

CANADA / JUDGMENT

Northam Distributor Ltd. v. Roman Hardware Inc.

2024 BCSC 2594

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2594 Northam Distributor Ltd. v. Roman Hardware Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Northam Distributor Ltd. v. Roman Hardware Inc.,

2024 BCSC 2594

Date: 20241107

Docket: S249622

Registry: New Westminster

Between:

Northam Distributor Ltd. and 1057079 B.C. Ltd.

Plaintiffs

And:

Roman Hardware Inc., Dilpreet Singh Joura and Jasbir Singh Kochar

Defendants

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

H. Hehar

Counsel for the Defendant Roman Hardware Inc.:

M.K. Shergill

Place and Date of Hearing:

New Westminster, B.C.

November 5, 2024

Place and Date of Judgment:

New Westminster, B.C.

November 7, 2024

This is the written version of judgment rendered orally on November 7, 2024. It has been edited to correct or improve grammar and style, and add case citations, but no other changes have been made.

- [1] THE COURT: The defendant Roman Hardware Inc. ("Roman") seeks an order under R. 9-5(1) of Supreme Court Civil Rules, striking out the claims made in the amended notice of civil claim ("ANOC") against it.
- [2] In the alternative, it seeks an order pursuant to R. 9-6 summarily dismissing the proceeding against it. In the further alternative, it seeks security for costs within 14 days in the amount of \$31,133, the estimated costs for a 10-day trial. It also seeks costs.
- [3] The plaintiffs, Northam Distributer Ltd. ("Northam") and 1057079 BC Ltd. ("105"), oppose all relief sought. The defendants Dilpreet Joura and Jasbir Kochar ("Personal Defendants") did not appear on this application.
- [4] This dispute is about a non-compete clause that the Personal Defendants entered into with the plaintiffs. It is not disputed that in March 2021, the plaintiff 105 purchased shares in Northam from Wipro, a company owned by the Personal Defendants, for about \$1.2 million. The content of that agreement, as well as the validity and content of what constitutes the non-compete clause, are in dispute amongst the parties.
- [5] The notice of civil claim was filed June 21, 2023, and then amended shortly thereafter on June 30, 2023. A response was filed by all defendants in August 2023, and a counterclaim was filed by the Personal Defendants. The plaintiffs filed a response to the counterclaim in November 2023.
- [6] In the original notice of civil claim, the plaintiffs did not plead a cause of action against Roman, but made an allegation about its failing to disclose certain documents. Not long after that and shortly before the claim was amended, Roman disclosed those documents -- the Central Securities Register and Register of Directors.

- [7] In April 2024, the plaintiffs filed a motion seeking an interlocutory injunction against the Personal Defendants. That was heard last month and remains under reserve.
- [8] During the agreement to purchase shares, the Personal Defendants entered into a restrictive covenant that would not allow them, for a period of five years, to compete with the plaintiffs in BC, Alberta, and Saskatchewan in the kitchen cabinet and shower door hardware business. The defendant Roman is engaged in the business of selling cabinet hardware and other similar products.
- [9] The plaintiffs allege that Roman sells these products out of a shop located in Surrey run by Onex Enterprises Inc. ("Onex"), which is owned by one of the Personal Defendants. The registered owner of the shop at that address is Wipro, again, owned by one of the Personal Defendants. The plaintiffs allege that the Personal Defendants are, in fact, involved in the day-to-day operations in Roman and thereby are breaching the non-compete clause.
- [10] The test for striking a claim under R. 9-5(1)(a) is that it must be plain and obvious, assuming the facts as pleaded are true, that the claim discloses no cause of action or reasonable prospect of success: *Watchel v. British Columbia*, 2019 BCSC 1087; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5. These cases indicate the threshold to strike a claim as not demonstrating a cause of action is high.
- [11] Roman contends that the allegations against it, even as set out in the ANOCC, are deficient as being, among other things, unspecified, vague, and lacking full particulars with respect to the claim of civil conspiracy. Specifically, Roman submits that the pleading fails to identify material facts supporting the allegation that Roman became aware of the non-compete clause, or that someone was breaching it. As I noted, this is a test applied to the pleadings alone, and Roman says that the pleadings on their face are insufficient.
- [12] Specifically, Roman points to the claims made in the ANOCC under the heading "'Civil Conspiracy", which I reproduce here:

U. Two or more of the defendants named in this proceeding acted in concert, by agreement, or in the alternative, with a common design or intention.

