IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Manterra Technologies Inc. v. Verathon Medical (Canada) ULC,* 2023 BCSC 263

Date: 20230223
Docket: S157978
Registry: Vancouver

Between:

Manterra Technologies Inc.

Plaintiff

And

Verathon Medical (Canada) ULC

Defendant

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:	D.J. Sorochan, K.C.
Counsel for the Defendant:	C. Elrick
Place and Date of Hearing:	Vancouver, B.C. December 2, 2022
Place and Date of Judgment:	Vancouver, B.C. February 23, 2023

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Introduction

[1] The plaintiff seeks to require the defendant to provide further document production. Underlying this application, is the plaintiff's claim alleging, among other things, a breach of a "long-term relational contract" between the parties.

[2] In the November 8, 2022, notice of application, the plaintiff requests an order requiring the defendant to: (a) amend its list of documents to list the additional categories of documents requested by the plaintiff; and (b) to provide an affidavit verifying the list of documents.

[3] For the reasons that follow, I dismiss the application.

Background

[4] The plaintiff is a manufacturer of designed commercial, metal and plastic products including medical devices. The plaintiff operates a production facility in Delta, British Columbia.

[5] The defendant's business includes designing and distributing medical products, including a device known as the "Glidescope" used for intubating patients. Until approximately 2014, the parties had a lengthy business relationship related to the production of the Glidescope.

[6] The plaintiff commenced this action September 28, 2015, by filing a notice of civil claim. The plaintiff amended the claim on February 28, 2020. Following a contested application, the plaintiff was authorized to make further amendments to the claim which the plaintiff did when it filed a further amended claim on January 25, 2022 (the "Claim").

[7] In the Claim, the plaintiff sets out facts alleging long-term mutually beneficial business dealings between the parties related to the development and manufacture of the Glidescope. In part 1 of the Claim, the plaintiff alleges as follows:

…

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> 5. The contractual relationship between the parties is not an agreement for a discrete transaction or even a series of agreements for transactions but rather the parties intended to, and did, create a long-term relationship that would involve significant investment by the plaintiff and would be mutually beneficial.
>
> 6. The description by the parties of their relationship as a “joint venture” or a “partnership” are colloquial descriptions they used because of their mutually acknowledged duties of good faith to each other, but they were not intended to be, and are not legally accurate descriptions of the contractual relationship.
>
> 7. The correct legal description of the relationship that the parties entered into is that of a long-term relational contract which established a business relationship that would continue indefinitely.
>
> 8. The long-term relational contract between the parties specified mutual goals and established structures to keep the parties’ expectations and interests aligned while requiring the parties to perform the contract in good faith and to cooperate in order to achieve the objectives of the contract.
>
> …

[8] The Claim alleges that the defendant terminated the long-term relational contract dishonestly, unreasonably, and contrary to the contractual duties owed to the plaintiff. The Claim further alleges the defendant misused the plaintiff’s confidential information contrary to a mutual non-disclosure agreement and the defendant owed a duty of honesty and good faith in its contractual dealings with the plaintiff which it breached, including by making the plaintiff’s confidential information available to a competitor.

[9] The Claim also alleges that “all kinds of unfair dealing and unconscionable conduct by the defendant in matters of the contract with the plaintiff come within the application of the equitable doctrine of fraudulent concealment”, including by actively

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concealing and failing to disclose information. The plaintiff pleads that it relies on the equitable doctrine of fraudulent concealment as grounds to postpone the running of the limitation period in respect of the further amendments to the Claim.

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[10] The relief sought by the plaintiff includes a declaration that the parties are party to the “contractual obligations manufacturing agreement” and that the defendant repudiated the “contractual obligations”. The plaintiff seeks, among other things, general damages against the defendant and an accounting of the profits wrongly obtained by the defendant.

