

CANADA / JUDGMENT

Gross v. Peak Products Manufacturing Inc.

2022 BCSC 861

COURT

Supreme Court of British Columbia

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2022 BCSC 861 Gross v. Peak Products Manufacturing Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gross v. Peak Products Manufacturing Inc.,

2022 BCSC 861

Date: 20220524

Docket: S213994

Registry: Vancouver

Between:

Phil Gross

Plaintiff

And

Peak Products Manufacturing Inc., Peak Products International Inc.,

Peak Innovations Inc., Peak Products America Inc., Peak

Products USA Corporation, Peak RSG Services Inc., Peak Products

Corporation, Peak Products Industries Inc., Peak Products

Industrial Inc., Mountaintop Holdings Inc., 561885 BC Ltd.,

Synergize Innovations Inc., West Coast Summit Holdings, Peak

Installations Inc., H2Go Installations Inc., OnPoint Compliance

Solutions Inc., Superspike Inc., Synergize International Inc.,

6191533 Canada Inc., 6251242 Canada Inc., 7260326 Canada Inc.,
7259158 Canada Incorporated, 7258356 Canada Inc., 6504558 Canada Inc.,
Peak Products Pty. Ltd., Synergize Incorporated, and All Corporations
and Entities, Wherever Situated, Captured by the February 1992 Agreement
(Individually and collectively referred to as the "Peak Group of
Companies") and John Anthony Gross aka John Gross
Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgments

Counsel for the Plaintiff:

W.G. Wharton

Counsel for the Defendants via videoconference:

I.G. Nathanson, Q.C.

E. X. Chen, Articled Student

Place and Dates of Hearing:

Vancouver, B.C.

April 6 - 7, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 24, 2022

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Overview

- [1] This case involves a dispute between two brothers. Since the plaintiff, Phil Gross, and the individual defendant, John Gross, have the same surname I will refer to them as the plaintiff and the individual defendant throughout this decision. The defendants include the individual defendant and the Peak Group of Companies (the "corporate defendants"). I note that the plaintiff is a defendant by way of counterclaim and the defendants are plaintiffs by way of counterclaim. I do not refer to the parties by their counterclaim status in these Reasons.
- [2] The parties have a number of applications before this Court. The parties agreed we only had time to deal with two applications. The other applications were adjourned.
- [3] These are the two applications before me:
- a) The plaintiff brings an application to strike the defendants' counterclaim in its entirety and to strike paragraphs 8 to 15 of the defendants' response to amended notice of civil claim.
 - b) The defendants have a cross application seeking a declaration that the plaintiff waived privilege when it referred to instructions provided to legal counsel in its November 10, 2021 notice of application.
- [4] For the reasons that follow, the application to strike the counterclaim under both R. 9-5 and 9-6 is dismissed. The application to strike paragraphs 8 to 15 of the response to amended notice of civil claim under R. 9-5 is also dismissed. Lastly, the application for a declaration that the plaintiff waived privilege is also dismissed.

Background Facts

- [5] The facts relevant to these applications are largely not in dispute. How these facts should be treated is very much in dispute.

- [6] The plaintiff and the individual defendant are brothers. The individual defendant controls the corporate defendants. On March 29, 2021, plaintiff's counsel sent a demand letter to the individual defendant regarding an alleged asset sharing agreement entered into between the brothers in February 1992 (the "March 29, 2021 Demand Letter"). The asset sharing agreement had been drafted by Mr. Shawn Hatch, a solicitor. No response was received from the individual defendant.
- [7] Farris LLP is the Registered and Records office for the corporate defendants. On April 8, 2021, plaintiff's counsel wrote to Farris LLP, enclosing a copy of the March 29, 2021 Demand Letter, and advising Farris LLP that he had not received a response to the Demand Letter. In this April 8, 2021 letter, plaintiff's counsel also included an unfiled notice of civil claim and advised Farris LLP that in the event that there was no response from the defendants by April 15, 2021, the unfiled notice of civil claim would be filed in BC Supreme Court (the "April 8, 2021 Letter"). The unfiled notice of civil claim named the individual and corporate defendants as defendants.
- [8] On April 14, 2021, defendants' counsel emailed counsel for the plaintiff and advised that he had been retained as counsel for the individual defendant and the corporate defendants. He requested a copy of the alleged agreement between the brothers.
- [9] On April 15, 2021, counsel for the plaintiff wrote to counsel for the defendants and enclosed a copy of the alleged agreement between the brothers. He advised counsel for the defendants that he anticipated having the filed notice of civil claim in short order and he would provide him with a filed copy as soon as it was available.
- [10] On April 22, 2021, the notice of civil claim was filed and delivered to defendants' counsel. In summary, the relief sought by the plaintiff against the corporate defendants is as follows:
- a) 50% of the shares in the companies;
 - b) injunctive relief against
 - i. the individual defendant,
 - ii. the companies,
 - iii. Home Depot (a major purchaser of Peak's products), and
 - iv. the companies' bank, RBC; and
 - c) the appointment of a receiver/manager.
- [11] The defendants contend that the amended notice of civil claim threatens the continuation of the businesses run by the corporate defendants and controlled by the individual defendant.

