

CANADA / JUDGMENT

Chen v. Obsidian Advisory Group Inc.

2020 BCSC 1482

COURT

Supreme Court of British Columbia

DECIDED

6 October 2020

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2020 BCSC 1482 Chen v. Obsidian Advisory Group Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chen v. Obsidian Advisory Group Inc.,

2020 BCSC 1482

Date: 20201006

Docket: S192346

Registry: Vancouver

Between:

Yin-Chieh Chen

Plaintiff

And:

Obsidian Advisory Group Inc., Obsidian Insurance Inc., Marilyn deRooy-Pearson, Michael Kowalchuk and Carl Brodie

Defendants

Before: Master Vos

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

T.W. Clifford

Counsel for the Defendants, Obsidian Advisory Group Inc. and Obsidian Insurance Inc.:

R.M. Mennie

Counsel for the Defendants, Marilyn deRooy-Pearson and Michael Kowalchuk:

W.E. Stransky

Counsel for the Defendant, Carl Brodie:

L.C. Morrison

Place and Date of Hearing:

Vancouver, B.C.

July 8, 10 and 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 6, 2020

Introduction

- [1] The corporate defendants seek orders that would require the plaintiff and the defendant, Mr. Brodie, to produce documents. The plaintiff and Mr. Brodie oppose the granting of the orders sought. The defendants, Ms. deRooy-Pearson and Mr. Kowalchuk, take no position with respect to the orders sought.

Background

- [2] The plaintiff, Yin-Chieh Chen, is a businessperson.
- [3] The defendants, Obsidian Advisory Group Inc. ("Obsidian Advisory") and Obsidian Insurance Inc. ("Obsidian Insurance") (collectively "Obsidian", except where identified separately), are federally incorporated companies. Obsidian Advisory is in the business of providing tax, estate and financial planning advice to privately held corporations, professionals and high worth individuals in Canada. Obsidian Insurance provides insurance brokerage services, specializing in life, critical illness and disability insurance.
- [4] The defendant, Marilyn deRooy-Pearson, is a director and shareholder of Obsidian. She is the Chief Financial Officer of Obsidian.
- [5] The defendant, Michael Kowalchuk, is a director and shareholder of Obsidian. He is the Chief Executive Officer of Obsidian.
- [6] The defendant, Carl Brodie, was a director and shareholder of Obsidian. He was the Chief Operating Officer of Obsidian. On March 18, 2019 he resigned from his positions with Obsidian.

- [7] Ms. Chen worked with Obsidian. This lawsuit concerns her claim for compensation she believes is due to her for services she provided to Obsidian.
- [8] Ms. Chen says that on or about October 17, 2017 she entered into an agreement with the defendants. She alleges that the agreement provided that she would be issued a 25% shareholding in Obsidian; would be appointed a director of Obsidian; would be provided compensation, salary and commission in accordance with her strategic input and/or development efforts; and would be involved in the day-to-day operations of Obsidian (Notice of Civil Claim, Part 1, paras. 9-10).
- [9] Ms. Chen alleges the defendants breached the October 17, 2017 agreement. At Part 1, para. 14 of her Notice of Civil Claim, Ms. Chen acknowledges that between September 2017 and January 2019 she received dividends from Obsidian equivalent to a 25% shareholding, but states she did not receive salary, commission or other compensation. At paras. 16-17, she alleges the defendants neglected, or refused, to comply with the terms of the agreement, resulting in a breach of the agreement. At para. 18, she claims the defendants received "a benefit, value or enrichment" because of her efforts to increase Obsidian's revenues and streamline its business. She alleges those efforts increased the value and profitability of Obsidian and increased the value of Obsidian's shares.
- [10] Ms. Chen claims damages for breach of contract or, alternatively, damages based on quantum meruit.
- [11] Obsidian denies the essential elements of Ms. Chen's claims. At Part 1, para. 7 of its Response to Civil Claim, Obsidian denies it entered into an agreement with Ms. Chen whereby it would issue shares to her or appoint her as a director; denies it was unjustly enriched by her efforts; and says she was fully and fairly compensated for the work she did with Obsidian. Obsidian characterizes its October 2017 deal with Ms. Chen as an "Understanding". At para. 15 of its Response to Civil Claim, Obsidian alleges that the "Understanding" provided that if Ms. Chen ". . . achieved the set-up of an alternative fund of funds investment vehicle (the Fund) . . .", and if that Fund came under the direct control and ownership of Obsidian (the "Fund Target"), then Mr. Kowalchuk, Ms. deRooy-Pearson and Mr. Brodie ". . . were prepared to agree to organize Obsidian such that the Plaintiff would be issued 25% of the shares following a proposed reorganization of Obsidian as compensation for creation of the Fund, at which time the Plaintiff would be appointed as a director (the Understanding)". At para. 17, Obsidian states that the plaintiff did not achieve the Fund Target. At para. 18, Obsidian alleges that in February 2019 Ms. Chen advised Mr. Kowalchuk and Ms. deRooy-Pearson that she no longer felt her relationship with Obsidian was working and ". . . thus the Understanding was terminated". At para. 19, Obsidian takes the position that the plaintiff's termination of the "Understanding" ended any obligation it had ". . . to take any additional steps in furtherance of the Understanding".

- [12] Ms. Chen's association with Obsidian appears to have ended in February 2019. She soon was involved in a new business venture. On March 22, 2019 she became a member of the first board of directors of First Democracy Capital Inc., also known as FDP & Co.
- [13] The defendant, Mr. Brodie, formally resigned as a director of Obsidian on March 18, 2019. He joined Ms. Chen at FDP & Co. A screen shot of FDP & Co.'s website taken June 23, 2020 shows Ms. Chen and Mr. Brodie as partners of FDP & Co. (Mr. Kowalchuk's first affidavit, made June 24, 2020, para. 40 and Exhibit "DD").
- [14] On March 22, 2019 Brady IP Inc. was incorporated. A BC Company Summary for Brady IP Inc., dated June 23, 2020, lists Mr. Brodie and Ms. Chen as the only directors for that company (Mr. Kowalchuk's first affidavit, Exhibit "EE").
- [15] Mr. Kowalchuk alleges that FDP & Co. is competitive with Obsidian Advisory and Brady IP Inc. is competitive with Obsidian Insurance (Mr. Kowalchuk's first affidavit, paras. 39 and 41).
- [16] The trial of this action is scheduled for a ten-day hearing starting on April 19, 2021.

The Applications

- [17] Obsidian proceeded with the applications set out at Part 1, paras. 1 (a) and b(i) of its Notice of Application filed June 24, 2020. They are:
1. Orders pursuant to Rules 7-1(1), 7-1(10) and/or 7-1(11) of the Supreme Court Civil Rules ("Rules") that:
 - (a) the Plaintiff, Yin-Chieh Chen ("Chen"), amend her list of documents to list and produce:
 - i. the documents listed in the "Privilege List" enclosed with her counsel's letter dated August 12, 2019 and those demanded by counsel for Obsidian in its letter of October 7, 2019, at paragraphs 1 and 6; and
 - ii. the documents demanded at paragraphs 2-5 and 7-9 in Obsidian's letter dated October 7, 2019 ("Chen Documents");
 - (b) the Defendant, Carl Brodie ("Brodie"), amend his list of documents to list and produce:
 - i. the documents listed in the "Schedule B" to Brodie's List of documents dated October 4, 2019, and those demanded by counsel for Obsidian in its letter of June 17, 2020 at paragraphs 1 and 6; . . .
- [18] The "Privilege List" referred to in para. 1(a)(i) describes documents Ms. Chen has claimed to be privileged from production to the defendants.
- [19] The documents listed in Schedule "B" of Mr. Brodie's list of documents are documents he has claimed to be privileged from production to the defendants.

