

S158569  
Vancouver Registry

**In the Supreme Court of British Columbia**  
(BEFORE MASTER BAKER)

Vancouver, B.C.  
July 6, 2017

**BETWEEN:**

**LISA THOMSON**

**PLAINTIFF**

**AND:**

**A.R. THOMSON GROUP**

**DEFENDANT**

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**PROCEEDINGS IN CHAMBERS**  
(Excerpt - 2:27:28 p.m. to 3:32:30 p.m.)

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**Counsel for the Defendant:**

**R.B. Fraser  
A.J. Piercy**

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REPLY FOR PLAINTIFF BY MR. COLES, Continuing: ..... 1

EXHIBITS

Nil

RULINGS

Nil

**Proceedings**

Vancouver, B.C.

July 6, 2017

(EXCERPT COMMENCING AT 2:27:28 P.M.)

**REPLY FOR PLAINTIFF BY MR. COLES, CONTINUING:**

MR. COLES: Now -- now at paragraph 14, Your Honour. I say the defendant's response submissions devoted a considerable length of time reviewing evidence, namely the affidavit of legal assistant. I refer to that.

We say the ARTG relies on affidavits taken out of context, that were sworn in response to or in support of applications to issues that are not before this court. Indeed, we heard a lot about what we refer to as the Taylor litigation. As Your Honour may recall, it was a [indiscernible] slash derivative leave claim started by Lisa Thomson's husband after he was -- after 934 was removed.

So that's where these affidavits are, all these affidavits are largely sworn in 2010 or 2011, four or five years before this action -- or this cause of action arose, I should say.

Plaintiff submits that without the benefit of the full context of the earlier proceedings, the affidavits cannot be afforded any weight. Ultimately, it will be for the trial judge to determine if statements made by Ms. Thomson in cases five years before the within cause of action arose are relevant to Ms. Thomson's credibility or the terms therein state an agreement.

Ms. Alexander's affidavit also attached as pleadings and application materials from other litigation, pleadings as a rule do not contain evidence.

The parties are in agreement that pleading amendment applications are resolved on the principles contained in Rule 9-5. Although the court may receive evidence on the issues enumerated in Rule 9(b), (c), and (d), no evidence is admissible to prove that a pleading amendment discloses no reasonable claim. Why I say that is that the use that we say the court can put the earlier affidavits to doesn't go to whether the claim will succeed, but rather the latter groups,

**Reply for Plaintiff by Mr. Coles**

1           which are whether the amendments are unnecessary,  
2           scandalous and frivolous, prejudice, or otherwise  
3           an abuse of process. So that's what those  
4           affidavits can be confine -- can be confined to.

5           And in fact, as Your Honour well knows, Rule  
6           9-5(2) says no evidence is admissible on an  
7           application under subrule (1)(a), which is the  
8           discloses no reasonable claim or defence.

9           We say that to the extent that Ms.  
10          Alexander's affidavit is receivable, it's -- it's  
11          double hearsay. Pleading amendments are to be  
12          granted liberally and not denied except in the  
13          clearest of cases.

14        THE COURT: Sorry, double -- double hearsay in what  
15          respect? She says, "Look, these are -- here --  
16          here are affidavits by the plaintiff."

17        MR. COLES: Yes.

18        THE COURT: So that's hearsay, it's not double hearsay.  
19          Where's the double hearsay?

20        MR. COLES: Well, it would be an out-of-court statement  
21          by Ms. Thomson. I mean, an affidavit in itself is  
22          hearsay, right? I mean, if it was not sworn in  
23          this proceeding, it's not evidence -- it's not  
24          evidence in this action, it's evidence in -- in  
25          the Taylor action.

26        THE COURT: Understood, but it's a statement from Ms.  
27          -- Ms. Thomson herself.

28        MR. COLES: Yes. Yes.

29        THE COURT: So for the -- the assistant to recite that,  
30          I'm not sure she is. She's not saying, "Ms.  
31          Thomson said this," she says "Here's a document to  
32          which she put her oath," you know?

33        MR. COLES: Well, I suppose then we get into the -- is  
34          my friend relying on it for the truth of its  
35          contents. I mean --

36        THE COURT: I think he is. I think he's saying she was  
37          telling the truth then that she was paid out, she  
38          and her husband, and they went off to resolve  
39          their own problems. I think that's exactly his  
40          point, is that she was, you know, telling the  
41          truth then and, therefore, that truth precludes or  
42          estops her, I guess, I don't know which, from  
43          alleging anything to the contrary. That's his --  
44          I think his whole point. That's fair, yeah?

45        MR. FRASER: Yes. Yes, Your Honour.

46        THE COURT: Yeah.

47        MR. COLES: So like all hearsay risks, Your Honour, the

**Reply for Plaintiff by Mr. Coles**

1 issue is this: These are a carefully curated  
2 selection of pleadings and application materials  
3 and affidavits. Certainly my friend does not  
4 purport to put the entire record before the court,  
5 so what -- what he's asking the court to do is  
6 take Ms. Alexander's evidence, which is -- sorry?  
7 MR. FRASER: Did you say Ms. Alexander's evidence? Oh,  
8 sorry, you're --  
9 THE COURT: Well, that's your -- that's your --  
10 MR. FRASER: My assistant.  
11 THE COURT: -- assistant, yeah. Yeah.  
12 MR. COLES: So what my friend is asking the court to  
13 accept is Ms. Alexander's curated account of  
14 certain exhibits. My friend certainly didn't take  
15 the time to -- to take the court through all of  
16 the pleadings, all of the application materials,  
17 the affidavits from Al Thomson and other siblings,  
18 the settlement agreement. There's a whole world  
19 out there of information, and that, of course, is  
20 one of the main hearsay things. This is not an  
21 issue where -- suggesting that Ms. Alexander needs  
22 to be in a witness box so the court can examine  
23 her, but one of the risks of hearsay, of course,  
24 is you just don't get a complete picture.  
25 Now, I don't want to spend a lot of time  
26 on this issue, Your Honour. I mean, you know,  
27 chambers applications are routinely resolved with  
28 affidavits. What I'm highlighting is -- is it is  
29 -- and we'll get to this in the authorities --  
30 finding an abuse of process or that an amendment  
31 is unnecessary or vexatious is -- is a high  
32 threshold, and to find that on affidavits sworn  
33 five years before a cause of action arose in  
34 another proceeding in support of or responding to  
35 applications in other proceedings, plaintiff  
36 submits that that should be done very cautiously.  
37 Your Honour, I'm going to deal with Al  
38 Thomson's evidence. Your Honour knows evidence is  
39 not necessary to support pleadings amendment;  
40 however, in the -- in the several hours of my  
41 friend's submission, as we have just discussed, he  
42 raised a lot of issues with respect to evidence  
43 and that evidence must be rebutted with statements  
44 that Al Thomson has made under oath in this  
45 proceeding. So to deal with that, I propose to  
46 take the court to Al Thomson's examination for  
47 discovery transcript.

