

CANADA / JUDGMENT

Yen v. Ghahramani

2023 BCSC 229

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 229 Yen v. Ghahramani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yen v. Ghahramani,

2023 BCSC 229

Date: 20230215

Docket: S220213

Registry: Vancouver

Between:

Vincent Yen and 0756383 B.C. Ltd.

Plaintiffs

And

Frederick Ghahramani, 0751846 B.C. Ltd.,

AirG Employee Share Ownership Plan Ltd. and airG Inc.

Defendants

And

Vincent Yen, Canfleet Logistics Ltd., Studypug Inc., Studypug Holdings Inc., Studypug USA Inc., Studypug Holding (HK) Limited, Studypug (HK) Limited, Manitoulin Global Forwarding Inc., airG Services Inc. and Tai Management Ltd.

Defendants by Counterclaim

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiffs and Defendant by Counterclaim Vincent Yen:

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Place and Date of Hearing:

Vancouver, B.C.

January 12, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 15, 2023

Introduction

[1] By application filed November 25, 2023, the defendant airG Inc. ("airG") applies for orders that:

- a) Item 3 - The plaintiffs shall review the entirety of the documents in their power, possession or control associated with the "lumc@airG.com" email account (the "airG Account"), the "chan.lum@gmail.com" email account (the "Gmail Account") and any other email account which Pai Lum Chan ("Mr. Chan") used to communicate with the plaintiff Mr. Yen or other representatives of the defendants by counterclaim (collectively, the "Lum Chan Emails") or other electronic or paper documents generated or received by Mr. Chan which relate to matters in question in this action (the "Lum Chan Documents") and list and make those documents available for inspection by the parties of record, pursuant to Rules 7-1(13) and (14) of the Supreme Court Civil Rules ("SCCR"); and

- b) Item 4 - Mr. Chan (not a party) shall review the entirety of the documents in his power, possession or control which comprise the Lum Chan Documents, and list and make those documents available for inspection by the parties of record within 21 days, pursuant to Rule 7-1(18).
- [2] The application originally also sought an order that the plaintiffs and Mr. Chan deliver to airG the entirety of the emails associated with Mr. Chan's airG Account and other electronic of paper copies or USB hard drives generated or received by Mr. Chan during his employment with airG. Mr. Chan tendered an affidavit in which he verified that in March 2021 he delivered several USB drives containing various backups from his airG Account to Mr. Yen. He also confirmed he did not have any further airG Account-related documents in his possession or control. In December 2022, plaintiffs' counsel forwarded a copy of Mr. Chan's backups to counsel for airG, who agreed this adequately addressed items 1 and 2 of the relief sought in the application.
- [3] Counsel for airG advised that the relief still being sought had been narrowed to focus on emails from Mr. Chan's Gmail Account, including those relating to airG and two of Mr. Yen's other ventures, called "Canfleet" and "Studypug", and email communications exchanged between Mr. Chan and Mr. Yen generally.
- [4] The defendants Mr. Ghahramani and 0751846 B.C. Ltd. ("Ghahramani Co") support the application.
- [5] The plaintiffs Mr. Yen and 0756383 B.C. Ltd. ("Yen Co") oppose all of the relief sought against them under item 3, on the basis that airG failed to make a pre-application written demand for additional documents under Rule 7-1(10) and (11) and failed to identify the documents and classes of documents that are being sought with reasonable specificity.
- [6] Mr. Chan opposes all of the relief sought against him under item 4, on the basis that he has already provided all of the airG Account backups he had plus he provided Mr. Yen a sizable collection emails from his Gmail Account. He has also tendered evidence regarding his pre-litigation deletion of emails. The remaining demands are unduly vague, broad and amount to a fishing expedition.

Background

- [7] airG is in the business of creating and selling mobile software, including mobile social entertainment content including games, chat and advertising, as well as mobile billing systems. It was founded in 2000 by Mr. Yen, Mr. Ghahramani and Bryce Pasechnik. Mr. Pasechnik's interest was bought out in 2005. The company is successful and has grown substantially over the years.

