

CANADA / JUDGMENT

Konicek v. Vantown Infrastructure Invesco Inc.

2021 BCSC 1237

COURT

Supreme Court of British Columbia

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2021 BCSC 1237 Konicek v. Vantown Infrastructure Invesco Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Konicek v. Vantown Infrastructure Invesco Inc.,

2021 BCSC 1237

Date: 20210629

Docket: S189109

Registry: Vancouver

Between:

Ralph Konicek and Jennic #60 Holdings Ltd.

Plaintiffs

And

Vantown Infrastructure Invesco Inc., R.S.K. Excavating & Contracting Ltd., Paul Leung, Amy Hung Ying Leung and the Crown in Right of Canada

Defendants

And

Ralph Konicek and Jennic #60 Holdings Ltd.

Defendants by Counterclaim

Before: The Honourable Mr. Justice Kirchner

Reasons for Judgment

Counsel for Plaintiffs:

M. Dew

Counsel for Vantown Infrastructure Invesco Inc. and R.S.K. Excavating & Contracting Ltd:

C. Holloway

Appearing on his own behalf:

Paul Leung

Appearing on her own behalf:

Amy Hung Ying Leung

Place and Date of Hearing:

Vancouver, B.C.

June 3 and 4, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2021

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Introduction

- [1] The plaintiffs in this commercial contract dispute seek orders falling under three broad categories:
- a) First, they seek a declaration that communications between Lawson Lundell LLP ("Lawson Lundell") and each of two individual defendants, Paul Leung and Amy Leung (the "Leungs"), in their personal capacities, are not subject to solicitor-client privilege or, alternatively, that any such privilege has been waived.
 - b) Second, and related to the first category, an order that Frans Lotz, a lawyer formerly with Lawson Lundell, attend an examination by the plaintiffs under Rule 7-5 to answer questions relating to his witnessing of documents signed by Ms. Leung.
 - c) Third, orders that the defendant, Vantown Infrastructure Invesco Inc. ("Vantown") obtain from Lawson Lundell copies of certain emails relating to the subject matter of the litigation, deliver an amended list of documents listing those emails which have not been previously listed, and produce copies of those that are not privileged.
- [2] The first two categories of orders relate to Ms. Leung's defence as well as evidence she gave on discovery and in an affidavit. The third category arises from the fact that neither Vantown nor its principals (including Mr. Leung) has been able to produce relevant emails from a time period material to the action due to the loss or destruction of the computers, phones, and hard drives that stored such emails.
- [3] The Leungs oppose to the first two categories of relief claiming their communications with Lawson Lundell are privileged. Vantown and the Leungs oppose the third category of orders claiming the request is a fishing expedition, overly broad, unlikely to produce relevant documents, and inconsistent with the proportionality objectives of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

Facts

The Parties and the Transaction as Issue

- [4] The plaintiffs, Ralph Konicek and Jennic #60 Holdings Ltd. ("Jennic") are the former owners of RSK Excavating & Contracting Ltd. ("RSK"), a construction company based out of Kitimat, British Columbia where it performed various construction and property management work. Mr. Konicek was the director and operator of RSK from the time it was formed in 1991 until it was sold to the defendant Vantown in 2016. Jennic is a holding company wholly owned by Mr. Konicek which held shares in RSK.
- [5] Vantown is a British Columbia company whose directors at the material time were John Gordon and the defendants Paul Leung and Amy Leung. A third individual, Brian Gessner, is a former director of Vantown and became shareholder in RSK after it was acquired by Vantown.
- [6] Mr. Gordon, Mr. Leung, Mr. Gessner, and potentially Ms. Leung worked together to purchase RSK from the plaintiffs through Vantown (Ms. Leung denies active involvement). I will refer to this group collectively, with or without Ms. Leung, as the "Buyer Group".
- [7] By share purchase agreement dated April 27, 2016 (the "SPA"), Vantown purchased all the shares in RSK from Mr. Konicek and Jennic for approximately \$7.9 million plus some additional amounts for accounts receivable. The first \$5 million was due at the time of closing and the balance of approximately \$2.9 million (the "Balance") was to be paid, subject to some adjustments, in installments commencing January 1, 2017.
- [8] Payment of the Balance was arranged through a Deferred Payment Loan Agreement and a promissory note, and was personally guaranteed by Mr. Leung pursuant to a guarantee he executed with Mr. Lotz as witness. Mr. Lotz, as noted, was a lawyer with Lawson Lundell who were Vantown's solicitors on the RSK purchase. Mr. Leung's personal guarantee was secured by way of a mortgage granted in favor of the plaintiffs over the Leungs' family home in the Shaughnessy area of Vancouver. The mortgage document was executed by both Mr. and Ms. Leung on June 6, 2021 and witnessed by Mr. Lotz. The personal guarantee permits the plaintiffs to take action on the guarantee, including executing on the mortgage, without exhausting its recourse against Vantown.
- [9] Ms. Leung also signed a consent to act as director of Vantown on March 2, 2016 and on or about June 23, 2016, in her capacity as a director of Vantown, signed resolutions in relation to the closing of the transaction with the plaintiffs. She remained a director of Vantown until October 25, 2018.

Alleged Breach of the SPA and the Pleadings

- [10] Vantown made the required \$5 million payment on closing pursuant to the SPA but made no further payments on the Balance. On February 2, 2017, the plaintiffs gave Vantown and Mr. Leung notice of failure to pay and thereafter pursued payment of the Balance by seeking to enforce the guarantee through foreclosure proceedings taken against the Leung's home. Those proceedings, I understand, were converted into this action in which the plaintiffs now sue Vantown for breach of contract and the Leungs for enforcement of the personal guarantees.
- [11] Vantown and Mr. Leung each allege in their responses to civil claim that the plaintiffs made certain representations as to the ongoing state of RSK's business as at the time of the SPA, including, amongst others, that RSK was earning substantial and stable net income revenues from operations of the business each year and there was a significant amount of ongoing ordinary and normal work opportunities that would continue to be available to RSK after the transaction. Vantown and Mr. Leung each plead that they relied on these representations in deciding to execute the SPA and, contrary to these representations, Mr. Konicek had begun the intentional process of winding down RSK's operations starting in late 2015 or early 2016. The response to civil claim of each alleges that Mr. Konicek failed to disclose to Vantown that he was winding down the RSK and that, at the closing date, RSK was not a "going concern" such that Vantown did not receive the benefits for which it had bargained.
- [12] The plaintiffs say they made no secret of the fact he was winding down RSK and made no representations to the contrary. RSK was once a busy and active construction company but Mr. Konicek was trying to retire as he was looking for a buyer for the business. He says he did not wait to find a buyer before starting to wind it down and this was effectively done by the time of the SPA. The plaintiffs say this was properly communicated to the Buyer Group prior to the signing of the SPA and the Buyer Group was well aware of the true state of RSK's business.
- [13] The Plaintiffs point out that the SPA expressly states RSK had no ongoing contracts. Further, in an email dated April 4, 2016, three weeks before the SPA was signed, in which the Buyer Group discussed the state of RSK's business as follows:
- Let's look at it from purely practical business and economic point of view. March figure is alarming. Essentially the company dropped off the cliff. It changed all our financing and budgeting figures. However, I still think the deal can work if we just change the payment schedule and the security to give everyone comfort i.e. the purchaser and the vendor.
- [14] The plaintiffs believe there may be more emails like this one exchanged by the members of the Buyer Group that have not been produced.
- [15] Ms. Leung takes a very different approach in her defence. She does not rely on representations made in connection with the transaction but instead focuses on the guarantee and the mortgage that secures it. In a short response to civil claim, she pleads she

signed the mortgage under duress and without the benefit of legal advice. She states she was asked by Mr. Leung to sign legal documents relating to the Shaughnessy property and Mr. Leung assured her that there was no risk to the property. She pleads she relies on Mr. Leung to take care of all financial matters for the family and had no knowledge or involvement of Vantown's business or of the loan agreement.

