

CANADA / JUDGMENT

Price v. 481530 B.C. Ltd.

2015 BCSC 781

COURT

Supreme Court of British Columbia

DECIDED

13 May 2015

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2015 BCSC 781 Price v. 481530 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Price v. 481530 B.C. Ltd.,

2015 BCSC 781

Date: 20150513

Docket: S149212

Registry: Vancouver

Between:

Michael James Price

Plaintiff

And

481530 B.C. Ltd. doing business as Micron Laboratories,

8577935 Canada Corporation,

Farrukh David Robson, Sabrina Yasmeen Robson,

Katrina Robson also known as Sheena Robson, and

Jonathan Robson

Defendants

Before: Master Muir

Reasons for Judgment

Counsel for plaintiff:

A.H. Narod

Counsel for defendants:

D.J. Taylor

Place and Dates of Hearing:

Vancouver, B.C.

April 21 and 22, 2015

Place and Date of Judgment:

Vancouver, B.C.

May 13, 2015

I. Introduction

- [1] There were several applications before me. The plaintiff's applications were to compel particulars and production of documents and seeking leave to serve interrogatories, although the application for documents was not pursued. The defendants' applications were for leave to file a counterclaim after the time permitted in the Supreme Court Civil Rules, B.C. Reg. 168/2009 and for an order striking out parts of the plaintiff's notice of civil claim.
- [2] These applications were preceded by an application by the plaintiff to adjourn the applications of the defendants on the basis that they had been served late and, particularly as to the application to strike parts of the notice of civil claim, the plaintiff was prejudiced in being unable to fully respond to a complicated application.
- [3] The defendants objected to parts of the applications of the plaintiff proceeding if their application was not heard, as the interrogatories and some of the particulars sought by the plaintiff dealt with matters the defendants sought to have struck from the plaintiff's claim.
- [4] In essence, the defendants' seek to strike all allegations in the notice of civil claim other than those of constructive and wrongful dismissal and the wrongful transfer of assets to the defendant 8577935 Canada Corporation ("Canada Corp.") from the defendant 481530 B.C. Ltd. ("B.C. Ltd.").
- [5] To deal with the prejudice to both sides, I ordered that the defendants' application to strike parts of the notice of civil claim and the plaintiff's application for interrogatories and his application seeking particulars of paragraphs 19, 20, 22 and 23 of the response to civil claim be adjourned generally.
- [6] The applications that did proceed were argued strenuously by counsel over a period of a day and a half.

II. Background

- [7] The plaintiff is a 20% shareholder in B.C. Ltd. and was a director and the vice-president of that company.
- [8] The defendant Farrukh David Robson ("Mr. Robson") is an 80% shareholder in B.C. Ltd. and a director and president of the company. Sabrina Yasmeen Robson ("Mrs. Robson") is Mr. Robson's wife and the other personal defendants are their children. The personal defendants all reside in Ontario.
- [9] The plaintiff and Mr. and Mrs. Robson were said to be, at least at one point, close friends.
- [10] The business of B.C. Ltd. is the operation of a hair loss clinic in Vancouver, B.C. and the sale of related products.
- [11] The relationship between the parties apparently deteriorated, with allegations from both sides regarding financial irregularities. Negotiations were undertaken for the plaintiff to purchase B.C. Ltd. but those foundered in May 2013.
- [12] The plaintiff has serious health issues, having been diagnosed with stage 4 metastatic cancer. He left work in order to have surgery on May 30, 2013. He has recently been diagnosed with a new polyp and his doctor has opined that his condition may only be stable for 3 to 6 months. Hence, he is anxious to have this matter proceed as quickly as possible.
- [13] After the plaintiff's surgery, sometime in June 2013, Mr. Robson travelled to Vancouver and installed a new manager for B.C. Ltd.
- [14] Mr. Robson also has serious health issues resulting from a failed kidney transplant and now requires lengthy dialysis.
- [15] By letter from B.C. Ltd.'s counsel of June 21, 2013, the plaintiff was told to "stay away from the business and cease interfering in the business."
- [16] B.C. Ltd. has apparently ceased doing business and its assets have been transferred to Canada Corp., a business incorporated on July 11, 2013 and run by the personal defendants or some of them.
- [17] The plaintiff deposes that there was some delay in commencing this action because of his impecuniosity, which is alleged to be as a result of the actions of the defendants.
- [18] The notice of civil claim was filed on November 28, 2014. It was served on the corporate defendants in December 2014. The personal defendants were not served, but counsel for the corporate defendants has apparently admitted service on their behalf. The claims against the personal defendants are among those that are sought to be struck in the defendants' pending application.

- [19] As a result of the plaintiff's medical problems, counsel for the plaintiff has been trying to move this matter forward, including by unilaterally booking a 4 day trial in August 2015, having an early case planning conference, seeking the particulars and interrogatories applied for, and proposing examinations for discovery by teleconference.
- [20] The defendants say they do not oppose moving quickly, but take the position that the trial dates in August 2015 are impossible as this case likely cannot be ready for trial in August and, in any event, the trial is likely to take in excess of 8 days, not 4 days.
- [21] Although there is a lengthy affidavit before me from the plaintiff, none of the defendants have provided evidence, other than that which is presented through affidavits from their counsel's legal assistant.