- [12] On May 21, 2021, the defendants filed an application seeking to strike certain paragraphs of the notice of civil claim filed April 22, 2021. The defendants relied on R. 3-1(2), 3-3, 3-7(1), 9-5(1), and 14-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [the "Rules"]. The defendants also sought special costs against the plaintiff.
- [13] On June 3, 2021, the plaintiff filed a response to the defendants' May 21, 2021 notice of application.
- [14] On August 30, 2021, Justice Tammen heard the defendants' application to strike portions of the notice of civil claim. On September 16, 2021, Tammen J., in oral Reasons for Judgment, struck certain paragraphs of the notice of civil claim as being unnecessary. He found that even though the facts were potentially relevant at trial, they were not material: *Gross v. Peak Products Manufacturing Inc.*, 2021 BCSC 2016. As he reasoned:
- [6] At the core of this litigation is an alleged agreement between the brothers in February 1992 that any building supply company started by either of them would be jointly owned and the profits equally divided. The plaintiff says the brothers made the agreement at a time when a manufacturing business founded and run by their father, Bill Gross Sr., was foundering, facing bankruptcy and subject to various creditor claims and enforcement proceedings. Both brothers had been involved in that business over the years, including a lengthy stint by the defendant as president and general manager. Both brothers were named in litigation involving the family business.
- []
- [13] There are numerous facts pled in relation to the death or illness of both parents of the brothers, which may prove to be tangentially relevant to the core issues, but are certainly not material facts. Paragraphs 61-87 of the NOCC set out claims of fiscal extravagance and mismanagement against the defendant while he was general manager of the family business, leading to mass exodus of staff and regulatory enforcement proceedings by Canada Customs. Such facts are potentially relevant but are not material.
- [15] On September 21, 2021, pursuant to the Order of Tammen J., the plaintiff filed an amended notice of civil claim.
- [16] On October 27, 2021, the defendants filed a response to the amended notice of civil claim.
- [17] In the defendants' response to the amended notice of civil claim, the defendants stated the following:
10. The letters dated March 29 and April 8, 2021, including the unfiled Notice of Civil Claim, were an attempt by the plaintiff to unlawfully extort funds from John Gross, prior to the commencement of any action, by seeking to threaten and damage his personal and business reputation with his business associates, the directors of companies with whom he had associations, and his relationships with the internal and external stakeholders of the defendant corporations.

11. The plaintiff delivered the March 29, 2021, letter to John Gross on March 30, 2021 and the unfiled Notice of Civil Claim to Farris LLP on April 8, 2021, knowing that they asserted allegations about the existence and breach of an Alleged Agreement which were untrue, for the purpose of deliberately seeking to damage the reputation of John Gross in order to extort funds from him in return for the plaintiff agreeing not to file the unfiled Notice of Civil Claim.
 12. The said letters, including the unfiled Notice of Civil Claim, were an attempt to, and did, interfere with the business relationships of John Gross and the corporate defendants.
 13. The unfiled Notice of Civil Claim delivered to Farris LLP on April 8, 2021 contained allegations at paragraphs 149-155 and 206-209 which were defamatory of John Gross and which were known to the plaintiff to be irrelevant to the contract alleged by the plaintiff.
 14. Pursuant to the Order of Mr. Justice Tammen dated September 16, 2021, many of the paragraphs contained in the unfiled Notice of Civil Claim, also contained in the original filed Notice of Civil Claim, were struck from the filed Notice of Civil Claim.
 15. As a consequence of the conduct of the plaintiff as set out herein, the defendants have suffered loss and damage.
- [18] On October 27, 2021, the defendants filed a counterclaim against the plaintiff asserting, *inter alia*, the following:
4. The defamatory statements contained in the unfiled Notice of Civil Claim in paragraphs 149-155 and 206-209, published of and concerning the defendant, John Gross are as follows:
 - (a) paragraphs 149-155 of the unfiled Notice of Civil Claim, falsely asserted an Alleged Agreement; and
 - (b) paragraphs 206-209 of Part 3: Legal Basis of the unfiled Notice of Civil Claim falsely alleged that John Gross breached the terms of his contract with the plaintiff and breached the terms of the alleged trust; that the conduct of John Gross was wrongful, resulting in loss and damage to the plaintiff; and that John Gross profited and was unjustly enriched resulting in a loss and deprivation suffered by the plaintiff.
- (together, the "Defamatory Statements")
5. The Defamatory Statements in the unfiled Notice of Civil Claim conveyed, and were intended to convey, that in 2021 John Gross, a very successful businessman, was an individual whose prior business dealings fell below the standard of behaviour to be expected of a successful businessman, all for the purpose of deliberately seeking to damage his reputation in the eyes of a reasonable person.
 6. The plaintiff published the Defamatory Statements to Farris LLP, which was the registered and records office of the corporate defendants. The extent of the publication by the plaintiff of the Defamatory Statements is within the knowledge of the plaintiff.