- [16] In the "Legal Basis" of her response to civil claim, Ms. Leung pleads she was "under undue influence" of Mr. Leung when she signed the mortgage and the mortgage was not obtained by the free exercise of her independent will. She thus denies the mortgage and the guarantee are valid and enforceable against her.

Key Issues for the Law Suit

- [17] These facts identify two key points that will be in issue at trial and are relevant to this application:
- a) What was Buyer Group's knowledge of the state of RSK's business at and before the SPA was signed?
 - b) What was Ms. Leung's state of mind when she signed the mortgage pledging her and Mr. Leung's Shaughnessy property as security for the Balance of the purchase price?
- [18] These two issues give rise to the three broad areas of relief summarized at the outset of these reasons.

Privilege and Pre-trial Examination of Mr. Lotz

Background to the Request to Interview Mr. Lotz

- [19] The first two categories of orders sought concern whether the plaintiffs may examine Mr. Lotz on matters relating to his witnessing of Ms. Leung's signature on the mortgage. The plaintiffs also seek to examine him on the circumstances of Ms. Leung's signing the consent to act as director and the corporate resolutions relating to the closing of the transaction. As the Leungs maintain that their dealings with Mr. Lotz and Lawson Lundell more broadly are privileged, it is necessary to consider whether there is such a privilege and, if there is, whether it has been waived.
- [20] Mr. Lotz and Lawson Lundell do not take a position in this application and did not appear at the hearing. The plaintiffs seek no orders that would challenge the solicitor-client privilege that exists between Vantown and Lawson Lundell and they do not seek to question Mr. Lotz about such matters. As will be discussed below, Lawson Lundell has stated in correspondence with the Leungs it was not representing them in their personal capacity in connection with the transaction. However, since the Leungs assert otherwise, Mr. Lotz is (understandably) unwilling to give himself to be interviewed without a determination of the privilege issue by the court.

- [21] As noted, Ms. Leung has pleaded that she signed the mortgage without independent legal advice and under duress and undue influence from Mr. Leung, that she relies on Mr. Leung to take care of all financial matters for the family, and that she had no knowledge or involvement with the business of Vantown or the loan agreement. She also deposed in an October 18, 2018 affidavit that she had never been involved in the business or management of Vantown, she was not involved in the underlying business transactions in connection with this proceeding, she did not review the mortgage documents prior to signing them, and she did not receive any legal advice prior to signing the mortgage documents.
- [22] Further, in her examination for discovery, Ms. Leung, denied having any knowledge of the mortgage document. She acknowledged her signature on the document but said she does not remember attending at the lawyer's office to sign it and did not agree to borrow anything. She denies understanding the consequences of the mortgage document. When asked to confirm that she signed the document in front of Mr. Lotz, Ms. Leung stated (reproduced as appears in the transcript throughout):

Not -- no, no, I don't think I've seen this one. You know what, lawyers, it's just terrible, they just stuff things -- you know, piles and piles and just give you to sign and I don't think you know what you have signed.

I think they just stuff -- stuff, you know, papers in between and then without really notify the person to sign the document. I have no idea I've signed these things.

- [23] The plaintiffs dispute these assertions and point to two emails from Mr. Leung suggesting that Ms. Leung had active involvement in the transaction. They seek to examine Mr. Lotz as witness to Ms. Leung's signature to elicit information about Ms. Leung's defences.
- [24] On April 15, 2021, counsel for the plaintiffs contacted Mr. Lotz requesting an opportunity to interview him. He initially appeared willing to cooperate provided Vantown's litigation counsel was also present. This was acceptable to plaintiffs' counsel but Vantown's litigation counsel would not (at least initially) consent unless Mr. and Ms. Leung also agreed. They did not and asserted their relationship with Mr. Lotz was privileged. Thus, the plaintiffs brought this application.

The Leungs' Assertion of Privilege

- [25] Lawson Lundell was clear with the Leungs that it did not represent them in their personal capacity in the transaction. This was stated unambiguously in an email to the Leungs dated June 22, 2016 in which Amanan Gangji of Lawson Lundell wrote:

Paul and Amy,

As we have discussed, while we have been involved in the negotiation of the Deferred Payment Loan Agreement, the Leung Guarantee and the Leung Mortgage and other matters related to the Deferred Payment Loan Agreement we have only represented Vantown Infrastructure Invesco Inc. (the "Company") and the interests of the Company. We have not represented either of you in

this transaction personally. As a result, and as has been previously discussed (including yesterday) and included on the Agenda, Vendors' counsel would like for both of you to obtain certificates of independent legal advice. This would involve having both of you sit down with another lawyer, whom we can connect you with, and having them walk you through what you are agreeing to as a part of the transaction involving the purchase of RSK by the Company. We understand that you would like to push back on this front and not obtain a Certificate of Independent Legal Advice and would instead like to sign a waiver. Please confirm this is your position and that you would like us to convey this to Vendors' counsel. [Emphasis added, bold/underline text at the end is in original]

- [26] In an email to Lawson Lundell sent the following day (June 23, 2016), Mr. Leung stated that Ms. Leung did not require legal advice in relation to the transaction. In his examination for discovery, Mr. Leung confirmed Lawson Lundell were not personal lawyers of his or Ms. Leung's in the transaction.
- [27] More recently, Lawson Lundell confirmed to counsel for the plaintiffs in an email dated November 27, 2020 from Mr. Gangju "that in Lawson Lundell's view Amy [Leung] was not a client of Lawson Lundell".
- [28] On this basis, it is clear that Ms. Leung cannot rely on any solicitor-client relationship with Lawson Lundell to prevent Mr. Lotz from speaking about his observations of her signing the mortgage document. He was not acting as her counsel when he did so and this was plainly communicated to the Leungs.
- [29] The plaintiffs also wish to question Mr. Lotz on the circumstances surrounding Ms. Leung's signing of the consent to act as director and the resolution authorizing Vantown to enter into the SPA. Counsel for Vantown objects to this on the basis that, when Ms. Leung signed these documents, she did so in her capacity as a director of Vantown. Citing *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, Vantown argues the signing of the documents is part of the "continuum of communications" in which Lawson Lundell provided advice to Vantown. In that case, the Court of Appeal stated:
- [32] The most important question when the status of communications from a lawyer is questioned is whether those communications took place within the context of a solicitor-client relationship. Once privilege has been established, it applies "to all communications made within the framework of the solicitor-client relationship"...
- [33] A common way of expressing the breadth of the privilege once the context of the solicitor-client relationship has been established is that the privilege attaches to the continuum of communications in which the solicitor provides advice...