- [8] Mr. Yen alleges he and Mr. Ghahramani made a series of agreements over the years which included that their respective share ownership in the company would remain equal and providing for base salaries and division of profits between them. They each created a "sidecar company" through which they billed airG and its subsidiaries to draw compensation.
- [9] Early on, several angel investors provided financing and received shares. In subsequent years, Mr. Yen and Mr. Ghahramani took steps to buy back some of those shares.
- [10] Mr. Yen alleges that in December 2020 and January 2021, Mr. Ghahramani tried to convince him to pursue further share buybacks from a number of the remaining angel investors before the latter became aware of significant growth in revenue during the previous fiscal year. Mr. Yen says he did not agree to this because he was concerned it would expose airG and them to litigation.
- [11] Mr. Yen says in or about March 2021, Mr. Ghahramani took steps to remove him as a director, terminate his employment and various consulting agreements his side-car company had with airG and its subsidiaries, arranged several share buy-backs for his sole benefit and caused airG to pay him amounts in excess of their agreed compensation structure.
- [12] Later in March 2021, Mr. Ghahramani completed further share buyback transactions. Mr. Yen alleges Mr. Ghahramani created the defendant AirG Employee Share Ownership Plan Ltd. ("AirG Employee") and registered some of those shares in its name. Mr. Yen says it is effectively controlled by Mr. Ghahramani. At the time this action began, airG share distribution included Ghahramani Co holding 48.58%, Yen Co holding 44.37%, AirG Employee holding 2.56% and various others holding the balance of issued airG shares.
- [13] Mr. Yen says on or about May 14, 2021, Mr. Ghahramani caused airG and its subsidiaries to terminate all consulting agreements with his sidecar company, airG Services Inc. ("ASI").

Notice of Civil Claim

- [14] On January 14, 2022, the plaintiffs started this action. Mr. Yen claims against Mr. Ghahramani for breach of various alleged agreements between them. He and Ghahramani Co also make oppression claims.

Response and Counterclaim

- [15] On March 7, 2022, airG. and AirG Employee filed a response to civil claim and airG filed a counterclaim.
- [16] airG alleges Mr. Yen, while a director of airG, surreptitiously misconducted himself and breached fiduciary and statutory duties owed to it between 2009 and 2021, including by devoting significant time to competing ventures while he was a full-time employee of airG and diverting company resources, employees and contractors to them. One was Canfleet

Logistics Ltd. ("Canfleet") starting in about 2009, which Mr. Yen later sold for a profit. The second is Studypug Inc. ("Studypug") and related entities, which started in about 2015. airG says Mr. Yen used company resources, including staff and contractors, to benefit Studypug, he poached a contractor and charged Studypug expenses to airG. One of the staff resources allegedly co-opted was Mr. Chan, who eventually became a Studypug shareholder. It is alleged that Mr. Chan worked for Canfleet and Studypug while employed full-time for airG and/or ASI.

- [17] In the counterclaim, airG seeks a declaration that Mr. Yen breached fiduciary and statutory duties owed to airG, damages for that, an accounting and disgorgement of profits arising from those breaches, a declaration that Mr. Yen breached his employment agreement and damages arising from that, various declarations of unjust enrichment and constructive trust remedies.

