

CANADA / JUDGMENT

Kirk v. Kirk

2007 BCSC 875

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 875 Kirk v. Kirk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kirk v. Kirk,

2007 BCSC 875

Date: 20070615

Docket: E019164

Registry: New Westminster

Between:

Anna Aaltje Kirk, also known as Anna Kirk

Plaintiff

And

Denis Fredrick Kirk, also known as Denis Frederick Kirk and

White Dragon Enterprises Inc.

Defendants

Docket: S93407

Registry: New Westminster

Between:

Anna Aaltje Kirk, also known as Anna Kirk

Plaintiff

And

Denis Fredrick Kirk, also known as Denis Frederick Kirk, Hyper Technologies Inc.,

White Dragon Enterprises Inc., and Faronics Corporation

Defendants

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment

Counsel for the Plaintiff

Irene A. Pietrow

George F. Gregory

Counsel for the Defendant Denis Fredrick Kirk, White Dragon Enterprises Inc., and Hyper Technologies Inc.

Paul M. Daykin

Counsel for the Defendant Faronics Corporation

Daniel R. Bennett

Date and Place of Hearing:

February 13, April 10 & 11, 2007

New Westminster, B.C.

Introduction

- [1] The plaintiff, Ms. Kirk, has commenced two legal actions arising from the break down of her 30 year marriage with the defendant, Mr. Kirk. The first is the divorce and family property action, court file no. E019164, New Westminster Registry, (the "family action"); and the second, court file no. S93407, New Westminster Registry, is a related civil action (the "civil action"), in which Ms. Kirk is suing Mr. Kirk and three companies in which he has interests. The civil action is founded in breach of fiduciary obligation, breach of trust, interference with contractual relations, and alleges a civil conspiracy to enter into a series of transactions to "strip the value" of one of the companies, Hyper Technologies Inc. ("Hyper Tech"), in relation to which Ms. Kirk asserts a family property claim.
- [2] In Ms. Kirk's application made February 13, 2007, she applied for an order pursuant to Rule 15(5)(a)(iii) of the Rules of Court, B.C. Reg. 221/90, to add Hyper Tech, Faronics Corporation ("Faronics"), and Denis Fredrick Kirk in his capacity as trustee of the Kirk Family Trust and the said Kirk Family Trust as defendants to the family action, and to further amend the amended statement of claim in that action, and to adjourn the trial in the family action set to commence on April 10, 2007. White Dragon Enterprises Inc. ("White Dragon"), a private

company wholly owned by Mr. Kirk, is already a named defendant in the family action.

- [3] The plaintiff also seeks an order permitting her to file a further statement of claim in the civil action, alleging a civil conspiracy pursuant to Rule 24 of the Rules of Court.
- [4] In the alternative, should the court permit Ms. Kirk to amend her pleadings in the family action, but not add Hyper Tech and Faronics as defendants to that action, then she seeks joinder of the two actions in the same proceeding.
- [5] The proposed amendments to both actions are significant and include several new causes of action that arguably do not flow from the newly alleged conspiracy to commit fraud cause of action.
- [6] The defendants oppose the addition of Faronics and Hyper Tech as defendants to the family action and oppose any amendments to the statements of claim in either action that serve to expand the matters pleaded. In relation to the family action, the defendants allege that it is simply too late, given the history of this matter, for the plaintiff to seek significant amendments to her claim. In relation to the civil matter, the defendants submit that the recent order of the Court of Appeal limits the plaintiff's claim to the tort of civil conspiracy, on the basis that all other claims were dismissed by Josephson J. and he was substantially upheld by the Court of Appeal. Further, counsel for the defendants allege that the statement of claim that the plaintiff now seeks to file in the civil action fails to properly plead the tort of civil conspiracy.
- [7] A separate application by the plaintiff in the family action to restrain the defendant White Dragon and Mr. Kirk in his personal capacity and in his capacity as trustee of the Kirk Family Trust from disposing of, encumbering or assigning assets of the Kirk Family Trust, three pieces of real property, and certain other assets, was adjourned by consent.
- [8] At the hearing of these applications on February 13, 2007 the parties had recently received a decision of the Court of Appeal on an appeal taken by the plaintiff of an interlocutory decision of Josephson J. in relation to both actions and had yet to settle the orders. It became clear that counsel took widely differing views as to the nature and parameters of what could properly be pleaded in the family action as constituting the fraudulent conspiracy alleged by Ms. Kirk that is said to diminish the value of her potential interest in the shares held by Mr. Kirk in Hyper Tech, White Dragon, and through White Dragon, in Faronics.
- [9] I directed that the parties seek clarification regarding the scope of the Court of Appeal decision. They did; and returned on April 10 and 11, 2007 to make further submissions to this court as to what further amendments to pleadings ought to be permitted, and what was properly *res judicata*, as a result of the Court of Appeal's decision to substantially uphold the decision of Josephson J. on these related interlocutory matters.
- [10] On February 13, 2007 the plaintiff also applied to this Court for an order adjourning the trial in the family action pursuant to Rule 39(9) of the Rules of Court, due to the unavailability of Ms. Pietrow for reasons of grave family illness. Ms. Pietrow is Ms. Kirk's counsel of choice

and has had primary conduct of this matter from the outset. There is no issue as to the gravity of the situation that causes her to be unavailable for the upcoming trial in the family action. The defendants were opposed to any further adjournment of the trial in the family action, given its lengthy history and the associated cost of preparing for trial again. Although counsel for Mr. Kirk did not take issue with the reason for the application, he submitted that it came too late in the day and the plaintiff ought to make arrangements for other counsel, in order that the matter proceed to trial as scheduled, to commence on April 10, 2007.

- [11] On February 13, 2007 I granted the adjournment of the trial in the family action and indicated that I would provide brief written reasons in this ruling, which follow. Ms. Kirk's applications to again add parties to the family action, and to further amend the pleadings in that action and to join both actions or, failing that, to further amend the pleadings in both actions so as to reflect new or modified claims, may only be appreciated in the context of the relevant facts as alleged, and the legal history of these actions, which is already lengthy and complex. However, first I will address the matter of the adjournment of the trial in the family action.

Reasons for Adjournment of Trial in Family Action

- [12] On February 13, 2007 counsel for Ms. Kirk sought an adjournment of the upcoming trial in the family action, scheduled to commence on April 10, 2007 and continue for two to three weeks. At the hearing on February 13, 2007 I indicated that I granted Ms. Kirk's application to adjourn the trial and would provide reasons subsequently. These are those reasons.
- [13] The adjournment was sought due to grave terminal illness of an immediate family member of Ms. Pietrow's as deposed to in her February 12, 2007 affidavit. Ms. Pietrow indicated that she had advised Mr. Daykin, counsel for Mr. Kirk and White Dragon, in December 2006 of the possibility that she would be unable to proceed with this trial as scheduled due to her personal circumstances.
- [14] Ms. Pietrow has been Ms. Kirk's primary counsel in relation to this litigation. She has at times been assisted by Ms. Gregory and recently by Mr. Gregory. However, I was advised that Ms. Pietrow has been Ms. Kirk's counsel from the outset and that Ms. Kirk has confidence in her and wishes her to continue to represent her at trial.
- [15] Mr. Daykin, counsel for the defendants, Mr. Kirk, White Dragon and Hyper Tech, took no issue with the gravity of the personal circumstances of Ms. Pietrow, but was very concerned, and understandably so, with the further delay of the trial in this matter given its history. He opposed the adjournment because it was likely to result in "an open-ended adjournment", and if granted and Ms. Pietrow's current family difficulties continue, a further adjournment of the next trial date could be sought.
- [16] It is accepted that the family action already has a protracted history and it is in the best interests of all parties that it come to trial soon.

- [17] It is accepted law that the decision to adjourn a trial is a discretionary one. It is a decision that must take into account the interests of justice, which requires balancing the interests of the parties. The paramount consideration is whether it is necessary to adjourn the trial to ensure a fair trial on the merits: *Cal-wood Door v. Olma*, [1984] B.C.J. No. 1953 (C.A.)(QL); *Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 (C.A.); *Novak v. Bond* (1998), 82 A.C.W.S. (3d) 260 (B.C.S.C.); *Murao v. Blackcomb Skiing Enterprises Limited Partnership*, 2003 BCSC 1957.
- [18] This application to adjourn the trial was brought about two months before the trial was scheduled to start. At the time the application to adjourn was made and granted it was clear that the trial in the family action was likely to be a long and complex one, and potentially more so were I to decide to permit Ms. Kirk to plead conspiracy to commit fraud and to add Hyper Tech and Faronics as defendants.
- [19] Ms. Pietrow has detailed knowledge of what the case entails and presumably has done much to prepare the matter to date, including the preparation of detailed experts' reports analyzing certain corporate transactions relevant to the family and civil actions.
- [20] In terms of balancing the parties' interests, I note that Ms. Kirk has significantly fewer financial resources than Mr. Kirk, and she was the party seeking the adjournment. I accept that it is inconvenient to the parties to have this matter adjourned a further time, but given the inability of one of the parties' counsel to proceed at this relatively late date, I saw no practical alternative. It would have been fundamentally unfair to force either party on to trial at this time without their counsel, or with newly retained, less prepared counsel. I appreciated that the further adjournment may result in additional cost to the parties but hoped it would be minimized by two months' notice and a rescheduled early trial date. I add now with the benefit of hindsight that given the need to clarify the orders of the Court of Appeal that arose during the hearing of the present applications, in all likelihood the trial in the family action would have had to be adjourned in any event.
- [21] Had I denied the adjournment application based on Ms. Pietrow's inability to act and forced Ms. Kirk on to trial with new counsel, that counsel would in all likelihood have then approached the court for an adjournment due to previous court commitments and/or an inability to prepare adequately in the time remaining between the date of the application and April 10, 2007.
- [22] For these reasons I granted Ms. Kirk's application to adjourn the trial in the family action that was scheduled to commence on April 10, 2007. I did not grant an "open-ended" adjournment. A new trial date has been set. The trial in the family action is set to commence on October 22, 2007 for 15 days. Both parties have been put on notice that they must be ready to proceed on that date, and Ms. Kirk and her counsel appreciate that no further adjournment for Ms. Pietrow's continuing difficult personal family circumstances will be granted, and contingent arrangements must be made to ensure that Ms. Kirk is ready to proceed to trial with counsel on that date.

