

CANADA / JUDGMENT

## Anenda Systems Inc. v. AL13 Systems Inc.

2020 BCSC 2077

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

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2020 BCSC 2077 Anenda Systems Inc. v. AL13 Systems Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Anenda Systems Inc. v. AL13 Systems Inc.,

2020 BCSC 2077

Date: 20201229

Docket: S205204

Registry: Vancouver

Between:

Anenda Systems Inc. d.b.a. AL13 Architectural Systems

Plaintiff

And

AL13 Systems Inc.

Defendant

And

Anenda Systems Inc. d.b.a. AL13 Architectural Systems and Keith Borg

Defendants by Counterclaim

Corrected Judgment: The front page of the judgment was corrected on  
February 25, 2021

Before: The Honourable Madam Justice Lindsay M. Lyster

## Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

October 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 29, 2020

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## Introduction

[1] On May 20, 2020, the plaintiff, Anenda Systems Inc. d.b.a. AL13 Architectural Systems (the "Plaintiff"), filed a Notice of Civil Claim against the defendant, AL13 Systems Inc. (the "Defendant"), seeking payment of a debt of approximately \$600,000, which it alleged the Defendant owed on unpaid invoices for building materials.

- [2] On June 30, 2020, the Defendant filed its response to civil claim (the "Original Response"), a third party notice seeking judgment against Keith Borg, and a counterclaim seeking approximately \$7,000,000 in damages and other relief against the Plaintiff arising from allegations of fraud, trademark infringements, passing off, unlawful interference with economic relations, breach of contract, and conspiracy. The parties later agreed to discontinue the third party notice against Mr. Borg on a no costs basis.
- [3] The Plaintiff took the position that the Original Response and counterclaim were inconsistent with the Supreme Court Civil Rules. Correspondence ensued between the parties, in the course of which counsel for the Defendant provided counsel for the Plaintiff an unfiled amended response to civil claim (the "Unfiled Amended Response") and an unfiled amended counterclaim (the "Unfiled Amended Counterclaim"). Those unfiled pleadings did not satisfy the Plaintiff, and further correspondence continued. On August 28, 2020, the Defendant filed an amended response to civil claim (the "Filed Amended Response") and an amended counterclaim (the "Filed Amended Counterclaim").
- [4] The filed amended pleadings did not satisfy the Plaintiff, which brought the present application, by which it seeks to have the Filed Amended Response and Filed Amended Counterclaim struck, with leave to the Defendant to file new pleadings. The Defendant denies that its amended pleadings are deficient and opposes the application.

### Filed Amended Response

- [5] The Plaintiff argues, on several overlapping bases, that the Filed Amended Response is non-compliant with the Rules and fails to disclose a reasonable defence known to law, and should be struck with leave to the Defendant to substitute a response to civil claim that is compliant with the Rules. The Defendant disagrees that its Filed Amended Response is deficient. It submits that taken as whole the Amended Filed Response alleges that the Plaintiff's debt allegations are patently false, and part of its fraudulent scheme against the Defendant.
- [6] Underlying the Plaintiff's entire application is Rule 9-5, which provides that, at "any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document" on a number of grounds. In particular, under Rule 9-5(1)(a), a pleading may be struck if "it discloses no reasonable claim or defence, as the case may be". Under Rule 9-5(1)(b), a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious".
- [7] The Court of Appeal recently discussed the importance of Rule 9-5(1)(a) in *Kindylides v. Does*, 2020 BCCA 330 at para. 28 [Kindylides]:
- [28] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 20 [Imperial Tobacco] the Supreme Court of Canada explained the important housekeeping function provided by a rule of civil procedure such as Rule 9-5(1)(a):

- [20] This promotes two goods -- efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be -- on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
- [8] As the Court of Appeal explained, parties are required to plead the material facts supporting each legal element of its cause of action, or defence, as the case may be: Kindylides at paras. 29-34.
- [9] The Court has broad discretion about the orders it may make if pleadings are found to be non-compliant with the Rules, including striking out, amending or making any other order it considers will further the object of the Rules: Rule 22-7(2).

