IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Navarro v. Doig River First Nation,* 2016 BCSC 2006

Date: 20161031
Docket: S123116
Registry: Vancouver

Between:

Carlos F. Navarro, Car & Mar Ortho, P.L.L.C. and Man & CFN Ortho, P.L.L.C.

Plaintiffs

And

Doig River First Nation, Terry Aven, Sicily Candice Aven, Tracy Hunter and Peejay Environmental Ltd.

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Plaintiffs:	R. Fleming, D. Cowper
Counsel for Defendants, Terry Aven, Sicily Aven, Tracy Hunter and Peejay Environmental Ltd.:	J. Schmidt, D. Yaverbaum
Place and Date of Hearing:	Vancouver, B.C. May 9-10, 2016 June 21-22, 2016 August 3, 2016
Place and Date of Judgment:	Vancouver, B.C. October 31, 2016

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I: INTRODUCTION

[1] This action, which was commenced on May 2, 2012, arises out of the plaintiff, Dr. Carlos F. Navarro's investment in a soil decontamination project located near Fort St. John, British Columbia. It has been assigned to me for judicial case management and trial.

[2] There are two applications before the Court. First of all, Dr. Navarro with the applicants DRE/CF General Partner Ltd. ("DRE/CF GP Ltd.") and 856320 B.C. Ltd. ("CFP Ltd.") apply to have:

- CFP Ltd. and CanadaFirst Environmental Management Limited Partnership (DRE/CF LP) added as plaintiffs;
- Car & Mar and Ortho P.L.L.C. and Man & CFN Ortho P.L.L.C. removed as plaintiffs;
- Aventur Energy Corporation ("Aventur"), Peejay Environmental Limited Partnership ("DRE LP"), and Northern Nations Development Limited Partnership ("NND LP") added as defendants; and
- Doig River First Nation ("DRFN") and Tracy Hunter removed as defendants

together with consequential amendments (the "Proposed Amendments") to the Further Amended Notice of Civil Claim (the "Pleadings Application").

[3] Secondly, the defendants, Terry Aven, Sicily Aven, and Peejay Environmental Ltd apply, in the event the Pleadings Application is granted:

- for their costs thrown away; and
- that the proposed plaintiffs post security for costs in the amount of approximately $60,500

(the "Costs Application").

[4] The defendants do not oppose the removal of Car & Mar Ortho, P.L.L.C. and Man & CFN Ortho, P.L.L.C. as plaintiffs or the removal of DRFN and Tracy Hunter as defendants.

[5] As the defendants point out in their written argument "there is now before the Court the fifth set of pleadings or proposed pleadings by a shifting group of plaintiffs against a shifting group of defendants".

[6] Notwithstanding the accuracy of this statement, for the reasons that follow, the Pleadings Application is granted. The Costs Application is granted in part: there will be an order for security for costs to be posted by the proposed plaintiffs in the amount of $25,000.00.

II: BACKGROUND

[7] While the parties agree on certain of the background facts, they fundamentally disagree on others.

A: The Defendants' Version

[8] On November 17, 2008, the defendant, Peejay Environmental Ltd., then named Doig River Environmental Ltd. ("DRE Ltd."), entered into a 40 year industrial lease with the Province of British Columbia (the "Lease") for land located in the Peace River District, British Columbia (the "Land").

[9] DRE Ltd. also obtained permits under the laws of the Province of British Columbia (the "Permits") to use the Land to operate a landfill which was known as the Peejay Secure Landfill Project (the "Landfill").

[10] In 2009 and 2010, DRE Ltd. had negotiations with a group of American companies ("CanadaFirst"), the principals of who were Roger Gaskins and Michael Marsolek.

[11] The negotiations between DRE Ltd. and CanadaFirst concerned a proposed partnership to operate a waste-treatment facility to treat contaminated soil (the

"Proposed Treatment Facility"). It was planned that the Proposed Treatment Facility would operate next to the Landfill in reliance on the Permits.

[12] The negotiations resulted in two non-binding agreements between the parties. One of them was a memorandum of understanding (the "MOU") between DRE Ltd. and CFP Ltd. dated June 15, 2009. CFP Ltd. was to be incorporated by CanadaFirst as a vehicle for its involvement in the Proposed Treatment Facility.

[13] The MOU provided that a further agreement, defined as the "Definitive Agreement", would be entered into to create legally-binding obligations.

[14] On July 14, 2009, an agreement was made to form a limited partnership in respect of the Proposed Treatment Facility (the "DRE/CF LP Agreement"). The parties to that agreement were CFP Ltd. and NND LP, as limited partners, and DRE/CF General Partner, Limited ("DRE/CF GP Ltd."), as the general partner.

[15] The defendants say that the DRE/CF LP Agreement formed a partnership structure that could have been used for the Proposed Treatment Facility had a legally-binding commercial agreement in respect of that facility been reached. They assert that Dr. Navarro acknowledges in his evidence, that the legally-binding agreement (the Definitive Agreement) was distinct from the DRE/CF LP Agreement and was never finalized or executed.

[16] They say that the parties did not enter into the Definitive Agreement because in April 2010 following unsuccessful negotiations, Terry Aven, Sicily Candice Aven and the DRFN broke off discussions about the partnership and the Project.

[17] The defendants assert that separately, and without the defendants' knowledge, Dr. Navarro and CFP Ltd. entered into an agreement in which Dr. Navarro agreed to provide USD $1,000,000 in exchange for, among other things, 100% of the Class A common stock in CFP Ltd.

[18] Notwithstanding that no binding agreement for the Proposed Treatment Facility was reached, CanadaFirst began construction of the Proposed Treatment Facility in the summer of 2009 with the assistance of DRE Ltd.