Family Action

[23] For the reasons that follow I have determined that it is neither just nor convenient in the context of Rule 15(5) of the Rules of Court to permit the plaintiff to add Hyper Tech and Faronics to the family action. The plaintiff is permitted to make the proposed amendments in her statement of claim in the family action that pertain to Mr. Kirk's alleged fraud in relation to the collaborative law process. I find that the plaintiff is also permitted to add reference to the defendant Denis Fredrick Kirk, also known as Denis Frederick, "in his personal capacity and in his capacity as Trustee of the Kirk Family Trust, and the said Kirk Family Trust". I find the plaintiff is not permitted to further amend her statement of claim in the family action in any other manner; and, specifically, she is not permitted to plead the tort of civil conspiracy in the family action.

Civil Action

[24] I have determined that the plaintiff may file a statement of claim in the civil action to include the civil tort of conspiracy. Otherwise, she is not permitted to add again those claims dismissed by Josephson J. in *Kirk v. Kirk*, 2006 BCSC 277, who I interpret to have been upheld by the Court of Appeal in relation to the striking of the other claims the plaintiff sought to advance against the defendants named in that action. Paragraph 36 is to be struck from the proposed statement of claim.

Joinder

[25] The plaintiff has sought joinder in relation to the family action and the civil action pursuant to Rule 5 of the Rules of Court. I have determined that this is not appropriate as it would "unduly complicate" the trial in the family action and "is otherwise inconvenient" to the corporate defendants, Hyper Tech and Faronics, who I have declined to add as parties to the family action. However, pursuant to Rule 5(6), I have decided it is "just" to order that I remain seized of both matters (dates have been set for the trial in the civil action following the family action) to preserve the possibility of evidence from the trial in the family action being admitted without repetition at the trial of the civil action with the consent of the parties. This may reduce the length of the trial in the civil action. It also will serve to reduce the risk of contradictory findings on the same evidence.

Factual History

[26] The parties married on May 10, 1968 and separated in December 1998. They have two adult children, Gillian and Bradley. Anna Kirk, born on October 8, 1943, is now 63 years old. Denis Kirk, born on June 9, 1940, is now 67 years old.

- [27] When the parties separated they had assets that included the family home, Mr. Kirk's shares in Hyper Tech, modest RRSPs owned by each of them, two vehicles, and furniture and household effects. Ms. Kirk worked in a transition house for the Tri-City Women's Resources Society from September 1978, where she held the same position for 26 years. She now no longer works and has a medical disability.
- [28] On May 4, 1988 Mr. Kirk and another person incorporated Hyper Tech, a software development company, in which each of them held half of the shares of the company. Hyper Tech developed a software program called DeepFreeze that has proved to be very valuable. Mr. Kirk deposes that early in 1999 Hyper Tech began developing DeepFreeze and began to sell the software in the fall of 1999. Mr. Kirk's main role at Hyper Tech was to market and sell the software products. He did not personally create or develop the software.
- [29] Ms. Kirk's position is that between 1988 and 2003 Hyper Tech developed five kinds of computer software, including DeepFreeze and WinSelect, both of which are now developed and marketed by Faronics, and that Hyper Tech developed WinSelect and conceived of the concept for DeepFreeze prior to the separation of the parties. Although improvements have been made to the DeepFreeze technology over the years, all the DeepFreeze software is based on the original concept.
- [30] In October 2002 Mr. Kirk incorporated White Dragon. Mr. Kirk and the other owner of Hyper Tech joined forces with others able to assist in further development and marketing of the software developed by Hyper Tech, including DeepFreeze. To this end, in April 2003, Faronics was incorporated, and on April 4, 2003 White Dragon became the owner of 23% of the shares of Faronics. On May 1, 2003 Hyper Tech sold its core assets, including DeepFreeze, to Faronics for \$4.5 million, payable in annual instalments over a 10 year period between August 30, 2003 and August 30, 2012. Since 2003, Mr. Kirk has received considerable income by way of salary, management fees and bonuses from Faronics.
- [31] Several months prior to Hyper Tech selling its assets (May 2003), the parties commenced settlement discussions (February 2003) in a collaborative law process in an effort to resolve the financial matters arising from the breakdown of their marriage. They were not successful and the plaintiff commenced this proceeding in April 2004. She now alleges that Mr. Kirk used the collaborative law process fraudulently and in bad faith to delay her asserting her legal rights in relation to the assets of Hyper Tech until he was able to transfer those assets to Faronics.
- [32] Ms. Kirk alleges that, as a result, Mr. Kirk has not fully disclosed his assets and income since separation, and that the transfer of assets from Hyper Tech to Faronics in May 2003, whereby his holding company, White Dragon, came to hold a 23% interest in Faronics, effectively stripped Hyper Tech of its underlying, profit-generating assets. Mr. Kirk still owns a 50% interest in Hyper Tech and apparently concedes that Hyper Tech is a family asset. In addition to receiving a 23% interest in Faronics through White Dragon, Mr. Kirk received a directorship and employment at Faronics, which pays him large amounts of money per year,

and Hyper Tech received an unsecured promissory note in its favour for \$4.5 million, payable over a 10 year period.

- [33] Ms. Kirk submits that family assets at this point include the common shares in Hyper Tech, a shareholders' loan from Hyper Tech, White Dragon common shares, the matrimonial home, equity in the Riverside townhouse, and RRSPs, with a total estimated value of \$9,339,000. Mr. Kirk admits that his shares in Hyper Tech are family assets. He denies that his shares in White Dragon are a family asset, and further submits that in any event no dividends have been paid by Faronics to White Dragon in the material time period. He further denies that Ms. Kirk is entitled to share in the management salary and bonuses paid to him directly by Faronics.

History of this Litigation

- [34] The family action was commenced by Ms. Kirk on April 28, 2004, after the parties were unsuccessful in resolving the issues between them in the collaborative law process. The case already has a lengthy history before the court. The parties' counsel have advised me of the following background.
- [35] On May 7, 2004 Master Brine (as he then was) pronounced a declaration pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128, that the spouses had no reasonable prospect of reconciliation. He made an order restraining Mr. Kirk from "disposing of family assets or any other property at issue in this proceeding without written consent of the Plaintiff or until further Order of This Honourable Court". The order further provided that either party could apply to the court to "clarify or particularize" the terms of the order, and that Mr. Kirk's shares in White Dragon were "one of the properties at issue".
- [36] On September 17, 2004 a judicial case conference was held and a seven day trial was set to commence on April 18, 2005. On January 10, 2005 MacKenzie J. ordered interim spousal support payable by Mr. Kirk to Ms. Kirk in the amount of \$7,000 per month. She also made an order that Ms. Kirk was to have a \$20,000 advance on account to retain a business valuator.
- [37] At a February 2005 pre-trial conference Truscott J. indicated that the case was not ready for trial in view of a valuation report regarding Hyper Tech shares that was delivered less than 60 days before the scheduled April 2005 trial date. Mr. Kirk did not agree to an adjournment at that time, except on terms that were unacceptable to Ms. Kirk. On February 15 and 16, 2005, examinations for discovery were held.
- [38] On March 11, 2005 Ms. Kirk filed an amended statement of claim in the family action; and on March 14, 2005 counsel on her behalf served an application to add Hyper Tech, White Dragon and Faronics as parties, and to adjourn the trial. Mr. Kirk served an application for summary judgment under Rule 18A for a declaration that White Dragon was not a family asset.

- [39] Prior to the hearing of that application, Ms. Kirk as plaintiff in the civil action delivered a statement of claim (writ of summons and statement of claim filed July 15, 2005) that named White Dragon, Hyper Tech and Faronics as defendants. As a result, the defendants Hyper Tech, White Dragon and Faronics countered with an application to have the statement of claim in the civil action struck out as disclosing no reasonable claim against them, pursuant to Rule 19(24).
- [40] On April 7, 2005 Mr. Kirk's Rule 18A application in the family action, set before Barrow J., was adjourned at the request of Ms. Kirk. The April 2005 trial date was struck because of the non-filing of a trial certificate.
- [41] On April 15, 2005 the parties appeared again before MacKenzie J. and a new trial date was set for September 12, 2005 and the cross-applications of both parties were set for a day of hearing on May 20, 2005. On that date those applications were adjourned due to the lack of a judge and were re-set for July 15, 2005. On May 27, 2005 Mr. Kirk served an application to reduce the amount of interim spousal support payable to Ms. Kirk. On June 18, 2005 she served an application to strike the notice of trial.
- [42] On July 15, 2005 the parties' cross-applications were not heard due to the lack of a judge and were re-set for October 6 and 7, 2005.
- [43] On July 29, 2005 the trial in the family action, set to commence September 12, 2005, was adjourned to May 29, 2006 because it was apparently set by Mr. Kirk without ascertaining the availability of Ms. Kirk's counsel.
- [44] On September 9, 2005 MacKenzie J. dismissed the applications of both parties in the family action to vary interim spousal support payable to Ms. Kirk by Mr. Kirk.
- [45] On October 6 and 7, 2005 a hearing proceeded before Josephson J. who agreed to serve as the case management judge. He dismissed Mr. Kirk's Rule 18A application in the family action, and heard but adjourned applications to add corporate defendants.
- [46] On November 25, 2005 a further hearing occurred before Josephson J. and he adjourned the applications to add the corporations and to strike claims against the corporations pending completion of disclosure by Faronics.
- [47] On January 23 and 24, 2006 a hearing proceeded before Josephson J. under Rule 19(24) to strike the statement of claim against Hyper Tech, White Dragon and Faronics in the civil action as disclosing no reasonable cause of action, and under Rule 15(5) to add the corporate defendants in the family action and to further amend the statement of claim. Josephson J. filed written reasons on February 17, 2006: *Kirk v. Kirk*, 2006 BCSC 277, which I will review in some detail.

- [48] On March 10, 2006 Ms. Kirk filed an appeal of the decision of Josephson J. in the Court of Appeal. The appeal was heard on January 24, 2007 and oral reasons for judgment were given: *Kirk v. Kirk*, 2007 BCCA 63. I will also review the reasons of the Court of Appeal and the orders that followed in some detail, as they have significant bearing on the present applications.
- [49] On April 18, 2006 Mr. Kirk attended for further examination for discovery and on April 19, 2006 Ms. Kirk produced her expert report. On May 29, 2006 the trial that was scheduled to commence was again adjourned due to the lack of a judge.
- [50] On June 29, 2006 a hearing proceeded before Joyce J. concerning an application by Ms. Kirk to revise and expand the interim restraining order, upon which he reserved and filed written reasons: *Kirk v. Kirk*, 2006 BCSC 1164. Ms. Kirk, who was the unsuccessful party, filed a notice of appeal of the interlocutory judgment of Joyce J., but to date that appeal has not been heard.
- [51] The matters were assigned to me to act as the case management judge and the assigned trial judge, with the trial in the family action set to commence on April 10, 2007, which I subsequently adjourned.
- [52] On December 13, 2006 I heard applications in relation to the family action on behalf of both parties. Each party was opposed to the application of the other. Mr. Kirk sought an order of divorce, a reduction in the previously-ordered spousal support payable to Ms. Kirk and permission to access a GIC to assist him in paying down a mortgage on real property. Ms. Kirk sought a further advance on capital of \$140,000 to assist her in paying disbursements relating to experts' reports to prepare for trial. In *Kirk v. Kirk et al.*, 2007 BCSC 67, I denied Mr. Kirk's applications except to permit encroachment on the GIC to the extent of making an advance on capital in the amount of \$100,000 payable to Ms. Kirk, pursuant to her application.

