

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tophay Leo Farms Ltd. v. Wu*,
2023 BCSC 992

Date: 20230609
Docket: S196113
Registry: Vancouver

Between:

Tophay Leo Farms Ltd. and Tophay Agri-Industries Inc.

Plaintiffs

And

**Judd Ying Yu Wu, Jessica Ju Ying Wu, Alfalfa Holdings Ltd.,
Shanghai Topfor Logistics International Co. Ltd.,
Topfor Logistics (Canada) Inc., Topfor Logistics International Limited,
Polar Construction Ltd., and Marshall Schneider**

Defendants

-and-

Docket: S1911050
Registry: Vancouver

Between:

**Judd Ying Yu Wu, Jessica Ju Ying Wu and
Alfalfa Holdings Ltd.**

Plaintiffs

And

**Tophay Leo Farms Ltd., Tophay Agri-Industries Inc., Topagri Holdings Ltd.,
Dingli Investment Co., Ltd., Prospring Holdings (Canada) Ltd.,
Fishlee Investments Ltd., Donghwa Enterprises Limited, Hong Liang
Investment Ltd., Landy North American Investment Company Ltd.,
Jade Paramount Holdings Ltd., Yi Ding, Cheng Ming He, Fei Xu, Dong Chen,
Yi Hong Guan, San Yin Yang, Roger Xue Jiang Ding and Yu Feng Lu**

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.
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April 3 and May 15, 2023

Place and Date of Judgment:

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Introduction

[1] These are my reasons for judgment in respect of three applications brought in two related actions. The trial of these actions, which are to be heard together, is set for September 2023.

[2] The first action (the “Tophay Action”) was commenced on May 27, 2019, by the plaintiffs, Tophay Leo Farms Ltd. (“Tophay Leo”), and its subsidiary, Tophay Agri-Industries Inc. (“Tophay Agri”) (collectively, “Tophay”) against the defendants, Judd Wu, his wife, Jessica Wu (together, the “Wu’s”), and their holding company, Alfalfa Holdings Ltd. (collectively, the “Wu Parties”) and various logistics companies in which Judd Wu has a one-third interest, including Shanghai Topfor Logistics International Co. Ltd., Topfor Logistics (Canada) Inc., and Topfor Logistics International Limited (collectively, “Topfor”).

[3] Tophay is in the business of farming, harvesting, compressing, and processing of hay for export and was established by Judd Wu and the defendant, Yi Ding, in 2012. The capital was provided by Judd Wu and Yi Ding, with each contributing shareholder loans of USD 1.55 Million.

[4] The Wu’s were involved in the management of Tophay until they were removed from their roles in the fall of 2018 and at or around the same time, Topfor was terminated as Tophay’s logistics services provider. In the summer of 2019, the Wu’s shares in Tophay Leo, which were held through Alfalfa Holdings Ltd. (“Alfalfa”), were redeemed for \$0.42.

[5] Tophay seeks damages against Judd Wu for alleged breaches of fiduciary, statutory, and common law duties owing to Tophay, both in his capacity as its director and officer and pursuant to the terms of a shareholders’ agreement. Tophay seeks damages against Jessica Wu and Topfor for knowing assistance and or participation in Judd Wu’s alleged breaches.

[6] The second action (the “Wu Action”) was commenced by the Wu Parties on October 1, 2019, against a number of defendants, including Yi Ding and Tophay,

alleging that the affairs of Tophay in which they have an interest have been exercised in an oppressive manner. The Wu Parties seek orders including an order for purchase of Alfalfa's shares in Tophay for fair market value, and a declaration and directions concerning liquidation of Tophay.

[7] In their application in the Tophay Action, the Wu Parties and Topfor seek an order that Tophay and other plaintiffs prepare and serve an amended list of documents, including listing documents in a number of categories of records which they say are relevant to the claims against them. In their application in the Wu Action, the Wu Parties seek similar relief against Tophay and other defendants.

[8] In their application in the Wu Action, Tophay seeks an order severing the relief in which the Wu's seek orders for the purchase of all Alfalfa's shares in Tophay for their fair market value and directions for the valuation of the shares. Tophay also seeks an order postponing discovery of any financial records for the period after February 28, 2019, until after the oppression remedy claim has been decided by this Court. I will explain the relevance of the February 2019 date later in my reasons.

Background

[9] A more detailed history of the relationship between the parties which gives rise to these applications is set out below.

[10] In 2012, Judd Wu and Yi Ding incorporated Tophay Agri with the objective of growing and processing hay for export to China. Judd Wu was appointed and remained Tophay Agri's sole director until May 28, 2018.

[11] Tophay Agri purchased a 76-acre farm in Vanderhoof, B.C., to which various improvements were made to facilitate hay production and export. The Wu's moved to Vanderhoof and purchased a home. Judd Wu managed the day-to-day business and Jessica Wu provided bookkeeping and office administration services.