V. The co-conspirators engaged in conduct which breached the SPA.

W. The conduct was directed towards the plaintiffs.

X. At all material times, the co-conspirators knew, or ought to have known, that injury was likely to result.

Y. The plaintiffs suffered damages as a direct result of the defendants' conspiracy.

- [13] Roman points out that, at paragraph U, it simply states that "two or more of the defendants acted in concert", and that on its own, the allegation is vague because it does not identify exactly who was acting in concert. Roman complains that the allegation at paragraph V of a co-conspirator engaging in conduct that breached the agreement, is without definition or identification of, among other things, the impugned conduct, how Roman was involved, or how Roman knew about it.
- [14] Roman relies on *Equustek Solutions Inc. v. Jack*, 2024 BCCA 104 as an example of how pleading for conspiracy should be set out with regard to the identification of material facts (which it says is missing in the matter at hand):
- [126] The judge set out the portions of the appellants' pleading related to the alleged conspiracy:
- [338] The conspiracy in this case is delineated in the pleadings in the following terms:
33. At a time unknown to the Plaintiffs, the Defendants Jack, Colin Marsh, Kathleen Marsh, Crawford, Ingraham, Bunker, Igor Cheifot, Alexander Cheifot, Geiger, Alfonso Doe, and John Doe, and those of the Datalink Companies that were then in existence, agreed to act in concert using unlawful means to destroy Equustek's business in order that they could appropriate all of Equustek's business, profits, and goodwill for themselves.
 34. This intention to harm the Plaintiffs was the predominant purpose of the Defendants at all material times.
 35. The acts done in furtherance of the conspiracy, and the unlawful means used, include:
 - a. Stealing the Plaintiffs' Trade Secrets, below, in order to build the Datalink Products, as set out below;
 - b. Claiming Equustek's products as their own, and misrepresenting to the public that their own products were an upgrade or replacement of the Equustek products, which they said were no longer available;
 - c. Using the Plaintiffs' trademarks to drive traffic to the Datalink websites on the false pretense that they intended to sell the Equustek products under the Distribution Agreement;
 - d. Breaching the Distribution Agreement;
 - e. Infringing the Plaintiff's copyrights;
 - f. Organizing their assets and their corporate structure to make it as difficult as possible for the plaintiffs to identify who is involved, recover their intellectual property, or collect any damages;
 - g. Using false names in their dealings with their customers;

- h. Using false names in their communications with one another, in order to create a false documentary record to be revealed in this litigation, in order to make it as difficult as possible for the plaintiffs to discover the truth about these events;
- i. Giving false or misleading evidence and further concealing documents in these proceedings, in order to prevent the plaintiffs from discovering the full scale of the conspiracy;
- j. Continuing to carry on business, or assisting Jack and the Datalink Companies to carry on business, after they had been prohibited from doing so by orders of this court;
- k. Carrying on their scheme under multiple fictional corporate names [names listed]

And further particulars are set out in the balance of this Statement of Facts.

[Emphasis in original.]

[15] In response, the plaintiffs say that pleadings should not be measured on a standard of perfection, and in any event, their pleading is sufficient. They point to other portions of the ANOCC that they say provide sufficient detail to pass this test, including:

F. In 2022, it came to the attention of Northam and 1057079 that Joura and Kochar had been competing with Northam and 1057079 in a manner which was in breach of the SPA, by becoming involved in the running of business for Roman.

G. At all material times, Joura's and Kochar's involvement in Roman's business was deliberate, calculated and strategically carried out, the details of which are better known to the defendants.

H. At all material times, Roman was aware of and aided in Joura's and Kochar's breach of the non-competition clause contained in the SPA, for business gains and did in fact secure business gains, the particulars of which are better known to the defendants.

I. At all material times, Joura and Kochar intended on profiting from making contributions to Roman, and did obtain such profit(s), the details of which are better known to the defendants.

[16] In summary, the plaintiffs argue that Roman's conduct constituting a conspiracy was allowing the Personal Defendants to get involved in Roman's business for the purpose of competing against the plaintiffs. The plaintiffs allege Roman was aware of the non-compete and allowing the Personal Defendants to become involved in its business, Roman abetted in a breach of the agreement for the purpose of making profits.

