 2000. The only substantial steps in this action began in early 2003, when the Morton & Company trial was imminent.

[62] In addition, there are large swathes of time in the later years when Roeder was not taking steps in the action, as evidenced by the fact that two further notices of intention to proceed were required to be filed.

[63] While there were some complexities relating to the issues arising from the Keywest transaction and the SPA, they were not such that it should have taken this long for Roeder to bring the matter forward for trial and disposition.

[64] There is also authority for the proposition that the nature of the allegations may be considered as to whether the delay is inordinate or whether, put conversely, per *Rhyolite*, the delay is "reasonable".

[65] This Court in *Thore v. Sliva*, 2001 BCSC 899 at paras. 12-14, following *Rhyolite*, considered that the allegations of breach of fiduciary duty were serious. Justice Hall in *Rhyolite* at para. 24 suggested that having these types of allegations hanging indefinitely over a defendant's head was no doubt unpleasant. See also *Vic Van Isle Construction Ltd. v. Lomenda*, [1999] B.C.J. No. 3032 at para. 19 and *Bay v. Family Insurance Corporation*, 2008 BCSC 1164 at para. 31 where similar issues of "character and credit" were involved.

[66] Here, almost immediately following the dismissal of the appeal in the Morton & Company action in late 2004, Roeder firmly turned his sights back to Pinchin in this action and doubled down on his allegations. Roeder filed an amended statement of claim in February 2005, which added the following allegations:

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> 8. In addition, the Defendant, Pinchin breached or, in the alternative, induced NCG to breach the contract and the express trust condition referred to in paragraph five, by either misappropriating the monies to his own use or paying the monies to a person other than Comtech International Corporation.
>
> 9. The breach of the trust condition was a fraudulent breach of trust, in that the Defendant Pinchin knew that the monies were to be used only to purchase an interest in Comtech International Corporation and were not to be misappropriated by him for his own use.

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[67] The introduction of these serious allegations of misappropriation, fraud and breach of trust required that Roeder proceed apace with his litigation against Pinchin. Even so, there was an almost ten-and-a-half year delay in bringing forward these new issues to the time of the settlement agreement. The Loan issues remain extant and will only possibly be addressed after some 16-17 years after the action was filed.

[68] I have no hesitation in concluding that there has been inordinate delay in the prosecution of this litigation.

(2) Was the Delay Excusable?

[69] The more significant issue between the parties is who is responsible for the delay. Both parties point their finger at the other as the cause of the delay.

[70] In *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2000 BCSC 1414 [*Tundra BCSC*] at para. 16; rev'd on other grounds 2002 BCCA 145 [*Tundra BCCA*], this Court observed that having found inordinate delay, any delay both before and after commencement of the action could be taken into account in considering the remaining issues:

> [16] In my view, the court should focus primarily on the delay after commencement of action to determine whether it was inordinate and it will ordinarily be unnecessary to focus on prior delay for that purpose. However, the combined effect of delay before and after commencement of action should be taken into account at the next stages, in determining whether delay was inexcusable in the particular circumstances and whether the defendants are likely to have been seriously prejudiced. The overall delay must also be considered in applying the overarching principle that justice be done.

[71] In this case, there was already considerable delay by Roeder in bringing this action only on the eve of the expiry of the contractual limitation period. While Roeder

cannot be faulted for that strategy, this is a factor to be considered in the context of the later significant delay in the action itself.

[72] I conclude that there is merit in Pinchin's argument that Roeder's focus on conducting significant other litigation concerning the Keywest transaction and the SPA at the expense of this action is telling in terms of indicating the decisions Roeder made, either implicitly or expressly, as to how he would prosecute this action.

[73] For the period from 1995-2007, Roeder was very involved in the aftermath of the Commission's decision to penalize him for his misconduct in the Keywest matter. During those years, he was focussed on numerous court actions which directly or indirectly challenged the Commission's decision in April 1995.

[74] From June 1999 to 2003/2004, Roeder focussed on the Morton & Company litigation. I accept Pinchin's point that, even if the actions hadn't been consolidated for trial, it would have been reasonable for Roeder to have prosecuted this action and the Morton & Company action in tandem given the clearly common issues and that involvement of the same witnesses. In other words, if Roeder was able to marshal his claim in order to prosecute Morton & Company, then surely it was within his capability to do the same in respect of Pinchin.

[75] In the face of these allegations, one would have expected some response from Roeder as to why this initial delay occurred. Even so, Roeder has chosen to remain silent in the face of Pinchin's allegations that he was clearly focussed on the other litigation until 2003/2004 and that he deliberately disregarded this litigation in favour of that strategy. He offers no explanation for this delay. As such, from June 1999 to late 2004, little was done in this action, beyond some document discovery and an examination for discovery of Pinchin.

[76] Yet, having failed in all of his litigation strategies to the end of 2004, Roeder did not even then focus on this litigation. Instead, he turned his sights on his own lawyer, Mr. Chamberlain, in May 2007.