**Reply for Plaintiff by Mr. Coles**

1 THE COURT: No, I'm not sure we've got that right. One  
2 -- one is not to -- to lead evidence on the issue  
3 created or raised by the pleading itself. In  
4 other words, one wants to -- I don't know, has an  
5 accident, and then wants to amend to say, "Well,  
6 actually, there was more to it. I was assaulted.  
7 He punched me. Here's -- here's the evidence of  
8 the assault," and the law says, no, no, you don't  
9 do that, but you can lead evidence as to why you  
10 didn't say that earlier, why you didn't plead it.

11 MR. COLES: Mm-hmm.

12 THE COURT: I mean, evidence does a lot of things for  
13 us, proves or disproves a lot of things, and the  
14 one evidence you're not supported to lead on an  
15 amendment application is of the ultimate issue,  
16 the ultimate question, and I'm not sure that  
17 giving us Ms. Taylor's earlier affidavits is -- is  
18 that. Maybe it is -- certainly it's evidence of a  
19 position contrary and I understood that to be led  
20 not to just summarily dismiss the claim before the  
21 amendment is even allowed, but to say, you -- you  
22 can't, you know, plead things that are patently  
23 contradictory to positions you've taken or parties  
24 have relied on in the past. That's the MVA case,  
25 you know -- the two MVA cases, rather, that were  
26 put before the court, liability admitted in one  
27 and denied in the other, same accident, you know?

28 Anyway, I don't want to digress, but I --

29 MR. COLES: Well, I mean -- I mean, my friend has taken  
30 the court through the affidavit and, of course, I  
31 didn't object then.

32 THE COURT: Yeah.

33 MR. COLES: I'm not -- I'm not raising objection now.  
34 However, in the course of that evidence being lead  
35 to the court, there's been -- as Your -- as Your  
36 Honour alluded to, you were uncertain if Al  
37 Thomson even acknowledged having the reinstatement  
38 agreement discussion.

39 THE COURT: Yeah.

40 MR. COLES: So with that doubt being raised in the  
41 court's mind, it's important that I bring the  
42 court's attention to some actual evidence in this  
43 proceeding to replying to those allegations.

44 THE COURT: You see, when I say that and, you know,  
45 express my either doubt or lack of recollection on  
46 the point, it's not did I see it in an affidavit  
47 on behalf of the defendants. No, it's was it ever

**Reply for Plaintiff by Mr. Coles**

1           pled, you know, was that his position of pleading?  
2           That's what I was addressing. So it's not an  
3           issue in that respect for my purposes today.

4           But, anyway, carry on -- carry on with where  
5           you were going -- or where you're going.

6 MR. COLES: My Lord, we're at tab -- Your Honour, we're  
7           at Tab 3.

8 THE COURT: We're at Tab 3?

9 MR. COLES: And this is page -- page 15.

10 THE COURT: Okay.

11 MR. COLES: I just want to take the court -- so this is  
12           the April 5, 2016 examination for discovery of Mr.  
13           Thomson, and I just want to take the court's  
14           attention right off the bat to question and answer  
15           number 7. Again, my friend in his submission says  
16           Al Thomson was not the managing partner. Well,  
17           I've addressed that issue with reference to the  
18           terms of the partnership agreement, but here we  
19           have Mr. Thomson's evidence [as read in]:

20

21           Q       You are the managing partner of the  
22                    defendant A.R. Thomson Group?

23           A       Yes.

24

25                    Next question at 237, again -- again this is  
26                    to buttress issues which we'll deal with later  
27                    with respect to trust issues and proper parties,  
28                    beneficial interests. It's 59, in the top right.

29 THE COURT: Yeah.

30 MR. COLES:

31

32           237 Q       How would you describe 934's role  
33                    vis-à-vis the partnership?

34           A       Well, it was a vehicle whereby Lisa and  
35                    Gordon, her ex-husband, were partners --  
36                    partners in A.R. Thomson Group.

37

38                    Questions 261 to 263 set out a chronology.  
39                    It's very important to keep what the plaintiff  
40                    says has been a conflation of issues and ARTG's  
41                    response, which is we have the November 2009  
42                    agreement. This was -- there was a 60-day notice  
43                    to Mr. Taylor, Lisa Thompson's estranged husband,  
44                    and when that notice went out, that's when the  
45                    conversation happened. 60 days passed and then we  
46                    have the February 18, 2010 special resolution, and  
47                    those -- those two determinative dates -- which



**Reply for Plaintiff by Mr. Coles**

1 are both pled in the original Notices of Civil  
2 Claim, those aren't -- these aren't new concepts  
3 being adduced -- are very different and need to be  
4 kept distinct, especially when we're dealing with  
5 concept of the trust and the unjust enrichment,  
6 which I'll be replying to in a moment.

7 Now at Question 273 [as read in]:  
8

9 273 Q Do you recall discusses that the  
10 plaintiff -- with the plaintiff with  
11 respect to what impact the special  
12 resolution would have on her business,  
13 being 934?