[17] The plaintiffs rely on *Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 [Garcha Bros], which dealt with a dispute amongst a franchisee and principals. They specifically rely on the following passage:

[36] There is no doubt that the franchisor pleaded conspiracy in para 32 of its + notice of civil claim:

Kuldip [Singh], Kulwinder [Sandhu], and Arshpreet [Singh] conspired to incorporate [1127] for the purpose of defeating the non-competition obligations of the Franchisee.

[18] The plaintiffs say that if the above wording was considered sufficient, their pleadings are sufficient and meet the test.

[19] However, Roman points out that the pleading in Garcha Bros is superior because it actually identified the particular defendants alleged to have conspired, as well as the particular conduct that amount to a conspiracy (incorporating a company).

[20] Roman emphasizes the following comments from *Owimar v. Stewart*, 2019 BCSC 1198:

[19] Rather than plead material facts, the Claim contains numerous speculative propositions and bald statements of wrongdoing in relation to the plaintiff's medical testing and against ICBC and its counsel, Mr. Stewart, in relation to the plaintiff's motor vehicle actions. Care must be taken to avoid undermining the role of pleadings in identifying the issues by allowing a party to plead bald assertions or mere conclusory statements of law. A bald assertion of a conclusion is not a pleading of material fact:

[18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

Mancuso v. Canada (Minister of National Health and Welfare), 2015 FCA 227 at paras. 18-19 & 27.

[20] However, even assuming the facts in the Claim to be true, the plaintiff still has no chance of succeeding and the Claim is sure to fail due the numerous radical defects in it: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263 at para. 15. The requirement to assume the facts pleaded to be true does not prevent skeptical analysis in the case of purely speculative allegations or assumptions: *Green v. Proline Management Limited*, 2017 BCSC 1656 at para. 35. Speculative and fanciful claims in a pleading may also demonstrate that it is plain and obvious no cause of action is disclosed: *Olenga v. British Columbia*, 2015 BCSC 1050 at paras. 17 and 21.

[21] Roman emphasizes that while perfection is not needed, there must be something more than a bald assertion. Simply making a conclusory statement does not satisfy the requirement to plead a material fact. Roman submits that the proposition from *Owimar* that "[t]he requirement to assume the facts pleaded to be true does not prevent skeptical analysis in the case of purely speculative allegations or assumptions" applies here: at para. 20.

- [22] Roman also submits that that the plaintiffs' reliance on paragraphs F to I of the ANOCC does not assist because those paragraphs are not under the portion of the claim identified as constituting the facts for conspiracy. Instead, they are under the heading for breach of a non-competition agreement. Accordingly, Roman submits that does not alleviate the problems they have identified with the plaintiffs' claim.
- [23] Moreover, Roman points to another deficiency in the pleadings: Roman is not a party to the share purchase agreement, and therefore, cannot be said to be bound by the non-compete clause.
- [24] However, in *Garcha Bros*, a similar argument was made, but the court granted an injunction restraining not only the franchisee and its principals, but the appellants, who were not privy to the franchise agreement: at para. 2. That accords with my understanding of the law, which is that a claim for breach of a competition agreement could not be sustained individually against Roman--it might be sustained through the route of the plea of conspiracy.
- [25] With regard to that point, I agree with the plaintiffs that one must read the ANOCC as a whole. While it may have been preferable to articulate the alleged facts that constitute conspiracy under the proper heading, I find one must read all claims together. On that standard, while the plea is not very detailed, the claim of conspiracy is supported by allegations of material facts.
- [26] When making a claim for predominant purpose conspiracy, a plaintiff's obligation is to establish three things: (i) an agreement or concerted action between two or many persons; (ii) with the predominant purpose of causing injury; and (iii) that overt acts committed cause damage to the plaintiff. The plaintiffs in this case say that the act in question is Roman's allowing the Personal Defendants to be involved in its business, which constitutes the "agreement" that ended up creating a conspiracy.

The Application to Strike Pleadings

- [27] Striking a claim under R. 9-5(1)(d) -- that it is "plain and obvious" a claim cannot succeed -- has a high threshold. It is meant to dismiss claims that have no chance of success as they are pleaded.
- [28] I do not find that Roman has met that test in this case. While the pleading against Roman is not detailed, I am unable to conclude it has no chance of success. Looking at the claim as a whole, there is sufficient assertion of material facts that may constitute conspiracy.
- [29] Roman also relies on the other subsections in R. 9-5(1), mainly those in (b), (c), and (d). Counsel appropriately addressed each subsection separately, but I find it more convenient to address them together because of the commonalities in the legal test, which I will comment on first.