[19] Construction continued until November 2009 when it was halted by DRE Ltd. as a result of non-payment of bills by CanadaFirst. The result of those efforts was a partially-completed building for the Proposed Treatment Facility.

[20] The defendants say that the parties attempted to resolve their differences in the fall of 2009 and in March 2010, but were unable to do so. The parties ceased to communicate after March 2010.

[21] No further work was done in respect of the Proposed Treatment Facility and according to the defendants, CanadaFirst made no attempt to address the outstanding payables from construction of the Proposed Treatment Facility.

[22] In the spring of 2012, DRE Ltd. and Petrowest GP Ltd. (“Petrowest”) had negotiations regarding a sale of DRE Ltd.’s assets, rights and interest pertaining to the Landfill.

[23] In conducting its due diligence for the transaction, Petrowest discovered that the then plaintiffs had commenced this action and had registered a certificate of pending litigation (“CPL”) on the Land. The transaction with Petrowest could not complete with the CPL on title to the Land.

[24] On May 31, 2012, certain of the then defendants, including Terry Aven and Sicily Aven (the “Aven Defendants”) and the then plaintiffs, through their respective solicitors, entered into a letter agreement whereby the plaintiffs agreed to discharge the CPL on the condition the Aven Defendants placed into trust the amounts that the then plaintiffs alleged were advanced and claimed as particularized in the original notice of civil claim (the “CPL Discharge Agreement”), namely, the amount of $1,893,750.

[25] DRE Ltd. undertook a voluntary dissolution on August 15, 2012. DRE Ltd.'s liabilities were assumed by Aventur. NND LLP was dissolved on August 14, 2012. DRE LP, most recently named Peejay Environmental Limited Partnership but originally called Doig River Environmental Limited Partnership was dissolved on August 15, 2012.

B: The Plaintiffs' Version

[26] Dr. Navarro says that on June 19, 2009 he entered into a subscription agreement with CFP Ltd. whereby for the payment of US $1million he was to receive all of that company's common shares.

[27] By agreement dated July 14, 2009, being the DRE/CF LP Agreement, CFP Ltd. and NND LP, which was controlled by Aventur, formed DRE/CF LP, which was initially called DRE/CF Limited Partnership but was later renamed CanadaFirst Environmental Management Limited Partnership., The purpose of DRE/CF LP was to develop a secure landfill facility on the Property for the disposal and decontamination of soil contaminated by the oil and gas industry (the "Project").

[28] DRE Ltd. was the general partner of DRE LP. It was also a subsidiary of NND LP, which also the sole limited partner of DRE LP. .

[29] CFP Ltd. and NND LP agreed to be equal limited partners in DRE/CF LP, with a corporate general partner, DRE/CF General Partner Limited ("DRE/CF GP Ltd.") holding a general partnership interest.

[30] The shares of DRE/CF GP Ltd. were to be distributed equally between CFP Ltd. and NND LP, but the corporate solicitors, who received instructions from Terry Aven, were never instructed to issue any shares apart from the initial share upon incorporation.

[31] CFP Ltd. used the funds received from Dr. Navarro to improve the Property for the partnership undertaking of DRE/CF LP. The improvements of the Property

included roads and other infrastructure, an excavated landfill, a building to house a soil remediation facility, and associated equipment.

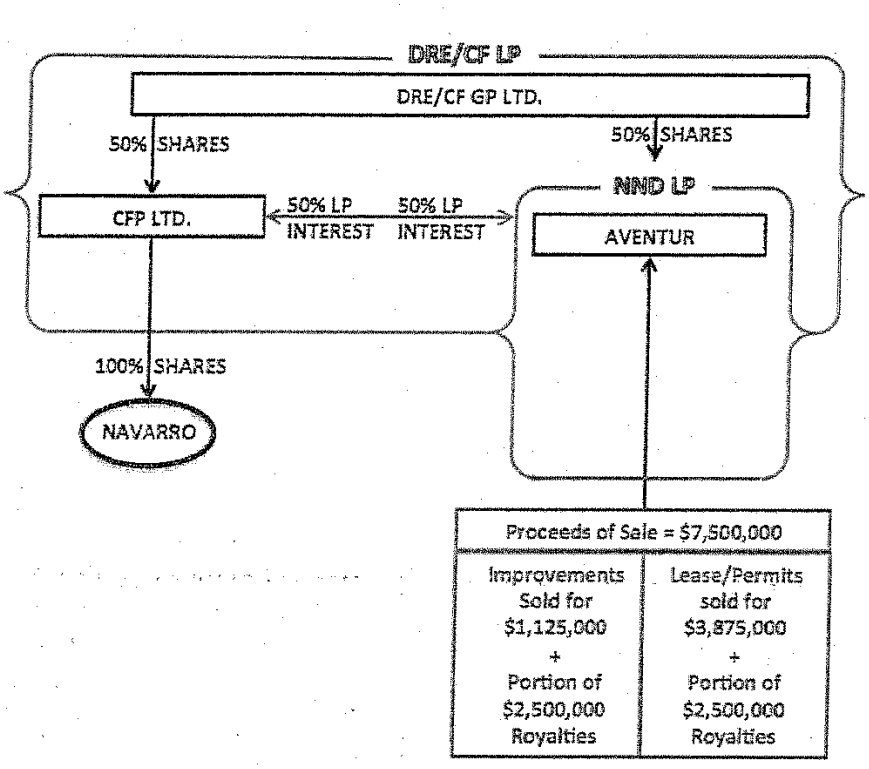
[32] However, on or about August 12, 2012, DRE Ltd. sold the Property, which represented the entire partnership undertaking of DRE/CF LP, for a total of $7,500,000 (the “Proceeds of Sale”). On the face of the sale contract, approximately 24% of the purchase price was allocated towards the improvements and equipment on the Property, which had been purchased by the funds provided by Dr. Navarro through CFP Ltd.