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[77] In *Irving v. Irving*, (1982) 38 B.C.L.R. 318 (C.A.), the court discussed when a delay may be excusable. In that case, the plaintiff's delay was driven by a need to await a change in the law, which the court described as seeking to obtain a "tactical advantage" in the litigation. This was held to be inexcusable at pp. 324-325:

> The chambers judge found, and in my view he had no alternative, that the delay was inordinate. He then turned to the question whether the delay was inexcusable and concluded:
>
> > While I have concern in this area in respect to a litigant waiting for the law to advance, or to develop or to be clarified, in order to enhance the advancement of a claim against a defendant, I am unable to say that such a type of delay was inexcusable. In my view there was a reason ascribed to the delay and even though that reason does not appear to be a particularly commendable reason, nevertheless, I cannot conclude that it should be characterized as inexcusable.
>
> That is not the approach to excusability found in most of the cases. The reason, that the action would probably fail, seems to be a wise reason not to proceed. When tied to a hope that the law will change, it might justify a tactical decision to delay the trial. But the question here is not whether the reason is good or bad, or wise or unwise; it is whether the delay was excusable or inexcusable. A delay as a means of gaining tactical advantage is not to be compared to a delay forced on the plaintiff by negligent solicitors, impecuniosity, or illness. The delay was intentional, calculated to help the plaintiff and therefore hurt the defendants. None of the questions that arise on an application such as this can be considered in isolation. That which would make a short delay excusable might not be sufficient to make a long delay excusable. Some delays may be so long and the prejudice to the defendant so great that no reason would excuse the delay. The question is whether this delay is excusable in the light of the reason for it and the other circumstances.
>
> The chambers judge proceeded on the assumption that the plaintiff's counsel or solicitor was keeping a watching brief on developments in the law. We have additional evidence that clearly indicates that that was not the case.
>
> On the material before us, I feel bound to conclude that the delay was inexcusable.

[78] Other cases consider whether any delay occasioned by the plaintiff has been accepted or whether the defendant acquiesced in the delay.

[79] In *Vic Van Isle Construction* at para. 24, the court rejected that there was any acquiescence or "tolerance" of the delay and that in any event, the actions of the defendant could not have excused the inordinate delays that occurred.

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[80] In *Tundra BCSC*, the plaintiffs took the position that they were awaiting the outcome of litigation in other jurisdictions before proceeding against the defendants. In this court, at paras. 17-18, this was described as a "tactical" decision not justifying the delay. This conclusion was overturned on appeal. At paras. 19-24 of *Tundra BCCA*, Justice Esson found that the defendants were also content to await the outcome of the other litigation.

[81] Nevertheless, the Court of Appeal in *Tundra BCCA* at para. 21, endorsed the principle from *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 (C.A.) that "mere inaction on the part of a defendant cannot amount to waiver or acquiescence".

[82] Here, I accept that Roeder's inattention to this action in the early years was a tactical and deliberate strategy on his part. Roeder saw it as being in his interests to "park" this litigation while he pursued other avenues of redress on a serial basis. This "placeholder" strategy is consistent with his filing this action on the eve of a limitation period, which also allowed Roeder to preserve his rights against Pinchin while he looked elsewhere for relief. It was really only in 2005 that Roeder began to consider that he had to make some serious efforts in this litigation, which led to the first trial date being set for October 2006, some six-and-a-half years after it was commenced.

[83] There is no evidence that Pinchin acquiesced in this strategy or tactic by Roeder so as to justify the delay in the early years of this litigation.

[84] Roeder argues that he consistently prosecuted this action and that it was Pinchin who constantly frustrated and delayed the proceeding. Roeder advances a number of arguments in aid of convincing the court that he is not to blame for the delay, although these arguments only address the delays post-2003.

[85] Firstly, he argues that there was a substantial amount of documents disclosed in the matter, but I do not see that as determinative of the complexity of the matter.

[86] Secondly, he refers to difficulties from early 2003 in securing the attendance of Pinchin at an examination for discovery which was ultimately held in November

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2004. It appears that this took place in the face of Master Barber's order of August 4, 2004 that Pinchin attend an examination for discovery. Even accepting that Pinchin was to blame for some or all of this delay, it does little to explain the overall delay in prosecuting the action.

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[87] Thirdly, Roeder argues that he had certain difficulties in relation to document production from Pinchin, particularly disclosure of certain banking records which were in the possession of the Commission. On April 10, 2006, Roeder obtained an order that Pinchin produce these documents, which was done. This led to an order of August 15, 2006 by Master Donaldson that Pinchin attend a second examination for discovery in September 2006, which he did.

[88] Roeder argues that it was only after a number of years and after a number of court orders were obtained that he received sufficient information upon which he understood his claim. He says that it was only then revealed to him that he was misled as to the use of the funds advanced after these many years of attempting to obtain discovery from Pinchin. In my view, this is a strange argument given that, as I understand it, Roeder's core argument from the outset was that this was a loan to Pinchin which was to be repaid by Pinchin. By any measure, this was a straightforward argument that was not complex which could have been prosecuted from the outset without any difficulty.