14 [Al Thomson:] Yes, I think we had discussions.  
15

16 Do you have any specific recollection of  
17 these discussions?  
18

19 No.  
20

21 Question 275:  
22

23 275 Q Are you aware of whether or not another  
24 partner explained to the plaintiff the  
25 significance of the special resolution  
26 being passed?  
27

28 Might have. I don't know.  
29

30 Do you recall the plaintiff objecting to  
31 the partnership's proposed course of  
32 action?  
33

34 No.  
35

36 Do you have any recollection of the  
37 plaintiff lobbying yourself or any other  
38 partners not to pass the resolution?  
39

40 No.  
41

42 Would you agree with me that the  
43 plaintiff cooperated with the resolution  
44 to terminate 934's interest in the  
45 partnership?  
46

47 A I don't think she was in objection to  
it. I think she understood what we were



**Reply for Plaintiff by Mr. Coles**

1 partnership?

2

3

Yes.

4

5

Would you agree with me that you  
6 communicated these intentions to the  
7 plaintiff prior to 934's termination?

8

9

Probably.

10

11

You have no reason to deny that you have  
12 communicated those intentions to her?

13

14

No, I don't.

15

16

Question 298 to 300, Your Honour [as read in]:

17

18

298 Q During the Gordon Taylor litigation that  
19 we discussed briefly before the coffee  
20 break, you confirmed with the plaintiff  
21 that she will become a partner again  
22 once litigation was concluded; is that  
23 correct?

24

25

Yes, that was the expectation.

26

27

Well, it's more than an expectation,  
28 sir. I'm suggesting that it was a  
29 representation made by you; is that  
30 correct?

31

32

I would have expected her to be  
33 reinstated.

34

35

You told her that?

36

37

Yes.

38

39

Question 309:

40

41

309 Q My suggestion to you is that when  
42 discussions were happening in the fall  
43 of 2009 with respect to the termination  
44 of 934 from the partnership agreement,  
45 you advised the plaintiff that she will  
46 be re-admitted on the same terms to the  
47 partnership; is that correct?

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

**Reply for Plaintiff by Mr. Coles**

1           A     Well, it would be the same. I mean, it  
2                    would be the same agreement, right, as  
3                    it would be current at the time, right,  
4                    yes, of course.  
5

6           Your Honour, at 374 [as read in]:  
7

8           374   Q     My question is just does this accord  
9                    with your recollection in the summer of  
10                   2013 that it was contemplated by the  
11                   partnership that 934 be reinstated?  
12

13                    Yes. Not necessarily that summer, but  
14                    sometime -- and this is just trying to  
15                    get a grip on all of the mechanics of  
16                    doing it.  
17

18           Question 376:  
19

20           376   Q     But you would agree with me that, as far  
21                    as you were concerned, and evidently Jim  
22                    Thomson, who is the president, there was  
23                    a plan to reinstate 934 into the  
24                    partnership?  
25

26                    A     There had been a plan. From the time  
27                    that Gordon Taylor was removed from the  
28                    partnership, there had been a plan to  
29                    reinstate Lisa into the partnership.  
30

31           392 I'm putting an email to Mr. Thomson:  
32

33           392   Q     934 was removed because of Gordon's  
34                    actions. That had been resolved. You  
35                    should be reinstated on the terms  
36                    agreeable to the majority and  
37                    partnership agreement amended to suit?  
38

39                    "Okay, right," he says.  
40

41                    Q     And does that statement accord with your  
42                    understanding of how the plaintiff's  
43                    reinstatement would work?  
44

45                    A     Yes, it sounds reasonable that would be  
46                    done.  
47

46   THE COURT:   What was that number again, please?

47   MR. COLES:   We are at 392, 393.

**Reply for Plaintiff by Mr. Coles**

1 THE COURT: Hold on, then. I'll read that. Okay.  
2 MR. COLES: Your Honour, I'm at 397 [as read in]:  
3  
4 397 Q And I am just confirming your earlier  
5 evidence that in November of 2009, the  
6 representation to Lisa, the plaintiff,  
7 was 934's interest is going to be  
8 terminated, and when that issue with  
9 Taylor was resolved, we readmit you back  
10 into the partnership on terms equivalent  
11 to the other partners as the agreement  
12 then stood. That's what I understand  
13 you told me earlier today?  
14 A Yeah. I think that's fair to say, yeah.  
15  
16 THE COURT: Does she plead somewhere -- does she plead  
17 somewhere that she -- she had like tendered funds  
18 or anything to buy her way back in?  
19 MR. COLES: Well --  
20 THE COURT: In other words, does she plead -- enlighten  
21 me here -- on her original -- even on her original  
22 Notice of Civil Claim on what terms she expected  
23 to be re -- re-admitted?  
24 MR. COLES: On the terms agreed, which is that she  
25 would get the 15 percent back, so her 15 percent  
26 was forcibly withdrawn and the deal was that --  
27 THE COURT: Forcibly withdrawn by whom?  
28 MR. COLES: The partnership. So the partnership in  
29 February 2010 passes what -- what I've defined as  
30 a special resolution.  
31 THE COURT: Yeah, 60-day notice to Mr. Taylor and all  
32 that?  
33 MR. COLES: Yeah, yeah.  
34 THE COURT: Yeah. Okay.  
35 MR. COLES: "We will forcibly withdraw you." That's  
36 the language --  
37 THE COURT: That's right. That's right.  
38 MR. COLES: -- used in the partnership agreement.  
39 THE COURT: KPMG values, they pay out 1.1 or 1.5.  
40 MR. COLES: Something like -- yeah, maybe --  
41 MR. FRASER: 1.7.  
42 MR. COLES: 1.7.  
43 THE COURT: Okay, 1.7, yeah.  
44 MR. COLES: Yeah, that's right. So that happens.  
45 THE COURT: Yeah.  
46 MR. COLES: Gets the money.  
47 THE COURT: Yeah.