[33] A few days later, DRE Ltd. assigned the Proceeds of Sale, together with all its assets and liabilities, to Aventur.

[34] Aventur has since retained the Proceeds of Sale, with the exception of $1 million, which is being held in trust. Aventur wound up DRE Ltd., DRE LP, and the corporate general partner of NND Ltd., substituting itself as the general partner of NND LP.

[35] Although the partnership undertaking of DRE/CF LP was sold and the proceeds received by one partner, there has been no attempt to settle the accounts of the partnership.

[36] What I can only describe as a convoluted investment structure is captured by what the plaintiffs’ current counsel has now included in the proposed notice of civil claim:



[37] Schedule A to the defendants' written submission is also illustrative:

Schedule "A"

Plaintiffs and Proposed Plaintiffs

Name(s)	Status	Abbreviation	Summary
Carlos F. Navarro	Plaintiff	Navarro	Investor in CFP Ltd. Dissolved August 20, 2012 Restored January 14, 2016
856320 B.C. Ltd./CanadaFirst - Peejay Ltd.	Proposed Plaintiff	CFP Ltd.	Limited partner of DRE/CF LP
CanadaFirst Environmental Management Limited Partnership / DRE/CF Peejay Limited Partnership	Proposed Plaintiff	DRE/CF LP	Limited partnership formed by DRE/CF LP Agreement

Defendants and Proposed Defendants

Name	Status	Abbreviation	Summary
Terry Aven	Defendant	N/A	Chief Executive Officer of DRE Ltd. Director of CFP Ltd. until March 31,2011
Sicily Candice Aven	Defendant	N/A	N/A
Peejay Environmental Ltd. / Doig River Environmental Ltd.	Defendant	DRE Ltd.	Holder of Lease Now Dissolved (August 15, 2012)
Aventur Energy Corporation	Proposed Defendant	Aventur	Assumed liabilities of DRE Ltd.
Peejay Environmental Limited Partnership/ DRE Limited Partnership	Proposed Defendant	DRE LP	Now dissolved (August 15, 2012)
Northern Nation Development Limited Partnership	Proposed Defendant	NND LP	Limited partner in DRE/CF LP Now dissolved (August 14, 2012)
Doig River First Nation	Former Defendant	DFRN	N/A
856690 B.C. Ltd. / DRE/CF General Partner, Limited	Applicant	DRE/CF GP	General Partner of DRE/CF LP Dissolved January 14, 2013 Restored January 15, 2016
Doig River Resources Ltd.	N/A	DRR	Amalgamated to form Aventur Energy Corporation on October 1, 2014
Northern Nations Development Ltd.	N/A	N/A	Dissolved August 15, 2012

C: The Procedural History and Partnership Claims

[38] The action was started on May 2, 2012. The primary claim was that Dr. Navarro, through his alleged agents Roger Gaskins and Michael Marsolek, had

entered into a partnership agreement with Terry Aven, Sicily Aven and the then Defendant, the DRFN, in respect of the construction and operation of a contaminated soil treatment facility in Fort St. John, British Columbia. This was defined as the “Project”.

[39] Dr. Navarro alleged that the partnership agreement included, among other things, the following terms:

(a) the Lease would be an asset of the Partnership;

(b) Terry and Sicily Aven would be responsible for construction, management and oversight of the project; and

(c) once the project was complete profits from the treatment of contaminated soil would be shared with 50% going to Dr. Navarro and 50% going to Terry Aven, Sicily Aven and the DFRN.

[40] On June 18, 2013, the Aven Defendants filed a response to civil claim.

[41] On November 4, 2013, Justice Grauer ordered the then corporate plaintiffs to post security for costs in the amount of $35,000 for the defendants and $35,000 for the DRFN.

[42] On April 15 and 16, 2014, the defendants conducted an examination for discovery of Dr. Navarro. On April 17, 2014, the plaintiffs conducted an examination for discovery of Chief Norman Davis on behalf of the DRFN.

[43] On April 30, 2014, the plaintiffs filed an amended notice of civil claim as of right. The amended notice of civil claim expanded the definition of the “Project” to include the Landfill in addition to the Proposed Treatment Facility and advanced a claim of fraud against Terry Aven and Sicily Aven.

[44] In addition, the then plaintiffs pleaded that in 2009 or 2010 a written “Draft Definitive Agreement” was prepared that was never finalized or executed.

[45] On May 13, 2014, the defendants filed a motion to strike all or part of the amended notice of civil claim.

[46] On May 14, 2014, Master Taylor ordered that the examination of Terry Aven be adjourned pending the hearing and determination of the defendants' application to strike all or part of the amended claim.

[47] On August 18, 2014, the plaintiffs filed a motion for leave to further amend the notice of civil claim with the Aven Defendants filing a response to this application on August 28, 2014.

[48] On September 2, 2014, Justice N. Smith found that the plaintiffs' claim based on the alleged partnership agreement and the related claim of breach of fiduciary duty did not disclose a cause of action.

[49] He also found that it was plain and obvious that the partnership allegations failed to state a cause of action and were certain to fail. He did so on the basis that:

> By their own pleadings in this case, the plaintiffs allege an intention to create a partnership that never came into existence, involving as it did corporate parties that are not parties to this action and a final agreement that was never executed.

[50] Justice Smith noted that Dr. Navarro had pleaded that the Definitive Agreement had never been finalized or executed.