[Citations omitted; emphasis added]

- [30] As Vantown argues, solicitor-client privilege is as close to absolute as possible and will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. Communications protected by privilege should be disclosed only where absolutely necessary, applying as restrictive a test as may be formulated short of an absolute prohibition in every case: *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, at para. 50; *R. v. McClure*, 2001 SCC 14 at para. 35
- [31] The plaintiffs argue that a distinction must be made between the communications between the lawyer and client, which are privileged, and acts done by a lawyer in the course the retainer that are not privileged. The plaintiffs cite *Luu Bankruptcy (Re)*, 2013 BCSC 1374, where the petitioners sought information from the bankrupt's solicitors regarding whether certain funds generated from the settlement of litigation conducted by the firm for the bankrupt remained in the firm's trust account. There was no evidence that the firm acted in any capacity other than as litigation counsel. The respondents argued the receipt and disbursement of the funds arose out of the solicitor-client relationship and thus the information sought by the petitioners was privileged. Justice Sewell stated:
- [24] It is clear that when a lawyer represents a client not everything that the lawyer does on behalf of the client is subject to solicitor-client privilege. Traditionally the dividing line between privileged and non-privileged information was that communications for the purpose of giving and obtaining advice are privileged but facts having an independent existence are not. [Emphasis added]
- [32] Justice Sewell referred to passages from the Federal Court of Appeal's decision in *Stevens v. Canada* (1998), 161 D.L.R. (4th) 85 (F.C.A.), which has also been endorsed by the B.C. Court of Appeal in *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135. The Federal Court of Appeal stated:
- [42] Thus, the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.
- [43] Where a lawyer is involved in the dealings of his or her client, like the disposition of funds held in trust for the client, as in *Greymac*, or the execution of an agreement for the purchase and sale of property, the existence or contents of these acts are not protected. The lawyer, in those situations, is not in the process of giving advice to the client, but is more like a witness to an objective state of affairs. [Emphasis added]

- [33] Justice Sewell went on to say at para. 35: "In every case the critical question is whether the facts sought to be disclosed can be said to be part of or sufficiently connected to the obtaining of legal advice so as to fall within the privilege attaching to communications." He held that the law firm must disclose records showing "to whom, how and when those funds were disbursed", finding that this information was not privileged.
- [34] In my view, the consent to act as a director could only have been signed by Ms. Leung in her personal capacity. It was her choice to commit herself to becoming a director of the company and this is not something that Vantown's lawyer could give her advice on.
- [35] I accept that Ms. Leung signed the corporate authorizations in her capacity as a director of Vantown, and counsel for the plaintiff may not examine Mr. Lotz on discussions he had or advice he gave Ms. Leung and the other Vantown directors on the authorization to enter into the SPA. However, Ms. Leung has, by her response to civil claim, pleaded she had no knowledge or involvement of Vantown's business. That seems to be contradicted by her signing the authorization as well as other evidence.
- [36] Counsel for the plaintiff did not provide a specific list of questions that he wishes to ask Mr. Lotz. However, he said he generally wants to ask about matters that arise from Ms. Leung's pleading of duress and lack of legal advice. He wishes to ask whether she appeared distressed or agitated. He would like to ask if the question of independent legal advice arose and whether it was recommended to Ms. Leung that she get independent legal advice. He would also like to ask if Ms. Leung read the documents she was signing.
- [37] In my view, these kinds of questions are factual in nature and do not engage Vantown's solicitor-client privilege. As I understand it, counsel does not wish to ask what legal advice Mr. Lotz gave, if any, to Ms. Leung in her capacity as a Vantown director. Rather, he is seeking information relating to Ms. Leung's knowledge and state of mind when she signed the documents.

Waiver of Privilege

- [38] If I am wrong in this last conclusion, however, I would find that Ms. Leung waived any privilege with regard to the nature of the information that plaintiffs' counsel wishes to elicit from Mr. Lotz by pleading she did not receive independent legal advice, that she had no involvement or understanding of Vantown's business, and by putting her state of mind in issue with respect to undue influence.
- [39] In *Do Process LP v. Infokey Software Inc.*, 2015 BCCA 52, the defendants pleaded they executed an agreement with the plaintiffs under duress and without legal advice. The court found that, by this pleading, the defendant had waived any privilege in respect of legal advice that it might have received. Speaking for the majority, Justice Newbury stated:

- [1] It is a well-established principle of law that "when a party makes its state of mind material to its claim or its defence in such a way that to enforce [solicitor-client] privilege would be to confer an unfair litigation advantage on the party claiming it", the privilege will be considered waived: see *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*-Canada 2004 BCCA 512 at para 12.
- [27] the defendants had, by pleading duress, put their state of mind in issue. In my view, this plea, together with the allegation of 'no legal advice', lead to the conclusion that if advice was received, fairness in the litigation requires that it be disclosed.
- [40] Since Ms. Leung also pleaded duress combined with "no legal advice" this case could not fit more squarely into Do Process. Thus, even if there was a solicitor-client relationship between Ms. Leung and Lawson Lundell, that privilege was waived.

Conclusion on Privilege

- [41] I therefore find that questioning Mr. Lotz on the issues arising from Ms. Leung's response to civil claim, as well as the evidence that she gave in her affidavit and on discovery does not breach the solicitor-client privilege between Vantown and Lawson Lundell. If it does, the privilege has been waived to the limited extent of what Ms. Leung has put in issue. Any examination of Mr. Lotz as it relates to Ms. Leung's signing of the authorization cannot stray into matters concerning legal advice Lawson Lundell gave to the Vantown directors about the transaction. It must be confined to matters arising from Ms. Leung's response to civil claim and her affidavit and discovery evidence.
- [42] A further reason to limit the examination of Mr. Lotz to Ms. Leung's state of mind and degree of knowledge of the Vantown business is that this is the full extent to which Mr. Lotz's evidence could be relevant to Ms. Leung's defence. Ms. Leung is a defendant only because Mr. Leung's personal guarantee is secured by a mortgage on the property he owns with Ms. Leung and for which both signed the mortgage document. She would not have otherwise been named as a defendant in her personal capacity. The only issue between the plaintiffs and Ms. Leung personally is the enforceability of the mortgage as security for the guarantee. The fact Ms. Leung may have had knowledge of or involvement with Vantown's business could suggest she understood the consequences of the guarantee and the mortgage and I accept that is relevant, but what she was specifically advised about the transaction as a Vantown director is not. There is no suggestion that the authorization is invalid or Vantown lacked the capacity to enter into the SPA. Thus, the only relevant evidence Mr. Lotz may have as it relates to Ms. Leung must be confined to matters relating to Ms. Leung's personal capacity arising from her own defence and not that of Vantown's.
- [43] I would therefore make the declaration sought in paras. 1 and 2 of the plaintiffs' notice of application.

Rule 7-5(1)

[44] I turn then to the second branch of orders sought by the plaintiffs, namely an order that Mr. Lotz attend for a pre-trial examination under Rule 7-5(1), which reads:

7-5(1) If a person who is not a party of record to an action may have material evidence relating to a matter in question in the action, the court may

- (a) order that the person be examined on oath on the matters in question in the action, and
- (b) either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.

[45] In *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2014 BCSC 361 at para. 15, Cullen A.C.J. (as he then was) held that to meet the requirements of Rule 7-5(1), in addition to the witness having material evidence to give, there should also be no compelling reasons why the order should not be made. He stated:

[15] Thus, as I see it, the issues on this application are (i) whether the questions on which the applicants seek to examine the Physicians are material, in the sense that they may relate to matters in issue; (ii) whether there are no compelling reasons why the order should not be made; and, (iii) whether the application is based upon the probative value of the evidence as opposed to its adverse effect or any embarrassment it may cause.

[46] In *Gardner v. Viridis Energy Inc.*, 2014 BCSC 232 at para. 10, the court summarized the purposes, policy and scope of Rule 7-5 as set out by Justice Dillon in *Sinclair v. March*, 2001 BCSC 102, aff'd 2002 BCCA 65, as follows:

- (a) The purpose of the rule is to provide an investigative technique to facilitate full disclosure of the facts before trial, thus avoiding a party being taken by surprise and ensuring that all relevant evidence is brought before the court (at para. 10);
- (b) The policy of the Rule is to permit examination of an uncooperative witness (at para. 10);
- (c) The purpose of the Rule is to provide information, not to record evidence or provide admissions. The scope of the inquiry is broader under Rule 7-5 than in the examination for discovery of a party because it not limited to matters at issue between the parties as defined in the pleadings but includes all that is generally relevant between all parties (at para. 13);
- (d) The Rule is to be interpreted liberally so as to eliminate the element of surprise at trial (at para. 14).