- [30] Under R. 9-5(1)(b)-(c), pleadings that are said to be embarrassing, frivolous or vexation or unnecessary can lead to the court striking them. "Embarrassing" in that sense refers to failing to state the real issue in an intelligible way. That test has some commonality with abuse of process in R. 9-5(1)(d).
- [31] Under R. 9-5(1)(b), "scandalous, frivolous or vexatious" typically means the pleadings lacks a bona fide legal argument and is, in fact, intended to harass or embarrass, and therefore, serves no legitimate purpose: *Young v. Borzoni et al*, 2007 BCCA 16. That particular formulation of the test also has some commonality to abuse of process.
- [32] A helpful discussion is in *Sahyoun v. Ho*, 2013 BCSC 1143, where Justice Voith discusses the basic test for each subsection illustrating how abuse of process is, in some ways, the underlying foundation to or can be seen as an umbrella for all of the other subsections.
- [58] In this case, having regard to the numerous and varied deficiencies in the Proposed Pleading, I am satisfied that it should not be filed. There was some suggestion by some of the Defendants that I ought not to allow the Plaintiffs to redraft the Proposed Pleading. In *The Owners, Strata Plan LMS3259 v. Sze Hang Holdings Inc.*, 2009 BCSC 473 at paras. 40-43, Justice Sinclair Prowse described both the authorities that addressed the circumstances in which a party will not be permitted to redraft pleadings that were struck by the court as well as the conceptual basis for the exercise of that discretion.
- [59] The notices of application that were filed by the Defendants do not seek any such relief nor do I consider that it would be appropriate, for various reasons, to limit the Plaintiffs' ability to amend and file a proper claim.
- [60] The courts will, to the extent reasonably possible and depending on the history of a matter, extend some indulgence to a self-represented litigant who is not conversant with the Rules or the law. Such indulgences do not, however, extend to any diminution or impairment of another party's substantive rights. Allowing the Proposed Pleading to be filed, for example, would impair the ability of the Defendants to respond to and defend the claims being made against them. It would render their defence inefficient. It would impede their intended application to strike all or parts of the claims being made against them. An indulgence granted to a self-represented litigant cannot extend this far.
- [61] Providing the Plaintiffs a further opportunity to prepare a proper claim does not engage these concerns. Having said this, other concerns do arise. In *Broadfoot 2011* and *Broadfoot 2008*, Justices Silverman and Williams, respectively, identified various deficiencies in the pleadings advanced by Dr. and Mrs. Sahyoun. Some of those deficiencies are repeated in the Proposed Pleading. Furthermore, in *Broadfoot 2008*, Justice Williams addressed Dr. and Mrs. Sahyoun's attacks on various administrative decision-makers and observed:

- [80] I reach my conclusion having carefully examined the statement of claim. While it is important to be cautious of allegations that they are really just attacks on the decision dressed up to allege serious bad faith misconduct, the court must bear carefully in mind the test which is to be employed in assessing this application and to which I adverted earlier. It must be assumed that the facts alleged can be proved.
- [62] These comments resonate in the present case. The Proposed Pleading contains numerous serious allegations of fraudulent misrepresentation, falsification of materials, perjury and malicious behavior on the part of numerous unrelated defendants. It is open to a plaintiff, on a proper basis, to advance some of these matters either independently or in support of an action if a proper foundation exists for the allegation. It is thoroughly wrong to do so for strategic reasons. I have explained to Dr. and Mrs. Sahyoun that they must reflect carefully on what allegations they advance and should be mindful of the sanctions that potentially exist where a claim of this nature is not made out.
- [63] I am ordering the Plaintiffs to provide the Defendants with a further amended notice of civil claim, which complies with Rule 3-1, within 60 days of receipt of these reasons. That timeframe provides the Plaintiffs ample time to reflect on these reasons and to make the amendments that are required. It also recognizes that the Defendants have been seeking to obtain a proper pleading from the Plaintiffs for many months and that they wish to address the claims being made against them.
- [33] Roman submits that even if one looks at the whole ANOCC incorporating the facts asserted in paragraphs F to I under the conspiracy claim, there is a lack of particularity. Roman contends that it is not an intelligible pleading to which it can respond. It submits the pleading of a conspiracy lacks precise detail as to what the agreement was, how it was formed, how Roman became aware of it, and what it was meant to do.
- [34] In particular, Roman points to what it says is the vague pleading made in paragraph I that somehow, the Personal Defendants made contributions to Roman for profit. Roman alleges that it is entirely unclear what that is supposed to mean.
- [35] With regard to abuse of process, Roman points out that in the original notice of civil claim, it was not named as a party and was only listed in terms of failing to disclose certain documents. It was only after getting those document that the plaintiffs then amended the claim, or at least, around the same time. Roman asserts that this may have been a strategic sequence of pleadings, in that it was a way to get access to documents that normally, the plaintiffs would not have. Roman submits being named in the original notice of civil claim was for a collateral purpose of getting access to the documents in order to get a "leg up" in the litigation.
- [36] Although I find that Roman's points about the lack of particularity in the civil claim has a sound basis, overall, I am not satisfied that satisfies any of the tests, especially for abuse of process, as set out in R. 9-5(1)(b), (c), or (d). In a way, Roman relies on the same grounds it raised under R. 9-5(1)(a), albeit now pointing to some evidence. I am not being critical of