[51] On September 23, 2014, the plaintiffs applied for leave to further amend the notice of civil claim. The primary change to the claim was that all references to the partnership were amended to refer to a "proposed partnership". The Aven Defendants filed an application response on September 30, 2014.

[52] In October of 2014, an application by the Aven Defendants to vary the amounts held in trust was granted in part by Justice Beames who also reduced the amount in trust from $1.89 million to $1 million as the plaintiffs had conceded that a significant amount of the money claimed could not be directly tied to the project or to the Lease, or connected to the defendants.

[53] On December 17, 2014, the plaintiffs filed an application to add Aventur as a party. The Aven Defendants filed an application response on January 16, 2015.

[54] On May 20, 2015, Master Taylor, while critical of the material in support of the application, granted the plaintiffs leave to further amend the notice of civil claim with the exception of the claim advanced by the plaintiffs against Tracy Hunter, the daughter of Terry and Sicily Aven.

[55] On June 29, 2015, the plaintiffs filed a further amended notice of civil claim. The Aven Defendants filed a further amended response to civil claim on October 26, 2015.

[56] In August 2015, Dr. Navarro filed a notice of intention to act in person.

[57] The trial was scheduled to commence in November 2015. Shortly before the trial, Dr. Navarro applied for an adjournment. The basis for this adjournment included that the claim as pleaded was deficient. Dr. Navarro represented himself at the adjournment application but his present counsel appeared as "proposed counsel" in the event the adjournment were granted.

[58] In Reasons for Judgment indexed at 2015 BCSC 2173, Justice Dillon granted the adjournment stating at paras 10-12:

> [10] The history of the plaintiff's pleadings shows confusion as to the nature of the claim to be made. Initially, the claim pleaded a partnership between the plaintiff, the Aven defendants, and the Doig River First Nation…. The first Amended Notice of Civil Claim filed on April 30, 2014 claimed that CEP was owned and controlled by the personal defendants and claimed misrepresentation against the Aven defendants for representations made at a certain meeting. Allegations of a partnership and breach of fiduciary duty were struck on September 2, 2014, following application by the defendants. A second Amended Notice of Civil Claim, filed with leave on June 29, 2015, claims fraudulent misrepresentation as to a partnership that was to be formed. It also alleges breach of an oral agreement between the plaintiff and the Aven defendants and unjust enrichment by the defendants.
>
> [11] The plaintiff was represented by the same counsel until August 20, 2015 when the plaintiff, who lives in Texas, filed a Notice of Intention to Act in Person. Present counsel, R. Fleming, represented the plaintiff at the trial management conferences and at the adjournment application under a retainer limited to these purposes. However, Mr. Fleming reviewed the state

> of pleadings and concluded that they were miscast. New counsel would seek to revive the nature of the initial claim within an oppression action or derivative action by Navarro involving CEP and CEP would be added as a plaintiff claiming breach of fiduciary duty against Terry Aven and breach of a partnership agreement and resulting trust with tracing against PJ. It is proposed that CEP would be restored and added as a party. CFEM and its principals would also be added as parties.
>
> [12] The litigation has been hotly contested…

[59] At paragraph 30, Justice Dillon stated:

> [30] Present plaintiff's counsel with the limited retainer has described the problems in the framing of the action which have led to the request for this adjournment. From the outset, the defendants have said that the plaintiff's claim was miscast. All parties described the pleadings situation as a "mess". It is not surprising that plaintiff's counsel would have difficulty in properly identifying the parties and in defining the cause of action given the complex and fluctuating relationships between the parties and others involved in the project and the oblique and/or unfulfilled nature of any agreements that were made. Contrary to the position taken by the defendants, the plaintiff should not have to assume sole responsibility for this difficulty to the extent of jeopardizing a fair trial on the merits of the claim and the plaintiff's chance to make out his case.
>
> [Emphasis added.]

III: THE PLEADINGS APPLICATION

A: The Legal Framework

[60] In order to add a party Rule 6-2(7)(b) requires that a plaintiff must establish either that the proposed defendant ought to have been joined at the outset of the proceedings or that the proposed defendant's participation in the proceeding is necessary for the issues between the existing parties to be effectually adjudicated.

[61] Under Rule 6-2(7)(c), two criteria must be met by the applicant. The first requires that there is a question or issue between the proposed defendant and any party to the action relating to the relief, remedy or subject matter of the action. The second requires that it be both just and convenient to determine that issue in the existing action.

[62] Courts take a generous approach to the question of amendments, but will not sanction amendments that violate the rules which govern pleadings. These rules

include the requirements relating to conciseness, material facts and particulars and the prohibition against pleadings that disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious. With respect to the latter, it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial: *Morriss v. British Columbia,* 2010 BCCA 95 at para. 17; *Gardner v. Viridis Energy Inc.,* 2014 BCSC 204 at paras. 76-77.

[63] The rule is that a party is generally not required to adduce evidence in support of an amendment of a pleading: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17, 1988 CanLli 3036 (C.A.) at para. 22.

[64] This rule does not prevent consideration of the evidence of the plaintiff that contradicts the pleadings. Where a party states facts in evidence that are pivotal and essential, it cannot then change its pleadings to directly or indirectly contradict those facts: *McGrath Rentcorp dba TRS-Rentelco v. Unity Wireless Systems Corporation,* 2008 BCSC 1106 at para. 4.

[65] Furthermore, evidence is admissible for the purpose of showing whether a claim is unnecessary, scandalous, frivolous or vexatious or an abuse of process: *Huang v. Silvercorp Metals Inc.,* 2016 BCSC 278.

[66] I also accept as correct, the following summary of principles which is set out in the defendants' written submissions.