[12] In order to market hay in China and elsewhere, Judd Wu and Yi Ding established a company in China, Xiamen Tophay Import and Export Company

(“Tophay China”), which was managed by Yi Ding. Initially, Judd Wu and Yi Ding were the only shareholders of Tophay China.

[13] Yi Ding and his cousin, Fei Xu, incorporated Tophay Leo and purchased 3,000 acres of farmland in the Vanderhoof area to grow hay.

[14] In 2013, Fei Xu provided a loan of USD \$1.55 Million to Tophay Agri and became its third shareholder.

[15] Hay shipments from Vanderhoof to China began in 2013 with logistics handled by a company partially owned by Judd Wu, Shanghai Topfor Logistics International Co. Ltd. (“Topfor China”).

[16] In 2015, Judd Wu and Yi Ding decided to expand the hay export business of Tophay Agri and Tophay Leo by purchasing approximately 8,000 acres of farmland in the Vanderhoof area for approximately \$11 Million. Yi Ding recruited other shareholders who partially funded the purchase of the additional land by way of shareholder loans to Tophay Leo, which held the lands. Additional funding was obtained through a loan from Bank of Montreal of approximately \$10.5 Million, \$4 Million of which was jointly guaranteed by Judd Wu and Yi Ding. These lands were then leased to Tophay Agri, which hired Marshall Schneider’s company, Polar Construction Ltd., to erect facilities, purchase equipment, and improve these lands.

[17] Judd Wu, Yi Ding, and Fei Xu exchanged their shares in and shareholder loans to Tophay Agri for shares in and shareholder loans to Tophay Leo and Tophay Agri then became a wholly-owned subsidiary of Tophay Leo. In the process of this restructuring, Judd Wu put his shares (totalling approximately 9% of issued shares) and shareholder loans (of USD \$1.52 Million as of February 28, 2019) in the name of Alfalfa.

[18] A shareholders’ agreement made January 1, 2016 (the “Shareholders’ Agreement”), provided that Judd Wu and Yi Ding would be two of the three directors of Tophay Leo unless they became permanently disabled. The Shareholders’

Agreement also provided that a majority of the directors were required to approve expenditures or a series of related expenditures in excess of \$30,000 per year.

[19] Cheng Ming He was appointed as the third director of Tophay Leo on September 25, 2016. The Shareholders' Agreement was amended on January 1, 2017.

[20] On or about April 17, 2017, Tophay Agri entered into a joint venture agreement with a US company operating in Idaho, Driscoll Brands, LLC ("Driscoll") for the growing and acquisition of hay in the US for export to China and other countries. The joint venture operated through a company called Driscoll Tophay LLC (the "Driscoll JV"). Hay grown by Driscoll and purchased from other growers in the US was to be delivered to the Driscoll JV and then sold by Tophay Agri to Tophay China, which was responsible for sales to purchasers. Logistics for the shipping and transportation of hay for export was to be handled by Topfor China. Topfor China arranged for the incorporation of Topfor Logistics (Canada) Inc. to deal with logistics for the Driscoll JV.

[21] Mr. Schneider was appointed as Tophay Agri's representative and moved to Idaho to manage its interests. He received \$63,000 to assist him in purchasing a home in Idaho and it is alleged that Judd Wu did not properly document this transaction. Mr. Schneider was fired on September 12, 2018.

[22] In March 2018, an attempt was made to remove the Wu's and Topfor from their roles in the hay export business. At a shareholders meeting on March 14, 2018, a resolution was passed that Yi Ding be put in charge of the operations of Tophay Agri and the Driscoll JV, that the employment of the Wu's be terminated, and that Topfor would no longer provide logistics for the Driscoll JV (the "March 2018 Shareholders Resolutions"). Yi Ding brought in new employees to handle logistics in place of Topfor and travelled to Vanderhoof and advised the employees of Tophay Agri that Judd Wu no longer had any management responsibilities.

[23] As a result of concerns expressed by Driscoll regarding the removal of Topfor as logistics service provider, the decision to remove the Wu's from their roles and Topfor as logistics service provider was unwound. On May 20, 2018, Yi Ding travelled to Vanderhoof and offered the Wu's \$200,000 worth of shares in Tophay Leo as compensation for distress and embarrassment caused by the March 2018 Shareholders Resolutions. At a shareholders meeting on May 22, 2018, Yi Ding and other shareholders of Tophay Leo apologized to the Wu's. In addition, the shareholders of Tophay Leo passed a resolution making Yi Ding and Cheng Ming He directors of Tophay Agri. Before this date, Judd Wu had been the only director of Tophay Agri. The shareholders decided that Topfor would continue to provide logistics services for the Driscoll JV but not for the Vanderhoof business.