counsel: it was appropriate to argue that the same factors could substantiate meeting the test under the other subsections. However, I am not persuaded that these pleadings are embarrassing or speculative in the sense that the case law talks about.

- [37] The claim of conspiracy is tied to the alleged breach of the non-compete clause, and, therefore, it is tied to those allegations of facts, even if those might be characterized as a bit thin. That allegation is Roman's permitting the Personal Defendants, who were bound by the non-compete agreement, to get involved in Roman's operations amounted to a breach of the non-compete, which is the underpinnings of a claim of conspiracy.
- [38] For all those reasons, I am not satisfied that Roman has met the test to strike the pleading under Rule 9-5(1).

Summary Dismissal

- [39] Roman also applies, in the alternative, for summary dismissal of the claim under R. 9-6 and appropriately refers to the leading case from the Supreme Court of Canada, Canada (Attorney General) v. Lameman, 2008 SCC 14 [Lameman]. Several basic principles about summary judgment were set out in that case. Among these is that the rule serves the important purpose of preventing claims or defences that have no chance of success from proceeding to trial. The test to meet again is high, but it is not restricted to the pleadings: Lameman at paras. 10-11.
- [40] The idea is that if the court is satisfied there is no genuine issue for trial, it should pronounce judgment in favour of the defendant. The onus is on the party applying for summary trial to show that there is no triable issue, and that the other party is bound to lose. It is acknowledged that this is a very high standard: Rahman v. Windermere Valley Property Management Ltd., 2021 BCSC 118.
- [41] The case law confirms that the test of "no genuine issue existing" can be made out when it is manifestly clear, or beyond doubt, that the party is bound to lose. The policy underlying this rule is that it is essential to the proper operation of the justice system that cases that have no chance of success are weeded out at an early stage: Lameman at para. 10. Although parties are not expected to bring their entire case, they should put their best foot forward in terms of answering the claim made that it should be dismissed summarily: at para. 11.
- [42] The plaintiffs submit that, among other things, this application is premature in that the parties have not engaged in examination for discovery. They submit this is one reason why summary judgment should not be granted: Xiao v. Fan, 2020 BCSC 69 at paras. 48-49.
- [43] They also rely on another principle from Lameman that summary judgment motions are decided on the basis of pleadings and material before the court, but they ought not to be granted by vague references to what might be adduced in the future. Thus, there is a balance between holding a party to put their "best foot" forward, and not dismissing a case too early in the stage of the litigation.

