

CANADA / JUDGMENT

Wong v. Wilson

2013 BCSC 1465

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1465 Wong v. Wilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Wilson,

2013 BCSC 1465

Date: 20130813

Docket: S130826

Registry: Vancouver

Between:

Allan Wong, 0828720 B.C. Ltd. and 0836862 B.C. Ltd.

Plaintiffs

And

Byron Wilson, Judith Ann Wilson and J.A.W. Services Inc.,

LG Millson & Co. Inc. and Larry Milson

Defendants

And

Allan Wong also known as Al Wong,

also known as Allan Shek Chi Wong and 0836862 BC Ltd.

Defendants by Counterclaim

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiffs and the Defendants by Counterclaim:

K.A. McLean

Counsel for the Defendants Byron Wilson, Judith Ann Wilson and J.A.W. Services Inc.:

M.M. Sinclair

Counsel for the Defendants LG Millson & Co. Inc. and Larry Milson

S.M.Vorbrodt

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 15 and 16, 2013

Place and Date of Judgment:

Vancouver, B.C.

August 13, 2013

Introduction

- [1] The defendants Byron Wilson ("Mr. Wilson"), Judith Ann Wilson ("Ms. Wilson") and J.A.W. Services Inc. ("J.A.W.") (collectively, the "Wilson Defendants") apply for orders under R. 9-5 of the Supreme Court Civil Rules striking the Amended Notice of Civil Claim filed April 15, 2013 (the "ANOC") and under R. 9-6 dismissing several of the claims raised against them.
- [2] The other defendants, LG Millson & Co. Ltd. and Larry Milson (the "Millson Defendants"), appeared at the hearing of the application but took no position on the application.

Background

- [3] The currently named plaintiffs are Allan Wong ("Mr. Wong"), 0828720 BC Ltd. and 0836862 BC Ltd ("083"). It is agreed that there is no such company as 0828720 BC Ltd., but rather 0828720 is the incorporation number of a company currently named Arcon Water Designs Ltd. ("Arcon Water"). During the hearing of this application, it was agreed that all references to 0828720 BC Ltd. should be read as referring to Arcon Water.
- [4] Mr. Wong owns the shares of Arcon Water and 083.
- [5] This action arises out of the share purchase and subsequent operation of two companies, Arcon Rock & Waterscapes Inc. ("Arcon Rock") and 0680483 B.C. Ltd. ("068").

- [6] Arcon Rock is in the business of installing swimming pools and other landscape features on residential and commercial properties. 068 is the concrete business, servicing Arcon Rock as its sole, or at least primary, client.
- [7] Prior to about October 2008, all the shares in Arcon Rock were owned by Mr. Wilson and Ms. Wilson, and all the shares in 068 were owned by J.A.W. Mr. Wilson was the sole officer and director of Arcon Rock, and Mr. Wilson and Ms. Wilson were the directors of 068.
- [8] In or about October 2008, Arcon Water purchased half of Mr. Wilson's shares in Arcon Rock, half of Ms. Wilson's shares in Arcon Rock and half of J.A.W.'s shares in 068 pursuant to a written share purchase agreement (the "2008 SPA").
- [9] Prior to Arcon Water entering into the 2008 SPA, Mr. Wong was provided with financial and other information about Arcon Rock and 068, including the financial statements for Arcon Rock for the year ending December 31, 2007 (the "2007 Financial Statements"). The Millson Defendants are accountants who were involved in a review of the 2007 Financial Statements. It is not clear whether they had previously provided accounting services to Arcon Rock and 068 or whether they were retained specifically for the purpose of reviewing the 2007 Financial Statements. If the latter, it is not clear who retained them.
- [10] In 2009, after completion of the 2008 SPA, a new accounting firm prepared financial statements for Arcon Rock for the year ending December 31, 2008 and concluded that the 2007 Financial Statements had erroneously overstated Arcon Rock's equity by more than \$600,000.
- [11] In 2010, 083 agreed to purchase all the remaining shares in Arcon Rock and 068 from Mr. Wilson, Ms. Wilson and J.A.W. pursuant to a written share purchase agreement (the "2010 SPA"). Mr. Wong assumed certain obligations under the 2010 SPA as covenantor.
- [12] The 2010 SPA was amended by two written modification agreements (the "Modification Agreements"). Among other things, the Modification Agreements extended the closing date for the 2010 SPA and altered some of the provisions related to the payments due to Mr. Wilson, Ms. Wilson and J.A.W.
- [13] It appears that the 2010 SPA closed sometime in late 2011, although the specific timing of the actual transfer of the shares under the 2010 SPA is not clear. Since then all the shares of Arcon Rock and all the shares of 068 have been owned by Arcon Water and 083, which in turn are owned by Mr. Wong.
- [14] For two to three years following completion of the 2008 SPA (that is until the closing of the 2010 SPA), the shares of Arcon Rock were owned by Arcon Water (as to 50%) and Mr. Wilson and Ms. Wilson (collectively as to 50%), and the shares of 068 were owned by Arcon Water (as to 50%) and J.A.W. (as to 50%). Mr. Wilson and Mr. Wong were the directors of Arcon Rock and 068, Ms. Wilson having ceased to be a director of 068 on October 16, 2008. Mr. Wilson ceased to be a director of Arcon Rock and 068 on June 22, 2011.

- [15] It is Mr. Wong's evidence that during the time between the 2008 SPA and the closing of the 2010 SPA (in 2011), he and Mr. Wilson were "de facto business partners in that [they] were the principals and the faces of Arcon".
- [16] At some point in 2010 or 2011, Arcon Rock was reassessed by Canada Revenue Agency ("CRA") for approximately \$300,000 related to erroneous GST-related entries in Arcon Rock's 2007 Financial Statements.

Summary of the Claim

- [17] The ANOCC is convoluted and confusing. However, after hearing the submissions of counsel, it appears that the essence of the plaintiffs' claim is that the Wilson Defendants and the Millson Defendants misrepresented the state of Arcon Rock's business and, in particular, its financial position for the purpose of inducing Arcon Water to enter into the 2008 SPA, and that in 2011 and 2012, Mr. Wilson wrongly competed with Arcon Rock. The principal complaints appear to be as follows:
- a) Prior to completion of the 2008 SPA, Mr. Wong was provided with financial information concerning Arcon Rock and 068, including the 2007 Financial Statements. The plaintiffs allege that the Millson Defendants conducted a review engagement of the 2007 Financial Statements and represented that they had been prepared in accordance with generally accepted accounting principles ("GAAP"). After completion of the 2008 SPA, the plaintiffs say they discovered that the 2007 Financial Statements had not been prepared in accordance with GAAP, and that the 2007 Financial Statements erroneously overstated Arcon Rock's equity by more than \$600,000.
 - b) The plaintiffs allege that the Millson Defendants improperly recorded certain GST payments in the 2007 Financial Statements. It is not clear whether this GST error relates to the overstated equity referred to above, but it is alleged that it eventually resulted in the \$300,000 GST liability to CRA.
 - c) The plaintiffs allege that prior to completion of the 2008 SPA, the Wilson Defendants failed to advise or concealed that Arcon Rock had poor relations with its suppliers, that employees were having to loan money to Arcon Rock and that Arcon Rock had working capital issues in the form of poor receivables.
 - d) The plaintiffs allege that between the fall of 2011 and well into 2012, Mr. Wilson wrongly represented to clients that he remained affiliated with Arcon Rock, took confidential and proprietary information, solicited employees and wrongfully took business opportunities for himself.
 - e) It was also suggested by counsel for the plaintiffs that Mr. Wilson knew about but did not disclose the extent and likelihood of the CRA reassessment, and that the plaintiffs did not know about it until after 083 entered into the 2010 SPA. However, this is not clearly pleaded or stated directly in the evidence.