**Reply for Plaintiff by Mr. Coles**

1 MR. COLES: She then bides her time until about 2013 --  
2 THE COURT: Yeah.  
3 MR. COLES: -- when the Taylor litigation is finally  
4 resolved.  
5 THE COURT: Yeah.  
6 MR. COLES: And then says, "Okay, I'd like back in  
7 now." And what -- and what we see happening is  
8 from early in -- in '09, 2010, when it was very  
9 clear, we say the evidence, what the deal was, she  
10 gets her 15 percent back. What starts to happen  
11 in the years thereafter is ARTG starts to -- it  
12 starts to question about really what the terms  
13 were. We have Al Thomson's evidence, which was --  
14 THE COURT: The terms of her readmission?  
15 MR. COLES: That's right.  
16 THE COURT: Right.  
17 MR. COLES: So -- so we have Al -- Al Thomson's  
18 evidence, which was at the time she will be re-  
19 admitted on the same terms she left, and I said  
20 that -- I've taken the court to that.  
21 THE COURT: What does that mean? What does that mean?  
22 MR. COLES: A 15 percent equity interest.  
23 THE COURT: No, you -- you always give me half the  
24 equation. What's the other half of the equation?  
25 What was she to do, just walk in the door and say,  
26 "Now --"  
27 MR. COLES: No.  
28 THE COURT: "-- give me my shares"?  
29 MR. COLES: Oh, I see. Your Honour, I apologize. She  
30 was --  
31 THE COURT: Well, let's be blunt. How much was she  
32 going to pay to get back into the company?  
33 MR. COLES: The 1.7 million.  
34 THE COURT: Oh, she was going to pay the money back?  
35 MR. COLES: Absolutely.  
36 THE COURT: Oh, okay.  
37 MR. COLES: Yeah.  
38 THE COURT: Okay.  
39 MR. COLES: Yeah, that's the deal. She -- she gets  
40 back her shares, she gives back the money.  
41 THE COURT: Oh, okay.  
42 MR. COLES: That's what this has always been about.  
43 THE COURT: Okay.  
44 MR. COLES: And then what we see happen over the years  
45 is ARTG, when we say the date triggered, the  
46 triggering date, which is when the Gordon Taylor  
47 settlement was -- was wrapped up, they started to

**Reply for Plaintiff by Mr. Coles**

1 say, "Well, you know, really maybe the deal should  
2 be this, maybe it should be just 7 and a half  
3 percent, or maybe you get to come back and you  
4 don't have management access." So the -- so the  
5 terms -- ARTG in its response introduces concept  
6 of failure for contractual certainty, but that's  
7 -- that's their creation, it's in their emails and  
8 documents they start to unilaterally introduce new  
9 -- new concepts.

10 Just a few more -- a few more points. So,  
11 Your Honour, we're at 399:

12  
13 399 Q And I say -- and I know you did not  
14 write that sentence. I'm referring to  
15 the email that's captioned above. But  
16 what I want to ask you about is your  
17 understanding of the summer of 2014.  
18 Had the arrangement changed from the  
19 agreement in November 2009?  
20

21 Mr. Thomson says:

22  
23 I think that what has happened here is  
24 we've got to the point where we said,  
25 okay, we have to change the issue about  
26 having services from partners. In other  
27 words, the agreement even up to this  
28 time called for the partners to provide  
29 services to the partnership and so I  
30 think that's what Jim is referring to,  
31 that the agreement -- that everyone's  
32 agreeable that the agreement would be  
33 changed to accommodate Lisa not wanting  
34 to work in the business, not wanting to  
35 provide any services.  
36

37 So we have this concept now that by the summer of  
38 2014, Mr. Thomson still admits that there was this  
39 -- this agreement -- agreement being his word --  
40 but that they -- they're now thinking about  
41 changing the terms on -- on Ms. Thomson  
42 unilaterally.

43 THE COURT: No, it -- it -- I don't know, was she --  
44 what he's saying, look, everybody else was working  
45 in the company, she -- she wasn't going to, was  
46 that agreeable to the others? Does that change --  
47 what are you saying she -- was changed there, that

**Reply for Plaintiff by Mr. Coles**

1 -- that she wanted to jump in and work in the  
2 company?

3 MR. COLES: Well, there -- there -- one of the  
4 disagreements in the evidence was Ms. Thomson's  
5 willingness to -- to work, to provide the  
6 management services, so there's that schedule in  
7 the partnership agreement that, Your Honour, I  
8 took you to earlier that says, you know, Al  
9 Thomson's managing partner and the other siblings  
10 had a title, and there's an issue about whether  
11 Ms. Thomson wanted to work or was able to work.

12 Now, her mother, who is a partner principal,  
13 also does not provide services, so she's not the  
14 only one to do that, and, as Your Honour can  
15 appreciate in a family business, a closely-held  
16 business, query what -- to what degree you have to  
17 work to provide work.

18 But, in any event, that -- that is the  
19 suggestion here, that perhaps at this time Al  
20 Thomson or ARTG had -- had determined that Lisa --  
21 Ms. Thomson, the plaintiff, did not want to  
22 perform services and that the agreement should be  
23 amended that when she comes back in, she is not  
24 going to get a -- a salary draw or something to  
25 that effect.

26 But, in any event, the significant point is  
27 that this is -- this is now a change. It's not  
28 the "You give us the money back, we get the  
29 shares," as Al Thomson said, "You get back what  
30 you had." This is -- now it's going to be a  
31 little bit different. The agreement's going to be  
32 now amended. I mean, this -- this is not a -- a  
33 significant point, Your Honour, I just highlight  
34 it to say that -- that the -- the ground beneath  
35 Ms. Thomson's feet was starting to shift by 2014.

