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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

MARY SOPHIE FUTROS, BY HER JOINT)	<u>Janet I. Jardine</u>
POWERS OF ATTORNEY, MICHAEL DONALD)	for the plaintiffs
FUTROS AND ANGELA MARIA EMMS, AND)	
ANGELA MARIA EMMS,)	
)	
)	
)	
- and -)	
)	
ERNEST MICHAEL FUTROS JR.)	<u>Brittany M. Tofangsazan</u>
AND KRISTA DEIGHTON,)	for the defendants
)	
defendants.)	
)	
)	Judgment delivered:
)	February 13, 2025

ASSOCIATE JUDGE GOLDBERG

INTRODUCTION

[1] The within action by the plaintiffs involves a dispute between family members over land ownership. The defendants counterclaimed, alleging various claims regarding ownership of corporations, ownership of a piece of land, breaches of trust and contract, interim recovery of equipment and tools and wrongful dismissal. Their counterclaim was struck, but with leave to amend. The defendants then filed a statement of defence and

amended counterclaim. The plaintiffs now seek to strike the amended counterclaim without leave to amend.

[2] For the reasons that follow, I find that the amended counterclaim does not disclose a reasonable cause of action, is frivolous and vexatious, is an abuse of the process of the court, offends the rules of proportionality and/or would prejudice or delay the fair trial of the action. The amended counterclaim is, therefore, struck without leave to amend.

BACKGROUND

[3] For ease of reference, the parties will be referred to in these reasons as they are named in the statement of claim.

[4] The plaintiff Mary Sophie Futros (Mary) was predeceased by her husband Ernie Futros Sr. (Ernie Sr.). Mary and Ernie Sr. had three children together: the plaintiff Angela Marie Emms (Angela), the defendant Ernest Michael Futros Jr. (Ernie) and another son, Joey Ernest Futros (Joey). The defendant, Krista Deighton (Krista), is married to Ernie.

[5] Mary's claim is brought by her joint powers of attorney, her brother-in-law Michael Donald Futros, and her daughter Angela.

[6] The plaintiffs filed a statement of claim (the Claim) against the defendants seeking a declaration that Mary owns 10 acres of a 39.9 acre parcel of land in Rosser, Manitoba (the Property) and that the defendants are holding 10 acres of the Property in trust for her. They also seek a declaration that Angela owns three acres of the Property and that the defendants are holding the three acres in trust for her.

[7] In the initial counterclaim, the defendants sought a declaration that Ernie is the owner of Aristocrat Sales and Service Inc. (Aristocrat), and that the plaintiff, Mary, was

holding the company in trust for him. Ernie sought an order transferring the shares of Aristocrat to himself. He also sought an order for the return of tools and equipment and an order transferring the ownership and shares in Perimeter Drilling Ltd. (Perimeter) to himself. The counterclaim also sought a declaration that Ernie had been wrongfully dismissed by the plaintiffs and that he is entitled to reasonable pay in lieu of notice, etc.

[8] The plaintiffs sought particulars regarding certain portions of the counterclaim. The defendants provided a reply refusing to provide most of the requested particulars (the first set of particulars). The plaintiffs brought a motion to strike the counterclaim. A contested motion was held, which I presided over. The defendants' counterclaim was struck in its entirety but with leave to amend. Brief oral reasons were given at that time.

[9] The counterclaim was amended to vary the relief sought to some extent and provides different and additional details about the allegations in the counterclaim. The additional relief sought in the amended counterclaim includes a declaration that the defendants by counterclaim are unjustly enriched, damages for breach of contract and breach of the trust agreement and constructive trust, and a declaration that Ernie was wrongfully dismissed from his employment.

[10] The plaintiffs served the defendants with a request for particulars, requesting particulars concerning a large number of the allegations in the counterclaim. The defendants replied to the request for particulars refusing to provide most, primarily on the basis that the particulars sought comprise evidence as opposed to material facts (the second set of particulars). The plaintiffs then brought this motion to strike the amended counterclaim.

