

*Case Name:*

**Ascent Inc. v. Fox 40 International Inc.**

**RE: Ascent Incorporated, and  
Fox 40 International Inc., Fox 40 U.S.A., Ronald  
Foxcroft, David Foxcroft and Steven Foxcroft**

[2009] O.J. No. 2964

Court File No. 04-CV-273649CM1

Ontario Superior Court of Justice

**Master R. Dash**

Heard: June 8, 2009.

Judgment: July 14, 2009.

(44 paras.)

*Civil Litigation -- Civil procedure -- Pleadings -- Amendment of -- Statement of claim -- Adding new cause of action -- After expiry of limitation period -- Motion by plaintiff to amend statement of claim allowed in part -- Amendments which sought to particularize claims made in original pleading not objectionable -- Other amendments, which set out new causes of action that arose from same factual matrix or set out new facts not in original pleading and not necessary to establish existing claims, were barred by passage of limitation period and could not be saved by doctrine of special circumstances as were made solely to shield against defendants' Rule 21 motion and to force certain individuals to attend an examination for discovery.*

Motion by plaintiff to amend statement of claim. The plaintiff brought a claim against the defendants for damages and disgorgement of profits for breach of fiduciary duty, damages for breach of contract or unjust enrichment and an accounting of revenues wrongfully appropriated in breach of a joint venture agreement. The plaintiff alleged that the defendants breached promises and oral agreements to grant it exclusive marketing rights, to divide certain revenue from a joint venture, to commit the venture to a written agreement and to participate in arbitration. The plaintiff also alleged that the defendants took steps to reduce or eliminate the plaintiff's participation in the market, improperly conducted itself, took benefit of the plaintiff's efforts and resources and misappropriated its market share and revenue. Although there was reference in the original statement of claim to intentionally breaching promises and agreements, there were no allegations of the defendants knowingly making false promises. In addition, although the individual defendants were identified in the origi-

nal statement of claim, there were no pleas of separate tortuous activity on the part of the individual defendants nor any claim that the actions of the individual defendants were taken for personal gain. Based on those defects in the pleadings, the defendants brought a motion to strike the statement of claim against the individual defendants as disclosing no cause of action. Consequently, the plaintiff sought to amend the statement of claim to set out the causes of action with greater particularity. The parties agreed that the plaintiff was aware of the facts supporting his claims for fraudulent misrepresentation no later than the fall of 2002. The defendant opposed the motion on the basis that the amendments asserted new causes of action after passage of the limitation period.

HELD: Motion allowed in part. The amendments which sought to particularize claims made in the pleading were not objectionable. Other amendments, which set out new causes of action that arose from the same factual matrix or set out new facts that were not in the original pleading and were not necessary to establish existing claims, were barred by passage of the limitation period and could not be saved by the doctrine of special circumstances as they were made solely to shield against the defendants' Rule 21 motion and to force certain individuals to attend an examination for discovery.

### **Statutes, Regulations and Rules Cited:**

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 24

Limitations Act, R.S.O. 1990, c. L.15, s. 43, s. 45(1)(g)

Rules of Civil Procedure, Rule 20, Rule 21, Rule 25.06(8), Rule 26.01

### **Counsel:**

Howard J. Wolch, for the plaintiff.

Julian Falconer and Sunil Mathai, for the defendants.

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[Editor's note: A correction was released by the Court July 16, 2009; the correction has been made to the text and the correction is appended to this document.]

### **REASONS FOR DECISION**

**1** MASTER R. DASH:-- The plaintiff moves to amend its statement of claim. The defendants oppose the motion on the basis that the amendments purport to assert new causes of action after passage of the limitation period. What is objected to are claims of fraudulent misrepresentation, conspiracy and the individual defendants acting for their personal gain. The plaintiff submits that the amendments only provide further particulars of causes of action already pled.

**2** I must determine whether the amendments assert a new cause of action and if so whether the amendments are barred by passage of the limitation period and whether they can be saved by the doctrine of special circumstances. There is an outstanding motion by the defendants under Rule 21 to strike the existing statement of claim as against the individual defendants as disclosing no cause of action, which motion will be heard after determination of this motion to amend.

DO THE AMENDMENTS PLEAD NEW CAUSES OF ACTION?