## **Division 2 - Defendant's Version of Facts: Paragraphs 3-9**

- [10] The Plaintiff submits that paragraphs 3-9 of the Defendant's Filed Amended Response, which constitute the entirety of Division 2 of the Filed Amended Response, are bare denials, and as such are non-compliant with Rules 3-3(2)(a)(ii) and 3-7(15).
- [11] In those paragraphs the Defendant denies being party to a purchase and sale agreement, denies any agreement to buy building materials, denies issuing purchase orders to the Plaintiff, denies the Plaintiff supplied the building materials, denies that the Plaintiff sold the building materials to the Defendant and denies that the Plaintiff incurred expenses on behalf of the Defendant. The only paragraph that contains anything other than the barest of denials is paragraph 7, in which the Defendant denies that "any legitimate invoices were issued" by the Plaintiff to the Defendant [emphasis added]. This seems to imply that invoices, albeit illegitimate ones, may have been issued.
- [12] In support of its position that these paragraphs are not deficient, the Defendant submits that they reflect its position that the allegations made by the Plaintiff are patently false and part of a fraudulent scheme on the Plaintiff's part. It submits that it cannot answer a false allegation with anything other than a denial of that allegation.

- [13] Rule 3-3(2)(a) provides:

Contents of response to civil claim

- (2) A response to civil claim under subrule (1)

- (a) must

- (i) indicate, for each fact set out in Part 1 of the notice of civil claim, whether that fact is
  - (A) admitted,
  - (B) denied, or
  - (C) outside the knowledge of the defendant,
- (ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant's version of that fact, and
- (iii) set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim,

[14] Rule 3-7(15) states that "[i]f a party in a pleading denies an allegation of fact in the previous pleading of the opposing party, the party must not do so evasively but must answer the point of substance."

[15] As Master Baker explained in *Royal Bank of Canada v. Pisani*, 2014 BCSC 761 [Pisani], under the former rules it was sufficient for a defendant to issue a general denial or general traverse of facts alleged by the plaintiff. But:

[12] That has now all changed with Rule 3-3(2), above. The new Rule effectively requires that a defendant respond by way of confession and avoidance. A simple or basic denial of the facts alleged by the plaintiff will no longer suffice as adequate pleading. The risk to such a pleader now . . . - it will run the risk of being struck. . . The clear intent of the new Rule is to require a pleader to address the point or points of substance.

[Emphasis in original.]

[16] In *Royal Bank of Canada v. Roberts*, 2014 BCSC 1797 at paras. 7-8 [Roberts], Master Bouck commented on Pisani, and suggested that striking the claim seemed to be rather a draconian remedy, and that the defendant ought to be given an opportunity to amend their pleadings. The Court of Appeal referred to both Pisani and Roberts with approval in *Creyke v. Creyke*, 2016 BCCA 499 at para. 48.

[17] To all this it might be objected, as the Defendant does here, that if a defendant entirely denies the plaintiff's allegations, nothing more than a bare denial is possible or necessary. Nonetheless, there are no exceptions to this requirement: Kathy Grant & Frederick Irvine, eds, *McLachlin & Taylor British Columbia Practice*, 3d ed (Toronto: LexisNexis Canada, 2006).

[18] I conclude that paragraphs 3-9 of the Filed Amended Response are contrary to Rule 3-3(2)(a) (ii) in that they fail to "concisely set out the defendant's version" of the facts denied. I will deal globally with the appropriate remedy for the various deficiencies in the Filed Amended Response below.