[11] After the plaintiffs had filed their motion brief, the defendants filed an updated reply to the request for particulars (the third set of particulars). While the plaintiffs objected to me considering the third set of particulars, I have nevertheless done so.

GROUND FOR THE MOTION

[12] The plaintiffs' position is that the amended counterclaim, or the vast majority of it, ought to be struck out without leave to amend because it:

- a) Fails to disclose a reasonable cause of action;
- b) Was brought outside of the applicable limitation period, which is obvious on the face of pleadings/particulars;
- c) Will potentially delaying the fair trial of the within actions including on the basis that the amended counterclaim has no bearing or relationship to the claim;
- d) Is scandalous, frivolous and/or vexatious;
- e) Is an abuse of the process of the court;
- f) Is without merit; and/or
- g) Because the defendants have already had their counterclaim struck out in its entirety with leave to amend once and/or have refused to provide particulars, which may have eliminated the need for any further amendments.

ANGELA AND KRISTA

[13] Before going into a detailed analysis of the various claims alleged in the amended counterclaim, I am first addressing more generally the issue of the counterclaim being brought against Angela and by Krista.

CLAIMS AGAINST ANGELA

[14] Some of the allegations are expressly against Mary. In a few instances, however, the allegations are against "the defendants". There are no material facts pled to show that any cause of action exists against Angela in her personal capacity. The particulars ask in what way Angela was involved in various of the alleged wrongdoings but provide no satisfactory answers.

[15] The amended counterclaim alleges that Ernie was wrongfully dismissed by the plaintiffs. In their request for particulars, the plaintiffs ask for material facts relied upon by Ernie in support of his allegation that he was wrongfully dismissed by Angela. The response was that this is evidence, not material fact.

[16] The amended counterclaim alleges that the plaintiffs were unjustly enriched when Perimeter was sold to another family member inclusive of Ernie's tools and equipment. In their request for particulars, the plaintiffs ask for particulars of Angela's ownership interest in Perimeter. Ernie indicates that Angela is Mary's Power of Attorney and made and continues to make decisions on Mary's behalf.

[17] The particulars ask the basis upon which it is alleged that Angela has been unjustly enriched. The answer is that she has been involved as Mary's Power of Attorney and made decisions with respect to the sale of the business. The particulars also ask the basis upon which it is alleged that Angela benefitted from the sale of Perimeter, the tools and the equipment. The answer is that this is seeking evidence.

CLAIMS BY KRISTA

[18] The counterclaim is brought by Ernie and Krista; however, there are no material facts showing how Krista has any cause of action against the plaintiffs. In their request for particulars the plaintiffs ask for the basis upon which Krista has any claim against the plaintiffs concerning the claims itemized in the amended counterclaim. Their response was:

Krista Deighton is Ernie's spouse and their claim is joint. Your client has included Krista Deighton as one of the defendants on their statement of claim. Your clients have not been able to establish why they included Krista Deighton as one of the defendants.

CONCLUSION

[19] Neither the fact that Krista is Ernie's spouse nor that the plaintiffs' claim is against both of them establishes that there is a reasonable cause of action by Krista against the plaintiffs. There are no material facts setting out any cause of action against Angela or any cause of action by Krista. This was the case in the original counterclaim and has not been cured either by the amended counterclaim or by the three sets of particulars. Accordingly, the amended counterclaim is struck in its entirety against Angela, and Krista ought not to be named as a plaintiff by counterclaim.

COUNTERCLAIM BY ERNIE AGAINST MARY

[20] I will now analyze the motion to strike the amended counterclaim as it relates to allegations by Ernie against Mary. The amended counterclaim alleges several causes of action, which I will address in turn.