Prior Rulings and Judgments Relevant to the Present Applications

- [53] The prior decisions of Josephson J. in *Kirk v. Kirk*, 2006 BCSC 277, and the Court of Appeal in *Kirk v. Kirk*, are particularly significant in relation to the present applications.
- [54] In the former, Josephson J. declined to add Hyper Tech and Faronics to the family action, and added White Dragon with the consent of Mr. Kirk. In his reasons Josephson J. notes that Ms. Kirk agreed that if she was unsuccessful in adding Hyper Tech and Faronics to the family law proceeding, their application to strike her claims against them pursuant to Rule 19(24) would be granted.
- [55] In particular, ¶1 and ¶6-8 of Josephson J.'s reasons are relevant:

- [1] Ms. Kirk seeks to join as defendants in this matrimonial proceeding three companies in which Mr. Kirk has an interest: Hyper Technologies Inc. ("Hyper Tech"), Faronics Corporation ("Faronics") and White Dragon Enterprises Inc. ("White Dragon"). The parties married in 1968 and separated in December of 1998.
- []
- [6] As a result, she now seeks to join Hyper Tech, Faronics and White Dragon to these proceedings, pursuant to Rule 15(5) of the British Columbia Rules of Court.
- [7] In response, the defendants seek to have Ms. Kirk's claim struck out under Rule 19(4) of the Rules of Court. The plaintiff concedes that this application should be granted in the event that she is unsuccessful in her application to join Hyper Tech, Faronics and White Dragon to these proceedings, pursuant to Rule 15(5).
- [8] For the reasons which follow, I decline to grant the plaintiff's application on the grounds that it would not be just and convenient to do so. However, I grant the plaintiff's application to join White Dragon to these proceedings.
- [56] Josephson J. then engaged in a review of the law regarding claims on corporate assets by parties engaged in family law litigation, namely that a shareholder does not have an interest in the assets of a corporation, and therefore that Mr. Kirk had no direct interest in the corporate assets of Hyper Tech, and therefore Hyper Tech could not hold those assets in trust for Ms. Kirk (at ¶9).
- [57] After reviewing *Rohani v. Rohani*, 2004 BCCA 605, *Volken v. Volken*, 2002 BCSC 426, and *Gabriel v. Gabriel* (1980), 12 Alta. L.R. (2d) 1 (C.A.), Josephson J. concluded that as Mr. Kirk has not declared bankruptcy, and it would not appear there is an immediate danger of him doing so (as in *Rohani*), nor was he the sole shareholder of Hyper Tech engaged in stripping its assets in the face of a court order (as in *Volken*), and nor was it a procedural necessity to add Hyper Tech and Faronics as defendants to compel disclosure of information necessary to assess and apportion family assets (as in *Gabriel*), he rejected Ms. Kirk's application.
- [58] Therefore, Josephson J. concluded that it was not "just and convenient" to add Hyper Tech and Faronics to the family law proceedings, with the following comments at ¶20-24:
- [20] If Ms. Kirk is able to establish at trial that the companies placed a value below market value for the assets sold by Hyper Tech to Faronics in order to diminish the value of her interest in the shares of Hyper Tech, she has remedies against Mr. Kirk. No prejudice flows to her by not naming the companies as parties to this action. This is also the case if she establishes at trial that Mr. Kirk took benefits from Faronics in the form of salary and bonuses rather than dividends to White Dragon, thus diminishing any claim to the shares of White Dragon as a family asset. The ability to establish and recover any loss is not enhanced by naming the companies as parties.

- [21] Even if Ms. Kirk can establish that Faronics was aware of Mr. Kirk's alleged "design" to under value the asset sold to it by Hyper Tech in order to attempt to defeat a portion of her family asset claim, her claim is solely against Mr. Kirk and appropriate remedies are available without naming the companies as parties.
- [22] Not naming the companies as defendants will not increase the risk of family assets being hidden, nor will Ms. Kirk be deprived of any appropriate remedy should she be able to establish her claims regarding the sale of an asset by Hyper Tech to Faronics for inadequate consideration.
- [23] Moreover, also germane to the present discussion is the potential effect of joining the proposed corporate defendants to the action on the ability of Faronics, in particular, to carry on business, and on third parties doing business with Faronics.
- [24] Since May of 2003, Faronics has been distributing the software it purchased from Hyper Tech to third party customers. In doing so it has represented to those customers that it had clear and unencumbered ownership of that corporate asset. A finding otherwise at this stage of the litigation could have a significant negative impact on its ability to engage in commercial activities for the foreseeable future.
- [59] Ms. Kirk appealed the judgment of Josephson J. to the Court of Appeal. The import and practical effect on the present applications of the judgment of the Court of Appeal has been the subject of exhaustive submissions before me. As previously indicated, I directed the parties to return to the Court of Appeal to seek further clarification on the effect of its orders on both the family action and the civil action, as it became clear that counsel for the various parties held widely disparate views of what exactly had been determined, and were unable to agree on the terms of the orders to be drawn up.
- [60] It is useful to include in their entirety the reasons for judgment of the Court of Appeal as they frame the applications before me:
- [1] MACKENZIE J.A.: This is an appeal from an order refusing to add the Corporate respondent's Hyper Technologies Inc. and Faronics Corporation as defendants in a family law action commenced by the plaintiff wife against the defendant husband. The reasons are reported at 2006 BCSC 277.
- [2] The wife applied to add the two corporations together with White Dragon Enterprises pursuant to Rule 15(5) of the Rules of Court. The application to add White Dragon, a holding company wholly owned by the husband, was unopposed and granted by the chambers judge. At the same time, the judge granted applications by the husband and respondent companies pursuant to Rules 19(24) and 57 to dismiss a separate action by the wife advancing claims in trust over assets of the respondents and ancillary equitable relief ("the second action"). Claims in the second action overlap the claims in the family law action.

- [3] The gravamen of the wife's claim essentially is that the husband and the companies have implemented a corporate scheme to defeat the wife's claim to family assets. As the matter was framed in this Court, the appellant accepted that the appellant did not have a claim in law directly against the assets of Hyper Technologies and Faronics. I am satisfied that the chambers judge was correct in striking the pleadings proposed by amendment in the family law action and the pleadings in the second action as he did.
- [4] However, in this Court the appellant advances a different claim, not against the assets directly but based on her position as shareholder arising out of the respective division family assets. That claim is essentially a claim in fraudulent conspiracy to diminish the value of the wife's potential shareholdings in Hyper Technologies Inc. and White Dragon Enterprises Inc. and, through White Dragon, which is presumably an alter ego of the husband, the shares held by White Dragon in Faronics.
- [5] With some reluctance I think that the wife should be given an opportunity to attempt to plead those claims in a satisfactory manner. That would be a matter for the trial court to consider.
- [6] Accordingly, in my view, the form of the order in this Court should be to uphold the decision of the chambers judge striking the proposed amended pleadings in the family action with liberty to re-apply to file revised pleadings and to join the two corporate defendants on the basis of those pleadings. Also, to strike the statement of claim in the second action leaving the writ of summons with a view to permitting the appellant to file a new statement of claim with the revised cause of action and leaving it to a judge in the Supreme Court to decide, firstly, whether that is a proper pleading and, secondly, if so, whether that action should be joined with the family law action for purposes of trial.
- [7] PROWSE J.A.: I agree.
- [8] HUDDART J.A.: I agree.
- [9] PROWSE J.A.: The order would be in the form indicated by Mr. Justice Mackenzie. Now, costs.

(submissions by counsel)

- [10] MACKENZIE J.A.: In my view, the pleadings that were before Mr. Justice Josephson and before us were misconceived. There is no good reason in my view why the action could not have been framed properly at a much earlier stage of these proceedings. Accordingly, I would award the respondents costs of this application both here and before Mr. Justice Josephson.
- [11] Any application for amended pleadings in this matter should be filed not later than two weeks from today in the Supreme Court in order avoid further delay this already too protracted proceeding.

[12] I should add this, just as a final comment, Mr. Gregory, it appears that your client is contemplating going down a road of advancing a claim in fraudulent conspiracy against these companies. I am sure that you will inform your client that there are severe cost penalties for advancing such a claim and not succeeding. That strategy is a high risk strategy in terms of potential costs consequences.

[13] PROWSE J.A.: I agree with everything that Mr. Justice Mackenzie has said.

[14] HUDDART J.A.: I agree.

[Emphasis added.]

[61] The Court of Appeal, in my view, substantially upheld the decision of Josephson J. not to add Hyper Tech and Faronics to the family action, with the appellant at liberty "to re-apply to file revised pleadings and to join the two corporate defendants on the basis of those pleadings". The writ was to remain in the civil action with the appellant able to file a new statement of claim with a revised cause of action, leaving it to a judge of this Court to decide whether it was a proper pleading and whether the civil action should be joined with the family action.

[62] In view of the fact that counsel for the plaintiff (Ms. Kirk) and the defendants disagreed as to which claims by the plaintiff against the defendants survived the judgment of the Court of Appeal and which claims had been found to be properly dismissed by Josephson J., they sent written submissions to the Court of Appeal to endeavour to clarify matters. The appellant's submissions (on behalf of Ms. Kirk) set out the nature of the disagreement (Appellant's Submissions, para. 6) as follows:

The essential difference between the Appellant's and the Respondents' interpretation of this Court's orders is that the Appellant understands that the Court granted Ms. Kirk open ended leave to submit new Statements of Claim for full consideration by the Honourable Madam Justice Arnold-Bailey, the case management judge, provided it did not claim directly against Faronics' assets. The Respondents, on the other hand, interpret the Court of Appeal's reasons to say that Mr. Justice Josephson was correct in striking the pleadings in every aspect, not just the claim against Faronics' assets; accordingly, the Respondents say that the leave granted by this Court is to plead a case in civil conspiracy only. They interpret the Court of Appeal's reasons as finding that all of the proposed pleadings in the factum were also improper, and that the Appellant is forever precluded from pleading any and all other claims, save and except a civil conspiracy.