- [44] In this case, both parties filed affidavit evidence. Roman relies on the affidavits from the Personal Defendants. As I noted, Roman's position, in part, is that it could not have breached the non-compete clause when it was not a party to the share purchase agreement. It acknowledges the allegation in the claim that it was aware of a non-compete clause, but asserts that there is no evidence to substantiate that allegation.
- [45] It also goes further, relying on the affidavit of Jasbir Kochar in which he says that he is not involved in the Onex store, which was alleged to be a vehicle through which Roman was selling competing products. He also deposed that he is not involved at all in the kitchen cabinet hardware or shower-door hardware business, which was the subject of the non-compete clause.
- [46] Similarly, Dilpreet Joura filed an affidavit. He is the owner of the Onex company. He explained that there used to be two shareholders of Northam, which were: (1) the other plaintiff, 105, which was owned by a Mr. Ahuja; and (2) Wipro. Wipro is a company in which the Personal Defendants are involved.
- [47] Mr. Joura alleges that at one time Mr. Ahuja, while they were still shareholders in Northam, began disrupting the business by diverting products to a competitor. Mr. Joura deposed that led to a parting of ways, which ultimately resulted in Wipro selling its shares in Northam to 105. Mr. Joura similarly deposed that he has no financial interest in Roman and is not involved in its business in any way.
- [48] The plaintiffs rely on two affidavits from Mr. Ahuja. He is the director of Northam, and he alleges that Roman was incorporated after the non-compete clause was entered into. He explained in his affidavit why he wanted the non-compete clause in the share purchase agreement. He alleges that Roman and Onex operate out of premises that are owned by Onex.
- [49] Mr. Ahuja also deposed that he asked a relative to visit the Onex store as a mystery shopper. He stated that this person bought products that identified in the restrictive covenant as items for which the Personal Defendants could not engage in business. He attached receipts and photographs to substantiate this fact. He also described noticing a decline in sales to particular customers, who he claimed informed him were getting products from Roman.
- [50] Roman emphasizes that much of evidence is hearsay, and the pleadings do not contain those allegations. While that is true, on an application for summary judgment, the court is permitted to look at evidence.
- [51] However, Roman submits the more important point is that the description in Mr. Ahuja's affidavit of the sale of items alleged to have constituted a breach cannot be so. It submits there is a fatal flaw to the plaintiffs' allegations because there are two different versions in the record of the share purchase agreement and the non-compete clause.

- [52] Roman submits that the plaintiffs have merely pointed to products listed in the appendix to the agreement as proof of the breach of the non-compete clause, alleging that it lists items that sold by Roman through Onex. However, the specific pages that list those products are not initialled by the parties, unlike other pages. Both of the Personal Defendants deposed that when they signed the share purchase agreement, they initialled every page. Roman submits that the pages not initialled cannot be said to form a part of the agreement and, therefore, there is no evidence on the summary dismissal application about the potential breach of the non-compete agreement.
- [53] Mr. Ahuja's affidavit explained why those pages are not initialled. He deposed that the Personal Defendants' lawyer requested the schedule of items be included at the time, after signing. The plaintiffs submit the Personal Defendants cannot now deny the validity or effectiveness of those pages.
- [54] What this means is that there is a dispute on facts fundamental to the claim --the content of the non-compete clause. As noted in *Lameman*, where there is a dispute that cannot be resolved by looking at the evidence itself, I am bound to assume the version most favourable to the plaintiffs is true. That is simply a reflection that summary judgment is not meant to be a forum in which disputed material facts are decided.
- [55] Roman points out that it denies selling any of those products in the first place. Therefore, it says the allegation that there was a relationship, or somehow that the two Personal Defendants were involved, is denied in its affidavit evidence. Its position is that this is a conflict that cannot be decided on the basis of the evidence before the Court, and that is a fundamental dispute. Therefore, while Roman is not a party to the non-compete clause and can legitimately assert that this issue is separate from the allegations made against it, the dispute is a fulcrum upon which the conspiracy claim is made.
- [56] Roman is not a party to the agreement, but the evidence before me is disputed as to what constitutes that agreement. Therefore, I am unable to say that the plaintiffs' claim is bound to fail because those types of conflicts ought not to be decided on a summary judgment application.
- [57] For all those reasons, I am unable to grant summary judgment in this case, and I therefore dismiss the application brought under R. 9-6.

Security for Costs

- [58] In the further alternative, Roman sought an order for security of costs based on s. 236 of Business Corporations Act, S.B.C. 2002, c. 57. That section allows such an order to be granted where it appears a corporation is unable to pay costs if the defendant were to be successful.
- [59] Both parties agreed that the applicable test is set out in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, 91 A.C.W.S. (3d) 362, 1999 CanLII 5860 (B.C.S.C.):

[14] the test to be applied on an application for security for costs is as follows:

1. Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails?
2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
3. Is the court satisfied that the defendants have an arguable defence to present?
4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

[60] I also note the factors identified in *Kropp v. Swaneset Bay Golf Course Ltd.*, 29 B.C.L.R. (3d) 252, 1997 CanLII 4037 (C.A.):

[17] The principles may be summarized in this way:

1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
7. The lateness of the application for security is a circumstance which can properly be taken into account.