**3** A "cause of action" has been defined as a "factual situation the existence of which entitles one person to obtain from the court a remedy against another person."<sup>1</sup> The key is whether substantially all of the material facts giving rise to the "new cause of action" have previously been pleaded<sup>2</sup> or whether new facts are sought to be added that are relied upon to support a new cause of action.<sup>3</sup> A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon,<sup>4</sup> or amount simply to different legal conclusions drawn from the same set of facts,<sup>5</sup> or simply provide particulars of an allegation already pled<sup>6</sup> or additional facts upon which the original right of action is based.<sup>7</sup>

**4** The existing statement of claim is for damages and disgorgement of profits for breach of fiduciary duties, damages for breach of contract or unjust enrichment and an accounting of revenues wrongfully appropriated in breach of a joint venture agreement. The claim centers on promises and oral agreements to grant various exclusive marketing rights to the plaintiff, to divide certain revenue from a joint venture, to commit their venture to a written agreement and to participate in arbitration, all of which were breached. The plaintiff alleges that the defendants took steps to reduce or eliminate the plaintiff's participation in the market. The plaintiff has stated that the defendants exploited its vulnerability by improper conduct, that Fox 40 took the benefit from the plaintiff's efforts and resources, misappropriated its market share and revenue and intentionally caused damage to the plaintiff.

**5** Although there is reference in the original statement of claim to intentionally breaching promises and agreements, there is nothing in the original statement of claim that alleges that the promises or representations by the defendants were knowingly false or fraudulent *at the time they were made* or made with an intention to deceive. To amount to fraud there must be allegations in the statement of claim that a false representation was made knowingly or without belief in its truth or recklessly without caring whether it is true or false. "The intention to deceive or reckless disregard for the truth is critical."<sup>8</sup> None of those allegations were pleaded in the original statement of claim, nor were the words "fraud" or "fraudulent misrepresentation" mentioned.

**6** A cause of action in conspiracy requires that the statement of claim set out the following elements: the parties to the agreement, the particulars of the agreement, the purpose or object of the conspiracy, the overt acts done in furtherance of the agreement and the damages suffered by the plaintiff from those acts.<sup>9</sup> The fact of an agreement to commit harm and the parties to and particulars of the agreement were not pleaded in the original statement of claim, nor was the word "conspiracy" used.

**7** Further, although the individual defendants are identified in the existing statement of claim as officers and/or directors "of Fox 40" and that "Fox 40" is a "family business, owned and operated" by the individual defendants and there is sporadic mention of specific individuals attending various meetings, there is nothing on the face of the original statement of claim that pleads any separate tortious activity on the part of any of the non-corporate defendants nor is there any plea that any actions of the individual defendants were taken for their personal gain rather than for the benefit of the companies of which they were officers and directors. Further, although the word "Fox 40" is defined in paragraph 3 of the original statement of claim as referring collectively to "the defendants", it also states, inconsistently in the same paragraph that the individuals are officers "of Fox 40".

**8** It is the alleged failure to plead a distinct cause of action against the non-corporate defendants that has led the defendants to bring a Rule 21 motion to strike the statement of claim as against the individual defendants as disclosing no cause of action. Although the plaintiff submits that the origi-

nal statement of claim does disclose a cause of action against the individual defendants given that pleadings must be read "liberally", it moves to amend the statement of claim to set out those cause of action with greater particularity. If I decline to grant the amendments it will be up to the judge hearing the Rule 21 motion to determine whether the original statement of claim discloses any cause of action against the individual defendants, and my decision on this amendment motion should not be taken as a finding in that regard.

**9** In paragraph 46 the plaintiff had originally pleaded that "Fox 40 management" thwarted efforts to commit the parties' agreement to writing. I find nothing objectionable about particularizing in the amendments who is referred to as "Fox 40 management", namely the three individuals and giving them the defined term "Foxcroft Defendants". I would allow the amendment to paragraph 46 whether or not the limitation period has passed.

**10** The amendments in proposed paragraphs 46A to 46D seek to plead that when the Foxcroft Defendants (defined as the Fox 40 management team being the three named individuals) promised to execute a detailed written agreement, the promise was made "without any intention to enter into any agreement", that the Foxcroft Defendants "intended to and did mislead the plaintiff by these false representations" to convince the plaintiff to continue to work to the plaintiff's detriment and "to their benefit", that the Foxcroft Defendants promised to enter binding arbitration to formalize their agreement, but these "promises and representations were false" and were made to induce the plaintiff to continue its work building markets for the defendants, that a promise by the individual defendants to consider an agreement drafted by the plaintiff's solicitors was a "false representation" made "by the individual defendants knowing that the representation was false" and intending to mislead the plaintiff to its detriment and "to the benefit of the defendants", that "all of these false promises and misrepresentations" were made by the Foxcroft defendants to induce the plaintiff to provide greater services, which the plaintiff would not have undertaken "but for the false promises" of those defendants.