[20] The remaining applications concern additional documents Obsidian seeks from Ms. Chen and Mr. Brodie.

Positions of the parties

[21] The parties' submissions mainly focussed on Obsidian's applications concerning documents Ms. Chen and Mr. Brodie have claimed to be privileged from production.

[22] Obsidian's application for production of privileged documents relies on allegations set out in its Response to Civil Claim. At Part 1, Division 3, para. 30, Obsidian says that if there was an agreement between it and Ms. Chen, then an implied term of the agreement was that Ms. Chen would act in good faith in relation to the Fund she was to set up, and in relation to Obsidian's business generally. Paragraph 30 alleges that Ms. Chen breached the requirement to act in good faith because she ". . . failed to act in an honest, candid, forthright or reasonable manner in relation to Obsidian". Obsidian sets out the following particulars of Ms. Chen's alleged conduct:

- a. conspiring to undermine Kowalchuk and deRooy-Pearson in relation to Obsidian;
- b. failing to take steps to ensure that the Fund was under the direction and control of Obsidian, rather the Plaintiff attempted to secure the benefits of the Fund for another company for her own personal benefit;
- c. willfully interfering, or causing others to interfere, with the banking arrangements of Obsidian when the Plaintiff knew she lacked authority to do so for the purpose of causing disruption to the business of Obsidian resulting in financial loss and damage to its business relationships;
- d. willfully interfering, or causing others to interfere, with payments properly owing to Obsidian by third parties when the Plaintiff knew she lacked authority to do so for the purpose of causing disruption to the business of Obsidian resulting in financial loss to Obsidian and damage to its business relationships;
- e. actively pursuing clients of Obsidian;
- f. improperly accessing documents of Obsidian and/or Kowalchuk and deRooy-Pearson; and
- g. creating a hostile work environment for Kowalchuk, deRooy-Pearson, and the employees, agents and contractors of Obsidian, resulting in financial loss to Obsidian and damage to its reputation in the industry.

[23] In Part 1, Division 3, para. 31 of its Response to Civil Claim, Obsidian alleges that the claims the plaintiff has presented against it in this action are ". . . baseless, frivolous, vexatious and/or constitute an abuse of process and/or are brought in bad faith, solely to prejudice Obsidian . . ." Particulars of those allegations are set out. They are rather general in nature.

- [24] Obsidian argues that the illegal conduct and abuse of process alleged in paras. 30-31 of its Response to Civil Claim justify production of documents Ms. Chen and Mr. Brodie claim to be privileged.
- [25] Ms. Chen takes the position that her claims of solicitor client privilege and litigation privilege should be maintained. She submits the crime/fraud/illegal conduct exception to privilege only applies if the applicant provides clear and convincing evidence of misconduct. She says Obsidian's evidence does not do so.
- [26] Mr. Brodie submits that Obsidian has not established necessary components of the crime/fraud/illegal activity exception to privilege as Obsidian has not shown that he engaged in illegal conduct and has not demonstrated that his counsel knowingly furthered, or was duped into furthering, illegal activity.

Analysis

- [27] The first part of the application at Part 1, para. 1(a)(i) of Obsidian's Notice of Application concerns the documents on the "Privilege List" the plaintiff's lawyer provided with his letter to Obsidian's counsel dated August 12, 2019 (attached as Exhibit "O" to Ms. Nguyen's third affidavit, made June 24, 2020).
- [28] Ms. Chen asserts solicitor client privilege with respect to documents she sent to or received from her lawyers for this case, MLT Aikins. She claims "solicitor-client privilege/common interest privilege", "litigation privilege", or "litigation privilege/common interest privilege" for the other documents on the list.
- [29] The history of Ms. Chen's relationship with the defendants provides some insight into the disputes that resulted in this application.
- [30] Mr. Brodie initially introduced Ms. Chen to Mr. Kowalchuk and Ms. deRooy-Pearson in 2015. Thereafter, he encouraged Mr. Kowalchuk and Ms. deRooy-Pearson to consider a role for Ms. Chen with Obsidian.
- [31] Ms. Chen eventually went to work with Obsidian.
- [32] In October 2017, Ms. Chen entered into an agreement (according to Ms. Chen) or an understanding (according to Mr. Kowalchuk) with the defendants. She became the Chief Strategic Officer of Obsidian.
- [33] Ms. Chen's relationship with Mr. Kowalchuk and Ms. deRooy-Pearson deteriorated from late 2018 through early 2019.
- [34] On February 19, 2019, Ms. Chen sent an email to Mr. Kowalchuk and Ms. deRooy-Pearson. The email was copied to Mr. Brodie and Mr. Veylan, a lawyer at MLT Aikins. The email is attached as Exhibit "E" of Mr. Kowalchuk's first affidavit. The email was titled "Meeting Tomorrow" and said:

Michael and Marilyn,

It's become apparent to me and the rest of the ecosystem that we are no longer able to work effectively together.

I suggest we meet outside the office as soon as possible to discuss a resolution forward. In the mean time, it is in each of our best interest to keep this private and also to safeguard and close on files in the execution funnel. Anything that is currently in the sales funnel would also continue business as usual to our individual benefit.

I suggest we meet tomorrow afternoon at 2 pm at this law firm:

MLT Aikins LLP

1800 - 355 Burrard Street

Vancouver, B.C.

We should each come prepared to discuss solutions.

Alice

- [35] The meeting suggested by Ms. Chen did not occur. However, Obsidian scheduled a directors' meeting for February 21, 2019. The directors' meeting took place at the offices of Miller Titerle & Company, Obsidian's lawyers for this action. Mr. Brodie attended with his lawyer, Mr. Turner, and participated in the meeting. Ms. Chen and her lawyer attended for the meeting, but were not admitted into the meeting room and did not participate in the meeting.
- [36] Minutes from the February 21, 2019 directors' meeting are attached as Exhibit "E" to Mr. Brodie's first affidavit, made July 3, 2020. There was a proposal to include Mr. Brodie as a signing authority on Obsidian's bank accounts. Mr. Brodie voted against the proposal. It was not adopted. There was a proposal to remove Ms. Chen as a signing authority with Obsidian's bank. The minutes indicate Mr. Brodie did not believe the resolution to remove Ms. Chen as a signing authority was "the best resolution for the company" and voted against it. Mr. Kowalchuk and Ms. deRooy-Pearson voted in favour of the resolution. It passed.
- [37] It is not clear on the materials exactly when Ms. Chen stopped working with Obsidian. It appears to have been about the time she sent her February 19, 2019 email indicating that it was apparent to her that she, Mr. Kowalchuk and Ms. deRooy-Pearson were no longer able to effectively work with each other. Her Notice of Civil Claim was filed on March 4, 2019, about two weeks later.
- [38] Mr. Brodie resigned as a director and Chief Operating Officer of the two Obsidian companies on March 18, 2019 (Mr. Brodie's first affidavit, para. 33). He filed his Response to Civil Claim for this action on June 11, 2019.