[47] I pause to note with respect to para. (b), Mr. Lotz is not an "uncooperative" witness in any pejorative sense. Vantown is (or was) Lawson Lundell's client, and two of Vantown's principals, the Leungs, have taken the position that Mr. Lotz' dealings with them are privileged. Mr. Lotz is understandably cautious, having regard to his professional responsibilities and duties as a lawyer.

- [48] Nor would I fault litigation counsel for Vantown for treading cautiously with respect to this privilege issue. The plaintiffs argue that Vantown unreasonably withheld consent to the plaintiffs interviewing Mr. Lotz given that Lawson Lundell had clear advice that it did not represent the Leungs in their personal capacity. However, the Leungs took a different position on privilege and, since Mr. Leung at least is still a principal of Vantown, Vantown's litigation counsel was placed in an awkward position and he chose to proceed cautiously.
- [49] I am satisfied that Mr. Lotz has material evidence relating to facts in issue as between the plaintiffs and Ms. Leung. Ms. Leung signed the mortgage document in her personal capacity and she has put in issue her state of mind in signing that document. I am satisfied that Mr. Lotz, as witness to her signature, likely has material evidence to give as to her apparent state of mind and other circumstances relating to her signing the document and he can give that evidence without breaching any privilege.
- [50] Likewise, Ms. Leung has put in issue her knowledge of and involvement with the business of Vantown and, to the extent Mr. Lotz observed her signing the consent to act as director and the corporate authorizations, he has material evidence relating to this defence.
- [51] Vantown, however, argues that Rule 7-5(1) requires the plaintiffs to show that examining Mr. Lotz is necessary to avoid surprise at trial. It argues the central objective of Rule 7-5 is to avoid surprise and examining Mr. Lotz will not further this objective since nothing Mr. Lotz can say will come as a surprise to the plaintiffs. Vantown argues:

Either Amy Leung attended the offices of Lawson Lundell, or she did not. Either Amy Leung executed the relevant documentation before Mr. Lotz, or she did not. Either Amy Leung received independent legal advice, or she did not. Either Mr. Lotz explained to Amy Leung the significance and effect of executing the relevant documents, or he did not.

There are only a limited number of possible scenarios with respect to which Mr. Lotz could conceivably give evidence at trial, and not one of them would be a surprise to the Plaintiffs.

- [52] With respect, Rule 7-5 is not to be construed so narrowly. While one objective of the Rule is to avoid a party being taken by surprise at trial, this is a reason for the rule to be interpreted broadly, not narrowly. Its fundamental purpose, as stated in *Gardiner* and in *Sinclair*, is to "provide information" and ensure that "all relevant evidence is brought before the court". As Master Scarth recently observed in *Greengen Holdings Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Forests, Lands, and Natural Resource Operations)*, 2021 BCSC 185 at para. 19, Rule 7-5 serves to:

obtain evidence from those who were "on the spot, of exactly what has happened", not limited to matters in issue with the party in question, but including "all that is relevant, generally, to all parties in the action: *Yemen Salt Mining Corporation v. Rhodes-Vaughan Steel Ltd.*, 1977 CanLII 350 (B.C.S.C.) at para. 7 and 8.

- [53] Based on the requirements of the rule and the considerations set out in the authorities just discussed, I am satisfied that Mr. Lotz has material evidence to give and there is no compelling reason why I should not exercise my discretion in favour of ordering a pre-trial examination. The permitted scope of the examination should be guided by my reasons on the privilege issue set out earlier.
- [54] To the extent that Mr. Lotz is asked to produce or bring with him to the examination relevant documents, Vantown asks that the order be clear he is not required to produce any documents that are subject to privilege by Vantown. Vantown asks that the order specify that it shall have the right to object to any documents in whole or in part that are subject to Vantown privilege, irrespective of whether counsel for Vantown elects to attend the examination. I would make that order.
- [55] The plaintiffs have not identified any specific documents they wish Mr. Lotz to produce at the examination. As I will discuss in the next part of these reasons, the plaintiffs are seeking an order that Vantown produce non-privileged Buyer Group emails that are held by Lawson Lundell. However, it is not proposed that these be produced through the Rule 7-5 examination of Mr. Lotz. Nevertheless, I will be clear that in ordering Mr. Lotz to attend for examination under Rule 7-5, I am not ordering that any Buyer Group emails in Lawson Lundell's possession be produced through that examination. A different process is sought by the plaintiffs for production of those documents. I now turn to that proposed process.

Document Production from Lawson Lundell

- [56] The third branch of relief the plaintiffs seek are orders compelling Vantown to obtain from Lawson Lundell production of non-privileged emails sent or received by members of the Buyer Group at material times relating to the transaction. The plaintiffs are not asking that any communications between the Buyer Group and Lawson Lundell that are subject to solicitor-client privilege be disclosed. Rather, they seek production of non-privileged emails Vantown may have had in its possession or control and which it provided to Lawson Lundell in the course of its retainer on the transaction.
- [57] The plaintiffs are primarily interested in email communications that occurred within the Buyer Group which they say are relevant to what the members of the Buyer Group knew of the state of RSK's business in the weeks and months before the SPA.
- [58] The plaintiffs say they have been forced into this unusual route for seeking production of these emails after having tried, unsuccessfully, to obtain substantive email production from Vantown and Mr. Leung. In particular, the plaintiffs say:
- a) Based on a detailed analysis of emails produced by the defendants as compared to those produced by plaintiffs, the defendants' production of emails is woefully inadequate.

- b) In particular, there are very few emails produced that involve discussions amongst the Buyer Group. The plaintiffs say it is highly unlikely the Buyer Group was not communicating internally by email in the weeks and months leading to the SPA.
 - c) When the plaintiffs pressed the defendants for production of emails through examinations for discovery and document production proceedings, Buyer Group members have each said their emails are no longer available because phones have been lost, hard drives have been damaged, or emails otherwise deleted. This appears to be a wide-spread phenomenon amongst all members of the Buyer Group.
 - d) However, in circumstances that I will describe in a moment, a particularly relevant and probative email that involved an internal discussion by the Buyer Group was produced by Vantown, after having obtained it from Lawson Lundell. It appears this email, which is referred to as the "B67" document, was provided to Lawson Lundell at some point by a member the Buyer Group, possibly as an attachment to another email.
- [59] The plaintiffs argue these factors converge to create unique circumstances where they can only obtain potentially highly-relevant Buyer Group emails through production from Lawson Lundell, which is apparently the last possible repository for such emails. They ask for an order that Vantown's litigation counsel obtain from Lawson Lundell all emails relating to this matter containing specific email addresses for members of the Buyer Group, remove or redact any emails for privilege, and produce non-privileged emails to the plaintiffs.
- [60] The plaintiffs acknowledge the process will be arduous, time-consuming, and likely expensive as Lawson Lundell requires payment for its work in producing the emails. However, they say it is a necessary part of the plaintiffs' document production obligations and is only required because Vantown and Mr. Leung have failed to protect and preserve their electronic records relevant to the transaction and their defence.
- [61] Vantown argues in response that the plaintiffs are on a fishing expedition. They say the plaintiffs have not established Lawson Lundell has, or is likely to have, relevant emails and the process required to produce those emails is so arduous and expensive that it is not in keeping with the proportionate objectives of the Rules.

The Genesis of the Proposed Process

- [62] The plaintiffs' proposed method for producing emails from Lawson Lundell has its roots in a process followed earlier in this litigation when the plaintiffs were seeking production of Ms. Leung's emails. Ms. Leung's first list of documents contained only four documents and no emails. The plaintiffs' list disclosed 57 emails sent between February 24, 2016 and June 22, 2016 to addresses used by Ms. Leung. These emails included or had been forwarded to the plaintiffs or persons working for the plaintiffs and were thus in the plaintiffs' possession and control. Their existence, though, established that Ms. Leung's first list of documents was inadequate. Two of the emails indicate, contrary Ms. Leung's response to civil claim, that she had at least some involvement in the transaction.