[67] Applications to amend pleadings are also considered on the same basis as applications to strike pleadings under Rule 9-5. In *Kent v. Translink,* 2016 BCSC 224 at para. 8, the court cited with approval the summary of the jurisprudence on Rule 9-5 by Justice Garson (as she then was) in *Dempsey et al v. Envision Credit Union et al.,* 2006 BCSC 750:

> [13] In summary, a pleading will be struck out if:
>
> (a) the pleadings are unintelligible, confusing and difficult to understand;

(b) the pleadings do not establish a cause of action and do not advance a claim known in law;

(c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time;

(d) the pleadings are not *bona fides,* are oppressive and are designed to cause the Defendants anxiety, trouble and expense;

(e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants.

[Citations omitted.]

B: The Parties' Positions

The Applicants

[68] The applicants' position is that the proposed amendments and proposed additional plaintiffs are required to reframe the legal basis for the claims within the framework established by the legal relationship entered into between the parties:

> (a) CFP Ltd. and the partners of NND LP entered into a partnership to build and operate a business on land held in the name of DRE Ltd., a subsidiary of Aventur;
>
> (b) CFP Ltd. advanced certain funds to construct facilities for the partnership undertaking, as well as additional funds to secure technology for that business; and
>
> (c) the partnership undertaking was sold, and the proceeds retained by the partners of NND LP, being Terry Aven, Siciliy Ave, and Aventur at the relevant time, with no settlement of the accounts of the partnership.

[69] Dr. Navarro has taken the necessary steps to restore CFP Ltd. and DRE/CF GP Ltd., the general partner of the limited partnership (CanadaFirst Environmental Management Limited Partnership) sought to be added as a plaintiff.

[70] As sole shareholder of CFP Ltd., Dr. Navarro has authority to cause CFP Ltd. to bring its claims as set out in the Proposed Amendments.

[71] However, the shares of DRE/CF GP Ltd. have never been distributed to NND LP and CFP Ltd., and if they were, NND LP, of which Aventur is the general partner, would receive 50% of the shares of DRE/CF GP Ltd.

[72] There is no reasonable likelihood that NND LP, which is fully controlled by Aventur, will consent to DRE/CF LP commencing an action in the name of DRE/CF GP Ltd. to recover amounts owed to DRE/CF LP by Aventur.

[73] Only a general partner has the capacity to bring a claim in the name of a limited partnership, barring leave under Rule 20-3(1), or, where the general partner is a corporation.

[74] If it is found that a portion of the Proceeds of Sale was not partnership property of DRE/CF LP, but that those funds were attributable to the improvement to the Property funded by CFP Ltd. through DRE/CF LP, then either:

> (a) the Property was improved as part of a unwritten partnership with the owner of the Property; or
>
> (b) the improvements to the Property represent an unjust enrichment.

[75] In either case, DRE/CF LP is a proper plaintiff. The funds advanced for the Project were distributed through a bank account in the name of CFP Ltd., as well as a bank account in the name of DRE/CF LP. Prima facie, all of the improvements to the Property that were carried out using the funds provided by Dr. Navarro were for the purposes of DRE/CF LP.

[76] If leave is not granted to bring these alternative claims in the name of DRE/CF LP, it will be open to the defendants to continue to argue that the proper parties have still not been named, and to raise a *Foss v. Harbottle* defence in order to retain an unjust enrichment.

[77] The litigation of the derivative claims will not add significant complexity or cost to this litigation. In substance, the derivative claims propose an alternative legal

theory for recovery arising from the same facts as the principal claims. The naming of DRE/CF LP as a plaintiff is in the best interests of the administration of justice.

The Defendants

[78] The defendants raise a plethora of objections to the proposed amendments and addition of parties. They submit that the claim based on the alleged "partnership agreement" does not disclose a cause of action. They allege that Dr. Navarro's own evidence directly contradicts his pleadings that such an agreement came into existence.

[79] They also say that the claim of an alleged partnership agreement is an abuse of process in that the applicants are re-litigating the application which was heard by Justice Smith. In that application, Dr. Navarro acknowledged that the Definitive Agreement had never been finalized. In particular the defendants allege that Dr. Navarro is attempting to re-litigate whether a partnership agreement was entered into by claiming that it was entered into though his proxy, CFP Ltd., rather than directly by him.

[80] They also argue that the oppression, breach of fiduciary duty, unjust enrichment and knowing receipt of trust funds claims do not disclose a cause of action. Insofar as the proposed derivative and representative claims are concerned, they say these must fail, in part because the DRE/CF LP claim does not disclose a cause of action.

C: Discussion

[81] When I apply the principles to which I have referred to the circumstances of this case, I conclude that the Pleadings Application should be granted.

[82] First of all, I agree with what the parties advised Justice Dillon in November 2015, being that the pleadings as presently constituted "are a mess". This application is clearly an attempt to clear that mess up.

[83] I also agree with the defendants that the plaintiffs, at this stage, are attempting to recast their claims in an entirely different manner from what was previously the case.

[84] But I do not consider this to be fatal to what the plaintiffs seek to accomplish as long as it complies with the applicable principles and the provisions and objectives of the Supreme Court Civil Rules.

[85] I will repeat for convenience what Justice Dillon stated at para. 30 of her Reasons for Judgment:

> [30] Present plaintiff's counsel with the limited retainer has described the problems in the framing of the action which have led to the request for this adjournment. From the outset, the defendants have said that the plaintiff's claim was miscast. All parties described the pleadings situation as a "mess". It is not surprising that plaintiff's counsel would have difficulty in properly identifying the parties and in defining the cause of action given the complex and fluctuating relationships between the parties and others involved in the project and the oblique and/or unfulfilled nature of any agreements that were made. Contrary to the position taken by the defendants, the plaintiff should not have to assume sole responsibility for this difficulty to the extent of jeopardizing a fair trial on the merits of the claim and the plaintiff's chance to make out his case.