[63] Written submissions to the Court of Appeal on behalf of Faronics ("Submission on Form of Order") review how the most recent proposed amendments to pleadings in the civil action continue to plead essentially what was before Josephson J. with some minor changes, and neglect to refer to the words "fraudulent" or "conspiracy". By way of a conclusion (at para. 20), counsel for Faronics submitted the following to the Court of Appeal for consideration:

The Court recognized that this litigation has already been too protracted and even contemplated not granting Ms. Kirk any further opportunities after all these years to pursue any additional claims. Certainly, the Court did not intend to allow Ms. Kirk to revisit the same issues properly

disposed by Mr. Justice Josephson. Accordingly, it is submitted that the Court only intended to grant Ms. Kirk the narrow leave identified in the Respondent's proposed form of Order, rather than the extremely broad leave provided for in Ms. Kirk's proposed form of Order. The former will allow this matter to proceed diligently and provide Ms. Kirk with a full remedy if there was an alleged fraudulent conspiracy while the latter will simply make this litigation more protracted.

[64] By Memorandum dated March 12, 2007, Prowse J.A., on behalf of the court, responded as follows:

The panel has reviewed the submissions of counsel concerning the appropriate form of orders arising from the reasons for judgment of this Court dated February 13, 2007. In our view, two orders should be drawn to reflect the fact that there are two appeals before the Court: CA033877, arising from Action No. E019164, New Westminster Registry, and CA033878, arising from Action No. S93407, New Westminster Registry.

In CA033877 [the family action], the substantive provision of the order should be as follows:

THIS COURT ORDERS that the appeal from the Order of Mr. Justice Josephson, made February 17, 2006, be allowed to the extent of granting the appellant leave to make further application to add Hyper Technologies Inc. and Faronics Corporation as defendants to this proceeding in order to advance a claim against them, and against the other defendants, in conspiracy;

In CA033878 [the civil action], the substantive provision of the order should be as follows:

THIS COURT ORDERS that the appeal from the order of Mr. Justice Josephson, made February 17, 2006, be allowed to the extent of striking only the Statement of Claim, with leave to the appellant to apply to file a further amended Statement of Claim to advance a claim against the defendants in conspiracy.

In our view, these orders reflect the decision of this Court. Any further applications which the appellant may wish to make in the Supreme Court with respect to the pleadings or proceedings in these actions continue to be governed by the Rules of Court and related authorities.

[65] My interpretation of the above is that this Court may again consider whether it is appropriate to add Hyper Tech and Faronics as defendants to the family action and whether it is appropriate to permit further amendments to the statement of claim in that action to include an alleged civil conspiracy. In relation to the civil action, I interpret the above to permit the appellant, Ms. Kirk, to file a statement of claim that permits her to claim a civil conspiracy against the named defendants in that action, Mr. Kirk, White Dragon, Hyper Tech and Faronics, but not to advance the other claims as previously pleaded. To interpret the order in the civil action otherwise, in my view, would be to ignore the words "to advance a claim against the defendants in conspiracy". Had the Court of Appeal intended the outcome of the appeal to be a wholesale revival of the claims dismissed by Josephson J. against Hyper Tech and Faronics, it would, in my respectful view, have said so. I approach the present applications on that basis.

Issues to be Decided

[66] The issues to be decided on these applications are:

1. Should the plaintiff be permitted to add Hyper Tech and Faronics as defendants to the family law action pursuant to Rule 15(5)(a)(iii) of the Rules of Court?
2. Should the plaintiff be permitted to join the family and civil actions pursuant to Rule 5 of the Rules of Court?
3. Should the plaintiff be granted leave of the court pursuant to Rule 24(1) of the Rules of Court to further amend her statement of claim in the family action and, if so, to what extent given the prior history of this matter and the judgment and orders of the Court of Appeal?
4. Is the plaintiff permitted to file a new statement of claim in the civil action that includes the claims previously struck by Josephson J. against the corporate defendants Hyper Tech and Faronics, or is she limited to a claim founded on the tort of civil conspiracy by virtue of the decision of the Court of Appeal?
5. Is the conspiracy to commit fraud cause of action as pleaded in the proposed statement of claim in the civil action a valid cause of action, or should it be struck out pursuant to Rule 19(24) of the Rules of Court?

Issue # 1: Should the plaintiff be permitted to add Hyper Tech and Faronics as defendants to the family law action pursuant to Rule 15(5)(a)(iii) of the Rules of Court?

[67] In this application the plaintiff again seeks to add Hyper Tech and Faronics as additional defendants to the family action.

[68] The issue is whether it is "just and convenient" to add Hyper Tech and Faronics as defendants in the family action. The "just and convenient" test is contained in Rule 15(5)(a)(iii) of the Rules of Court, which states:

(5)(a) At any stage of a proceeding, the court on application by any person may

[]

(iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

[69] The application of this rule is best approached through a two stage inquiry. The first question to be decided is whether or not there exists a common issue to be determined as between the parties sought to be added and the parties to the present proceeding. This is the "least stringent part of the test". The second question is whether it is just and convenient, in the opinion of the court, to add the parties to the proceeding; see *Zymtech Developments Inc. v. Sport Central Enterprises Ltd.*, 2004 BCSC 309, (Master), at ¶16 to 17.

[70] With respect to this second aspect of the test, Burnyeat J. said the following in *Mannix Resources Inc. (Trustee of) v. Mondial Corp.*, 2006 BCSC 170, at ¶14:

[]In determining whether it is just and convenient to exercise the available discretion, I am satisfied that the exercise of the discretion is fettered only to the extent that it must be exercised judicially in accordance with the guidelines set out in the authorities which include the extent of the delay, the reasons for the delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the claims alleged against the proposed new parties.

[Emphasis Added.]

[71] This issue was considered in some detail by Josephson J. in the previous application. Insofar as the plaintiff still seeks to advance a claim against the assets of Hyper Tech and Faronics, she is not advancing a claim known to law. This was the conclusion reached by Josephson J. and upheld by the Court of Appeal (at ¶3).

[72] Insofar as the plaintiff now seeks to advance a claim based on her position as a shareholder arising out of a division of family assets, she must first establish her interest in Hyper Tech and White Dragon, and then, through White Dragon as Mr. Kirk's alter ego, an interest in the shares held by White Dragon in Faronics.

[73] While there is some connection between Hyper Tech and Faronics and the parties to the present proceedings, and this connection may well satisfy the first, less stringent aspect of the test under Rule 15(5)(a)(iii), I am not convinced that adding these corporations as parties to the family action satisfies the second aspect of the test. Absent a need to join Hyper Tech and/or Faronics as defendants to compel disclosure, which to date has not been necessary, I find that it is not "just and convenient" to add either corporation as parties to the family action for the same reasons that Josephson J. articulated and which I have previously referred to at ¶9 and ¶20 -24 of his reasons. Quite simply, once the plaintiff's claims to family assets are determined, if Ms. Kirk is found to have a legal interest in Mr. Kirk's shares in White Dragon, it may not be necessary for the civil action founded in conspiracy against Mr. Kirk and the corporate defendants to go forward. To my mind, it is neither just nor convenient to involve Hyper Tech and Faronics as parties to what is likely to be a protracted and costly family law proceeding when absent the issue of a civil conspiracy, the relevant parties to any foreseeable outcome are Mr. Kirk and Ms. Kirk.

[74] I accept the characterization of this case by counsel for Mr. Kirk:

The issue at the heart of this case is whether Mr. Kirk's interest in White Dragon is a family asset. The key evidence in the determination of that issue are [sic] the documents formalizing the transaction that took place in May 2003. Those documents will be in evidence and the individuals involved in the transaction will testify at trial.

Issue #2: Should the plaintiff be permitted to join the family and civil actions pursuant to Rule 5 of the Rules of Court?

[75] The decision to join claims or parties in a proceeding is a discretionary one to be exercised after weighing the factors set out in *Merritt v. Imasco Enterprises Inc.* (1992), 2 C.P.C. (3d) 275 at 282 (B.C.S.C.). These were summarized succinctly by Satanove J. in *Robak Industries Ltd. v. Gardner*, 2006 BCSC 1628, as follows at ¶2-3:

[2] [] In *Merritt*, supra, Master Kirkpatrick, as she then was, set out these two tests to be met for separate actions to be heard together:

1. Do the pleadings disclose common claims, disputes and relationships between the parties?
2. Having regard to matters outside the pleadings, are the claims so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense?

[3] If the first test is passed then I must go on to consider the second test and specifically whether:

1. the order sought will create a saving in pre-trial procedures;
2. there will be a real reduction in the number of trial days taken up by the trials being heard at the same time;
3. there is a potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest;
4. there will be a real savings in experts' time and witness fees;
5. one of the actions is at a more advanced stage than the other;
6. the order will result in a delay of the trial of one of the actions and, if so, whether any prejudice which a party may suffer as a result of that delay outweighs the potential benefits which a combined trial might otherwise have; and
7. there is a substantial risk that separate trials will result in inconsistent findings on identical issues.

[76] In my view, after reading the pleadings and considering the submissions of counsel, the plaintiff has not satisfied me on the threshold test of commonality. The issues to be decided in the family action are those typical of a family law proceeding, and the evidence will, I anticipate, focus on what constitute family assets, and whether they are subject to equal division or reapportionment. The fact that Ms. Kirk is claiming an interest in shares held by

her husband does not change the fundamental nature of the proceeding. In contrast, the claim to be advanced in the civil action is the tort of conspiracy. If it does proceed it will involve the principals of Hyper Tech, Faronics and the defendant, Mr. Kirk (as the sole shareholder of White Dragon) facing allegations of participation in acts directed at frustrating or reducing Ms. Kirk's claim to shares of Hyper Tech at a time when it possessed the valuable software assets. The tenor running throughout the allegations against the defendants in the civil action is that they, with a view to harming Ms. Kirk, acted deliberately, knowingly, or had knowledge of facts that would put a reasonable person on notice that harm to Ms. Kirk would result.

[77] Even if the threshold test of commonality of claims was met, I find that joining the parties and claims in the family and civil actions would not create significant savings in pre-trial procedures given the extensive disclosure already provided on behalf of Hyper Tech, Faronics, Mr. Kirk, and White Dragon. Because of the different claims in the two actions I do not foresee a reduction of the number of days taken up by each trial. Furthermore, I do see a serious inconvenience for Faronics and, to a lesser degree, Hyper Tech in having to attend a trial in which each may have only a marginal interest. I see no prejudice in terms of delay in relation to the civil action given that it has already been set for hearing in 2008, and by seizing myself of the second trial I expect that the risk of inconsistent or contradictory findings on the same evidence has been substantially reduced. These steps, taken pursuant to Rule 5(6), also preserve the possibility of evidence from the first trial being admitted in the second trial by agreement.

[78] Therefore, I decline to exercise my discretion to join the family and civil actions.

Issue #3: Should the plaintiff be granted leave of the court pursuant to Rule 24(1) of the Rules of Court to further amend the statement of claim in the family action?