**Division 3 - Additional Facts: Paragraphs 15-30**

- [19] The Plaintiff submits that paragraphs 15-30 of the Filed Amended Response, which constitute the entirety of Division 3, do not set out an objection to the Plaintiff's claim on the grounds of jurisdiction, a denial of the Plaintiff's claim, a submission that if the Plaintiff's claim is true it discloses no cause of action, or a submission that if the Plaintiff's claim is true there are facts that provide a legal justification. In other words, the Plaintiff says that Division 3 fails to disclose a reasonable defence known at law.
- [20] Paragraphs 15-30 of the Filed Amended Response have been copied and pasted nearly verbatim from the Filed Amended Counterclaim.
- [21] The Defendant says in response that these paragraphs provide the factual background that discloses its reasonable defence. It says further that these paragraphs are "at the core of relevancy" in determining the issues raised by the Notice of Civil Claim.
- [22] In these paragraphs, the Defendant alleges that:
- Mr. Borg was a key employee of the Plaintiff, and in a position of trust and a key employee of the Defendant,
  - the Defendant is the beneficial owner and licensee of two registered trademarks in Canada and the U.S. ("V-Line"),
  - the Plaintiff and the Defendant entered into a Licensing Agreement on February 13, 2017, granting the Plaintiff certain rights to use V-Line,
  - Mr. Borg resigned from his positions with the Defendant on June 28, 2019, but remained employed by the Plaintiff,
  - on that same date, the Plaintiff provided the Defendant with notice of the termination of the Licensing Agreement,
  - sometime prior to July 12, 2019, the Plaintiff unlawfully accessed private communications between the Defendant's General Manager and a potential manufacturing partner for V-Line and distributed those communications to its employees and contractors,
  - on July 23, 2019, one of the Plaintiff's directors unlawfully instructed the Defendant's Canadian trademark agent to instruct the Defendant's American trademark agent to submit an application to abandon and withdraw trademark applications for V-Line owned by the Defendant,
  - on August 19, 2019, the Defendant requested that the Plaintiff remove and discontinue the use of any material that would make it appear to the public that the Plaintiff was associated with the Defendant and to immediately deliver to the Defendant any materials related to V-Line, and the Plaintiff failed to do so,

- in June 2020, upon reviewing its balance sheets and bank statements, the Defendant discovered that Mr. Borg, acting either on his own accord or as the Plaintiff's agent, used the Defendant's funds to secretly make numerous unauthorized expenditures for himself or the Plaintiff, amounting to approximately 1.3 million USD. The Defendant calls these the "Fraudulent Expenditures", and
- the Plaintiff continues to profit from the use of V-Line.

[23] In my view, the facts pleaded in paragraphs 15-30 do not disclose a reasonable defence known to law to the Plaintiff's allegation that the Defendant owes it \$600,000 for unpaid invoices. In *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 at 327 (S.C. Chambers), Madam Justice McLachlin (as she then was) held that the mortgagors in that case had failed to raise a defence, but rather had made an independent claim for damages. In doing so, she explained:

A defence is a contention that the plaintiff's claim is not established. It adopts one or more of the following positions:

- i. an objection on grounds of jurisdiction;
- ii. a denial of the plaintiff's allegations (traverse);
- iii. a submission that if the plaintiff's allegations are true they disclose no cause of action (demurrer); and
- iv. a submission that if the plaintiff's allegations are true there are facts which provide a legal justification for the defendant's conduct (confession and avoidance).

A counterclaim, on the other hand, is an independent action raised by a defendant, which, because of the identity of the parties, can conveniently be tried with the plaintiff's claim. While a counterclaim frequently (although not necessarily) arises from the same events as the plaintiff's claim, and while it may result in reduction of the plaintiff's claim, it is in principle an independent action.

[24] Paragraphs 15-30 raise independent claims or claims for damages against the Plaintiff. They do not set out any facts upon which a defence to the Plaintiff's debt claim, as described in the passage just cited, could be established. I therefore conclude that these paragraphs are contrary to Rules 3-3(2)(a)(iii) and 9-5(1)(a).

### Legal Basis - Paragraphs 32-36

[25] The Defendant points to Part 3: Legal Basis of the Filed Amended Response to Claim, and in particular paragraph 32, in support of its position that its pleadings, considered as a whole, are not deficient. In paragraph 32, the Defendant pleads as follows:

32. In response to the Notice of Civil Claim as a whole, AL 13 denies that it owes any amounts to Anenda and states that any alleged purchase orders and invoices were provided as part of Anenda and Borg's scheme to defraud AL13.
- [26] As the Court of Appeal stated in *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 51 [Sandhu], "the requirement to set out the legal basis of the claim is intended to provide a listing of causes of action and reference to statutes that provide the underpinning for a claim." The court went on to refer to "the unsound, but not uncommon, practice of pleading material facts in Part 3: Legal Basis": Sandhu at para. 52. The Defendant points to the fact that in that case, the court indicated that while it had regard primarily to Part 1: Facts to determine whether the causes of action had been properly pleaded, it also considered Part 3: Legal Basis "to fill in any hole in the material facts where such is possible, on the premise that the appellants are now alerted to the factual assertion, and an amendment to relocate the 'fact' could be made without unfairness": Sandhu at para. 52.
- [27] I agree with the Plaintiff that paragraph 32 does not save this otherwise deficient Filed Amended Response. There are no material facts pleaded to support the conclusory statement that any purchase orders or invoices were part of a scheme to defraud the Defendant. There are no material facts pleaded concerning the issuance of fraudulent purchase orders or invoices. The Fraudulent Expenses alleged by the Defendant relate to different matters. It is therefore not just the case that the Defendant has engaged in the unsound practice of pleading material facts in the Legal Basis section; even in the Legal Basis section, it has failed to plead the material facts underlying its allegation that the Plaintiff and Mr. Borg have defrauded it.
- [28] In this regard, I would also refer to Rule 3-7(18), which provides that "if the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and times if applicable, must be stated in the pleading." The essence of the Defendant's position is that it was defrauded by the Plaintiff and Mr. Borg. The Defendant has failed to provide full particulars, with dates and times, of the fraud that it alleges they engaged in.

## Remedy

- [29] I agree with the Plaintiff that the appropriate remedy for the deficiencies I have found in the Filed Amended Response is for it to be struck in its entirety, with leave to the Defendant to file a new response to civil claim drafted in compliance with the relevant rules and this decision within a reasonable time. Given the nature of the deficiencies found, taken together with the multiple iterations of the response to date, it would likely only result in more confusion were the court to attempt to strike out or amend portions of the Filed Amended Response. The Defendant has 21 days from the date of this decision to file a new response to civil claim.

## Filed Amended Counterclaim

Should it be tried separately under Rule 3-4(7.1) or Rule 22-5(7)?

[30] The Plaintiff submits that the Filed Amended Counterclaim should be ordered to be tried separately pursuant to Rule 3-4(7.1). The Defendant says that this part of the application should be considered under Rule 22-5(7), and that the Plaintiff has not established that it would be appropriate to sever the Defendant's counterclaim from the Plaintiff's action.

[31] The Statement of Facts in the Filed Amended Counterclaim is substantively identical to the Additional Facts section of the Amended Filed Response, already summarized at para. 22 above. The Defendant seeks the following relief:

- a declaration that the Plaintiff has infringed on the Defendant's Canadian trademarks,
- a declaration that the Plaintiff is passing off its wares, services or business as the Defendant's,
- an order that the Plaintiff deliver up all materials relating to V-Line,
- an interim, interlocutory and permanent injunction restraining the Plaintiff from infringing on the Defendant's trademarks and marketing the "PANEL SYSTEM" and the "PLANK SYSTEM",
- damages or an accounting and disgorgement of profits made by the Plaintiff and Mr. Borg, and
- exemplary or punitive damages, interest and costs.

[32] In the Legal Basis section, the Defendant alleges fraud by the Plaintiff and Mr. Borg resulting in damages of at least 1.3 million USD. It further alleges trademark infringement relating to V-Line, stating that it "pleads the provisions of the Trademarks Act, R.S.C. 1985, c T-13". It alleges that the Plaintiff has breached the Licensing Agreement. Finally, it alleges that Mr. Borg was in a fiduciary position in relation to the Defendant, and breached his fiduciary duties in making the Fraudulent Expenditures.

[33] The Plaintiff relies upon Rule 3-4(7.1), which provides:

### **Separate trial of counterclaim**

(7.1) If, on the application of a party against whom a counterclaim is made, it appears that the subject matter of the counterclaim ought to be dealt with separately, the court may order that the counterclaim be struck out or tried separately or may make any other order the court considers will further the object of these Supreme Court Civil Rules.

[34] The Defendant relies upon Rule 22-5(7), which states that "[i]f a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the court may so order."

