IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Merit Interior Designs (Duncan) Ltd. v. Kapila,* 2023 BCSC 1528

Date: 20230831
Docket: S183292
Registry: Vancouver

Between:

Merit Interior Designs (Duncan) Ltd.

Plaintiff

And

Rajinder Parsad Kapila

Defendant

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff (Respondent):	D. Church, K.C. E. Dolinsky
Counsel for the Defendant (Applicant):	R. Morton J. Jutras
Place and Date of Trial/Hearing:	Vancouver, B.C. August 8, 2023
Place and Date of Judgment:	Vancouver, B.C. August 31, 2023

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Background

[1] There are two proceedings involving the parties to this application. The plaintiff in this proceeding (a civil action), Merit Interior Designs (Duncan) Ltd. ("Merit Duncan"), is a closely-held private company. The defendant in this proceeding, Rajinder Parsad Kapila ("Rajinder"), is a minority shareholder and former manager of Merit Duncan. As counsel have, where appropriate, I will refer to individuals involved in these actions by the first names they use. In doing so, I mean no disrespect.

[2] The first proceeding was originally an oppression petition commenced by Rajinder in December 2017. It bears action #S214076. The second proceeding is this action brought by Merit Duncan in March 2018, seeking damages from Rajinder for fraud and breach of fiduciary duty.

[3] The two proceedings are set for trial together on November 20, 2023, for 20 days.

[4] There have been three earlier decisions of this Court, the most recent of which was heard by Justice Elwood in the spring of this year.

Hearing Before Justice Elwood

[5] After two days of argument, Elwood J. released reasons dealing with the two proceedings, indexed at *Kapila v. Merit Interior Designs (Duncan) Ltd.*, 2023 BCSC 1076 ("Elwood Reasons"). Rajinder's petition proceeding was converted to an action, referred to in the Elwood Reasons as the "Shareholder Action", distinguishing it from this action, referred to as the "Merit Duncan Action".

[6] Justice Elwood dealt with Rajinder's application to substantially rewrite his pleadings in both proceedings. Some of the amendments were minor and largely unopposed. Others were more substantive and vigorously opposed. Justice Elwood permitted some, but not all, of the opposed amendments.

[7] At paras. 8–18 of the Elwood Reasons, Elwood J. set out the background to the relationship between Chanan ("Sandy") Singh Sandhu, who owned and operated

a number of Merit Home Furniture stores on Vancouver Island, and Rajinder, who worked for Sandy at the Nanaimo Merit store and later became a minority shareholder and manager of Merit Duncan. I will not repeat that background here.

Events Giving Rise to the Shareholder and Merit Duncan Actions

[8] The Shareholder Action and the Merit Duncan Action both arise from events in the spring of 2017. At about that time, Sandy's son, Jagjit Singh Sandhu ("Jeet"), became more actively involved in the management of Merit Duncan. He changed Merit Duncan's accountant from ACM Fitterer Ltd. ("ACM") to KPMG LLP, Chartered Professional Accountants ("KPMG").

[9] In about March 2017, KPMG reported to Jeet that Merit Duncan was not profitable, particularly in light of a significant shareholder loan that was purportedly owed to Rajinder.

[10] Under Jeet's direction, Merit Duncan investigated and discovered issues with Rajinder's management.

[11] On August 31, 2017, Merit Duncan notified Rajinder that it did not consider his shareholder's loan valid and, on October 24, 2017, terminated his employment as manager.

Original Pleadings and Initial Steps

[12] On December 19, 2017, Rajinder filed a petition seeking relief against Merit Duncan under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*], on the basis that the powers of the directors had been exercised in a manner oppressive to Rajinder as a shareholder of the company. In the petition, Rajinder sought relief, including a direction that Merit Duncan compensate him for the loss of his employment, in an amount to be determined by agreement or arbitration.

[13] In its response to the petition, Merit Duncan said that in April or May 2017, it learned that Rajinder failed to manage the business prudently and effectively and that he engaged in various unlawful acts, including a double invoicing scheme,

unauthorized cash sales, and a misappropriation of assets. Merit Duncan denied that the directors had any knowledge of these unlawful acts prior to April 10, 2017. Merit Duncan further denied any knowledge of the alleged shareholder loan.