III. Particulars sought

- [22] In general, the plaintiff says that certain particulars are required due to the nature of the allegations in the amended response to civil claim and, amongst other things, in order for him to know the case he has to meet.
- [23] The plaintiff refers to the decision in *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (C.A.), where the Court of Appeal set out the purposes of particulars at para. 15 as follows:
- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
 - (2) to prevent the other side from being taken by surprise at the trial;
 - (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
 - (4) to limit the generality of the pleadings;
 - (5) to limit and decide the issues to be tried, and as to which discovery is required, and
 - (6) to tie the hands of the party so that he cannot without leave go into any matters not included.
- [24] In addition, the plaintiff argues that in cases of wrongful dismissal and a plea of fundamental breach of contract there is a requirement that the facts constituting just cause and the fundamental breach must be pled: *30E Enterprises Inc. v. Godsy*, 2004 BCSC 150, paras. 21-22; *Humen v. S & K Management Services Ltd.*, [1987] B.C.J. No. 2624 (B.C. Co. Ct.).
- [25] Further, that where just cause is relied upon as a defence, the minimum level of material fact disclosure required is very high: *30E Enterprises Inc.*; *Broad v. Women in Crisis (Algoma) Inc.*, [1986] O.J. No. 2078 (Ont. Dist. Ct.).
- [26] The plaintiff also specifically relies upon Rules 3-7(9) and 3-7(18), which provide:

Pleading conclusions of law

- (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

When particulars necessary

- (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.
- [27] The defendants say the particulars sought by the plaintiff are not required. They say the pleading is sufficiently clear. They rely on *British Columbia Society for the Prevention of Cruelty for Animals v. Stone*, 2009 BCSC 725, which notes at para. 44
- [44] The test for sufficiency of the particulars is whether the plaintiff is able to identify in a reasonable way the incident described by the defendants. It will not be necessary in every case for the defendants to provide the exact date, place, name of employee, or name of animal, but enough of these details should be available to the plaintiff to put it in a position to investigate the allegation.
- [28] The defendants also rely on *Andrus v. Sihata*, 2012 BCSC 12 at paras. 11 and 12 and say that the plaintiff is wrongly seeking evidence or the manner by which the allegations will be proved.
- [29] The defendants submit that particulars will not be ordered where it is simply an attempt to have the defendants synthesize the documents: *Order of the Oblates of Mary Immaculate (British Columbia) v. Dohm, Jaffer & Jeraj*, 2007 BCSC 734. Here, the defendants' list of documents has just been provided and they argue that much of the information sought by the plaintiff is contained in those documents.
- [30] In addition, the defendants say that the demand for particulars at this juncture, after pleading but before examinations for discovery, is a tactical move to limit their ability to investigate the case. They say that many of the allegations involve facts that will be solely within the knowledge of the plaintiff. The defendants rely on *30E Enterprises Inc.* at paras. 25, 26 and 30, which provide:
- [25] The defendant in the case at bar submits that the plaintiff is the sole depository of the particulars asked for. The defendant also submits that the circumstances here are unusual in that Godsy is a guarantor but is not the "employer" and is not a party to the Consulting Agreement between Dowds, 30E, and Unity.
- [26] In *British Columbia Liquors Company Limited v. Consolidated Exporters Corporation Limited et al.* (1930), 2 WWR 379 (B.C.C.A.), the court said:

"[T]here is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars, but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances."

[30] From the perspective of the defendant in the case at bar, the following is the pertinent paragraph in *B.C. Liquors Company Limited*:

When the plaintiff alleges fraud *prima facie* it ought to particularize, but the Courts are careful to avoid making an order which might preclude him from proceeding where there is evidence that the defendants themselves are the sole depositaries of the particulars asked for. The order appealed from is futile because, if it orders discovery, it confines that to those matters of which particulars have already been given and are not wanted, and does not permit the plaintiff to inquire into the matters in respect to which it requires the information which would enable it to answer the demand for particulars, and may find it in the sole possession of the defendants who are demanding them.

[31] The plaintiff, however, points out that there is no evidence from the defendants on this point. He relies upon *Proconic Electronics Ltd. v. Wong* (1985), 67 B.C.L.R. 237. In that decision, Madam Justice Southin considered a similar argument, as follows:

[8] Counsel for the defendants asserts that if I decline to require particulars, the plaintiffs both through the process of discovery of documents and examination for discovery will enter upon a fishing expedition to see whether there was any wrongdoing by the personal defendants and, more particularly, may require those personal defendants to produce all their own personal financial records to see if anything can be found.

[9] While the expression "a fishing expedition" is hallowed by usage, it really does not provide a principle upon which a decision can be founded. Some fishing expeditions are, if I may put it so, licensed by the Rules of Court and authority; others are not. Perhaps it is not too fanciful to say that a litigant cannot have a licence to fish in his opponent's private swimming pool unless he can provide some evidence from which it can be inferred that there may be fish in that pool. If there is no such evidence, the defendant need not let him in to see if there is a fish.

[10] Counsel for the plaintiffs put his opposition to the motion on the ground that the plaintiff cannot now give particulars, that these matters are peculiarly within the knowledge of the defendants and they should be required to answer. He says while ultimately particulars should be given and must be given, they should not be given until after the examination for discovery is held.

[13] I might agree with the submission of counsel for the plaintiffs if the material had, for instance, included an affidavit from some officer of the plaintiffs:

(a) that they were unable to give particulars but,

- (b) they believe that there was wrongdoing of the kind alleged in the plea at issue and giving the grounds of that belief.
- [14] Grounds for such a belief need not be direct evidence. There are all kinds of gradations between, on the one hand, direct evidence of the fact and, on the other, no evidence at all.
- [15] To illustrate: If I see someone pull a gun and shoot another person, that is direct evidence of a crime and of the criminal; if I hear a shot, look out a window and see someone standing with a gun over a recumbent figure, that is somewhat less direct evidence of the crime and the criminal; if I hear a shot, look out and see a recumbent figure but no other person, that may be some evidence of a crime but none of the perpetrator; however, if I hear and see nothing at all, I have no evidence of either a crime or a criminal.
- [16] In this case, the plea in para. (c) of converting the assets is the kind of plea I would have thought the plaintiffs could support with some evidence, even if not very much. The plaintiffs must have known what their own assets were and be able through the documents of the plaintiffs to trace something of the use of those assets.
- [17] In the case at bar no officer of the plaintiffs has made any affidavit in answer to this motion. The only affidavit is that of a chartered accountant who has been retained by the plaintiffs to consider their financial affairs in British Columbia. I have considered that affidavit and I simply do not think it is good enough to support the plaintiffs' proposition.
- [18] Counsel for the plaintiffs cited to me some authorities. Those authorities in turn refer to other authorities.
- [19] In such cases as *Ross v. Blakes Motors Ltd.*, [1951] 2 All E.R. 689 (C.A.), *Whyte v. Ahrens* (1884), 26 Ch. D. 717 (C.A.), and *Leitch v. Abbott* (1886), 31 Ch. D. 374, 55 L.J. Ch. 460 (C.A.), there was something in the relationship between the plaintiff and the defendant warranting the order made. In the 19th century cases, the plaintiffs were principals and the defendants were agents. The plaintiff in each of those cases was, as a matter of law, save for the defence of settled account, entitled to a full account from the defendant of various transactions carried out by the defendant on the plaintiff's behalf. It was held in both cases that the defence of settled account did not deprive each of the plaintiffs of the right to particulars of the transactions carried out. In *Ross v. Blakes Motors Ltd.*, the defence admitted conduct which might, unless justified, constitute a breach of the defendant's contractual obligation to the plaintiff.
- [20] In the case before me there is nothing.
- [32] The plaintiff seeks particulars of many paragraphs in the amended responses to civil claim of the defendants. Although the corporate and personal defendants filed separate responses, the pleading is essentially the same in the relevant paragraphs and I will not, therefore, distinguish between the two responses.
- [33] I will deal with each of the paragraphs in turn.

1. Paragraph 1

[34] Paragraph 1 of division 2 of the amended response is as follows:

1. These Defendants say that they did not wrongfully or constructively dismiss the Plaintiff from his employment position. Rather, the Plaintiff was unable to fulfill the terms of his employment contract by reason of his health and abandoned his position.

[35] The plaintiff seeks the following particulars:

1. Particulars of the dates and manner in which the [sic] Mr. Price was allegedly unable to fulfill the terms of his employment contract by reason of his health.
2. Particulars of the Plaintiff's alleged abandonment of his position, including when his employment with BC Ltd. ceased.

[36] The plaintiff asserts that he tried to return to work and was told to stay away. He says he requires particulars of when and why the defendants say his health prevented him from continuing his employment.

[37] The defendants plead in this division of the amended response that:

6. As a result of learning about various issues with respect to the Plaintiff's work performance and business methods, the Defendant David Robson, as president of B.C. Ltd., travelled from Toronto to British Columbia to visit the B.C. Ltd. offices in or about June, 2013. When he arrived at the Vancouver offices, Mr. Robson discovered that the Plaintiff had recently undergone surgery and had a health concern.
10. Because there was no manager to run the Vancouver B.C. Ltd. offices in his absence, B.C. Ltd., was required to replace the Plaintiff on a temporary basis with a new manager
18. The Plaintiff did not return to his position with B.C. Ltd. and did not, at any time at all, indicate to B.C. Ltd. that he was in a physical or emotional position to return to work or that he wished to do so. Accordingly, the temporary manager was kept on to continue operations with B.C. Ltd. as long as it could continue to operate.

[38] They plead in para. 10 that:

At no time did B.C. Ltd. communicate to the Plaintiff that he had been dismissed from his employment position.

[39] With respect to the first particular sought, it is clear that the defendants assert that the plaintiff did not return to work after his surgery and evinced no intention of doing so. I do not see that further particulars are required of that allegation.

[40] The plaintiff then says that the assertion that he abandoned his position is a conclusion of law and requires the material facts in support of that conclusion be pled in accordance with Rule 3-7(9).

- [41] The plaintiff relies on *Pereira v. Business Depot Ltd. (c.o.b. Staples Business Depot)*, 2011 BCCA 361, in which the Court of Appeal held, at para. 47:
- [47] The parties agree that it is an implied term of every employment contract that an employee must attend work. They also agree that when an employee fails to comply with that term he or she will be taken to have abandoned (i.e., repudiated) the contract, entitling the employer to treat the contract as being at an end. Lastly, the parties agree that the trial judge properly stated the test for determining whether an employee had abandoned his or her employment, namely, whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract: *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 at 104 (B.C.S.C.); *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593 (CanLII), 47 B.C.L.R. (4th) 56 at para. 8.
- [42] Again, this allegation has been adequately particularized by the paragraphs of the amended response to civil claim set out above. The defendants' plea is that the plaintiff left work for surgery and did not return, evinced no intention of returning and thus abandoned his position. That pleading would be sufficient to found a claim of abandonment. Whether the evidence supports those allegations is for another day.

2. Paragraph 5

- [43] In paragraph 5 of division 2 of the response to civil claim the defendants plead:

In or about December 2012 David Robson, as president of B.C. Ltd., determined that there was reason to believe that the Plaintiff was operating other businesses, for his own benefit, from the business premises of B.C. Ltd. Further, David Robson as president of B.C. Ltd. was informed that the Plaintiff was utilizing a second credit card machine, not authorized by B.C. Ltd., at the B.C. Ltd. premises and was transacting company business with that machine.

- [44] The plaintiff seeks particulars as follows:

3. Particulars of the "other businesses" Mr. Price allegedly operated from B.C. Ltd.'s premises, the period of time he allegedly did so, as well as when and how David Robson acquired knowledge of this.
- [45] The plaintiff points to evidence brought by him showing that Mr. Robson was aware as early as 2003 that the plaintiff also dealt in real estate. If this is the other business referred to, or one of them, the plaintiff wants that clearly set out in particulars, as the plaintiff alleges acquiescence and limitations defences.
- [46] Counsel for the defendants argued that the defendants reasonably suspect that the plaintiff was operating one or more other businesses. In addition to the plaintiff's real estate activities, they allege in the amended response to civil claim that he had a separate credit card machine on the premises of B.C. Ltd. Counsel for the defendants argued, however, that the facts behind the plaintiff's activities are solely or primarily within the plaintiff's knowledge.