[35] In considering the former Rule 21(13), the predecessor to Rule 3-4(7.1), Justice Johnston wrote that "[w]hile I agree that in the usual circumstances it is preferable to have all the issues among the parties before the court adjudicated, that is subject to an overriding discretion of a trial judge or, in this case, a case management judge, to make such orders as are necessary to ensure that the litigation can proceed efficiently for all parties concerned": Willson, et al v. British Columbia, et al, 2006 BCSC 1436 at para. 53 [Willson]. He concluded

that the issues raised in that case by the counterclaim would unduly complicate the action, and exercised his discretion to strike the provisions of the counterclaim and third party notice, leaving the defendants free to pursue their claims in a separate action.

- [36] In *Voyage Company v. Craster and others*, 1998 CanLII 1776 (B.C.S.C. Chambers) [Voyage], the plaintiff filed a statement of claim alleging that one of the defendants unlawfully took money from it. The defendant filed a statement of defence and counterclaim in which he alleged that he was wrongfully dismissed and sought an oppression remedy. The plaintiff applied under the former Rule 21(13) to strike the part of the counterclaim claiming an oppression remedy. Justice Harvey granted the application. He held that while the wrongful dismissal action could intersect factually with the defalcation action, the oppression remedy raised altogether different questions: Craster at para. 19. He ordered that that part of the counterclaim be stayed pending resolution of the main action: Craster at para. 20.
- [37] Turning to Rule 22-5, the Court of Appeal endorsed the following non-exclusive summary of the key considerations relevant to an application to sever under Rule 22-5 in *Johnston Estate v. Johnston*, 2017 BCCA 59 [Johnston]:
- [46] I would endorse the judge's non-exclusive summary of the key considerations relevant to an application to sever and the general principles governing severance:
- [68] The key factors engaged in a general sense on an application to sever were canvassed in *Schaper v. Sears Canada*, 2000 BCSC 1575 [Schaper] at para. 19:
1. ...the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
  2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the complication, the delay, or the inconvenience alleged by the party applying? If this found [sic], that would strengthen the argument to sever.
  3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.
  4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.
  5. Does the prejudice to the party applying, prejudice based on undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?

- [38] As mentioned above, the Plaintiff submits that Rule 3-4(7.1) is applicable, while the Defendant relies on Rule 22-5(7). Both, on their face, could apply. None of the cases relied upon by either party consider the relationship between the two rules or the circumstances when one or the other might be applicable.
- [39] The Plaintiff submits that on its face, Rule 3-4(7.1) is distinct in its purpose and effect from the narrower Rule 22-5(7), into which it asserts the Defendant is attempting to "shoehorn" the Plaintiff's application. It says that Rule 3-4(7.1) confers a wide discretion on the court to review a counterclaim at the pleadings stage and assess whether it frustrates or furthers the object of the Rules, and to strike the counterclaim, order it be tried separately, or make such other order as will further the object of the Rules. The Plaintiff submits that the issues addressed by Rule 22-5(7) and the case law applying it are different in purpose, scope and effect.
- [40] The Defendant submits that Rule 22-5(7) must also be considered in addition to Rule 3-4(7.1), but offers no submissions in terms of why it, and the case law decided under it, should be considered in preference to that under Rule 3-4(7.1).
- [41] In my view, the application to strike or order that the Filed Amended Counterclaim be heard separately is properly considered under Rule 3-4(7.1). That is the rule that the Plaintiff relied upon in its notice of application, as it was entitled to do. On its face, it is applicable at the pleadings stage, and provides the court with broad discretion, if it considers the subject matter of the counterclaim ought to be dealt with separately, to make any order it considers will further the object of the Rules. I would further observe that the relevant principles under both rules are broadly similar, with the court's discretion to be exercised in accordance with the object of the Rules to secure the just, speedy and inexpensive determination of every proceeding on the merits.
- [42] I turn to the substance of the parties' submissions with respect to whether the subject matter of the Filed Amended Counterclaim ought to be dealt with separately from the Plaintiff's action. The Plaintiff submits that it ought to be because the claims are separate and distinct. The Filed Amended Counterclaim is not a defence to the action, but an independent action. The Plaintiff submits that any overlap is an artificial construct set up by the Defendant to frustrate the Plaintiff's ability to obtain relief under Rule 3-4(7.1). It says that its debt claim is a straightforward commercial claim arising from the provision of physical building materials pursuant to specific purchase orders. By contrast, the Plaintiff says that the Defendant's Filed Amended Counterclaim raises elaborate and complicated claims based on fraud, dishonesty, misappropriation, the infringement of intellectual property rights and breach of contract. The Plaintiff points to the fact its claim is for a debt of \$600,000, favouring an efficient proceeding, while the Defendant seeks at least 7.2 million CAD. The relief sought is disparate, with the Plaintiff seeking strictly monetary relief, while the Defendant seeks a variety of remedies, including permanent injunctive relief. Finally, the Plaintiff submits the Defendant would suffer no prejudice in having its Filed Amended Counterclaim heard separately.