**11** In my view, the allegations of fraudulent misrepresentations by the non-corporate defendants set out a new cause of action. It is not simply an alternate claim for relief or a different legal conclusion based on facts already pleaded. The new facts pleaded are necessary to support the new cause of action based on fraudulent misrepresentation. They are not particulars of the initial claims pled based on breach of contract and breach of fiduciary duty. Although the new allegations arise in a very general sense out of the same factual matrix as the originally pled allegations, they add a markedly different and new set of facts to fashion liability against the individuals based on their separate tortious acts. The promises and breaches of promises were pled initially, but there had never been an allegation that the promises were made fraudulently and with an intent to mislead *at the time they were made*. This is the first time that the plaintiff has pled that the promises that were ultimately breached were made falsely or fraudulently and without any intent to honour them at the time they were made. It has turned a breach of contract claim into a fraudulent misrepresentation claim. If the claims are time barred, the proposed amendments in paragraphs 46A to 46D referring to the false representations and fraudulent intentions will not be permitted and will be struck from the draft pleading.

**12** There are other parts of paragraphs 46A to 46D that, in the absence of allegations of fraud at the time the representations were made, do little more than particularize the promises that were made (absent the fraudulent intent), the reliance and the work done in reliance thereon and the breaches thereof as already alleged in the original statement of claim. Although the amendments

indicate the promises were made by the "Foxcroft defendants" (defined as the Fox 40 management being the three named individuals) or by the "individual defendants" I note that in the original statement of claim the promises and agreements were made by "Fox 40" which had been defined in paragraph 3 of the original statement of claim as the "Defendants collectively" (including the individuals). Setting out details of promises as made by the individual defendants (absent fraudulent intent) and breaches thereof do not in my view establish a new cause of action or separate tortious liability, nor does it establish that any representations made were for their personal gain without authority as opposed to having been made by them as officers of and for the benefit of the corporation. Those portions of paragraphs 46A to 46D would not be struck in any event.

**13** Proposed amended paragraph 46E alleges that the individuals "conspired together to mislead the plaintiff" and "agreed with one another to make the false representations" so that the defendants could improperly take the fruit of the plaintiff's efforts contrary to their agreement with the plaintiff and that they took such steps "in concert with each other knowing it would cause extreme harm to the plaintiff." Although paragraph 47 of the original statement of claim pleads that the various steps taken by the defendants were part of a deliberate strategy to reduce the plaintiff's role, take over markets and vary the agreements between the parties and that prolonging negotiations served Fox 40's purpose of developing strategies to marginalize the plaintiff's participation, there is no reference in the original pleading to the individual defendants conspiring to mislead the plaintiff, agreeing to make false representations or acting in concert with each other knowing it would cause harm as set out in the proposed amendments. These new facts, particularly an agreement to cause harm, are necessary elements to establish a cause of action in conspiracy, but are unnecessary to establish the existing claims of breach of agreement and fiduciary duties. There is also no direct reference to a "conspiracy" in the original pleading. The claim based in conspiracy in paragraph 46E of the amendments is a new cause of action and not simply alternate relief or a different legal conclusion based on previously pled facts. None of these allegations will be permitted if time barred.

**14** At the end of proposed paragraph 46E the plaintiff proposes to plead that the Foxcroft defendants chose to ignore their agreement with the plaintiff "for their own personal enrichment, want of complete authority, and control." The sentence is not only grammatically incorrect it makes no sense. I will however allow for deficiencies in pleading and assume the plaintiff intended to plead that the individuals acted for their own personal enrichment and without the authority of the corporation of which they were officers and directors. Nothing was pled in the original statement of claim that the individuals acted for their personal benefit rather than for the benefit of and in their capacity as officers and directors of the companies. This is no more than a blatant attempt to plead facts that could lead to personal liability of the individuals when none had been alleged initially. It creates a new cause of action and must be struck if time barred.

**15** The defendants consent to the amendment to paragraph 1(j), which initially pled quantum meruit and unjust enrichment, by including a reference to a constructive trust for the plaintiff's share of the promised markets. That is simply a different remedy arising out of previously pled facts.