[89] I accept that Roeder was not responsible for the adjournment of the March 2007 trial, which arose from a change of counsel by Pinchin. In addition, Pinchin's applications before Kelleher J. did delay matters but only for a short time to August 2007 (which resulted in the adjournment of the trial to October 2008).

[90] When asked in argument why it took 14 years for Roeder to determine in 2007 that he had a claim against Mr. Chamberlain, no answer was forthcoming from Roeder's counsel. Parenthetically, I'm sure that Mr. Chamberlain had sought an answer to that same question earlier. The delay here from 2008 to 2012 was largely caused by the inextricable and inevitable linking of this action with the Chamberlain action. The matter could have proceeded from that time, but for Roeder's decision to

oppose Mr. Chamberlain's application to remove Mr. Frank as his counsel. Even accepting that there was some merit in opposing this application, this can hardly be laid at the feet of Pinchin. I do not accept that Pinchin caused the adjournment of the October 2008 trial dates by reason of his consolidation application and the third party proceeding. In particular, I reject that the third party notice was a tactical move by Pinchin to create procedural difficulty and delay this action.

[91] By all accounts, the Chamberlain action was tied to some extent to this action given the common issues, just as this action was tied to the Morton & Company action. In any event, there is no evidence that Pinchin's third party proceedings caused any delay in this action. It remained within Roeder's power to retain new counsel to get on with the matter of prosecuting this action, particularly given the delays that had already occurred and the serious allegations that were leveled at Pinchin (and also Mr. Chamberlain, for that matter).

[92] Having said this, I accept Roeder's argument that, while the disqualification application mired the litigation in procedural complexity and did cause some delay, it was not as a result of an intentional or tactical delay on Roeder's part. It did, however, arise from the disjointed and serial nature of Roeder's overall litigation strategy in terms of targeting different people at different periods of time.

[93] Roeder also argues that by March 2007, he had finished his discovery process and was ready to proceed to trial. As later events would prove, this was anything but the case.

[94] The delay from 2008 to the October 2014 trial date was caused, at least in part, by the confusion arising from Roeder's intention to add the Mashburn Parties, which was unsuccessfully executed at the registry and which was then revisited in fits and starts and then ultimately fizzled. Roeder accuses Pinchin of adding the Mashburn Parties only on the eve of the April 2012 trial dates, which is true. He says that there is no explanation as to why Pinchin waited 12 years after filing a defence to add these defendants. However, Roeder's evidence and arguments neatly avoid any explanation as to his own attempts to add these same parties from as early as

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August 2008 and his later apparent decision to abandon this effort only some three-and-a-half years later, without explanation.

[95] I conclude that it was likely the result of Roeder failing to finish what he had started - ie. bringing the Mashburn Parties into the litigation - that caused Pinchin to decide that he would have to do it himself. This made sense in light of the allegations that Roeder was raising in relation to the Keywest transaction and the SPA and the participation by these same people in the determination of similar issues in the Morton & Company trial.

[96] Roeder also argues that any delay to October 2014 has effectively been resolved by reason of the settlement agreement. He argues that the issues were significantly narrowed by reason of the settlement agreement reached just prior to the trial date; that the "simplicity" of the summary trial application is evident from Roeder's evidence; and, that Roeder's remaining claim for recovery of the Loan is "straightforward". I disagree entirely with this characterization of the remaining claims in relation to the Loan, as I will discuss below.

[97] There is some force to Roeder's argument that the matter was essentially "re-set" as of the date of the settlement agreement. Indeed, Pinchin's counsel conceded that Pinchin might well have decided not to bring this application, and simply respond to the summary trial application, if the summary trial was to be heard within a reasonable time thereafter.

[98] Even with this concession by Pinchin, I am troubled by Roeder's attempt to absolve himself of any of the consequences arising from the delay to the date of the settlement agreement. In my view, it will not generally benefit a plaintiff to argue that, having delayed prosecution of the entire action for almost 15 years, the delay is excused because most issues were later abandoned and only one narrow issue remains to be determined. I do acknowledge that Roeder should not be faulted for delay by reason of the October 2014 trial not proceeding, as that arose from the settlement agreement between the parties.

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[99] However, even accepting that there has been some excusing of the delay to October 2014, the period following the settlement agreement was, as in previous years, marked by further delays on Roeder's part. Roeder offers up the following explanations for the considerable delay after October 2014 to the time that his summary trial application was filed in January 2016:

a) that his new counsel from July 2014, Mr. Forrester, was required to review a substantial amount of documents which had been disclosed in the action;

b) that once the settlement was reached and the October 2014 trial adjourned, "there was no apparent urgency to proceed";

c) that Mr. Forrester was mostly unavailable to review the matter and prepare materials, given his other time commitments from late 2014 until mid-2015; and

d) that Roeder was not available or able to deal with the matter in the fall of 2015 given "other business interests" and that he was "quite busy" dealings with those interests.

