

CANADA / JUDGMENT

Nouhi v. Pourtaghi

2021 BCSC 1779

COURT

Supreme Court of British Columbia

DECIDED

28 July 2021

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2021 BCSC 1779 Nouhi v. Pourtaghi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nouhi v. Pourtaghi,

2021 BCSC 1779

Date: 20210728

Docket: Vancouver

Registry: S184410

Between:

Massimo Aki Nouhi

Plaintiff

And

Nahid Pourtaghi and Naki Enterprises Inc.

Defendants

And:

Massimo Aki Nouhi

Defendant by way of Counterclaim

Corrected Judgment: The front page of the judgment was corrected on

December 9, 2021

Before: The Honourable Mr. Justice Skolrood

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff/Defendant

by way of Counterclaim:

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The Representative for the

Plaintiff/Defendant by way of Counterclaim:

A. Nouhi

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 13 and 14, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2021

[1] THE COURT: There are two applications before the court, both brought by the defendants. The first application seeks an order cancelling Certificates of Pending Litigation ("CPL's") registered against three properties located in the Lower Mainland. The second application seeks an order deeming admissions on the part of the plaintiff for failing to properly respond to notices to admit and a further order for production of documents.

[2] The applications are brought in the context of a complex action brought by the plaintiff relating to the commercial dealings of the parties. There is also an underlying family dynamic in that the plaintiff, Mr. Nouhi, is the uncle of the personal defendant, Dr. Pourtaghi.

[3] I do not propose to review the background facts in any detail; however, I will touch upon the procedural history as it provides some context for the current applications.

- [4] The plaintiff filed his notice of civil claim on April 6, 2018 (the "NOCC"). The defendants filed a response to civil claim on May 8, 2018 (the "RTCC"), and then an amended RTCC on August 20, 2018. The defendants filed a counterclaim on October 24, 2018. The plaintiff then filed an amended NOCC on January 17, 2019, and the defendants filed a response to the amended NOCC on February 11, 2019. I note that the plaintiff has since filed a further amended NOCC on July 15, 2021 and the defendants filed a response on July 26, 2021.
- [5] On April 6, 2018, at the same time that he commenced his action, the plaintiff filed CPLs against a number of properties, the registered owners of which are the defendant Dr. Pourtaghi and/or the corporate defendant, Naki Enterprises Inc. ("Naki"). On December 13, 2018, the defendants filed a notice of application seeking to cancel the CPLs and to dismiss some or all of the plaintiff's claims.
- [6] On January 4, 2019, the plaintiff filed a notice of application seeking a Mareva injunction or, alternatively, a preservation order.
- [7] Both applications came on for hearing before Justice Matthews on March 11 and April 24, 2019. On May 21, 2019, Matthews J. issued her reasons for judgment (now indexed at 2019 BCSC 794).
- [8] The key aspects of Matthews J.' decision include:
- a) She found that the plaintiff had not adequately pled a claim for a constructive trust based on fraud.
 - b) The claims with respect to disputed shares in Naki were not in relation to land and, as such, could not support the CPL's.
 - c) The claim for a constructive trust based on unjust enrichment did not include a plea that monetary damages would not be an adequate remedy and, as such, the pleadings did not support the claim to a constructive trust.
 - d) Given that the pleadings did not adequately plead the elements necessary for a constructive trust, there was no claim disclosed for an interest in land and accordingly no basis for the filing of the CPL's. Justice Matthews therefore ordered that the CPL's be cancelled.
 - e) Justice Matthews held that given her findings on the pleadings, it was not necessary for her to consider the defendants' other arguments, specifically its application to dismiss the claim under Rule 9-6 and its application to cancel the CPL's based on hardship and inconvenience pursuant to s. 256 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA].
 - f) Justice Matthews dismissed the applications for a Mareva injunction and a preservation order. She found the plaintiff's allegations of fraud or dishonest conduct on the part of Dr. Pourtaghi to be weak.

