BRIEFING NOTE

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Court strikes out 'disgorgement of profits' remedy in negligence action

In ***Insurance Corporation of British Columbia v. Teck Metals Ltd***. [1], the British Columbia Supreme Court determined that the Plaintiff's plea for disgorgement of profits had no reasonable chance of success and granted an order for the impugned portions of the claim to be struck. In his reasons, Riley J indicated obiter that such a remedy was unlikely to be available in a negligence claim given the potential to "*expand the scope of liability for negligence by producing damage awards with no relationship to any loss suffered by the plaintiff*."[2]

The underlying action arose from two separate spills of sulphuric acid on a highway in Trail, BC. The acid was transported by one defendant, from a smelter owned by another, to a rail siding for onward transport on behalf of a third defendant who had purchased the acid. ICBC alleged that the two spills were caused and/or contributed to by each of the defendants and that the spills resulted in damage to vehicles that were on the highway at or around the time of the spills.

ICBC filed second and third amended notices of civil claim, which included a claim for disgorgement of profits earned by each of the 3 defendants from their alleged negligent transport of the sulphuric acid. ICBC brought an application to compel disclosure of documents related to its disgorgement of profits claim, and the defendants applied to strike those portions of ICBC's claim pleading disgorgement.

The Court set out the well-established principles relating to the striking of pleadings under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*:

- The test is whether it is plain and obvious the claim will fail or has no reasonable prospect of success;

[1] 2022 BCSC 374
[2] Ibid at paragraph 21

- The facts alleged in the pleading, read liberally, are assumed to be true;
- Where there is doubt on either the fact or the law, the court should allow the claim to succeed;
- Notwithstanding the stringency of the test, courts should not shy away from striking claims that are bound to fail, even where novel points of law are raised, and should strike them in the interests of fostering timely and affordable access to justice.

By reference to the recent Supreme Court of Canada decision in ***Atlantic Lottery Corp. Inc. v. Babstock,***[3] the Court described disgorgement as:

- A "gain based" remedy not referable to or dependent upon the Plaintiff's loss, but focused entirely on disgorging the defendant's profit from the alleged wrongful conduct;
- An exceptional form of relief only available for an otherwise viable cause of action where other remedies would be ineffective;
- Not available at the plaintiff's election to obviate matters of proof;
- Not yet definitively determined as a remedy available for a legally viable claim of negligence; and
- Available only in relation to the actionable wrong against that particular plaintiff.[4]

In granting the Application to strike, the Court observed that the claim for disgorgement was framed as a supplementary or alternative form of relief without any allegation that more conventional forms of damage would be inadequate; and the plaintiff's losses were quintessentially financial and there was no suggestion they would be impossible to calculate. Riley J. concluded that the plaintiff's disgorgement claim was bound to fail given that the plaintiff did not allege (nor was there any suggestion) that more conventional forms of damage would be inadequate, reaffirming the dicta in ***Babstock*** that "*disgorgement should only be available where at a minimum, other remedies are inadequate*" [5].

This decision makes it clear that disgorgement is an exceptional remedy that will only be granted out of necessity, where other forms of relief are unavailable. It ought not to be pursued equivocally or ambivalently. Such pleadings seem destined to fail and will attract applications under Rule 9-5(1)(a).

Of note, Riley J found "*considerable force*" in the defendants submission that disgorgement should not be recognized as an appropriate remedy for a

[3] 2020 SCC 19
[4] Supra note 1 paragraphs 16-20
[5] Supra note 1 at para 28 (emphasis in original)

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claim of negligence because decoupling of remedies from actual damages in negligence cases would greatly expand the scope of liability in negligence actions. A successful negligence claim requires proof of causation and damages. Because disgorgement involves "decoupling remedies from actual damages", it has the potential to expand the scope of liability for negligence by producing damage awards with no relationship to any loss suffered by the plaintiff.[6]

While he found the remedy was not available for other reasons, this suggests that, in addition to the very narrow scope of a claim that meets the factors set out in ***Babstock***, there is an additional hurdle for a plaintiff to clear, in order to make out a claim to this remedy in a negligence action.

Given it is still yet to be definitively determined whether disgorgement is even available in a claim of negligence, it seems it would take an intrepid counsel to plead disgorgement in the manner advised by Riley J. in such a claim. This decision is therefore likely to act as a deterrent to disgorgement being sought at all as a remedy for negligence, at least until the availability question is definitely determined, while those Defendants that are required to respond to the sort of hopeful and equivocal pleas of disgorgement criticized here by Riley J. will be able to rely on this decision as authority to have such claims struck.

Whilst not addressed in this decision, it is also worth remembering that disgorgement is an equitable remedy and therefore subject to and governed by the maxims and principles of equity. Accordingly, even when properly pleaded, the actual entitlement to the remedy and the precise nature and scope of it will to some degree be subject to the court's discretion, exercised judicially in the particular circumstances of the case.

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[6] See Supra at paragraph 21

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