Mr. Chan's Involvement

- [18] Mr. Chan is a chartered professional accountant. On July 7, 2008, he entered into a temporary full-time employment agreement with airG as Controller.
- [19] On February 1, 2009, he entered into a regular full-time employment agreement with airG as Finance Manager. That agreement included the following clause:
- 1.2 The Employee will devote his best efforts, expertise and full business time and attention to the Company's business and will not be employed or otherwise perform services for any other company unless approved in writing by the Company.
- [20] On September 24, 2012, Mr. Chan's employment arrangement changed. He entered into an employment agreement with Mr. Yen's sidecar company ASI effective October 1, 2012. This was a regular full-time position as Director, Finance reporting to Mr. Yen. His salary was \$157,688 per annum.
- [21] At the same time, Mr. Chan entered into an addendum to his airG employment agreement effective September 30, 2012 which reduced the salary he was received from airG to \$1,200 per year. Mr. Chan says this was so he could remain notionally employed by airG and remain eligible to exercise airG share options he had been granted.
- [22] Ms. Taing, airG's Vice President Human Resources has sworn an affidavit disputing Mr. Chan's characterization of his new employment arrangement. She says the restructuring was for tax and other commercial reasons only, but he was still tracked as an employee and senior manager of airG in the company's internal human resource software, she had monthly meetings with him to review performance and track HR issues. He also participated in the employee review process for the employees he managed. He continued to receive various benefits only extended to airG employees, including participation in the company stock option plan, corporate credit card, employee wellness program, employee bonus plan and employee education assistance program.

- [23] On October 1, 2012, airG and ASI entered into a consulting agreement (the "Consulting Agreement") whereby ASI provided financial, administrative, strategy and development services to airG and its affiliates. It also has a non-competition clause.
- [24] At para. 9 of his affidavit #1, Mr. Chan asserts that neither his employment agreement with ASI nor the Consulting Agreement required that he devote the entirety of his working hours with ASI to providing services for airG. It is airG's position that from 2008 until his departure in 2021, Mr. Chan was a full-time employee of airG. I note that Mr. Chan's employment agreement with airG remained in force throughout the time he was also employed via ASI.
- [25] Mr. Chan deposes he used the airG Account for the work he was performing for airG and ASI. From time to time, he asked business contacts relating to the other entities he was working with to correspond with him at his Gmail Account because he wanted those saved separately for administrative purposes. They were unrelated to his work for airG and ASI.
- [26] airG's affidavit material attaches an email Mr. Chan sent to representatives of HSBC, copied to Mr. Yen's private email, dated August 29, 2017, regarding Studypug group. airG also had a banking relationship with HSBC and Mr. Chan dealt with it in the course of his duties for airG as well. The email included the following:

Thanks for giving me a call today. As promised, here is my contact information (chan.lum@gmail.com; [number redacted]) for the studypug group of companies which I help manage and am a signatory.

I also want to introduce you to Mr. Vincent Yen who is also a shareholder/ signatory of the studypug group. You can reach him via this email or at [number redacted]. Please also note that Mr. Yen is also a shareholder of airG.

In the meantime, the only thing outstanding for the studypug group is opening up accounts for studypug USA Inc., a Nevada corporation. I followed up with Vivian a couple weeks ago and she said we're waiting for HSBC USA to respond.

Again, please keep all communication for studypug separate from airG. This includes the HSBC USA side of things as airG USA also has accounts with HSBC USA. Thank you and we look forward to working with you.

Regards,

Lum

- [27] Also included is a second email dated October 10, 2017 from Mr. Chan to representatives of HSBC. Mr. Chan was introducing himself to the new account manager for studypug:

Hi Jordan,

Thanks for your call today.

As discussed, for anything studypug related, please contact me via [number redacted] or this email (chan.lum@gmail.com).

Please do not send (or make mention of) studypug information via my airG contact (lumc@airg.com) / [number redacted].

I have cc'd Vincent Yen who is also a shareholder/signatory of the studypug group. You can reach him via this email or at [number redacted]. Please note that Mr. Yen is also a shareholder of airG.