- [9] The plaintiff then filed an application seeking to file a further amended NOCC. That application came on for hearing before me, and I granted the order sought on July 25, 2019. The plaintiff then filed his further amended NOCC and refiled the CPL's.
- [10] In July of 2020, the defendants brought another application to cancel the CPL's. That application was heard by Justice Horsman on July 23, 2020. She ordered cancellation of the CPL registered against one property owned by Naki; however, there was insufficient time to deal with the other properties, so the balance of the relief sought by the defendants was adjourned. That application is the first of the two applications before the court now.
- [11] It is also useful to note that the trial of this matter was originally scheduled to commence on April 6, 2020. I am told that the trial was struck from the list because the plaintiff failed to schedule a trial management conference.
- [12] The trial was rescheduled to begin on July 12, 2021. However, it was adjourned at a TMC held on June 21, 2021, and has now been rescheduled to begin October 4, 2021.

The CPL Application

- [13] As noted, the defendants apply to cancel CPLs registered against three properties, two of which are registered in the name of Dr. Pourtaghi, and one that is registered in the name of Naki.

- [14] The two properties registered in Dr. Pourtaghi's name are located at 1908 - 660 Nootka Way, Port Moody, B.C., and 1604 - 977 Mainland Street in Vancouver. The property registered in the name of Naki is located at 851 Paladin Terrace, Port Coquitlam.

- [15] The defendants rely on ss. 256 and 257 of the LTA, the relevant provisions of which state:

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on

- (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
 - (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
 - (2) The form of the undertaking must be settled by the registrar of the court.
 - (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.
- [16] The defendants seek an order cancelling the CPL's on the basis of hardship and inconvenience within the meaning of s. 256(1). The test to be met by an applicant under this section was discussed by the Court of Appeal in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388, where Justice Newbury said at para. 28 (excluding citations):
- [28] As a preliminary matter the applicant must show that it is experiencing or likely to experience "hardship and inconvenience" as a result of the registration of the CPL. It appears that the degree of hardship required is the subject of disagreement in the Supreme Court of British Columbia. While some judges have proceeded on the basis that the hardship need not be "significant" others have required "severe suffering" The Shorter Oxford Dictionary (6th ed., 2007) defines "hardship" to mean "the quality of being hard to bear" or "severe suffering or privation"; "significant" to mean "important, notable; consequential"; and "insignificant" to mean "of no importance; trivial, trifling" or "meaningless". To the extent that these or other decisions of the trial court suggest that "hardship" in s. 256(1) may be met by proof of hardship that is "insignificant" or "not significant", I would disagree. I doubt that the Legislature intended the threshold under s. 256 to be surmounted by proof of hardship that is only "trifling". On the other hand, I agree that a court should not be "exacting" in its analysis of hardship and inconvenience.

[17] In her 6th affidavit, Dr. Pourtaghi deposes as to the financial hardship and inconvenience sought by the CPL's. I note that much of her evidence is concerned with the property located at 2205 - 977 Mainland Street in Vancouver, as that property had a mortgage maturing in August 2020. The CPL registered against this property was the one ordered to be cancelled by Horsman J. in July 2020. Dr. Pourtaghi's evidence relating to the other properties is as follows, again taken from her 6th affidavit:

I will also need to refinance other mortgages on the CPL properties in order to pay my living expenses and debts, including the legal fees being incurred to defend myself and Naki in this action and another lawsuit filed against me by plaintiff Nouhi in the State of Michigan.

[18] She then sets out the various mortgage balances as of July 2020, and goes on to state:

In addition, in order to pay my debts and Naki's debts, including the legal fees incurred over the past nine months and the fees that will need to be incurred to continue defending us, I will need to either borrow additional funds secured by the properties or sell one of the properties. The four properties that are the subject of the CPL are the only significant assets owned by myself or my company Naki from which such debts can be paid. I will not be able to refinance or sell any of the properties unless the CPL registered by plaintiff is cancelled.

[19] The defendants submit that they have established sufficient hardship and inconvenience sufficient to warrant cancelling the CPL's.