#### WHAT IS THE APPLICABLE LIMITATION PERIOD?

**16** What is the applicable limitation period for claims based in fraudulent misrepresentation? It is common ground that Alan Martlin, the principal of the plaintiff, was aware of the facts leading to his conclusion that the defendants' representations had been fraudulently made no later than the fall of 2002. As the cause of action was discovered before the date that the *Limitations Act, 2002, S.O. 2002, c. 24, Schedule B* ("New Limitations Act" or "Act") came into effect (January 1, 2004) and

the new causes of action are asserted after the Act came into effect, the transition provisions of section 24 govern this motion and the limitation period that existed before the Act came into force will apply.

**17** Under the law that existed prior to the New Limitations Act, claims based in fraud were considered actions "on the case" under section 45(1)(g) of the *Limitations Act*, R.S.O. 1990 c. L. 15 ("Old Limitations Act") and subject to a six-year limitation period.<sup>10</sup> A claim based on fraudulent misrepresentations has specifically been determined to be subject to the six-year limitation period.<sup>11</sup> A claim based in conspiracy was also subject to a six-year limitation period.<sup>12</sup>

**18** Under the law that existed prior to the New Limitations Act coming into force, a limitation period commenced when the plaintiff discovered the underlying material facts that provided a cause of action or alternatively when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.<sup>13</sup> (The discoverability principle is now statutorily provided in the New Limitations Act.)

**19** Alan Martlin on behalf of the plaintiff admitted in cross-examination that in March 2000 he saw evidence that caused him to form the belief that the defendants were "poaching" his clients and surreptitiously eroding his interests (questions 190 to 193), that sometime in 2001 he discovered a note dated April 29, 1994 that caused him to believe that Ron Foxcroft was instructing his sons to abandon the agreement that they were in the midst of putting together (question 150), that Ron Foxcroft was not interested in committing to an agreement in writing (question 164) and that the individual defendants were not dealing with a straight hand (question 167). By the fall of 2002, when the defendants openly declared that the plaintiff never had certain exclusivity rights, the plaintiff knew he "had been had" and the parties' co-operative efforts "imploded." (questions 316 to 318) It is common ground that by the fall of 2002 Alan Martlin had discovered the facts that led him to believe that the defendants had agreed to deprive him of his rights and that the defendants' representations were made fraudulently and with the intent of misleading the plaintiff. No issue of discoverability beyond that date is raised. As a result, the six-year limitation period for alleging new causes of action based thereon expired no later than the fall of 2008. As the motion to amend was served on February 12, 2009, the plaintiff was out of time for alleging new causes of action.

#### ADDING A NEW CAUSE OF ACTION AFTER EXPIRY OF THE LIMITATION PERIOD BASED ON THE DOCTRINE OF SPECIAL CIRCUMSTANCES

**20** Rule 26.01 provides that the court shall allow amendments at any stage of an action unless prejudice would result that could not be compensated for by costs or an adjournment.

**21** However, "rule 26.01 does not contemplate the addition of unrelated statute-barred claims by way of amendment to an existing statement of claim. Conceptually, this should be treated no differently than the issuance of a new and separate statement of claim that advances a statute-barred claim."<sup>14</sup>

**22** The Court of Appeal in *Frohlick* stated that in interpreting rule 26.01, the "expiry of a limitation period gives rise to a presumption of prejudice. This presumption of prejudice will be determinative unless the party seeking the amendment can show the existence of special circumstances to rebut the presumption"<sup>15</sup> or "special circumstances that would lead the court to conclude that the presumption of prejudice should not apply."<sup>16</sup> This principle has been stated by a different panel of the Court of Appeal in *Joseph* that a motions court may "add a cause of action after the expiry of a limitation period where special circumstances exist, unless the change would cause prejudice that

could not be compensated for with either costs or an adjournment."<sup>17</sup> Whichever definition is used, the plaintiff must establish special circumstances in order to add a cause of action after the expiry of a limitation period.

**23** Although the Court of Appeal concluded that the "court's common law discretion to extend limitation periods ... by applying the doctrine of special circumstances" has not been extended to claims governed by the New Limitations Act,<sup>18</sup> the "court may continue to apply the common law doctrine of special circumstances, where appropriate, to extend a former limitation period when the transition provision, s. 24 of the new Act applies."<sup>19</sup> In the circumstances of this motion, I have a discretion to permit these amendments that set out a new cause of action after expiry of the limitation period provided that special circumstances are shown.