[11] The parties exchanged lists of documents in early 2019. On April 20, 2021, the plaintiff delivered written demands to the defendant requesting that it amend its list to include certain documents and classes of documents pursuant to Rules 7-10(10) and (11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[12] On September 30, 2022, the plaintiff made an additional written demand to the defendant for an amended list of documents to include certain documents and classes of documents. On December 1, 2022, shortly before the hearing of this application, the defendant served the plaintiff with an amended list of documents. The amended list of documents contains some, but not all, of the documents demanded by the plaintiff.

The Documents Requested

[13] The specific details of the plaintiff’s demand for documents is described in Appendix A to the notice of application:

> The Documents or classes of documents that:
>
> were created as a result of the negotiation of the contract between the plaintiff and defendant including all documents referenced at or created in discussions by the defendant’s management servants or agents involving the terms of the contract; [Category #1]
>
> in any way relate to use made by the defendant of any of these documents; [Category #2]
>
> were created as a result of the negotiation of the contract between the plaintiff and defendant including all documents referenced at or created in discussions by the defendant’s management servants or agents (including

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> but not restricted to Dr. Jack Pacey, Gerald McMorrow, Russ Garrison, Jeff Clark, Keith Forbes) involving the terms of the contract and Verathon's approval of those terms; [Category #3]
>
> in any way related to the agreements between the defendant and Southmedic Inc. related to the manufacturing of any medical products for the defendant; [Category #4]
>
> relate to the costs, revenues and profits from the manufacturing of the Glidescope; [Category #5] and
>
> any other medical products for the defendant by the plaintiff and Southmedic Inc. [Category #6]
>
> (the "Requested Documents")

<u>Issue – Should the defendant be ordered to produce some or all of the requested documents</u>

The Legal Principles

[14] In *Araya v. Nevsun Resources Ltd.*, 2020 BCSC 511 [*Nevsun*], the Court provides a useful summary of the potential two-step system for document production in the *Rules*:

> [73] The initial production obligation under R. 7-1(1)(a)(i) is limited to what could be used by any party to prove or disprove a material fact. Material fact refers to an issue that is in dispute, the resolution of which will have legal consequences between the parties to the dispute. It is a fact put in issue by the pleadings. In *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2017 BCSC 19 (B.C. S.C.) at para. 90, Justice Adair stated:
>
>> What qualifies as a "material fact" was discussed by K. Smith J.A. in *Jones v. Donaghey*, 2011 BCCA 6, at paras. 9-10 and 18. An "issue" is a disputed fact the resolution of which will, without more, have legal consequences as between the parties to the dispute. Such facts are referred to as "material" facts. Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. On the other hand, facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.
>
> [74] The *Rules* create what has been characterized as a two tier system for document production. Pursuant to R. 7-1(10) a party who believes that documents have been omitted from the disclosure can demand further production. In addition, pursuant to R. 7-1(11) a party can seek broader disclosure of documents that "relate to any or all matters in question in the action".
>
> [75] A party who is not satisfied with the response to a demand made pursuant to subrules (10) or (11) can apply to the court pursuant to R. 7-

1(13). The discretion of the court in relation to such an application is addressed in R. 7-1(14), which states, in part:

> (14) On an application under subrule (13) or otherwise, the court may
>
> > (a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or
> >
> > (b) order a party to
> >
> > > (i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,
>
> . . .

[76] The jurisprudence with respect to the interplay between the subrules of R. 7-1 was summarized in *Edwards v. Ganzer*, 2012 BCSC 138 (B.C. S.C.) at para. 41, in which Master Bouck stated :