[63] By order dated February 5, 2021, Master Scarth ordered Ms. Leung to produce a better list of documents, including listing emails associated with her two accounts. Master Scarth also ordered production of Ms. Leung's relevant emails that were provided to Lawson Lundell. To address concerns about privilege, Master Scarth's order provided that the emails in Lawson Lundell's possession that included Ms. Leung as a sender, recipient or cc recipient were to be produced to Vantown's litigation counsel who would then screen them for privilege and produce any non-privileged communications to the plaintiffs. The relevant terms of her order read as follows:

Document production from Lawson Lundell

4. Within 14 days of pronouncement of this Order Lawson Lundell LLP provide to counsel for the defendant Vantown Infrastructure Invesco Inc. ("Vantown") (Att: Casper Holloway), native format electronic copies of all emails (collectively, the "Email Collection") in the possession or control of Lawson Lundell LLP which Lawson Lundell LLP sent to, or received from, email addresses of Amy Leung in relation [sic] the June 24, 2016 transaction according to which Vantown purchased shares in S.K Excavating & Contracting Ltd.

5 Within 28 days of pronouncement of this Order Vantown shall provide to the plaintiffs:

- a. Native format electronic copies of all emails in the Email Collection which Vantown does not claim privilege over any part of;
- b. pdf copies, with privileged portions redacted, of emails in the Email Collection which Vantown does not claim privilege over the entirety of, along with a list indicating the basis for the reactions made to each email disclosed in PDF format pursuant to this subparagraph; and
- c. A list of all emails in the Email Collection which Vantown claims privilege over the entirety of.

[64] Ms. Leung did not attend the hearing before Master Scarth. She made a late objection to the production order but did not appeal it or apply to have it set aside. After some delay due to this late objection, by March 16, 2021, Master Scarth's order respecting production by Lawson Lundell had been fulfilled, and Ms. Leung's emails had been produced to the plaintiffs.

[65] Among those emails is the one dated June 22, 2016 whereby Lawson Lundell made it clear to the Leungs that it only represents Vantown and does not represent either Mr. or Ms. Leung in their personal capacity.

[66] The plaintiffs now seek essentially the same type of order made by Master Scarth but broader in scope so as to capture the email addresses of each member of the Buyer Group.

Email Production Generally

- [67] The plaintiffs have led detailed evidence analyzing the number of emails involving members of the Buyer Group that have been produced by the plaintiffs compared those produced by Mr. Leung and Vantown. The vast majority of emails on the plaintiffs' list include the plaintiffs, their agents or transaction solicitors as senders or recipients, which is how they were in possession of these several hundred emails. However, very few of these emails were included in the defendants' lists of documents.
- [68] The plaintiffs' detailed evidence comparing their production of emails with the defendants' shows the plaintiffs have gone to considerable effort to review and produce vast numbers of emails that relate to the transaction. They have established beyond any doubt their email production far exceeds, by several hundred, the number produced by any of the defendants.
- [69] This evidence is unchallenged and not disputed. Rather, Vantown's position is that of the many hundreds of emails listed by the plaintiffs, only a small few are probative of issues in the action. They say it is fine for the plaintiffs to have chosen to list this vast collection of emails but, having regard to what must be produced under the Rules, it does not follow that the defendants are required to do the same.
- [70] I agree with Vantown that this comparison (detailed though it is) does not, on its own, prove that Vantown's production is necessarily inadequate. It is the substance of what is produced, or not produced, that is material. However, the plaintiffs' detailed evidence provides a baseline from which their case on this application is built. They do not rely solely on the difference in the number of emails produced. This is just a starting point to show that the parties have taken vastly different approaches to reviewing and listing emails as part of their document production obligations. The analysis also shows that members of the Buyer Group regularly used email as a form of communication, suggesting that they likely also communicated internally with one another by email.
- [71] As will be discussed later, the plaintiffs take their analysis further and seek to show that the defendants' approach to reviewing and listing emails has excluded Buyer Group emails that are potentially probative of matters the defendants have put in issue.

Mr. Leung Email Production

- [72] Mr. Leung produced his first list of documents in July 2019. It contained 25 emails that he had either sent or received. By contrast, the plaintiffs' list of documents contained 545 emails sent or received by Mr. Leung.
- [73] During examinations for discovery, Mr. Leung was asked about the production of his emails:
- a) When asked if he had done a detailed search through available electronic documents on his computers and looked for documents that might be relevant to the proceeding, Mr. Leung responded, "I don't know why I need to go through that process."

- b) When asked what historical emails he reviewed in preparing his list of documents, Mr. Leung responded: "it's in my list of documents all the relevant email I got from you, David Taylor, and all the relevant one in regard to this case, I included them."
- c) Mr. Leung also said that he had reviewed every document "you people send me and I review what I have in my collection." When asked what collection that is, paper or electronic, Mr. Leung responded: "paper."
- d) When asked if he still had his emails from 2015 and 2016 Mr. Leung responded: "No. They all purged." He went on to explain that his computer crashed and his emails were not backed-up or were deleted by accident. He said he did not have access to his other email accounts used at the time.
- e) Mr. Leung was requested on discovery to explain the steps taken to search for and produce all relevant emails:

Mr. Leung to confirm the steps that he took to review historical e-mails, including in electronic format on his computers, and to produce any documents relevant to the matters in this proceeding that have not already been produced, including e-mails and text messages and any other types of correspondence, and if he sent a fax or sent a letter, produce copies of those, and in all cases, especially for e-mail, produce the original native format files with attachments.

Mr. Leung's response to this request was nonspecific: "I reviewed my paper records and reviewed the email records to the best of my abilities." The plaintiffs took issue with this non-specific answer and Mr. Leung provided a further answer that merely summarized instructions from a Microsoft website on a technique to review historical emails.

- [74] In short, Mr. Leung's email production was minimal. While his discovery evidence shows a hesitancy to conduct a detailed examination of his electronic records, and it is still unclear whether he actually conducted such an examination, he ultimately said that his electronic records have been lost due to a computer crash and his emails were not backed up.
- [75] Based on the minimal email production that Mr. Leung made, only a single internal Buyer Group email was disclosed.

Vantown Document Production

- [76] Vantown produced its first list of documents on June 24, 2020, the day before a scheduled application of the plaintiffs to compel it to produce a document list.[1] That first list contained only 26 documents and no emails so the plaintiffs proceeded with their application the following day. Master Dick ordered Vantown to produce a list of documents that complies with Rule 7-1(1).
- [77] On June 30, 2020, counsel for Vantown stated it had no further documents to disclose but would be checking an additional available hard drive.

- [78] By letters dated July 21, 2020 and August 5, 2020, the plaintiffs made a detailed demand for document production from Vantown pursuant to Rules 7-1(10) and (11), including, specifically, emails "pertaining to the knowledge of Vantown (including its representative John Gordon) from time to time regarding the business of RSK, and Vantown's expectations as to RSK's income after closing of the share sale transaction."
- [79] On October 16, 2020, the plaintiffs filed a notice of application, set for November 4, 2020, seeking an order that Vantown and RSK produce further documents and provide an affidavit verifying their list. Two days before the hearing, Vantown delivered an updated list and the parties consented to an order requiring Vantown and RSK to provide an affidavit verifying that list. That order was made by consent by Master Muir at the November 4, 2020 hearing.
- [80] On November 19, 2020, Vantown provided an affidavit of John Gordon, a Vantown director and a member of the Buyer Group, dated November 12, 2020. The affidavit purported to verify the November 2, 2020 list of documents but, by letter dated January 20, 2021, counsel for the plaintiffs objected to the adequacy of the affidavit. At the heart of the plaintiffs' objection was the production of emails and how Mr. Gordon had explained Vantown's searches for emails. In particular, issue was taken with, among other things, the following:
- a) the affidavit did not verify full disclosure of relevant documents which were or had been in the possession or control the party;
 - b) the affidavit did not verify how or when documents (namely the Buyer Group emails) ceased to be in Vantown's possession or control;
 - c) the extent of the search for relevant documents was not described in sufficient detail; and
 - d) only two email accounts belonging to Mr. Gordon had been searched whereas the plaintiffs' document production indicated there were two other email accounts that Mr. Gordon had used to correspond on matters relating to the RSK purchase.