[20] The plaintiff submits that the defendants have not established hardship, as that term is defined in cases like *Youyi*, as being severe and beyond trifling. The plaintiff submits further that even if hardship is established, the court nonetheless retains a discretion to decline to cancel a CPL. He cites *Soo v. Law*, 2009 BCSC 1041, where Justice Bruce held at para. 38:

[38] I agree with the plaintiff's submission that the court has a discretion whether or not to cancel a CPL regardless of whether the applicant has established sufficient hardship and inconvenience. This proposition is clearly established in *Lam* where Sigurdson J. refused to exercise his discretion to cancel a CPL notwithstanding the applicant had demonstrated hardship and inconvenience. Thus even where hardship and inconvenience are proven the court must still decide if its discretion should be exercised in favour of removal based on all the relevant circumstances. In this case, the relevant circumstances include the strength of the plaintiff's cause of action with respect to the property, the strength of the defendant's claim to a right to dispose of the property, whether damages are an adequate remedy, and the nature of the hardship suffered by the defendant.

[21] I am satisfied that the defendants have established hardship and inconvenience within the meaning of s. 256(1) of the LTA. I reach this conclusion for the following reasons:

- a) The uncontroverted evidence is that the properties are the only significant assets of Dr. Pourtaghi and Naki that can be used to fund expenses, including the expenses associated with this litigation. While I appreciate that the evidence proffered in support of the hardship claimed is somewhat general in nature, I think the court can fairly infer hardship and inconvenience in circumstances where a party's sole assets are tied up for an extended period of time.
 - b) This leads me to my second reason, that being that the CPL's were originally filed at the time the plaintiff filed his claim in April 2018. They were cancelled pursuant to the order of Matthews J. in May 2019, but then refiled upon the plaintiff filing an amended notice of civil claim. As a result, the properties have been encumbered by CPL's for the better part of three years, during which it appears that the plaintiff has made minimal effort to set this matter for trial. CPL's are an extraordinary form of pre-judgment execution that is often used improperly to gain leverage in litigation. To be clear, I am not saying that this is what has occurred here, but I am saying it is unreasonable to file CPLs then essentially leave them on title without moving expeditiously to trial.
- [22] In the circumstances, I am satisfied that this is an appropriate case in which to exercise my discretion to cancel the CPL's.
- [23] The next issue then is whether Dr. Pourtaghi and Naki should be required to post security. As reflected in s. 257(3) of the LTA, a key factor in determining whether to require security and, if so, the amount of the security, is the likelihood of success in the underlying action.
- [24] With respect to the one remaining property owned by Naki, being the property located at 851 Paladin Terrace, Port Coquitlam, Matthews J. found that this claim was weak, given that the plaintiff was claiming a right to shares in Naki, which of course is distinct from a right to an interest in any property owned by the company. That flaw in the plaintiff's claim persists.
- [25] As I understand, however, the plaintiff now alleges that he has a direct interest in the property, not through Naki, but because he personally paid a deposit of \$20,000 towards the purchase. There are problems with this submission:
- a) Dr. Pourtaghi deposes that, although she is uncertain about the source of the \$20,000, she believes the payment was made with the plaintiff's knowledge and consent. Further, the payment was made on behalf of Naki and the property was again purchased in the name of Naki;
 - b) There is no evidence from the plaintiff that he personally provided the 20,000 deposit amount, apart from general statements in his affidavit that he provided funds for Naki to purchase property; and
 - c) In response to a fact alleged in Dr. Pourtaghi's notice to admit dated October 29, 2019, that "an initial down payment of \$20,000 Canadian for the purpose of the 851 Paladin Terrace property was paid on or about June 4, 2004," the plaintiff refused to admit that fact on the basis that he "is either not in possession of the documents that substantiate the transfers or

payment referenced, or does not have personal knowledge of these transfers or payments". Leaving aside the adequacy of that response, which I will return to when dealing with the second application before me, it is not open to the plaintiff to assert an interest in the Paladin Terrace property based upon a deposit that he, at the same time, professes no knowledge about.