[79] In the family action the plaintiff seeks leave to further amend the statement of claim in relation to a number of significant aspects of her claim. I have appended as "Appendix A" the relevant portions of the proposed amendments for ease of reference and marked as "New" those portions that contain significant proposed amendments, without engaging in a microscopic comparison of the earlier versions as placed before Josephson J. and the Court of Appeal.

[80] The proposed further amendments relate to Mr. Kirk's alleged abuse of the collaborative law process and the tort of conspiracy.

[81] The plaintiff's proposed amendments regarding Mr. Kirk's alleged dishonest purpose in inviting Ms. Kirk to engage in the collaborative law process so as to delay her resorting to court to secure orders under s. 57 or s. 67 of the Family Relations Act, was allegedly to permit him the opportunity to restructure his personal financial affairs to eliminate or substantially diminish the assets that Ms. Kirk could properly lay claim to as family property. His alleged misuse of the collaborative law process, during which he is alleged to have caused Hyper Tech to become inactive and "transfer its assets to Faronics", is alleged to

have been in breach of contract and his trust and fiduciary duties (Proposed Further Amended Statement of Claim, para. 33.11).

- [82] The plaintiff also sets out the new claim in the family action based on an alleged civil conspiracy between Mr. Kirk, Hyper Tech, Faronics and White Dragon when they engaged in a number of allegedly unlawful acts aimed or directed at Ms. Kirk, such that "some or all of the Conspirators unlawfully conspired and agreed together to pursue Mr. Kirk's purpose of frustrating and defeating Ms. Kirk's Legitimate Claims by causing the stripping of Hyper's value" (para. 33.18 of Proposed Amended Statement of Claim).
- [83] Since I have determined that Hyper Tech and Faronics are not to be added as defendants in the family action, I decline to permit these claims to be added to the previously amended statement of claim in the family action. Insofar as they were directed towards her initial, poorly conceived claims against the assets of Hyper Tech and Faronics, they have no place in the family action as the plaintiff is now attempting to frame it. The claim of the alleged civil conspiracy is most properly dealt with in the separate civil action.
- [84] Apart from the issue of the civil conspiracy, it is unclear whether counsel on behalf of the defendants seek to dismiss the plaintiff's claim in relation to Mr. Kirk's alleged abuse of the collaborative process under Rule 19(24). I have assumed that their submissions under this rule in relation to the tort of civil conspiracy apply also to this claim.
- [85] I note that a party is generally not required to adduce evidence in support of pleadings or amendments to pleadings. Before the courts will strike out a pleading or refuse an amendment it must be perfectly clear that it discloses no reasonable cause of action or defence: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.). The courts will generally permit all amendments to pleadings that are necessary for the purpose of determining the issues outstanding between the parties, and prejudice is to be considered in terms of whether it can be compensated for by costs or an adjournment: *Royal Bank of Canada v. Bacon* (1999), 218 N.B.R. (2d) 98 (Q.B.), citing *Turnbull J.A. in Triathlon Leasing Inc. v. Juniberry Corp. and Hong* (1995), 157 N.B.R. (2d) 217 (C.A.).
- [86] I find, having considered the submissions in relation to the above proposed amendments and the nature of the proposed amendments in the context of the family action as pleaded, and in the interests of having a full, fair and hopefully final resolution of the factual and legal issues that may properly be raised in the trial, that it is appropriate to permit the plaintiff to further amend her statement of claim in the family matter to include the allegations pertaining to Mr. Kirk's alleged misuse of the collaborative law process.
- [87] To the extent that their submissions under Rule 19(24) apply to this claim, they have not demonstrated that it is plain and obvious that the plaintiff's claim in relation to Mr. Kirk's alleged abuse of the collaborative process discloses no reasonable claim. I find that it should be allowed to go to trial in the family action, notwithstanding its ostensible novelty. My finding in this respect should not be taken as an endorsement of this unique and somewhat questionable cause of action; rather, I base my finding on the fact that the defendants have

failed to carry their burden under Rule 19(24) in relation to this apparently novel claim.

- [88] I find the alleged subversion of the collaborative law process by Mr. Kirk is relevant to the family action and the claims made by Ms. Kirk. Furthermore, given that Mr. Kirk's alleged abuse of the collaborative law process likely requires the determination of whether he had a dishonest purpose (which is a requisite element of the tort of civil conspiracy pleaded in the civil action), determination of this factual matter in the family action will go some considerable distance to indicate whether the factual matrix for the alleged conspiracy may be proven in the subsequent civil trial.
- [89] In a similar vein, I permit the amendment in relation to Mr. Kirk "in his personal capacity and in his capacity as Trustee of the Kirk Family Trust, and the said Kirk Family Trust", although I certainly echo the comments of Mackenzie J.A. (at ¶10) that "[t]here is no good reason in my view why the action could not have been framed properly at a much earlier stage of these proceedings."
- [90] In her further proposed amendments to the statement of claim in the family action the plaintiff also seeks to revive the various claims against Hyper Tech and Faronics that were previously struck when Josephson J. declined to add those two parties to the family action. Those claims included claims against Faronics of knowing receipt of assets of Hyper Tech from Mr. Kirk in breach of his fiduciary duty to Ms. Kirk, and knowing assistance by Hyper Tech and Faronics to Mr. Kirk in his attempts to defeat some portion of Ms. Kirk's claim to assets owned or controlled by Mr. Kirk. In my view, those claims against Faronics and/or Hyper Tech did not survive the appeal and the subsequent order of the Court of Appeal that substantially upheld the judgment of Josephson J..
- [91] I note in the proposed amended pleadings that were extant before the Court of Appeal (but were not reviewed or commented upon in detail in their reasons) were the additional claims that the defendants, including Faronics and Hyper Tech, induced a breach of contract, intentionally interfered with contractual relations and engaged in fraudulent conveyance and fraud.
- [92] To my mind these claims as against Hyper Tech and Faronics are properly subsumed in the alleged civil conspiracy, and as such have no place in the proposed further amended statement of claim in the family action. In the event that I am in error on this point, the plaintiff has time before the scheduled trial in the civil action to attend again at the Court of Appeal to endeavour to have these claims added.
- [93] Therefore the plaintiff is permitted to file a further amended statement of claim in the family action that does not advance claims against Hyper Tech and Faronics as I have not permitted them to be added. I find that Ms. Kirk may add the proposed pleadings in relation to Mr. Kirk's alleged abuse of the collaborative law process, but not the tort of conspiracy alleged against him and the other conspirators. While I appreciate that other minor changes must be made for overall consistency in the further amended statement of claim, I specifically direct that paragraphs 33.1 to 33.12 inclusive are added, but paragraphs 33.13 to

33.24 inclusive are not. Paragraph 33.32 is not added.

[94] The plaintiff may submit a further amended statement of claim in the family action in this format for my approval prior to service.

Issue #4 Is the plaintiff permitted to file a new statement of claim in the civil action that includes the claims previously struck by Josephson J. against the corporate defendants Hyper Tech and Farnois, or is she limited to a claim founded on the tort of civil conspiracy by virtue of the decision of the Court of Appeal?

[95] I have set out in "Appendix B" the proposed statement of claim to be filed in the civil action.

[96] The plaintiff submits that the civil action is a new action and therefore she is entitled to one amendment without leave of the court, pursuant to Rule 24(1)(a) of the Rules of Court. In my view, this submission ignores all that has occurred to date in the context of the application to strike on behalf of Farnois and Hyper Tech before Josephson J. and the Court of Appeal. To my mind, this is not a correct approach.

[97] However, the statement of claim Ms. Kirk now seeks to file in the civil action reveals carefully drafted allegations that frame the alleged conspiracy she claims against Mr. Kirk, White Dragon, Hyper Tech and Farnois, based on their alleged involvement in a series of transactions designed to defeat her legitimate Family Relations Act claims, by their assistance to Mr. Kirk in his "dishonest purpose" to do the same. Her claim is now "not against the assets directly but based on her position as shareholder arising out of the respective division [of] family assets" (Court of Appeal at ¶4). To that end, I regard it as distinctly different in character and kind from her earlier claims against Hyper Tech and Farnois as they were embodied in her poorly conceived effort to expand the nature of the claims and the parties in the context of the family action.

[98] Insofar as her proposed statement of claim focuses on the tort of civil conspiracy referred to by the Court of Appeal, it does not go beyond what was contemplated by the order of the Court of Appeal and may not be said to contain claims that are res judicata. Therefore I find that it may be filed in its present form, with the provisos that follow.

[99] I interpret paragraphs 28 and 29 as pleaded to relate only to the alleged civil conspiracy and not to constitute separate causes of action. On that basis I permit them to stand. However, I accept the submission of counsel for Farnois that the plaintiff may not plead unjust enrichment (para. 36) in relation to Farnois or the other defendants, as I consider this to be beyond the scope of the order of the Court of Appeal and to be outside the conspiracy as alleged. Therefore, I order that paragraph 36 of the civil statement of claim be struck.

Issue #5: Is the conspiracy to commit fraud cause of action as pleaded in the proposed statement of claim in the civil action a valid cause of action, or should it be struck out pursuant to Rule 19(24) of the Rules of Court?

- [100] Counsel for the defendants submit that the plaintiff's proposed statement of claim in the civil action is flawed insofar as the civil conspiracy as now framed is not properly pleaded. They submit that the plaintiff has not set out the facts that, if proved, would show the existence of any agreement to act between the alleged conspirators. Further, the defendants submit that the plaintiff has not pleaded that the predominant or specific intent of Faronics, White Dragon, and Hyper Tech's alleged participation with Mr. Kirk was to injure her. Specific or predominant intention is an essential element and must be pleaded and proved at trial.
- [101] The key portions of the statement of claim now proposed in the civil action as they relate to the alleged civil conspiracy are:
- 20) Mr. Kirk, Hyper, White Dragon, and Faronics (the "Conspirators") agreed to commit the unlawful acts (and participate in Mr. Kirk's unlawful acts) particularized below to defeat Ms. Kirk's legitimate claims under the Family Relations Act ("Ms. Kirk's Legitimate Claims") and assist Mr. Kirk in his Dishonest Purpose.
 - 21) In or around 2002 to early 2003, the Conspirators combined or conspired with each other in the terms set out below with the intent to injure Ms. Kirk by entering into a course of transactions which had the effect of the Stripping of Hyper's value.
 - 22) The sole or predominant intention of the Conspirators in entering into the conspiracy was to injure Ms. Kirk, and the Conspirators were acting in contravention of their duties to Hyper and White Dragon, and were motivated to advance their own interests contrary to those of Hyper, White Dragon and Ms. Kirk. Some or all of the Conspirators intended that the conspiracy would frustrate or defeat Ms. Kirk's Legitimate Claims. In the alternative, they ought to have known that their actions would have that effect.
 - 23) Further, in breach of the Collaborative Law Participation Agreement and in breach of Mr. Kirk's trust and fiduciary duties, some or all of the Conspirators unlawfully conspired and agreed together to pursue Mr. Kirk's purpose of frustrating and defeating Ms. Kirk's Legitimate Claims by causing the Stripping of Hyper's value.
 - 24) Further, counsel for Hyper and the other director of Hyper had knowledge of these designs of Mr. Kirk and his Dishonest Purpose, or had knowledge of facts that would put a reasonable person on inquiry that Mr. Kirk had these designs and was acting:
 - a) in breach of the trust duties he owed Ms. Kirk;
 - b) in breach of the fiduciary duties he owed Ms. Kirk; and
 - c) in breach of his obligations to Ms. Kirk under the Collaborative Law Participation Agreement.