THE LAW

[21] My analysis turns primarily on Rule 25.11 of the King's Bench Rules, M.R. 533/88 (the Rules) but also gives consideration to the principle of proportionality set out in Rule 1.04(1.1). Those Rules provide as follows:

Proportionality

1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:

- (a) the nature of the proceeding;
- (b) the amount that is probably at issue in the proceeding;
- (c) the complexity of the issues involved in the proceeding;
- (d) the likely expense of the proceeding to the parties.

STRIKING OUT OR EXPUNGING DOCUMENTS

25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious;
- (c) is an abuse of the process of the court; or
- (d) does not disclose a reasonable cause of action or defence.

CLAIMS RELATING TO ARISTOCRAT AND PERIMETER

[22] Regarding Aristocrat and Perimeter, the causes of action pled in the counterclaim appear to include breach of trust, constructive trust, and breach of contract. While Ernie says he is not alleging that the corporations were gifted to him, the basis of his claim to entitlement to these corporations, or their shares, or the value of their shares, seems to be that they were promised to him by his father before his father died. As it relates to Mary, the basis of the action appears to be that she promised to keep her husband's promise to give them to Ernie and was thereby holding them in trust for Ernie.

[23] The amended counterclaim alleges that Ernie had an agreement with his father that both Perimeter and Aristocrat would be transferred to him. He says that he worked

for both businesses with the understanding and agreement that he would take over ownership of both corporations. In his reply to particulars, he said it was an oral agreement made with his father in August 2011. Ernie was asked for the specific terms of the alleged agreement including the date upon which Perimeter and Aristocrat were to be transferred to him. His answer was:

you are seeking evidence and not material facts. Ernie's father promised that the business would be transferred to Ernie when he passed away. Ernie was part owner of Aristocrat, he was supposed to retain control of his father's shares when he passed away.

[24] Ernie was also asked who the parties were to the alleged agreement that he would take ownership of the companies. In his reply, Ernie said:

I am not sure what you mean by this question. The parties had an oral agreement.

[25] Despite the allegations that there was an agreement with his father that he would take over ownership of both companies, the amended counterclaim also alleges an agreement that Ernie was to receive half of Aristocrat as well as 50 percent of what Aristocrat generated. Ernie refused to answer the question of who made this specific promise, saying that the counterclaim sets out who promised the business to Ernie and that the question is an attempt to gather evidence. He also would not say when the alleged promise was made, but did say that the date he was to receive half the business and 50 percent of what Aristocrat generated was "**upon Ernie's request**".

[26] Ernie alleges that when his father passed away in 2013, that his mother Mary promised and confirmed she would hold Aristocrat in trust for Ernie until he was ready to receive the business. He says that Mary was holding Aristocrat in trust for him.

[27] The plaintiffs asked why Ernie was not ready to receive Aristocrat in 2013 when his father passed away. His answer was:

Ernie after his father passed away, was running the business and he requested to receive the shares but he did not receive those shares. As you may know this is why the parties extensively negotiated these issues from March 2020 to December 2020.

[28] The plaintiffs requested particulars about the alleged trust agreement between Ernie and Mary that she would hold Aristocrat in trust until he was ready to receive the business. Ernie confirmed that the agreement was oral but said that the terms and conditions of the trust agreement are evidence. Ernie said that he did advise Mary that he was ready to receive Aristocrat, but did not answer the question of when he so advised Mary.

[29] Ernie says that in 2020, the plaintiffs sold Perimeter to another family member even though they were aware that there was an agreement between him and his father that the Perimeter ownership must be transferred to him, and even though Mary was holding the business in trust for Ernie.

[30] The plaintiffs also requested particulars about the alleged trust agreement between Ernie and Mary that she held Perimeter in trust for him. His response was:

Mary was aware of the agreement that existed between Ernie and his father – she was holding the business for Ernie.