- [26] The claims to an interest in the two other properties owned personally by Dr. Pourtaghi are equally weak. In her 6th affidavit, she details how those properties were purchased, including the source of funds used. I was not taken to any evidence from the plaintiff contradicting that evidence. Rather, as I understand the plaintiff's position, it is that a line of credit used in part to purchase one or both of the properties is secured against the Paladin Terrace property, which the plaintiff again asserts an interest in. However, as I have found, the claim to an interest in the Paladin Terrace property, based upon the alleged deposit or down payment, is weak. Further, even if made out, it would not give rise to a claim to an interest in the other properties on the part of the plaintiff.
- [27] Given the weakness of the claims, I am satisfied that damages would be an adequate remedy in the event the plaintiff is successful. Further, I find that this is an appropriate case in which to order cancellation of the CPLs without monetary security and on the basis of an undertaking by Dr. Pourtaghi and Naki to pay any damages resulting from the cancellation of the CPLs if proven at trial: see *Beach Estate v. Beach*, 2021 BCCA 238 at paras. 63-65; 0861695 B.C. Ltd. v. Meola, 2013 BCSC 121 at paras. 11-15; and *De Cotiis and Others v. De Cotiis*, 2004 BCSC 1658 at para. 79. As an aside, I note that Horsman J. did not require security when she ordered cancellation of the CPL registered against the other Mainland Street property.
- [28] Accordingly, I order that the CPLs registered against the properties located at 1908-660 Nootka Way, Port Moody, B.C., 1604-977 Mainland Street, Vancouver, B.C., and 851 Paladin Terrace, Port Coquitlam, B.C., be cancelled upon Dr. Pourtaghi and Naki providing the plaintiff with the required undertaking.

Notice to Admit Application

- [29] The second application brought by the defendants is for an order that the plaintiff is deemed to admit the truth of the facts and the authenticity of the documents set out in three notices to admit. I note that the notice of application states that all three notices are dated October 29, 2019. However, it appears that only notice to admit No. 1 has that date, and notices to admit Nos. 2 and 3 are both dated December 19, 2019.
- [30] The defendants also seek an order dismissing the plaintiff's claim for failure to comply with a direction of the court and failure to make proper document disclosure. Alternatively, the defendants seek an order compelling further document disclosure from the plaintiff.
- [31] Notices to admit are dealt with in Rule 7-7, which reads in part:

Notice to admit

- (1) In an action in which a response to civil claim has been filed, a party of record may, by service of a notice to admit in Form 26, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice.

Effect of notice to admit

- (2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a notice to admit is deemed to be admitted, for the purposes of the action only, unless, within 14 days after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that
- (a) specifically denies the truth of the fact or the authenticity of the document,
 - (b) sets out in detail the reasons why the party cannot make the admission, or
 - (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.

Unreasonable refusal to admit

- (4) If a responding party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document specified in a notice to admit, the court may order the party to pay the costs of proving the truth of the fact or the authenticity of the document and may award as a penalty additional costs, or deprive a party of costs, as the court considers appropriate.

[32] In *Ceperkovic v. MacDonald*, 2016 BCSC 939, Justice Dillon described the purpose of a notice of admit at para. 30 (omitting citations):

[30] The purposes of the notice to admit are multiple. The primary purpose is to "save both the Court and litigants the time and expense involved in proving the authenticity of documents or in proving facts" The rule is intended to eliminate issues altogether from a case or to facilitate proof of issues that cannot be eliminated Thus, the notice to admit can isolate important factors from a strategic and cost efficient perspective It enables the parties to "prepare for an efficient trial focused on what is disputed" The notice to admit obviates the necessity and expense of calling evidence at trial Ultimately, it is a means to foster the timely adjudication of a claim on its merits

[33] Notice to admit No. 1 sets out 66 alleged facts and 25 documents on which an admission is sought. In his response dated November 13, 2019, the plaintiff admits 16 of the alleged facts and then provides a uniform response to the other 50 as follows:

Not admitted. The Plaintiff is either not in possession of the documents that substantiate the transfers or payments referenced, or does not have personal knowledge of these transfers or the dates referenced therein.