- [47] The defendants say that if I were to order that they provide complete particulars of this allegation now I will prevent them from inquiring at examinations for discovery about the plaintiff's other business activities.
- [48] The plaintiff asserts that such inquiry is just a fishing expedition.
- [49] The amended response to civil claim asserts that in December 2012 Mr. Robson was led to believe that the plaintiff was operating other businesses from B.C. Ltd.'s premises. He has not produced any such evidence, nor has he deposed that he cannot provide particulars of those other businesses. There is no affidavit from Mr. Robson or any of the defendants. The matter was argued by counsel for the defendants from evidence tendered by the plaintiff himself and the relationship between the parties.
- [50] While there is evidence in the plaintiff's affidavit that he was dealing in real estate to the knowledge of Mr. Robson as early as 2003 and as recently as 2012, there is nothing in the evidence that supports the allegation that he did so from the offices of B.C. Ltd. and there is no evidence of any other businesses operated by him, either at the B.C. Ltd. offices or elsewhere.
- [51] There is no clarification of what was discovered in December 2012 and whether that related to real estate or some other business.
- [52] The only hint in the pleadings is the reference in the amended response to civil claim to the second credit card machine allegedly used by the plaintiff on the premises of B.C. Ltd. That, however, is not said to be related to other businesses, but rather is said to have been used to separately process payments due to B.C. Ltd., presumably in support of the allegation of conversion of funds by the plaintiff.
- [53] I was essentially asked to infer that the defendants would be the sole repository of such information. That, in my view, is not sufficient. Even the case relied upon by the defendants, 30E Enterprises Inc., does not go as far as the defendants propose. There must be some evidence that the plaintiff is the sole repository of this information. Here there is none.
- [54] I agree with the plaintiff that these allegations, involving amongst other things, breaches of fiduciary duty, require full particulars in accordance with Rule 3-7(18). I am not satisfied that those particulars cannot be provided by the defendants.
- [55] I conclude that particulars are required of the other businesses allegedly run by the plaintiff and when Mr. Robson learned of them. That part of the application is allowed. The application for particulars of how Mr. Robson learned of this, however, is denied. In my view, that is a matter properly left to examination for discovery.

3. Paragraph 8

- [56] Paragraph 8 of division 2 of the amended response to civil claim alleges:

8. At the time that the Plaintiff left B.C. Ltd. in or about June 2013, there was approximately \$7,000.00 in the company bank account and there were numerous expenses and financial obligations of B.C. Ltd. which were unpaid, due and owing. In particular, the company owed money for the following matters:

[57] The particulars sought by the plaintiff of this paragraph are:

4. Particulars of the date when Mr. Price left B.C. Ltd.

[58] As set out above with respect to paragraph 1, the defendants have pleaded that the plaintiff left to have surgery and never returned. The date he is alleged to have left B.C. Ltd. is known and no particulars are required.

4. Paragraph 10

[59] In paragraph 10 of division 2 of the amended response to civil claim, the defendants allege:

10. Because there was no manager to run the Vancouver B.C. Ltd. offices and because there was no replacement sales staff hired by the Plaintiff to continue to generate sales and income for B.C. Ltd. in his absence, B.C. Ltd. was required to replace the Plaintiff on a temporary basis with a new manager who could operate the business of B.C. Ltd. and also work toward generating sales and income for the company. At no time did B.C. Ltd. communicate to the Plaintiff that he had been dismissed from his employment position.

[60] The particulars sought are:

5. Particulars regarding B.C. Ltd.'s efforts to replace the [sic] Mr. Price with a temporary manager, including the date the requirement to replace the [sic] Mr. Price was identified.

[61] Particulars with respect to the hiring of the temporary manager are duplicated in the plaintiff's application regarding paragraphs 17 and 18 of the amended response to civil claim and are dealt with below.

5. Paragraph 11

[62] Paragraph 11 of division 2 of the amended response to civil claim pleads:

11. In order to sustain the operations of B.C. Ltd. after June, 2013, David Robson made arrangements to deposit funds to the bank account of B.C. Ltd. so that it could meet its expenses and continue in operation. However, when additional funds were deposited to the bank account of B.C. Ltd., from sources other than B.C. Ltd. business or customers, the Plaintiff immediately withdrew funds for his own purposes, leaving the B.C. Ltd. bank account in the continual position where there were insufficient funds to meet ongoing business obligations. The Plaintiff notified B.C. Ltd. and David Robson that he considered that he was entitled to continue to withdraw funds in that manner.

[63] The plaintiff seeks the following particulars:

6. Particulars of the funds the [sic] Mr. Price allegedly withdrew for his own purposes, including the dates of the withdrawals and the quantum withdrawn.
7. Particulars of the notification Mr. Price allegedly gave Mr. Robson that he was entitled to continue to withdraw funds in that manner.
- [64] This withdrawal of funds is also included in paragraph 31 of division 2 of the amended response to civil claim as justification for an alternative plea of dismissal for cause. Particulars are also sought with respect to that paragraph and I will deal with this when I deal with paragraph 31.
- [65] The plaintiff says that the money he received from B.C. Ltd. was for salary, commission, dividend benefits and repayment of expenses.
- [66] The plaintiff is entitled to know particulars of what the defendants' rely on as the notification referenced in paragraph 11. Particulars of the date of that notification, to whom it was given and whether it was written or oral are to be provided.
6. Paragraph 15
- [67] Paragraph 15 of division 2 of the amended response to civil claim pleads:
 15. At the material times, the Plaintiff was aware that the defendant David Robson had and has a very serious health concern himself, and was on dialysis five times per week for 5 - 6 hours per session, so that he was and is seriously disabled and unable to fully participate in the business and affairs of B.C. Ltd.
- [68] The particulars sought are:
 8. Particulars of the status of David Robson's health "at the material times."
- [69] The defendants point out that the plea as to Mr. Robson's health is quite clear. The plaintiff submits he requires particulars of what are the "material times." The defendants say that is not what is sought and that the particulars sought, as to the state of Mr. Robson's health, are not required as they are sufficiently set out in the pleadings.
- [70] The evidence from the defendants includes a letter from his physician, attached to the affidavit of counsel's legal assistant, which indicates Mr. Robson had kidney failure in 2000, followed by an unsuccessful transplant and he has required dialysis since 2007. He has clearly had significant health issues for much of the history of B.C. Ltd.
- [71] Much of the complaint of the plaintiff, as expressed by counsel, was not regarding Mr. Robson's health issues, but not knowing when the matters pleaded are alleged to have happened, making it impossible to know the precise case that is to be met and, if appropriate, argue a limitations defence.
- [72] Thus, the assertion that the particulars of "material times" are required.

- [73] The question of when matters occurred is best dealt with when pleading the individual events. A catch all pleading of material times is used here to capture all of the events in issue and I am of the view that no further particulars of this pleading are required.
7. Paragraphs 17 and 18
- [74] Paragraphs 17 and 18 of division 2 of the amended response to civil claim are as follows:
17. The hiring of a temporary manager for B.C. Ltd. Vancouver operations was undertaken in good faith, in the best interest of B.C. Ltd. and as a matter of business and financial necessity in order to permit B.C. Ltd. to continue operations and continue to generate some sales income. At no time was the temporary replacement manager hired with the intention on the part of the Defendants, or any of them, of causing undue or unnecessary stress, mental distress, anxiety, upset or humiliation to the Plaintiff.
18. The Plaintiff did not return to his position with B.C. Ltd. and did not, at any time at all, indicate to B.C. Ltd. that he was in a physical or emotional position to return to work or that he wished to do so. Accordingly, the temporary manager was kept on to continue operations with B.C. Ltd. as long as it could continue to operate.
- [75] The particulars sought are:
9. Particulars of the hiring of the Temporary Manager, his name, his date of hire and date of commencement of work with B.C. Ltd., and the date when his employment with B.C. Ltd. ceased.
- [76] The plaintiff says the timing regarding the hiring of the temporary replacement is relevant, as even advertising for a replacement employee can constitute constructive dismissal, citing *Patterson v. Lee Munro Chevrolet Ltd.*, [2009] O.J. No. 1894 (Ont. S.C.J.), in which the court held, at para. 17:
- [17] Viewed objectively, however, this court is driven to the inescapable conclusion that the placing of the advertisement for the position without providing any explanation or even informing the plaintiff that it would be published was conduct rendering the continuation of Franklyn Patterson's employment untenable. At that point, the plaintiff was constructively dismissed by the defendant.
- [77] The plaintiff says that the ability of the defendants to replace him so quickly is suspicious and that he wants to know if the replacement for his position was arranged before Mr. Robson came to Vancouver. Thus, the details are relevant to whether the plaintiff abandoned his position or was replaced.

- [78] Further, they allege that the date the temporary manager ceased employment is relevant, as it is said to be the date that B.C. Ltd. ceased operations. If the plaintiff did not abandon his position, then the plaintiff says his employment would have been terminated, at the latest, when the business closed, citing *Lewis v. Terrace Tourism Society*, 2010 BCCA 346 at paras. 41-42 and 47-49.
- [79] The defendants say that the plaintiff is seeking evidence, not particulars.
- [80] With respect to the hiring of the temporary manager, the date of his hire is relevant to the allegation of abandonment and I will therefore order that the defendants provide particulars of the date the temporary manager was hired and the date he or she commenced work.
- [81] The plaintiff conceded that the name of the temporary manager is irrelevant to the plea and can be pursued on discovery. That aspect of the demand for particulars is denied.
- [82] The defendants say when the temporary manager ceased employment is only relevant to the issues that are the subject of the application to strike, not the alleged wrongful termination and conversion of assets issues, and should not be dealt with until that is resolved. They point out that the plaintiff has not pleaded that he was constructively dismissed when the company ceased operations.
- [83] The defendants plead that the plaintiff abandoned his position. In the alternative, they plead that he was dismissed for cause. The plaintiff alleges wrongful termination and gives particulars of that and of alleged bad faith and unfair dealing, but makes no claim based on B.C. Ltd. ceasing operations. There is nothing in the pleading that would make the date that B.C. Ltd. ceased operations relevant to their pleading regarding wrongful dismissal. As a result, this part of the application is dismissed.
8. Paragraphs 19, 20, 22 and 23
- [84] The application for particulars of these paragraphs of division 2 of the amended response to civil claim was adjourned generally, to be dealt with, if necessary, after the defendants' application to strike portions of the notice of civil claim.
9. Paragraph 27
- [85] Paragraph 27 of division 2 of the amended response to civil claim pleads:
27. As of June 2013, including the Manager of the store, B.C. Ltd. had two Vancouver employees.
- [86] The plaintiff seeks the following particulars:
15. Particulars of who was the manager of the store and who were the two employees in June 2013, and when any of those persons ceased being employed by B.C. Ltd.
- [87] This is not a plea for which particulars are necessary. The names of the employees and the dates they were terminated are simply not matters that require elaboration in order to fulfill any of the proper functions of particulars.