The letter also noted there were only two emails disclosed by Vantown which were sent within the Buyer Group.

- [81] Having not received this response to the January 20, 2021 letter, on March 11, 2021, plaintiffs' counsel wrote to Vantown's litigation counsel suggesting Vantown was in breach of Master Muir's order for failing to provide a proper affidavit, and that an updated affidavit was required. The letter also made reference to the fact Ms. Leung's emails had been produced from Lawson Lundell under Master Scarth's order and sought broader production of email communications within the Buyer Group on the same basis. Counsel for the plaintiffs wrote:

However, it is likely the case that there were email communications between the buyer group (e.g. Paul Leung, John Gordon, and Brian Gessner) and then such email strings, which were initially limited to just the buyer group and not involving counsel, were later forwarded to Lawson Lundell for the purpose of obtaining legal advice. Such "pre-forwarding to Lawson Lundell" email strings are now in the possession of Vantown and should, where appropriate, be

listed on an updated List of Documents of Vantown, and dealt with in the updated affidavit of John Gordon verifying the List of Documents of Vantown and RSK. For greater clarity, we are not saying that privileged emails must be disclosed, but any part of the email strings obtained from Lawson Lundell which contain "pre-forwarding to Lawson Lundell" email conversations which would otherwise be producible if currently available in "pre-forwarding to Lawson Lundell" form, must be listed and produced. Without limiting the generality of the foregoing, discussions about the knowledge of the buyer group regarding the state of the business of RSK are particularly relevant. [Emphasis in original]

[82] On March 29, 2021, the plaintiffs filed an application to strike Vantown's response to civil claim for non-compliance with Master Muir's order. Before that application was heard, on April 27, 2021, Vantown provided a third amended list of documents and, on May 17, 2021, an unfiled copy of an updated affidavit of John Gordon attaching the third list of documents. In that affidavit, Mr. Gordon states:

- a) he does not have access to one of the email accounts he used in the time leading to the transaction because it had been shut down and emails from that account cannot be retrieved;
- b) the computers he was using at the time of the transaction have been destroyed and the backup drive for those computers could not be found; and
- c) text messages that may have been sent during the time of the transaction were not backed up and Mr. Gordon no longer has the phones he used at the time.

[83] Thus, like Mr. Leung, Mr. Gordon was unable to search for and produce emails he had in his possession or control at the time of the transaction because the devices containing those emails were lost.

[84] After some further negotiations between counsel as to the content of Mr. Gordon's affidavit, a final version was eventually sworn. That version contained this statement, which was apparently requested by counsel for the plaintiffs:

40. Lawson Lundell, who represented Vantown in the purchase of RSK, may have further disclosable documents, although I have no actual knowledge to that effect.

The "B67" Email

[85] One of the documents found on Vantown's third amended list of documents, delivered April 27, 2021, was an email dated January 26, 2016 from Paul Leung to the Buyer Group. It concerned the personal guarantees on the transaction and was sent several months before the SPA was signed in April 2016.

[86] The plaintiffs maintain this is a "vitally important document" relating directly to the knowledge of the Buyer Group of the state of RSK's business at the time. Mr. Leung acknowledges in the email that he and Ms. Leung are concerned there is "no warrant on the

revenue and EBITDA [earnings before interest, taxes, depreciation and amortization] from the vendor" and "[t]here are no contracts with any customers to guarantee some amount of revenue over a period of time." These acknowledgments indicate the Buyer Group was aware that RSK had no existing contracts with customers in the weeks leading to the SPA and the vendors were not making any warranty as to the revenue or earnings of the company. The plaintiffs say these acknowledgements go to the heart of Vantown's and Mr. Leung's defences.

[87] Vantown's litigation counsel later confirmed that the B67 email was obtained from Lawson Lundell. It was a stand-alone (.msg) electronic document, meaning it was not part of an email string that included Lawson Lundell.

[88] Counsel for the plaintiffs then restated his position that Lawson Lundell should be asked to produce emails that were provided to it by the Buyer Group. In an email dated May 3, 2021, plaintiffs' counsel suggested other emails like B67 must surely exist and, given Vantown and Mr. Leung were both unable to produce emails due to lost hard drives or failure to backup electronic documents, it is necessary to further assess Vantown obtaining and reviewing all relevant emails in the possession of Lawson Lundell. Counsel suggested such emails are within the "power" of Vantown as required by Rule 7-1(11).

[89] Counsel for Vantown responded as follows:

I don't think this one email indicates that Lawson Lundell or anyone else would have further emails of this kind but I'm willing to work with Lawson Lundell to resolve this issue - but I'm not sure it's necessary or proportionate to ask for every email it has related to this matter, which I'm sure would include, among other things, hundreds or thousands of emails sent internally within Lawson Lundell, or sent between Lawson Lundell and Miller Titerle [plaintiffs' counsel on the transaction], or emails which are clearly privileged.

I don't think there's any reason to think that John [Gordon] should or could have known that Lawson Lundell was in possession of that particular email or that the affidavit is necessarily deficient but I will add a general caveat regarding review of any further emails from Lawson Lundell.

[90] After some further communication on the matter, on May 6, 2021, Vantown's counsel advised that Lawson Lundell would not send any emails unless they are compensated for their time in producing them and Vantown was not prepared to incur these costs. He said emails held by Lawson Lundell are not within Vantown's possession, power or control. In another communication sent later that day, he suggested the plaintiffs' request to obtain emails from Lawson Lundell was a "fishing expedition", and Vantown is not required to incur the expense of obtaining them. He said the Leungs can be expected to object to the production of the emails from Lawson Lundell based on privilege. In light of this, he would not "negotiate" with Lawson Lundell but suggested that the plaintiffs communicate directly with them regarding the cost and providing additional emails.

[91] Plaintiffs' counsel then attempted to deal with Lawson Lundell but without success. By email dated May 9, 2021, he proposed that Lawson Lundell produce relevant emails that are not privileged using the same method set out in Master Scarth's order. He provided a list of email addresses for Lawson Lundell to search, but Lawson Lundell declined to make further disclosure, responding as follows:

This is getting a bit out of control. We have made one round of disclosure pursuant to a court order. You are now asking for an even wider search for emails that will likely capture a lot of material that is irrelevant, privileged and related to other matters we have acted on entirely unrelated to Amy Chan [Leung]. We are not going to do that.

[92] The email went on to say that if the plaintiffs still intend to pursue this, they will either need to persuade Vantown to instruct them to do so and pay Lawson Lundell's fees to conduct the search, including reviewing the emails to exclude material that is unrelated to this matter; or get a court order, a term of which must include payment of remuneration to Lawson Lundell to review the captured material.

The Parties' Positions

[93] The (comparatively) limited number of emails produced by either Vantown or the Leungs, including those produced through the Lawson Lundell production made under Master Scarth's order, include some emails that were internal to the Buyer Group. Four were identified by counsel during the application, one of which is the "B67" email.