- [18] The plaintiffs advance a variety of causes of action, including breach of fiduciary duties, breach of common law duties, negligent misrepresentation, fraudulent misrepresentation, interference with economic relations, conversion, breach of trust and breach of the 2010 SPA.
- [19] Among other things, the plaintiffs seek a declaration of unconscionably regarding, and rescission of, both the 2008 SPA and the 2010 SPA; general damages, equitable damages, special damages, aggravated damages, exemplary damages and punitive damages; indemnification; a variety of injunctions; an accounting and disgorgement of revenue; double costs; and special costs.
- [20] The Wilson Defendants have filed a Counterclaim in which they allege that 083 and Mr. Wong are in breach of the payment obligations under the 2010 SPA as modified by the Modification Agreements.
- [21] There are deficiencies in the drafting of the ANOCC that will be addressed in more detail below. However, certain aspects of the ANOCC are noted here because they provide helpful context for the analysis that follows:
- a) Very little distinction is made in the ANOCC between Mr. Wong and the other plaintiffs even though Arcon Water and 083 were the purchasers under the 2008 SPA and the 2010 SPA, respectively, while Mr. Wong was merely a shareholder of Arcon Water and 083. For example, the plaintiffs allege that a duty of care, identical in all respects, was owed by the Wilson Defendants to both Mr. Wong and Arcon Water, that Arcon Water and Mr. Wong relied on misrepresentations made by the Wilson Defendants in deciding to proceed with the 2008 SPA even though only Arcon Water was a purchaser. The plaintiffs also allege that the Wilson Defendants owed fiduciary duties, identical in all respects, to all the plaintiffs.
 - b) The ANOCC does not allege a breach of the 2008 SPA, even though the 2008 SPA contains express representations and warranties that appear to correspond with the misrepresentations that the plaintiffs allege they relied on in deciding to proceed with the 2008 SPA. While the 2008 SPA contains time limitations on the survival of such representations and warranties, it also provides that a claim for breach of any of them involving fraud or fraudulent misrepresentation is subject only to the limitation periods imposed by law.
 - c) As noted above, although it was suggested during oral submissions that Mr. Wong only became aware of the extent of the CRA reassessment after the 2010 SPA, the plaintiffs have not alleged a breach of the 2010 SPA in relation to the GST liability even though the 2010 SPA contains an express representation to the effect that neither Mr. Wilson nor Ms. Wilson was aware of any undisclosed claim related to Arcon Rock.

- d) Neither Arcon Rock nor 068 is a plaintiff even though some of the duties alleged to have been owed by the Wilson Defendants are said to arise as a result of the positions they held with those companies, and even though much of the damage alleged appears to be damage to the business of Arcon Rock and/or 068.

Analysis

Differences between R. 9-5 and R. 9-6

- [22] The Wilson Defendants submit that the ANOCC as a whole discloses no reasonable claim and is unnecessary, scandalous, frivolous or vexatious, and/or may prejudice, embarrass or delay the fair trial of the proceeding and so ought to be struck under R. 9-5. They also submit that certain specific claims are bound to fail, there is no genuine issue for trial with regard to those claims and, as such, those claims should be dismissed summarily under R. 9-6. They rely on affidavit evidence in support of their R. 9-6 application but argued the R. 9-5 application on the basis of the pleadings alone.
- [23] The plaintiffs oppose the application, but during submissions conceded they need to apply to further amend the ANOCC in several respects, and to add Arcon Rock and 068 as plaintiffs, in order to clarify the bases upon which they assert their claims.
- [24] The Court of Appeal recently considered Rules 9-5 and 9-6 in *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Ltd.*, 2011 BCCA 149 at paras. 9-11 [International Taoist Church], where Low J.A. noted that the two rules are quite different. Rule 9-5 is solely concerned with the sufficiency of the pleadings and raises issues of law only, whereas R. 9-6 is an assertion that the claim is factually without merit. An order striking a pleading under R. 9-5 could not be the basis for a res judicata defence in subsequent proceedings, whereas an order dismissing a claim under R. 9-6 would support a future pleading of res judicata.
- [25] In considering an application to strike pleadings under R. 9-5, the court should consider whether defective pleadings can be corrected by way of an amendment: *Willow v. Chong*, 2013 BCSC 1083 [Willow]. Put another way, as long as the pleadings disclose a triable issue, either as it exists or as it may be amended, then the issue should go to trial. Accordingly, the prospect of future amendments will be considered on the R. 9-5 application.
- [26] However, in my view, it would be unfair to the Wilson Defendants to permit the plaintiffs to argue the R. 9-6 application on the basis of potential future amendments and new parties. This application was filed more than four weeks prior to the hearing. During that four week period, plaintiffs' counsel could have filed an application to further amend the pleadings and add yet additional parties, such as Arcon Rock and 068, but did not do so.

[27] The defendants brought their R. 9-6 application on the basis of the pleadings as they stood in the ANOCC. They are entitled to know the case they have to meet: *Charest v. Poch*, 2011 BCSC 1165 at paras. 46-48. Therefore, the R. 9-6 application will proceed on the basis of the ANOCC.

The application to strike under R. 9-5

[28] The Wilson Defendants apply under R. 9-5(1)(a), (b) and (c) which provide as follows:

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

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding

[29] The test for striking a claim as disclosing no reasonable claim as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 [Hunt], and reiterated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17, is whether, assuming the facts pleaded are true, it is "plain and obvious" that the claim discloses no reasonable cause of action. If there is a chance that the respondent might succeed, then the respondent should not be "driven from the judgment seat" (Hunt at 980).

[30] The basis for striking a pleading under R. 9-5(1)(b) was summarized by Fisher J. in *Willow* at para 20:

Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v. Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

[31] An "embarrassing" pleading as contemplated by R. 9-5(1)(c) is one that is so irrelevant that to allow it to stand would involve useless expense and would also prejudice the trial of the action by involving the parties in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (C.A.).

[32] Pleadings that are prolix, that violate the rules of pleading set out in the Supreme Court Civil Rules and the common law, and that are constructed in a confusing manner that makes it difficult to answer, are prejudicial and should be struck: *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.) [Homalco].