[86] It is noteworthy in my view, that the defendants took the position before Justice Dillon that "the plaintiff's claim was miscast" and yet they now object to the recasting of the claim by the plaintiff with the assistance of his new counsel.

[87] With the benefit of lengthy submissions from all the parties and the extensive materials before the Court, I also agree with Justice Dillon that the plaintiff should not have to assume sole responsibility for the prior state of the pleadings. As should be evident from the detailed background I have provided above and the manner in which the plaintiff(s) now wish to advance their claims there appears to have been:

> complex and fluctuating relationships between the parties and others involved in defining the project and the oblique/or unfulfilled nature of any agreements that were made.

[88] The defendants submit that this is one of those rare situations where the Court should examine Dr. Navarro's evidence. That is because where a party states

facts in evidence "that are pivotal and essential, it cannot then change its pleadings to directly or indirectly contradict those facts": *McGrath Rentcorp dba TRS-Rentelco v. Unity Wireless Systems Corporation*, 2008 BCSC 1106 at para. 4.

[89] I agree that in this case I should examine Dr. Navarro's affidavits. The defendants submit that what is now being pled in the Proposed Amendments is an agreement "which is separate and distinct from the DRE/CF LP Agreement".

[90] I disagree. In his affidavit #1, filed November 1, 2013, Dr. Navarro stated that:

> the Draft Limited Partnership Agreement and Draft Definitive Agreement were never finalized or executed because Terry Aven, Sicily Candice Aven and the Doig River First Nation broke off discussions about the partnership and the Project following the March 2010 meetings.

[91] The "Draft Limited Partnership Agreement" and the "Draft Definitive Agreement" were appended as exhibits to that affidavit. The Draft Limited Partnership Agreement was said by Dr. Navarro in his affidavit to be dated July 14, 2009.

[92] But that evidence was incorrect as Dr. Navarro stated in his affidavit #2 filed November 5, 2013. The Draft Limited Partnership Agreement was in fact executed by the parties on July 14, 2009 and does not, on its face, indicate that it was a draft. This is evident from the document itself. If was the Draft Definitive Agreement which was not finalized or executed.

[93] Accordingly, there is a basis for the claims in the proposed amendments. The legal effect of what certain of the parties signed and did not sign and what occurred between them will have to be determined at the trial.

[94] It follows that I do not accept the defendants' submission that the proposed amendments are unnecessary, scandalous, frivolous or vexatious.

[95] Insofar as the argument that the proposed amendments are an abuse of process are concerned, I also disagree with the defendants that what is now sought by the plaintiffs is inconsistent with what Justice Smith decided. As I noted above on

September 2, 2014, Justice Smith found that the plaintiffs' claim based on the alleged partnership agreement and the related claim of breach of fiduciary duty did not disclose a cause of action. He also referred to the fact that the Draft Definitive Agreement had not been finalized.

[96] But the issue before Justice Smith was whether a pleading of an oral agreement between Dr. Navarro, Terry Aven, Sicily Aven and the DRFN to organize a partnership through corporations was a valid pleading of a partnership between these parties. The issue raised in the Proposed Amendments is whether a written partnership agreement prepared by the defendants created a partnership between the entities, which were parties to that agreement.

[97] It bears repeating that Justice Dillon granted the plaintiff's request for an adjournment such that the pleadings issues could be dealt with.

[98] The defendants also raise a number of other arguments.

[99] The plaintiff pleads at paras. 61-63 and 68 of the Proposed Amendments that if DRE Ltd. was a stranger to the DRE/CF LP then the parties, being either DRE LP and DRE/CF LP or DRE Ltd. and DRE/CF LP, indicated by their conduct an agreement to work together with an eye to profit. This agreement, evidenced by conduct, created a general partnership.

[100] The defendants submit that there is no pleading of an agreement with respect to the alternative claims founded in partnership arising by an agreement implied by conduct and law. In my view the proposed pleading at paras. 61-63 is sufficient for that purpose.

[101] In this regard, I agree with the plaintiff that it is ironic on the one hand for the defendants to submit that the Proposed Amendments are confusing and prolix and yet also argue that, in a number of instances, there is a failure to plead material facts.

[102] The defendants also submit that the claims in the Proposed Amendments pertaining to unjust enrichment, oppression, breach of fiduciary duty and knowing receipt of trust property are inconsistent with other proposed claims and/or lack of the requisite plea of material facts.

[103] When I consider these objections from a pleadings and addition of parties' perspective, I do not accept this submission. The plaintiff is not required to repeat material facts which are set out in one part of the proposed pleading in relation to each of the alternative claims. When the Proposed Amendments are considered in their entirety I conclude that they satisfy the legal criteria to which I have referred.

[104] It is also not possible for the Court on this application to decide whether the defendants' limitation defence constitutes a bar to one or more of the plaintiff's alternative theories for the defendants' liability.

[105] The plaintiff also seeks leave to have DRE/CF LP added as a plaintiff pursuant to Rule 20-3, being the representative action proceeding. He seeks to do so "in order to ensure that if property of the DRE/CF LP has been alienated from the partnership, that it be recovered".