Thanks,

Lum

Deletion of Emails

- [28] Deletion of emails in Mr. Chan's airG Account and Gmail Account is a significant issue in this case.
- [29] Mr. Chan says airG's IT department told him that his airG Account had a storage capacity of 5-10 gigabytes and that if the maximum was surpassed, the Microsoft Exchange application would crash. As his airG Account approached maximum capacity, he received automated emails warning that his mailbox was becoming too full and suggesting that he delete items. In response to this he initially started deleting larger emails from his mailbox. This was time-consuming and inefficient. The IT department later showed him how to pull emails and back them up onto a USB drive.
- [30] Tony Yip, airG's Director of IT Operations, tendered an affidavit stating that despite the automated warning that Mr. Chan received, his airG Account actually had unlimited storage size at all material times. On October 4, 2017, he made Mr. Chan aware of this feature. Mr. Chan indicated at the time that he had archived his 2014 and 2015 earlier in the year.
- [31] Mr. Chan says prior to Mr. Yen's removal as a director of airG, Mr. Yen asked him for the USB drives with email back-ups from his airG Account. He gave the drives to Mr. Yen.
- [32] On May 14, 2021, airG gave ASI notice it was terminating the Consulting Agreement effective August 16, 2021. Mr. Chan's employment with airG ended on August 27, 2021, at which time he received an Exit Letter from the company. It required him to attest that he did not have in his possession or control any records or documents relating to airG. In order to comply with this directive, he says he reviewed and deleted airG emails from his Gmail Account, beginning with the most recent. As he reached December 2020, he realized it would take considerable effort to individually review and delete emails going back to 2008. He decided instead to mass-delete all emails in his Gmail Account from December 2020 backwards.

- [33] Ms. Taing conducted an exit interview with Mr. Chan on August 27, 2021. She says he told her he did not have any digital or working files, email backups, external hard drives or USBs to return to airG. He did not inform her that he had provided USB drives to Mr. Yen. She says he told her he had not used USB drives to backup his work. She also says she had a telephone call with him on October 26, 2021, during which she again asked if he had an external hard drive and he said again it did not exist.
- [34] Mr. Chan says Mr. Yen later asked him for Gmail Account emails. He selectively deleted some of his personal emails between January 2021 and August 27, 2021 before sending the remainder to Mr. Yen. A paralegal with plaintiffs' counsel states that after de-duplication, there are about 1,988 documents of which the plaintiffs have listed 22 in this action.
- [35] Mr. Chan says after August 27, 2021, he continued to use the Gmail Account for personal matters. He says to the best of his knowledge, he does not have any other electronic or paper documents associated with airG in his possession or saved in any other email account that he controls. He does not discount the possibility that in future a few paper documents might turn up.

Return of airG Account Backups

- [36] On November 25, 2022, airG filed this application.
- [37] On December 15, 2022, plaintiffs' counsel wrote to airG counsel advising that prior to receiving this application, their clients were not aware that airG did not have possession of Mr. Chan's airG Account emails. They said they would send along via secure server all airG Account emails in the plaintiffs' power, possession and control. In argument, counsel indicated this included all of the email backups Mr. Yen received from the USB drives. A paralegal with plaintiffs' counsel states that after de-duplication, this comprises about 492,687 documents, of which the plaintiffs have listed 623 in this action.
- [38] On December 20, 2022, airG counsel asserted that the USB drives were also airG's property and demanded that they be turned over.
- [39] Mr. Yen has tendered sworn evidence that in early March 2021 he asked Mr. Chan to provide him with copies of the airG Account emails. He does not recall how many USB drives he received from Mr. Chan at the time, but he subsequently downloaded their contents onto his personal computer and merged these into a single folder. He later provided all of these to his counsel in ".pst" format. He now says he has not been able to locate the USB drives. Given his general practice of periodically wiping the contents of hard drives in his possession to limit security risks like data leakage, it is likely that even if he is eventually able to locate them, they will be empty.