[33] The purpose of pleadings was described by Smith J. in *Homalco* at para. 5:

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39.

- [34] That purpose is reflected in the Rules. Rule 3-1(2)(a) requires a Notice of Civil Claim to set out a concise statement of the material facts giving rise to the claim. Rule 3-1(2)(b) requires that the relief sought by the plaintiff be set out as against each named defendant. Rule 3-7 prohibits the pleading of evidence. Rule 3-7(9) states that conclusions of law must not be pleaded unless the material facts supporting them are pleaded. Finally, R. 3-7(18) requires full particulars be pleaded where a party relies on misrepresentation, fraud or breach of trust.
- [35] Thus, to comply with the Rules and fulfil the purpose of pleading, the material facts necessary for each cause of action must be pleaded, but not the evidence by which the facts are to be proved. This should be done in a logical sequence and separately for each cause of action so as to avoid confusion. If there is more than one plaintiff, it must be clear which cause(s) of action are being advanced by each plaintiff. If there is more than one defendant, the relief sought should be set out as against each separately. Conclusions of law must not be pleaded unless the material facts supporting them are also pleaded and particulars are necessary to support allegations of fraud or misrepresentation.
- [36] The ANOCC is confusing and violates several of these rules. Without endeavoring to list every infraction, some examples are set out below:
- a) The plaintiff Arcon Water has been named incorrectly in the style of cause as 0828720 BC Ltd. and is referred to throughout as "082".
 - b) As already noted, the ANOCC appears to confuse the shareholders with the company in which the shares are owned. For example, in Part 2 of the ANOCC at paragraph 1(f), the plaintiffs seek indemnification of "083 for any loss or damage occasioned by the disclosure or use of the Plaintiffs' confidential information by the Defendants". From this, it seems that all of the plaintiffs claim to own information that has been wrongfully used. However, it is never alleged that 083 or any of the other plaintiffs had any confidential information. It is more likely this is intended to refer to information belonging to Arcon Rock and/or 068. If that is correct, any loss would be loss suffered by Arcon Rock and/or 068, but neither is a plaintiff. There are several other examples of this problem. Throughout, claims are advanced collectively by the "plaintiffs" without regard for the fact that Mr. Wong was merely the shareholder of Arcon Water and 083 who were in turn shareholders of Arcon Rock and 068.
 - c) While it is alleged that the Vendors "took confidential and proprietary information", the information taken is not identified.

- d) It is alleged that the plaintiffs lost customers and experienced negative impacts on their relationship with their employees. However, no facts are pleaded to suggest that the plaintiffs themselves had any business, customers or employees. The only business mentioned is the business of Arcon Rock and 068.
 - e) The ANOCC fails to accurately identify parties and use defined terms consistently. For example, it defines certain representations as the "Vendors' Misrepresentations" and others as the "LG Inc. Misrepresentations" but then later refers only to the "Representations". Similarly, the Defendant Byron Wilson is defined originally as "B. Wilson", but later there are references to both "Wilson" and to "B. Wilson". These are just some examples; there are numerous such errors.
 - f) The misrepresentation cause of action against the Wilson Defendants is set out primarily in paragraphs 21 and 24 through 30 of the ANOCC. The "Vendors Misrepresentations" are listed in paragraph 21, but there is no reference in that list to the alleged errors in the 2007 Financial Statements. Then, in paragraphs 40 and 41, it is alleged that the Vendors concealed errors in the Financial Statements. This allegation appears to be a material fact central to the plaintiffs' misrepresentation case, but it is not cross-referenced to the misrepresentation cause of action.
 - g) The ANOCC does not clearly spell out who the vendors were under each of the 2008 SPA and the 2010 SPA.
 - h) Claims are advanced against the Millson Defendants (who were the accountants), but the ANOCC does not set out who the Millson Defendants were acting for or retained by.
 - i) The fiduciary duty claim is asserted against the Wilson Defendants in paragraphs 47 and 49 of the ANOCC where it is alleged that a fiduciary relationship existed between Mr. Wong and Arcon Water on the one hand and the Wilson Defendants on the other as a result of Mr. Wong's and Arcon Water's "peculiar vulnerability". Then in paragraph 60, with allegations of breach by Mr. Wilson of the 2010 SPA intervening, a fiduciary duty is pleaded again, but this time it is alleged to arise by virtue of the Wilson Defendants' positions in the companies. There is no attempt to link the two separate sets of facts to the same cause of action or to identify the conduct that is alleged to constitute a breach of one or both of these fiduciary duties.
 - j) The ANOCC does not allege that the Wilson Defendants, or some of them, were directors or officers of any of the companies and does not explain any other relevant roles they may have played, but it asserts that they owe fiduciary duties by virtue of the positions they held with the companies.
- [37] In my view, the ANOCC is embarrassing and prejudicial in that it contains many drafting errors, there is a lack of precision with respect to which allegations relate to which parties or which causes of action, the material facts are not set out clearly in relation to the relevant causes of action and there is a lack of clarity regarding the roles of the various parties.

- [38] Further, during oral submissions, counsel for the plaintiffs agreed that some of the specific claims should be dismissed, and as will be seen below, I have concluded that others should be dismissed as well. It is likely that the dismissal of those specific claims will result in the need for consequential amendments relating to the claims that remain. Also, counsel for the plaintiffs acknowledged that a variety of additional amendments were required in order to clarify the bases upon which the plaintiffs assert their claims. These included amendments to plead breach by the Wilson Defendants of some of the representations and warranties in Article 3 of the 2008 SPA and perhaps some of the representations and warranties in Article 3 of the 2010 SPA. Further, counsel for the plaintiffs acknowledged the need to apply to add Arcon Rock and 068 as plaintiffs in order to advance some of the claims.
- [39] Given the above, it is obvious that the claim is going to have to be significantly recast. Any attempt to remedy the ANOCC by striking some portions only is likely to result in more confusion. Therefore, in my view, the entire ANOCC should be struck with leave to the plaintiffs to substitute a Further Amended Notice of Civil Claim prepared in accordance with the principles set out above and subject to my conclusions on the R. 9-6 application set out below.

The application for judgment under R. 9-6

- [40] Rule 9-6(5)(a) provides that a court, "if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly." The "no genuine issue for trial" standard is identical to the "bona fide triable issue" standard under the predecessor R. 18: *Haghdust v. British Columbia Lottery Corp.*, 2011 BCSC 1627 at para. 15 [*Haghdust*]. That is, it must be manifestly clear or beyond a reasonable doubt that there is no issue to be tried: *Haghdust* at para. 15; *Progressive Construction Ltd. v. Newton* (1981), 25 B.C.L.R. 330 at 334-335 (S.C.).
- [41] In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, the Supreme Court of Canada considered the summary judgment rule in Alberta. Stressing that the question of whether there is a genuine issue for trial must be determined on the evidence, the Court set out the applicable analysis at para. 11:

[T]he bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, *aff'd* (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p.

434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[Emphasis added.]