**24** Circumstances warranting amendments after a limitation period has passed will be rare, and as such the discretion will be exercised sparingly.<sup>20</sup> The "circumstances of all affected parties should be examined to determine, on the facts of the individual case, whether sufficient special circumstances are present to support the requested amendment" including a "consideration of the knowledge of both the moving party and her agents at the time of [the] commencement of the proceedings" and "of the opposing party in relation to the nature of the true claim to be advanced."<sup>21</sup>

**25** The following are also considerations in determining whether special circumstances exist:<sup>22</sup>

**23** ... the court, faced with a rule 26.01 motion, will consider whether it would be unfair to allow the opposite party to rely on the limitation period given the relationship the proposed claim has to the existing and ongoing claim and the way that the action has progressed to date. The court will consider the true nature of all of the claims and the knowledge of the parties.

**25** There is no exhaustive list of what constitutes special circumstances in the context of rule 26.01. They are often procedural or informational mistakes made by a party that have not misled the opposite party or induced the opposite party to defend the claim differently than it would have if the amendment had been made before the limitation period expired.

**26** I must therefore consider the circumstances and knowledge of both the plaintiff and of the defendants at the time of the original pleadings as to the true nature of the claims advanced, the relationship of the proposed claim to the existing claim, the way the action has progressed to date, whether the absence of the allegations of fraudulent misrepresentations, conspiracy and personal gain was a mere informational mistake that has not misled the defendants or induced the defendants to defend differently, as well as any other special circumstances alleged by the plaintiff. I must also bear in mind that amendments after a limitation period are rare and should be granted sparingly.

#### ARE THERE SPECIAL CIRCUMSTANCES?

**27** It is clear that at the time that the statement of claim was issued in August 2004 the plaintiff's claim was based solely on breach of contract, joint venture agreement and fiduciary duties and not on fraudulent misrepresentations, conspiracy or the individual defendants acting without authority for their personal gain. It is also clear that the plaintiff was aware of the facts that he now says amount to fraudulent misrepresentations by the fall of 2002. Not only is the nature of the claim clear on the face of the pleading, the plaintiff, in an affidavit opposing a motion for security for costs in

April 2007, went on at some length about the conduct of the defendants making and breaching various agreements in order to demonstrate that it had a strong case on the merits, but did not refer to any fraudulent misrepresentations or conspiracy. In its factum in response to that motion the plaintiff stated: "The relationship between the parties was such that the conduct of the Defendants, aside from breaching the contract between the parties, amounts to a breach of fiduciary duty." Again, no mention was made of these new allegations.

**28** Although considerable latitude must be accorded to pleadings, rule 25.06(8) requires that full particulars of fraud be pleaded. "Fraud is the most serious civil tort which can be alleged, and must be strictly pleaded and strictly proved."<sup>23</sup> There were no hallmarks of fraud pled in the original statement of claim, nor was the word fraud used. It is not reasonable to suggest that the defendants could have inferred from the original statement of claim that allegations of fraud were being advanced or that a personal claim was being advanced against them based on fraudulent misrepresentations.

**29** There were no specific allegations in the original statement of claim as to the individual plaintiffs acting without the authority of the corporation or for their own gain. In paragraph 3 of their statement of defence served in November 2004, the defendants pled:

The defendants deny that Ronald Foxcroft, David Foxcroft and Steven Foxcroft are proper parties to the litigation. The defendants say that all dealings by them with Ascent were on behalf of Fox 40 International Inc. The Defendants ask that claims against Ron Foxcroft, David Foxcroft and Steven Foxcroft be dismissed without costs.

Notwithstanding this plea by the defendants, which was made within the applicable limitation period, the plaintiff made no effort to amend the statement of claim or deliver a reply to allege that the individual defendants were acting for their personal gain outside the authority of the company or to allege any other specific acts of the individual defendants which could result in the imposition of personal liability.

**30** The examination for discovery of Ronald Foxcroft, individually and as an officer of the corporate defendants, began in January 2007 and continued for eight days through May 2008. Alan Martlin was also examined on behalf of the plaintiff for three days in April 2007. I have not been directed to any portion of the transcripts of these discoveries where any allegations were made that the individual defendants acted in a fraudulent manner or made false representations at the time the promises and agreements were made or that they acted outside the authority of the company, even though Mr. Martlin was directly asked at his examination on April 4, 2007 whether there were any other claims.

**31** In mid 2005 and again between February 2007 and June 2008, Mr. Wolch was attempting to arrange for the discovery of Steven and David Foxcroft. Although John Kranjc, the former solicitor for the defendants, initially agreed to include David and Steven in the discovery schedule, this was later resisted. In July 2005 and December 2007, Mr. Kranjc made suggestions that Steven and David be removed as personal defendants. On February 15, 2008 Mr. Kranjc stated that he was instructed to bring a motion to remove David and Steven as personal defendants. On June 30, 2008 he stated that he was taking instructions to bring a motion to have the action dismissed as against the personal defendants "as any of the conduct that they had undertaken was on behalf of the company and the company only. It is the company that will be responsible." This was a clear statement of the

basis for the motion to dismiss as against the individual defendants. Had the plaintiff moved to amend at that time the limitation period would not have expired.