[24] In August 2018, Judd Wu received notice from a US company complaining of actions taken to register trade names and logos in China belonging to several US Companies. Subsequently, hay export groups in the US sent a demand to the Driscoll JV and Tophay Agri to cease these registration efforts, which were made under the names of Tophay China and a company called Tianjin Cao Sijie Trade Co. Ltd. Judd Wu asked Yi Ding and Cheng Ming He to investigate the alleged appropriation of trademarks, which they refused to do. It is alleged that Yi Ding was involved with efforts to fraudulently register trade names in China. After a threat of legal action, Yi Ding transferred the registrations in China to a number of the complaining companies.

[25] It is alleged that a takeover of sorts of the boards of Tophay Leo occurred on September 5, 2018. A special shareholders meeting was called by Yi Ding, allegedly without the authority of the board of Tophay Leo. At this meeting, a resolution was passed removing Cheng Ming He as a director of Tophay Leo and replacing him with Dong Chen. The reconstituted Tophay Leo board then passed a resolution removing Judd Wu and Cheng Ming He as directors of Tophay Agri and the reconstituted Tophay Agri board then authorized an audit investigation into financial and accounting management by Judd Wu. In addition, on September 5, 2018, resolutions were passed terminating the employment of the Wu's. The termination

letters and instructions to change the locks on Tophay's Vanderhoof premises were prepared the day before.

[26] Upon the Wu's being ousted from Tophay, Topfor was terminated as the logistics services provider for the Driscoll JV.

[27] On September 18, 2018, Tophay Agri hired MNP LLP ("MNP") to perform an audit and an initial report was delivered on December 4, 2018 (the "MNP Audit Report"), setting out concerns with respect to 210 transactions for which MNP was unable to vouch for source documents. In its report, MNP raised additional concerns regarding approvals for capital expenditures, some questionable invoices and transactions and an undocumented loan agreement, including a possible \$350,000 loan to Judd Wu from Tophay Agri.

[28] On February 8, 2019, a meeting of the directors of Tophay Leo was convened pursuant to a notice issued by Yi Ding on February 4, 2019. Judd Wu had responded to the notice indicating that he was not available. At this meeting, which was attended by Yi Ding and Dong Chen, it was resolved to hold a special meeting of Tophay Leo and a related holding company on February 28, 2019, to consider removing Judd Wu as a director and to amend the shareholders rights to allow the companies to redeem shares of any shareholder at any price as they might decide. These resolutions were passed at the special meeting held on February 28, 2019. The Wu Parties contend that Yi Ding relied on the MNP Audit Report at this meeting—although a copy was not provided to Judd Wu at that time.

[29] The Tophay Action was commenced on May 27, 2019, which included the following allegations:

- 1) that Judd Wu had caused Topfor to overcharge for logistics services, obtained kickbacks, failed to maintain proper accounting records, caused unauthorized payments to be made and engaged in related party transactions, caused the improper repayment a \$350,000 to him; and

- 2) that the Wu Parties used Tophay's Vanderhoof office for their own business, failed to maintain hay inventory records, failed to maintain adequate insurance and charged personal expenses to Tophay.

[30] On July 19, 2019, Tophay Leo, pursuant to a resolution passed by Yi Ding and Dong Chen, resolved to redeem Alfalfa's shares in Tophay Leo for \$0.42, effective August 19, 2019. Tophay Leo did not repay Alfalfa's shareholder loan of approximately \$1.5 Million. Alfalfa rejected the payments and demanded an accounting or valuation for its shares.

[31] The Wu Parties commenced the Wu Action on October 1, 2019, which includes pleadings for wrongful means conspiracy led by Yi Ding, wrongful dismissal from the Wu's employment with Tophay, and claims for shareholder oppression.

[32] On June 2, 2020, Tophay served a list of documents, which listed the MNP Audit Report and a valuation reported dated July 15, 2019, valuing the enterprise value of Tophay Leo as at February 28, 2019 at nil (the "Valuation Report"). The Wu Parties contend that the Valuation Report appears to constitute the basis of the resolution authorizing the purchase of Alfalfa's shares in Tophay Leo for \$0.42.

[33] Following these events, a long series of document requests and partial responses were exchanged between the parties. The Wu Parties and Topfor take the position that Topfor has failed to provide substantive responses to their various document demands.

The Document List Applications

[34] In separate applications, the Wu Parties and Topfor seek orders that Tophay prepare and serve an amended list of documents, including listing documents in a number of categories of records.

[35] The document list applications are brought pursuant to Rule 7-1(1) of the *Supreme Court Civil Rules* which provides that within 35 days after the end of the pleading period, a party must prepare a list, under subsection (i), of all documents

that are or have been in the party's possession or control that could, if available, be used to prove or disprove a material fact; and, under subsection (ii), all other documents the party intends to refer to at trial. Rule 7-1(2) provides that the list of documents must include a brief description of each listed document.