- [34] With respect to the documents, 23 of the documents are admitted, with the remaining two "not admitted".
- [35] Notice to admit No. 2 sets out nine alleged facts and four documents. The uniform response in the plaintiff's reply dated December 24, 2019, to the alleged facts is "[n]ot admitted. The Plaintiff does not have personal knowledge of this fact or dates referenced therein." Each of the documents is again "not admitted".
- [36] Notice to admit No. 3 sets out 33 alleged facts and 20 documents. The uniform response in the plaintiff's reply dated December 24, 2019, is again "[n]ot admitted. The Plaintiff does not have personal knowledge of this fact or dates referenced herein" and all of the documents are "not admitted".
- [37] The defendants submit that the plaintiff's responses, apart from those facts and documents admitted, are deficient. They submit further that a party served with a notice to admit is obliged to take steps to inform themselves in order to properly respond and that the plaintiff failed to do so.
- [38] The plaintiff submits that his responses comply with Rule 7-7. He cites *Luu v. Wang*, 2009 BCSC 860, where the defendant responded to a notice to admit served by the plaintiff by giving a blanket response, "the defendants deny each fact, the admission of which is requested in the plaintiff's Notice to Admit." Justice Pearlman held that this response complied with the rule, stating at para. 94:
- [94] In my view, this constitutes a specific denial of the truth of the facts set out in paragraphs 1 through 15 of the Notice to Admit. That denial is as clear and precise as if the defendants had set out a separate denial of each paragraph of the facts for which the plaintiff requested admissions.
- [39] The plaintiff submits that he has similarly made a clear denial of the facts and documents set out in the notices to admit.
- [40] However, unlike in *Luu*, the plaintiff here did not expressly deny the truth of the facts nor the authenticity of the documents. Rather, the standard response was "not admitted". I understand from plaintiff's counsel that he considered the response, "not admitted", to be a denial within the meaning of the rule. Respectfully, it is not. Rule 7-7(2) sets out a clear distinction between a denial of a fact and a refusal or inability to admit a fact. Where a fact is denied, that is all that is required. However, where there is a stated refusal or inability to admit a fact or document, an explanation is required under Rule 7-7(2)(b).

- [41] I also note the evidence of Angelica Nouhi, the plaintiff's daughter, in her 2nd affidavit dated July 12, 2021, where she states that her father intended to deny the facts and documents in Notices to admit Nos. 2 and 3. Leaving aside the questionable admissibility of this evidence, it does not change what was actually stated in the responses.
- [42] Master Harper addressed this issue in *Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.*, 2020 BCSC 1608. There the plaintiff delivered a notice to admit seeking 160 admissions and attaching over 650 pages of documents. The defendant responded by stating "denied" with respect to each fact and document, but indicated the possibility of entering into a document agreement for trial. There was subsequent correspondence between counsel suggesting that the defendant was not actually denying the facts and documents, but was refusing to admit in light of possible further discussion of any possible document agreement. The plaintiff took the position that the response did not comply because it did not provide a reason for the refusal to admit. Master Harper agreed.
- [43] She said at paras. 14-16:
- [14] Rule 7-7(2) requires a party who receives a notice to admit to do one of four things:
- a) make the admission sought, either expressly or by not responding to the notice to admit;
 - b) specifically deny the truth of the fact, or the authenticity of the document;
 - c) refuse to make the admission sought and explain why the party cannot make the admission; or
 - d) particularize an objection to the admission sought on the basis of relevance, privilege, or some other objection to the appropriateness of the admission sought.
- [15] The purpose of Rule 7-7 is obvious on its face: a party should make concessions where appropriate so that the parties can focus their attention on the real issues in dispute. The principles of Rule 1-3 apply to Rule 7-7, as they do to all Rules. Accordingly, the object of Rule 7-7 is to secure the just, speedy, and inexpensive determination of the proceeding on its merits. The proceeding should be conducted in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.
- [16] The defendant was entitled to respond to the notice to admit by simply invoking "denied" as Rule 7-7(2)(a) permits. The response is not sworn evidence and requires no justification for the position taken. If the position is unreasonable, the only recourse is an award of costs pursuant to Rule 7-7(4).
- [44] Master Harper then went on to find the exchange of correspondence between counsel made it clear that the defendant was not, in fact, denying the facts and documents, but declining to admit them. She observed at paras. 20-21:

- [20] Counsel for the defendant submits that the email exchange was a "philosophical" discussion of the meaning of "deny" versus "refusal to admit". I do not agree that "deny" means "refusal to admit" in the context of Rule 7-7. Subrule (b) requires the party responding to the notice to admit to "specifically deny" the facts and authenticity of documents. The rule does not contemplate a philosophical discussion between the parties on the meaning of "specifically deny" versus "refusal to admit", especially in light of the overlay of Rule 1-3 principles.
- [21] If the defendant was unable to admit the facts or documents because he was not the author or recipient, it ought to have made a response pursuant to Rule 7-7(2)(b), but only after taking steps to inform itself of the facts or documents: *Ceperkovic v. MacDonald*, 2016 BCSC 939, para. 36.
- [45] Here, regardless of what was intended, it is clear on the face of the replies to the notice to admit that there was no specific denial of the facts and documents. Rather, it was a refusal to admit. The question then becomes whether the explanation given for the refusal is sufficient and whether the plaintiff took adequate steps to inform himself before responding.
- [46] There appears to be minimal case law addressing the question of what constitutes sufficient detail for the purposes of Rule 7-2(b). Justice G.C. Weatherill touched on this question in *The Whalen Company v. Olympic International Agencies Ltd.*, 2017 BCSC 1771. There the defendant provided a largely uniform response to a notice to admit but refused to admit facts and documents because the fact alleged was not a material fact and thus the request for an admission was irrelevant and improper. With respect to the documents, the defendant replied, "[t]he request is an improper attempt to pursue document discovery outside Rule 7-1 or to obtain evidence outside Rule 7-2."
- [47] Justice Weatherill found that the reply to the notice to admit was improper. With respect to the refusal based on relevance and materiality, he stated at para. 34:
- [34] By any measure, the facts set out in the 40 paragraphs of the notice to admit are necessary and material to the plaintiff's claim, and are precisely the type of factual questions that are routinely asked during an examination for discovery, in interrogatories, or indeed, in notices to admit.
- [48] He also rejected the second reason given by the defendant that the notice to admit somehow sought improper discovery. According to Weatherill J., there was no basis for that assertion.
- [49] Of note, despite finding that the reply to the notice to admit was improper, Weatherill J. declined to deem the facts and documents as admitted. Instead, he struck out the reply but granted the defendant leave to serve an amended reply within 14 days.
- [50] In *Whalen*, Weatherill J. was able to determine on the face of the reply that the explanation provided for refusing to admit facts and documents was improper or insufficient. Master Harper came to the same conclusion in *Bene*.

- [51] In my view, the present case is different, in that the plaintiff has given an explanation for refusing to admit at least the facts alleged, albeit it is a formulaic explanation based upon an alleged lack of personal knowledge. I will return shortly to the issue of the plaintiff's refusal to admit the authenticity of documents for which no explanation is given.
- [52] As a general proposition, lack of personal knowledge of a fact or document may be a valid reason for declining to admit that fact or document if the party in receipt of the notice to admit has taken some steps to inform themselves. Justice Dillon made this point in *Ceperkovic* at para. 36, where she said:
- [36] While lack of knowledge may be a proper ground for refusing to admit a fact or document, it is unlikely that this explanation would be accepted if the party has not taken reasonable steps to inform themselves about the fact or document (see e.g. *Pershad v. Lachan*, 2015 ONSC 5290 at para. 81). This is in keeping with the basic duty under the discovery rules that the party discovered should take reasonable steps to inform himself or herself.
- [53] It is useful to note that Dillon J.'s comments were made in the context of a consideration of costs following trial. This reflects the fact that the reasonableness of a response to a notice to admit can often only be assessed once all of the evidence at trial has been considered. This is also reflected in Rule 7-7(4), which permits the court to award the costs of proven facts where there was an unreasonable denial or refusal to admit.
- [54] In *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1994), 28 Alta. L.R. (3d) 89, Justice O'Leary suggested that a judge hearing an interlocutory application on a notice to admit is ill placed to conduct an inquiry into the reasonableness of a response. Rather, that is better left to the trial judge to deal with as a matter of costs (at paras. 17-18).
- [55] In the present case, it is not possible on the record nor is it appropriate for a judge in chambers to parse each alleged fact and each reply to determine whether the reply is reasonable or whether the plaintiff took adequate steps to inform himself. To the extent that the plaintiff here has provided a reason for refusing to admit facts, the reply satisfies the technical requirements of the rule. Whether that position is reasonable will have to be determined at trial.
- [56] That said, I will make a couple of observations:
- a) I have already touched on the fact that the plaintiff has refused to admit the fact alleged at para. 4 of notice to admit No. 1 concerning the down payment paid towards the purchase of the 851 Paladin Terrace property, yet purports to rely on that payment in support of his claim to an interest in that property. For him to deny any personal knowledge of the fact of the payment appears somewhat disingenuous. This is one of a number of inconsistencies between the plaintiff's position in the litigation and the response provided to the notices to admit.