> I understand the principles outlined in these various decisions, together with the applicable Rules, to be as follows:
>
> > a. The initial production obligation under Rule 7-1(1)(a)(i) is limited to what is required to prove or disprove a material fact: *Biehl v. Strang* at para. 14;
> >
> > b. Rule 7-1(10) allows the opposing party to issue a written demand requiring the listing party to amend the original list and produce documents that should have been disclosed under Rule 7-1(1)(a)(i);
> >
> > c. In addition, Rule 7-1(11) allows the opposing party to issue a written demand requiring the listing party to amend the list and produce documents which ought to be disclosed under a test "close to" that set out in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 at 63, *(*the "*Guano* test"): *Global Pacific* at para. 9;
> >
> > d. The distinction between the two types of disclosure provided for under Rule 7-1 is stated in *Global Pacific* as follows:
> >
> > > The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, or if it may have either of those two consequences. *Therefore, it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, but that a party can apply to the court, as the defendant did here, for broader disclosure pursuant to Rule 7-1(14).*

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> [Emphasis in original.]
>
> [77] The materiality requirement under R. 7-1(1) was discussed in *Biehl v. Strang*, 2010 BCSC 1391 (B.C. S.C.). In that case, the court considered the meaning of "used by a party of record at trial to prove or disprove a material fact" in subrule (1)(a)(i), and at para. 16, Justice Punnett noted:
>
>> In Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at para. 2.50, relevance is distinguished from materiality:
>>
>>> §2.50 A distinction has also been drawn between relevance and materiality. . . . The concept of materiality, however, requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case.
>>
>> In other words, the requirement that the disclosure relate to a material fact limits the breadth of what is relevant.
>>
>> [Emphasis in original.]
>
> [78] The scope of disclosure pursuant to R. 7-1(14) was described by Justice Dillon in *Global Pacific Concepts Inc. v. Strata Plan NW 141*, 2011 BCSC 1752 (B.C. S.C. [In Chambers]) at paras. 8-9. Justice Dillon cited *Biehl* and stated that R. 7-1(14) "provides a wider disclosure" than subrule (1), permitting a court, on application, to order the production of documents related "to any or all matters in question in the action". The court proceeded to align this wider disclosure with the *Peruvian Guano* test of relevancy (at para. 9; set out in *Edwards* at para. 41; see above, para. 77).

[15] To this summary of the applicable legal principles on an application for further document production, I would add:

a) There exists an assumption underlying the potential two-step process for document production that only the first step will be necessary “in many, if not most cases”: *Este v. Blackburn*, 2016 BCCA 496 at para. 18 citing *Biehl v. Strang*, 2010 BCSC 1391; and

b) The party seeking production at the second step must describe the documents with reasonable specificity, explain why the documents should be disclosed, and, in ordering further production, the court must consider proportionality: *Marion Family Ventures Inc. v. Lam*, 2021 BCSC 1076 at para. 31; *Red Avacado Sales Inc. v. Yao*, 2019 BCSC 996 paras. 15–20.

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[16] The plaintiff submits that the documents requested are clearly relevant to the Claim. The plaintiff points out that the Claim alleges among other things, the existence of a “long term relational contract” and that the defendant owed the plaintiff a duty of honesty and good faith in its contractual dealings.

[17] The defendant submits that the plaintiff’s request for documents is overbroad, vague, disproportionate and it seeks documents that are irrelevant.

[18] I will deal with the objections raised by the defendant in the context of each category of documents requested by the plaintiff.

Analysis

[19] For Category 1, the plaintiff requests “documents created as a result of the negotiation of the contract between the plaintiff and defendant including all documents referenced at or created in discussions by the defendant’s management servants or agents involving the terms of the contract”.

[20] According to the Claim, the parties entered into a long-term relational contract that was “not an agreement for a discrete transaction or even a series of agreements for transactions but rather the parties intended to, and did, create a long-term relationship that would involve significant investment by the plaintiff and would be mutually beneficial”.

[21] The defendant submits that it has produced a “Kanban” agreement and a mutual non-disclosure agreement, but the request for the other documents requested in Category 1 should be denied because they are either inadmissible or irrelevant and the request is overbroad, vague and disproportionate.

[22] The defendant submits that documents related to the negotiation of a contract, or the promisor’s state of mind when entering into a contract, are generally irrelevant and inadmissible. I acknowledge that there is an open debate in the jurisprudence as to whether evidence of negotiations can be considered when interpreting a contract: *Corner Brook (City) v. Bailey*, 2021 SCC 29 at paras. 56-57.