Additional Documents from Plaintiffs - Rule 7-1(10), (11), (13), (14)

Position of the Parties

- [40] The plaintiffs and defendants by counterclaim say airG's application has a fatal deficiency, in that airG failed to comply with the mandatory requirement of making a written demand which identifies the additional documents or classes of documents sought with reasonable specificity and which provides a reason why the additional documents or classes of documents should be disclosed. Thereafter, the other side has 35 days to provide a written response. That process did not occur here.
- [41] airG argues that it has effectively complied with the requirement for a written demand for additional documents, including by making several demands for production of emails and other documents and through an email exchange in mid-October 2022 which includes airG counsel providing a draft of the order that would be sought on this application. This was followed by back and forth between counsel regarding certain email deletions and what emails were available. This is the process that the rules intend occur in advance of a contested application.

Legal Basis

- [42] "Tier one" document discovery under Rule 7-1(1)(a)(i) requires parties to list all documents that are or have been in their possession and control that could, if available be used by any party of record at trial to prove or disprove a material fact.

List of documents

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
- (a) prepare a list of documents in Form 22 that lists
- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
- (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.
- [43] In *Biehl v. Strang*, 2010 BCSC 1391 at para. 29, Justice Punnnett stated that this includes not only documents that prove or disprove a material fact, but also documents that can assist in doing so.

29 I am satisfied that, if otherwise admissible, the requested production is relevant and could prove or disprove a material fact. Rule 7-1 does not restrict production to documents that in themselves prove a material fact. It includes evidence that can assist in proving or disproving a material fact.

[44] In *Imperial Parking Canada Corporation v. Anderson*, 2014 BCSC 989 at paras. 19-22, Justice Kent summarized the tier 1 standard, as follows:

19 The first tier of document discovery applies the "probative of material facts" test. It is much more narrow than any *Peruvian Guano* "direct/indirect, relating to matters in question/train of inquiry possibility" test.

20 The concept of "material facts" requires a careful analysis and understanding of the causes of action/defence in each case. Each cause of action, whether it is negligence, breach of contract, conspiracy or simple debt, is broken down into constituent elements i.e. the components that must be established on the evidence in order to make out the cause of action/defence. The factual underpinnings of these elements are the "material facts" and to the extent that they can be proved/disproved by way of documents, the latter are the documents that must be initially disclosed under Rule 7-1(1).

21 Under the new rules, plaintiffs and defendants must plead the "material facts". Part 1 of the notice of civil claim requires the plaintiff to "set out a concise statement of the material facts giving rise to the plaintiffs claim". A defendant's response to civil claim must admit, deny or disclaim knowledge of those facts, must set out the defendant's own version of the facts including any additional "material facts relevant to the matters raised".

22 Hence, reference to the facts that have been specifically pleaded in the pleadings can assist in determining what are the "material facts" in relation to which document discovery must occur. If the pleadings are poorly drafted or otherwise inadequate, careful analysis of the material elements of the cause of action sought to be pleaded will be required to "inform" the proper document discovery process.

[45] "Tier two" document discovery has two variations.

[46] Sub-rule (10) sets out a process through which a party who believes a list of documents they have received omits documents or a class of documents that should have been disclosed under the sub-rule (1) standard to amend their list accordingly.

Party may demand documents required under this rule

(10) If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to

- (a) amend the list of documents,
- (b) serve on the demanding party the amended list of documents, and
- (c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[47] Sub-rule (11) sets out a process through which a party who has received a list of documents and who believes the list should include documents or classes of documents that are within the opposing party's possession, power or control that relate to any or all matters in question in the action and which are in addition to tier one documents under sub-rule (1):

Party may demand additional documents

(11) If a party who has received a list of documents believes that the list should include documents or classes of documents that

- (a) are within the listing party's possession, power or control,
- (b) relate to any or all matters in question in the action, and
- (c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),

the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to

- (d) amend the list of documents,
- (e) serve on the demanding party the amended list of documents, and
- (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[48] In *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633 at para. 28, Master Muir noted that the applicant must demonstrate a connection between the documents sought and the issues beyond a mere possibility; there must be some air of reality between the documents and the issues in the action.