[31] Ernie also said that the agreement was oral and entered into in 2011. In response to being asked the date upon which Perimeter was to be transferred to him pursuant to the trust agreement, Ernie answered:

there was no specific date as to when the business to be transferred to Ernie. It was of course upon his request. As you may know a trust is designed, and it is an arrangement where trustee holds a property as its nominal owner for the good of one or more beneficiaries.

[32] In his statement of defence, Ernie pleads that any meetings between the parties were to discuss the transfer and sale of Perimeter and to transfer the Aristocrat shares to himself. He pleads that this negotiation took place in 2020 and was well documented.

[33] The law relating to striking a pleading for failure to disclose a reasonable cause of action is well settled and is not in dispute between the parties.

[34] In *Winnipeg (City) v. Caspian Projects Inc. et al*, 2020 MBQB 129, this court sets out the legal test:

87 The legal test for determining whether a statement of claim should be struck out for not disclosing a reasonable cause of action and the rigours attached to that test have been discussed in a number of Manitoba cases. **It is well-established that a claim will only be struck where it is plain and obvious - assuming the facts to be true - that the pleading discloses no reasonable cause of action.** Any such determination requires the Court to conclude that the claim has no reasonable prospect of success. Where a reasonable prospect of success does exist, the matter should be allowed to proceed to trial. See *Rebillard*. The remedy of striking out a pleading for disclosing no reasonable cause of action has been identified as a remedy that should be used "sparingly" as it is reserved for only the "clearest of cases", *Grant v. Winnipeg Regional Health Authority et al.*, 2015 MBCA 44 (CanLII) ("*Grant*") at para. 36. It has also been accepted that the claim "should be read generously notwithstanding any imprecision in the language" (at para. 37). Further, factors like the novelty of the claim or the length and complexity of the issues are not reasons to strike out a pleading. See *Grant* at para. 37. (emphasis added)

[35] For the purpose of considering the motion to strike on the basis of a failure to disclose a reasonable cause of action, no affidavit evidence is to be considered and the facts plead are considered to be true unless they are manifestly incapable of being proven (see *R. v. Imperial Tobacco Canada*, [2011] 3 S.C.R. at para. 22). For this ground, I am considering only the pleadings and the third set of particulars.

[36] In the plaintiffs' motion brief, they make submissions and provide case law in support of their position that there is no cause of action that the corporations or their shares were gifted to Ernie by his father. In his brief, Ernie says that the plaintiffs are conflating the issues of trust and gift and that the amended counterclaim makes no mention of a gift with respect to the shares and values of the corporations. Ernie says he is not alleging that the corporations were gifted to him; instead, he alleges that the businesses were held in trust for him.

[37] In their brief, the defendants say at paragraph 8 that:

It is clear from the amended counterclaim that a trust agreement was entered between Ernie and his late father and his mother that Perimeter, Aristocrat and a lot adjacent to the cottage were held for Ernie in trust.

[38] I disagree with the assertion that it is clear that the amended counterclaim provides for a trust agreement between Ernie, his late father, and his late mother. To the contrary, the pleadings never refer to a trust agreement with Ernie Sr., rather, only refer to a trust agreement with Mary. All references to Ernie Sr. are to agreements between him and Ernie that ownership of the businesses would be transferred to Ernie upon Ernie Sr.'s death.

[39] While Ernie is now saying he does not allege that the corporations were gifted to him, the amended counterclaim claim alleges that Ernie had an agreement with his father that both corporations would be transferred to him, and that there was an agreement that he would take ownership of the corporations (see para. 17 of the amended counterclaim).

[40] I agree with the plaintiffs' submissions that a promise or intention to gift is not enforceable unless or until all steps are taken to perfect a gift. Nothing is pled by Ernie to establish that steps were taken to perfect these gifts. There is nothing more pled in the amended counterclaim beyond a promise by Ernie Sr. to give the corporations to Ernie. A promise to give is not enforceable. (see **63833 Manitoba Corporation v. Cosman's Furniture (1972) Ltd. et al**, 2017 MBQB 15, at para. 60, **McKendry v. McKendry**, 2017 BCCA 48 at paras. 31 to 32, and **Kavanagh v. Lajoie**, 2014 ONCA 187 at paras. 13 to 14).