[100] I do not accept that the above reasons offer up a justifiable excuse for a further 15 month delay in bringing this matter forward to a summary trial. Roeder was clearly aware that the ball was in his court to proceed with the summary trial. He deliberately and intentionally decided not to press the matter; instead, he chose to attend to his other interests, just as he had done in relation to the other defendants in the other actions. This attitude is consistent with his earlier evidence that "time was on his side", an attitude that, as of October 2014 and even earlier, was antithetical to his clear obligation to proceed forthwith. If he had done so after October 2014, as was conceded by Pinchin's counsel, the force of Pinchin's arguments on this application may well have been significantly blunted.

[101] Roeder either deliberately chose to disregard his obligation to proceed with reasonable dispatch in relation to Pinchin or he blithely ignored his need to do so. In

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doing so, he caused further unreasonable delay after the parties agreed in the settlement agreement to proceed: *Allen* at 260.

[102] The fact remains that all issues, even those relating to the Keywest transaction and the SPA, were capable of being determined within a reasonable amount of time and well before 16 years had elapsed.

[103] I conclude that overall, Roeder bears the most responsibility for the delay here. While Pinchin's actions did cause some delay, I do not see that his positions on the various issues give rise to any concerns. Positions were taken on various issues, such as examinations for discovery and document production. This is not an entirely unusual course of events. In addition, particularly after Mr. Macdonald came on board for Pinchin in early 2007, all issues were addressed by Pinchin's counsel in a timely fashion. The tipping point of the inexcusable delay occurred after the settlement agreement in October 2014, which was consistent with the delay of Roeder to that time arising from Roeder's lax attitude toward a timely prosecution of the action.

[104] In conclusion, I consider that the overall delay in the prosecution of the action by Roeder was inexcusable.

(3) Is there Serious Prejudice?

[105] The relevant principles are set out in well-known decisions of our Court of Appeal.

[106] In *Rhyolite* at para. 9, the court said that delay which occurs after the expiry of the applicable limitation period will often give rise to the presumption of prejudice.

[107] Another leading authority is *Busse v. Chertkow et al.*, 1999 BCCA 313. At paras. 18-20, the court adopted the principle that, once a defendant has established that the delay has been inordinate and is inexcusable, a rebuttable presumption of prejudice arises. The court should then dismiss the action for want of prosecution unless the plaintiff establishes, on a balance of probabilities, that the defendant has

not suffered prejudice or that other circumstances would make it unjust to terminate the action. This approach was recently endorsed in *Ed Bulley Ventures* at para. 51.

[108] This presumption of prejudice was later discussed by Esson J.A. in *Tundra BCCA*:

> [35] I also regard it as error in principle to dispose of the issue of prejudice by asking whether the plaintiffs had rebutted 'the presumption of prejudice that arises in the circumstances' and by going on to answer that question in the negative. The "presumption of prejudice" is not a presumption of law. It can be termed a presumption of fact but only in the sense, as it is put in Sopinka and Lederman *"The Law of Evidence in Civil Cases"*, 1974 at p. 378:
>
>> The term "presumption of fact" is used in many instances in which it is desired merely to shift the secondary burden to a particular party. When used in this sense, it means that the facts are such that a certain inference should, but need not, be logically drawn.
>
> [36] It is in that sense that the word "presumption" is employed in *Busse v. Robinson Morelli Chertkow*, *supra*. In considering whether the presumption of prejudice has any application in a particular case, the question properly to be asked, as stated by Goldie J.A. in para. 27 of *Busse*, is:
>
>> ... has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action?
>
> In considering that question it may be misleading to approach it by asking whether the plaintiff offered evidence on the point. In most cases, it will only be the defendant who is in a position to offer evidence as to the existence of specific prejudice – as two of the defendants attempted to do in this case. The plaintiff often will be able only to point to the overall circumstances, including the absence of any evidence from the defendant of specific prejudice, as establishing on the balance of probabilities that serious prejudice has not been suffered.
>
> [37] … It matters not who puts forward the evidence. The question remains whether, on a balance of probabilities, absence of prejudice has been established. In considering that, it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. …

[109] The limitation period in respect of Roeder's contractual claims expired in 1999, some 16 years ago. Further, given that Roeder's delay was inordinate and inexcusable, a rebuttable presumption of prejudice arises. The onus then falls upon Roeder to establish that Pinchin has not suffered prejudice or that other circumstances would make it unjust to terminate the action.

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[110] In order to properly address the issue of prejudice, it is necessary to review Roeder's allegations and Pinchin's defence in relation to the Loan issue in more detail.