[42] Low J.A. held in *International Taoist Church*, at paras. 13-14, that affidavit evidence is not only admissible on a summary judgment application but is essential to such an application:

I find it curious that R. 9-6 does not specifically provide for affidavit evidence except in response to a plaintiff's application. It is inconceivable to me, however, that a plaintiff could overcome a filed defence and obtain summary judgment under the new rule in the absence of sworn evidence that proves the claim. A claim for a liquidated sum under a contract, for example, surely would require sworn evidence under the rule to prove the contract, breach of the contract and the amount owing.

It is also inconceivable to me that a defendant could obtain summary judgment without presenting sworn evidence establishing that the claim is without merit.

[43] Courts are not permitted to assess or weigh evidence on an application under R. 9-6. As a result, where the parties present conflicting affidavit evidence, the onus of proving the absence of a genuine issue for trial will generally not be met and the court will be unable to grant summary judgment: *International Taoist Church* at para. 14.

[44] The evidence relied upon by the Wilson Defendants in support of the R. 9-6 application was the affidavit of Mr. Wilson sworn June 7, 2013. Counsel for the plaintiffs submitted that the R. 9-6 application should be dismissed on the basis that the Wilson affidavit was so replete with inadmissible argument and opinion that it should be disregarded in its entirety. I do not agree. Although there were aspects of Mr. Wilson's evidence that were contradicted by Mr. Wong, that does not make Mr. Wilson's affidavit inadmissible. Given this is a summary judgment application, I have not attempted to resolve any of those conflicts. However, in my view, the only portion of Mr. Wilson's affidavit that is inadmissible is the last sentence in paragraph 8 which amounts to an opinion about the sufficiency of the information provided to Mr. Wong. I have not relied on that sentence in reaching my conclusions.

[45] In their Notice of Application, the Wilson Defendants sought dismissal of the following claims:

- a) all claims brought by Mr. Wong personally as against the Wilson Defendants;
- b) the claim for breach of fiduciary duty against the Wilson Defendants;
- c) the claim for breach of common law duties against the Wilson Defendants;
- d) the claim for misrepresentation against the Wilson Defendants;
- e) the claim for interference with economic relations and conversion;

- f) the claim based upon the law of vicarious liability;
- g) the claim for breach of trust against the Wilson Defendants;
- h) the claims for a declaration of unconscionability with regard to, and rescission of, the 2008 SPA and the 2010 SPA; and
- i) the claim for double costs.

[46] During oral submissions, counsel for the Wilson Defendants abandoned the application as it related to the claim based upon the law of vicarious liability and the claim for double costs, and as such, those are not addressed in these reasons.

[47] The claims brought by Mr. Wong personally are addressed to a large extent in the course of dealing with each of the other claims. Accordingly, I will address the other claims first.

The claim for breach of fiduciary duty

[48] The claim for breach of fiduciary duty against the Wilson Defendants appears to be expressed primarily in paragraphs 47, 49 and 60 of the ANOCC.

[49] First, in paragraphs 47 and 49 of the ANOCC, it is alleged that "by virtue of Wong's unfamiliarity with the business, tax law and lack of access to relevant information from the Wilson Defendants and LG Inc., 082 and Wong were subject to a peculiar vulnerability in respect of the exercise of the discretion or power that the Vendors cloaked themselves in as an incident [sic] of their knowledge, power and discretion in relation to the Plaintiff" and that, as a consequence, a fiduciary relationship existed between Arcon Water and Mr. Wong on the one hand and the Wilson Defendants on the other.

[50] Then, in paragraph 60 of the ANOCC, it is alleged that the Wilson Defendants owed fiduciary duties to the plaintiffs "by virtue of the position they held with the Companies as defined in the 2010 SPA". The "Companies", as defined in the 2010 SPA, are Arcon Rock and 068.

[51] Although there is no express reference in the ANOCC to these duties being breached, it is alleged in general terms in paragraphs 62 through 69 that the Wilson Defendants took opportunities and used confidential and proprietary information in a manner that caused damage to the plaintiffs.

[52] The Wilson Defendants assert that there is no genuine issue to be tried with respect to the claim for breach of fiduciary duty. First, they say that while a director and officer owes a fiduciary duty, that duty is owed only to the company, in this case Arcon Rock and 068, and neither of those companies is a plaintiff.

[53] Second, the Wilson Defendants say that the plaintiffs have not tendered any evidence upon which a court could conclude a fiduciary duty existed on the basis of the requirements set out in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [Lac Minerals]. Specifically, there is no evidence that the Wilson Defendants had scope for the

exercise of some discretion or power and could unilaterally exercise that discretion or power so as to affect the plaintiffs' legal or practical interests, or that the plaintiffs were peculiarly vulnerable to the Wilson defendants. Citing *Lac Minerals, Frame v. Smith*, [1987] 2 S.C.R. 99, and *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, the Wilson Defendants submit that courts are loathe to find a fiduciary relationship in the context of an arm's length business transaction because the requirement of vulnerability is seldom present in such a relationship.

- [54] The Wilson Defendants note that while the ANOCC pleads that Mr. Wong was unfamiliar with the business and tax law and had a lack of access to information, clause 9.1 of the 2008 SPA gave him the right to inspect the financial records of Arcon Rock and 068 and speak to its accountants, major customers and suppliers. In addition, Mr. Wilson has sworn that Mr. Wong did have unfettered access to the financial statements, some of which were reviewed by an accountant named Christian Milau who initially was planning to buy into the Arcon Rock business with Mr. Wong. Further, the evidence establishes that Mr. Wilson has a grade 11 education while Mr. Wong had an MBA at the time of the 2008 SPA. Finally, Mr. Wilson deposes that his relationship with Mr. Wong was at all times as a vendor in a potential business sale. The Wilson Defendants say neither the evidence nor the pleadings support a claim, at least by the currently named plaintiffs, for breach of fiduciary duty; it is clear there is no triable issue with respect to that claim; and, as a result, it should be dismissed.
- [55] Mr. Wong does not take issue with much of Mr. Wilson's evidence on this point. He did not deny having access to the financial records of Arcon Rock and 068, nor did he deny that Mr. Milau reviewed some of the financial information. Mr. Wong said that while he hired accountants, this was done to assist him in future tax planning, and they did not review the 2007 Financial Statements. He also directly contradicted Mr. Wilson's characterization of their relationship as merely vendor and purchaser in a potential business sale. According to Mr. Wong, he and Mr. Wilson were "de facto business partners in that we were the principals and faces of Arcon from 2008 until 2010". Of course, if that characterization of their relationship is correct, it would apply only to the time period after completion of the 2008 SPA.
- [56] In the face of an application for summary judgment, a party is expected to put his or her "best foot forward". In my view, on the evidence tendered, it is manifestly clear that the Wilson Defendants did not owe the Plaintiffs fiduciary duties in relation to the sale and purchase of the shares pursuant to the 2008 SPA. The parties were at arm's length on opposite sides of a business transaction, and while the plaintiffs may have relied on the information provided to them, there is no evidence that suggests the Wilson Defendants could unilaterally exercise any power or discretion so as to affect the plaintiffs' legal or practical interests or that the plaintiffs were peculiarly vulnerable to the Wilson Defendants in evaluating Arcon Rock's business and deciding to proceed with the 2008 SPA. As such, the plaintiffs' claim against the Wilson Defendants for breach of fiduciary duties alleged to have arisen in relation to the purchase of the shares pursuant to the 2008 SPA is dismissed.