[36] Rules 7-1(10) and (11) provide that a party that believes relevant documents have not been listed may issue a written demand requiring an amended list. Rule 7-1(13) allows a party to apply to the Court for production of an amended list of documents. Rule 7-1(14) provides that the Court may excuse a party from, *inter alia*, the requirement to provide an amended list of documents or order production of an amended list.

[37] The test with respect to a party's obligation to list documents under Rule 7-1(1) is one of relevance, not necessity. All relevant documents must be listed and produced: *Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2018 BCSC 897 at para. 89.

[38] A document is relevant if it may assist in proving or disproving a material fact in issue: *Biehl v. Strang*, 2010 BCSC 1391 at para. 16.

Position of the Respondents to the Document List Applications

[39] Tophay and the other respondents contend that there has been extensive document production and submit that listing of relevant documents in their possession has already taken place, with the exception of documents it does not wish to disclose at this time, which I will address later in these reasons.

[40] Tophay and the other respondents say that they provided all documents in its possession to MNP, apparently for the purposes of completing the MNP Audit Report and the Valuation Report. They say that these documents, contained in some 15 bankers boxes, and another six boxes comprising the contents of Jessica Wu's filing cabinets at Tophay Agri's Vanderhoof office (for a total of 21 boxes), have now been made available to the Wu Parties and Topfor to review. The Wu Parties and Topfor say that the documents in the 21 boxes were not made available to them to

inspect until approximately January and February 2022, and then on a restricted basis.

[41] Tophay and the other respondent says that the Wu Parties and Topfor have the ability to obtain copies of documents which they consider to be relevant in the file folders located in the boxes. They say that they have listed the file folders within these boxes in their lists of documents, as opposed to listing individual documents which is unreasonably expensive and time consuming.

[42] With the exception of Tophay's financial statements and documents with respect to its shipping costs post-dating February 2019, Tophay and the other respondents say that the Wu Parties and Topfor are demanding that they list documents which do not exist. For example, with respect to requests made that directors and shareholders of Tophay companies provide communications exchanged on various issues, counsel for Tophay and the other respondents say that requests for any such documents have been made and they have produced what they have.

[43] In addition, Tophay and the other respondents say that, in some cases, the Wu Parties and Topfor are seeking disclosure of documents which go well beyond the scope of disclosure required. For example, they say that with respect to the two shipping price comparisons obtained by Yi Ding in 2018 that they have produced relevant documents—and that the communication sought by the Wu Parties and Topfor concerning how Yi Ding obtained these comparisons is irrelevant.

[44] Tophay and the other respondents contend that the Wu Parties' and Topfor's demand for listing of documents concerning shipping costs paid to others after Topfor's removal as logistics service provider is irrelevant on the basis that, for example, shipping costs fluctuate over time. That is, shipping costs after Topfor's removal are not relevant to whether Topfor was overcharging for shipping costs while it provided logistics services to Topfor and the Driscoll JV. In addition, they submit that disclosing shipping costs information to Topfor, a potential competitor in

the hay export business, is prejudicial because this information is confidential and sensitive business information.

[45] Tophay and the other respondents' principle objection to the document applications for financial records for the Tophay companies from December 31, 2018 forward (the "Disputed Records") is that disclosure would be harmful to the Tophay companies, as they say the Disputed Records contain confidential business and financial information. In particular, they allege that Judd Wu is in competition with Tophay in the hay export and sale business. It is for this reason that Tophay, in its application in the Wu Action, seeks to sever the Wu Parties' relief seeking that Tophay purchase all of Alfalfa's shares in Tophay Leo for their fair market value and for directions for the valuation of the shares, as in their view the documents sought will only be relevant if the Wu Parties' oppression remedy claims are successful.

Analysis and Conclusion on Document List Applications

[46] A detailed and lengthy spreadsheet setting out categories of documents which the Wu Parties wish to have listed, some 16 pages long, is attached as Appendix A to their October 15, 2021 notice of application and was updated in or about April 2022. I will not repeat that list in these reasons. An abbreviated summary of the outstanding documents which the Wu Parties and Topfor seek to have listed is as follows:

- a) Communications between directors and shareholders of Tophay in early 2018 or afterwards regarding concerns that Topfor was charging more than market rates for logistics services;
- b) Documents and communications related to demands made to Judd Wu to provide a breakdown of Topfor's logistics services costs and his refusal to provide the same, communication concerning commissioning of shipping price comparisons by Yi Ding, and quotations provided for shipping by Topfor to Yi Ding;