[14] On March 2, 2018, the Merit Duncan Action was commenced against Rajinder seeking damages for fraud, breach of fiduciary duty, breach of employment contract, unjust enrichment, and rescission of the alleged shareholder loan. Merit Duncan alleged that, between April and May 2017, it discovered that Rajinder had mismanaged the business and engaged in the various unlawful acts as it set out in its response to the petition. Merit Duncan amended its claim on April 11, 2019, to add further allegations of unlawful and unauthorized acts.

[15] Under the heading “Rajinder’s Fraud” in paras. 17(a)–(i) of Merit Duncan’s claim is a list of various acts of alleged mismanagement by Rajinder, and at para. 18, is a list of various alleged unlawful and unauthorized acts committed by Rajinder.

[16] In his original response to Merit Duncan’s claim, Rajinder denied all of the facts and specifically denied the allegations of fraud. He further alleged that, if the acts alleged under the heading of ‘Fraud’ in the claim “existed”, which he denied, then he acted under the specific instructions of Merit Duncan’s board of directors and its shareholders, whom had full knowledge of all material facts.

[17] Merit Duncan applied for an order that the petition be referred to the trial list and joined for trial together with the Merit Duncan Action. On May 29, 2019, Master Bouck granted the order, finding that “the issue of [Rajinder’s] alleged fraud permeates both [proceedings]”: *Kapila v. Merit Interior Designs (Duncan) Ltd.* (29 May 2018), Victoria 17-4813 at para. 1 (B.C.S.C.). She wrote:

> [2] It is nonsensical that on the one hand, the court is asked to find that the actions of the directors have been wrong and monies ought to be paid or repaid to [Rajinder] but at the same time ignoring the fact that [Rajinder] might have obtained those monies by fraud in the first place. There is simply too much intertwining of the two actions to allow for the petition to proceed independently of the action.

[18] Despite Bouck M.'s order, Rajinder applied in the Shareholder Action for relief under s. 227 of the *BCA*, including that Sandy be removed as a director, restraining Merit Duncan from engaging in any transactions outside the ordinary course of its business, a forensic accounting, appointment of a valuator to determine the value of the business or the shares, and that the disputed amount of the shareholder's loan be paid into court or held in trust.

[19] On June 20, 2018, Justice Bracken denied the relief sought by Rajinder: *Kapila v. Merit Interior Designs (Duncan) Ltd.* (20 June 2018), Victoria 17-4813 (B.C.S.C.). He agreed with Bouck M.'s assessment that Rajinder's oppression allegations could not be determined separately from Merit Duncan's allegations of fraud and unlawful conduct.

[20] The proceedings did not progress much between Bracken J.'s decision and the scheduled trial of both proceedings in August 2022. Both parties changed counsel, and orders were made compelling disclosure from Rajinder. The August 2022 trial was adjourned.

Elwood Reasons

[21] As I have said, Elwood J. delivered his reasons in July 2023 with respect to Rajinder's applications for pleadings amendments. After setting out the applicable law, he concluded, with respect to whether Rajinder should be permitted to add a claim for wrongful dismissal to the Shareholder Action:

> [94] …I find that it would be just and convenient to allow the amendments to add the claim of wrongful dismissal in the Shareholder Action. While the claim of wrongful dismissal will add some new issues, its inclusion serves to better define the real issues between the parties. The dispute has always involved an employment aspect, and this amendment properly frames the issue as a breach of contract claim.
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> …
>
> [100] …I have found that it is just and convenient to allow the amendments to raise a claim in damages for wrongful dismissal, notwithstanding Merit Duncan will lose a limitation defence.
>
> [101] The full extent of any prejudice from the delay may be clearer at trial. However, limitation bars are not discretionary. A claim is not barred by the

> *Limitation Act* based on a judge's view of the plaintiff's conduct. A more appropriate way to address the prejudice in this case is in costs.
>
> [103] For these reasons, I would grant leave for [Rajinder] to amend the pleadings in the Shareholder Action to add a claim of wrongful dismissal, with the costs relating to that claim to be determined by the trial judge.