[94] The plaintiffs argue that the existence of these four emails demonstrates the Buyer Group engaged in internal email communications on the purchase of RSK and it is only logical and reasonable to infer they communicated with each other by email. On this basis, it is suggested there must be more Buyer Group emails that have not been produced. Further, since each member of the Buyer Group states they have lost their emails or their electronic devices that store those emails, the only way to obtain any surviving Buyer Group emails, or to otherwise confirm that none more exist, is to seek production through Lawson Lundell.

[95] The plaintiffs acknowledge they do not have, nor could they have, concrete evidence that Lawson Lundell is in possession of additional Buyer Group emails. However, it is known that the highly relevant B67 email came from Lawson Lundell.

[96] The plaintiffs argue that since Vantown and the Leungs have failed to reliably produce Buyer Group emails from the time leading to the transaction, and because of the wide-spread loss or destruction of the electronic repository of those emails, the defendants ought to be required to obtain and produce those emails that are available from Lawson Lundell, the only remaining potential repository of them.

[97] As noted earlier, Vantown does not dispute the disparity between the number of emails produced by the plaintiffs and those produced by the defendants. However, they argue the evidence does not disclose that Lawson Lundell is likely to have the relevant emails. They

point to the fact that Lawson Lundell has already produced all the emails that included Ms. Leung as a sender, recipient, or cc recipient. They say Lawson Lundell provided over 1,000 emails to Vantown's litigation counsel under Master Scarth's order and, of those, only 13 were disclosed to the plaintiffs, either in whole or with redactions. The rest were privileged. Vantown argues that of those 13 emails, the plaintiffs have identified only one that is potentially relevant: the "B67" email.

- [98] Vantown also argues that Ms. Leung is part of the Buyer Group and therefore the earlier production from Lawson Lundell under Master Scarth's order likely exhausted the relevant Buyer Group emails, such that further production from Lawson Lundell is unlikely to generate anything new. Vantown argues the considerable time and expense required to produce the additional emails from Lawson Lundell cannot be justified.
- [99] The plaintiffs reply to this by pointing out that Ms. Leung was not included on three of the four Buyer Group emails they have located. The only one on which she was copied is the B67 email. The plaintiffs say this shows the Buyer Group's communications did not always include Ms. Leung such that it is no answer for the defendants to say the likely relevant emails have already been produced through Master Scarth's order.

Analysis on Document Production

- [100] The plaintiffs seek production of the Buyer Group emails held by Lawson Lundell under Rules 7-1(10) and (11). Subrule (10) relates to documents that the party seeking production believes should have been included in the original list provided under Rule 7-1(1). Rule 7-1(1) limits production to documents that could be used by any party to prove or disprove a material fact. Rule 7-1(11) permits a party to seek production of a broader class of documents, namely those that "relate to any or all matters in question in the action". Production under Rule 7-1(11) is broader than under 7-1(1), but is also subject to the court's discretion under Rule 7-1(14) to order that a party be excused from compliance with subrule (11) having regard to the proportionality objectives of the Rules: *Imperial Parking Canada Corporation v. Anderson*, 2014 BCSC 989 at para 23; *Przybysz v. Crowe*, 2011 BCSC 731, at paras. 27-29; *Kaladjian v. Jose*, 2012 BCSC 357, at paras. 44-45.
- [101] I will first consider the plaintiffs' application under Rule 7-1(11).
- [102] A party seeking disclosure under Rule 7-1(11) must establish a connection between the documents for which production is sought and issues in the action. In *Kaladjian*, Justice Davies said:
- [62] I have also concluded that the narrowing of the discovery obligations of parties and most particularly the removal of the Peruvian Guano "train of inquiry" test of relevance will generally require a defendant to provide some evidence to support an application for additional documents, whether demand is made under Rule 7-1(11) or Rule 7-1(18).

- [63] A requirement for evidentiary support recognizes the difference between the scope of examination for discovery and the scope of document discovery under the present Rules and will allow considerations of proportionality to be addressed in specific cases.
- [64] A requirement for evidentiary support in requests for additional documents and third party records also prevents against unwarranted "fishing expeditions" based solely upon pro forma pleadings.
- [103] Likewise, in *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633, Master Muir stated:
- [28] As such, Whitefox must demonstrate a connection between the documents sought and the issues beyond a "mere possibility", see *Przybysz v. Crowe*, 2011 BCSC 731 at para. 45, referencing *Gorse v. Straker*, 2010 BCSC 119 at para. 53. As held by Master Bouck in *Edwards v. Ganzer*, 2012 BCSC 138, at para. 51, "there must be some "air of reality" between the documents and the issues in the action ..."
- [104] In my view, the plaintiffs have satisfied this test. First, the evidence shows that members of the Buyer Group regularly communicated by email on matters relating to the transaction and there is more than an "air of reality" to the proposition that the Buyer Group's internal communications likely included emails beyond the four that have been produced.
- [105] Second, email was a means of communication within the Buyer Group itself. While the plaintiffs have provided only four emails that are internal to the group, this may be explained by the defendants' lack of production of Buyer Group emails and the loss or destruction of electronic document repositories by all members of the group. Thus, the plaintiffs cannot be faulted for relying on evidence of only four Buyer Group emails.
- [106] Third, one of those four emails - the B67 document - relates very directly to issues in the action. Indeed it is an email that would fall within the scope of Rule 7-1(1). It could be used to prove or disprove a fact in issue, namely what was known to the Buyer Group about the state of RSK's business in the months and weeks leading to the SPA. Again, the plaintiffs cannot be faulted for identifying only one such email given the limited production of Buyer Group emails.
- [107] Fourth, the plaintiffs have demonstrated that the earlier production of Ms. Leung's emails under Master Scarth's order does not necessarily exhaust the full extent of the Buyer Group emails. Three of the four Buyer Group emails identified by the plaintiffs did not include Ms. Leung.
- [108] I am therefore satisfied that the plaintiffs have met the standard of demonstrating with evidence a connection between the documents sought and the issues in the litigation beyond a "mere possibility". While the evidence on this application amounts to a relatively small number of emails compared to those that were produced from Lawson Lundell under Master Scarth's order, the materiality of at least one of those emails provides the necessary evidence for the plaintiffs to meet the standard required of Rule 7-1(11). On this basis, I am satisfied that the plaintiffs' request does not amount to a "fishing expedition".

- [109] I would add that since the B67 email, which was produced from Lawson Lundell, would fall within the scope of Rule 7-1(1) (being a document that may be used to prove or disprove a fact in issue), this suggests it is necessary for Vantown to search out emails provided to Lawson Lundell to comply with its production obligations under Rule 7-1(1). On this basis, the evidence led by the plaintiffs on this application would also support their request for documents under Rule 7-1(10).
- [110] I thus turn to the question of whether ordering production of the Buyer Group emails in Lawson Lundell's possession would be disproportionate, having regard to the objectives of the Rules. There is no question that the production sought by the plaintiffs calls for an arduous process that will be time-consuming and potentially costly. I expect there may be ways to make the search more manageable, such as excluding from electronic searches any emails that include Ms. Leung's email addresses. (Since those emails have already been produced from Lawson Lundell, there is no need to produce them again.) If this can be done, it will avoid duplication of previous work, but even so, the task remains sizeable.
- [111] In other circumstances, the size of this task may well give rise to a concern that an order for disclosure would be inconsistent with the proportionality objectives of the Rules. However, I would not exercise my discretion under Rule 7-1(14) in this case to excuse Vantown from compliance with the document request made under Rule 7-1(11) for several reasons.
- [112] First, as discussed above, one of the Buyer Group emails obtained from Lawson Lundell is highly relevant to the issues in the case.
- [113] Second, Vantown and Mr. Leung have each put in issue through their pleadings their own knowledge of the business of RSK in the months and weeks leading up to the SPA. Thus, what the Buyer Group knew about RSK's business and when they knew it is highly relevant to defence put forward by Vantown and Mr. Leung. The plaintiffs are entitled to the Buyer Group's email communications on these matters.
- [114] Third, and critically, the wide-spread loss of electronic repositories of documents by each one of the Buyer Group members weighs heavily in favour of the order sought by the plaintiffs. As the plaintiffs acknowledge, they cannot prove the loss or destruction of the devices containing Buyer Group emails was deliberate. However, the fact that each one of the Buyer Group defendants is unable to produce electronic documents for the material time means that the only remaining potential repository of those documents is Lawson Lundell.
- [115] It is notable that the first payment of the Balance was due under the Deferred Payment Loan Agreement on January 1, 2017 and Vantown refused to make that payment, apparently because of the state of RSK's business and the alleged representations made by the plaintiffs. Thus, Vantown and Mr. Leung have known since at least January 2017 (and likely much earlier) that the state of RSK's business at the time of the SPA, and the Buyer Group's knowledge of that leading up to the SPA, would be material to an inevitable dispute over the Balance and subsequent litigation over the SPA. Despite this, neither the Leungs nor anyone