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[23] However, I am not required to enter into that debate to resolve this application. That is because I agree with the defendant that the Category 1 documents request is vague, lacking in reasonable specificity and overbroad.

[24] I reach this conclusion because the identity of the "contract" referenced in the request is unclear in light of the factual allegations in the Claim. Similarly, the request for all documents referenced or created that "involv[e] the terms of the contract" lacks reasonable specificity.

[25] The Category 2 and Category 3 requests raise the same issues that I have identified in relation to the request for Category 1 documents.

[26] Category 4 requests documents, or classes of documents, that "in any way related to the agreements between the defendant and Southmedic Inc. related to the manufacturing of any medical products for the defendant". The Claim states, among other things, that the defendant wrongfully made the plaintiff's confidential information available to the new manufacturer.

[27] However, the plaintiff has not adequately explained why documents that relate "in any way" to agreements with Southmedic Inc. ought to be listed and I am concerned that this request will undoubtedly involve production of documents irrelevant to the Claim. I agree with the defendant that the request for Category 4 documents is overbroad and it lacks reasonable specificity.

[28] In Category 5 and 6, the plaintiff requests the documents or classes of documents that relate to the costs, revenues and profits from the manufacturing of the Glidescope and any other medical products produced for the defendant by the plaintiff and Southmedic Inc. The defendant submits that these requests lack reasonable specificity, they are overbroad and disproportionate to the potential probative value.

[29] I note that the Claim seeks, for example, "an accounting of the profits wrongly obtained" by the defendant from the misappropriation of the confidential information. The costs, revenues and profits to the defendant from the manufacturing of the

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Glidescope appear related to a matter in question in the Claim. However, the difficulty is that these requests, as presently worded, are overly broad, lacking in reasonable specificity and disproportionate.

[30] The overbreadth and disproportionate nature of these requests could potentially require the defendant to produce each and every supporting invoice, receipt and record of any kind that touches on Glidescope sales, costs and expenses from the inception of the parties' alleged relational contract to the present day. The disproportionate nature of these requests clearly outweighs the potential probative value.

[31] In my view, documents related to the issue of profits could be reasonably specified and narrowed to, for example, a request for the defendant's annual revenue and expense statements related to the manufacture and sale of the Glidescope prepared for or by the defendant for accounting or tax reporting purposes.

[32] As for the request for documents concerning "any other medical products", I have already concluded that requiring the defendant to produce documents that relate "in any way" to agreements with Southmedic Inc. will undoubtedly involve production of documents irrelevant to the Claim. I therefore, decline to order the defendant to list documents concerning any other medical products produced for the defendant by Southmedic Inc.

[33] For these reasons I have explained, I decline to order the defendant to amend its list of documents to list the additional documents requested in Categories 1 to 6 of Appendix A to the application.

[34] However, while I decline to make the order sought, the plaintiff may make future requests for documents and potentially reapply to the court for an order that the defendant produce additional documents.

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Issue – Should the defendant be ordered to provide an affidavit of documents

[35] Rule 7-1(8) provides the court with discretion to require an affidavit of documents when, in the absence of an adequate explanation, relevant documents are not included in the party's list of documents and the listing party has demonstrated a dilatory attitude towards document production: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2016 BCSC 1870 at paras. 10–12; *Nevsun at* para. 19.

[36] While the defendant did not immediately provide an amended list following the demands, I am satisfied that the amended list was provided with reasonable promptness in all of the circumstances. I also note that the defendant has produced a significant number of documents in this action.

[37] I therefore decline to order the defendant to provide an affidavit of documents. While I am dismissing this aspect of the application, the plaintiff may reapply for such an order in the future should the circumstances change.

Disposition

[38] I dismiss the plaintiff's notice of application filed on November 8, 2022.

"E. McDonald J."