10. Paragraph 29

[88] Paragraph 29 of division 2 of the amended response to civil claim is as follows:

29. B.C. Ltd. denies that it, or any of its representatives or agents, at any material times took steps to change the locks on the business premises of B.C. Ltd. to keep the Plaintiff from entering such premises.

[89] The plaintiff seeks particulars as follows:

16. Particulars of the change of locks of B.C. Ltd.'s premises.

[90] The plaintiff argues that the locks were in fact changed and that he is entitled to know when that happened, as it would go to show constructive dismissal. The plaintiff alleges this as a factor in support of his wrongful dismissal claim at paragraph 54(e) of the notice of civil claim.

[91] The defendant says that as they have denied changing the locks to keep the plaintiff out, they are not required to provide further particulars of that plea.

[92] Further particulars would not serve to clarify the defendants' position or serve any of the other functions of particulars. This question is more properly for discovery. This part of the application is denied.

11. Paragraph 30

[93] The defendant pleads, in paragraph 30 of division 2 of the amended response to civil claim, as follows:

30. For many years prior to June, 2013 the Plaintiff failed to devote full time, full effort to the business and activities of B.C. Ltd., as required by his contract of employment, and rather, the Plaintiff engaged in other business activities and endeavours for his own benefit alone, using the business premises of B.C. Ltd. and during time that he ought to have been working only for the benefit of B.C. Ltd.

[94] The particulars sought are:

17. Detailed particulars of the dates and times and the nature of the alleged failures by Mr. Price referred to in paragraph 30 of the Defendants' Demand Responses and of Mr. Price's "other business activities and endeavours [that were] for his own benefit alone, using the premises of B.C. Ltd." during the time he ought to have been working only for the benefit of B.C. Ltd.

[95] The particulars of the failure to devote full time to the B.C. Ltd. business are set out in the paragraph itself, which references the plaintiff's alleged other businesses. The particulars of the alleged other businesses have been dealt with above. Other than what is provided for above regarding the alleged other businesses, no further particulars are required.

12. Paragraph 31

[96] Paragraph 31 of division 2 of the amended response to civil claim sets out the alternative claim that the plaintiff was dismissed for just cause. In it the defendants plead:

31. In the alternative, these Defendants say that the Plaintiff was dismissed for just cause. Particulars of just cause currently known to B.C. Ltd. are as follows:

[97] There are then set out a number of sub-paragraphs. The plaintiff has requested particulars of only some of those. The plaintiff seeks particulars of para. 31(b):

31(b) failing to work in the best interests of B.C. Ltd. and provide full time, full effort in accordance with the terms of his employment agreement.

[98] This plea follows that of paragraph 30, which has been dealt with above. No further particulars are required.

[99] The plaintiff seeks particulars of paragraph 31(d):

31(d) unilaterally and without justification misrepresenting his shareholding interest in B.C. Ltd. to third parties.

[100] The plaintiff seeks:

18(d) The dates and details of the alleged misrepresentations of his shareholding interest in BC Ltd and the names and contact information of the third parties to whom they were made.

[101] Where misrepresentation is alleged, "full particulars, with dates and items, if applicable" are required by Rule 3-7(18). The defendants argue that this is known to the plaintiff from correspondence and from documents produced. Those, however, do not take the place of particulars, which are pleadings and required for different purposes.

[102] I therefore order that the defendants provide full particulars of the misrepresentation, including when the misrepresentation is alleged to have been made and to whom. Contact information for the third parties is not the proper subject of particulars and is not required.

[103] The plaintiff seeks particulars of paragraph 31(f):

31(f) wrongfully withdrawing funds from the bank account of B.C. Ltd. or in the alternative, withdrawing funds from the bank account of B.C. Ltd. in circumstances which prejudiced the financial stability and solvency of B.C. Ltd.

[104] The plaintiff seeks particulars as follows:

18(f) The dates of each alleged wrongful bank withdrawal, the quantum of each withdrawal and the manner in which each withdrawal allegedly prejudiced B.C. Ltd.

[105] The defendants argue that the financial disclosure has only just been made and that all of the information regarding withdrawal of funds is contained in those documents. Counsel for the defendants referred me to Samji (Trustee of) v. Chatur, 2013 BCSC 1915, where the court reviewed some prior decisions dealing with particulars, and noted at paragraph 32:

- [32] Whether or not to order particulars depends on the facts of the particular case. For example, in *Order of the Oblates of Mary Immaculate (British Columbia) v. Dohm, Jaffer & Jeraj*, 2007 BCSC 734 (B.C. S.C.), an order for particulars was declined in a situation where after a large volume of documents was disclosed by the plaintiff and the defendant was seeking particulars in an attempt to force the plaintiff to synthesize the documents.
- [106] As noted above, the defendants referred me to the decision of Master Young in *Andrus* on another point. In that decision, however, the question of information contained in documents was dealt with, as follows:
- [19] Again the plaintiffs received pages and pages of cell phone statements and gas statements from the defendants' list of documents, but there is no indication of which of those charges were wrongfully incurred by the plaintiffs or whether those documents contain all of the wrongful charges.
- [20] The defendants have an interesting defence to this demand for particulars. They submit that the plaintiffs are seeking to have the defendants synthesize their own huge amount of documentation to particularize the claim. They rely on the decision of Mr. Justice Schultes in *Copithorne v. Benoit*, 2010 BCSC 130 (CanLII) where he says at paragraph 22:

However, when a large number of documents have already been disclosed it is not proper to use a demand for particulars to force the other party to synthesize the documents into the demanding party's defence

- [21] That may be the case if the nature of the claim is clear to the demanding party, but where it is vaguely stated and the production of documents does nothing to clarify or narrow the issue then I question who is responsible for synthesizing the documents. Should it be the party who produce the documents and knows what the documents support, or should the demanding party be put to the onerous task of examining the producing party for discovery on every single piece of paper to ascertain the parameters of the producing parties' claim?
- [22] If some of these documents are not relevant and are too voluminous to synthesize, then why on earth did the defendants produce them in the first place?
- [23] The defendants are claiming a set-off against the contract claim of the plaintiffs. To succeed with this set-off, it is the defendants who are going to have to quantify their claim. If it is too onerous a task to be bothered with, then perhaps the defendants should not pursue that claim; but, if the defendants intend to pursue the claim, then the claim needs to be quantified prior to trial and the plaintiffs are entitled to know the parameters of the claim that they have to defend.