- b) Many of the facts alleged in the notices to admit involve alleged steps taken or payments made by Dr. Pourtaghi in respect of which it is not surprising that the plaintiff would have no personal knowledge.
- c) Conversely, there are also numerous facts alleged about specific events involving the plaintiff, for example, meetings that he is alleged to have attended and documents that he is alleged to have signed. For him to profess a lack of personal knowledge of these facts suggests a failure to make reasonable efforts to properly respond to the notice.
- [57] I make these observations simply to point out that there are a number of factors that the court will have to consider at trial when assessing the reasonableness of the plaintiff's response and any costs consequences flowing therefrom.
- [58] That brings me back to the issue of the refusal to admit documents based upon the bare statement of "not admitted". Those responses do not comply with the requirements of Rule 7-7(2) in that no explanation is given for the refusal to admit.
- [59] In terms of a remedy for this non-compliance, like Weatherill J. in Whalen, I am not prepared to simply deem admissions. Instead, as Weatherill J. did in Whalen, and although this was not sought by the plaintiff here, I am going to grant the plaintiff leave to serve amended replies to each notice to admit within 14 days of today's date. Those amended replies must provide a proper and compliant response to the request to admit the authenticity of documents. The plaintiff may also wish to use this opportunity to address some of the facts alleged in the notices to admit that he has so far declined to admit in order to avoid potentially negative costs consequences following trial. If the plaintiff fails to serve compliant responses within 14 days, the documents that are the subject of the non-compliant responses will be deemed to be admitted.
- [60] The second order sought by the defendants in this notice of application is an order dismissing the plaintiff's claim for failure to comply with a direction of the court and for failure to provide proper document discovery. The direction or order of the court relied upon is that of Matthews J. in her order dated January 17, 2019, which states:
- By February 18, 2019 the parties shall make document production in accordance with the provisions of the Supreme Court Civil Rules relating to document production and, in particular, the parties shall produce any bank documents that are made relevant pursuant to the pleadings in this matter.
- [61] The defendants submit that this order has not been complied with and accordingly the plaintiff's claim should be struck.
- [62] Rule 22-7(5) empowers the court to dismiss a proceeding in the face of non-compliance by a party, including for a failure to produce documents. However, the cases make it clear that striking a claim is a draconian remedy only to be invoked in the most egregious cases: see *Muscroft et al v. Eurocopter S.A. et al*, 2003 BCCA 229 at para. 4.

- [63] I decline to make the orders sought by the defendants for the following reasons:
- a) The terms of Matthews J.'s order are very general in nature and do not identify specific documents or categories of documents to be produced apart from a general reference to bank documents. The general nature of the order does not lend itself to a clear determination of whether the order has in fact been breached; and
 - b) The plaintiff has made extensive document production, including extensive production of banking/financial records. As an example, the plaintiff's amended list of documents dated January 8, 2020, contains nine pages of listed documents, the vast majority of which appear to be banking and financial records.
- [64] That brings me to the alternative order sought by the defendants, which is couched in these terms in the notice of application: "that the plaintiff comply with the demand for the documents the production of which has been demanded, including all audit reports and working papers of the auditors."
- [65] Rule 7-1 deals with the discovery of documents and requires parties to list all documents that are or have been in their possession or control that could be used by any party of record to prove or disprove a material fact, as well as all other documents to which a party intends to refer at trial. It is well established that document production is an ongoing obligation. This is reflected in the Rule 7-1(9) requirement for supplementary lists of documents. Rule 7-1(11) and (12) then establish a procedure to be used by a party who believes that another party's document production is inadequate. That procedure involves making a written demand specifying the additional documents or classes of documents that the party says should be disclosed and the reasons therefor. The party in receipt of the demand must then comply with the demand or provide an explanation of why it is refusing to do so. This process is mandatory: see *Red Avacado Sales Inc. v. Yao*, 2019 BCSC 996 at para.15.
- [66] The plaintiff submits that the defendants have not complied with this process mandated by the Rules. However, Exhibits H and I to the 2nd affidavit of Faisal Alamy, sworn July 2, 2021, set out two demand letters dated September 15, 2019, and September 17, 2019, in which counsel for the defendants specifically identifies documents that are said to be missing. Further, on its face, the September 15, 2019, demand specifically references Rule 7-1(10) to (14) and some relevant case law.
- [67] Counsel for the plaintiff responded on September 30, 2019, indicating that they were in the process of determining what financial records are producible and suggesting that many of the documents sought represent a fishing expedition and are not relevant.
- [68] With respect, this response does not comply with the requirement of Rule 7-1(12), in that it does not address the particular documents identified by the defendants.