- [43] The Defendant submits in response, relying on Johnston, that the Plaintiff has failed to show that hearing the two claims together would unduly complicate or delay the hearing, or otherwise be inconvenient. It says that that alone should result in the dismissal of the Plaintiff's application. The Defendant goes on to argue that the issues raised are entirely intermingled and connected, and that it makes the most sense, practically and economically, to hear them together. It says that it would suffer significant prejudice by severing the Filed Amended Counterclaim, including significant additional time and expense, the risk of unnecessary duplication of evidence and inconsistent findings by different trial judges, and being deprived of the proper adjudication of the Plaintiff's claim.
- [44] In my view, the Filed Amended Counterclaim ought to be dealt with separately from the Plaintiff's action. The two matters are distinct and, as in Willson and Voyage, raise very different sorts of questions. It is significant, in my view, that even after having been amended, the Filed Amended Counterclaim fails to draw any factual or legal connection between the Plaintiff's debt claim and the Defendant's multifaceted claims of wrongdoing by the Plaintiff. The Defendant alleges that Mr. Borg, either on his own accord or as the Plaintiff's agent, made the Fraudulent Expenditures listed in the Filed Amended Counterclaim, and that in doing so he breached his fiduciary duties to the Defendant. But the Defendant does not allege that those Fraudulent Expenditures were related to the unpaid invoices, which form the sole basis of the Plaintiff's claim. Further, the Defendant's other claims, especially those related to infringement of intellectual property rights and breaches of the Licensing Agreement, are entirely different in kind from the debt claim made by the Plaintiff.
- [45] It would significantly and unduly complicate the adjudication of the Plaintiff's debt claim to have it heard together with the Defendant's much more wide-ranging and complicated claims. The scope of discovery would be unnecessarily broadened to include aspects not connected to the Plaintiff's claim in any way. It may also involve pre-trial procedures that would otherwise be unnecessary for the Plaintiff's action to recover debt. While not determinative, the relative size of the monetary claims made, as well as the much broader kinds of injunctive and other relief sought by the Defendant, also suggest that it would unnecessarily complicate the adjudication of the Plaintiff's claim for it to be heard together with the Defendant's claims.
- [46] I have considered the Defendant's arguments to the contrary, and in particular the concerns it raises about duplicative proceedings and potentially inconsistent results. However, given the lack of any connection drawn in the Defendant's own amended pleadings between the Plaintiff's allegations and its allegations, I am of the view that it is unlikely that there will be significant duplication between the proceedings or that inconsistent results will occur. I also do not accept that the Defendant stands to be prejudiced by an order that its counterclaim be heard separately. The Defendant will be at liberty to pursue that action as and when it deems fit.

[47] I have stated that in my view this application is properly considered under Rule 3-4(7.1). However, were I to apply Rule 22-5(7) and the principles set out by the Court of Appeal in Johnston, I would come to the same conclusion. In my opinion, the Plaintiff has shown that hearing the claims together would unduly complicate, delay or otherwise be inconvenient. Considering the nature of the case, I consider it appropriate to exercise my discretion to order that the Plaintiff's action and the Defendant's counterclaim be heard separately.

Should it be struck under Rule 9-5(1)?