- [39] In her first affidavit, made July 2, 2020, Ms. Chen deposes that MLT Aikins is her counsel generally and acted for her with respect to this action (para. 19). At para. 23, Ms. Chen indicates that in January and February 2019 she used her Obsidian email account to communicate with MLT Aikins.
- [40] At para. 25 of her first affidavit, Ms. Chen indicates that from February 2019-April 2019 she also used her Obsidian email account for communications with MLT Aikins, Mr. Brodie and/or his counsel "in obtaining legal advice and preparing for" this action and other litigation. At para. 28 Ms. Chen states that she was locked out of her Obsidian email account on or about April 18, 2019 and was unable to access any documents or emails contained therein.
- [41] On April 18, 2019, Ms. Chen's counsel advised Obsidian's counsel that Ms. Chen had been locked out of her email account at Obsidian and that there were privileged emails in the account. Ms. Chen's emails were extracted from Obsidian's email system and were provided to MLT Aikins on an encrypted USB device.
- [42] Obsidian sought production of documents on the USB device, including documents Ms. Chen claimed to be privileged.
- [43] The general legal principles that apply to claims of privilege were very helpfully explained by Justice Warren in *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795:
- [79] Since the Supreme Court of Canada's decision in *Blank* it has been clear that solicitor client privilege (sometimes referred to as legal advice privilege) and litigation privilege are conceptually distinct. Solicitor client privilege protects confidential communications between a client and a lawyer for the purpose of seeking or providing legal advice, whether or not litigation is pending, whereas litigation privilege protects any communications or other documents created or obtained for the dominant purpose of anticipated litigation. The term "solicitor's brief privilege" is sometimes used to describe the privilege that applies to the work product generated by a lawyer in the course of giving legal advice or preparing for litigation. Thus, "solicitor's brief privilege" is not a conceptually distinct kind of privilege; rather, it describes a particular class of documents (i.e., documents reflecting the application of a lawyer's skill and judgment) over which solicitor client privilege, litigation privilege, or both, applies. I will use the terms solicitor client privilege and litigation privilege to refer to the two kinds of privilege at issue in these applications.
- [80] The purpose of solicitor client privilege is to permit full, free, and frank communication between those who need legal advice and those who are best able to provide it, which is essential to the solicitor client relationship and to the proper functioning of the legal system. Over time solicitor client privilege evolved from a rule of evidence to a fundamental rule of substantive law and a principle of fundamental justice: *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 836 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 20; *Blank* at para. 24. It is as close to absolute as possible: *Blank* at paras. 24-26. It will not be lightly abrogated: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875 (S.C.C.).

- [81] The criteria to establish solicitor client privilege were articulated in Solosky at 837:
- (a) a communication between solicitor and client;
 - (b) for the purpose of seeking or giving of legal advice; and
 - (c) which is intended to be confidential by the parties.
- [82] Not everything said to a lawyer is protected by solicitor client privilege. In particular, a communication with a lawyer for a purpose other than obtaining legal advice does not attract solicitor client privilege: *R v. Campbell*, [1999] 1 S.C.R. 565 at para. 50 (S.C.C.).
- [83] The scope of solicitor client privilege extends beyond the actual requesting or giving of legal advice and includes communications that are part of the continuum of information exchanged, provided the object is the seeking or giving of legal advice: *Canada (Information Commissioner) v. Canada (Minister of Safety and Emergency Preparedness)*, 2013 FCA 104 at para. 28. This continuum of communications includes information furnished by the client to the lawyer related to the advice sought, including purely factual information, and internal memoranda of the client related to the legal advice received and the implications of it: *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24. Communications with third parties may fall within the chain or continuum of communications that are covered by solicitor client privilege provided the third party is essential or integral to the solicitor client relationship: *Greater Vancouver Water District v. Berger AG*, 2015 BCSC 532 at paras. 25-27.
- [84] The purpose of litigation privilege is to ensure the efficacy of the adversarial process by creating a "zone of privacy" that applies to litigation preparation: *Blank* at paras. 27 and 34. It is not absolute or permanent. The protection afforded by it ends when the litigation in question, including related proceedings, has concluded: *Blank* at paras. 36-41.
- [85] The criteria to establish litigation privilege were articulated in *Hamalainen (Committee of) v. Sippola*, [1992] B.C.W.L.D. 144 (C.A.):
- (a) there was a reasonable prospect of litigation at the time the document was created; and
 - (b) the litigation was the dominant purpose for its production.
- [86] As a result, not every document created at a time when litigation was a reasonable prospect attracts litigation privilege. A document created for more than one purpose does not attract litigation privilege unless litigation was the dominant purpose: *Hamalainen* at paras. 23-25. Where litigation was a substantial purpose, but not the dominant purpose, the test is not met: *Blank* at para. 60; *Raj v. Khosravi*, 2015 BCCA 49 at paras. 12-15.
- [87] Although solicitor client privilege and litigation privilege are conceptually distinct, they are both class privileges and, as such, they give rise to a presumption of non-disclosure once the conditions for their application are met. They yield only in clearly defined circumstances and not on a case-by-case balancing of interests. This was emphasized by the Supreme Court

of Canada in relation to solicitor client privilege in *R. v. McClure*, 2001 SCC 14 at para. 35, and in relation to litigation privilege in *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52 at paras. 32-40, and was recently emphasized by the Court of Appeal in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 51. Accordingly, where a claim of solicitor client privilege or litigation privilege is challenged, the court is to identify specific exceptions, which are defined by specific criteria, and not assess whether, in the particular circumstances of the case, the harm flowing from non-disclosure outweighs the benefit accruing from recognition of the privilege: *Lizotte* at para. 41.

- [88] Two well-established exceptions are engaged here. These are what I will refer to as the "crime/fraud exception" and the "Blank exception". Under the crime/fraud exception, communications for the purpose of facilitating the perpetration of a crime or the commission of a fraud are not privileged at all. Whether the scope of the crime/fraud exception extends beyond crimes and frauds to other tortious conduct or to a breach of contract is a question to which I return later. Under the Blank exception, upon a *prima facie* showing of actionable misconduct by a party in relation to the proceedings with respect to which litigation privilege is claimed, the documents in question may be ordered to be disclosed in the originating or in related litigation: *Blank* at paras. 44-45.
- [44] Ms. Chen claims privilege over documents on the "Privilege List" that are communications between her and her lawyers for this action. Those documents are dated from January 26, 2019, about five weeks prior to the commencement of the action. Obsidian argues that Ms. Chen has not sufficiently established privilege for each document.
- [45] The party asserting privilege bears the burden of proving, on a balance of probabilities, the privilege they assert. They must do so for each and every document subject to the claim of privilege and their failure to do so will result in a finding that privilege has not been established: *Huang*, para. 94. This does not mean that it is always necessary to list documents individually. When the documentation is voluminous, it may be helpful to group documents, for example by type, subject or time period: *Huang*, para. 95. However, "this convenience is only available if the description of the documents is exhaustive and the reason for finding the existence or non-existence of privilege applies to the entire class": *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCCA 193 at para. 68, as quoted in *Huang*, para. 95.
- [46] Although these guidelines suggest detailed descriptions should be provided for the grounds of privilege for every document, the general practice is to simply label communications between a party and their lawyer during the time directly before the commencement of the action as solicitor client communications. The assumption is that correspondence between the client and lawyer during the weeks leading up to the initiation of the action would be for advice concerning possible options and matters relating to the litigation. Ms. Chen's evidence supports this assumption. She has deposed that the communications were for legal advice and were for preparation of the very action that the parties are now involved in. Obsidian has not provided evidence that questions or would contradict Ms. Chen's assertion

of solicitor client privilege.