- [24] I do not accept the defendants' submission that the issue at trial is not whether or not a charge was made but whether or not the charge was authorized. This issue cannot be dealt with in a vacuum. The starting point will still be to identify the charge or the converted or sold asset. The defendants will have to provide a ledger setting out all of the charges they claim were unauthorized.
- [25] Many of the damages sought by the defendants are quantifiable using mathematical calculation and relying on the Camp Development case. The defendants should be providing those particulars to the plaintiffs.
- [107] This case is precisely on point. The plaintiff is entitled to know the dates and amounts of the allegedly wrongful withdrawals and those particulars will be provided.
- [108] As to how the withdrawals allegedly prejudiced B.C. Ltd., in my view, what is sought is evidence, not particulars, and that is a matter to be left for examination for discovery.
- [109] The plaintiff seeks particulars of para. 31(g), which provides:
- 31(g) failing to make appropriate adjustments in the compensation scheme offered to employees contrary to direct instructions from the president;
- [110] The particulars sought are:
- 18(g) The dates and circumstances of the alleged failure to adjust the employees' compensation scheme, the names and employer of such employees, and the date, circumstances and mode of the "direct instructions from the president".
- [111] Counsel for the defendants points to emails that he says delineate the issues pled here. There is no evidence to that effect, nor that these emails represent the only instances of this allegation.
- [112] I am satisfied that the plaintiff is entitled to particulars of this allegation in order to know the case he has to meet. Therefore, the defendants will provide particulars as to the date of the instructions from the president and whether they were oral or in writing, and will particularize the employees referenced in the pleading and whether they were employees of B.C. Ltd. The "dates and circumstances of the alleged failure" are not proper particulars and the application in that regard is denied.
- [113] The plaintiff seeks particulars of para. 31(h), which provides:
- 31(h) receiving cash from customers of B.C. Ltd. and failing to record cash transactions properly, or at all, in the books of record of the company and failing to deposit all cash receipts to the bank account of B.C. Ltd.
- [114] The particulars sought are:

18(h) The dates and quantum of each alleged receipt from customers of cash and the names of each customer who paid each cash receipt that was not recorded and/or deposited to the B.C. Ltd. bank account.

[115] As noted above, there are no affidavits from the defendants. There is no evidence regarding these allegations other than some weekly tracking sheets that tell me nothing. It is a classic "bald allegation" dealt with by Madam Justice Southin in *Proconic*. Counsel for the defendants advised that the defendants have obtained an expert report regarding this issue and have disclosed all of the back up to that report. They submit they should not have to do that work for the plaintiff.

[116] This is similar to the argument dealt with above regarding paragraph 31(f) of division 2 of the amended response to civil claim, and the reference to Master Young's reasoning in paras. 19-25 of *Andrus* is equally apt here. The plaintiff is entitled to know the parameters of the claim being made, both dates and amounts, and therefore, the defendants will provide those particulars.

[117] The plaintiff seeks particulars of para. 31(j) of the amended response to civil claim, in which it is pleaded:

31(j) failing to make satisfactory arrangements for replacement staff, properly trained, to operate B.C. Ltd. in his absence or in the alternative, failing to honestly and in a timely manner notify B.C. Ltd. of his health issues and the potential consequences of such health issues on the viability of B.C. Ltd.

[118] The particulars the plaintiff seeks are:

18(j) The dates and circumstances of the Plaintiff's absence, the period in which he allegedly failed to arrange for replacement staff, the period in which B.C. Ltd. was unaware of his health issues, and the nature, magnitude and duration of the alleged consequences.

[119] One could presume, from the alternative plea of abandonment, that the defendants are alleging they were unaware of any health issues of the plaintiff until Mr. Robson came to Vancouver in June and that the absence referred to is the absence due to the plaintiff's surgery.

[120] The plaintiff should not have to presume, however, and particulars will be provided of when the defendants learned of the plaintiff's health issues, the date of the absence referred to and when the plaintiff should have arranged for replacement staff.

[121] As to the balance, what is sought is that the defendants provide particulars of what the plaintiff foresaw as potential consequences of his poor health. I do not see that such particulars are necessary or proper.

[122] The plaintiff seeks particulars of para. 31(k) of the amended response to civil claim, in which it is pleaded:

31(k) processing personal expenses without the authority or approval of the board of directors of B.C. Ltd. and paying such expenses from the bank account of B.C. Ltd.

[123] The particulars sought are:

18(k) The personal expenses allegedly processed and paid from BC Ltd's bank account, including the dates, times and quantum of each transaction.

[124] The analysis here is similar to that for amended response paragraphs 31(f) and 31(h), dealt with above. The plaintiffs are entitled to know the parameters of the claim being made, both dates and amounts, and therefore, the defendants will provide those particulars.

13. Paragraph 40

[125] Paragraph 40 of division 2 of the amended response to civil claim pleads as follows:

40. Consideration for any and all assets transferred from B.C. Ltd. to Canada Corp. was provided on behalf of Canada Corp. by David Robson or on his behalf to B.C. Ltd., by way of cash deposits to the account of B.C. Ltd. and other considerations to the business of B.C. Ltd., until it ceased operations.