[41] On the establishment of a trust agreement between Ernie and Mary regarding the shares of Perimeter and Aristocrat, I find that after two sets of counterclaims and three sets of particulars, the defendants have still not disclosed a reasonable cause of action.

[42] The basis for the trust agreement alleged between Ernie and Mary appears to be that a trust was created by Mary agreeing to uphold the agreement between Ernie and Ernie Sr. that ownership of Perimeter and Aristocrat would be transferred to Ernie.

[43] The basis of the allegation that Mary is holding the shares of the two companies in trust for Ernie is an alleged unenforceable promise from his father to gift the shares to him on his father's death in 2013 which he admits in his statement of defence that he was negotiating to purchase in 2020.

[44] Furthermore, Ernie claims he is entitled to damages for unjust enrichment based on Mary holding the shares in Perimeter, presumably pursuant to a constructive trust. However, the requisite elements for a trust are not pled. Nor is the basis for such a trust pled.

[45] As with the alleged promises to gift by Ernie Sr., the material facts seem to plead an alleged promise to gift by Mary, as opposed to a trust. For a finding of a constructive trust, there must be a recognition of a right of property (see ***Horch v. Horch***, 2017 MBCA 97 at para. 75). The pleadings and particulars fall well short of establishing that Ernie has a right to the corporations. Instead, there is nothing more than Mary promising to uphold Ernie Sr.'s promise to give the corporations to Ernie, with nothing pled to establish that Mary herself took any steps to perfect these gifts.

[46] I find that there is no reasonable cause of action pled for breach of trust against Mary and that all portions of the amended counterclaim relating to an alleged trust or breach of trust, including the allegations of a constructive trust ought to be struck.

[47] In addition to there being no reasonable cause of action on the basis of trust, I also find there is no reasonable cause of action for breach of contract. There is only a bald assertion to that effect, without material facts to support that there was any contract, let alone a breach of contract relating to the corporations. In any event, even if there is a reasonable cause of action for a breach of contract, presumably for the breach of the alleged oral agreements with Ernie Sr. that Ernie would receive the shares of Aristocrat and Perimeter on Ernie Sr.'s death, his death was in 2013, such a claim is clearly statute barred.

[48] In addition to there being no reasonable cause of action for breach of trust relating to Perimeter, I also find the claim is frivolous and/or an abuse of process of the court. For those grounds, it is permissible to consider affidavit evidence. The public records at the Companies Office show that Ernie Sr. did not own any Perimeter shares so they were

not his to give Ernie, in trust or otherwise (see the affidavit of Angela Emms sworn June 20, 2023).

[49] Pleadings with no probable justification at law for the claim advanced, or that are certain to fail based on the evidence, have been found to be frivolous and/or an abuse of process. See ***Robertson v. Manitoba Keewatinowi Okimakanak Inc. et al***, 2011 MBCA 4 at para. 17 and ***5976511 Manitoba Ltd. et. al. v. Taylor McCaffrey LLP et. al.***, 2020 MBQB 7 at paras. 43 to 45.

[50] I also find that leave to amend ought not to be granted. After two sets of counterclaims and three sets of particulars, Ernie has still not properly set out a cause of action for the existence of a trust agreement with Mary. He acknowledges that he is not taking the position that the properties were gifted to him. There is no reasonable prospect that the plaintiff will successfully plead the requisite elements of a trust agreement relating to the properties. And, the claim pertaining to Perimeter is frivolous and/or an abuse of process of the court.

CLAIM FOR LAND

[51] In the amended counterclaim, Ernie says he has a claim for loss of land. He pleads that in or around 2007, his father agreed to gift him a piece of family land adjacent to where the family's cottage is built and located. He claims that Mary holds the land in trust and has refused to transfer the title to Ernie.