[111] Roeder's evidence is as follows: he had a discussion with Pinchin in the midst of closing the Keywest transaction and learned that Pinchin needed US$150,000 to fund Comtech International Inc. ("Comtech") in respect of the purchase of long distance telephone time; Pinchin told him that it was his intention to have Keywest complete the Comtech deal but that the delay in closing the Keywest transaction prevented him from accessing funds to do so; he offered to loan the money to Pinchin in order that Pinchin could close the Comtech deal; given the purpose of the loan, Roeder considered that he was likely to be repaid; and, he advanced the funds to Pinchin in reliance of his "representation" that the funds would be used for this purpose (or per his pleadings, that it was advanced on this "express trust condition"). Roeder denied that it was a condition of Pinchin's repayment of the funds that Pinchin's benefit from the Comtech deal would be transferred to Keywest, although they generally understood that would happen (it did not).

[112] Roeder alleges that Pinchin did not use the funds for the Comtech deal. Roeder then asserts that, as a result, Pinchin "misappropriated" the funds in breach of the "express trust condition". Roeder also advances other claims in relation to the Loan: firstly, that the parties agreed that the Loan was to be repaid on demand; and, secondly, that the monies are now owed based on the equitable remedy of monies had and received.

[113] Pinchin's evidence is as follows: he never agreed that he would be personally responsible for repayment of the Loan; he confirms that he needed access to the fund before he obtained control of Keywest and that he advised Roeder that the purchased asset would be vended into Keywest after the Keywest transaction completed; he advised Roeder that Keywest would repay the Loan; and, that Roeder agreed to advance the monies on the condition that Pinchin accelerate the payments under the SPA, which he agreed to do.

[114] Pinchin contends that his version of events is consistent with the earlier findings of the Commission and also the findings of fact of Pitfield J. in his reasons at trial in the *Morton & Company* action.

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[115] The terms of the Loan were not evidenced in writing and as such, the competing versions of the oral agreement advanced by Roeder and Pinchin will likely, of necessity, be heavily dependent on their own version of events. It should be noted at this time that my summary of Pinchin's evidence is not based on a full evidentiary response by Pinchin in relation to the summary trial application; before he provides that, he awaits the outcome of this application.

[116] Not surprisingly, both Roeder and Pinchin intend to argue that the other's evidence is unreliable and contradicted by other evidence. Roeder intends to rely on Pinchin's examination for discovery and Pinchin's evidence at the *Morton & Company* trial (the latter being subject to an admissibility issue). In addition, it appears to be Roeder's intention to argue at the summary trial that Pitfield J.'s finding of fact arising from the *Morton & Company* trial - that the loan was conditional upon Pinchin accelerating payment of the remainder of the $850,000 purchase price - was incorrect. Roeder stated in his affidavit #3 sworn December 15, 2015:

> 25. The Loan was peripheral to the matters in issue in *Roeder v. Morton & Co.* While the finding of fact by Pitfield J. that the Loan was not conditional upon the closing of the Keywest transaction is true, it is not correct that the Loan was conditional upon the acceleration of the payment of the remainder of the $850,000 due and owing in the Keywest transaction.

[117] In this "he said, he said" scenario, Pinchin contends that various elements of prejudice arise in terms of his ability to defend the action in relation to the Loan.

[118] The first and obvious issue that arises is the ability of the parties to clearly recall discussions that would have occurred in 1993, some 23 years ago.

[119] As was noted by Esson J.A. in *Tundra BCCA*, as above, a degrading of witnesses' memories is expected to occur in most, if not all, litigation, even if the matter should proceed with dispatch and be decided within a reasonable time.

However, common sense tells us that the longer the delay, the more likely the impairment of memories.

[120] In *Cardinal v. Tassone*, 2013 BCSC 609, Justice Savage (as he then was) found that this factor was a crucial one in the circumstances of that case:

> [58] There is a real and substantial possibility that the parties' and other witnesses' recollections of the events is and will be impaired. The events in the Conveyance Action concern matters that occurred in 2002 and January 2003. The gravamen of that action concerns the capacity and cognitive ability of Mr. Romans during that time. The recollections of parties, medical professionals, neighbours, and other witnesses will be important. For some of those persons, there will be no documentary evidence to help fix their recollections. One of the neighbours is now 80 years old. At this point in time, the trials in the Probate Action and Conveyance Action are still years away.
>
> [59] Where witnesses' recollections are crucial and there has been the passage of ten years or more from the events, there is a virtual certainty that the necessary *viva voce* evidence will be adversely affected: *Bonaparte Indian Band* at para. 13; *Williamson v. Toyota Canada Inc.*, 2002 BCSC 421 at paras. 51 & 60, 24 M.V.R. (4th) 97; and *Shields v. Nishin Kanko Investments Ltd.*, 2008 BCSC 36 at para. 41-47, 49 C.P.C. (6th) 392.

[121] These comments in *Cardinal* apply equally, if not more, here where the delay is more substantial. It is more than apparent that the recollection of Roeder and Pinchin concerning the crucial discussions they had before the Loan was advanced will be the key evidence leading to a determination of the critical issue. Given the extreme delay that has occurred, I agree that it is most likely that the evidence of both parties will have been impaired.

[122] Pinchin also alleges other elements of prejudice that have arisen by reason of the delay. He refers to three material witnesses having died who would likely have had collateral evidence to either support or refute the versions advanced by Roeder and Pinchin.