- c) Documents regarding amounts paid by Tophay and the Driscoll JV to Topfor for logistics services from the termination of Topfor as logistics services for these parties until December 31, 2020;
- d) A transcript of a video taken at a meeting of the directors and shareholders of Tophay on September 5, 2018, at which Judd Wu was removed as a director and officer and an audit of Tophay was authorized;
- e) Various documents pertaining to the engagement of MNP in 2018 to conduct an audit of Tophay and communications between directors and shareholders regarding the engagement of MNP to conduct the audit;
- f) Communications between directors and shareholders of Tophay regarding the meeting of the shareholders of Tophay Leo on February 28, 2019, at which Judd Wu was questioned on the MNP Audit Report and removed as a director of Tophay Leo;
- g) Various documents, including invoices, payroll records and government payments, regarding 210 transactions which MNP determined did not have source documents (as is set out in the MNP Audit Report) and communication between Yi Ding and Judd Wu regarding these transactions;
- h) Communications with the Wu's in which a demand for copies of supporting invoices was made in respect of charges by Topfor for logistics services and communication between directors and shareholders on this issue;
- i) Documents and communications with respect to approval policies for expenditures by Tophay;
- j) Communications between directors and shareholders, or external accountants or auditors, regarding an alleged unauthorized repayment

of a shareholder loan of \$350,000 to Judd Wu or other short-term shareholder loans;

- k) Documents or communications concerning alleged breaches by Judd Wu of regulations applicable to the hay export business including communication between directors and shareholders on this issue;
- l) Documents and communications concerning the claim that Topfor charged or obtained kickbacks for the shipment of hay products from British Columbia;
- m) Documents and communication regarding the preparation and maintenance of hay inventory by Tophay including those concerning an alleged reconciliation of hay inventory records;
- n) Documents and communication regarding an alleged secret hay supply agreement between Judd Wu and Black Creek Cattle Company Ltd.;
- o) Documents and communication concerning an alleged failure by the Wu's to obtain appropriate insurance, including those concerning settlement of two insurance claims;
- p) Communications and documents between shareholders and directors concerning the purchase of hay by Tophay from growers in Canada and the US;
- q) Corporate documents for Tophay China;
- r) Documents concerning the corporate reorganization of Tophay Leo including communication between shareholders and directors regarding the reorganization and advice provided by Deloitte in this respect;
- s) Documents and communication regarding the shareholders meeting of Tophay Leo on March 14, 2018, including the resolutions to terminate

the Wu's from Tophay including communication between directors and shareholders;

- t) Communication concerning concerns expressed by Driscoll arising from the termination of logistics services from Topfor;
- u) Any communication between directors and shareholders that the termination of the Wu's in March 2018 was a mistake;
- v) Records and communication between shareholders and directors of Tophay Leo concerning the shareholders meeting on May 22, 2018;
- w) A number of records concerning the alleged attempted misappropriation of various trademarks in China;
- x) Various documents concerning the ultimate decision to remove Judd Wu as a director of Tophay companies and to terminate the Wu's and Topfor without compensation and to amend the articles of Tophay companies to permit the redemption of shares;
- y) Communications and documents regarding the issuance of a notice of a special shareholders meeting to be held on September 5, 2018, and relevant meeting records;
- z) Instructions from counsel for Tophay to bailiffs to change the locks on Tophay premises in Vanderhoof;
- aa) Meeting records in respect of the July 18, 2019, resolution redeeming Alfalfa's shares in Tophay, including communication between directors and shareholders regarding the resolution and the rationale for the redemption amount;
- bb) Meeting records for a meeting of the members of the Driscoll JV on September 7, 2018;

- cc) Meeting records including communications between directors and shareholders concerning a shareholders and directors meeting on December 9, 2017;
- dd) Documents and records regarding the ownership of Tianjin Trade—on the basis that Yi Ding has an interest in this company—and documents regarding Yi Ding’s attempts to register trade names in China;
- ee) Documents and communications concerning the basis for Tophay’s allegations of breaches of duties by Judd Wu and knowing assistance by Jessica Wu and Alfalfa;
- ff) Communications and documents, including communication with MNP concerning the valuation engagement; and
- gg) Financial statements of Tophay companies for the period December 31, 2018 through 2020 and year to date statements for 2022.

[47] I am not satisfied that an order to list certain documents is warranted.

[48] Counsel for Tophay and the other respondents to the document list applications have advised the Court that various communications between directors and shareholders have been requested and are not available. This submission from counsel is to be given weight and is binding upon Tophay. Accordingly, there is no evidence upon which the Court can conclude that such documents still exist and therefore an order to produce them is improper.

[49] I pause to state that when counsel advise the Court that a document request has been passed on to a client and that client has advised that the requested document can not be located, the Court takes such advice at face value. If at a later date the requested documents are obtained, and the requested party seeks to rely on them, the Court may refuse to allow them to do so without a satisfactory explanation as to why they were not produced earlier, in accordance with the rules.

[50] The relevance of documents and communications regarding short term loans by Tophay to Yi Ding or other shareholders or directors of Tophay, excluding Judd Wu, is not clear. There is no pleading regarding such shareholder loans.

[51] The request for documents regarding obligations on the part of Judd Wu to make declarations to tax authorities and T4 reporting requirements are requests for legal requirements and not documents.