- 25) Hyper, White Dragon and Faronics assisted Mr. Kirk in his designs referred to in the immediately preceding paragraph. Particulars of that assistance are peculiarly within their knowledge. Pursuant to their conspiracy, the Conspirators, or some or all of them, agreed to and did carry out or caused to be carried out the following unlawful acts, which were aimed or directed at Ms. Kirk:
- a) adjusted the timing of various transactions, and the payments of bonuses, salaries and dividends to assist Mr. Kirk in his efforts to frustrate or defeat Ms. Kirk's Legitimate Claims;
 - b) altered the form, but not the substance, of the transaction by which Hyper and Faronics Technologies Inc. amalgamated to form Faronics, from that of a merger of Hyper and Faronics Technologies Inc. to that of a nominal sale of Hyper's assets to Faronics in return for an unsecured promissory note;
 - c) participated in Mr. Kirk's breaches of trust and fiduciary obligation to Ms. Kirk, including the Stripping of Hyper's value;
 - d) induced Mr. Kirk to breach the terms of the Collaborative Law Participation Agreement, including the Stripping of Hyper's value;
 - e) participated in Mr. Kirk's breach of the terms of the Collaborative Law Participation Agreement, including the Stripping of Hyper's value;
 - f) interfered with the contractual relations between Ms. Kirk and Mr. Kirk under the Collaborative Law Participation Agreement, and
 - g) full particulars of the acts the conspirators committed in furtherance of the conspiracy are peculiarly within the knowledge of the Conspirators and will be given pursuant to Rule 19(11.1) of the Rules of Court,

and, in doing so, some or all of the Conspirators either intended to cause damage to Ms. Kirk, or knew or ought to have known their actions would injure Ms. Kirk, and Ms. Kirk has suffered damage as a result.

[Emphasis Added]

[102] The plaintiff submitted that although the unlawful acts complained of were delicts that were actionable in and of themselves, this did not mean that they could not support a conspiracy claim. For the purposes of this application, I accept that to be so.

[103] I have been referred to two decisions relating to the nature of the tort of conspiracy and how it is to be pleaded: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 and *Skybridge Investments Ltd. v. Metro Motors Ltd.* (c.o.b. Metro Ford), 2006 BCCA 500.

[104] In Skybridge reference is made to Canada Cement and ¶32-35 are of assistance to the present analysis:

32. The pertinent facts pleaded by Skybridge are as follows: Ford Canada, authorized Ford dealers, automobile dealer associations, and other individuals and entities initiated and continue a course of conduct to prevent new Ford vehicles sold in Canada from being exported or resold, in particular to the United States (paras. 23, 25). These entities have in the past and continue to: investigate prospective purchasers to identify potential exporters and resellers of new Ford vehicles and refuse to sell to those identified as potential exporters or resellers; create and exchange blacklists of people and/or entities that purchase new Ford vehicles for export or resale (paras. 24, 26). By reason of these actions the Plaintiffs have and continue to suffer substantial damage and irreparable harm (para. 27).
33. The judge noted at paragraph 53 that the Supreme Court of Canada set out the following articulation of the tort of conspiracy in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-472, 145 D.L.R. (3d) 385, and the parties in the case at bar agree that this is the correct test:

... the law of torts does recognize a claim against [persons] in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

34. As correctly noted by the judge at paragraph 54, "[t]here is no plea that the conduct particularized is unlawful" so situation (2) is inapplicable. With regard to situation (1), the judge stated:

[56] On the alternative plea of civil conspiracy, the plaintiffs say that even if the particularized conduct is lawful, the evidence they propose to tender [at trial] will prove the predominant purpose, of the parties to the agreements alleged, was to cause injury to the plaintiffs.

35. Skybridge's intention to adduce such evidence at trial was irrelevant to the application because Skybridge's pleadings did not disclose such a material fact to be proved. That is, Skybridge did not plead the material fact that the predominant purpose of the combined conduct alleged was to cause injury to Skybridge. It follows that Skybridge's pleaded facts cannot support the required elements of situation (1) as set out in *Canada Cement* for the purposes of the Rule 18(6) application. Consequently, Skybridge's plea of conspiracy is bound to fail.

[105] I find that the conspiracy as pleaded, although somewhat "bare bones", is adequate in terms of the required basic elements. The "predominant intention" is pleaded, as is the nature of the alleged unlawful acts directed at Ms. Kirk. In this case the conspiracy as alleged, based on alleged unlawful acts, falls into in both scenarios (1) and (2) as set out in Canada Cement.

[106] Rule 19 (24)(a) of the Rules of Court provides:

At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence as the case may be

[107] The law pertaining to Rule 19(24)(a) is not in dispute. The basic principle governing an application under this rule is the determination of whether there is a question to be tried, regardless of the complexity or novelty of that question: *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.). If so, then an application under this rule must be dismissed: *Re Milito* (1984), 52 B.C.L.R. 269 (S.C.). I am to assume for the purposes of this application that the facts as pleaded are true: *Hunter v. Canada Mortgage and Housing Corp.*, [1990] B.C.J. No. 2543 (C.A.) (QL). The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[108] Although the authorities I have been presented with refer to relief in relation to the tort of conspiracy to be in the form of damages, I am not prepared to strike any of the forms of relief as set out in the proposed statement of claim. Assuming the facts as pleaded are true, I find that it is not plain and obvious that the plaintiff's claim in relation to the tort of civil conspiracy discloses no reasonable claim.

Summary

[109] For these reasons I order the following:

1. That the two actions be maintained as separated actions, but that they be heard together by me in a two-phase proceeding. The first phase, to commence on October 22, 2007 for 15 days will consist of the family action and will determine, among other things, the plaintiff's entitlement to alleged family assets and the nature of the plaintiff's interest, if any, in White Dragon. The second phase will consist of the civil action, now set to be heard from April 18 to May 9, 2008, with the option of a third week (May 12 to 16, 2008) to conclude the matter if required. Evidence from the first action may, by agreement, be incorporated into the second action to avoid duplication, additional time and expense, and eliminate the risk of contradictory findings.
2. The plaintiff is not permitted to add Faronics or Hyper Tech as defendants to the family law action.

3. The plaintiff is granted leave to amend her pleadings in the family action to include claims in relation to Mr. Kirk's alleged abuse of the collaborative law process and to add reference to the defendant Denis Frederick Kirk, also known as Denis Frederick, "in his personal capacity and in his capacity as Trustee of the Kirk Family Trust". The plaintiff is not permitted to plead the tort of civil conspiracy in the family action, and paragraphs 33.13 to 33.24 inclusive are struck, as is paragraph 33.32.
4. The plaintiff is permitted to file an amended statement of claim in the civil action to include the tort of civil conspiracy as alleged against Mr. Kirk, Hyper Tech, Faronics and White Dragon. The plaintiff is not permitted, however, to advance a separate claim of unjust enrichment in the civil action, and therefore paragraph 36 is struck.
5. The civil conspiracy as pleaded in the civil action is sufficient and is not struck out.

Costs

[110] In view of the fact that each party has met with mixed success on the various issues raised, I direct that each party is to bear their own costs in relation to these applications.

"Arnold-Bailey J."

Appendix "A"

[111] The proposed amended statement of claim in the family action includes the following:

33.1 Ms. Kirk has contributed directly and indirectly, to the acquisition, preservation and maintenance of the parties' assets, including the shares of Hyper held in the name of Mr. Kirk, and to the development of the business of Hyper, and without limiting the generality of the foregoing, Ms. Kirk has contributed indirectly to same by assuming household duties, effectively managing the household and performing childrearing responsibilities throughout the marriage within the meaning of s. 59(1) of the Family Relations Act. [Portions are new]

33.2 Ms. Kirk claims that the shares owned by Mr. Kirk in Hyper are family assets within the meaning of Part 5 of the Family Relations Act.

33.3 When Mr. Kirk acquired his shares in Hyper, and at all material times since then, Mr. Kirk and Ms. Kirk intended and agreed, expressly or impliedly, that Mr. Kirk would hold the Hyper shares in his name for the joint benefit of both Mr. Kirk and Ms. Kirk, and, without limiting the generality of the foregoing, that Mr. Kirk would hold Ms. Kirk's 50% interest in trust for Ms. Kirk.

33.4 In the circumstances, Mr. Kirk, personally, and as an officer, director, and shareholder, and controlling mind of Hyper, owes and owed Ms. Kirk a fiduciary duty not to affect her legal, practical and substantive interests in the value of the shares in Hyper, as Ms. Kirk was particularly vulnerable to Mr. Kirk's actions.

33.5 Ms. Kirk claims that that any and all income, dividends, management bonuses, payments or distributions of any kind, that Mr. Kirk has received from, or that he has or will become entitled to receive, since the date of the separation of Ms. Kirk and Mr. Kirk, from Faronics, Hyper and White Dragon, in excess of the sum of \$200,000 per year (the "Capital Profits"), and all assets Mr. Kirk has acquired with the Capital Profits, whether in his name or in the name of the Kirk Family Trust, are family assets within the meaning of Part 5 of the Family Relations Act.

33.6 Mr. Kirk has desired to reorganize and manipulate the family assets, in order to defeat Ms. Kirk's legitimate claims under the Family Relations Act ("Ms. Kirk's legitimate claims").

33.7 Mr. Kirk knew that if a triggering event occurred, pursuant to s. 57 of the Family Relations Act, or if Ms. Kirk obtained a s. 67 order under the Family Relations Act, his ability to defeat Ms. Kirk's legitimate claims would be impaired or destroyed. Therefore, on or before February 19, 2003, Mr. Kirk fraudulently prevailed upon Ms. Kirk to enter into a Collaborative Law Participation Agreement with him.