- [69] Obviously, there has been further document production since the date of those demands; in particular, the plaintiff's amended list of documents dated January 8, 2020, that I previously referred to. It is unclear whether some, all, or none of the documents identified in the two demands are listed there.
- [70] In the circumstances, I think the appropriate order to make is to require that the plaintiff provide a response to the two demands dated September 15 and 17, 2019, in a manner that complies with Rule 7-1(12). That response will identify which of the documents demanded have or will be produced and will provide a proper explanation for the refusal to produce any of the documents. Rule 7-1(12) provides for a 35-day response time. Given how long the demands have been outstanding and the fact that a trial date is approaching in October, the plaintiff's response will be served within 21 days.
- [71] The defendants' notice of application refers to "all audit reports and working papers of the auditors". The application does not specify what audits are being sought. In her 7th affidavit, Dr. Pourtaghi alleges that professional accountants "conduct audits and prepare financial statements" for each of the corporate entities controlled by the plaintiff. She refers, as an example, to some correspondence from an accounting firm in Michigan relating to the 2016 tax filings of a Michigan company controlled by the plaintiff, and suggests that the accountants performed an audit in order to prepare the filings. She also attaches to her affidavit an audit engagement letter dated June 20, 2017, from an accountant to the plaintiff for the same Michigan company. Dr. Pourtaghi deposes that demands have been made for audit reports but they have not been forthcoming.
- [72] In response, Angelica Nouhi, who again is the plaintiff's daughter and the vice president of AKNO USA Inc., which I understand to be a parent company of the plaintiff's various U.S. ventures, deposes that there are no audits as sought by the defendants. She states that the accountants identified in the exhibits to Dr. Pourtaghi's affidavit prepared audited financial statements but did not prepare any audits. She does not state how there could be audited financial statements without an actual audit.
- [73] Notwithstanding this apparent anomaly in the plaintiff's response, I decline to make an order requiring the production of audits or auditors' working papers. The defendants have not established that they have complied with the requirements of Rule 7-1(11) by identifying the specific documents sought and the reasons for the demand. The general demand for audit reports and supporting working papers is not sufficient in that regard.

Conclusion

- [74] In summary on the two applications, I make the following orders:

- a) the CPLs registered against the properties located at 1908 - 660 Nootka Way, Port Moody, B.C., 1604 - 977 Mainland Street, Vancouver, B.C., and 851 Paladin Terrace, Port Coquitlam, B.C., will be cancelled upon Dr. Pourtaghi and Naki providing the plaintiff with the required undertaking;
- b) the plaintiff has leave to serve amended replies to the notices to admit dated October 29, 2019, and the two dated December 19, 2019, within 14 days of today's date, failing which the documents that are the subject of the non-compliant responses will be deemed to be admitted; and
- c) the plaintiff will provide a response in accordance with Rule 7-1(12) to the two demands made September 15 and 17, 2019, within 21 days of today's date.

[75] The defendants have largely been successful on both applications. They are entitled to their costs at Scale B.

[76] Those are my reasons.

"Skolrood J."

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