- [147] In the circumstances of this case, the descriptions of the communications between Ms. Chen and her lawyers are adequate to maintain solicitor client privilege.
- [148] Obsidian's attack on the plaintiff's claims of document privilege continues with an argument that all of the documents on the Privilege List should be disclosed because the plaintiff was involved in unlawful conduct. The law to be applied to that argument is set out in the following passages from Huang:
- [172] As already noted, two well-established exceptions to privilege are engaged on this application: the crime/fraud exception and what I have referred to as the Blank exception.
- [173] Under the crime/fraud exception, communications that are criminal or fraudulent themselves or are intended to facilitate criminal or fraudulent activities are not privileged. The Supreme Court of Canada recently clarified in *Lizotte*, at para. 41, that this exception applies both to solicitor client privilege and to litigation privilege.
- [174] The rationale for the crime/fraud exception is that the facilitation of wrongful conduct does not come within the scope of the professional employment of a lawyer. Again, this was explained by the Supreme Court of Canada in *Campbell*, at para. 55, citing *Solosky* at pp. 835-6:

More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

- [175] Although originally recognized in cases concerning criminal conduct, the crime/fraud exception now encompasses wrongful acts that are not necessarily criminal in nature, including tortious conduct: *Goldman, Sachs & Co.*; *McDermott v. McDermott*, 2013 BCSC 534. Silvercorp submits that these cases are wrongly decided and emphasizes commentary warning against expanding the exception to communications made in furtherance of a tort or a breach of contract.
- [176] This Court will only go against its previous decisions if subsequent jurisprudence has affected the validity of the impugned judgment, it is demonstrated that some binding authority was not considered, or the judgment in question was not fully considered: *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.). None of these circumstances apply.

[177] Further, the conclusion of Justice Smith in *Goldman, Sachs & Co.* that the crime/fraud exception extends to torts was grounded in the Supreme Court of Canada's decision in *Campbell*. Justice Smith observed that in *Campbell*, Binnie J. referred to a journal article, "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 Harv. L. Rev. 730, which characterized the exception as applying to both criminal and tortious conduct. He then reasoned:

The conduct in issue in *R. v. Campbell* was criminal conduct. However, the adoption into the analysis by the Court, without qualification, of the words "crime or tort" and "unfounded claims or illegal projects" from the journal article referred to leads, in my opinion, to the conclusions that the Court had in mind the proper delimitation of the scope of the rule and that it does not consider that "unlawful conduct" is confined strictly to criminal or fraudulent conduct.

[178] I agree with that analysis. This view is also shared by the authors of *The Law of Evidence in Canada* at para. 14.89:

There is no reason why this exception to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortious conduct which may not become the subject of criminal proceedings.

[179] It is not necessary, in this case, to consider whether the crime/fraud exception extends to breach of contract. Here, the wrongful conduct in issue is the tort of false imprisonment, which is akin to fraud in terms of moral culpability. It is clear from the authorities referred to above that in this jurisdiction the exception extends at least that far.

[180] In *Goldman, Sachs & Co.*, Justice Smith explained what an applicant must do in order to invoke the crime/fraud exception. There must be some *prima facie* evidence that "gives colour to the charge", but it is not necessary to weigh conflicting evidence and make findings of fact (paras. 20-21). Once that threshold is met the court must then inspect the documents to determine the legitimacy of the claim of privilege (para. 30).

[181] The exception referred to in *Blank* applies to "evidence of the [privilege-holder's] abuse of process or similar blameworthy conduct" (para. 44). Under the *Blank* exception, upon a *prima facie* showing of actionable misconduct in relation to proceedings with respect to which litigation privilege is claimed, the documents in question may be ordered to be disclosed, in either the originating litigation or in related litigation, and the court may review the documents to determine whether they should be disclosed on this ground: *Blank* at para. 45.

[182] The rationale underlying the *Blank* exception is similar to that underlying the crime/fraud exception. Neither solicitor client privilege nor litigation privilege may be raised to mask communications or documentation in furtherance of unlawful conduct. This was observed by the authors of *The Law of Evidence in Canada* at para. 14.219:

Just as solicitor-client privilege cannot be raised to mask communications between a lawyer and client that are for a wrongful purpose, so too litigation privilege cannot be invoked to protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct: "It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day." [Blank at para 44] Disclosure will be ordered upon a prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.

- [183] In the result, there is a significant overlap in the analysis of the crime/fraud exception and the Blank exception because at the core of both is the question of whether privilege is being asserted to mask communications or documents that furthered or facilitated wrongful conduct.
- [49] At the hearing of the application, Obsidian's counsel referred to documents he submitted provide prima facie evidence that "gives colour to the charge" set out at paras. 30-31 of its Response to Civil Claim. The phrase "gives colour to the charge" is a reference to para. 180 of Huang.
- [50] The illegal activity alleged by Obsidian falls within four categories:
- a) Mr. Brodie provided Ms. Chen with "Super Administrator" status in relation to Obsidian's Google "G suite", providing her with unrestricted access to all of Obsidian's email accounts, business information and intellectual property;
 - b) Mr. Brodie and Ms. Chen used Obsidian's confidential information to further their schemes to try to adversely impact Obsidian's business;
 - c) After Ms. Chen ceased to be actively involved in the day-to-day operations of Obsidian (on or about February 19, 2019), Mr. Brodie forwarded confidential Obsidian information to Ms. Chen, thereby breaching his duties to Obsidian;
 - d) Ms. Chen and Mr. Brodie pursued Obsidian's clients, employees and/or contractors for their own gain or the benefit of the business ventures they were involved in after leaving Obsidian.
- [51] At para. 40 of his first affidavit, Mr. Brodie indicates that he made Ms. Chen "Super Administrator" because he no longer wanted to be responsible for that role, for reasons unrelated to his and Ms. Chen's eventual departure from Obsidian.
- [52] Mr. Brodie denies he did anything improper when he provided information to Ms. Chen. Mr. Brodie says that Ms. Chen required access to the confidential information of Obsidian in order to do her job as Chief Strategic Officer of Obsidian and deposes that he, Ms. Chen, Mr. Kowalchuk, and Ms. deRooy-Pearson had the same access to this information (Mr. Brodie's first affidavit, para. 7). He states that he did not have access to any confidential information of Obsidian that Ms. Chen did not also have access to (para. 10). Mr. Brodie argues that the information he provided to Ms. Chen was information she was entitled to in any event. He

says Ms. Chen ranked higher than him at Obsidian and she often delegated the task of locating documents to him (para. 55).