**32** On March 31, 2007 Mr. Wolch suggested that Steven and David be examined "as officers of the company" since they were more knowledgeable than Ron and on December 20, 2007 stated that David and Steven should be examined before the discovery of Ron resumed because Ron at his examination "indicated on numerous occasions that he would have to ask Dave and Steve for the answers to various questions posed." On April 8, 2008 Mr. Wolch stated that it was "irrelevant whether they are being examined as alternate representatives of the corporate defendant or as parties". His concern was that they be examined "with respect to issues in which they were involved and in which Ron Foxcroft was not involved." On June 30 Mr. Wolch wrote to Mr. Kranjc and stated: "As to presenting Dave and Steve Foxcroft for discovery, wouldn't it be easier to determine their personal culpability after discovery? I would suggest that the action against one, or more, or all of the personal defendants could be dismissed if we should agree after our examination of each of them on behalf of the company." On July 8, 2008 Mr. Wolch added that there would be no settlement without the examination for discovery of the individual defendants "on behalf of the corporate defendants." It appears that the plaintiff was more interested in obtaining the discovery evidence of Steven and David as second and third representatives of the corporation than in establishing their personal liability. Furthermore, there was no suggestion during these discussions that the plaintiff would seek to amend its statement of claim to plead fraudulent misrepresentations or other bases for personal liability.

**33** On November 26, 2008 the current solicitors for the defendants<sup>24</sup> advised they would be bringing a motion under Rules 20 and 21 "with respect to the personal liability of the personal defendants." On February 2, 2009 the defendants served a motion returnable February 18 to strike the statement of claim as against the individual defendants under Rule 21 on the basis that the statement of claim pleaded no reasonable cause of action against them, or alternatively for summary judgment on the basis that the individual defendants were acting solely in the capacity and within the scope of their authority as officers of the corporation and with a view to the legitimate interests of the company and not for personal gain or other improper purpose. On February 10 the defendants advised that they would not be adducing affidavit evidence and that the motion was restricted to striking the statement of claim as against the individual defendants under Rule 21.

**34** This was met by the motion by the plaintiffs now before me seeking to amend the statement of claim, which was served on February 13, 2009. As noted, the proposed amended statement of claim seeks to add allegations of fraudulent misrepresentation, conspiracy and actions of the individual defendants for their own personal gain and without the authority of the company. On May 15, 2007 Mr. Kranjc had asked Mr. Wolch to provide him with a draft of any proposed amendments to "include your claim for restitution and whatever other claims you may wish to make." No amendments or motion to amend were provided although it would have been within the applicable limitation period at that time and there was no indication any proposed amendments would include claims based in fraud, conspiracy or self-interest.

**35** The plaintiff had known as early as the statement of defence in November 2004 and reinforced in Mr. Kranjc's various letters between July 2005 and June 2008 that the defendants took the view that any actions of the individual defendants were as officers of and for the benefit of the company, and that the defendants were resisting producing Steven and David for discovery, yet the plaintiff took no steps to amend. No allegations were ever advanced as to fraudulent misrepresenta-

tions despite the plaintiff having full knowledge of the facts by the fall of 2002. In all of the circumstances I am of the view that the current motion to amend is but a shield against the Rule 21 motion. It is designed to plead new causes of action against the individual defendants such that the Rule 21 motion might be defeated. Further, given the timing of this motion to amend only after the defendants elected not to file affidavits (on which the plaintiff might cross-examine) and to rely solely on Rule 21, given the plaintiff's insistence that David and Steven be examined as additional representatives of the corporation and that such examination be conducted before determining whether there may be a personal claim against them and given the defendants' refusal to produce Steven and David for examination for discovery on the existing pleadings, I am of the view that the motion to amend by adding new causes of action that could lead to personal liability had a secondary purpose of forcing Steven and David to attend an examination for discovery.

**36** I am of the view that the plaintiff never had any intention of alleging fraudulent misrepresentation, conspiracy or actions by the individual defendants for personal gain until faced with a Rule 21 motion that would have had the potential of ending the action against the individual defendants without having had an opportunity to examine all of them. Even if I am wrong in that view, the individual defendants certainly had no reason to believe that the plaintiff had alleged or would be alleging that they had made fraudulent misrepresentations, had engaged in a conspiracy or had taken actions for personal gain rather than in their capacity as officers of the company.