28 As such, Whitefox must demonstrate a connection between the documents sought and the issues beyond a "mere possibility", see *Przybysz v. Crowe*, 2011 BCSC 731 at para. 45, referencing *Gorse v. Straker*, 2010 BCSC 119 at para. 53. As held by Master Bouck in *Edwards v. Ganzer*, 2012 BCSC 138, at para. 51, "there must be some "air of reality" between the documents and the issues in the action ..."

[49] In *Mann v. Jagpal*, 2020 BCSC 1919, Justice Giaschi summarizes the proper process for requesting additional documents:

39 The rules have a clearly defined procedure to obtain additional documentary discovery from a party. The procedure is for the party demanding additional discovery to make a demand in writing under Rule 7-1(10) if the party believes first tier documents have not been produced or Rule 7-1 (11) if the party wishes production of documents relating to a question in the action (the broader Peruvian Guano test). The party from whom the additional disclosure is requested then has 35 days to comply with the demand. Pursuant to Rule 7-1(13), an application may only be

brought if the demand is not complied with.

40 I note that Rule 7-1(14) gives the court discretion to waive the requirement for a prior written demand under Rules 7-1(10) and (11), however, no such application was made by Manreet and, in any event, the court should be cautious and reluctant to waive the demand requirement.

41 The requirement for a prior written demand in Rules 7-1(10) and (11) is not optional and failure to comply will not be readily forgiven. (See *Lit v Hare*, 2012 BCSC 1918, at para. 65) As was noted by Master Keighley, a purpose of the prior demand is to prevent unnecessary applications to the court relating to document production. A prior demand allows the parties to address the document disclosure issues, hopefully, without the expense and delay of an application. This process furthers the object of the Rules, as described in Rule 1-3, to secure the just, speedy and inexpensive determination of the proceeding on the merits.

Analysis

[50] I have reluctantly concluded that airG has not adequately complied with the mandatory pre-application process for requesting production of additional documents.

[51] The relief sought in part 1, para. 3 of the application is exceptionally broad. airG seeks an order that the plaintiffs review the entirety of the documents in their power, possession or control associated with the airG Account, the Gmail Account and any other email account which Mr. Chan used to communicate with Mr. Yen or other representatives of the defendants by counterclaim or other electronic or paper documents generated or received by Mr. Chan which relate to matters in question in this action, list those and make them available for inspection. This request may have been narrowed somewhat in the wake of Mr. Chan's backups from his airG Account being provided to airG, but the balance of the demand remains unduly vague and broad.

[52] Counsel for airG did not direct me to anything that I consider to be a reasonably clear demand for additional production of specific documents or classes of documents under rule 7-1 (10) or (11). To the extent that this is intended as a demand under sub-rule (11), I am also concerned the classes of documents sought have not been identified with reasonable specificity and no clear pre-application reason was offered for why such additional documents or classes of documents should be disclosed. There was undoubtedly considerable refinement and analysis offered in the course of argument before me, but there is no indication that this rationale for the various requests had been communicated in a pre-application demand. A blunt demand for all emails has the appearance of a fishing expedition.

[53] I dismiss the application for the relief set out in item 3, but with liberty to re-apply after a written demand has been made in accordance with the requirements set out in sub-rules (10) and/or (11).