[52] With respect to various requests for meeting records for various shareholders' and directors' meetings and communication between shareholders or directors concerning these meetings, Tophay and the other respondents submit that all available documents have been produced. There is no evidence upon which the Court can conclude that such documents still exist and therefore an order to list them is not appropriate.

[53] With respect to the application to list documents supporting the 210 transactions which MNP found were not supported by source documents, the Wu Parties and Topfor contend that they have found some relevant documents in the boxes of documents provided by Tophay to MNP. For this reason, they contend that position taken by Topfor that certain records are not available should not be believed and seek a listing of individual documents.

[54] I am not convinced that an order requiring listing of individual documents within the 21 boxes of documents in Tophay's control is appropriate. As I have already stated Rule 7-1(2) provides that a list of documents must include a brief description of each listed document. Where sufficiently described, listing a folder containing multiple documents is permissible, so long as the nature of documents contained within the folder is apparent: *Homalco Indian Band v. British Columbia*, 56 B.C.L.R. (3d) 114 at paras. 24–25, 1998 CanLII 6574 (S.C.); *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, 1992 CarswellBC 592 at para. 23, 1992 CanLII 2189 (S.C.). I have reviewed the lists of folders included in Tophay's list of documents, which I find to be sufficient.

[55] Further, the Wu Parties and Topfor have been provided access to the documents contained within the 21 boxes of documents, although it would appear very late in this proceeding. Counsel for Tophay advises that Tophay will allow the Wu Parties and Topfor to identify documents they wish to have specifically produced. This Court expects that they will stand by this commitment.

[56] I find that the following documents are relevant and order that they be listed, if they are available:

- a) Voice recording of the March 14, 2018 Tophay shareholders meeting—which Tophay has agreed to produce if they have it;
- b) Communication regarding Yi Ding’s commissioning of two shipping price comparison reports—such documents may assist in determining whether there was a legitimate basis for taking the position that Topfor was overcharging for logistics services;
- c) Documents and communications regarding the shipping costs incurred by Tophay Agri and Driscoll JV after the termination of Topfor’s services in 2018 up to December 31, 2020—such documents may assist in determining whether there was a legitimate basis for taking the position that Topfor was overcharging for logistics services. I am not satisfied that disclosure of shipping cost documents, which are approaching two-and-a-half years old, will be prejudicial to Tophay;
- d) A complete transcript of the video recording of the meeting of the directors of Tophay on September 5, 2018, if a complete transcript exists—which is possible given that a partial transcript has already been produced;
- e) Any documents relevant to damages suffered by Tophay Agri as a result of the alleged investigation or imposition of fines or penalties by the Canada Revenue Agency—such documents may assist in determining whether there was a legitimate basis for termination of the services of the Wu Parties;

- f) The reconciliation and underlying documents concerning the allegations of missing hay—such documents may assist in determining whether there was a legitimate basis for termination of the services of the Wu Parties;
- g) Corporate documents for Tophay China—such documents may assist in determining Yi Ding’s role in Tophay China. The documents are relevant, for example, because of the pleading that there was a conspiracy involving Mr. Ding in cancelling and redeeming Judd Wu’s shares of Tophay China without compensation;
- h) All records relating to the hiring of the two employees hired in or about March 2018, to provide logistics services in place of Topfor—such documents may assist in determining the circumstances of the initial firing and then re-hiring of the Wu Parties;
- i) The May 18, 2018 email from Yi Ding to Driscoll concerning Driscoll’s concerns regarding the termination of Topfor as logistics service provider—such documents may assist in determining the circumstances of the initial termination of Topfor as logistics service provider;
- j) A copy of Yi Ding’s written apology referred to in the minutes of Driscoll JV meeting dated May 25, 2018—such documents may assist in determining the circumstances of the initial firing and then re-hiring of the Wu Parties;
- k) Any documents or communication concerning the decision of the “Other Shareholders” of Tophay Leo in the March 2018 Shareholders Resolutions that removing the Wu’s from their positions, was a mistake—such documents may assist in determining the circumstances of the initial firing and then re-hiring of the Wu Parties;
- l) Documents and communication related to instructions given by counsel to change the locks on the Tophay Agri premises in Vanderhoof, to the extent that such records do not contain information subject to solicitor

client privilege—such documents may assist in determining the circumstances of the initial firing and then re-hiring of the Wu Parties;

- m) Records from the September 7, 2019 meeting between members of the Driscoll JV which relate to the Topfor termination, which Tophay has agreed to produce if they exist; and
- n) Documents and records regarding ownership of and control of Tianjin Trade—which, given the suggestion that Yi Ding may be involved with the company, are relevant to the Wu Parties and Topfor's allegation, which is essentially, that their removal was motivated by Yi Ding's attempt to cover up improper registrations in China.