**37** In *Re Bozzo* Stinson J. concluded that the plaintiff had "not demonstrated special circumstances warranting the exercise of discretion to add the claim of fraudulent misrepresentation" after passage of the limitation period<sup>25</sup> where "the original statement of claim made no reference to the false net worth statement, the centrepiece of the cause of action for fraudulent misrepresentation", where it could not "be inferred that [the defendant] would have expected a fraudulent misrepresentation action to be forthcoming against him", where the first occasion upon which there was any mention of fraudulent misrepresentation was at a discovery after the limitation period had already expired and where the plaintiff had known for some time that the net worth statement was false yet refrained from pursuing a claim in fraudulent misrepresentation 'for the time being'.<sup>26</sup>

**38** I adopt the following conclusion in *Frohlick* as applicable to the motion before me:<sup>27</sup>

The material filed does not indicate that the respondent was made aware of these new allegations or the appellant's concerns prior to the appellant seeking the amendments. Nor has it been suggested that these events were put in issue or encompassed within the original claim. Having failed to rebut the presumption of prejudice, the appellant was not entitled to amend the statement of claim.

**39** I have considered the circumstances and knowledge of both the plaintiff and of the defendants at the time of the original pleadings as to the true nature of the claims advanced and the relationship of the proposed claim to the existing claim. The plaintiff clearly knew before the statement of claim was issued of the facts supporting claims it wished to advance based on fraudulent misrepresentation, conspiracy and actions by the individuals without authority and for personal gain, yet chose to plead only in breach of contract, joint venture and fiduciary duties. The plaintiff chose not to seek an amendment within the limitation period despite both an invitation in May 2007 to bring any proposed amendments forward and despite a clear message in June 2008 within the limitation period that the basis for a motion to dismiss the action as against the individual defendants was that any actions taken by them were only on behalf of the corporations. These allegations were not made

until the plaintiff was facing a motion to dismiss the action as against the original defendants. The defendants from the start (as contained in their statement of defence) stated that the individuals were acting only as officers or employees of and in the interests of the company. The plaintiff never alleged within the limitation period that he would be alleging fraud, conspiracy and self-interest against the individuals. None of the individual defendants could have anticipated claims against them in fraud or conspiracy. The defendants based their approach to this litigation, including resisting discovery of Steven and David and bringing the Rule 21 motion based on those beliefs. The amended claims asserted after the limitation period totally change the nature of the original allegations and purport to establish separate tortious and other liability against the individuals. There is no evidence that the absence of allegations of fraudulent misrepresentations, conspiracy and personal gain in the original pleading was a mere informational or procedural mistake as opposed to a deliberate pleading based solely upon breaches of contract and fiduciary duties.

**40** Although the defendants waited until after the expiry of the limitation period to bring their Rule 21 motion, the plaintiffs were well aware years earlier that the defendants considered that there was no cause of action against the individual defendants and that they were acting solely as officers of and in the interests of the corporation.

**41** The plaintiff has failed to satisfy the onus upon it to demonstrate special circumstances that would rebut the presumption of prejudice. I am of the view that no special circumstances exist that would lead the court to conclude that the presumption of prejudice should not apply. The amendments relating to fraudulent misrepresentation, conspiracy and personal gain will not be allowed.

#### ORDER

**42** Leave is hereby granted to amend the statement of claim in the form of the Amended Statement of Claim set out at Tab 6 of the Supplementary Motion Record of the Plaintiff subject to the following redactions:

- (a) That portion of paragraph 46A commencing with "This promise" in the third line and ending with "to their benefit" in the sixth line shall be deleted.
- (b) That portion of paragraph 46B commencing with "These promises" in the seventh line and ending with "more money for the defendants" in the eleventh line shall be deleted.
- (c) That portion of paragraph 46C commencing with "Again the false" in the fourth line to the end of subparagraph 46C shall be deleted.
- (d) That portion of paragraph 46D commencing with "All of these false promises" in the first line and ending with "mere distributor" in the third line and that portion of paragraph 46D commencing with "The plaintiff would never" in the fourteenth line to the end of subparagraph 46D shall be deleted.
- (e) All of paragraph 46E shall be deleted.

**43** If the parties are unable to agree upon costs of the motion, I am prepared to receive brief submissions from the defendants within ten days and from the plaintiff within a further seven days. Any party claiming costs shall include a Costs Outline (Form 57B) and dockets.