- [53] Obsidian alleges emails Ms. Chen sent to the Royal Bank of Canada (RBC) on February 13, 2019 (asking that she be added as a signatory on Obsidian's accounts) and February 19, 2019 (asking that Mr. Brodie be added as a signatory to Obsidian's accounts) were not authorized by Obsidian and made representations that could compromise Obsidian's control over its financial accounts (emails attached as Exhibits "K" and "M" to Mr. Kowalchuk's first affidavit).
- [54] Mr. Brodie states that he and Ms. Chen already were contingent signatories on Obsidian's accounts with RBC, meaning they would act as signatories if Mr. Kowalchuk or Ms. deRooy-Pearson were incapable of doing so (para. 42 of Mr. Brodie's first affidavit). He says that it was his understanding that Ms. Chen contacted RBC to protect Obsidian's assets from improper withdrawals by Mr. Kowalchuk and Ms. deRooy-Pearson (para. 43).
- [55] Obsidian alleges that emails sent by Ms. Chan and Mr. Brodie suggest they may have indicated to others that there were internal issues at Obsidian and argue that the emails may have been sent to try to manipulate Obsidian's value.
- [56] Mr. Brodie denies that any of the emails in question sought to adversely manipulate Obsidian's value. At para. 48 of his first affidavit, Mr. Brodie says he wanted Obsidian to realize a high percentage of its current revenue, so the value of the company would be maximized, as he hoped that if Obsidian's value was at its maximum, he would be better able to bargain for a higher price if he sold his shares. Mr. Brodie goes on to say that he considered this course of conduct to be in the best interests of Obsidian and himself.
- [57] Obsidian points to an email exchange between Mr. Brodie and Connie Yip as evidence of Mr. Brodie and Ms. Chen conspiring to pursue Obsidian's clients. The email exchange is attached as Exhibit "BB" to Mr. Kowalchuk's first affidavit. They are emails dated March 14 and 15, 2019. They concern a potential meeting between Ms. Chen, Mr. Brodie, Ms. Yip and Dan Lok. Mr. Kowalchuk identifies Mr. Lok as a client of Obsidian at the time (Mr. Kowalchuk's first affidavit, para. 37).
- [58] At para. 48 of his first affidavit, Mr. Brodie denies that he wanted to take any of Obsidian's clients. At para. 62 Mr. Brodie indicates that Ms. Yip and Mr. Lok were close business associates of his; that Ms. Chen had previously advised them that she and Mr. Brodie were leaving Obsidian; that the meeting was arranged to assist Ms. Yip with obtaining a loan; that the purpose of the meeting was social; and that he did not expect more from Ms. Yip and Mr. Lok than "friendly interest".
- [59] Obsidian submits that these matters bring the communications in question within the crime/fraud/illegal activity exception to privilege.

- [60] Counsel for Mr. Brodie submits that the crime/fraud and "Blank exceptions" to privilege Obsidian relies on have been construed narrowly.
- [61] As stated at para. 174 of Huang, the rationale for the crime/fraud exception to privilege is that the facilitation of wrongful conduct does not come within the scope of the professional employment of a lawyer.
- [62] In *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44, at para. 10, the Supreme Court of Canada described the crime/fraud exception as follows:
- . . . The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance . . .
- [63] In *Camp Development Corp. v. South Coast Greater Vancouver Transport Authority*, 2011 BCSC 2011, the court, at para. 28, discussed the stringent requirements to establish the crime/fraud exception. The court indicated that a party seeking to invoke the crime/fraud exception to privilege must show that the client, when consulting the lawyer, knew or should have known that the intended conduct was unlawful. Absent this knowledge requirement, legitimate consultations would be inhibited by the risk that the matter might turn out to be illegal and therefore not privileged. Indeed, counselling against illegal activity is an important part of the lawyer's function. In addition, the conduct contemplated by the client must clearly be wrong. There are many cases where clients seek guidance in relation to proposed conduct whose legality is not plain or apparent. This falls within the legitimate purview of a lawyer's activity.
- [64] Obsidian alleges that Mr. Brodie and Ms. Chen were involved in a conspiracy and other unlawful activities. However, Obsidian has not established that the lawyers acting for Mr. Brodie or Ms. Chen knowingly furthered, or were coerced into furthering, a conspiracy or unlawful activities. Furthermore, Mr. Brodie denies that he and Ms. Chen ever sought to cause damage to Obsidian (Mr. Brodie's first affidavit, para. 24).
- [65] Counsel for Mr. Brodie submits that Obsidian has not met the requirements of the crime/fraud exception to privilege. I agree. The evidence advanced by Obsidian does not establish the crime/fraud/illegal activity exception to the solicitor client and litigation privilege claimed by Mr. Brodie and Ms. Chen.
- [66] As pointed out at para. 182 of Huang, the rationale underlying the Blank exception is that neither solicitor client privilege nor litigation privilege may be raised to mask communications or documentation in furtherance of unlawful conduct. Obsidian has not provided prima facie evidence showing that the communications or documents between Mr. Brodie and his lawyers or Ms. Chen and her lawyers furthered or facilitated wrongful conduct. Put on its strongest basis, Obsidian's pursuit of documents relating to Ms. Chen's and Mr. Brodie's communications with their lawyers is simply a blind hope that those documents might reveal information that supports its theory of illegal activity. It is what is

often referred to as a fishing expedition. The evidence Obsidian relies on with respect to this aspect of its application is nowhere near the proof required to set aside properly established claims of solicitor client and litigation privilege.

- [67] Obsidian's argument that the crime/fraud or "Blank exceptions" to privilege should apply to documents relating to Mr. Brodie's and Ms. Chen's communications with their lawyers must fail.
- [68] Obsidian's final attack on Ms. Chen's claims of privilege is that she waived privilege with respect to all documents she sent to or received from Mr. Brodie.
- [69] Ms. Chen and Mr. Brodie argue they did not waive privilege on documents they sent to each other because those documents are subject to a common interest privilege.
- [70] Waiver of privilege was explained by Justice McLachlin (as she then was) in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.). She wrote:
- [6] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive the privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189.
- [71] Ms. Chen and Mr. Brodie submit that the communications between them are protected by common interest privilege, whereby information that is otherwise privileged is confidentially shared among parties who share a common goal or who seek a common outcome. They rely on *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 at para. 45 for the principle that parties sharing a common interest do not need to be co-parties, as long as they have a common adversary on the same issue or issues.
- [72] Ms. Chen addresses her claim of a common interest privilege in her first affidavit:
38. Prior to the initiation of the within action, both myself and Mr. Brodie anticipated litigation against Obsidian, Mr. Kowalchuk, and/or Ms. deRooy.
39. Both myself and Mr. Brodie were concerned with Mr. Kowalchuk and Ms. deRooy exercising their obligations to Obsidian in a diligent manner. In addition, we were concerned about reimbursement of certain out of pocket expenses we incurred with respect to Obsidian, and also generally, Obsidian complying with the terms of the Agreement and formally appointing me as director, and issuing me shares.
40. As a result, I caused my counsel to initiate the within action, the Chen Small Claims Action, and Mr. Brodie initiated the Derivative Action and the Brodie BCSC Action.

[73] Mr. Brodie is a defendant to this action. The Response to Civil Claim he filed consented to the relief sought by Ms. Chen. He argues that this confirms his common interest with Ms. Chen.

[74] The documents on the Privilege List for which Ms. Chen claims common interest privilege are dated from February 19, 2019 to February 28, 2019.

[75] Ms. Chen's position concerning common interest privilege asserted with respect to these documents is inconsistent. In her first affidavit, she deposes:

23. Between January of 2019 and February of 2019, I used my Obsidian email account to undertake communications with MLT Aikins in obtaining legal advice with respect to a potential reorganization of Obsidian and/or a corporate divorce between myself, Mr. Brodie, Mr. Kowalchuk and Ms. deRooy.

[Underlining added.]

[76] Ms. Chen's indication that she obtained legal advice concerning a potential corporate divorce between herself and Mr. Brodie suggests she and Mr. Brodie may not have fully shared a common goal at that time.

[77] Mr. Brodie's position concerning the common interest privilege he asserts with respect to these documents also is troubling.