[22] On Rajinder's application to add Jeet as a party to the Shareholder Action, after setting out the test for adding parties, Elwood J. concluded:

> [122] I find that it would be just and convenient to add Jeet as a defendant and allow the amendments that claim relief against Jeet personally. However, the relief that is sought against Jeet in paragraph 35(a) must be particularized. As drafted, paragraph 35(a) is too general.
>
> [123] As discussed above, I would not make an order preserving a limitation defence. It is clear the limitation period for a separate proceeding against Jeet has expired. Instead, I expect that any prejudice from the delay in adding Jeet will be addressed by the trial judge in a costs award.
>
> [124] For these reasons, I would grant leave for [Rajinder] to add Jeet as a defendant in the Shareholder Action and amend the notice of civil clam accordingly, with the necessary particulars to paragraph 35(a). Costs relating to the claim against Jeet will be determined by the trial judge.

[23] On Rajinder's application to amend his notice of civil claim in the Shareholder Action and his response in the Merit Duncan Action to add allegations concerning Sandy's knowledge and approval of a cash diversion scheme, and Sandy's active participation in the scheme ("Sandy Amendments"), Elwood J. concluded:

> [148] Many of the Sandy Amendments are simply particulars of the previous allegations of knowledge and approval and clarification of statements in the original pleading like "all activity now complained of" or "the Defendant's management style and related business activity".
>
> [149] What is new is the allegation that Sandy was the primary beneficiary and the author of a diversion of money from Merit Duncan's cash sales. There is no allegation in the existing pleadings that Sandy was an active participant in any scheme involving [Rajinder]. More importantly, there is no allegation that Sandy was the beneficiary of any scheme predating [Rajinder's] involvement.
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> …
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> [151] I agree with Merit Duncan that the full scope of the Sandy Amendments would expand the scope and expense of the litigation. In particular, the allegation that Sandy was the original architect and primary beneficiary of the cash diversion scheme would extend the scope of discovery. It could invite an investigation into Sandy's business practices

> beyond his knowledge and oversight of [Rajinder]'s management of the Duncan store.
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> …
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> [155] In my view, the allegation that Sandy was the author and primary beneficiary of a cash diversion scheme does not have a sufficiently close connection to the existing issues to justify its late addition to these proceedings.
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> …
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> [157] Overall, the Sandy Amendments will bring some needed clarity and legal rigour to the proceeding. The amendments relating to Sandy's knowledge and approval of [Rajinder]'s actions will clarify the defence and better define the real issues between the parties.
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> [158] However, the … allegation that Sandy was the author and primary beneficiary of a cash diversion scheme risks causing undue prejudice to Merit Duncan.
>
> …
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> [161] For these reasons, I would grant leave for [Rajinder] to make the Sandy Amendments, but confined to the allegations of Sandy's knowledge and approval.
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> [Emphasis in original.]

[24] The other issues dealt with by Elwood J. are not relevant to the application before me.

Pleadings Following the Elwood Reasons

[25] On July 17, 2023, Rajinder filed an amended response to the Merit Duncan Action. In it, at paras. 8–13, Rajinder's primary defence concerning the allegation of cash diversion is that Sandy was Merit Duncan's director and primary decision maker, and he knew and approved of what Rajinder was doing. Rajinder denies Merit Duncan sustained any damages from any alleged unlawful conduct, and asserts that Merit Duncan is estopped from now claiming damages for actions approved by Sandy.

[26] On July 21, 2023, Rajinder also filed an amended statement of claim in the Shareholder Action. Among other amendments, he claimed damages for wrongful dismissal.

[27] On August 4, 2023, Merit Duncan and Jeet, who had been added as a defendant to the Shareholder Action as a result of the Elwood Reasons, filed a response to civil claim and a counterclaim. Rajinder's wife, Reetika Kapila, was added by Merit Duncan as a defendant by counterclaim.