[52] Ernie was asked for particulars of the loss of land claimed, including a legal description. His answer was:

...a land adjacent to the family cottage was promised to Ernie. Details will be provided when we exchange evidence. For the purpose of being consistent, the lot was set aside for Ernie by his father and the address is 31 Birch Bay, Laurilla subdivision, Pinawa Bay, Lac du Bonnet, MB

[53] Ernie also says the land was allegedly promised to him in early 2007 to late 2008 pursuant to an oral promise and that he was to receive the land upon his request. The plaintiffs asked for particulars of the consideration Ernie gave to his parents for the alleged land. His response was:

...You are seeking evidence. Ernie worked for his family and built and repair th(e)ir cottage, in return the family promised to gift him a lot.

[54] The plaintiffs sought particulars of the allegation that they are holding the land in trust. Ernie advised that the trust agreement was entered into in 2007 and that the oral agreement was that he was to receive the piece of land adjacent to the family cottage that he helped to build. Ernie was asked to provide the date that he asked the plaintiffs to transfer title to him. His response was "**Ernie and his family relationship has been deteriorated since 2020.**" He confirmed that the request to transfer title to him was oral and made to the plaintiffs individually.

[55] In the third set of particulars, Ernie identified the cottage property for the first time. As this was done after the plaintiffs had filed their evidence and brief, they filed a supplemental affidavit of Angela Emms. In Angela's supplemental affidavit, she sets out evidence to show that the property claimed by Ernie was never registered in Ernie Sr.'s name and, therefore, could not have been given to Ernie by Ernie Sr. through a trust or otherwise. Furthermore, and of significance, the affidavit shows that the property at 31 Birch Bay has always belonged to Angela and her husband.

[56] As with the claim relating to Perimeter, I find that the claim for land is frivolous and/or an abuse of process because there is no justification in law for the claim advanced and it is certain to fail based on the evidence produced in Angela's supplemental evidence.

[57] In addition, I find that there is no reasonable cause of action pled with respect to the existence of a trust relating to the land and that, in all the circumstances, no further leave should be granted.

WRONGFUL DISMISSAL AND CLAIMS UNDER THE EMPLOYMENT STANDARDS CODE

[58] Ernie seeks a declaration that he was wrongfully dismissed by the plaintiffs and is entitled to reasonable pay in lieu of notice, including payment for all outstanding pay, overtime, vacation pay, benefits and severance pursuant to the "Manitoba Employment Standards and reasonable notice under the Common Law."

[59] Ernie says he started working part-time for Perimeter in 1987 and that in or around August 2011, his father asked him to take over operation and management of Perimeter. He said that his father and mother agreed to pay for the benefits he gave up leaving employment at Air Canada to take over management and operation of Perimeter. He says he left his employment elsewhere to work for Perimeter and Aristocrat, with the promise that he would acquire the ownership of Perimeter and Aristocrat.

[60] Concerning Perimeter, Ernie states that he was not properly compensated for his time. He says he worked overtime and was never compensated for his overtime hours. He said he worked for Perimeter for 33 years before he was terminated by the plaintiffs.

He says not only did the plaintiffs refuse to transfer the business to him, as agreed, but he was also terminated from his position without proper notice, severance and overtime pay.

[61] The following requests for particulars by the plaintiffs and response by Ernie relate to his claim for wrongful dismissal:

7. As to paragraph 17 please provide particulars of:

. . .
d) Whether the Ernie was an employee of both businesses; **You are seeking Evidence, facts were provided – please respond accordingly.**

e) If Ernie was an employee of either or both of the businesses, the dates upon which he commenced and ceased employment with said businesses; **As stated in the statement of defence and the amended counterclaim, he started working for Perimeter Drilling in 1987 part time and full since 2011. Please read paragraph 21. The date which his employment ended was set out in the counterclaim.**

. . .
12. As to paragraph 24, please provide particulars of:

a) Whether Ernie was an employee or manager of Perimeter when he was terminated; **manager is also an employee who hold a management position. It's a poorly constructed. Please clarify what do you mean.**

b) The date on which Ernie's employment at Perimeter was terminated; **in 2020 when your clients sold the business.**

. . .
16. As to paragraph 30, please provide particulars of:

. . .
d) The work allegedly performed by Ernie for which he did not receive salary or payment for his service.