[57] With respect to the Wu Parties' and Topfor's application that the Disputed Records be listed, I grant this application. These documents may be relevant to assessing the value of the Wu Parties' interest in Tophay at various times, including up to the time of trial, and are therefore relevant to its claim for relief. I will provide my reasons in respect of the Tophay parties severance application and the related application to defer production of certain documents later in my reasons. As a result, the following documents are also to be listed:

- a) Financial statements of Tophay Agri for the years ended December 31, 2018 through 2021, including any partial-year financial statements for 2019 fiscal year and year to date statements for 2022;
- b) Financial statements of Tophay Leo for the years ended December 31, 2018 through 2021, including any partial-year financial statements for 2019 fiscal year and year to date statements for 2022; and

- c) Financial statements of Tophay Holdings Ltd. for the years ended December 31, 2018 through 2021, including any partial-year financial statements for 2019 fiscal year and year to date statements for 2022. ¹

The Severance and Document Production Deferral Applications

[58] Paragraph 162(a) and (b) of the Wu Parties' notice of civil claim in the Wu Action reads as follows:

162. The plaintiffs claim as follows:

(a) a declaration that the affairs of the Tophay Leo, Tophay Agri and Holdings are being or have been conducted, or that the powers of the Directors of Tophay Leo, Tophay Agri and Holdings are being or have been exercised, in a manner oppressive to the plaintiffs and/or the actions of Tophay Leo, Tophay Agri and Holdings, have been done or are about to be done that are unfairly prejudicial to the plaintiffs;

(b) an order that Tophay Leo and Holdings, purchase all of Alfalfa's Shares in these companies for their fair market value and that directions be given for the valuation of the shares;

...

[59] As previously stated, Tophay and the other defendants in the Wu Action seek an order, pursuant to Rule 12-5(67) of the *Supreme Court Civil Rules*, that the relief sought under paragraph 162(b) be severed from the remaining relief and dealt with after the Court has ruled on the merits of the Wu Parties' oppression claims. They contend that this relief is warranted in order to reduce the prejudice to them flowing from the production of financial records for the period after February 28, 2019, which contain current sales revenues, cost of goods sold, and profits or other sensitive and confidential business information or trade secrets.. They contend that prejudice arises because Topfor is a competitor, or potential competitor, involved in the hay export business and therefore disclosure of the Disputed Records may be harmful to their business interests.

¹ I have amended the dates for financial statements set out in the Wu Parties' and Topfor's notices of application to reflect the fact that this application was initially heard in 2022 and did not complete until 2023. If I am incorrect with respect to the dates of relevant financial statements to be listed the parties are at liberty to contact scheduling to set a further brief hearing before me by telephone.

Analysis and Conclusion on the Severance Application

[60] Whether or not to sever part of a trial is within the discretion of this Court and the scope of the Court's discretion must be interpreted in light of the overall object embodied in Rule 1-3 to "secure the just, speedy and inexpensive determination of every proceeding on its merits": *Kitsul v. Slater Vecchio LLP*, 2015 BCSC 1394 at paras. 22–23.

[61] The principles relevant to the exercise of discretion under Rule 12-5(67) were summarized in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2007 BCSC 1014 at para. 69 (citing *Nguyen v. Bains*, 2001 BCSC 1130 at para. 11), aff'd 2008 BCCA 107:

[69] ...

- a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
- b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
- c. Severance is most appropriate when the trial is by judge alone.
- d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
- e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
- f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

[62] In my view, the determinative factor in this case is (d), being whether the issue of the fair market valuation of Alfalfa's shares is inextricably interwoven with other issues in the trial.

[63] Tophay and the other defendants in the Wu Action contend that the material facts relevant to the relief sought under paragraph 162(b) of the Wu Parties' notice

of civil claim are distinct from those that are relevant to the rest of the action. I disagree.

[64] The threshold question of whether there was shareholder oppression in respect of the redemption of the Alfalfa shares in Tophay Leo will turn on the fairness of the redemption price paid for them at \$0.42. As a result, the question of liability (for oppression) cannot be separated from the question of whether the Wu Parties received a fair price for their shares.

[65] I note that the redemption date for Alfalfa's shares was not February 28, 2019, which was the effective date of the share valuation completed by MNP in the Valuation Report, but rather August 19, 2019. There is certainly no basis at all for withholding financial documents prior to August 19, 2019.

[66] The Wu Parties contend that the Valuation Report projected hay sales for 2019 based on sales for January and February of that year. They contend that this projection is flawed because the months of January and February are typically slower sales months. In addition, the Wu Parties contend that MNP incorporated a low amount for cash flow from operations for 2019 into their report (\$1.2 Million as opposed to \$1.8 Million). As a result, the Wu Parties say that access to the Disputed Documents is necessary in order to allow the Wu Parties to provide evidence that the redemption price paid for their shares, which appears to have been based on a valuation completed as at February 2019, was unfair.