The Current Application

[28] In the Merit Duncan Action, Rajinder applies for an order that:

a. Merit Interior Designs Ltd. a.k.a. Merit Interior Designs (Nanaimo) ("Merit Nanaimo"),

b. Merit Furniture Campbell River Ltd. ("Merit Campbell River"),

c. Merit Furniture & Appliance (Port Alberni) Ltd. ("Merit Port Alberni"),

d. Merit Furniture (Courtenay) Ltd. ("Merit Courtenay"),

collectively, the "Related Companies", or the company's former accountant, ACM produce year-end financial statements and general ledger detailed reports for the years ended 2002–2015, in CSV or Excel format.

[29] Rajinder also seeks the same documents from the plaintiff and the Related Companies for the years-end in 2016–2022, in CSV or Excel format.

[30] Rajinder argues that the financial records he seeks are primarily relevant to Merit Duncan's damages claim against him in the Merit Duncan Action. He does so on two bases.

[31] First, Merit Duncan relies on an expert report from the Spence Valuation Group ("Spence Report") that calculates Merit Duncan's damages from the alleged fraud, breach of fiduciary duty, breach of employment contract, and unjust enrichment to be almost $3 million.

[32] Rajinder argues that the Spence Report assumed that Merit Duncan would have generated a 50% gross profit margin had Rajinder not misappropriated funds.

Of course, in his pleadings Rajinder denies any unauthorized wrongdoing. He also asserts that, in any event, any damages suffered by Merit Duncan would be a fraction of the amount in the Spence Report.

[33] Second, Rajinder argues that the documents sought are relevant because they may tend to support Rajinder's defence that he was authorized by Sandy to retain some of Merit Duncan's cash for himself. He submits that if the margins are similar for similar operations at the Related Companies, that would be evidence that the cash diversion, as that term is defined in the pleadings, was not unique to Rajinder at Merit Duncan, and that this fact would be probative of whether Sandy authorized that practice for Rajinder.

[34] In response, Merit Duncan argues that the documents sought are a fishing expedition and would greatly expand the proceedings. It says that the Spence Report is not based on an "assumption" of a 50% gross profit margin but on a calculated 50% margin based on what was, in effect, a representative audit of actual sales at the Merit Duncan store and the gross profit margin achieved by Merit Duncan after Rajinder was removed as its manager.

[35] I will deal with Rajinder's justifications for the disclosure sought in the order they were argued.

Spence Report

[36] On January 30, 2020, Donald M. Spence, a chartered business valuator, on behalf of the Spence Valuation Group ("SVG"), prepared the Spence Report calculating the income loss that "may have been suffered" by Merit Duncan between August 1, 2008, to July 31, 2017 ("Loss Period"). The Spence Report calculated the income loss during the Loss Period at $2.957 million.

[37] The Spence Report looked at Merit Duncan's revenue, gross profit (i.e. revenue less direct costs), and gross profit margin (i.e. gross profit divided by revenue) to calculate the gross profit margin ("Margin") during each of the 2009–

2017 fiscal years. In a table set out at page two of the Report, SVG sets out the margin for each year based on Merit Duncan's financial statements for those years.

[38] In coming to the calculation of income loss, SVG reviewed:

a. Merit Duncan's financial statements for the period August 1, 2008, through July 31, 2015, compiled by ACM;

b. financial statements for the period of August 1, 2015, through July 31, 2017, compiled by KPMG;

c. Merit Duncan's internally prepared financial statements for the period August 1, 2008, through July 31, 2017;

d. a copy of an analysis of the Margin earned by Merit Duncan during 2017–2019 fiscal years prepared by Scott Tupper of KPMG ("KPMG Analysis"); and

e. a spreadsheet summarizing details of a randomly selected sample of Merit Duncan's invoices, prepared by management, and including date, invoice number, sales, cost of sales, gross profit, and the Margin generated.

[39] In addition, SVG discussed Merit Duncan's historical and current operations with Jeet, toured the premises, and generally discussed Merit Duncan's financial accounting records with its senior bookkeeper, Ms. Wunderlich.

[40] At page three of the Spence Report, SVG outlines the basis of its calculation. SVG started with the assumption that Merit Duncan's Margin, during the Loss Period, was lower than what was actually generated because not all of its revenue was recorded in the financial statements, a fact acknowledged by Rajinder.