- [19] On November 10, 2021, the plaintiff filed a response to the counterclaim and a notice of application to strike the counterclaim in its entirety and paragraphs 8 to 15 of the response to amended notice of civil claim. The application to strike is one of the two applications before me.
- [20] On November 30, 2021, the defendants filed a notice of application seeking a declaration that the plaintiff has waived privileged with respect to any instructions to counsel concerning the advancement of a claim against the defendants prior to April 22, 2021 and the purpose for sending the March 29, 2021 and April 8, 2021 Letters. The notice of application seeking a waiver of solicitor-client privilege is the other application before me.
- [21] On December 23, 2021, the plaintiff filed its application response regarding the defendants' application concerning waiver of privilege.
- [22] On April 1, 2022, the defendants filed an amended application response to the plaintiff's application to strike the counterclaim and portions of the response to amended notice of civil claim. The defendants also filed an amended notice of application regarding the sought declaration that the plaintiff has waived privilege.

Application to Strike and Summary Judgment

Parties' Positions

- [23] The defendants' response to the amended notice of civil claim and the counterclaim assert that the plaintiff's notice of civil claim is defamatory, the plaintiff is attempting to extort funds from the individual defendant, and the plaintiff is interfering with the business relationships of the corporate defendants.
- [24] The plaintiff argues that the notice of civil claim was made in the course of judicial proceedings and is protected by absolute privilege. Accordingly, the plaintiff contends the counterclaim discloses no reasonable cause of action, and is unnecessary, scandalous, frivolous, and otherwise an abuse of process. The plaintiff contends that the counterclaim should be struck pursuant to R. 9-5, or R. 9-6 as there is no genuine issue for trial. The plaintiff also argues that paragraphs 8 to 15 of the defendants' response to amended notice of civil claim must be struck as being unsustainable and unnecessary pursuant to R. 9-5.
- [25] The defendants argue the plaintiff's application to strike must be dismissed on the basis that it is not plain and obvious that the counterclaim and paragraphs 8 to 15 of the defendants' response to amended notice of civil claim do not disclose a reasonable defence or reasonable cause of action. The defendants further argue that the application to strike the counterclaim pursuant to R. 9-6 must be dismissed because the counterclaim discloses genuine issues for trial.

Legal Principles

Striking pleadings

[26] Rule 9-5(1) governs the striking of pleadings. It provides:

- (1) 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 the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[27] The test under R. 9-5(1)(a) is settled. A claim will only be struck if, assuming the truth of the facts pleaded, it is plain and obvious that the pleading discloses no reasonable cause of action or has no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 [*Imperial Tobacco*]; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 64.

[28] Pursuant to R. 9-5(2), evidence is inadmissible on an application to dismiss under R. 9-5(1)(a).

[29] In *Imperial Tobacco*, the Court explains the value of striking pleadings:

[19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[30] When relying on R. 9-5(1)(b), the applicant must establish that it is plain and obvious the allegations contained in the pleading are unnecessary, scandalous, frivolous, or vexatious. A pleading is frivolous if it is without substance, is groundless, is fanciful, trifles with the court, or wastes time: *Jerry Rose Jr. v. The University of British Columbia*, 2008 BCSC 1661 at para. 9. A pleading is vexatious if it is obvious that an action cannot succeed: *Willow v. Chong*, 2013 BCSC 1083 at para. 20; *Grosz v. Royal Trust Corporation Of Canada*, 2020 BCSC 128 at para. 63, *aff'd* 2022 BCCA 57.

[31] A pleading is unnecessary if it does not establish the plaintiff's cause of action, if it is obvious the action cannot succeed, if it does not advance any claim known in law, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Grosz* at paras. 62-63.

- [32] When determining whether a pleading is an abuse of process of the court, the court should consider whether its process is being used dishonestly or unfairly, or for some ulterior or improper purpose. The court should consider whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression: Grosz at para. 65.
- [33] Applications under R. 9-5(1)(b) to (d) can rely on evidence: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24; *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 20; *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176 at para. 34.

Summary Judgment

- [34] When the court is faced with an application for summary judgment, R. 9-6(5) provides:

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
 - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
 - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.
- [35] Under R. 9-6, the court must grant summary judgment dismissing a claim if it is satisfied that there is no genuine issue to be tried: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10-11 [Lameman]; *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at paras. 32-33 [LeRoy].
- [36] Rules 9-5 and 9-6 serve different purposes. In *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149, the court addressed their differences:
- [9] Rules 9-5 and 9-6 are quite different. The former is an attack on the pleadings on the basis that the action or the defence, as pleaded, cannot succeed as a matter of law. It raises a matter of law only. The latter is an assertion that the claim or the defence is factually without merit. It raises an issue of fact only or, at most, an issue of mixed fact and law, unless under subrule (5)(c) the court determines that "the only genuine issue is an issue of law", in which case it "may determine the question [of law] and pronounce judgment accordingly."