- [57] Having said that, I am not convinced that there is no genuine issue as to whether Mr. Wilson owed fiduciary duties to the plaintiffs based on the positions he held with Arcon Rock and 068. I am not, for the moment, referring to the duties that he may have owed to Arcon Rock and 068 as a result of being a director of those companies, but I will return to that.
- [58] As noted above, Mr. Wilson deposed that his relationship with Mr. Wong was "at all times as a vendor in a potential business sale". Mr. Wong directly contradicted that and said they were "de facto partners between 2008 and 2010" and that they "ran the operations of the businesses jointly". Further, in the time between the two sales, Mr. Wilson, Ms. Wilson and J.A.W. continued to own half the shares in Arcon Rock and 068. Also, in 2010, CRA was writing to Arcon Rock specifically to Byron Wilson's attention with respect to the GST issues and advising of the prospect of a reassessment, which did materialize in 2011 after the 2010 SPA. Finally, Mr. Wilson was using an email address and/or email signature, for business purposes, that referred to Arcon Water Designs in 2011 and 2012.
- [59] Common ownership of property does not, of itself, create a partnership, but it is a factor for consideration. The existence of a partnership is dependent on the facts and circumstances of each case and, in particular, on what the parties actually intended: *Rockwell v. Fay*, 2009 BCSC 935. If a partnership existed between Mr. Wilson and Mr. Wong, they would have owed obligations to each other and to the partnership that are fiduciary in nature: Mark Vincent Ellis, *Fiduciary Duties In Canada*, loose-leaf (Toronto: Carswell, 2004) vol. 2 at 12-6.2-12-6.2(2)).
- [60] The duties would include a duty of utmost good faith which, among other things, would preclude a partner:
- a) who knows more about the state of the partnership accounts than another and, concealing what he knows, entering into an agreement with that other relative to some matter as to which knowledge of the state of accounts is material; and
 - b) from obtaining private advantage at the expense of the partnership. (Ernest H. Scamell & R.C. I'Anson Banks, eds., *Lindley on the Law of Partnership*, 14th ed. (London: Sweet & Maxwell, 1979) at 430-432).
- [61] While the evidence before me is insufficient to conclude that a partnership existed between Mr. Wilson and Mr. Wong, I cannot conclude that there is no triable issue in that regard. I realize that a claim of fiduciary duty based specifically on the existence of a partnership between Mr. Wilson and Mr. Wong is not pleaded, but as set out above, the plaintiffs have pleaded fiduciary duties owed to them by virtue of the position the Wilson Defendants held with Arcon Rock and 068. I have given the plaintiffs leave to amend, and I want to be clear that my decision to dismiss the claim against the Wilson Defendants based on fiduciary duties alleged to have arisen in relation to the purchase of the shares pursuant to the 2008 SPA is not to be taken as precluding the plaintiffs from amending their claim to allege a fiduciary duty arising as a result of the manner in which the businesses of Arcon Rock and 068 were carried on in the time between the 2008 SPA and the 2010 SPA. I am not implying

that such a claim would have merit (no such conclusion could be reached on the evidence before me), and everything I have said about proper pleading would apply to such a claim.

- [62] Further, my decision to dismiss the claim based on fiduciary duties owed in relation to the purchase of the shares pursuant to the 2008 SPA would not preclude the advancement of a claim by Arcon Water and 068 based on Mr. Wilson's and/or Ms. Wilson's positions as directors, officers or key employees of those companies should the plaintiffs successfully apply to add Arcon Water and 068 as plaintiffs. Again, I am not suggesting that such a claim would have merit, and everything I have said about proper pleading would apply to such a claim.

The claim for breach of common law duties

- [63] In paragraph 61 of the ANOCC, it is alleged that the Wilson Defendants owed "common law duties" as follows:

- a) duty of utmost loyalty, fidelity and confidence;
- b) a duty not to misuse confidential information of the plaintiffs, including a duty not to put the plaintiffs' confidential information to their personal use or advantage, including after termination of employment;
- c) a duty not to make a secret profit from new employment or after closing of the 2010 SPA; and
- d) a duty not to take advantage of any ripe business opportunity after employment.

- [64] The ANOCC does not state to whom these duties are owed, but they appear to be similar to the kinds of duties that might be owed by a director or key employee to a company. If that is what is intended, then the duties would be owed to Arcon Rock and/or 068, who are not parties to the action.

- [65] Further, they appear to duplicate the fiduciary duties asserted and dealt with above. In oral submissions at the hearing, counsel for the plaintiffs agreed that this claim should be struck as being duplicative of the fiduciary duty claim that the plaintiffs intend be advanced by Arcon Rock and 068 in the event they are added as plaintiffs.

- [66] In the circumstances, the claim for breach of common law duties against the Wilson Defendants is dismissed.

The claim for misrepresentation

- [67] The plaintiffs' claim for misrepresentation as against the Wilson Defendants is most obviously set out in paragraphs 21, 24 and 25 of the ANOCC which state:

21. The Vendors made the following misrepresentations in the form of deliberate concealing, omissions and/or misleading information to induce 082 [should read Arcon Water] into the 2008 SPA as follows (which is non-exhaustive):

- a. the Vendors did not admit and/or concealed that Arcon had some poor supplier relations in the form of defaulting and/or extreme delay on account payments prior to 082 executing the 2008 SPA;
 - b. Wilson represented on or around 2008 before 2008 SPA directly to Wong that Arcon never had an issue with respect to paying suppliers;
 - c. the Vendors did not inform Wong that the employees were providing loans to Arcon and its related companies to save the Arcon and its related companies from financial crisis:
 - i. an employee loaned over \$157,000 to Arcon in 2008;
 - ii. the Vendors included all employee loans on the JAW balance sheet as opposed to the Arcon balance sheet which made said employee loans unavailable for review and inspection during Wong's due diligence process;
 - 1. the Vendors deliberately concealed said employee loans so as to induce 082 and Wong into the 2008 SPA;
 - d. the Vendors did not inform Wong or 082 that the employees were forced to pay suppliers due to lack of payment by Arcon;
 - e. that Arcon had working capital issues in the form of poor receivables; and
 - f. other further particulars to be provided
- (collectively, the "Vendors' Misrepresentations")
- 24. The Vendors' Misrepresentations were made by the Vendors with the intention and/or knowledge that 082 and Wong would rely upon them.
 - 25. There was, a special relationship between the Vendors and 082 and Wong sufficient to establish a duty of care being owed by the Vendors to Plaintiffs when B. Wilson and J. Wilson made the Vendors' Misrepresentations.
- [68] In paragraphs 27, 28 and 29 of the ANOCC, the plaintiffs allege that it was reasonable for Arcon Water and Mr. Wong to rely on the Vendors' Misrepresentations, and they did in fact rely on them to their detriment and suffered damages as a result; that the Vendors' Misrepresentations were untrue; and that they were made negligently or fraudulently.
- [69] Although not falling within the defined term "Vendors' Misrepresentations" in paragraph 21 of the ANOCC, the plaintiffs also allege, in paragraphs 40 and 41 of the ANOCC, that the Wilson Defendants failed to disclose that the 2007 Financial Statements contained errors and took steps to conceal the errors.