[78] Mr. Brodie deposed that he consulted with counsel starting in February 2019. In his first affidavit he states:

16. On or about February 13, 2019, Ms. Chen and I intended to jointly retain Sarvi Veylan, a lawyer at MLT Aikins LLP, in relation to the issues involving Obsidian. There were emails amongst Mr. Veylan, Ms. Chen and myself between approximately February 13 and February 18, 2019 for the purpose of furthering the joint retainer.

...

21. By February 19, 20[19], it was clear to me that the only way to resolve the disputes surrounding Ms. Chen's role with Obsidian was through litigation and that litigation was very likely to occur. Consequently, I retained separate litigation counsel from Ms. Chen on February 19, 20[19], Mr. Turner of Edwards, Kenny & Bray LLP. Ms. Chen continued to be represented by MLT Aikins LLP. I expected that Ms. Chen and I would be aligned in any litigation.

...

23. My communications with my counsel Mr. Turner were for the purpose of obtaining legal advice in relation to the impending litigation and other issues involving Obsidian.

- [79] Although Mr. Brodie says he expected he and Ms. Chen would be aligned in any litigation, he also recognized the need to retain separate counsel. The emails for which Ms. Chen claims common interest privilege are all dated during the time Mr. Brodie still was a shareholder and director of Obsidian, but after Ms. Chen no longer was active there. At para. 32 of her first affidavit, Ms. Chen deposes that the correspondence was created in preparation of this action and other actions against Obsidian. The documents therefore were created before Mr. Brodie resigned from his positions at Obsidian on March 18, 2019 and before he filed his Response to Civil Claim on June 11, 2019, consenting to the relief sought by Ms. Chen. If Mr. Brodie had a common purpose with Ms. Chen in her actions against Obsidian at that time, it is possible that he was not, at the same time, always acting in Obsidian's best interests. Furthermore, Mr. Brodie contends that information he passed on to Ms. Chen in some of these communications was merely information she was entitled to. If that is so, he should not object to produce those documents.
- [80] The evidence presented by Ms. Chen and Mr. Brodie does not support a finding that they were aligned in a common goal or outcome when the documents in question were generated and their claims of common interest privilege must fail. They may have become aligned later, but their evidence concerning their interests and activities during the relevant period is inconsistent with the common interest they allege.
- [81] Obsidian has alleged that Mr. Brodie was conspiring with Ms. Chen to steal Obsidian's clients. The meeting Mr. Brodie and Ms. Chen arranged with Ms. Yip and Mr. Lok lends some credence to the allegation.
- [82] Implied waiver of privilege can occur where fairness and consistency so require. The documents Obsidian seeks are correspondence between Mr. Brodie and Ms. Chen during the time period running from when Ms. Chen was no longer active in Obsidian (about February 19, 2019) to when Mr. Brodie resigned from his positions at Obsidian (March 18, 2019). Mr. Brodie had access to Obsidian's confidential information during this time. These documents may relate to Obsidian's allegation that Ms. Chen and Mr. Brodie were conspiring to undermine Obsidian's business and/or steal their clients. In order for Obsidian to be able to properly discover whether Ms. Chen and Mr. Brodie were involved in these alleged activities, fairness and consistency require that any correspondence between Ms. Chen and Mr. Brodie during this period, and any correspondence attached to those emails, including correspondence from or to lawyers, must be also produced.
- [83] The rest of Obsidian's applications against Ms. Chen are based on provisions in Rule 7-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules").
- [84] Rule 7-1 governs the discovery and inspection of documents in civil actions. It concerns a party's obligation to disclose documents that exist. It does not authorize the creation of documents for the litigation.

- [85] Rule 7-1(1) provides that unless all parties of record consent or the court otherwise orders, each party of record must prepare a list of documents. The list of documents must list all documents that are or have been in the party's possession or control that could, if available, be used by any party of record at trial to prove or disprove a material fact, and all other documents the party intends to refer to at trial. All documents that fit within this definition must be disclosed. There is no requirement that the disclosing party must select documents from a class of documents to suit the opponent's needs.
- [86] It can be expedient for a lawyer seeking documents to send a letter to counsel for the party from whom documents are sought describing the documents the lawyer or party believes should be produced. Sometimes these letters explore what documents or classes of documents may exist. However, if the parties do not agree on the documents that should be disclosed, such letters often do not provide a sufficient basis for an application for disclosure of documents.
- [87] Rules 7-1(10) and (11) enable a party to determine if the other party should disclose documents not listed in the Rule 7-1(1) list of documents.
- [88] Under Rule 7-1(10), a party who has received a list of documents, but believes the list omits documents or a class of documents that should have been disclosed under Rule 7-1(1), may, by written demand, require the party who prepared the list to disclose those additional documents. A demand under Rule 7-1(10) is restricted to documents that should have been disclosed under Rule 7-1(1). As only documents that exist can be disclosed, a party demanding documents pursuant to Rule 7-1(10) should indicate why it believes the documents exist and should be disclosed.
- [89] Rule 7-1(11) can be used when a party has received a list of documents but believes there are additional documents within a listing party's possession, power or control that relate to matters in question in the action. A party seeking documents pursuant to Rule 7-1(11) must provide a written demand identifying the additional documents or classes of documents with reasonable specificity and indicate why the additional documents should be disclosed. The test for disclosure of documents under Rule 7-1(11) is wider than the test in Rule 7-1(1). It is whether the document or class of documents can reasonably be expected to contain information which may enable the party requiring the document to either advance their own case or damage their opponent's case, or which may fairly lead the requesting party to a train of inquiry in relation to either of those consequences: *Global Pacific Concepts Inc. v. Strata Plan NW 141*, 2011 BCSC 1752. The applicant must provide some evidence of the existence and potential relevance of the additional documents: *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166 at para. 8. There are a number of ways to obtain such evidence. Often the parties have been in a relationship and are aware of the documents that would be available. Documents produced during the litigation may refer to other relevant documents. Examinations for discovery can reveal documents that should be disclosed.

- [90] A party who receives a demand pursuant to Rule 7-1(10) or (11), must, within 35 days after receipt, respond by either providing the requested documents or by indicating why those documents are not being made available. If the responding party does not comply with the demand within 35 days, the demanding party may apply for an order requiring disclosure of the additional documents, pursuant to Rule 7-1(13).
- [91] It is obvious that these provisions are designed to counteract speculative demands for documents. While counsel may send correspondence to explore what documents might be available, documents sought on an application need to be clearly identified. It would be wrong for the court to order a party to produce documents that do not exist.
- [92] There can be disputes about the issues on which there must be document disclosure. Occasionally the court is asked to confirm the issues in the proceeding, thereby providing a guide for the discovery process.
- [93] The second part of the application at Part 1, para. 1(a)(i) of Obsidian's Notice of Application seeks production of documents demanded in a letter from Obsidian's lawyer to Ms. Chen's lawyer dated October 7, 2019. A copy of that letter is attached as Exhibit "U" to Ms. Nguyen's third affidavit. The letter presents a demand pursuant to Rule 7-1(10), but the Notice of Application recasts the demand as pursuant to Rule 7-1(10) and/or (11). The documents sought are:
1. Any and all documents related to the Plaintiff's efforts to undermine the authority of Michael Kowalchuk and Marilyn deRooy-Pearson with respect to Obsidian, as outlined at paragraph 30(a) of the Response, including, inter alia, communications and documents exchanged between or among the Plaintiff, Carl Brodie and Joshua deHaan outlining any complaints or criticisms they may have had regarding the management of Obsidian.
 - ...
 6. Documents, including, in particular, correspondence, exchanged between the Plaintiff and Mr. Brodie. We have not been provided with any documents of this nature to date. These documents relate to, inter alia, the Plaintiff's conduct as outlined at paragraphs 30 and 31 of the Response.
- [94] Counsel for Ms. Chen responded to these requests in a letter dated December 3, 2019, attached as Exhibit "V" to Ms. Nguyen's third affidavit. The letter indicates that Ms. Chen refused to produce the documents, claiming they are subject to common interest privilege.
- [95] The demand presented at para. 1 of the letter misconstrues the discovery of documents process. Absent an agreement between the parties, the plaintiff cannot be required to assess documents to fit an argument Obsidian wishes to advance against her, rather than disclose documents within the categories specified by Rules 7-1(10) and (11). The demand does not sufficiently indicate why any documents the plaintiff may have exchanged with Mr. deHaan, a person who is not a party to this action, relate to a matter in question in the action. The demand with respect to Ms. Chen's correspondence with Mr. Brodie overlaps with the

demand at para. 6 of the letter. The application relating to the demand in para. 1 of the letter is dismissed.