- [10] Rule 9-5 is concerned only with the sufficiency of pleadings. It provides in subrule (1) that the court may strike or amend any pleading, in whole or in part. Subrule (2) prohibits the filing of evidence on an application under subrule 1(a). An order striking a pleading could not be the basis for a res judicata defence in subsequent proceedings.
- [11] Rule 9-6 permits an application for summary judgment, either allowing a claim in whole or in part or dismissing a claim in whole or in part. It is clear that the result sought by the application would support a future pleading of res judicata.
- [37] Evidence is admissible when considering an application under R. 9-6. However, there may be circumstances where evidence legitimately is not available for the application because, for example, the application is premature: *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, 2018 BCCA 151 at para. 21. A summary judgment application must be decided on the basis of the pleadings and evidence before the court. Each party must "put its best foot forward" with respect to the existence or non-existence of material facts: *Lameman* at para. 11. An application should not be defeated by a suggestion that the party might adduce evidence or there are amendments that might be made to the pleadings if the matter were to proceed to trial: *Lameman* at para. 19.

Absolute Privilege

- [38] Statements made in the course of judicial proceedings are protected by an absolute privilege. Absolute privilege "attaches to any statements made by lawyers, judges and witnesses in the course of judicial proceedings": *Duncan v. Lessing*, 2018 BCCA 9 at para. 47. As stated in *Big Pond Communications 2000 Inc. v. Kennedy* (2004), 70 O.R. (3d) 115, 236 D.L.R. (4th) 727 at para. 19 (S.C.J.):
- [19] Counsel have a professional duty to pursue their client's interests, within the law, to the fullest extent possible... Our system of law would be rendered ineffectual if counsel was required to look behind them for fear of a lawsuit as a result of presenting [their] client's case. This is the mischief that [absolute] privilege seeks to prevent.
- [39] The doctrine of absolute privilege protects statements made in court proceedings and communications made in the course of the inquiry with respect to, or in preparation for, judicial proceedings: *Peak Innovations Inc. v. Pacific Rim Brackets Ltd.*, 2009 BCSC 1034 at paras. 24-28 [Peak Innovations]. The basis for absolute privilege is to "permit a free adversarial atmosphere to flourish, which is essential to our system of justice": *Peak Innovations* at para. 26.

- [40] The defense of absolute privilege is "located in the law of defamation and is intended to ensure that the participants in a lawsuit, including counsel, are not impeded in making such statements or other communications as they consider appropriate given their role in the proceedings": Duncan at para. 6. It is based on the public interest in protecting the integrity of the judicial process. A "judicial proceeding is a protected occasion and attaches absolute privilege to any statements made on such an occasion": Duncan at para. 54.

Analysis

- [41] The plaintiff argues the defendants' counterclaim should be dismissed under R. 9-5 and R. 9-6 on the basis of absolute privilege. Further, the plaintiff argues that paragraphs 8 to 15 of the defendants' response to amended notice of civil claim must be struck as being unsustainable and unnecessary pursuant to R. 9-5.

Application to Strike

- [42] A pleading should be struck where it does not establish a cause of action, does not advance any claim known in law, and it is plain and obvious that an action cannot succeed. It should be struck if it serves no useful purpose and where allowing it to proceed would be a waste both of the court's time and public resources.
- [43] In the case at hand, the real question is whether the two Letters at issue, with the attached draft notice of civil claim, were written and delivered on an occasion of absolute privilege. The plaintiff argues the statements in the Letters and the attachment fall under such immunity. Accordingly, the plaintiff contends that it is plain and obvious the counterclaim and the paragraphs disclose no reasonable cause of action.
- [44] The plaintiff relies, inter alia, on the decision of Justice Groves in Peak Innovations. In Peak Innovations, the defendants in the current litigation brought a similar action. Justice Groves found absolute privilege and dismissed the action. I note that Peak Innovations was a summary trial under R. 18A [now R. 9-7], not an application to dismiss. As a result, Groves J. had actual evidence before him.
- [45] Aside from the factual differences in Peak Innovations, I have four reservations about the plaintiff's argument, which lead me to conclude that it is not plain and obvious the defendants' counterclaim is bound to fail.
- [46] First, it is not immediately clear whether the statements made in the April 8, 2021 Letter and the attached unfiled notice of civil claim fall under the doctrine of absolute privilege. Absolute privilege requires that statements made outside of court be made in contemplation of litigation or in the course of the inquiry with respect to, or in preparation for, judicial proceedings.
- [47] The plaintiff states at para. 22 of its application: "The 'objective patent facts and circumstances' before the Court in this application are as follows:

- (b) At the time of the letters' distribution, there were already conditional instructions to sue as demonstrated by the draft NOCC. The limited extent of the distribution of the letter to the registered and records office of the affected corporations is clear. If the registered and records office, the directors of the affected corporations, or, the individual defendant, John Gross, further distributed the letters to others that is beyond the control of the plaintiff;
- [48] The question is whether conditional instructions are sufficient to satisfy the test for absolute privilege as articulated by the authorities. Unlike in *Peak Innovations*, there is no evidence before this Court of what instructions were given at the time the Letters were written. All I have is the plain language of the Letters and the statement by counsel for the plaintiff that he had conditional instructions to sue, based on the draft notice of civil claim.
- [49] Several authorities have held that the mere possibility of future proceedings is not enough to ground a claim for absolute privilege. In *Moseley-Williams v. Hansler Industries Ltd.*, [2004] O.J. No. 5253, 2004 CanLII 66313 (S.C.J.), *aff'd* [2005] O.J. No. 997 (C.A.), the circumstances were such that a notice of civil claim was never filed. In my view, there is an open question regarding whether the Letters and attached draft notice of civil claim are sufficient to bring the communications within the purview of absolute privilege. While the plaintiff's sending of the Demand Letter with a draft notice of civil claim may suggest the plaintiff was preparing for litigation, the draft notice of civil claim was never filed. Rather, a similar - yet different - notice of civil claim was filed in court.
- [50] Second, although the counterclaim makes a number of references to defamation, I accept that the defendants' focus is on the tort of abuse of process. The tort of abuse of process consists of three elements: i) a collateral and improper purpose outside the administration of the law; ii) an overt act in furtherance of the illegitimate purpose; and iii) damages resulting from the wrongful use of the legal process: *Oei v. Hui*, 2020 BCCA 214 at paras. 5-6, citing John G. Fleming, *The Law of Torts*, 4th ed. (Sydney: Law Book Company, 1971) at 548 [Fleming].
- [51] The defendants argue that extortion is a collateral or improper purpose which satisfies the first element of tortious abuse. The second element, they argue, is satisfied because the plaintiff threatened litigation if the defendants did not take certain steps. The defendants also pleaded that damages have resulted.
- [52] Relying on *Oei* at paras. 5 and 35, the plaintiff argues the tort of abuse of process requires prior litigation. Here, there is no prior litigation.
- [53] I do not read the authorities addressing tortious abuse as requiring the precursor referred to in *Oei* at para. 5: previous court proceedings advanced against the plaintiff by the defendant. I acknowledge these facts were present in *Oei*, and mentioned in other cases. However, although there was previous litigation in *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C.S.C.) [Goldman]; and *Office and Professional Employees Int'l. Union v. Office and Professional Employees Int'l. Union, Local 15 et al.*, 2006 BCSC 847 [OPEIU], neither Goldman nor OPEIU mention this requirement prior to finding the tort of abuse of process.

Both these cases were cited with approval by the Court of Appeal in *Oei*. Further, precursor litigation is not mentioned as a requirement for the tort of abuse of process in *Fleming* nor in G.H.L. Fridman, *The Law of Torts in Canada*, 4th ed. (Toronto: Thomson Reuters, 2020).

- [54] Third, there is a tension between the doctrine of absolute privilege and the tort of abuse of process. Tortious abuse requires something outside the ambit of the administration of the law. The authorities hold that bad faith or improper purpose is not sufficient to ground a claim of the tort of abuse of process. There must be an improper objective, collateral to the legal proceedings before the court. For example, a party pleading an overt act or threat in furtherance of a collateral motive will be outside the normal incidents of litigation. In contrast, absolute privilege applies to what is said in the course of the law. The privilege need not be confined to proceedings in court. Statements made outside court are protected if they "are made to achieve the objectives of the litigation": *Peak Innovations* at para. 28
- [55] In *Goldman*, a similar case to the one before me, there was a motion by the corporate defendants for production of documents relating to the plaintiff's legal advice concerning the action and pre-judgment garnishment proceedings. Relying on John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: Law Book Company, 1998) at 688, Justice Smith found the defendants could not sue a third party to put pressure on the plaintiff as it was an act "outside the ambit of the legal claim" and a misuse of the court's process: at para. 27.
- [56] In the case at bar, the defendants argue that the plaintiff named the corporate defendants, and referred to unrelated criminal proceedings, solely to put pressure on the individual defendant to accede to the plaintiff's demands. They argue the reference to the unrelated criminal proceedings was intended to compromise the corporate defendants' ability to do business. The defendants argue these third-party corporations were sued for the sole purpose of forcing settlement of the plaintiff's claim against the individual defendant.
- [57] In the unfiled notice of civil claim attached to the April 8, 2021 Letter, the plaintiff relied on former criminal charges. Based on *Goldman*, these criminal charges are arguably outside the ambit of the contract claim. The defendants contend the plaintiff accepts this; it is demonstrated by the fact that the criminal charges are not explicitly referred to in the filed notice of civil claim. The defendants argue the plaintiff sued the corporate defendants, referred to criminal proceedings, and threatened the defendants with litigation, to force the individual defendant to settle.
- [58] The plaintiff spent considerable time, with the assistance of a table of concordance, establishing that the unfiled notice of civil claim was in substance the same as the filed notice of civil claim. In my view, the unfiled notice of civil claim and the filed notice of civil claim are largely the same. However, their similarity does not explain why the references to criminal counts and indictments were included in the unfiled notice of civil claim but not the filed version.

[59] For absolute privilege to apply, there must be some nexus between the impugned words concerning the individual defendant and the filed notice of civil claim for breach of contract. As Justice Goepel (as he then was) stated in *Monument Mining Limited v. Balendran Chong & Bodi*, 2012 BCSC 1769:

[104] Relying in part on the decision in *Hamouth, Groves J.* [in *Peak Innovations*] dismissed the action. He noted that absolute privilege protects both the solicitor and his client. He held that the privilege was not confined to court proceedings but extended to statements made to achieve the object of the litigation. He held that in determining whether a letter was sent on an occasion of absolute privilege the court must consider the surrounding facts and circumstances.