Production from Non-Party - Rule 7-1(18)

Position of the Parties

- [54] airG characterized Mr. Chan as "a non-party in name only". It says he is a central figure in Mr. Yen's misconduct as described in the response to civil claim and counterclaim. He is referred to by name in the pleadings. He is alleged to have been involved in (or the subject of) misappropriation of airG resources and is a Studypug shareholder. Counsel says the evidence establishes that Mr. Yen and Mr. Chan engaged in a practice of deleting emails and suggest this is the lens through which airG's application ought to be considered.
- [55] Counsel notes that Mr. Chan's affidavit evidence focuses on airG and fails to address Canfleet and Studypug related emails and other documents. They say there are remarkably few emails between Mr. Chan and Mr. Yen produced thus far considering their lengthy and close involvement with these other ventures. They suggest Mr. Chan's response at his exit interview, while technically accurate, was misleading by omission based on his failure to disclose having given the USB drives to Mr. Yen. There is clear evidence of subterfuge on his part.
- [56] In argument, the specific categories of documents sought were particularized as including communications between Mr. Chan and Mr. Yen in advance of the action being commenced. They note that Mr. Yen asked detailed questions about airG's financial affairs at the 2022 AGM, which indicated he had received information after he was removed as a director. They have tendered evidence showing Mr. Chan used his Gmail Account for Studypug but he did not address that at all in his affidavit. They suggest he has been selective regarding his willingness to curate his emails, noting he collected about 1,988 emails from his Gmail Account for Mr. Yen, while refusing to do likewise in response to this application. They also tendered evidence showing Mr. Chan had used airG's document scanner in August 2021.
- [57] Mr. Chan's counsel denies there is evidence of anything nefarious concerning his client's handling of emails. Mr. Chan explains how his practice of initially deleting and later backing up airG Account emails came about and notes this took place years prior to this litigation. He provided reasonable explanations for his decision to segregate airG emails from those relating to other ventures he was working on. His decision to bulk-delete Gmail Account emails up to December 2020 was a reasonable response to the exit interview requirement that he give assurances he had not airG documents. He had also provided all of his backups to Mr. Yen in March 2021.
- [58] Counsel also argues that provision of airG financial information to Mr. Yen cannot possibly be controversial because Mr. Yen was both an airG shareholder and a principal of ASI, which was still providing financial and administrative services to airG until the Consulting Agreement terminated in late August 2021. With regard to his Gmail Account emails between January 2021 and August 27, 2021, he voluntarily produced those to Mr. Yen. With regard to his use of the airG scanner, that involved documents relating to his employment with airG and ASI. Counsel says there is simply no evidence of questionable conduct on Mr. Chan's part.

[59] With regard to the request for Mr. Chan to produce additional documents, he says that the demand lacks specificity, is overly broad and what he does have has already been provided to plaintiffs' counsel and/or he has tendered sworn evidence indicating he no longer has them in his possession or control.

Legal Basis

[60] Rule 7-1(18) provides:

Documents not in possession of party

(18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:

- (a) production, inspection and copying of the document;
- (b) preparation of a certified copy that may be used instead of the original.

[61] In *Kaladjian v. Jose*, 2012 BCSC 357 at para. 53, Justice Davies commented that sub-rule (18) should be interpreted in a manner consistent with sub-rules (10) to (14):

53 I find that Rule 7-1(18) should be substantively and procedurally interpreted and applied in a way that is consistent with the interpretation and application of Rules 7-1(10) to (14) with necessary modification to ensure protection of the independent interests of third parties whose records are sought.

[62] In *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673 at paras. 78-81, Justice G.C. Weatherill set out the proper approach to interpreting sub-rule (18):

78 Although Davies J. concluded at para. 53 that Rule 7-1(18) should be "substantively and procedurally interpreted and applied in a way that is consistent with the interpretation and application of Rules 7-1(10) to (14)", he also concluded that, with respect to Rule 7-1(18), there should be "necessary modification to ensure protection of the independent interests of third parties whose records are sought".

79 That "necessary modification" includes a requirement that the applicant provide some evidence to support an application for documents from a non-party (see *Kaladjian*, para. 62) in order to prevent against "unwarranted "fishing expeditions" based solely upon pro forma pleadings" (see *Kaladjian*, para. 64).