You are seeking Evidence, facts were provided, please respond accordingly.

17. As to paragraph 31, please provide particulars of:

a) The specific terms of any agreement with Perimeter to pay Ernie overtime; **you are seeking evidence. I am not sure how to answer this question – as you may know the Employment Standard (the law) requires you to pay overtime if you work beyond 40 hours.**

b) Whether any such agreement was oral or written; **employment contract can be both verbal or written, in this case the agreement was oral.**

c) With whom Ernie made the alleged agreement at Perimeter for payment of overtime; **his father and Mary**

d) Whether Ernie was the general manager of Perimeter during the time period that he is claiming entitlement to overtime compensation.

Manager are also employees that they need to be compensated properly.

...

[62] For a number of reasons, I find that Ernie has not established a reasonable cause of action against Mary for wrongful dismissal or any breaches of *The Employment Standards Code*, C.C.S.M. c. E110 (the *Code*).

[63] Ernie is seeking compensation for wrongful dismissal and other employment related relief against Mary in relation to his employment at Perimeter, which is a corporation. There is nothing pled to establish any cause of action against Mary personally for any employment related relief against his employer Perimeter Drilling Ltd.

[64] Ernie seeks relief under the *Code* for the termination of his employment with Perimeter in 2020, which, under the provisions of the *Code*, must be brought within six months for the wage claim and one year for a termination claim (see ss. 96(2) and 142). In any event, the court does not have jurisdiction to hear matters that could properly and ought reasonably to have been heard by the Employment Standards Division under the *Code*. See **4565097 Manitoba Ltd. v. Jagger**, 2004 MBQB 235 at para. 13.

[65] Ernie seeks a declaration that he was wrongfully dismissed from Perimeter and therefore entitled to pay, in lieu of notice and other damages, for a termination that occurred while he claims he was the rightful owner and had taken over the operation and management of Perimeter. The plaintiffs say that allegation necessarily means that Ernie fired himself and makes the claim nonsensical.

[66] However, based on my findings that there is no reasonable cause of action as it relates to ownership of Perimeter, I am not prepared to rule out the possibility of there being a reasonable cause of action relating to wrongful dismissal if it can be properly pled. The alleged wrongful dismissal occurred in March 2020 and is not yet statute barred based on *The Limitations Act*, C.C.S.M. c. L150, including the transition provisions related to the previous *Limitation of Actions Act*.

[67] Nevertheless, it is my decision that leave should not be granted to re-amend the counterclaim for several reasons.

[68] First, Ernie has still not properly pled a reasonable cause of action for wrongful dismissal despite the two counterclaims and three sets of particulars. This has already caused an inordinate delay in the proceedings.

[69] Second, even if there is a reasonable cause of action against Mary, I find that allowing the counterclaim to proceed will prejudice or delay the fair trial of the action, contrary to Rule 25.11(1)(a).

[70] The wrongful dismissal claim is totally unrelated to the plaintiffs' claim of ownership of 13 acres of land currently held by the defendants. I find those claims ought to be the subject matter of a separate claim, to the extent that they are not statute barred and if Ernie can properly plead a cause of action.

[71] To allow the amended counterclaim to proceed, particularly concerning wrongful dismissal, would unnecessarily and vastly expand the scope of discovery of documents, examinations for discovery and the ultimate trial of the action in such a way that would exponentially increase the time and expense required to have the claim heard and

determined. It would not secure the just, most expeditious and least expensive determination of the claim, nor would it be proportionate, rather it would prejudice or delay the fair trial of the main action, contrary to Rules 1.04 and 25.11(1)(a).