[96] The demand presented at para. 6 of Obsidian's letter seeks production of all correspondence exchanged between Ms. Chen and Mr. Brodie. Their claim of common interest privilege has failed. Documents relating to communications between Ms. Chen and Mr. Brodie are potentially relevant to the matters in question in the action and are to be produced to Obsidian. The application relating to the demand in para. 6 of the letter is granted.

[97] Obsidian's third set of applications with respect to Ms. Chen are set out at Part 1, para. 1(a) (ii) of Obsidian's Notice of Application. The demands are at paras. 2-5 and 7-9 of Obsidian's counsel's October 7, 2019 letter to Ms. Chen's counsel (Exhibit "U" to Ms. Nguyen's third affidavit) They are:

...

2. Any and all documents related to the Plaintiff's attempting to ensure that the Fund came under the direction of Obsidian as outlined at paragraph 30(b) of the Response, including, inter alia:
 - a. any and all documents related to the Plaintiff attempting to secure the benefits of the Fund for other businesses, including FDP & Company; and
 - b. communications and documents exchanged between or among the Plaintiff, Mr. Brodie, Mr. deHaan, Simran Kang and Marcus Xu concerning the Fund.
3. Any and all documents related to the Plaintiff's communications with RBC Bank concerning Obsidian's banking arrangements as outlined at paragraph 30(c) of the Response, including, inter alia, the Plaintiff's communications with personnel of RBC Bank and/or communications with any other individuals concerning her communications with RBC Bank.
4. Any and all documents related to the Plaintiff interfering, or causing others to interfere, with payments properly owing between Obsidian and third parties as outlined at paragraph 30(d) of the Response.
5. Any and all documents related to the Plaintiff improperly accessing documents or documents exchanged by Mr. Kowalchuk and Ms. deRooy-Pearson as outlined at paragraph 30(e) of the Response, including, inter alia, documents shared with the Plaintiff and Mr. deHaan and Mr. Brodie beginning in or about January 2019.

...

7. Comprehensive disclosure, including (without limitation), all emails, WeChat messages and text messages between the plaintiff and any individual, with respect to the timing, origination, creation and/or business intentions of FDP & Company. These documents relate to, inter alia, the Plaintiff's conduct as outlined at paragraphs 30 and 31 of the Response. For

clarity, please ensure the Plaintiff provides all text messages and email communications, including those from her personal phone and email account(s) or those of any of the Plaintiff's companies.

8. Any and all documents related to any discussions in connection with FDP & Company between or among the Plaintiff, Mr. Brodie, Mr. deHaan or Ms. Kang and any customers or clients of Obsidian. This request relates to, inter alia, the Plaintiff's conduct outlined at paragraphs 30 and 31 of the Response, and, in particular, paragraph 30(e) of the Response.
9. Any and all documents related to the Plaintiff either hiring or managing Obsidian employees. This request includes any and all documents outlining the Plaintiff's efforts to hire, develop and retain employees including, but not limited to, Mackenzie Byers, Ms. Paerhati, Jeremy Wiebe, Ms. Kang and Winnie Feng.

[98] Ms. Chen's counsel provided the following response to those requests in his December 3, 2019 letter (Exhibit "V" to Ms. Nguyen's third affidavit):

In response to paragraphs 2 to 5, and 7 to 9, we note that none of the Defendants have made claims for set-off, nor have they filed a counterclaim seeking damages. As a result, it is our position that any alleged damages or economic loss which Obsidian or any of the other Defendants supposedly suffered is not at issue. Therefore, any such documents, if in existence, related to proving or disproving alleged damages or interference with Obsidian's business are not relevant to the claims in issue.

[99] The demand presented at para. 2 of Obsidian's October 7, 2019 letter does not comply with Rule 7-1(10) or (11). Absent an agreement between the parties, the plaintiff cannot be required to assess documents to fit an argument Obsidian wishes to advance concerning whether she took appropriate measures in relation to the Fund. However, the plaintiff's response, that documents relating to this matter would not be relevant to any claim in issue, cannot be upheld. Matters relating to the Fund are in question in the action. The application is not granted as presented, but Ms. Chen is to disclose all documents in her possession, power or control relating to her dealings with regulatory authorities and potential investors concerning the Fund described in Part 1, Division 2, para. 15 of Obsidian's Response to Civil Claim.

[100] The demand presented at para. 3 of Obsidian's October 7, 2019 letter is too broad. The plaintiff's response, that the documents would not be relevant to any claim in issue, cannot be upheld. Matters concerning Obsidian's bank accounts are clearly put in issue by Obsidian's Response to Civil Claim. Ms. Chen is to disclose all documents in her possession, power or control relating to Obsidian's banking arrangements with the RBC Bank. The additional requirement that Ms. Chen disclose ". . . communications with any other individuals concerning her communications with RBC Bank" is not granted. It is too vague and Obsidian has not established that such documents may relate to a matter in question in the action.

- [101] The demand presented at para. 4 of Obsidian's October 7, 2019 reads like a request that the plaintiff collect documents from her own and other sources and determine if they fall within limited parameters set out by Obsidian, in order to assist Obsidian in proving an allegation against her. The plaintiff cannot be compelled to curate the documents for Obsidian's convenience. However, the demand does touch on a matter in issue in the action. The application is not granted as presented, but Ms. Chen is to disclose all documents in her possession, power or control relating to her dealings with any of Obsidian's clients concerning payments for services provided by Obsidian.
- [102] The demand presented at para. 5 of Obsidian's October 7, 2019 letter seeks production of documents relating to the plaintiff "improperly" accessing Obsidian documents. The demand requires the plaintiff to assess if she improperly accessed Obsidian documents. This is a misapplication of the document discovery process under Rule 7-1. This application is dismissed.
- [103] The demand presented at para. 7 of Obsidian's October 7, 2019 letter seeks production of documents from multiple sources. The reference to conduct outlined in paragraphs 30-31 of Obsidian's Response to Civil Claim is not sufficient as there are no allegations against FDP & Co. in those paragraphs. The demand is overly broad and does not comply with Rule 7-1(10) or (11) as it does not specify why Obsidian believes the requested documents would relate to a matter in question in the action or sufficiently indicate why the documents should be disclosed. The demand is nothing more than a general exploration of documents that might exist. This application is dismissed.
- [104] The demand presented at para. 8 of Obsidian's October 7, 2019 letter is too broad and does not specify why Obsidian believes the requested documents would relate to a matter in question in the action or sufficiently indicate why the documents should be disclosed. The demand does, however, suggest an issue on which there should be document disclosure. The application is not granted as presented, but Ms. Chen is to disclose correspondence in her possession, power or control between herself and any client of Obsidian who moved their account from Obsidian to FDP & Co.
- [105] The demand presented at para. 9 of Obsidian's October 7, 2019 letter seeks documents relating to the plaintiff hiring or managing people employed by Obsidian. The demand is overly broad and does not comply with Rule 7-1(10) or (11) as it does not specify why Obsidian believes the requested documents would relate to a matter in question in the action. The demand is nothing more than a general exploration of documents that might exist. This application is dismissed.
- [106] The application at Part 1, para. 1(b) of Obsidian's Notice of Application seeks production of the documents listed in Schedule "B" to Mr. Brodie's list of documents dated October 4, 2019. A copy of that list of documents is attached as Exhibit "T" to Ms. Nguyen's third affidavit.