- [70] In the course of oral submissions, counsel for the plaintiffs agreed that the misrepresentation claim was only appropriately raised by Arcon Water as purchaser pursuant to the 2008 SPA, and that the claim by Mr. Wong personally would not be advanced. Accordingly, I dismiss the misrepresentation claim advanced by Mr. Wong personally against the Wilson Defendants.
- [71] In considering whether the misrepresentation claim advanced by Arcon Water against the Wilson Defendants should also be dismissed, I will give the ANOCC a generous reading. I will proceed on the basis that the substance of the claim is that the Wilson Defendants made negligent or fraudulent misrepresentations that induced Arcon Water to enter into the 2008 SPA, which included the failure to advise Arcon Water that:
- a) Arcon Rock had poor supplier relations;
 - b) employees were providing loans to Arcon Rock;
 - c) there were working capital issues due to poor receivables; and
 - d) Arcon Rock's 2007 Financial Statements contained errors.

Negligent Misrepresentation

- [72] The Wilson Defendants' submissions related only to the negligent misrepresentation claim. They made no submission regarding the fraudulent misrepresentation claim. Citing *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 [Cognos], they submitted that a claim for negligent misrepresentation requires the plaintiff to establish the following five elements: a duty of care (the proximity question); an untrue, inaccurate or misleading misrepresentation; that the representor acted negligently in making the misrepresentation; that the representee reasonably relied on the negligent misrepresentation; and that the representee suffered damage as a result. However, the submissions of the Wilson Defendants on this point addressed only the first and last of these elements.
- [73] First, the Wilson Defendants submit that the negligent misrepresentation claim is bound to fail because the plaintiffs cannot establish the proximity required to give rise to a duty of care. Citing *Hercules Managements v. Ernst & Young*, [1997] 2 S.C.R. 165 [Hercules], they submit that the plaintiffs must establish that the defendants ought reasonably to have foreseen that the plaintiffs would rely on the representation and that reliance by the plaintiffs would, in the circumstances of the case, be reasonable. They say the law imposes no obligation on the vendor to protect the purchaser in an arms-length business transaction and so in the circumstances of this case proximity cannot be established.
- [74] The Wilson Defendants did not refer to any evidence during their submissions on this aspect of their application. Instead, they appear to stand on the submission that this claim as pleaded must fail as a matter of law. I do not agree.

- [75] Hercules did not address the question of whether proximity could exist as between parties engaged in pre-contract negotiations. Rather, it concerned the question of proximity between auditors of a company and the shareholders of the company, where it was found there was no contract between the auditors and the shareholders.
- [76] The law recognizes that concurrent duties may exist in contract and tort and that proximity may arise from pre-contract negotiations: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 [BG Checo], and *Cognos*. This law was recently summarized in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2012 BCSC 564 [Westsea], where a party sought summary judgment under R. 9-6 dismissing a negligence claim. In that case, Harris J. (as he then was) said at paras. 65-69:

The law recognizes that concurrent duties may exist in contract and tort and that proximity may arise from a nexus between parties created by contract. The starting point of the analysis remains *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. In that case, an obligation in tort (negligent misstatement) was identical to the contractual obligation. The issue was whether the duties in negligence and contract could exist concurrently. The majority of the Supreme Court concluded they could. The basic rule was stated as follows at para. 15:

... where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. ... The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it.

The majority makes it clear that the critical question in deciding whether a tort claim can be maintained in the face of a contract addressing the same subject matter is whether the parties have contradicted, extinguished, modified or left untouched the tort duties in the contract. Thus, the principle of the primacy of private ordering is respected at para. 16. Moreover, there is no necessary inference to be drawn from the fact that the contractual obligation may perfectly correspond to the duty in negligence that the parties thereby intended to oust their tort obligations at para. 25; see also the discussion of the authorities beginning at para. 29.

In order, however, for a concurrent duty to arise in tort, that duty must exist "even in the absence of the specific contractual term which created the corresponding contractual obligation" at para. 34.

I take the following from the majority discussions of concurrency of tort and contract in *BG Checo*. First, one must be able to identify a tort duty that exists independently of the specific contractual duty in the sense that the tort and the contract duties co-exist, in principle, concurrently. In other words, the existence of the alleged tort duty cannot arise solely and exclusively out of the contract. Secondly, the existence of the contract may be a source of the proximity between the parties that gives rise to the alleged duty in tort. Thirdly, the existence of the tort duty will need to be justified in accordance with the ordinary rules in negligence for

recognition of duties. In other words, to establish potential concurrency of duties a plaintiff (or in this case, the defendants) will need to point to an established category where a tort duty has been recognised or justify a "novel" claim in accordance with the Anns test. Fourthly, if potential concurrency exists, in order to avoid a duty in tort, the defendant (or in this case, the plaintiffs) would have to show that the parties have structured their relationship through the contract in such a way that the existence of the tort duty is eliminated or modified. It must be shown that the parties intended to extinguish tort liability through the contract. Generally, this will require express language, although it may arise by necessary implication. It is not to be assumed that the existence of contractual obligations, even if they correspond exactly to the tort duties, evidences an intention to extinguish the tort duties.

In the context of the issue before me, these questions need to be analyzed first through the lens of the "plain and obvious" test. Hence, specifically, the question is whether it is plain and obvious that the plaintiffs could not owe the majority defendants duties in negligence given that they maintain the buildings and given that the defendants allege they have not done so "properly" and their failure to do so has led to damage to the structure of the building, including damage giving rise to safety and health concerns. Accordingly, the second critical question is, could these, admittedly broadly characterised circumstances give rise to a duty in negligence? The third question is whether, in the context of a summary judgment application, there is any evidence capable of raising a genuine issue for trial.

[77] Therefore, the questions on the issue of proximity are:

- a) Can a tort duty be identified independent of the specific contractual duties? In this regard, the existence of the contract may be a source of the proximity that gives rise to the alleged duty in tort.
- b) Can the existence of the tort duty be justified in accordance with the ordinary rules in negligence for recognition of duties? Can Arcon Water point to an established category where a tort duty has been recognized or justify a novel claim in accordance with the Anns test?
- c) If a potential concurrency exists, can the Wilson Defendants show that the parties have structured their relationship through contract in such a way that it is clear they intended to extinguish tort liability through contract? In this regard, it is not to be assumed that the existence of contractual obligations, even if they correspond exactly to the tort duties, evidences an intention to extinguish the tort duties.