[72] As it relates to a potential claim for wrongful dismissal, and particularly because Ernie still has not provided adequate particulars for such a claim, or set out a proper cause of action including how it could have a claim against Mary, it would simply not be proportionate to grant leave to amend.

[73] While the law is clear that a claim should only be struck where it is plain and obvious that it discloses no reasonable cause of action, I consider that in the present case it is still appropriate to strike this counterclaim for all of the reasons described. While the case law identifies the need for this remedy to be used sparingly, the potential prejudice to striking out this portion of the counterclaim is not as significant to this defendant as in other cases, as he is not precluded from bringing a claim on this ground. Rather, I find he is precluded from including it as a matter to be determined along with the plaintiffs' claim because it has no bearing or relationship to the plaintiffs' claim, would cause further inordinate delay of the fair trial of the plaintiffs' action and not be proportionate. On the contrary, it would move the court process into a situation too far removed from the plaintiffs' claim. See ***Grant v. The Attorney General of Manitoba et al***, 2023 MBKB 137 at para. 16.

RECOVERY OF TOOLS AND EQUIPMENT

[74] In the original counterclaim, the defendants sought various forms of relief regarding Ernie's tools and equipment. That included an order for the plaintiffs to return

the tools belonging to Ernie, or in the alternative, to pay Ernie \$50,000 for the tools. The amended counterclaim also seeks an order for interim recovery of equipment and tools, or in the alternative, recovery of assessed value of the equipment in addition to damages for wrongful detention. In the amended counterclaim, Ernie pleads that Perimeter was sold with his tools and equipment and therefore that the plaintiffs have been unjustly enriched.

[75] In the third set of particulars, Ernie says that his employment at Perimeter was terminated in 2020 when the plaintiffs sold the business. He was asked why he did not take his tools and equipment when his employment was terminated and his response was:

That is a very good question which was want your clients to answer as to why they kept my clients tools and refuse to return them to my client. Your firm was involved in negotiations and settlement of this matter in 2020. My client, ernie still waiting for your clients to respond to his requests.

[76] In the amended counterclaim Ernie itemizes the tools and equipment he says were left at Perimeter. He sets out a list of 23 items. Of the 23 items, Ernie alleges that four of them were damaged in a fire in 2007, that Perimeter replaced them through insurance but never compensated Ernie or returned his equipment.

[77] In the amended counterclaim, there is nothing pled to establish a cause of action against Mary for the tools that had been damaged by a fire in 2007. Perhaps Ernie would have had a cause of action then against Perimeter if Perimeter had been unjustly enriched by the insurance proceeds relating to tools he owned. Nevertheless, the claims for recovery or interim recovery of the tools and equipment against Mary have no reasonable

cause of action. Furthermore, any claims relating to compensation for tools damaged in 2007 are clearly statute barred.

[78] As for the claim that Mary was unjustly enriched when she sold the balance of Ernie's tools and equipment in 2020, there might be a reasonable cause of action that is not statute barred. Nevertheless, for the same reasons I set out above regarding wrongful dismissal, I am not granting leave to allow a re-amended counterclaim for this cause of action either.

CONCLUSION

[79] I find that the amended counterclaim ought to be struck in its entirety without leave to amend. While there might be a reasonable cause of action for wrongful dismissal and unjust enrichment relating to some of the tools, I nevertheless find that it would prejudice or delay the fair trial of the main action to allow those as counterclaims to the main action. If Ernie still believes he has a reasonable cause of action in these areas, such claims ought to be the subject matter of a separate claim.

[80] The plaintiffs were successful on the motion and are entitled to costs. If the parties cannot agree on the amount of costs they may speak to the matter.

J. L. Goldenberg
Associate Judge