36 THE COURT: Well, I can see that it might be. If all  
37 -- everything that you posit here and say it was  
38 correct, this happened --

39 MR. COLES: Yes. Yes.

40 THE COURT: -- the conversation --

41 MR. COLES: Yes.

42 THE COURT: -- the agreement --

43 MR. COLES: Yes.

44 THE COURT: -- in 2014 --

45 MR. COLES: Yes.

46 THE COURT: -- the change in circumstances or  
47 perspective --



## Reply for Plaintiff by Mr. Coles

1 MR. COLES: Yes.  
2 THE COURT: -- or expectations --  
3 MR. COLES: Yes.  
4 THE COURT: -- more recently --  
5 MR. COLES: Yes.  
6 THE COURT: -- taking a more active role. I mean, I  
7 could -- I can see that being quite significant if  
8 it's a deal-breaker, whether she works or not. If  
9 she said, "No, I want everything back, my 15  
10 percent, everybody else has 15 percent, I'm not  
11 going to work, and they apparently are, but that's  
12 going to be the deal," I can see that being a  
13 really pivotal issue, but it may be a condition, a  
14 -- you know, a real -- fundamental to the -- to  
15 the agreement. So don't think it's as simple as a  
16 paycheque. I don't know whether it is or not, but  
17 I don't pass that -- pass that aspect  
18 [indiscernible/overlapping speakers].  
19 MR. COLES: No, and -- and -- and in the grand scheme  
20 of this action, Your Honour, you're quite light,  
21 that issue about Lisa providing services to the  
22 partnership is not trivial, but to the extent of  
23 this application today, I don't intend to spend a  
24 lot of time on that, other than to say the  
25 evidence is conflicting on whether, in fact, Ms.  
26 Thomson was refusing or did not want to provide  
27 services.  
28 THE COURT: Okay.  
29 MR. COLES: That -- that issue is -- there's  
30 conflicting evidence on that.  
31 So --  
32 MR. FRASER: She doesn't provide any evidence on the  
33 [indiscernible].  
34 THE COURT: Oh, okay, thank you. But, yeah, the  
35 converse could be just as important, is that maybe  
36 she said, "Oh, yeah, I expected to come in and --  
37 and do my fair share," and the others might be  
38 saying, "Well, you never had a fair share, you  
39 don't know how the company is run, and so we  
40 actually don't want you in here." So, I don't  
41 know, I'm saying either way could be really  
42 significant and could be a -- depending on what  
43 the trial judge concludes, I suppose, a  
44 fundamental issue.  
45 MR. COLES: Your Honour, the -- the last series of  
46 questions relate to minutes of partnership  
47 meetings that Lisa Thomson attended on behalf of

**Reply for Plaintiff by Mr. Coles**

1 -- of 934. We're at Question 639. 152 is the  
2 Bates stamp on the top right-hand corner.

3 THE COURT: Thank you. Okay.

4 MR. COLES: [As read in]:

5

6 639 Q We are going to look at partnership  
7 meeting minutes shortly, but in this  
8 email that's in front of you, Lisa  
9 writes, about halfway down the page:

10

11 In late November, 2010, we had a  
12 partnership meeting and in that  
13 meeting minutes it was agreed by  
14 all through about that I would be  
15 fully reinstated by purchasing  
16 Taylor's seven and one-half shares.

17

18 And then I -- and I said:

19

20 It's not necessary that you read that  
21 verbatim, I'm just -- I'm just wondering  
22 if that's a sentence -- if that's an  
23 accurate statement.

24

25 Mr. Thomson says:

26

27 I'm not sure at this stage. I don't  
28 know who wrote the minutes. I don't  
29 recall there being a vote of that  
30 nature.

31

32 And then I just sum up and say:

33

34 Well, would you agree with me that in  
35 November 2010, it was your understanding  
36 the plaintiff would be fully reinstated  
37 in the partnership?

38

39 And he says:

40

41 I think that's the point, yeah.

42

43 Question 664 --

44 THE COURT: Well -- okay. 654?

45 MR. COLES: Sixty-four, Your Honour. [As read in]:

46

47 664 Q For the sake of completeness, I'm just

**Reply for Plaintiff by Mr. Coles**

1 going to draw your attention to the  
2 second sentence, which reads:

3  
4 Although 934 is not currently an  
5 active partner, there is an  
6 expectation that it will be  
7 reinstated.  
8

9 I say, "Did you write that?" He says, "Yes".  
10 And then from 696 onwards we're dealing with  
11 the minutes, the partnership meetings in 2010, Ms.  
12 Thomson attended.

13 Question 696 [as read in]:  
14

15 696 Q Did Lisa frequently take the minutes at  
16 partnership meetings she attended?

17 A I think she did for a time, yeah.

18 Q Do you recall whether or not it was her  
19 practice to email copies of those  
20 minutes to the principals or the  
21 partners?

22 A Probably, yeah.

23 Q Do you recall if you would review the  
24 meeting minutes on receiving them?

25 A Yes, I would peruse them, yeah.

26 Q And would it have been your practice  
27 that if meeting minutes were delivered  
28 to you that were inaccurate or did not  
29 reflect what was discussed at a  
30 partnership meeting, you would advise  
31 the same?

32 A Probably, yeah.  
33

34 Skipping to question 704:  
35

36 704 Q Do you have any record of receiving  
37 meeting minutes prepared by the  
38 plaintiff and advising her or the other  
39 principals that they were not accurate?

40 A No, I don't.  
41

42 I'm going to skip the questions from 6 -- 712  
43 to 726. Suffice it to say there's an agreement --  
44 well, no, we'll go to 712. 712, Bates stamp is  
45 170:  
46

47 712 Q As a general procedure, it would just be

**Reply for Plaintiff by Mr. Coles**

1                   the partner or principals . . .  
2  
3           -- this is whether they be at meetings -- or,  
4           sorry, the answer is [as read in]:  
5  
6           A       As a general procedure, it would just be  
7                   the partner or principles at meetings.  
8           Q       It would be an exception to that policy  
9                   to have some non-partner principal in  
10                   the room?  
11          A       I would say generally yes.  
12  
13       And I say:  
14  
15          Q       Okay. So if we flip over the page, we  
16                   see the heading "55934"; is that right?  
17          A       Yes.  
18  
19       I'm at Question 715:  
20  
21       715 Q       And this meeting took place October  
22                   2010? The 934 termination agreement  
23                   became effective in April of 2010; is  
24                   that correct?  
25  
26       It says, "I suppose that is correct, yes."  
27       And I said:  
28  
29                   Well, notwithstanding that, Lisa is in  
30                   attendance at the meeting?  
31  
32       And he says, "Yes." That's question 721.  
33       Question 723:  
34  
35       723 Q       The heading here is "550934"; is that  
36                   right?  
37  
38       Where the is -- I see.  
39       So at Question 721, Mr. Thomson suggests that  
40       Lisa Thomson could have been in attendance at the  
41       meeting as a representative of 920, which is a  
42       related company where she had an interest, and I  
43       clarify at 723 that the meeting minutes 934 is  
44       identified and not 920.  
45       But the important stuff here is at 725:  
46  
47       725 Q       The entry in the minutes read:

## Reply for Plaintiff by Mr. Coles

1 All agreed Lisa should have access  
2 to the 15 percent, but will then  
3 buy out Gordon Taylor's share of 7  
4 and a half percent

5  
6 Is that right?