[123] Two of these witnesses were the parties' respective lawyers retained to, among other things, document the Keywest transaction. These persons were Mr. Lyons, who acted for Pinchin in relation to the Keywest transaction and Mr. Chamberlain, who acted for Roeder and the Mashburn Parties. Mr. Lyons passed

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away on May 12, 2010. Mr. Chamberlain passed away on October 15, 2014, coincidentally the day after the trial in this action was to begin.

[124] Besides the parties' respective personal recollections, the documentary evidence produced in this action includes a June 14, 1993 draft loan agreement between Roeder and NCG (not Pinchin). The relevant terms of the agreement are:

> This Loan Agreement confirms our understanding pursuant to which Roeder has agreed to loan to NCG, the sum of …$192,000 [CDN]. …

[125] The evidence indicates that Mr. Lyons drafted the loan agreement and on June 14, 1993, he faxed it to Mr. Chamberlain. Roeder states:

> 12. The terms of the loan were never committed to writing, although the parties expressed an intent to do so. A week or two after the Loan was made, Don Lyons, who at that time was counsel for Mr. Pinchin, delivered a draft loan agreement (the "Draft Loan Agreement"), to my lawyer at that time, Andrew Chamberlain.

Nevertheless, Roeder disagrees that the draft loan agreement reflects his agreement with Pinchin. He says that he refused to sign it because it purported to re-characterize the loan as being advanced to NCG, not Pinchin.

[126] Pinchin states that the draft loan agreement is an important document in support of his position. He states:

> 21. Throughout the course of the Keywest Transaction, my solicitor Mr. Lyons and the plaintiff's solicitor Mr. Chamberlain drafted and exchanged numerous documents to be approved and executed by me, the plaintiff, and others involved in the Keywest Transaction.
>
> 22. To my knowledge, all of the information set out in the Draft Loan Agreement would have been related by me to Mr. Lyons prior to him drafting the document. I say this on the basis that Mr. Lyons was my solicitor and I was his principal source of information with respect to his job of documenting agreements which I was either contemplating or consummating.
>
> 23. At my November 9, 2004 discovery, I was shown the Draft Loan Agreement but did not recall its contents. I have since reviewed the document and can only say that, to my knowledge is the only document created during the relevant time period in respect to the $192,000 Advance.

[127] The documentary evidence also includes two draft memoranda of understanding, dated June 14 and 15, 1993, between Keywest and Comtech prepared by Mr. Lyons. These documents provided that Keywest would acquire an

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equity interest in Comtech and that Keywest would advance a US$150,000 loan to Comtech. The evidence indicates that at least the first draft was sent to Mr. Chamberlain.

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[128] Pinchin says that he does not recall his discussions with Mr. Lyons which led to the drafting of these documents by Mr. Lyons, but he believes that the funds necessary for Keywest to make this US$150,000 loan contemplated in the draft memorandum of understanding must have been those which Roeder advanced by way of the Loan.

[129] Finally, the documentary evidence includes a June 24, 1993 letter from Mr. Chamberlain to Mr. Lyons where Mr. Chamberlain makes the following request to Mr. Lyons:

> 5. We understand that the loan from Mr. Roeder has now been effected. As a result, would you please provide us with a Promissory Note and other loan documentation as soon as possible.

[130] At his discovery, when asked about the request being made in this June 24, 1993 letter, Roeder responded that Pinchin's counsel would have to ask Mr. Chamberlain about it. The clear inference is that Roeder disclaims any knowledge about the letter or what was referred to in it.

[131] Roeder's counsel advances a number of arguments intended to "fix" the prejudice issue as it relates to Mr. Lyons, although none of these are persuasive. The most substantial argument involves Roeder misinterpreting Pinchin's examination for discovery evidence in suggesting that Mr. Lyons advised Pinchin that he had no further documentation. The transcript does not bear that interpretation out. The transcript does not confirm that inquiries were made of Mr. Lyons about the lawsuit, or any additional documents Mr. Lyons may have had. There is simply no evidence from Mr. Lyons in relation to the documents.

[132] In addition, Roeder's "fix" to address the prejudice issue as it relates to Mr. Chamberlain is twofold. Firstly, he refers to notes of Mr. Chamberlain, although he did not attach the complete set of notes and the omitted portion indicated on June

15, 1993 that "John Roeder will put up the money for the $150,000 US". Secondly, he refers to Mr. Chamberlain's evidence in the *Morton & Company* trial which was to the effect that his only involvement was in receiving a draft of the loan agreement. Roeder says that Mr. Chamberlain did not act for him in respect of the Loan. This does not exactly square with Mr. Chamberlain's June 24, 1993 letter that referenced the finalization of the loan documentation. Further, such evidence from Mr. Chamberlain is presumptively inadmissible, save by order of the court upon reasonable notice being given (which was not done here): Rule 12-5(54).