- [107] Mr. Brodie's application response explains that, by agreement of the parties, privileged communications sent or received by Mr. Brodie on his Obsidian email were extracted from Obsidian's email system by an IT company and provided to counsel for Mr. Brodie without having been reviewed by Obsidian. The privileged emails recovered through this process are the documents listed in Schedule "B" to Mr. Brodie's list of documents. Obsidian's application seeks production of all those documents.
- [108] It is apparent that Schedule "B" to Mr. Brodie's list of documents includes some documents set out in the "Privilege List" Ms. Chen's counsel provided with his letter to Obsidian dated August 12, 2019.
- [109] The analysis above with respect to Ms. Chen's claims of privilege on her correspondence with her lawyers for this action applies here as well. Mr. Brodie has properly claimed solicitor client privilege with respect to communications between himself and his counsel for this action. Mr. Brodie has not provided detailed descriptions of the grounds for privilege for each document, but he has established that his communications with his lawyers at Edwards Kenney & Bray were communications between a party and their lawyer during the time directly before, and after, the commencement of the action. Obsidian's materials fall well short of dislodging the general rule whereby solicitor client privilege "is created and maintained as close to absolute as possible". Obsidian's application for production of solicitor client communications between Mr. Brodie and his lawyers for this action is dismissed.
- [110] Similarly, Obsidian's application for production of documents exchanged between Mr. Brodie and his lawyers for this action for which litigation privilege is claimed must be dismissed. Mr. Brodie is entitled to have privileged communications with his lawyers concerning this litigation. The allegations and arguments presented on behalf of Obsidian on this application do not come close to the proof required to displace this fundamental privilege.
- [111] As discussed with respect to the applications concerning Ms. Chen's documents, Obsidian should have the opportunity to properly discover whether Mr. Brodie and Ms. Chen were involved in conspiratorial activities during the period leading up to and just after their departure from Obsidian. Fairness and consistency require that any correspondence between Mr. Brodie and Ms. Chen during that time, including correspondence extracted from their email accounts at Obsidian, must be produced. Obsidian's application for production of all documents in Schedule "B" on which common interest privilege is claimed, regardless of whether the underlying privilege is solicitor client privilege or litigation privilege, is granted.
- [112] The application at Part 1, para. 1(b) of Obsidian's Notice of Application also seeks documents demanded in paras. 1 and 6 of Obsidian's lawyer's letter to Mr. Brodie's lawyer dated June 17, 2020. Those demands were made pursuant to Rule 7-1(10). They are:

1. Any and all documents related to the Plaintiff's efforts to undermine the authority of Michael Kowalchuk and Marilyn deRooy-Pearson with respect to Obsidian, as outlined at paragraph 30(a) of the Response, including, without limitation, communications and documents exchanged between or among Brodie, the Plaintiff and Joshua deHaan.
 - ...
 6. Documents, including, in particular, correspondence, exchanged between Brodie and the Plaintiff. We have not been provided with any documents of this nature to date. These documents relate to, inter alia, the Plaintiff's conduct as outlined at paragraphs 30 and 31 of the Response.
- [113] At Part 5, para. 1 of his application response Mr. Brodie states that Obsidian is not entitled to an order for production of these documents because 35 days has not elapsed since the demand was presented. This is correct. The application seeking an order for production of documents requested in paras. 1 and 6 of Obsidian's counsel's June 17, 2020 is dismissed.

Result

- [114] The application at Part 1, para. 1(a)(i) of Obsidian's Notice of Application refers to a "Privilege List" enclosed with a letter from MLT dated August 12, 2019 (Exhibit "O" to Ms. Nguyen's third affidavit). The application is dismissed with respect to all documents on which solicitor client privilege and litigation privilege are claimed. The application is granted with respect to all documents on which common interest privilege is claimed, and attachments to those documents, regardless of whether the underlying privilege is solicitor client privilege or litigation privilege.
- [115] The application at Part 1, para. 1(a)(i) of Obsidian's Notice of Application concerning documents demanded in para. 1 of Obsidian's lawyer's letter to plaintiff's counsel dated October 7, 2019 is dismissed and the application concerning documents demanded at para. 6 of that letter is granted.
- [116] The applications at Part 1, para. 1(a)(ii) of Obsidian's Notice of Application are determined as set out above.
- [117] The application at Part 1, para. 1(a)(b)(i) of Obsidian's Notice of Application refers to Schedule "B" of Mr. Brodie's list of documents. The application is dismissed with respect to all documents on which solicitor client privilege and litigation privilege are claimed. The application is granted with respect to all documents on which common interest privilege is claimed, and attachments to those documents, regardless of whether the underlying privilege is solicitor client privilege or litigation privilege.
- [118] The application at Part 1, para. 1(a)(b)(ii) of Obsidian's Notice of Application is dismissed.

Costs

- [119] Obsidian, Ms. Chen and Mr. Brodie each claim costs with respect to this application.
- [120] Unless the court otherwise orders, costs relating to an application are to be determined pursuant to Rule 14-1(12). Under that rule, the award of costs depends on whether the application is granted or refused. Here part of the application was granted and part of it was refused. There also are other factors that should be considered with respect to costs.
- [121] Obsidian originally estimated it would take three-and-a-half hours for the hearing of this application. The application was set for a one day hearing. Two large binders of evidence were filed and three volumes of case authorities were provided. It is unrealistic to believe that the court could hear the submissions of four counsel and consider their arguments on such a large volume of evidence and case authority in such a short period of time. The hearing took three full days of court time. As the Chief Justice indicated in *Sangha v. Deol*, 2018 BCSC 2267, counsel are to be discouraged from underestimating the time required for the hearing of their applications. The court can refuse to award of costs where such conduct occurs.
- [122] Document production is a fundamental component of litigation. Issues relating to document disclosure should be worked out between counsel without need for court intervention. In addition, parties are to be encouraged to reduce the matters in issue on any application. On this application, the plaintiff and Mr. Brodie opposed all orders sought by Obsidian. Although it is well within the right of a litigant to take the "fight everything" stance in response to an application, she or he can not do so with impunity. Contesting every issue is not consistent with conducting the proceeding in ways that are proportionate to the importance or complexity of the issues in dispute and inevitably extends the time required for the hearing.
- [123] The defendants, Mr. Kowalchuk and Ms. deRooy-Pearson did not file an application response in relation to the application. Their counsel made brief submissions at the hearing, fully supporting Obsidian's position on all matters.
- [124] In all the circumstances, the appropriate order, and the order that will go, is that each party will bear their own costs in relation to this application.

"Master Vos"

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