7  
8 Yes.

9  
10 Does the meeting minutes in October of  
11 2010 where Lisa recorded that all agreed  
12 that she would have access to the 15  
13 percent?  
14

15 Mr. Thomson agrees with that.

16 THE COURT: I don't understand -- what I'm trying to  
17 understand here is why isn't all of this evidence  
18 on the -- on the principal issue of whether or not  
19 there was an agreement or -- or -- or whether  
20 there was assurances given that -- upon which she  
21 relied, et cetera, all of which is -- is -- is  
22 either existing in your -- your claim or -- or --  
23 or in the amendments that you're proposing? Why  
24 -- why -- tell me why I'm not listening to  
25 evidence on the claim itself? It sure sounds to  
26 me like I am.

27 MR. COLES: ARTG resists the proposed amendments on the  
28 basis that they're an abuse of process, that  
29 they're vexatious --

30 THE COURT: Mm-hmm.

31 MR. COLES: -- that they're bound to fail.

32 THE COURT: Mm-hmm.

33 MR. COLES: This is in response to that. It says,  
34 parsed finely, these statements from Mr. Thomson  
35 could be interpreted to mean that, in fact, the  
36 contract may have been less than completely  
37 certain, but what this -- what it says is there  
38 was a series of representations made, that Ms.  
39 Thomson was led down the garden path to not oppose  
40 the special resolution, to participate in -- in  
41 the Gordon Taylor litigation as a good daughter  
42 and -- and former partner.

43 This is -- Your Honour, succinctly, this is  
44 to buttress any suggestion that these amendments  
45 are -- are frivolous or an abuse of process or  
46 inconsistent. This is to say that, in fact, all  
47 of these amendments that relation to, well, you

**Reply for Plaintiff by Mr. Coles**

1 know, maybe there was a misrepresentation,  
2 fiduciary duties, all of these things that my  
3 friend has said, well, that's entirely  
4 inappropriate and that's doomed to fail, but that  
5 -- that amendment cannot -- well, I'm taking to  
6 court's attention to say these are all grounded in  
7 evidence, these are reasonable, these are not  
8 bound to fail. That's why I'm taking the court to  
9 that.

10 THE COURT: Okay.

11 MR. COLES: Your Honour, I -- I think the court has my  
12 point with respect to the evidence. It is given  
13 in reply -- in response to the -- my friend's  
14 submission that these pleadings amendments are in  
15 any way scandalous or they're going to delay the  
16 trial or an abuse of process. With that being the  
17 case, I notice the time. I will move a little  
18 more expediently for the balance of the afternoon  
19 after the break, if it's convenient, or we can  
20 keep going, Your Honour. I'm in your hands.

21 THE COURT: How long -- because I do expect Mr. -- Mr.  
22 Fraser will want some surreply. I don't know, I  
23 suspect he will, but -- so how long do you think  
24 you'll be?

25 MR. COLES: Well, if -- if 15 minutes is sufficient,  
26 but, you know, my friend took a considerable  
27 period of time in his response, about three hours,  
28 and I advised my friend and the court at the  
29 outset that my reply would be significant, so I  
30 think I could do 45 minutes if -- if my friend can  
31 reply in 15. I wouldn't want to come back for --

32 THE COURT: Well, we're not -- we're not sitting late  
33 today. We're not sitting -- I can't.

34 MR. COLES: I'm happy to forego the -- the break, but I  
35 know Madam Clerk would --

36 THE COURT: Yeah. Okay, we'll take a short break.

37

38 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

39 (PROCEEDINGS RECONVENED)

40

41 **REPLY FOR PLAINTIFF BY MR. COLES, CONTINUING:**

42

43 MR. COLES: Your Honour, I spoke to my friend and  
44 advised him I'd endeavour to be done by 3:45,  
45 providing him with 15 minutes to do some reply.

46 Your Honour, we were just at paragraph 20 --  
47 or page 4, paragraph 26. We have canvassed

**Reply for Plaintiff by Mr. Coles**

1 largely the reinstatement agreement. I say at  
2 paragraph 27 it's important to keep in mind that  
3 at the time of the reinstatement agreement, 934  
4 was a partner, and that will become important for  
5 the fiduciary duty issues that will flow later.

6 Paragraph 28, just confirmation of beneficial  
7 ownership that's admitted.

8 I've already dealt with the managing partner  
9 issue at 30 and 31.

10 Paragraph 36, my friend, in his submissions,  
11 made issue of the word "terminated" being used in  
12 the original Notice of Civil Claim and in certain  
13 other affidavits sworn in the proceeding. That's  
14 a misnomer. The partnership agreement provides  
15 that in the process that was followed is a  
16 forceful withdrawal, and by virtue of the forceful  
17 withdrawal the partnership interest does not  
18 disappear, it is redistributed on a pro rata  
19 basis. But we'll touch on this later in the trust  
20 issue, but my friend went on at some length about  
21 the existence of trust property and when did the  
22 property exist, et cetera. To be clear, in  
23 November of 2009, the shares -- partnership  
24 interest, I should say, being held by 934, it was  
25 a partner, managing partner owes a partner  
26 fiduciary duties, and those shares were  
27 subsequently redistributed in 2010.