[133] In addition, it must be noted that Pinchin was not present at the *Morton & Company* trial as a party and would not have had the opportunity to cross examine Mr. Chamberlain on his evidence. In that vein, it cannot be said that Mr. Chamberlain would not have had other evidence relevant to the Loan. Pinchin's intention, as evidenced by his case plan proposal filed in February 2014, was to call Mr. Chamberlain as a witness at the trial.

[134] Roeder also argues that the evidence of most of his trial witnesses, including Mr. Lyons and Mr. Chamberlain, is now unnecessary because of the narrowing of the issues to only those relating to the Loan. He seeks to characterize the Loan issue as entirely separate from the other issues relating to the Keywest transaction and the SPA which have now been settled.

[135] This argument has little merit in light of the defences which Pinchin intends to raise in relation to this claim. Pinchin argues that the Loan was advanced within the context of the Keywest transaction and the conduct of the parties under the SPA, and that the advance was conditional upon payments being made by Pinchin under the SPA. As such, although Roeder is attempting to distance any consideration of the Loan issues from those arising solely under the SPA, it is very apparent to me that the defence will of necessity require a consideration of the overall circumstances between the parties, including the Keywest transaction and the SPA. In that light, while Mr. Lyons and Mr. Chamberlain may have had limited involvement

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regarding the Loan itself, they were very much involved in the overall course of the transactions between the parties, which, on Pinchin's view, included the Loan.

[136] I question how, if Roeder considered that Mr. Chamberlain was a key witness in terms of his allegations against Morton & Company, which included a consideration of the Keywest transactions, the SPA and the Loan, he can now take the position that Mr. Chamberlain' evidence is not relevant in terms of the remaining allegations against Pinchin?

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[137] The third witness is Mr. McColl, who died October 10, 2009. In his case plan proposal filed January 24, 2014, Roeder indicated that his witnesses at the October 2014 trial would include Mr. McColl. In his affidavit in support of the summary trial, Roeder attaches portions of Pinchin's examination transcript. There, Pinchin refers to NCG's funds being use to obtain a June 15, 1993 $135,000 bank draft payable to Grampian Holdings Ltd. ("Grampian"). It appears that Mr. McColl was the principal of Grampian.

[138] Pinchin states that it is unclear to him what point Roeder seeks to make by invoking this payment to Grampian. He says that after this $135,000 was transferred to Grampian, these funds were still available for his use in various business ventures, including the future business affairs of Keywest, if that proved necessary.

[139] I am unable to discern whether Mr. McColl's evidence as to this payment is even relevant to the issues, let alone sufficiently material to impair Pinchin's ability to defend the action. I do not consider that the unavailability of Mr. McColl at any trial factors into the prejudice analysis.

[140] In conclusion, I agree that Pinchin has demonstrated a very high likelihood that, while not determinative, both Mr. Lyons and Mr. Chamberlain would have had relevant evidence in relation to the issue as to the terms upon which Roeder advanced the Loan. This is particularly so given their involvement in the attempts to document those terms.

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[141] To put this finding within the proper test, I conclude that Roeder has not met his burden of showing that these lawyers would not have had material evidence that might have supported Pinchin's position. The fact that neither gentleman is now available to give their evidence in respect to the Loan issues does indicate prejudice to Pinchin.

[142] Lastly, I would adopt the comments found in *Lindholm v. Pollen* (1986) 3 B.C.L.R. (2d) 23 (S.C.) at 27-28 as particularly apposite here:

> The animating principle lying back of any system of administration of justice is that litigation be proceeded with diligence and expedition. This principle is expressed in R. 1(5) that the object of the Rules of Court is to secure the just, speedy and inexpensive determination of every proceeding on its merits and echoed in s. 11 of the Charter of Rights and Freedoms, which speaks of the right to be tried within a reasonable time. A just determination can only be attained if an action is tried while the facts are still within the recollection of the witnesses. As was said in *Russell v. Glassman* (1959), 66 Man. R. 464 at 472 (C.A.):
>
> > The court is entitled to have the best evidence obtainable. Even in the simplest of cases there is often great difficulty in ascertaining the relevant facts where the testimony is recent in the memory of the witnesses, a difficulty manifestly greatly increased when witnesses are asked to remember events or circumstances which occurred four years ago.
>
> In actions of this kind it is more than highly desirable that there be conveyed to the trial judge reliable evidence of the ambience of the alleged events. Effluxion of time here has been so great that the very substantial likelihood is that the evidence will have deteriorated to the point where it can be of little assistance to the court.

[143] There is the considerable prejudice at play here simply arising from the dimming of the parties' recall of the critical events in 1993, some 23 years ago.

(4) Does Justice require Dismissal?

[144] On this final question, I must consider whether justice requires a dismissal in the circumstances. That requires a more general consideration of the issue as to whether Pinchin can have a fair trial in spite of the delay and prejudice: *Ed Bulley Ventures* at para. 59.

[145] Further consideration of the settlement agreement is also merited at this stage. Again, Roeder argues that essentially, the clock was "reset" in October 2014

such that no issues of prejudice or delay could be advanced by Pinchin after that time.