[126] The plaintiff seeks particulars as follows:

19. Particulars of any and all assets transferred from B.C. Ltd. to Canada Corp., including revenues and income, the consideration paid for each asset and the date at which each asset was transferred, as well as the date when B.C. Ltd. ceased operations and the date that Canada Corp. ceased operations.

[127] The defendants consent to the provision of the particulars sought other than the dates when B.C. Ltd. and Canada Corp. ceased operations. The defendants say those dates are irrelevant to the claims advanced for wrongful dismissal and conversion. I agree. The particulars sought of this paragraph, other than the dates that the companies ceased operations, will be provided.

IV. Counterclaim

[128] The defendants seek leave to bring a counterclaim after the time provided for in the Rules.

[129] The proposed counterclaim relies on the same facts as are pleaded in the defendants' amended response to civil claim.

[130] The substantive relief sought is as follows:

- a. a declaration that the contract of employment between the Plaintiff and Defendant was not terminated by B.C. Ltd. or alternatively was terminated for just cause;
- b. damages against the Plaintiff Michael James Price for breach of fiduciary duty and breach of duty of a Director to B.C. Ltd.

- c. damages against the Plaintiff Michael James Price for misappropriation of corporate funds and assets and/or conversion of corporate assets;
- d. damages against the Plaintiff Michael James Price for misappropriation of corporate opportunities;
- e. damages against the Plaintiff Michael James Price for breach of his contract of employment;
- f. an accounting of all monies received by the Plaintiff Michael James Price with respect to monies and benefits received by him or withdrawn by him from B.C. Ltd.;

[131] The law is not in issue. The test for consideration of an application to extend the time for filing a counterclaim was set out in *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2014 BCSC 1049, as follows:

- [23] Rule 22-4(2) permits a court to extend any period of time provided for in the Rules. Rule 22-4(2) states:
- (2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

There is no substantive difference between the old and the new Rules regarding the discretion of the court to extend the period of time to file a responding pleading and neither the current nor former Rules set out factors to consider on an application to extend.

[24] In the recent decision of *Smith v. British Columbia*, 2010 BCSC 928 (CanLII), Madam Justice Gray referred to the decision of *Squamish Indian Band v. Canadian Pacific Ltd.*, [1998] B.C.J. No. 1726 (S.C.), which established the factors for consideration in deciding whether a judge should exercise his or her discretion under R. 22-4(2) (then R. 3(2) under the former Rules). The court will extend a time period for a counterclaim to be filed if it is "just and convenient" to do so. At paragraph 19, Madam Justice Gray summarized the considerations as follows:

- [19] In *Squamish Indian Band v. Canadian Pacific Ltd.*, [1998] B.C.J. No. 1726 (S.C.), Saunders J. (when she was a member of this court), held that the following factors should be considered in making any determination of whether it is just and convenient to extend the time to permit a counterclaim to be filed:
- a) What was the length of the delay between receiving the statement of claim and proposing the draft counterclaim;
 - b) What were the reasons for delay;
 - c) Whether the counterclaim would be time barred but for s. 4(1) of the Limitation Act; The connection between the proposed counterclaim and the plaintiff's claim;

- d) Whether there will be prejudice to the defendant, such as would arise if denial of the application to file a counterclaim would prevent the defendant from making full answer and defence to the claim brought against it; and
 - e) Whether there will be prejudice to the plaintiff by permitting the proposed counterclaim, such as if the counterclaim would require additional investigation and potentially delay the trial of the matter.
- [132] The time parameters in this case must be considered alongside the plaintiff's serious and apparently deteriorating condition. As noted above, his doctor is unable to say if he will remain stable for more than three to six months.
- [133] When the notice of civil claim was served on the corporate defendants on December 12, 2014, the plaintiff advised that he would insist on strict adherence to the time limits in the Rules.
- [134] The response to civil claim was due on January 2, 2015, but was not provided until January 20, 2015.
- [135] An amended response to civil claim was filed on March 10, 2015 and counsel for the defendants sought consent to file a counterclaim, which was not forthcoming.
- [136] As noted previously, there is no evidence from the defendants themselves and hence no evidence explaining the delay in filing a counterclaim other than the assertions of counsel.
- [137] Counsel for the defendants advised that the delay was due to the nature and complexity of the claim, that the defendants are located in Toronto and that Mr. Robson is ill and requires dialysis.
- [138] Counsel for the defendants asserts that there is no limitation issue raised in the counterclaim. That is impossible to determine, however, until the particulars of dates of allegations pleaded in the amended notice of civil claim are provided.
- [139] If there is no limitation issue, as is asserted by counsel for the defendants, then the defendants are not prejudiced in that regard if leave to file a counterclaim is denied and they are required to commence a fresh action. I do not see any prejudice to the defendants in answering the claim of the plaintiff if leave is not granted to file a counterclaim.
- [140] There is, however, prejudice to the plaintiff. Claims are advanced in the counterclaim that have no foundation in the facts or are otherwise not raised by the amended response to civil claim. I refer in particular to the relief sought for alleged theft of corporate opportunity and breach of the plaintiff's duty as a director of B.C. Ltd. Although counsel for the defendants sought to base the theft of corporate opportunity claim on the facts in support of theft of funds, the causes of action are quite different. Obviously the plaintiff's obligations as an employee differ from his obligations as a director.

[141] Amongst other things, the expansion of the claim in this way will very likely delay the trial of the issues brought by the plaintiff, perhaps to the point where he will be unable to have his day in court.

[142] In all of the circumstances, I am satisfied that it is not in the interests of justice to grant leave for the defendants to file a counterclaim in this action and the application is dismissed.

V. Conclusion

[143] As the plaintiff has been substantially successful, he will have his costs of his application for particulars and of the defendants' application for leave to file a counterclaim, in the cause.

"Master Muir"

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