[48] The Plaintiff argues, in the alternative, that the Filed Amended Counterclaim ought to be struck under Rule 9-5(1) on the basis that it in large part discloses no cause of action, is in substance non-compliant with the Rules, and represents an embarrassing pleading that is extremely difficult, if not impossible, to answer. There are several distinct aspects to this part of the Plaintiff's application, including that there is no cause of action for "fraudulent conduct"; the Business Corporations Act, S.B.C. 2002, c. 57 is improperly pleaded; and the claims regarding trademark infringement are so confusing that they are impossible to answer.

[49] The Defendant says in response that the Filed Amended Counterclaim clearly outlines its allegations against the Plaintiff and should not be struck.

[50] The Defendant provided the Plaintiff with a further amended counterclaim on September 30, 2020, asking for the Plaintiff's consent to it being filed (the "Further Amended Counterclaim"). In it, the Defendant seeks to make three amendments in response to some of the concerns raised by the Plaintiff about the Filed Amended Counterclaim. First, paragraph 38 is amended to read:

38. There were no funds owing from AL13 to any of these recipients of the Fraudulent Expenditures, there was no legitimate reason for Borg and/or Anenda or both of them to make the Fraudulent Expenditures on behalf of AL13, Borg and/or Anenda or both of them knew that there was no legitimate reason to make the Fraudulent Expenditures on behalf of AL 13, and Borg and/or Anenda or both of them made the Fraudulent Expenditures without AL 13's authorization.

[51] Second, the Defendant amended paragraph 50 to add references to the specific provisions of the Trademarks Act on which it relies.

[52] Third, the Defendant amended paragraph 71 to remove any reference to the Business Corporations Act.

- [53] The test under Rule 9-5(1)(a) is well known: a claim will be struck only if it is plain and obvious, assuming the facts to be true, that the pleadings disclose no reasonable cause of action: *Oei v. Hui*, 2020 BCCA 214 at para. 14. As stated in *Sandhu* at para. 44, the "[a]uthorities tend to be generous in making available the possibility of amendments to fine tune the pleadings and bring clarification to obscure issues". That is the approach I am going to take to addressing the problems in the Filed Amended Counterclaim.
- [54] The amendments that the Defendant sought the Plaintiff's consent to make go some way to addressing some of the legitimate concerns raised by the Plaintiff. Specifically, the proposed amendments to paragraphs 50 and 71 are appropriate, and should be made. In addition to the sections of the Trademarks Act, referred to in the Defendant's proposed amendment to paragraph 71, it should also refer to s. 4: *Distrimed Inc. v. Dispill Inc.*, 2006 FC 1229 at paras. 61-63.
- [55] There are additional issues that must be addressed by the Defendant in order to rectify its pleadings, which I will address below.
- [56] The Defendant has not yet properly pleaded its allegations of fraud. The removal of "and/or" and its replacement with "or both of them" in paragraph 38 was done to address the fact that "pleading in the form of 'and/or' is itself objectionable": *Interville Development Limited Partnership v. The Owners, Strata Plan BCS2313*, 2017 BCSC 1947 at para. 43 [Interville]. I agree with the Plaintiff, however, that the phrase "or both of them" amounts to the same thing and is also objectionable. If the Defendant believes the Plaintiff, or Mr. Borg, defrauded it, it must clearly plead that against each entity or person it alleges engaged in such misconduct.
- [57] It is not clear on the face of the Defendant's pleadings whether it is pleading civil or equitable fraud. The parties agree that the four elements of civil fraud are as set out by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood on the part of the defendant; (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss. The Plaintiff is correct in its submission that even in the Further Amended Counterclaim, the first element is not pleaded.
- [58] The Defendant submits that its pleading certainly meets the definition of equitable fraud. Both parties referred in this connection to the decision of the Court of Appeal in *Berthin v. Berthin*, 2018 BCCA 57 [Berthin], in which the court held that the judge erred in dismissing a fraud claim on the basis that it disclosed no reasonable cause of action. The court found the judge erred in assessing the pleading against the requisite elements of civil fraud, not equitable fraud: *Berthin* at para. 22. In that regard, the court held that "the error occurred no doubt in part because the notice of civil claim unhelpfully failed to use the phrase 'equitable fraud'". From the fact that the Court of Appeal clearly did not find the plaintiff's failure to use the phrase "equitable fraud" fatal to its pleadings, the Defendant argues that its pleadings are adequate. The Plaintiff counters that now is the time to avoid the errors that

arose in Berthin, and says that the Defendant should simply plead equitable fraud if that is what it is relying on. I agree with the Plaintiff.