[106] The defendants object to this on the basis that the test to be applied is that set out in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*]. The plaintiff disagrees and points to the fact that *Dutton* arose from a class action proceeding brought in Alberta which did not have class action legislation. The plaintiff submits that the Proposed Pleading on its face satisfies the test in *Hayes v. British Columbia Television Broadcasting Systems Ltd.* (1990), 46 B.C.L.R. (2d) 339 (C.A.) [*Hayes*] where Justice McDonald described the test as follows:

> In deciding whether a case is appropriate for a representative action, tests were laid down by Chief Justice McEachern of this Court, then Chief Justice of the Supreme Court, in Kripps et al v. Touche Ross & Co. (1986), 7 B.C.L.R. (2d) 105. The tests are stated in the form of three questions to be answered:
>
> > (1) Is the purported class capable of clear and finite definition?
> >
> > (2) Are the principal issue of fact and law essentially the same with regard to all members?

> (3) Assuming liability, is there a single measure of damages applicable to all members?

[107] I recently considered this issue in *Araya v. Nevsun*, 2016 BCSC 1856 at paras. 490 to 515, concluding at para. 515:

> [515] Considering the "history and purpose" of the representative proceeding rule and the circumstances in which it applied both prior and subsequent to Dutton and the enactment of the CPA, I conclude that common law class actions under Dutton are only available in the absence of comprehensive class action legislation. Non CPA proceedings are governed by Rule 20-3 and the way that rule and its predecessors have been interpreted by the courts of this province. This includes the test set out in Hayes, although the Dutton criteria may well be of assistance in some circumstances.

[108] In my view, the proposed addition of DRE/CF LP as a representative plaintiff on its face satisfies the *Hayes* criteria.

[109] It is also clear that this application is not the time to resolve the merits of this claim. But from a pleadings and addition of parties' perspective I would add that in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, Justice Iacobucci referred to the following "excellent statement of the test for striking out a claim" of Justice Wilson in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980:

> . . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of a plaintiff's statement of claim be struck out …

[110] Accordingly, for the reasons I have outlined, the Pleadings Application is granted.

IV: THE COSTS APPLICATION

[111] Since I have granted the Pleadings Application, I turn to the Costs Application.

A: Costs Thrown Away

[112] The defendants seek their costs thrown away payable forthwith in any event of the cause.

[113] Certain of the key principles which apply were summarized by Justice Bouck in *Cominco Ltd. v. Westinghouse Canada Ltd.* 1980 B.C.J. No. 1353 at paras. 17-22:

> [17] Any costs incurred by the defendants from the time of the amendment onwards would seem to be at large; that is to say they follow the event after the trial. In this instance if the plaintiff succeeds, it gets these costs. If the defendants win, the costs are theirs. All of these orders are, of course, subject to the discretion of the trial Judge.
>
> [18] While the term "costs thrown away" is a nebulous phrase, I do not think it wise to spell out precisely what it means in terms of the items contained in App. B. On a taxation before the district registrar he must decide on the facts before him and the submissions he hears, whether a specific item the defendants say they should be given falls within the meaning of the words "costs thrown away".
>
> [19] For example, a plaintiff may completely change his case in midstream from one of negligence to one of breach of trust. To meet this new allegation a defendant may have to entirely revise his defence and conduct new examinations for discovery. The old defence and the old discovery would have become useless and so the defendant would be entitled to the cost of these proceedings because he was put to the expense of defending allegations in negligence which were subsequently abandoned by the plaintiff and changed to breach of trust. It is as if the plaintiff's case for negligence was dismissed or discontinued and a fresh action for breach of trust was begun.
>
> [20] But some amendments do not establish an entirely new claim. Often there is no need for a defendant to amend his defence after a plaintiff has amended his statement of claim. If a new discovery is required it might just be for a limited purpose and most if not all of the earlier discovery might still be useful. In that sense the cost of the earlier discovery would not have been completely "thrown away". Only a part would have been lost. The same might happen here.
>
> [21] Therefore, I think it must be left up to the district registrar to decide in the initial instance what costs were or were not "thrown away" because of the adjournment and the amendments granted to the plaintiff's statement of claim on 21 January, 1980.
>
> [22] At the time of the taxation, it would be helpful for the reviewing Judge to have the benefit of the learned registrar's views as to the percentage of work actually thrown away because of the adjournment or the amendment. For instance, part of a transcript of an examination for discovery might indicate work was done for nothing because of the amendment. Similarly, part or all of the preparation for trial might have been wasted because of the

> adjournment. In view of the nature of App. B, it seems the registrar cannot apportion a percentage to a particular proceeding at the time of a taxation before him. This can only be done by a Judge of this Court under s. 80(2) of the Supreme Court Act.
>
> See also *Rabii v. Rabie*, 2007 BCSC 954 at paras. 28-30.

[114] In *Martel v. Wallace*, 2008 BCSC 436, Justice Chamberlist summarized the principles regarding when costs should be ordered payable forthwith:

> [27] In *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 1999 BCCA 749, the court provided the further rationale that the balance should be preserved between the litigants until final judgment is rendered.
>
> [28] On the basis of the cases I have cited, I would summarize the following principles that courts have recognized when dealing with costs of motions –
>
> > (1) Costs in the cause serve generally to maintain the balance that should be preserved between litigants until final judgment is rendered;
> >
> > (2) It is preferable to have only a single assessment of costs, at which time all aspects of the litigation may be considered by the assessing officer;
> >
> > (3) However, if the circumstances warrant, the court may order that costs be payable forthwith in any event of the cause in order to control its own process. For example, the court may make the order to deter unnecessary or unreasonable conduct in the proceedings;
> >
> > (4) Costs may also be payable forthwith if it is unlikely that the matter will proceed to trial, or if the motion deals with a discrete issue that is severable from the remaining claims; and
> >
> > (5) In making such an order, the court must remember that the order may prevent or hinder a meritorious claim from proceeding.
>
> [29] Applying those principles to the case at bar, my conclusion is that it is preferable for costs to be assessed in the cause, or at the conclusion of the proceeding.