44 If further revisions to the existing timetable or if scheduling of further discovery related motions are necessary, I may be contacted to convene a case conference.

MASTER R. DASH

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Correction

Released: July 16, 2009

The revised version corrects one typographical error in footnote 10 on page 5 of the reasons.  
cp/e/qlrxg/qljxr/qlmxb/qljxh/qlaxw/qlced

1 *Rotvold v. Rocky Mountain Diesel Ltd.*, [1994] B.C.J. No. 2718 (S.C.) at paragraph 18 quoting Lord Diplock in *Letang v. Cooper*, [1964] All E.R. 929.

2 *Fitzpatrick Estate v. Medtronic*, [1996] O.J. No. 2439 (O.C.G.D.) at paragraph 22.

3 *English Estate v. Tregal Holdings Ltd.*, [2008] O.J. No. 4122 (S.C.J.) at paragraph 5.

4 *English Estate v. Tregal Holdings Ltd.*, *supra*, at paragraph 5.

5 *Fitzpatrick Estate v. Medtronic*, *supra*, at paragraph 44.

6 *British Columbia Ferry Corp. v. T&N, plc*, [1993] B.C.J. No. 1827 (S.C.) at paragraph 26.

7 *Budget Rent A Car of Edmonton Ltd. v. University of Toronto*, [1991] A.J. No. 108 (Q.B. -- Master) quoting *Radigan v. Canadian Indemnity Co.*, [1953] O.W.N. 788 (C.A.) at pp. 789-790.

8 *Toronto-Dominion Bank v. Leigh Instruments Ltd.*, [1998] O.J. No. 2637 (O.C.G.D.) at paragraph 477.

9 *Apotex Inc. v. Plantey USA Inc.*, [2005] O.J. No. 1860 (S.C.J.) at paragraph 55.

10 *Re-Mor Investment Management Corp. v. Montemurro*, [1994] O.J. No. 724 (C.A.) at paragraph 3. The court indicated at paragraph 4 that the six-year limitation might not apply to an action by a beneficiary against a trustee under section 43 of the Old Limitations Act or a claim based in fraudulent concealment of a cause of action, neither of which applies to the claims made in this action.

11 *Re Bozzo*, [2005] O.J. No. 2037 (S.C.J.), at paragraph 27 -- per Stinson J.

12 *McKinlay Transport Ltd. v. Motor Transport Industrial Relations Bureau of Ontario* (1987), 60 O.R. (2d) 706, varied on other grounds, [1988] O.J. No. 450.

13 *Pepper v. Zellers* (2006), 83 O.R. (3d) 648 (C.A.) at paragraph 16.

14 *Frohlick v. Pinkerton Canada Ltd.*, [2008] O.J. No. 17, 88 O.R. (3d) 401 (C.A.) at paragraph 24.

15 *Frohlick v. Pinkerton Canada Ltd.*, supra, at paragraph 17.

16 *Frohlick v. Pinkerton Canada Ltd.*, supra at paragraph 23.

17 *Joseph v. Paramount Canada's Wonderland*, [2008] O.J. No. 2339, 90 O.R. (3d) 401 (C.A.) at paragraph 12.

18 *Joseph v. Paramount Canada's Wonderland*, supra, at paragraph 13. *Joseph* was dealing with adding parties and not causes of action under the New Limitations Act; however as I am dealing with adding a cause of action under the transition provisions it is unnecessary for me to decide if the doctrine of special circumstances may still be applied to adding new causes of action under the New Act.

19 *Meady v. Greyhound Canada Transportation Corp.*, [2008] O.J. No. 2338, 90 O.R. (3d) 774 (C.A.) at para. 24.

20 *Basarsky v. Quinlan*, [1972] S.C.R. 380, 24 D.L.R. (3d) 720, at p. 384 S.C.R.; *Deville v. Boegeman* (1984), 48 O.R. (2d) 725, 14 D.L.R. (4th) 81 (C.A.).

21 *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.) at paragraph 42. Although this case dealt with the addition of parties rather than causes of action, the principles apply generally to a consideration of special circumstances.

22 *Frohlick v. Pinkerton Canada Ltd.*, supra, at paragraphs 23 and 25.

23 *Toronto-Dominion Bank v. Leigh Instruments Ltd.*, supra, at paragraph 477.

24 A notice of change of solicitors had been served on October 8, 2008.

25 *Re Bozzo*, supra, at paragraph 41.

26 *Re Bozzo*, supra, at paragraphs 34 to 38.

27 *Frohlick v. Pinkerton Canada Ltd.*, supra, at paragraph 31.