- [59] Relying on older authorities such as *Strauss v. Jarvis*, 2007 BCCA 605, which predate the current Rules, the Defendant submits that it does not have to specifically plead the causes of action it relies upon. The Court of Appeal's decision in *Sandhu* makes clear that is no longer the case, stating that "[c]learly the requirement to set out the legal basis of the claim is intended to provide a listing of causes of action and reference to statutes that provide the underpinning for a claim": *Sandhu* at para. 51.
- [60] Earlier in this judgment I referred to Rule 3-7(18), which provides that "[i]f the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and times if applicable, must be stated in the pleading". Even in the Further Amended Counterclaim, the Defendant has not provided full particulars of the fraud that it says the Plaintiff engaged in.
- [61] The Plaintiff notes that in a letter from Defendant's counsel dated September 23, 2020 responding to the Plaintiff's concerns about the Defendant's pleadings, counsel stated that the Defendant's allegations would also give rise to a claim for conversion. The tort of conversion is not pleaded in any version of the Defendant's counterclaim.
- [62] The parties made extensive submissions with respect to the allegations of trademark infringement made by the Defendants in the Filed Amended Counterclaim. The Plaintiff argues that those claims are so confusing as to make it impossible for it to answer them. Among other things, the Plaintiff argues that the Defendant is confusing a trademark claim with a patent claim in relation to the V-Line trademark and the Panel System and Plank System. The Defendant denies this, writing in its application response:
51. To clarify, AL 13 is not claiming any entitlement to the Panel System and Plank System, or the intellectual property rights associated with same. AL 13's claim is that Anenda is using the V-Line trademarks in association with its own business and products, including the Panel System and Plank System, in violation of both the Licensing Agreement and AL 13's trademark rights.
- [63] In my view, the Defendant has adequately pleaded its claims in relation to trademark infringement. The disagreements between the parties with respect to these claims are not really about the adequacy of the Defendant's pleadings, but rather about the merits of its claims. Assuming as I must that the facts pleaded by the Defendant are true, I cannot say that the Defendant's claims of trademark infringement do not disclose a reasonable cause of action. Nor can I say that they are so confusing that it is difficult to understand what is pleaded.
- [64] Given the substantial revisions to the existing Filed Amended Counterclaim that will be necessary to bring it into compliance with the Rules, and that the Defendant's counterclaim will be heard separately from the Plaintiff's action, the most sensible approach is for the

Defendant to be granted leave to file a notice of civil claim. As in Interville at paras. 36-37, the amount of redrafting that will be required is substantial, so it makes sense to proceed in that manner, rather than attempt to revise the existing Filed Amended Counterclaim. The Defendant must ensure that the substance of the amendments discussed to the current paragraphs 50 and 71 are included. It must clearly and fully plead the material facts it relies upon in support of its allegations of fraud against the Plaintiff or Mr. Borg, and make clear in its legal basis whether it is alleging civil or equitable fraud or both, as well as whether it is alleging the tort of conversion or any other additional causes of action.

## Conclusion

- [65] I have granted the Plaintiff's application to strike the Defendant's Filed Amended Response pursuant to Rules 9-5(1)(a) and 3-3(2)(a), with leave to the Defendant to file a new response to civil claim consistent with the Rules and these reasons within 21 days of the date of this decision.
- [66] I have also granted the Plaintiff's application to order that the Defendant's Filed Amended Counterclaim be heard separately pursuant to Rule 3-4(7.1).
- [67] I have identified the deficiencies in the Filed Amended Counterclaim that need to be rectified and have granted the Defendant leave to file a notice of civil claim, which will replace the Filed Amended Counterclaim and must address the deficiencies in it.
- [68] If the parties cannot agree on costs, they may appear before me to speak to costs.

"Lyster J".

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Prepared on 28 October 2026 · Esheria