[78] As in *Westsea*, on an application for summary judgment these questions need to be analyzed through the lens of the plain and obvious test. Have the Wilson Defendants established that Arcon Water's negligent misrepresentation claim is bound to fail?

- [79] It is clear that Arcon Water alleges misrepresentations that predated and induced it to enter into the 2008 SPA. In other words, the alleged duty does not arise out of the 2008 SPA itself. Mr. Wilson has not denied providing the plaintiffs with financial information prior to the 2008 SPA. To the contrary, he says Mr. Wong was given significant financial information. As in BG Checo, the tort duty can be identified independent from the contract itself.
- [80] As is plain from BG Checo, parties engaged in pre-contract negotiations fall within an established category of relationship where a duty has been recognized.
- [81] It is not clear that the parties intended to extinguish tort liability. Although the 2008 SPA does contain representations that cover very similar if not substantially the same topics as the misrepresentations alleged by the plaintiffs (for example, clause 3.1(i) which states that the financial statements have been prepared in accordance with GAAP and present fairly the financial position of Arcon, and clause 3.1 (j) to the effect that there are no undisclosed liabilities), this does not necessarily preclude Arcon Water from suing concurrently in tort and contract (BG Checo at 26-27). The 2008 SPA does not contain a clause expressly limiting or excluding liability for negligence. As a result, I cannot conclude that Arcon Water's negligent misrepresentation claim is bound to fail on the question of proximity.
- [82] The Wilson Defendants also submitted that the plaintiffs have not alleged they suffered any damages from the alleged misrepresentation, but rather the only damages suffered were suffered by Arcon Rock. However, in paragraph 27 of the ANOCC, Arcon Water does claim to have suffered damage. Later in the ANOCC, Arcon Water claims to have "grossly overpaid" for the shares.
- [83] As noted above, the Wilson Defendants did not address in their submissions the second, third and fourth required elements of a cause of action in negligent misrepresentation: that the representations were untrue, inaccurate or misleading; that the representor acted negligently in making the misrepresentation; and that the representee reasonably relied on the negligent misrepresentation. However, I will address these briefly.
- [84] For ease of reference, the representations complained of include:
- a) the failure to advise of poor supplier relations;
 - b) the failure to advise that employees were providing loans;
 - c) that there were working capital issues in the form of poor receivables; and
 - d) that Arcon's 2007 Financial Statements contained errors.

- [85] Mr. Wilson deposed that at times Arcon Rock would fall behind in payments to suppliers but payments were "almost without exception ultimately tendered, unless there was a valid reason not to do so, and Arcon's relations with its suppliers were, almost without exception, positive". In my view, this evidence is too qualified to justify a conclusion, on a summary judgment application, that there is no genuine issue as to whether the status of Arcon Rock's supplier relations was accurately represented.
- [86] Mr. Wilson deposed that the only loans advanced by employees were a couple of loans advanced by Karen Neufeld which were made to Mr. Wilson personally and repaid fully and promptly. However, a memorandum attached as an exhibit to Mr. Wong's affidavit appears to indicate that Ms. Neufeld loaned Arcon Rock (not Mr. Wilson) in excess of \$150,000 with some of the loans being "posted from J.A.W." On the basis of this evidence, I cannot conclude that there is no genuine issue as to whether the loans were accurately represented.
- [87] No evidence was tendered on either side regarding the question of whether there were "poor receivables".
- [88] Mr. Wilson deposed that to his knowledge, the financial statements and documents "disclosed all liabilities of Arcon as of the date that they were generated" and that, although he later learned some errors were found in the work of Larry Millson, he was never made aware of any errors or misstatements of fact that originated from himself, Ms. Wilson or J.A.W. However, he has not said whether he was aware of the way the GST had been treated in the 2007 Financial Statements or when he learned of the possibility that this treatment might be disputed by CRA. Mr. Wilson has acknowledged there were errors and his statement that the financial statements disclosed liabilities existing as of the date they were generated does not, in my view, mean that he was unaware of any prospect of a potential problem regarding the GST.
- [89] The evidence before me is inadequate to justify a conclusion that there is no genuine issue as to the truth of the alleged misrepresentations. Also, given the paucity of evidence, I am unable to conclude that there is no genuine issue as to whether the representations were negligently made.
- [90] Finally, there is the reliance element. Did Arcon Water rely reasonably on the representations? Mr. Wilson says that Mr. Wong retained his own accountants to review the financial statements, implying there was no reliance. However, Mr. Wong says that while he retained accountants to assist in the structuring of companies for tax planning, he did not retain accountants to review the financial statements. I cannot resolve the conflict on a summary judgment application. Again, the evidence is inadequate to justify a conclusion that there is no genuine issue as to Arcon's reliance.
- [91] For the forgoing reasons, it would be premature to dismiss Arcon Water's negligent misrepresentation claim.

Fraudulent misrepresentation

- [92] As noted above, the Wilson Defendants did not make submissions regarding the fraudulent misrepresentation claim, but I will address it briefly.
- [93] To succeed in dismissing Arcon Water's fraudulent misrepresentation claim on a summary judgment application, the Wilson Defendants would have to establish, among other things, that there is no genuine issue as to whether they knew the representations were false or made them recklessly without knowing whether they were true or not: G. H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 285.
- [94] For the same reasons that I cannot conclude the representations were not made negligently, I cannot conclude they were not made fraudulently. To be clear, I am not suggesting they were made fraudulently, but the evidence before me is simply inadequate to justify any conclusions regarding what the Wilson Defendants knew about the accuracy of the information provided to the plaintiffs prior to the 2008 SPA or whether, in the circumstances, they were reckless in that regard.
- [95] In my view, it would be premature to dismiss Arcon Water's fraudulent misrepresentation claim.

The claim for interference with economic relations and conversion

- [96] The plaintiffs advance claims for interference with economic relations and conversion.
- [97] The ANOCC pleads the existence of a non-competition clause in the 2010 SPA which provides, in general terms, that for a period of two years from October 31, 2010, Mr. Wilson may not compete with the business being carried on by Arcon Rock and 068. In paragraph 58, the ANOCC goes on at length setting out numerous allegations of breaches by Mr. Wilson of the non-competition clause. Then, the ANOCC states:
63. The Vendors [defined to include not only Mr. Wilson, but also Ms. Wilson and J.A.W.] have knowingly taken business opportunities for themselves. The Vendors failed, at all material times after executing the 2010 SPA, to disclose that they were not shareholders, directors or officers of Arcon.
64. Further, the Vendors failed to inform third parties that they were not working or affiliated with Arcon or its related companies. The Vendors fraudulently attempted to pass themselves off as affiliated with Arcon or its related companies when, in fact, they no longer represented Arcon or its related companies in any capacity.
65. The Vendors took confidential and proprietary information and used it to their advantage to compete against Arcon and, by necessity the Plaintiffs, while representing themselves as Arcon or its affiliated companies.