[146] While I disagree with this contention, it is worth considering the comments of the court in *Pacific Hunter Resources Inc. et al. v. Moss Management Inc.*, 2004 BCCA 40. The court, in approaching the "balance of justice" component of the test, addressed the conduct of the defendant in the face of unreasonable delay. Justice Smith stated:

> [3] The conduct of the defendant in the face of unreasonable delay by the plaintiff is relevant in the assessment of where the balance of justice falls. As Diplock L.J. said, in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229, at 260:
>
>> Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. But also, <u>if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay</u>. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the Rules of Court is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial.
>>
>> [Emphasis in original]

[147] Even assuming that Roeder was led by the settlement agreement to believe that Pinchin was ready and willing to meet a summary trial application on the Loan issue, the later delay by Roeder was "unreasonable delay" for which there is no excuse. In my view, this later delay must be considered in the context of the existing delay and prejudice that was embedded in this litigation at that time. As Pinchin agreed in his submissions, if Roeder had proceeded with reasonable dispatch after that time, there might have been a very different outcome (or perhaps no application would have been brought at all).

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[148] As it was, Roeder approached the summary trial with the same lackadaisical approach that he has evidenced from the outset. Having Pinchin endure this further unreasonable delay only heightened and exacerbated the earlier delay and prejudice.

[149] The remarks of the Lords in *Allen*, cited with approval in *Irving* at para. 7, are instructive in considering this last issue:

> [Page 321] … Lord Denning M.R. said this [p. 245]:
>
> > The principle upon which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straightaway, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight.
>
> Of the first case he said [p. 248]:
>
> > The delay has been so great that two out of six witnesses cannot now be traced and the memory of the other four must be greatly impaired. It is impossible to have a fair trial after so long a time. The judge struck out the action. I would not disturb his decision.
>
> …
>
> [Page 322] Diplock L.J., coming to the same conclusion, made these general observations [p. 255]:
>
> > And where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. But there may come a time when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed …
>
> It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible … [p. 258]

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> It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be insufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago. [pp. 259-60].
>
> [Emphasis added]

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[150] Pinchin also refers to *Ed Bully Ventures* as support for the proposition that at this part of the test, the court may consider the merits of the case:

> [62] The court may consider the merits of a case when determining whether it is in the interest of justice to dismiss an action. Certainly if an action has no reasonable prospect of success and is bound to fail, this would weigh in favour of dismissing an action. …

[151] It is not my role on this application to determine the merit or lack of merit of Roeder's claims. Having said that, I would make the following observations.

[152] The evidence between the parties is clearly and decisively conflicting. The essence of the issue here is that Roeder bears the burden of proving the terms of an oral contract concerning the Loan. It is his word against that of Pinchin, arising from discussions that took place some 23 years ago. The documentary evidence relating to the Loan is not conclusive and in any event, the parties have differing views on the meaning to be taken from the few relevant documents that exist.

[153] Without other collateral evidence (such as any relevant testimony from either Mr. Lyons or Chamberlain), I expect that the issue will boil down to the credibility of the parties. If so, it may be the case that a summary trial application will be fruitless, in the sense that the court may be unable to assess the evidence of the parties simply by affidavits alone. It is, of course, within the purview of this court to make

that decision notwithstanding the parties' agreement that a summary trial is "appropriate".

[154] That presupposes that the court finds that Roeder's evidence is even sufficiently reliable so as to prove his case. As Pinchin argues, Roeder faces somewhat of an uphill battle in disputing the findings of both the Commission and Pitfield J. in the *Morton & Company* action, all of which tend to support Pinchin's version of the agreement.

[155] Pinchin has also pleaded that if the Loan is payable by him, it should not be enforced since it arises from an illegal contract; he says that the Keywest transactions and the SPA were designed to avoid regulatory approval. Again, this is supported to some extent by the Commission's decision against both Roeder and Pinchin.

[156] Further, Pinchin raises a number of objections to the evidence introduced by Roeder on the summary trial application. I make no determination of those issues, other than to comment that some of them appear to have some merit.

[157] In the above circumstances, I cannot conclude that Roeder's claims have no reasonable chance of success (per *Ed Bully Ventures*); however, it strikes me that Roeder has a fair and onerous task ahead of him to prove liability on the part of Pinchin.

[158] After finding inordinate and inexcusable delays attributable to Roeder, and prejudice suffered by Pinchin, I am not convinced that there are any other circumstances which would sway me to the conclusion that Pinchin can still be afforded a fair trial in this matter such that justice would be served. Roeder has approached this litigation in a dilatory fashion when all aspects of the issues - particularly the alleged oral agreement between the parties and the serious nature of the allegations - pointed to the need to determine the issues as soon as possible.

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CONCLUSION

[159] The application is allowed and the action is dismissed. In that event, Pinchin's counsel only seeks his costs post-October 2014, which I so order.

"Fitzpatrick J."

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