[41] SVG was advised by management that there were 19,350 sales invoices generated by Merit Duncan during the Loss Period. From that number, using a Sample Size Calculator published by Creative Research Systems, SVG selected a sample size of 377 invoices. Then, using a random number generator, SVG

provided management with 377 unique invoice numbers to select as a representative sample of sales invoices.

[42] Ms. Wunderlich advised, that for each invoice number, she recorded the revenue generated on the invoice and then reviewed Merit Duncan's supplier files to determine the cost of the specific goods sold on that invoice, to arrive at the gross profit and expected margin for each invoice. For those randomly selected invoices that Ms. Wunderlich was unable to use, because multiple invoices were generated for the same sale, usually when a partial payment was received from a customer, Ms. Wunderlich requested additional randomly generated invoice numbers from SVG until the sample size of 377 invoices was analyzed.

[43] Based on Ms. Wunderlich's work, the expected margin during the Loss Period was 51.4%.

[44] SVG also reviewed Merit Duncan's Margins generated from sales in the fiscal years ending July 31, 2018, and 2019, after Rajinder was removed as manager. The margins in those years were 40.6% and 36.8% respectively. SVG noted that in about March 2018, Merit Duncan opened a new division called Island Homes Forever. Island Homes Forever had a different sales mix than Merit Duncan store, including appliances that generate a lower margin. The KPMG Analysis separately calculated the Margin for what it referred to as the Island Division and the Merit Division. Based on the KPMG Analysis, accounting for the different margins in the Island Division, the Merit Division generated margins of 51.7% in 2018 and 49.3% in 2019.

[45] SVG then used 50% as the average expected margin Merit Duncan would have generated on all of its revenue had all of its revenue been recorded during the Loss Period. Using those revenue calculations, SVG deducted the actual revenue recorded in Merit Duncan's financial statements to arrive at its calculation of an income loss of $2.957 million.

[46] Rajinder has retained Daniel Sturgess of Crowe MacKay LLP to assess the Spence Report and potentially to provide a responsive report. Mr. Sturgess has

requested the documents sought in this application to analyze the Spence Group methodology and the 50% profit assumption. An expert's request for documents does not mean that they will necessarily be ordered to be disclosed.

[47] In his affidavit filed on this application, Mr. Sturgess says that in order to critique the Spence Report, he needs to review a number of documents. He wants to analyze Mr. Spence's sampling methodology and independently perform his own sampling analysis. He also wants to further confirm the costs associated with each revenue invoice and needs to review the relevant supplier files. He will also use those files to test the completeness of Ms. Wunderlich's work. In his affidavit, he provides a justification for the requests he makes for Merit Duncan's documents. I understand that those requests have been met with respect to Merit Duncan and that 49 bankers' boxes of Merit Duncan documents have been made available to Mr. Sturgess.

[48] With respect the financial statements and general ledgers for the Related Companies, at para. 16 of his affidavit, Mr. Sturgess says that:

> …we have asked for financial statements and general ledgers for other companies in the Merit Furniture & Appliances group…to determine what their margin was during the period of review and to understand why it was higher or lower than 50%. That, and [Merit Duncan's] financial statements and general ledger reports will help us determine whether Mr. Spence's 50% margin for [Merit Duncan] is appropriate.

Authorization for Cash Diversion

[49] As to the second basis for Rajinder's request, it was based solely on an agreement that a comparison of Margins generated at the Related Companies might assist him in establishing that the cash diversion he engaged in was authorized.

The Scope of Disclosure under the *Rules*

[50] Rajinder applies for production of the financial statements and general ledger reports for 2002–2022 under Rules 7-1(10), (11), and (18) of the *Supreme Court Civil Rules.*

[51] As has been frequently explained by this Court, the *Rules* provide for a two-tiered process of document disclosure: *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322 at para. 92.