80 The phrase "fishing expedition" perfectly describes the plaintiffs' application in this case. Although Ms. Tegart deposed that she has spoken to various of her constituents about the project, other than the specific documents that have been identified, there is no evidence that the requested documents even exist, let alone are in the possession or control of the appellants. With respect to those unidentified documents, in my view, the application is based upon the Peruvian Guano "train of inquiry" test that is no longer applicable under Rule 7-1(1).

81 It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access specific documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action.

[63] In *Mann v. Jagpal*, 2020 BCSC 1919 at paras. 48-49, Justice Giaschi also emphasized that sub-rule (18) is not intended to provide broad discovery of documents from non-parties and that a higher level of specificity is required when seeking documents from them. At para. 48, he sets out one of the reasons for this narrower interpretation:

48 It is to be noted that this rule refers to "a document" and "the document". The use of these terms is suggestive of a higher level of specificity than is required when seeking documents from a party. This was recognized by Smith J. in *Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd.*, 2007 BCSC 939, at para. 9:

[9] It is significant that Rule 26(1) refers to "all documents", while Rule 26(11) refers to "a document." Parties are expected to know the pleadings and the issues in the litigation and to make a thorough review of their documents in order to provide discovery of all relevant material. A stranger to the litigation has no such knowledge or obligation. It is up to the party seeking production to identify the specific document or documents being sought.

[64] There is no requirement that a party exhaust procedures related to discovery of documents prior to bringing an application under sub-rule (18). See *Belitchev v. Grigorov*, [1998] B.C.J. No. 1967 at para. 15

Analysis

[65] The relief sought in part 1, para. 4 of the application is framed in exceptionally broad terms. airG seeks an order that Mr. Chan review the entirety of the documents in his power, possession or control associated with the airG Account, the Gmail Account and any other email account which Mr. Chan used to communicate with Mr. Yen or other representatives of the defendants by counterclaim or other electronic or paper documents generated or received by Mr. Chan which relate to matters in question in this action and list those and make them available for inspection.

[66] During submissions, airG's counsel indicated this was now being narrowed to exclude Mr. Chan's backups of his airG Account emails, which had recently been provided in their entirety via counsel for Mr. Yen. They also suggested the scope of the remaining request was effectively narrowed based on Mr. Chan's evidence that he had bulk-deleted his Gmail Account emails up to December 2020.

- [67] In my view, the form of this demand is still unacceptably broad, keeping in mind that it is directed towards a non-party. It would require Mr. Chan to review broadly framed categories of documents, including ones not only in his possession or control but also in his power. It would also require him to review and analyze the pleadings so he can assess whether each document he reviews relates to matters in question in the action. It also appears to seek apply a very broad "Peruvian Guano" standard of relevance to this review.
- [68] It appears that airG seeks to impose on a non-party a proactive discovery burden which is consistent with what one might expect of a party to the action. Counsel did not refer me to any authority for the proposition that a higher standard of production can or should be imposed on a non-party based on allegations that they participated in alleged misconduct which underlies the litigation. As noted in *Northwest Organics*, sub-rule (18) permits access to specific documents or classes of documents when it has been demonstrated they are in the possession or control of a non-party and are relevant to an action. The demand in this instance is not specific.
- [69] I dismiss the application for the relief set out in item 4, but with liberty to re-apply based on request for specific documents or classes of documents as contemplated in the authorities interpreting sub-rule (18).

Conclusion

- [70] The application in item 3 of the application that the plaintiffs produce additional documents is dismissed, with liberty to re-apply after a written demand has been made in accordance with the requirements set out in rule 7-1(10) and/or (11). The application in item 4 relating to documents from Mr. Chan is dismissed, with liberty to re-apply based on request for specific documents or classes of documents as set out in the authorities interpreting sub-rule (18).

Costs

- [71] The plaintiffs and defendants by counterclaim have been successful and are entitled to costs of this application from airG. Mr. Chan has been successful and is entitled to costs of this application from airG. Since he is not a party, his costs are assessable and payable forthwith.

"Master Bilawich"

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