[Emphasis added.]

[60] I also find the following comment by Groves J. in *Peak Innovations* to be helpful:

[27] In *G.W.E. Consulting Group Ltd. v. Schwartz* (1990), 72 O.R. (2d) 133, 66 D.L.R. (4th) 348 at para. 17 (S.C.), the court adopted the following passage from Fleming, *The Law of Torts*, 7th ed. (1987) at 535:

The [absolute] privilege is not confined to statements made in court, but extends to all preparatory steps taken with a view to judicial proceedings... But the statement or document must be directly concerned with actual contemplated proceedings; not just remotely so, like a factual report containing allegations which merely might provide a ground for future prosecution.

[61] The plaintiff states at para. 22 of its amended application: "The 'objective patent facts and circumstances' before the Court in this application are as follows:

(a) The allegations in the March 29, 2021 John Gross Demand Letter and the April 8, 2021 Farris Letter are sufficiently related to the pleadings in the action which followed;

[62] In my view, it is not readily apparent that the statements regarding the criminal charges in the unfilled notice of civil claim are sufficiently related to the objects of the litigation. The litigation concerns a breach of contract. There is an argument that the statements regarding criminal counts and the references to an indictment in the unfilled notice of civil claim were unrelated to the breach of contract claim and were included for a collateral purpose. As such, I am not persuaded that it is plain and obvious the defendants' arguments on these matters are bound to fail.

[63] Fourth, while defamatory statements are caught by absolute privilege, the law is unsettled to what extent absolute privilege applies beyond defamation. As a result, there is an unsettled question whether the tort of abuse of process is captured by the doctrine of absolute privilege.

- [64] In *Oei*, at para. 46, the Court of Appeal held that the doctrine of absolute privilege has broad application outside of defamation cases. Nevertheless, in a relatively recent case of the Court of Appeal, *Duncan*, the Court stated the "immunity [of absolute privilege] was developed in the law of defamation but is sometimes said to extend beyond defamatory statements": at para. 44 (emphasis added). In *Duncan*, the Court was reluctant to say when absolute privilege would extend to other circumstances. As Justice Hunter, speaking for the Court, stated:
- [68] I agree that the immunity developed in the law of defamation can in principle apply to other causes of action when the public interest considerations that underlie the privilege apply to those actions
- [71] The challenge of reconciling the absolute privilege doctrine with non-defamation claims was addressed by the Ontario Court of Appeal in *Amato v. Welsh*, 2013 ONCA 258. In that case, absolute privilege was set up by litigation counsel as a defence to a claim by the lawyers' client for alleged breach of fiduciary duty and the duty of loyalty based on statements made or omitted by the lawyers while representing different clients in a quasi-judicial proceeding. The lawyers accepted that the absolute immunity did not bar claims in professional negligence, but argued that a claim could not be based on statements made or omitted to be made during the hearing.
- [72] The Court of Appeal refused to strike the claims. Cronk J.A. pointed out that "the boundaries of the absolute privilege doctrine are not firmly set" and that "its scope and application continue to evolve" (at para. 68).
- [73] I agree with Cronk J.A. that the scope and application of the absolute privilege doctrine are not settled. The doctrine clearly applies to claims in defamation brought against counsel for anything said during the course of judicial proceedings, inside or outside court, in order to protect the integrity of the justice system. The doctrine applies to statements by all participants in the litigation process, but is particularly important in its application to litigation counsel because of the need to ensure that counsel are not impeded from the vital role of zealously advocating on behalf of their clients without fear of liability for doing so.
- [74] It seems equally clear that the doctrine does not apply to claims of professional negligence for counsel's conduct of litigation, and may not apply to other claims of clients based on their lawyer's conduct in court. Whether it applies to other causes of action (what was referred to as "disputed ground" in *Taylor* at 215), will depend on whether the public interest in protecting the integrity of the judicial process will be impaired by permitting such claims to proceed.

- [65] In my view, although the Court in *Duncan* made these comments in the context of absolute privilege as a defence to claims against counsel, these comments apply equally here, where the plaintiff's argument requires the expansion of absolute privilege to the tort of abuse of process. When the court is faced with a possible extension of the doctrine of absolute privilege, it must focus on "whether the public interest in protecting the integrity of the judicial process will be impaired" by permitting the claim to proceed: *Duncan* at para. 74.
- [66] In the case at hand, the defendants argue that the purpose of the Letters and draft notice of civil claim was to coerce the individual defendant to settle the claim. If the defendants establish on the facts that this was indeed the plaintiff's purpose (and I make no comment on this argument), an important legal question arises: whether an act of coercion (what the defendants say is extortion) can constitute a privileged occasion.
- [67] Pleadings should be read generously. An application to strike is a tool that must be applied with care. As stated in *International Taoist Church of Canada*, "[w]hen there is an attack on a pleading as showing no reasonable claim or defence the court is well advised to first consider whether the pleading can be preserved by amendment": at para. 28. In addition, the court should permit novel but arguable claims to proceed to trial: *Imperial Tobacco* at para. 21.
- [68] Given the uncertainty in the law, and reading the pleadings generously, I do not find that it is plain and obvious that the doctrine of absolute privilege applies to the tort of abuse of process. As such, it is not plain and obvious that the counterclaim is bound to fail. The counterclaim should not be struck under R. 9-5.
- [69] In terms of the plaintiff's application to strike paragraphs 8 to 15 of the defendants' response to amended notice of civil claim, the paragraphs at issue contain the same subject matter as the counterclaim, and were adopted in the counterclaim. I apply the same reasoning to these paragraphs as I did to the counterclaim. As a result, they should not be struck as being unsustainable and unnecessary. It is not plain and obvious that they are bound to fail.