[67] Evidence with respect to the value of Tophay after February 2019 may be relevant for the purposes of assessing the Wu Parties damages arising from oppression as the trial judge may determine that a later valuation date is appropriate.

[68] As was stated in *Runnalls v. Regent Holdings Ltd.*, 2010 BCSC 1106 at para. 113 "..., the authorities make clear that in fixing a value for the purposes of an oppression remedy, the task is not simply to determine the market value, but to determine what is fair in the circumstances ... The court must make allowance for

future prospects, as seen from the valuation date and any effect on the value of the shares caused by the oppression itself”.

[69] In *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.*, 2020 BCCA 371, our Court of Appeal explained that when selecting other dates for a valuation of shares in the context of an oppression remedy claim, the court will consider any increase or decrease in value after a claim was filed. The Court of Appeal explained that “ ... In many cases it will be seen as fair that the departing shareholder share in the increase or decrease in value of the shares as between the date of the petition and the date of the trial”: at para. 136.

[70] In addition, other pleadings justify a conclusion that documents relevant to the value of Tophay after February or August 2019 are relevant. For example, the Wu Parties also advance a claim of conspiracy. At paragraph 109 of the notice of civil claim, the Wu Parties allege, *inter alia*, that Yi Ding and other defendants conspired to expropriate their interests in Tophay by passing a directors’ resolution purporting to redeem the shares of Alfalfa in Tophay, thereby, depriving them of the value of their investments in this company. At paragraph 161 of the notice of civil claim, the Wu Parties claim that they have suffered damage including the loss of value of their shares in Tophay and the loss of the value (approximately \$1.5 Million) of Alfalfa’s shareholder loan.

[71] In respect of potential damages for conspiracy, it is possible that a trial judge may determine that the alleged conspirators decided to redeem the Wu Parties’ shares to prevent them from benefiting from an anticipated growth in the value of Tophay. The trial judge may therefore determine that a later date for valuation of shares in Tophay Leo is appropriate, including up to the date of trial.

[72] Litigation in slices is generally to be avoided. In this case, there is simply no way to disconnect the factual and legal arguments concerning the Wu Parties’ and Topfor’s claims from the valuation of the Wu Parties’ shares in Tophay. Doing so would be exceedingly prejudicial to the Wu Parties and Topfor, which is not justified

by a potential (and I note unsupported by evidence) saving of time and expense. Tophay and the other defendants' application for severance is dismissed.

Analysis and Conclusion on the Deferral Application

[73] Tophay seeks, as a companion order, an order that disclosure of the Disputed Records be deferred until after determination of the Wu Parties' oppression claim. They contend that if no oppression is found, no valuation of the Wu Parties' shares in Tophay will be required.

[74] Tophay relies on Rule 7-1(22) which reads as follows:

Determination of issue before discovery

(22) If the party from whom discovery, inspection or copying of a document is sought objects to that discovery, inspection or copying, the court may, if satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery, inspection or copying, order that the issue or question be determined first and reserve the question of discovery, inspection or copying.

[75] Rule 7-1(22) cannot be relied on to postpone discovery of documents pending determination of an issue if those documents may be relevant to the preliminary issue and the nature of the issue to be determined must be such that its resolution may make discovery of the requested documents unnecessary: *Kwantlen University College Student Association v. Canadian Federation of Students Association – British Columbia*, 2017 BCSC 163 at para. 23, referring to the decision in *Belzberg v. North American Trust Co.*, [1994] B.C.J. No. 3326 (S.C.) at para. 22.

[76] As I already stated, the question of the value of the Wu Parties' shares is inextricably woven with both their oppression and conspiracy claims.

[77] As a result, it is not necessary for me to consider the arguments of Tophay with respect to whether the Wu's or Topfor are in competition or potentially in competition with Tophay.

[78] To the extent that any risk exists that Topfor will use the documents sought to the detriment of Tophay's business interests, the implied undertaking rule is

generally considered to be sufficient to protect a concerned party from mis-use of confidential information: *Larkin v. Johnson*, 2019 BCSC 164 at para. 27.

Conclusion

[79] In respect of the applications brought by the Wu Parties and Topfor in the Tophay Action and the Wu Parties in the Wu Action for production of an updated list of documents, these applications are granted with the respondents required to list the documents set out in paras. 56 and 57 of these reasons.

[80] In respect of the applications brought by Tophay and the other applicant defendants in the Wu Action, for severance of the relief sought by the Wu Parties at para. 162(b) of the notice of civil claim and the deferral of disclosure of the Disputed Documents, these applications are dismissed.

Costs

[81] With respect to costs of the above applications, the Wu Parties and Topfor have been substantially successful in their document applications and were entirely successful in their opposition to the severance and document deferral applications of Tophay, therefore, they are presumptively entitled to their costs of both. If the parties wish to make further submissions on costs, they are directed to contact Supreme Court Scheduling for the purposes of setting a further hearing before me.

“Mayer J.”