[61] With regard to the four-part test, the onus is on the defendant, although that onus shifts. If the defendant can establish that it appears the plaintiff would be unable to pay costs, then the onus shifts to the plaintiff to show that: (i) it has exigible assets of sufficient value; (ii) it can convince the court that it can still have an arguable defence; and/or (iii) an order for costs would visit undue hardship on the plaintiff, which would prevent the plaintiff's case from being heard.

- [62] Roman points to its evidence from the personal property register that the plaintiffs have no exigible assets. Roman also has evidence estimating that the cost of defending the action is just over \$31,000.
- [63] The plaintiffs' response is to point to a financial statement that they filed, which under the column of assets, shows liquid assets of just over \$1.18 million, as well as property, plant, and equipment valued at \$74,000. They submit that exceeds the claim that Roman makes. Therefore, the plaintiffs submit that it cannot be found that they are unable to pay costs on an evidentiary basis.
- [64] When looking at all the evidence, I am unable to conclude that the plaintiffs are unable to pay the defendants' costs should the defence succeed. Even if that conclusion was wrong, the plaintiffs have established that they have assets that could satisfy the estimated costs. Given that finding, I conclude security for costs should not be ordered. While the defendants clearly have an arguable defence to the case, that factor is not determinative.
- [65] I am not satisfied that an order of security for costs would visit undue hardship on the plaintiffs. However, as I understand it, the test is applied sequentially. Since I am not satisfied it has been demonstrated that the plaintiffs could not satisfy an award, security for costs is not granted.

Production of List of Documents

- [66] In the second application, the plaintiffs seek an order that Roman produce a list of documents within 14 days. They say it is long past the deadline, and that they made demands in a timely way. I note that the application is for the production of particular documents, but the plaintiffs resiled from that position at the hearing.
- [67] It is notable that even before or around the time the claim was amended and before it was added as a party, Roman provided documents that were identified in the notice of civil claim, namely, the central register and its incorporation documents.
- [68] Roman submits it is virtually impossible for it to know exactly what it would be responding to, for all the same reasons it raised under the application to strike or dismiss the claim. It submits that if it is likely that there is going to be an amendment to provide those particulars, then it should not be required to produce documents until the claim is clarified.
- [69] In addition, Roman points out that the plaintiffs were not just seeking a list of documents, but production of particular documents, which obviates the relief being claimed. It submits this point is underscored by the following: (i) as pleaded, the claim is vague; (ii) its submission that the pleading was improper; and (iii) there is an inference, or an implication, that the thrust of the plaintiffs' application was really to get production of those particular documents. Roman argues these factors militate against the relief being sought.

- [70] In the overall scheme of things, given that pleadings have closed, there is no reason why Roman should not produce a list of documents. I do find its reticence to do so to have a sound basis. While I make no findings to this effect, I note that the notice of civil claim would improve greatly if particulars were provided.
- [71] As it now stands, it is reasonable for Roman to say it does not know precisely what documents it is supposed to provide. However, it is not the court's role to insert itself and force parties to provide those particulars when those have not been sought, or to order amendments be made to pleadings, even if the court might view both things as being beneficial. However, in the absence of such relief being sought, there is no reason why a list of documents cannot be produced. Given Roman's position and the comments I have made, the plaintiffs might correctly anticipate receipt of a thin list of documents, which may be justified given the state of the pleadings.
- [72] While I have not found the lack of clarity identified by Roman to be sufficient to grant the other remedies sought, it may mean production of documents will required further litigation by the parties. The plaintiffs suggest that they were trying to be efficient in anticipating that Roman would not produce very much, but with respect, that is not how one goes about document production. It is the plaintiffs' obligation in the first place to make the pleadings clear.
- [73] I point out that it is not alleged that Roman breached the non-compete clause, nor could that allegation be made. Therefore, it is difficult to know what documents the plaintiffs expect to receive. The documents sought probably focus on the alleged conspiracy that Roman denies based, in part, on its position that the allegation suffers from vagueness and lack of particularity, as already discussed.
- [74] In particular, I note the failure to identify which particular defendants are alleged to have engaged in the concerted action. Therefore, it is understandable why Roman may not have responded to the demand for a list of documents given its position about these deficiencies. However, that does not provide a reason why it cannot respond formally to a demand for a list of documents.
- [75] For those reasons, I order that Roman prepare and deliver to the plaintiffs a list of documents within 21 days of today.

"Sharma J."

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