associated with Vantown evidently took steps to protect or preserve electronic records that may be relevant to that position. Their failure to do so should not be visited upon the plaintiffs.

[116] These facts distinguish the present case from the authorities cited by Vantown in support of its argument that I should exercise that discretion not to order production under Rule 7-1(11):

- a) In *Przybysz*, Master Bouck found the relevancy of the requested documents, said to relate to a pre-existing injury, was not established on the application. Alternatively, she found proportionality called for the exploration of that issue through examinations for discovery before the plaintiff is put to the cost of producing the requested documents.
- b) In *Sauve v. Maxxam Insurance Services Inc.*, 2016 BCSC 894, Master Bouck found that documents sought by the plaintiffs were overbroad, unnecessary to advance the plaintiffs' case, and would only be producible if the trial judge determined that a remedy in the nature of a tracing or accounting was justified.

Neither of these authorities is on point with the unique facts of this case.

[117] Vantown also refers to *Stephen v. McGillivray*, 2008 BCCA 472, which concerned the production of a report done by a private investigator in a personal injury action. The report suggested that the plaintiff's injuries were not as extensive as claimed. At issue was whether the report was privileged and, if not, whether production could be withheld until after discoveries. The decision considered the former Rules of Court and contains some commentary to the effect that courts should not slavishly follow the rule set out in *Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* (1882), 11 Q.B.D. 55. It has no bearing on the facts here.

[118] For these reasons I would make the orders generally as sought in paras. 7 through 10 of the notice of application, namely that Vantown produce emails from Lawson Lundell in the method set out in the requested order. At this point, I would not impose the specific time limits set out in the orders sought as it seems uncertain this task could be completed within the time proposed. Much will depend on the volume of emails that need to be reviewed. I leave it to counsel to work out amongst themselves and with Lawson Lundell what amount of time is reasonably required to complete these tasks and, if necessary, the parties may seek to address me on that issue in settling the terms of the order.

[119] I would further find that the expense of producing those emails should be born by Vantown. Vantown and Mr. Leung have put in issue the Buyer Group's knowledge of the state of RSK's business in the weeks and months leading to the SPA yet they have failed to take steps to protect the electronic records relating to this defence, allowing (perhaps innocently) the entirety of their electronic records to be lost or destroyed. In the face of that, it would be unfair and unjust to require the plaintiffs to bear the expense of this production.

[120] Vantown argues it cannot be compelled to produce documents that are not in their possession and control at their own expense. It cites *Solomon v. McLean*, 2016 BCSC 1765, where the court held that a plaintiff in a personal injury action was not required to produce medical and clinical records in the possession of a physician where the physician charged a fee for producing those records. In that case, Master Dick cited Chief Justice Esson's decision in *Seller v. Grizzle*; *Kinsella v. Beattie*, 95 B.C.L.R. (2d) 297 (B.C.S.C.), where Esson C.J. stated at p. 9:

In my view, the documents in question, i.e. the records created by the hospital or physician, are not within the patient's power or control. The right of the patient is to have access to the documents and to obtain copies of those documents at his or her own expense. If copies are obtained, those are documents in the control of the patient. But I see nothing in the Rules of Court which requires the patient to obtain copies simply for the purpose of disclosure and production to the opposite party. [Emphasis added]

[121] The plaintiffs argue that the Buyer Group emails held by Lawson Lundell are at least within the "power" of Vantown and "power", which appears in Rule 7-1(11), is broader than "possession or control" as used in Rule 7-1(1): *Sunnar v. U-Haul Co. (Canada) Ltd.*, 1998 CanLII 5894 (B.C.S.C.); *Nikolic v. Olson*, 2011 BCSC 125 at para. 18; and *Lit v. Hare*, 2012 BCSC 1918 at para. 62. They argue Lawson Lundell, as solicitors for Vantown in the transaction, received copies of Buyer Group emails as an agent for Vantown. Citing *The Owners, Strata Plan No. VIS3578 v. Canan Investment Group Ltd.*, 2012 BCSC 607 at para. 16, and *Samaroo v. Canada Revenue Agency*, 2014 BCSC 1349 at paras. 19-23, the plaintiffs say legal counsel who obtain documents on behalf of their client do so as agent for the client and those documents are thus in the client's control and certainly in the client's power.

[122] I agree with the plaintiffs. The medical and clinical records at issue in *Soloman* were prepared by the medical staff in the course of treating the patient. Here, the Buyer Group emails were created by members of the Buyer Group and provided to Lawson Lundell in the course of its retainer as Vantown's solicitors for the transaction. Lawson Lundell received and holds any such documents in this capacity. This is not to say that Lawson Lundell may not charge a fee to locate, sort, and provide the emails to Vantown, but the cost of doing so is something that Vantown must bear in connection with its document production obligations under Rule 7-1.

Conclusion

[123] I would therefore make the following orders:

- a) I would grant the declaration in the form sought by the plaintiffs that communications between Lawson Lundell and the Leungs in their personal capacity are not privileged.
- b) I would order that Mr. Lotz attend for an examination by the plaintiffs' counsel pursuant to Rule 15-1(1) to answer questions regarding Ms. Leung's signing of the mortgage document. Counsel may also ask questions relating to Ms. Leung's signing of the consent to act as

director and the corporate authorization documents but only to the extent that such questions bear on Ms. Leung's defence that she was not involved with and did not understand the business of Vantown. I would include the order requested by counsel for Vantown that it may object to the production of any documents through this process that may be subject to Vantown's privilege. To be clear, I am not permitting the production of Buyer Group emails through this examination process. That is to be done through a different process.

- c) I would order that Vantown obtain from Lawson Lundell and list all relevant documents and produce for inspection by the plaintiffs all of those relevant documents that are not subject privilege. Specifically, I would order the parties follow the procedure set out in the orders sought at paras. 7 to 10 of the notice of application, subject to setting reasonable time periods for the completion of the task. I would also order that Vantown bear the expense of this process, including Lawson Lundell's costs. For clarity, in making that order, I am not deciding whether this expense might be recoverable by Vantown in an award of costs at the end of the trial should Vantown ultimately succeed.

[124] I am not satisfied this is an appropriate case for special costs as sought by the plaintiffs. The conduct complained of does not meet the high threshold for "reprehensible" conduct that is needed for such an order. Costs of this application will therefore be in the cause.

"Kirchner, J"

- [1] Vantown and RSK are jointly represented in this proceeding. The list of documents was thus produced by Vantown and RSK. For convenience, I will simply refer to Vantown in this part of the reasons but this may be taken as a reference to Vantown and RSK.

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