28 Now, with respect -- I'm now down to  
29 paragraph 38, Your Honour. Now we talk about the  
30 February special resolution. At paragraph 40,  
31 there are four bullets that reiterate excerpts  
32 from the affidavits that my friend took you to,  
33 and I paraphrase them here. These are Exhibit 4  
34 -- sorry, Exhibit F, G, H and K. My friend relied  
35 on these excerpts, these are affidavits sworn by  
36 Ms. Thomson, to say that her amendments are now  
37 inconsistent, they're abuse of process. Why I say  
38 it's important for the court to bear in mind the  
39 distinction between the November agreement and the  
40 February agreement is that these excerpts strictly  
41 deal with whether the payout formula was fair.  
42 They don't -- they're completely silent on the  
43 existence of the November agreement, they don't  
44 disavow any previous agreement, they simply say,  
45 Exhibit F, the withdrawal formula is fair, the  
46 withdrawal formula set out in the partnership  
47 agreement was agreed to by all partners. Turning

**Reply for Plaintiff by Mr. Coles**

1 over the page, I'm satisfied that 934 has been  
2 dealt with in a fair manner and has received all  
3 of the funds in the partnership agreement.

4 So what my friend is doing is conflating the  
5 payout formula from the special resolution and the  
6 November agreement, but those terms can't be  
7 conflated because by Lisa Thomson swearing that  
8 the payout formula was fair, fine. That doesn't  
9 mean there was not the November agreement, just  
10 completely silent, it doesn't deal with that  
11 issue, because the November agreement is "I will  
12 return the money received from the payout  
13 formula," whether that's fair or not, it wasn't  
14 discussed in November, "I'll return the money and  
15 I get the shares back." So the fact that in 2010  
16 and 2011 in affidavits she says that the payout  
17 formula was fair, it does not go to the issues  
18 before the court today.

19 And I say at 41 passages excerpted above and  
20 relied on by ARTG do not in any way undermine or  
21 detract from the post-amendments.

22 That segues into the abuse of process  
23 arguments. Paragraph 42, the plaintiff says that  
24 ARTG spent considerable time advancing the abuse  
25 of process argument. Doing so relied heavily on  
26 two authorities, both of which have no  
27 applicability to -- with an application they're  
28 entirely distinguishable on the facts. *Glover v.*  
29 *Leakey*, Your Honour, you do recall the facts.  
30 That was a car accident case, and in that case Mr.  
31 Leakey, who is driving a car, has his wife in the  
32 back seat and another woman in the front seat.  
33 Ms. Yeomans is the other woman, Ms. Glover is his  
34 wife. They're both injured in the car accident.  
35 Both Ms. Yeomans and Ms. Glover commence an  
36 action. Mr. Leakey, through ICBC counsel, settles  
37 with Ms. Yeomans, admitting liability. Then a  
38 jury trial is had with Ms. Glover where he denies  
39 liability. So that is your classic example of an  
40 abusive process, diametrically opposed positions,  
41 whereby denying liability, admitting liability,  
42 black and white.

43 But that is -- that has nothing to do with  
44 the facts before the court, where Mr. -- sorry, I  
45 should say where my friend and ARTG are attempting  
46 to finely parse various affidavits and, at best,  
47 that evidence may arise some inconsistencies.



**Reply for Plaintiff by Mr. Coles**

1 Those are certainly issues that I expect my friend  
2 will explore in examination for discovery and it  
3 will be -- will be grounds for cross-examination,  
4 but nothing in the affidavits is anywhere near the  
5 *Glover v. Leakey* scenario.

6 Similarly, my friend relies on *Vanmills v.*  
7 *Coles*. I'm now at paragraph 56. Again, in  
8 *Vanmills v. Coles*, the issue is whether, in -- in  
9 one lawsuit Mr. Crux asserted that his legal and  
10 beneficial interest in certain shares have been  
11 transferred to Mr. Coles, no relation, and the  
12 latter action asserted that he, in fact, retained  
13 beneficial interest. Again, that is a  
14 diametrically opposed position or pleading.

15 Similarly, *Pepper's Produce* was not an abuse  
16 of process decision. The Court of Appeal went on  
17 to comment that it wouldn't appropriate to deny in  
18 one action that parties were parties to a contract  
19 and in a subsequent action to say that they were.

20 However, before we move on, it's important to  
21 note that in *Glover v. Leakey*, the 951(d), the  
22 abuse of process factor, was described as a high  
23 one. That's at paragraph 64 of the decision. And  
24 then the court said that whether taking  
25 inconsistent positions on the same issue in  
26 separate proceedings constitutes an abuse of  
27 process depends on the context and circumstance of  
28 each case. And that's at paragraph 45 of my  
29 written submissions, My Lord. That's from --  
30 that's from -- that's from the *Leakey* decision.

31 Of course, the full context and circumstances  
32 of the Taylor litigation is not before this court.

33 At paragraph 60, Your Honour, it's apparent  
34 that ARTG believes there are inconsistencies in  
35 the plaintiff's evidence. At its highest, these  
36 alleged inconsistencies raise issues; however,  
37 they do not rise to the level of being  
38 diametrically inconsistent, and evidentiary  
39 inconsistency, even a serious one, is not  
40 tantamount to an abuse of process. I say that  
41 were that the case, litigants would routinely  
42 bring 9-5 applications following discovery on the  
43 basis of the evidence disclosed in their view was  
44 inconsistent with the pleadings.

45 I'm at page 8 now, Your Honour. This is  
46 where I comment on the "forcibly withdrawn" versus  
47 "terminated" language. One of the proposed

**Reply for Plaintiff by Mr. Coles**

1 amendments is where in the original Notice of  
2 Civil Claim the drafter of that document, which  
3 was not my office, used the term "terminated".  
4 It's a misnomer. It should be "forcibly  
5 withdrawn". That's the language of the  
6 partnership agreement.

7 Paragraph 67, responding to paragraph 74 of  
8 the written submissions of ARTG that says that  
9 three certainties are required for the creation of  
10 express trusts are not found in Amended Notice of  
11 Civil Claim.