33.8 Prior to extending his invitation to Ms. Kirk to enter into the Collaborative Law Process, Mr. Kirk sought legal advice from one or more family law lawyers for the purpose of minimizing his financial exposure to Ms. Kirk. It was at or about the same time that Mr. Kirk incorporated White Dragon and he set up the Kirk Family Trust. [New paragraph]

33.9 Under the Collaborative Law Participation Agreement, the parties agreed to act in good faith, honestly disclose all of their assets, and not dispose of any assets except in the usual and ordinary course of business. Further, the parties contracted not to pursue any remedies in a legal proceeding, including obtaining orders pursuant to s. 57 or s. 67 of the Family Relations Act. Mr. Kirk did not intend to honour the terms of the Collaborative Law Participation Agreement. His aim was to dissuade Ms. Kirk from asserting her Family Relations Act remedies before he could strip the value out of Hyper as set out below. Ms. Kirk refers to Mr. Kirk's motive in tricking her to enter the Collaborative law process as "Mr. Kirk's Dishonest Purpose" or "his Dishonest Purpose".

33.10 As a result of deceiving Ms. Kirk into entering the Collaborative Law Participation Agreement, Mr. Kirk had the additional scope to exercise power over the main assets to be divided between the parties, that is, his shares in Hyper, and thus affect Ms. Kirk's legal or practical interests.

33.11 During the time that Ms. Kirk and Mr. Kirk were engaged in the collaborative law process, in breach of contract and his trust and fiduciary duties, Mr. Kirk, as an officer, director, and shareholder of Hyper, pursued his purpose of defeating and Ms. Kirk's legitimate claims by causing Hyper to cease operating its active and increasingly profitable business purposes for its own account, and transfer its assets to Faronics (the "Stripping of Hyper's value"). Those assets included the Deep Freeze software, the WinSelect software, and other software assets. In this way, Mr. Kirk devalued his Hyper shares in an attempt to deprive Ms. Kirk of her interest in the profits and business opportunities that would otherwise have been realized by Hyper as a going concern. Mr. Kirk intended further to claim that any interest that he would have in Faronics was not a family asset. The stripping of Hyper's value amounted to a theft of Hyper's business and

corporate opportunities. Further, Mr. Kirk's actions were oppressive to Ms. Kirk within the meaning of the Business Corporations Act and improper at common law.

33.12 In stripping Hyper's value while Ms. Kirk and Mr. Kirk were engaged in the collaborative law process, Mr. Kirk exercised power over assets which affected Ms. Kirk's legal, practical and substantive interests.

33.13 At all material times, White Dragon knew of the design of Mr. Kirk to defeat some portion of Ms. Kirk's legitimate claims and his dishonest purpose and assisted in that attempt.

33.14 At all material times, Mr. Kirk was a director of Hyper, White Dragon and Faronics. Accordingly, his knowledge of his intention to defeat Ms. Kirk's legitimate claims and his Dishonest Purpose is imputed to each of Hyper, White Dragon and Faronics.

33.15 Mr. Kirk, Hyper, White Dragon, and Faronics (the "Conspirators") agreed to commit the unlawful acts (and participate in Mr. Kirk's unlawful acts) particularized below to defeat Ms. Kirk's legitimate claims under the Family Relations Act (Ms. Kirk's Legitimate Claims") and assist Mr. Kirk in his Dishonest Purpose. [New]

33.16 In or around 2002 to early 2003, the Conspirators combined or conspired with each other in the terms set out below with the intent to injure Ms. Kirk by entering into a course of transactions which had the effect of the Stripping of Hyper's value. [New]

33.17 The sole or predominant intention of the Conspirators in entering into the conspiracy was to injure Ms. Kirk, and the Conspirators were acting in contravention of their duties to Hyper and White Dragon, and were motivated to advance their own interests contrary to those of Hyper, White Dragon and Ms. Kirk. Some or all of the Conspirators intended that the conspiracy would frustrate or defeat Ms. Kirk's Legitimate Claims. In the alternative, they ought to have known that their actions would have that effect. [New]

33.18 Further, in breach of the Collaborative Law Participation Agreement and in breach of Mr. Kirk's trust and fiduciary duties, some or all of the Conspirators unlawfully conspired and agreed together to pursue Mr. Kirk's purpose of frustrating and defeating Ms. Kirk's Legitimate Claims by causing the stripping of Hyper's value. [New]

33.19 Further, counsel for Hyper and the other director of Hyper had knowledge of these designs of Mr. Kirk and his Dishonest Purpose, or had knowledge of facts that would put a reasonable person on inquiry that Mr. Kirk had these designs and was acting:

- (a) in breach of the trust duties he owed Ms. Kirk;
- (b) in breach of the fiduciary duties he owed Ms. Kirk; and
- (c) in breach of his obligations to Ms. Kirk under the Collaborative Law Participation Agreement. [The portion re dishonest purpose is new]

33.20 Hyper, White Dragon and Faronics assisted Mr. Kirk in his designs referred to in the immediately preceding paragraph. Pursuant to their conspiracy, the Conspirators, or some or all of them, agreed to and did carry out or caused to be carried out the following unlawful acts, which were aimed or directed at Ms. Kirk:

- (a) adjusted the timing of various transactions, and the payments of bonuses, salaries and dividends to assist Mr. Kirk in his efforts to frustrate or defeat Ms. Kirk's Legitimate Claims;
- (b) altered the form, but not the substance, of the transaction by which Hyper and Faronics Technologies Inc. amalgamated to form Faronics, from that of a merger of Hyper and Faronics Technologies Inc. to that of a nominal sale of Hyper's assets to Faronics in return for an unsecured promissory note;
- (c) participated in Mr. Kirk's breaches of trust and fiduciary obligation to Ms. Kirk, including the Stripping of Hyper's value;
- (d) induced Mr. Kirk to breach the terms of the Collaborative Law Participation Agreement, including the Stripping of Hyper's value;
- (e) participated in Mr. Kirk's breach of the terms of the Collaborative Law Participation Agreement, including the Stripping of Hyper's value;
- (f) interfered with the contractual relations between Ms. Kirk and Mr. Kirk under the Collaborative Law Participation Agreement; and
- (g) full particulars of the acts the conspirators committed in furtherance of the conspiracy are peculiarly within the knowledge of the Defendants and will be given pursuant to Rule 19(11.1) of the Rules of Court,

and, in doing so, some or all of the Conspirators either intended to cause damage to Ms. Kirk, or knew or ought to have known their actions would injure Ms. Kirk, and Ms. Kirk has suffered damage as a result. [The portions in relation to conspiracy, conspirators alleged actions, and the "Stripping of Hyper's value" are new]

33.21 The Conspirators have refused to discontinue and intend to repeat and continue the acts complained of. The Conspirators continue to divert property, monies and benefits, that would otherwise flow to Ms. Kirk, by paying out excessive management salaries and other financial benefits, to the directors of Faronics and to Mr. Kirk personally. They have continued to do so despite the existence of the financial restraining order of Master Brine pronounced May 7, 2004, which Court Order the Conspirators have had notice of. [New]

33.22 As a result of the acts carried out by the Conspirators, or some or all of them, in furtherance of their conspiracy, Ms. Kirk has suffered loss and damage and continues to suffer loss and damage by reason of which the Defendants, and each of them, are liable for damages for the tort of conspiracy. [New]

33.23 Further, or in the alternative, White Dragon and Faronics received the assets of Hyper when they knew, or were put on inquiry, that in doing so Mr. Kirk was in breach of his duties as set out above.

33.24 Accordingly, White Dragon and Faronics became constructive trustees of the value of Ms. Kirk's beneficial interest in Hyper, and Ms. Kirk is entitled to trace that value into their hands.

33.25 On or before March 31, 2004, Ms. Kirk withdrew from the collaborative law process.

33.26 On May 7, 2004, Ms. Kirk obtained a declaration under s. 57 of the Family Relations Act that the parties had no reasonable prospect of reconciliation with each other (the "triggering event").

33.27 After the date of separation, both before and after the triggering event, Hyper paid out dividends to its directors knowing that doing so was in breach Ms. Kirk's rights as set out above.

33.28 After the Order of Master Brine was pronounced in this proceeding on May 7, 2004, Hyper, White Dragon and Faronics, improperly paid out dividends, income, management bonuses, payments and other distributions to Mr. Kirk, without regard to Ms. Kirk's interest and Ms. Kirk has been injured as a result.

33.29 Ms. Kirk was and remains at the mercy of Mr. Kirk, Hyper, White Dragon and Faronics.

33.30 Mr. Kirk used family assets or property he held in trust for Ms. Kirk to purchase the following properties:

- (a) City of Port Coquitlam, Parcel Identifier 023-162-244, Strata Lot 36, Section 6, Township 40, New Westminster District Strata Plan LM2053 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1;
- (b) City of Port Coquitlam, Parcel Identifier 018-305-911, Strata Lot 28, District Lot 386, Group 1 New Westminster District, Strata Plan LMS923 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1;
- (c) City of Vancouver, Parcel Identifier 017-581-079, Strata Lot 210, False Creek Strata Plan VR2613 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1; and
- (d) City of Vancouver, Parcel Identifier 019-153-759, Strata Lot 23, False Creek Strata Plan LMS1809 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1.

Accordingly, Mr. Kirk holds the properties referred to in paragraphs (a) to (d) in trust for Ms. Kirk.

33.31 Mr. Kirk made the payments to the Kirk Family Trust in order to delay, hinder or defraud Ms. Kirk of her just and lawful remedies and her rights were accordingly disturbed, hindered, delayed or defrauded. Ms. Kirk relies on the Fraudulent Conveyance Act.