Summary Judgment

- [70] Under R. 9-6, this Court must grant summary judgment if it is satisfied there is no genuine issue to be tried: *Lameman*; *LeRoy*. I find that there are genuine issues to be determined at trial. As discussed above, there is a question as to whether the conditional instructions in this case are sufficient to satisfy the test for absolute privilege. Further, the law is unsettled as to what extent absolute privilege applies beyond defamation. It is unclear whether the doctrine of absolute privilege applies to the tort of abuse of process.
- [71] I find that these questions are best answered at trial, where the parties may adduce evidence and make submissions on these issues. As such, I decline to grant summary judgment.

Waiver of Privilege

[72] The other issue before me is an application by the defendants for a declaration that the plaintiff has waived privilege with respect to:

- a) any instructions to counsel concerning the advancement of his claim against the defendants prior to April 22, 2021; and
- b) the purpose for sending the March 29, 2021 and April 8, 2021 Letters.

[73] Should I determine that privilege was waived, the defendants also seek an order that the plaintiff and his counsel disclose to the defendants, within seven days of the order, all communications between the plaintiff and his counsel with respect to the period in which privilege was waived.

[74] Lastly, the defendants seek to conduct an examination for discovery of the plaintiff with respect to the documents ordered to be produced, the conditional instructions of the plaintiff to advance his claim, and communications between the plaintiff and his counsel on these matters.

Parties' Positions

[75] The defendants rely on the sentence at para. 22(b) of the "Legal Basis" section of the plaintiff's application to strike. That statement is: "[a]t the time of the letters distribution, there were already conditional instructions to sue..." (the "Instructions Statement").

[76] The defendants argue that its response to the notice of civil claim and its counterclaim allege torts of abuse of process and defamation relating to the correspondence and unfiled notice of civil claim. The plaintiff filed an application to strike the counterclaim in its entirety and paragraphs 8 to 15 of the response to amended notice of civil claim on the basis that the communications were covered by absolute privilege. The plaintiff made the Instructions Statement in support of this claim.

[77] The defendants argue this paragraph constitutes a waiver of solicitor-client privilege. The plaintiff voluntarily disclosed its instructions in an attempt to establish the defence of absolute privilege. The defendants contend that the plaintiff cannot both seek to justify his reliance on absolute privilege based on his instructions while at the same time sheltering himself from disclosing those instructions. This would prevent the defendants from testing the explanation provided.

[78] The plaintiff argues that there has been no voluntary waiver of privilege. The question is whether there is an implied waiver. The plaintiff relies on the authorities that solicitor-client privilege is as close to absolute as possible. Lawyers frequently refer to the fact that they have received instructions. This statement was no more than that obvious fact.

- [79] The plaintiff further argues that the language used in the Instructions Statement is the same language Groves J. found were the "patent facts" before the court in *Peak Innovations*: at para. 62. In that case, Groves J. relied on that language to find that the doctrine of absolute privilege applied.

Legal Principles

- [80] Solicitor-client privilege is fundamental to the Canadian legal system. It has evolved into a substantive rule of law: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at para. 30, leave to appeal ref'd (S.C.C.) [*H.M.B. Holdings*], citing *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 50 [*Soprema*]. This is because the integrity of the administration of justice depends on the unique role of solicitors who provide legal advice to clients within the legal system.
- [81] Solicitor-client privilege must be as close to absolute as possible to ensure public confidence in the legal system. It will only be abrogated where absolutely necessary: *Soprema* at para. 50; *H.M.B. Holdings* at para. 30; *Mayer v. Mayer*, 2012 BCCA 77 at para. 178. Absolute necessity is "as restrictive a test as may be formulated short of an absolute prohibition in every case": *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para. 20.
- [82] Solicitor-client privilege will only yield in certain clearly defined circumstances; it does not involve a balancing of interests on a case-by-case basis: *Soprema* at para. 50. A necessary, but not sufficient, circumstance is where the statement or documents over which solicitor-client privilege is claimed are material to an issue before the court: *Kasian Estate v. Kasian*, 2021 BCCA 273 at para. 52; *Soprema* at paras. 29, 53. As a result, solicitor-client privilege ought not to be waived unless the subject matter of the privileged material will be determinative of the application in respect of which waiver is alleged.
- [83] In general, where a party places their state of mind in issue, for example by referring to legal advice which helped the party form their state of mind on a matter material to the claim, solicitor-client privilege will be deemed to be waived: *Soprema* at paras. 22-26.