[52] Rule 7-1(1) changed the test for documentary relevance in the first instance. It moved away from the level of disclosure required in the well-known case of *Compagnie Financière du Pacifique v. Peruvian Guano Co* (1882), 11 Q.B.D. 55 [*Peruvian Guano*], which was the level of disclosure under the prior *Rules*: *Este v. Blackburn*, 2016 BCCA 496 at para. 18.

[53] In the first instance, Rule 7-1(1)(a) requires every party to an action to list 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 to prove or disprove a material fact. Material facts are those a party must prove to make out their claim or defence. Rule 7-1 does not restrict production to documents that in themselves prove a material fact. It includes documents that can assist in proving or disproving a material fact: *Biehl v. Strang*, 2010 BCSC 1391 at paras. 16, 29; *Barrie* at para. 93.

[54] In many cases, the first tier of disclosure is all that is required. However, Rules 7-1(11)–(14) contemplate a second tier of disclosure and provide for processes by which that broader disclosure may be requested and under which the court can decide whether, and to what extent, broader disclosure should be made.

[55] Where a party believes that another party's list of documents either:

- omits documents that should have been listed under Rule 7-1(1)(a); or
- should include additional documents that relate to matters in question in the action

that party may, by written demand, require the listing party to amend their list of documents and serve that amended list: Rules 7-1(10), 7-1(11).

[56] Under Rule 7-1(12), the listing party must comply with the demand or explain why it is not doing so. A party dissatisfied with the listing party's response may apply under Rule 7-1(13) for an order requiring the listing party to comply with the demand.

[57] Under Rule 7-1(14) on such an application, the court may order a party to amend their list of documents to list additional documents that are or have been in their possession, power, or control, relating to any or all matters in question in the action.

[58] The second tier of disclosure essentially requires a party to produce documents that meet the broad test of relevance described in *Peruvian Guano*. This broader disclosure encompasses documents that may (not must) either directly or indirectly enable the party to advance their own case or damage the case of their adversary, and includes documents that may fairly lead to a train of inquiry having either of those two consequences: *Barrie* at para. 96, citing *Natural Trade Ltd. v. MYL Trading Ltd.*, 2019 BCSC 1368 at para. 23.

[59] In *XY, LLC v. Canadian Topsires Selection Inc*., 2013 BCSC 584 at paras. 34–35, Justice Voith, when a member of this Court, wrote that disclosure of documents can lead to relevant lines of inquiry, enable effective examinations for discovery or cross-examinations, establish material facts, and promote resolution. Nevertheless, there are limits that require the court to balance competing interests, such as privacy, confidentiality, and proportionality, as set out in the object of the *Rules*, to secure the just, speedy, and inexpensive determination of every proceeding on its merits: *Natural Trade Ltd.* at para. 26; *Economical Mutual Company and in French, Economical Compagnie Mutuelle D'Assurance v. Teck Metals Ltd.*, 2021 BCSC 1582 at para. 7.

[60] As Justice Marchand, then a member of this Court, wrote in *Natural Trade Ltd.*:

> [26] In all applications for disclosure of documents, the court must bear in mind Rule 1-3. …Rule 1-3(2) enshrines the principle of proportionality by promoting, "so far as is practicable", conduct that is proportionate to the amount involved, the importance of the issues and the complexity of the

> proceeding. This involves balancing "the burden of producing the documents in terms of time, cost and effort against their materiality and probative value": *Marsh* at para. 66.

Analysis

[61] For the reasons that follow, I have concluded that I should not exercise my discretion to order the disclosure sought by Rajinder from the Related Companies.

Spence Report

[62] At the outset, because the Loss Period as set out in the Spence Report, and which forms the basis of Merit Duncan's claim against Rajinder is August 1, 2008, to July 31, 2017, I cannot see how records from 2002 to 2022 can possibly be relevant—even on the *Peruvian Guano* test.

[63] There is no "Merit Furniture & Appliances group", as referred to by Mr. Sturgess in his affidavit. There are a series of incorporated companies running furniture and, in some cases, appliance stores in different communities on Vancouver Island. Each of the Related Companies has different shareholders. There are no consolidated financial statements.