[115] The defendants submit that the plaintiff has not pursued this claim diligently or in an orderly way. In particular they say that the requisite facts were known to the plaintiff at the early stages of the proceeding and “there is no reason that [he] could not have amended his claim to its present form in his first amendment”. They argue that the plaintiff’s conduct was both unreasonable and unnecessary.

[116] I referred above to the conclusions of Justice Dillon on the adjournment application which proceeded in October and November 2015 and in particular to her finding that the plaintiff was not solely responsible for the situation surrounding the pleadings and how the claims should best be advanced.

[117] As I have noted, with the benefit of lengthy submissions on both the Pleadings and the Costs Applications, I agree with Justice Dillon's conclusions.

[118] When I apply the principles to which I referred, I conclude that to the extent there are costs thrown away sustained by the defendants, they should be dealt with by me, as the trial judge, at the conclusion of the trial. This will allow me to take all relevant considerations regarding costs into account at that time.

B: Security for Costs

[119] The defendants also seek an order that CFP Ltd. and DRE/CF LP post security for costs.

[120] It is not in dispute that these entities have no assets.

[121] Section 236 of the *Business Corporations Act* S.B.C. 2002 c. 57 provides:

> **236** If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

[122] In *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12, the Court of Appeal recently summarized the principles which apply with respect to security for costs sought against a corporate plaintiff with Justice Goepel noting at paras. 17-18:

> [17] The legal principles governing an application for security for costs against an impecunious corporate plaintiff were summarized in *Kropp* at para. 17:
>
> > 1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;

> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
>
> 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
>
> 4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
>
> 5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
>
> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
>
> 7. The lateness of the application for security is a circumstance which can properly be taken into account.
>
> [18] Once an applicant for security for costs has shown that a corporate plaintiff will not be able to pay costs should its claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence: *Fat Mel's* at 235.

[123] The evidence required to resist such an application was discussed in *Kropp v. Swaneset Bay Golf Course Ltd*., [1997] B.C.J. No. 593. (BCCA). There Justice Finch, as he then was, stated at para. 22:

> [22] To succeed in showing that an order for security would stifle the action the plaintiff must do more than show that it has no assets: see Paul v. General Magnaplate Corp. (1995), 27 O.R. (3d) 314 (Gen.Div.). The defendants have already made out a prima facie case that the corporate plaintiff has insufficient assets to pay costs if unsuccessful. Mr. Kropp's affidavit does not really add to that position and establish that the corporate plaintiff is impecunious, in the sense of lacking any means of raising money for security. I think the law requires him to do so. As Megarry, V.C., said in Pearson, supra, at 535, the purpose of the provision is to protect "the community against litigious abuses by artificial persons manipulated by natural persons."

[124] The plaintiff submits that:

(a) due to Dr. Navarro's financial circumstances there is a "near certainty" that this claim will not be able to proceed if further security for costs is

ordered and “this application is an instrument of oppression intended to stifle a legitimate claim”;

(b) the reframed claim is very strong and that the defendants have no arguable defence to CFP Ltd.’s principle claim for a settlement of the accounts of DRE/CF LP. This is particularly the case since the defendant Terry Aven concedes that at least $500,000 of the funds provided by Dr. Navarro were used to pay for improvements to the Property;

(c) there remains $35,000 posted as security for costs and that “there is no basis for a further order because one set of corporate plaintiffs has replaced a prior set of corporate plaintiffs;

(d) there is “very little” in the way of material changes caused by the Proposed Amendments, and in fact the changes caused by the Proposed Amendments “significantly reduce the complexity of the issues” ; and

(e) the defendants’ draft bill of costs is almost identical to the one presented on their security for costs application in the Fall of 2013 when Justice Grauer ordered that one half of the amount claimed be posted as security.

[125] I cannot conclude at this stage that there is no arguable defence. In fact the defendants have raised many substantive and factual defences to the claims. Only a trial will resolve the many issues at stake.

[126] I also agree with the defendants that the situation is different now than it was in the fall of 2013. At that time the pleadings were closed and discovery of documents had taken place. The effect of the Proposed Amendments is that this claim has essentially returned to its initial stages.

[127] When I apply the principles to which I have referred I conclude that there should be a modest amount, being $25,000, posted as security for costs by the new corporate plaintiffs.

[128] When I consider what is at stake for the plaintiff I am not satisfied that there is a "near certainty" that Dr. Navarro will abandon advancing this claim on the basis that the new corporate plaintiffs have to post the amount in question as security.

[129] Conversely the defendants are entitled to some security and I consider the amount I have ordered to be fair to all the parties

V: CONCLUSIONS

[130] The Pleadings Application is granted as follows:

(a) Car & Mar and Ortho P.L.L.C. and Man& CFN Ortho P.L.L.C. shall be removed as plaintiffs;

(b) Doig River First Nation and Tracy Hunter shall be removed as defendants;

(c) 856320 B.C. Ltd. (CFP Ltd.) and DRE/CF LP shall be added as plaintiffs;

(d) Aventur Energy Corporation, Peejay Environmental Limited Partnership, and Northern Nations Development Limited Partnership shall be added as defendants; and

(e) the style of cause is to be amended accordingly.

[131] The Costs Application is granted in part as follows:

(a) security for costs are to be posted by 856320 B.C. Ltd. and DRE/CF LP in the amount of $25,000; and

[132] (b) should the security for costs not be posted within 30 days then the proceeding is stayed with leave to the defendants to apply to have it dismissed. There has been divided success on these applications. Under the circumstances I will decide the issue of these costs at the conclusion of the trial.

"Abrioux J."