33.32 Given the actions of the Conspirators and all of the circumstances, it is just and equitable that Hyper be liquidated, and that Hyper, Faronics and White Dragon be ordered to compensate Ms. Kirk in such sums as this Honourable Court deems just, or that Faronics and White Dragon be ordered to pay to Hyper sufficient funds to allow it to compensate Ms. Kirk in such sums as this Honourable Court deems just. [The reference to conspirators is new]

Appendix "B"

[112] The key portions of the proposed statement of claim in the civil action are as follows:

- 9) When Mr. Kirk acquired his shares in Hyper, and at all material times since then, Mr. Kirk and Ms. Kirk intended and agreed, expressly or impliedly, that Mr. Kirk would hold the Hyper shares in his name for the joint benefit of both Mr. Kirk and Ms. Kirk, and, without limiting the generality of the foregoing, that Mr. Kirk would hold Ms. Kirk's 50% interest in trust for Ms. Kirk.
- 10) In the circumstances, Mr. Kirk, personally, and as an officer, director, shareholder, and controlling mind of Hyper, owes and owed Ms. Kirk a fiduciary duty not to affect her legal, practical and substantive interests in the value of the shares in Hyper, as Ms. Kirk was particularly vulnerable to Mr. Kirk's actions.
- 11) Mr. Kirk has reorganized and manipulated the value of Hyper, in order to defeat Ms. Kirk's legitimate claims under the Family Relations Act ("Ms. Kirk's legitimate claims").
- 12) Mr. Kirk knew that if a triggering event occurred, pursuant to s. 57 of the Family Relations Act, or if Ms. Kirk obtained a s. 67 order under the Family Relations Act, his ability to defeat Ms. Kirk's legitimate claims would be impaired or destroyed. Therefore, on or before February 19, 2003, Mr. Kirk fraudulently prevailed upon Ms. Kirk to enter into a Collaborative Law Participation Agreement with him.
- 13) Prior to extending his invitation to Ms. Kirk to enter into the Collaborative Law Process, Mr. Kirk sought legal advice from one or more family law lawyers for the purpose of minimizing his financial exposure to Ms. Kirk. It was at or about the same time that Mr. Kirk incorporated White Dragon and he set up the Kirk Family Trust.
- 14) Under the Collaborative Law Participation Agreement, the parties agreed to act in good faith, honestly disclose all of their assets, and not dispose of any assets except in the usual and ordinary course of business. Further, the parties contracted not to pursue any remedies in a legal proceeding, including obtaining orders pursuant to s. 57 or s. 67 of the Family Relations Act. Mr. Kirk did not intend to honour the terms of the Collaborative Law Participation Agreement. His aim was to dissuade Ms. Kirk from asserting her Family Relations Act remedies before he could strip the value out of Hyper as set out below. Ms. Kirk refers to Mr. Kirk's motive in tricking her to enter the Collaborative law process as "Mr. Kirk's Dishonest Purpose" or "his Dishonest Purpose".

- 15) As a result of deceiving Ms. Kirk into entering the Collaborative Law Participation Agreement, Mr. Kirk had the additional scope to exercise power over the main assets to be divided between the parties, that is, his shares in Hyper, and thus affect Ms. Kirk's legal or practical interests.
- 16) During the time that Ms. Kirk and Mr. Kirk were engaged in the collaborative law process, in breach of contract and his trust and fiduciary duties, Mr. Kirk, as an officer, director, and shareholder of Hyper, pursued his purpose of defeating Ms. Kirk's legitimate claims by causing Hyper to cease operating its active and increasingly profitable business purposes for its own account, and transfer its assets to Faronics (the "Stripping of Hyper's value"). Those assets included the Deep Freeze software, the WinSelect software, and other software assets.
- 17) In this way, Mr. Kirk devalued his Hyper shares in an attempt to deprive Ms. Kirk of her interest in the profits and business opportunities that would otherwise have been realized by Hyper as a going concern. Mr. Kirk intended further to claim that any interest that he would have in Faronics was not a family asset. The stripping of Hyper's value amounted to a theft of Hyper's business and corporate opportunities. Further, Mr. Kirk's actions were oppressive to Ms. Kirk within the meaning of the Business Corporations Act and improper at common law.
- 18) In stripping Hyper's value while engaged in the collaborative law process, Mr. Kirk exercised power over assets which affected Ms. Kirk's legal, practical and substantive interests.
- 19) At all material times, Mr. Kirk was a director of Hyper, White Dragon and Faronics. Accordingly, his knowledge of his intention to defeat Ms. Kirk's legitimate claims and his Dishonest Purpose is imputed to each of Hyper, White Dragon and Faronics.
- 20) Mr. Kirk, Hyper, White Dragon, and Faronics (the "Conspirators") agreed to commit the unlawful acts (and participate in Mr. Kirk's unlawful acts) particularized below to defeat Ms. Kirk's legitimate claims under the Family Relations Act ("Ms. Kirk's Legitimate Claims") and assist Mr. Kirk in his Dishonest Purpose.
- 21) In or around 2002 to early 2003, the Conspirators combined or conspired with each other in the terms set out below with the intent to injure Ms. Kirk by entering into a course of transactions which had the effect of the Stripping of Hyper's value.
- 22) The sole or predominant intention of the Conspirators in entering into the conspiracy was to injure Ms. Kirk, and the Conspirators were acting in contravention of their duties to Hyper and White Dragon, and were motivated to advance their own interests contrary to those of Hyper, White Dragon and Ms. Kirk. Some or all of the Conspirators intended that the conspiracy would frustrate or defeat Ms. Kirk's Legitimate Claims. In the alternative, they ought to have known that their actions would have that effect.

- 23) Further, in breach of the Collaborative Law Participation Agreement and in breach of Mr. Kirk's trust and fiduciary duties, some or all of the Conspirators unlawfully conspired and agreed together to pursue Mr. Kirk's purpose of frustrating and defeating Ms. Kirk's Legitimate Claims by causing the Stripping of Hyper's value.
- 24) Further, counsel for Hyper and the other director of Hyper had knowledge of these designs of Mr. Kirk and his Dishonest Purpose, or had knowledge of facts that would put a reasonable person on inquiry that Mr. Kirk had these designs and was acting:
- a) in breach of the trust duties he owed Ms. Kirk;
 - b) in breach of the fiduciary duties he owed Ms. Kirk; and
 - c) in breach of his obligations to Ms. Kirk under the Collaborative Law Participation Agreement.
- 25) Hyper, White Dragon and Faronics assisted Mr. Kirk in his designs referred to in the immediately preceding paragraph. Particulars of that assistance are peculiarly within their knowledge. Pursuant to their conspiracy, the Conspirators, or some or all of them, agreed to and did carry out or caused to be carried out the following unlawful acts, which were aimed or directed at Ms. Kirk:
- a) adjusted the timing of various transactions, and the payments of bonuses, salaries and dividends to assist Mr. Kirk in his efforts to frustrate or defeat Ms. Kirk's Legitimate Claims;
 - b) altered the form, but not the substance, of the transaction by which Hyper and Faronics Technologies Inc. amalgamated to form Faronics, from that of a merger of Hyper and Faronics Technologies Inc. to that of a nominal sale of Hyper's assets to Faronics in return for an unsecured promissory note;
 - c) participated in Mr. Kirk's breaches of trust and fiduciary obligation to Ms. Kirk, including the Stripping of Hyper's value;
 - d) induced Mr. Kirk to breach the terms of the Collaborative Law Participation Agreement, including the Stripping of Hyper's value;
 - e) participated in Mr. Kirk's breach of the terms of the Collaborative Law Participation Agreement, including the Stripping of Hyper's value;
 - f) interfered with the contractual relations between Ms. Kirk and Mr. Kirk under the Collaborative Law Participation Agreement, and
 - g) full particulars of the acts the conspirators committed in furtherance of the conspiracy are peculiarly within the knowledge of the Conspirators and will be given pursuant to Rule 19(11.1) of the Rules of Court,

and, in doing so, some or all of the Conspirators either intended to cause damage to Ms. Kirk, or knew or ought to have known their actions would injure Ms. Kirk, and Ms. Kirk has suffered damage as a result.

- 26) The Conspirators have refused to discontinue and intend to repeat and continue the acts complained of. The Conspirators continue to divert property, monies and benefits, that would otherwise flow to the Mr. Kirk, by paying out excessive management salaries and other financial benefits, to the directors of Faronics and to Mr. Kirk personally. They have continued to do so despite the existence of the financial restraining order of Master Brine pronounced May 7, 2004, which Court Order the Conspirators have had notice of.
- 27) As a result of those acts carried out by the Conspirators, or some or all of them, in furtherance of their conspiracy, Ms. Kirk has suffered loss and damage and continues to suffer loss and damage by reason of which the Conspirators, and each of them, are liable for damages for the tort of conspiracy.
- 28) Further, or in the alternative, White Dragon and Faronics received the assets of Hyper when they knew, or were put on inquiry, that in doing so Mr. Kirk was in breach of his duties as set out above.
- 29) Accordingly, White Dragon and Faronics became constructive trustees of the value of Ms. Kirk's beneficial interest in Hyper, and Ms. Kirk is entitled to trace that value into their hands.
- 30) On or before March 31, 2004, Ms. Kirk withdrew from the collaborative law process.
- 31) On May 7, 2004, Ms. Kirk obtained a declaration under s. 57 of the Family Relations Act that the parties had no reasonable prospect of reconciliation with each other (the "triggering event").
- 32) After the date of separation, both before and after the triggering event, Hyper paid out dividends to its directors knowing that doing so was in breach Ms. Kirk's rights as set out above.
- 33) After the Order of Master Brine was pronounced in this proceeding on May 7, 2004, Hyper, White Dragon and Faronics, improperly paid out dividends, income, management bonuses, payments and other distributions to Mr. Kirk, without regard to Ms. Kirk's interest and Ms. Kirk has been injured as a result.
- 34) Ms. Kirk was and remains at the mercy of Mr. Kirk, Hyper, White Dragon and Faronics.
- 35) Given the actions of the Conspirators and all of the circumstances, it is just and equitable that Hyper be liquidated, and that Mr. Kirk, Hyper, Faronics and White Dragon be ordered to compensate Ms. Kirk in such sums as this Honourable Court deems just, or that Faronics and White Dragon be ordered to pay to Hyper sufficient funds to allow it to compensate Ms. Kirk in such sums as this Honourable Court deems just.

- 36) The stripping of Hyper's assets unjustly enriched Faronics, White Dragon, and Mr. Kirk at the expense of Ms. Kirk. There was no juristic reason to justify that.

Wherefore, the Plaintiff claims as follows:

- a) legal and equitable damages;
- b) special, general and punitive damages;
- c) a declaration of a resulting, constructive, express, or implied trust in favour of Ms. Kirk over the value of the assets owned by Mr. Kirk, Hyper, White Dragon and Faronics, and,
- d) in the alternative to the relief sought in the immediately preceding paragraph, restitution by quantum meruit;
- e) pursuant to s. 227(3)(j) of the Business Corporations Act, an order varying the transaction that affected the stripping of Hyper's value and requiring Hyper, White Dragon, and Faronics to compensate Ms. Kirk.
- f) in the alternative to the relief sought in the immediately preceding paragraph, an order varying the transaction that affected the stripping of Hyper's value and requiring White Dragon, and Faronics to compensate Hyper sufficiently to allow it to comply with any order the Court makes against it;
- g) an order that Hyper compensate Ms. Kirk for the wrongful payments of dividends and distributions of any kind, which disregarded her interest in the shares of Hyper;
- h) an accounting of the value of the assets held or owned by Mr. Kirk, Hyper, White Dragon and Faronics;
- i) pursuant to Rules 45 and 46 of the Rules of Court such orders as may be necessary for the detention, custody, or preservation of assets;
- j) costs; and
- k) such further and other relief as this Honourable Court deems meet.

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