12 Paragraph 68, we say that these certainties  
13 -- three certainties are, in fact, set out,  
14 paragraphs 18 and 24, proposed Notice of Civil  
15 Claim. They are as follows: Certainty of  
16 intention; Al Thomson offered and Lisa agreed that  
17 if 934's partnership interest in ARTG was  
18 withdrawn, ARTG would hold 934's partnership  
19 interest in trust for 934 LT and Lisa, was the  
20 intention. There's no ambiguity over the subject  
21 matter. ARTG would hold 934's partnership  
22 interest in trust. No ambiguity about what --  
23 what was being referred to there. It's identified  
24 in the partnership agreement.

25 Certainty of object. ARTG would act as a  
26 trustee for 934's partnership's interest in ARTG,  
27 Taylor's final removal from ownership of ARTG, at  
28 which point Lisa would give what ARTG paid to her  
29 and get back to the partnership interest in ARTG  
30 that 934 had lost.

31 Dealing with the issue of constructive and  
32 resulting trusts, ARTG forcefully asserts that  
33 there is no basis for the court to find resulting  
34 trust or constructive trust over 934's partnership  
35 interest. Doing so relies on the recent decision  
36 of *BNSF Railway v. Teck Metals*. I say that the  
37 case stands for just the opposite proposition, as  
38 -- as my friend advances it.

39 And we should -- I should take the court to  
40 that decision, Your Honour, because it is -- it is  
41 of some significance to the trust claim. It's at  
42 tab 16 of my friend's authorities. So in *BNSF*  
43 *Railway*, as I say at paragraph 71, the issue was  
44 money paid by mistake. The railway had been  
45 paying invoices that it shouldn't have so that the  
46 recipient of the monies were, in fact, being paid  
47 twice over a period of 17 years.

## Reply for Plaintiff by Mr. Coles

1           So this is Madam Justice Newbury writing for  
2 the court. I should highlight, Your Honour, that  
3 in paragraph 2, Madam Justice Newbury observes  
4 that:

5  
6           Courts are enjoined not to rule out pleadings  
7 merely because the cause of action asserted  
8 is novel. If the claim is arguable, or can  
9 be amended to be so, it should be permitted  
10 to proceed . . .

11  
12 That's useful, of course, for the applicant here.

13           So what was being advanced by the defendants  
14 in *BNSF Railway* is essentially the same position  
15 that my friend takes before this court, that a  
16 constructive -- I'm at paragraph 73 -- may only be  
17 advanced in two situations: To remedy wrongful  
18 conduct, or to remedy an unjust enrichment. Of  
19 course, both of those are pled. However,  
20 additionally the plaintiff would have to  
21 demonstrate that monetary award would be  
22 inadequate, and there was a link between the  
23 property that founds the action and the property  
24 in which the constructive trust is claimed.

25           That relates to my friend's submission that  
26 the partnership interest was terminated when the  
27 special resolution was passed and no longer  
28 existed, and therefore there wouldn't be trust  
29 property that a trust claim could attach to. The  
30 applicant, of course, says that is not the case.

31           But, anyway -- in any event, I should say,  
32 the ratio from *BNSF*, and -- and here Madam Justice  
33 Newbury canvasses the history of the law of  
34 constructive trusts, whether they be substantive  
35 or remedial or institutional. The language, of  
36 course, gets very confusing between America and  
37 English courts and even in Canada, but Madam  
38 Justice Newbury confirms a 1997 decision of the  
39 Supreme Court of Canada called *Soulos*, and -- and  
40 I'm at paragraph 48 of the decision, and here --  
41 and here, this is the indented paragraph:

42  
43           . . . the constructive trust . . .

44  
45 -- this is underlined --

46  
47           . . . is an ancient and eclectic institution

## Reply for Plaintiff by Mr. Coles

1           imposed by law not only to remedy unjust  
2           enrichment, but to hold persons in different  
3           situations to high standards of trust and  
4           probity and prevent them from retaining  
5           property which in "good conscience" they  
6           should not be permitted to retain.  
7

8           And that's the issue here.  
9

10           This served the end, not only of doing  
11           justice in the case before the court, but of  
12           protecting relationships of trust and the  
13           institutions that depend on these  
14           relationships. These goals were accomplished  
15           by treating the person holding the property  
16           as a trustee of it for the wronged person's  
17           benefit, even though there was no true trust  
18           created by intention.  
19

20           So at paragraph 52, the court poses a  
21           question to itself, which is as follows:  
22

23           The question then becomes whether newer  
24           cases . . .  
25

26           -- she cites a few Supreme Court of Canada  
27           decisions --  
28

29           . . . are to be read as overruling the clear  
30           statement of the majority in *Soulos* that the  
31           constructive trust is imposed "not only to  
32           remedy unjust enrichment, but to hold persons  
33           in different situations to high standards of  
34           trust and probity and prevent them from  
35           retaining property which 'in good conscience'  
36           they should not be permitted to retain." Put  
37           another way, is the constructive trust in  
38           Canada now restricted to cases of breach of  
39           fiduciary duty and unjust enrichment despite  
40           the clear statements in *Soulos* that the law  
41           of constructive trust "embraces the  
42           situations in which English courts of equity  
43           traditionally found a constructive trust as  
44           well as situations of unjust enrichment  
45           recognized in recent Canadian jurisprudence"?  
46

47           And the court answers a question in the negative.

**Reply for Plaintiff by Mr. Coles**

1           The court then goes on to summarize,  
2 beginning at paragraph 83, the principles in what  
3 the court admits is sort of a -- of a lengthy and  
4 confusing decision, but at 83(4) there is a  
5 summary that:

6  
7           . . . constructive trust continues to be  
8 available in Canada in the various types of  
9 circumstances "where its availability has  
10 long been recognized" . . . to "hold persons  
11 in different situations to high standards of  
12 trust and probity . . .

13  
14           So although -- although a wrongful act has  
15 been pled, unjust enrichment has been pled, to the  
16 extent that any of those amounts are not granted,  
17 the constructive trust claim still stands. It's  
18 not -- it's not limited. It's very broad.

19  
20           (EXCERPT CONCLUDED AT 3:32:30 P.M.)

21  
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23  
24  
25 Transcriber: S. Lotz  
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