- [98] In paragraphs 5 and 6 of Part 3 of the ANOCC, the plaintiffs allege that the Vendors have committed the tort of conversion and that their conduct in causing customers to obtain products and services from the Vendors "constitutes an interference with economic relations".
- [99] The ANOCC does not expressly identify whose business opportunities or information is alleged to have been taken, but when the ANOCC is read as a whole, it appears that the focus of these allegations is Arcon Rock's business and information. Among other things, the ANOCC does not claim that Mr. Wong, Arcon Water and 068 had any other business.
- [100] The Wilson Defendants submit that if there was any valid claim to advance, it would be Arcon Rock's claim because the alleged losses are losses of Arcon Rock. Relying on *Foss v. Harbottle* (1843), 67 E.R. 189, and *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61, the Wilson Defendants submit that, as a matter of law, the shareholder of Arcon Rock cannot advance these claims.
- [101] During oral submissions, counsel for the plaintiffs confirmed that the claims for interference with economic relations and conversion are based on allegations that the business and information of Arcon Rock and 068 has been interfered with or wrongly taken by the Wilson Defendants and that, as a result, he would be applying to add Arcon Water and 068 as plaintiffs to advance these claims.
- [102] In the circumstances, the plaintiffs' claims for interference with economic relations and conversion against the Wilson Defendants are dismissed.

The claim for breach of trust

- [103] At paragraph 1(p) of Part 2 of the ANOCC, the plaintiffs claim damages for breach of trust. There is no claim for a declaration of trust.
- [104] For a trust to come into existence, the three certainties must be established: certainty of intention, certainty of subject and certainty of objects (beneficiaries): *Donovan W.M. Waters, ed., Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 140.
- [105] The plaintiffs have not pleaded any facts that could establish the three certainties. For example, they do not identify either the subject or object of the trust.
- [106] There is nothing in Mr. Wong's evidence that would support a claim of breach of trust.
- [107] During oral submissions, counsel for the plaintiffs agreed to the dismissal of the breach of trust claim against the Wilson Defendants.
- [108] In the circumstances, the plaintiffs' claim for breach of trust against the Wilson Defendants is dismissed.

The claims for a declaration of unconscionability

[109] In Part 2 of the ANOCC, the plaintiffs claim, among other things:

- a) rescission of the 2008 SPA due to the Vendors' Misrepresentations (paragraph 1(b));
- b) a declaration that the 2008 SPA is unconscionable and rescission of it (paragraph 1(c)); and
- c) rescission of the 2010 SPA (paragraph 1(j)).

[110] At paragraphs 15 and 16 of Part 3 of the ANOCC, the plaintiffs claim the 2008 SPA and 2010 SPA were unconscionable because Arcon Water and 083 "grossly overpaid" for the shares.

[111] The Wilson Defendants submit that these claims should be summarily dismissed because "grossly overpaying for shares is not a basis, in and of itself, for a declaration of unconscionability".

[112] Given my conclusions above with regard to the misrepresentation claims, it would be inappropriate to dismiss the claim for rescission of the 2008 SPA as rescission is merely a remedy that might be available in the event the misrepresentation claim succeeds.

[113] Further, I do not think the allegation of unconscionability can be characterized as resting solely on a bald allegation of "gross overpayment". It is clear that the plaintiffs rely on several factors as tainting the share transactions as a whole. These include the overstatement of equity in the 2007 Financial Statement and the CRA reassessment, which the plaintiffs assert support claims in both negligent and fraudulent misrepresentation.

[114] As noted by the Wilson Defendants in their written submission, the test for unconscionability has been stated as, "was the transaction as a whole, sufficiently divergent from community standards of commercial morality": *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.).

[115] While the evidence before me on this application does not support a conclusion that there was a significant inequality of bargaining power, I am unable, on that evidence, to determine whether the transactions as a whole were so divergent from standards of commercial morality so as to warrant a declaration of unconscionability.

The claims by Mr. Wong personally

[116] As noted above, the ANOCC advances most claims on behalf of all the plaintiffs collectively. This is confusing and has contributed to my conclusions regarding the R. 9-5 application.

[117] In addition to submitting that this is a factor justifying striking the ANOCC, the Wilson Defendants also seek judgment on all claims advanced by Mr. Wong personally.

[118] In oral submissions, counsel for the Wilson Defendants agreed that Arcon Water and 083 could have reasonable claims to advance (subject to proper pleading), but they submit it is manifestly clear that Mr. Wong has no claim given that he was not a purchaser under either the 2008 SPA or the 2010 SPA.

[119] I have already concluded that the following claims as against the Wilson Defendants should be dismissed:

- a) the claim by all the currently named plaintiffs for breach of fiduciary duties alleged to have arisen in relation to the sale and purchase of the shares pursuant to the 2008 SPA;
- b) the claim by all the currently named plaintiffs for breach of common law duties;
- c) Mr. Wong's claim for misrepresentation;
- d) the claims by all the currently named plaintiffs for interference with economic relations and conversion; and
- e) the claim by all the currently named plaintiffs for breach of trust.

[120] In addition, the entire ANOCC has been struck under R. 9-5 (subject to amendment).

[121] In the absence of submissions regarding additional specific claims, I do not think it would be appropriate to further parse the ANOCC to determine whether there might possibly be some other claim being advanced by Mr. Wong personally that should be dismissed summarily.

Costs

[122] Although in their Notice of Application the Wilson Defendants seek special costs, no submissions were made on costs. Counsel may arrange through the registry to speak to costs if they wish, provided they do so within 60 days of the delivery of this judgment. Otherwise, the Wilson Defendants will have costs of this application in any event of the cause.

Conclusion

[123] The following claims against the Wilson Defendants are dismissed under R. 9-6:

- a) the claim by all the currently named plaintiffs for breach of fiduciary duties alleged to have arisen in relation to the sale and purchase of the shares pursuant to the 2008 SPA;
- b) the claim by all the currently named plaintiffs for breach of common law duties;
- c) Mr. Wong's claim for misrepresentation;
- d) the claims by all the currently named plaintiffs for interference with economic relations and conversion; and
- e) the claim by all the currently named plaintiffs for breach of trust.

[124] The plaintiffs have leave to amend their claim by substituting the ANOCC with a new Further Amended Notice of Civil Claim prepared in accordance with the principles set out in these reasons and subject to my conclusions on the R. 9-6 application as set out above. They will have 60 days from the delivery of this judgment to do so failing which the ANOCC shall be struck out in its entirety under R. 9-5.

[125] As noted above, counsel for the plaintiffs advised that he intends to apply to add Arcon Rock and 068 as plaintiffs. That application was not before me at the time the present applications were heard and so I make no order in that regard. However, I will be seized of that application in the event those additional parties are not added by consent and it is necessary for the plaintiffs to apply.

"Warren J."

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