[64] Mr. Sturgess does not provide a justification for seeking the records from the Related Companies. In his affidavit, he does not link how Margins at the Related Companies, selling different product mixes, in different communities with different socio-economic profiles, and responding to different market factors and pressures, with different mark-ups, could be relevant to Margins at Merit Duncan.

[65] In Jeet's affidavit #2, he says that his family is the majority shareholder in Merit Duncan and the Related Companies, and the stores have not been centrally managed. The manager of each store was a previous long-term employee and was given a minority ownership in the company operating the specific store. This was the practice Sandy followed when he opened Merit Duncan and made Rajinder its manager and a minority holder.

[66] Jeet explains that each manager has full autonomy to run the store they manage. The product mix in the different stores varies based on the manager's determination of the products they want to sell—furniture, appliances, or both—and what the mark up on products will be. He gave as an example, that Merit Courtenay did not sell appliances, while Merit Port Alberni's sales are made up of close to 50% appliances.

[67] Typically, Jeet says that managers locate their own suppliers and each store carries different products. In some cases, managers attempt to get exclusive access to supplier's products. There were no "general Merit suppliers", although some stores sell the same or similar products. Each Merit store operates as an independent business bearing the "Merit" name.

[68] Rajinder's affidavit #4 purports to contradict Jeet's affidavit but is so qualified that, at its essence, it confirms much of what Jeet attested to. For example, Rajinder says at para. 9 that the related stores offered some different products from each other but, "for the most part", carried the same products from the same suppliers or manufacturers. He then explains two exceptions. He also says at para. 10 that individual store owner/managers may have had some say in what products they wanted to offer and what the mark-ups would be, and some may have had more authority to do so than others, but no store manager had complete authority to make those decisions. He said that Sandy was still involved in overall management to ensure the Merit brand was consistent. Ensuring consistency of the brand does not suggest that all Merit stores were the same. As the evidence discloses, different stores carried different product mixes.

[69] Based on the combined affidavits, I conclude that there are enough differences in the way the Related Companies operate such that no meaningful conclusions could be drawn with respect to the Margins at Merit Duncan from the profit Margins at the Related Companies.

[70] The Spence Report calculated Margins based on actual sales at Merit Duncan and a methodology with respect to those sales. It is that calculation and that

methodology that is clearly the focus of Mr. Sturgess' analysis and that will be relevant to the trial judge's assessment of damages, if any.

[71] Even if there was a possibility of such an argument, the production of the documents sought would be disproportionate, in terms of the time and cost of their production, to their limited materiality and probative value. If 49 bankers' boxes were provided for Merit Duncan, a significant number of documents would be involved with respect to the Related Companies.

[72] Such disclosure would risk expanding the Merit Duncan Action well beyond its original scope, some three months before the scheduled trial, which would be prejudicial. These actions were commenced in late 2017 and the spring of 2018. The trial has already been adjourned once and is now scheduled for November 2023.

Authorization for Cash Diversion

[73] On the second basis for Rajinder's application, I was not persuaded that if the Margins are similar for similar operations, that this would be evidence that the cash diversion was not unique to Rajinder at Merit Duncan, and that this fact would in turn be probative of whether Sandy authorized that practice for Rajinder.

[74] For this submission to be accepted, it would require a finding that cash diversion was going on at all of the Related Companies and was authorized by Sandy. In my view, it is a stretch to argue the need for disclosure of the sought records on this basis.

[75] As Elwood J. made clear, it would be prejudicial to allow amendments that Sandy was the primary beneficiary and the author of a diversion of money from Merit Duncan's cash sales for the first time when Sandy is no longer alive to defend himself against those allegations. It would, in my view, also be prejudicial to drag the managers and shareholders of the Related Companies into these proceedings on the basis that Sandy also authorized such conduct at the Related Companies. Sandy is not able to defend against that allegation. The fact that some of the

managers of the Related Companies swore affidavits in these proceedings does not change my analysis.

[76] The amended pleadings do not refer to other stores participating in a cash diversion scheme or that the activities at Merit Duncan, authorized or not, were not unique to that store. No such amendment was sought.

Conclusion

[77] For these reasons, Rajinder's application is dismissed with costs to Merit Duncan in any event of the cause.

"MacNaughton J."