Analysis

- [84] In the case before me, I find that the plaintiff did not voluntarily waive privilege. Rather, the question is whether the plaintiff put his state of mind at issue through the Instructions Statement in his application such that there is an implied waiver of solicitor-client privilege.
- [85] The plaintiff relies on the *Peak Innovations* decision. I am not persuaded this decision assists the plaintiff for two reasons. First, the issue of waiver of solicitor-client privilege was not before Groves J. Second, the *Peak Innovations* case was a R. 18A summary trial proceeding, so there was actual evidence before Groves J. No evidence has been led in the case before me.

- [86] The defendants and the plaintiff both rely on *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512 [Doman]. Doman stands for the principle that solicitor-client privilege will be considered waived where a party "makes its state of mind material to its claim or its defence in such a way that to enforce the privilege would be to confer an unfair litigation advantage on the party claiming it": at para. 12. A waiver may also occur in the absence of an intention to waive the privilege where "fairness and consistency so require": Doman at para. 12, citing *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 at 220-221, 35 C.P.C. 146 (S.C.).
- [87] The party seeking the protection of the privilege must have put their state of mind into the dispute. However, there is a distinction between denying an allegation and putting a party's state of mind in issue. A "mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege": Doman at para. 19.
- [88] In *Soprema*, Justice Harris warned that courts must tread cautiously when assessing an allegation of implied waiver of privilege. As he explained:
- [50] The starting point of an articulation of the test for implied waiver must recognize what the Supreme Court of Canada has made clear about the importance of solicitor-client privilege. In *R. v. McClure*, 2001 SCC 14 at para. 35, the Court said that solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis" Furthermore, the Court said (at para. 17) that solicitor-client privilege "is part of and fundamental to the Canadian legal system. ... [I]t has evolved into a fundamental and substantive rule of law." This view was affirmed in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras. 20-21, where the Supreme Court of Canada made clear that communications protected by privilege should be disclosed only where "absolutely necessary", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case."

[Emphasis in original.]

- [89] Based on the authorities, it is clear that courts must exercise considerable caution before waiving solicitor-client privilege. Solicitor-client privilege is not to be yielded following a balancing of interests; the privilege should only be waived in "certain clearly defined circumstances": *Soprema* at para. 50.
- [90] I am not persuaded that the plaintiff simply referring to conditional instructions, without more, is sufficient to waive solicitor-client privilege. I emphasize two points. First, I do not agree that the Instructions Statement engages the plaintiff's state of mind. The language in the Instructions Statement is: "[a]t the time of the letters distribution there were already conditional instructions to sue as demonstrated by the draft NOCC" (emphasis added). As such, the plaintiff is relying on the draft notice of civil claim, not his state of mind.

- [91] The defendants argue that I cannot rely on the draft notice of civil claim because it was never filed. That would be an effective argument if the plaintiff had never filed a notice of civil claim. However, here, a notice of civil claim that was largely the same as the draft notice of civil claim attached to the April 8, 2021 Letter was filed.
- [92] Second, the law is clear that solicitor-client privilege is not to be lightly abrogated. If reference to instructions alone was sufficient to open a lawyer's file, the notion of solicitor-client privilege would be significantly undermined. As Master Baker held in *Concord Pacific Acquisitions Inc. v. Hong Leong Oei*, 2016 BCSC 1054 at para. 16:
- [16] [W]hen counsel says "I was instructed to prepare a counter-proposal" that is insufficient to waive privilege. But when counsel goes beyond that and avers to the reasoning (be it the solicitor's thinking or the client's) it amounts to entering the mind of the client and in my respectful view [that] waives privilege
- [93] In the present circumstances, the plaintiff's state of mind was not put into play. There was nothing in the statement referring to the plaintiff's reliance on legal advice. Rather, the plaintiff relied on the attached draft notice of civil claim to support its claim that there were conditional instructions.
- [94] In *Mayer*, solicitor-client privilege was not waived where plaintiff's counsel filed an affidavit because counsel had not entered the fray on matters of substance: at para. 212. Here, there is no suggestion that plaintiff's counsel entered the fray.
- [95] Counsel for the defendants argues this is a question of fairness. The plaintiff has raised the issue of instructions, putting his state of mind in play, and if counsel is unable to examine the plaintiff, the plaintiff will have an unfair litigation advantage. However, I find that the plaintiff did not place his state of mind before this Court. As such, there is no unfair litigation advantage.
- [96] I accept that the conditional instructions at issue here speak to a matter of substance in this case: whether the pre-litigation communications were captured by absolute privilege. However, based on a strict interpretation of solicitor-client privilege waiver, I find that simply referring to conditional instructions in the notice of application is insufficient to waive the privilege. I agree with counsel for the plaintiff that if a simple reference to having instructions could operate to waive privilege it would be difficult for counsel to ever communicate with the opposing side.
- [97] I find that solicitor-client privilege was not waived by the plaintiff's reference to conditional instructions.

Disposition

- [98] The application to strike the counterclaim pursuant to R. 9-5 and 9-6 is dismissed.

[99] The application to strike paragraphs 8 to 15 of the response to amended notice of civil claim pursuant to R. 9-5 is dismissed.

[100] The application for a declaration that the plaintiff waived solicitor-client privilege is dismissed.

"D. MacDonald J."

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