

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Century 21 Canada Limited Partnership v.
Real Estate Webmasters Inc.*,
2024 BCSC 518

Date: 20240328
Docket: S205654
Registry: Vancouver

Between:

Century 21 Canada Limited Partnership

Plaintiff

And

Real Estate Webmasters Inc.

Defendant

Before: The Honourable Justice Chan

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
March 12-15, 2024

Place and Date of Judgment:

Vancouver, B.C.
March 28, 2024

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Introduction

[1] There are two applications before the Court. Century 21 Canada Limited Partnership (“C21”) applies to strike the pleadings of Real Estate Webmasters Inc. (“REW”) pursuant to R. 22-7 of the *Supreme Court Civil Rules* [*Rules*] for failure to comply with the *Rules* with respect to production of documents. C21 seeks that judgment be entered against REW with damages and costs to be assessed. C21 seeks a number of alternative remedies if the Court dismisses the application to strike, including orders for disclosure, inspection of REW’s computer systems and a further examination for discovery of a representative of REW. REW opposes the application to strike and the alternative relief sought. REW also brings an application for C21 to produce documents.

[2] The underlying dispute between the parties relates to an agreement for REW to build and supply an online platform for C21 in its real estate business. C21 argues the platform was not functional and filed this action in June 2020, alleging breach of contract and negligence. C21 claims approximately \$12 million in damages. REW argues the platform was functional and that C21 accepted delivery of it. REW filed a counter-claim, seeking damages from C21 of at least \$19 million.

Factual Background

The Pleadings

[3] I take the following background facts from the pleadings. I will not provide a detailed overview, but will refer to what is necessary to give context to the applications.

[4] C21 is a national real estate franchisor for the global Century 21 brand in Canada. REW is a technology company that provides specialized website design and hosting for the real estate industry.

[5] The real estate industry uses the Multiple Listing Service (“MLS”). The MLS is a collection of approximately 60 regional databases containing commercial and residential properties for sale or recently sold in Canada. Each real estate board has its own database of listings (“MLS Feed”). In addition, there are two national,

aggregated MLS Feeds operated by the Canadian Real Estate Association. C21 subscribes to virtually all MLS Feeds in Canada. C21 and their brokers display the listings from those feeds on C21's own national website and on separate broker and agent websites.

[6] In September 2016, C21 sought bids from vendors to replace its existing web platform. REW prepared and submitted a proposal in October 2016. On May 31, 2017, the parties entered into the Enterprise Client Service Agreement ("Agreement"). Addendum 2 of the Agreement contains a scope of work, which sets out the custom features and requirements for the enterprise level web platform ("Platform"). The Agreement was structured such that C21 paid an initial setup fee, and then monthly payments would begin after the Platform went live.

[7] Starting from 2017, the parties worked together under the Agreement to develop the Platform. Along the way, changes were made to the Agreement, as detailed in project change requests. The Platform was to contain a long list of customizations to be built on the standard REW framework. C21 alleges that REW represented the Platform would go live no later than the Fall of 2018. REW alleges that the Platform was ready as per the Agreement by October 2018. In any event, the Platform went live for use by all agents and the public on January 31, 2020.

[8] C21 alleges there were numerous deficiencies in the functionality of the Platform after it went live. For example, C21 alleges the Platform mismanaged the priority of how listings would appear, and that inaccurate, duplicate and out of date information was included. C21 also alleges the Platform failed to deliver leads and route property enquiries to the appropriate individuals. C21 alleged other deficiencies. Attempts to fix the deficiencies did not satisfy C21. C21 filed this action on June 6, 2020, provided formal notice of its intention to terminate the Agreement on September 22, 2020, and terminated the Agreement effective March 17, 2021, after it transitioned to a new software platform.

[9] REW denies that the Platform failed to function as required under the Agreement. REW argues C21 reviewed, approved and accepted delivery in 2018.

REW argues in the alternative, there was contributory negligence by C21 in its management of the project and its insistence on extensive out-of-scope custom development work. REW counter-claims for damages from C21 for discontinuing payments under the original agreement, for failure to pay for extensive out-of-scope custom work and failure to promote REW's product to its brokers.

Procedural History

[10] C21 filed its notice of civil claim in June 2020. REW filed its response and its counter-claim in July 2020. C21 filed its reply and response to the counter-claim in October 2020.

[11] In October 2020, C21 made its initial demand for document production. Among other categories of documents, C21 demanded electronic communications within REW regarding the issues raised in the pleadings; project management systems including the Jira database used by REW to track issues identified in the Platform; source code of the Platform over time; records of testing conducted by REW on the Platform; and copies of communications in feedback channels through which REW communicated about deficiencies in the Platform.

[12] The parties produced its first set of documents in late February and early March 2021.

[13] On March 18, 2021, C21 filed a notice of trial scheduling the trial for 25 days to start on September 12, 2022.

[14] On February 22, 2022, counsel for C21 via letter demanded pursuant to R. 7-1(11), categories of documents including the following: Slack messages between members of the REW development team working on the Platform; planning, structuring, and database architecture documents; all source code containing the algorithms and functionality for handling specific issues; records from REW's internal service ticketing system including Zendesk; records from REW's internal project management systems including Jira; and all relevant records from Google sheets or docs prepared or used by REW regarding the Platform.

[15] On April 1, 2022, REW served its amended list of documents and provided documents responsive to eight of the categories. REW advised that it specifically refused to provide its source code and that in its view, the demand was too broad and did not comply with the *Rules*.

[16] On April 28, 2022, C21 advised it would be bringing a motion for production of its requested documents. C21 requested the consent of REW to adjourn the September 2022 trial dates. REW consented and the trial was adjourned to April 2023.

[17] On May 30, 2022, C21 responded to REW, providing further support for their position that the records sought ought to be produced.

[18] On June 16, 2022, C21 filed an application seeking an order for the production of the documents. REW took issue with the affidavit filed by C21 in support of its application. It was an affidavit from Jack Miller of T3 Sixty, a technology firm based in the U.S., who was acting as the chief technology officer of C21 during the development of the Platform. In REW's view, the affidavit contained opinion evidence about why the documents requested were required to analyze the functionality of the Platform and Mr. Miller was not an independent expert. REW, on June 28, 2022, filed an application to cross-examine Mr. Miller on his affidavit, due to REW's concerns regarding his lack of independence and qualifications. On July 15, 2022, C21 produced some of the documents sought by REW in its application to cross-examine Mr. Miller, including the contracts between C21 and T3 Sixty, entered into between 2015 and 2018.

[19] Both C21's document production application and REW's application to cross-examine Mr. Miller were heard by Justice Hughes on July 25, 2022. There was insufficient time to complete submissions and the matters were adjourned to November 1, 2022.

[20] In the meantime, the parties attempted to negotiate a consent order where REW would provide further documents and a comprehensive electronic export of its Jira and GitLab databases relating to the Platform, on the condition that Mr. Miller and T3 Sixty not be able to access the source code. C21 did not agree to this last condition.

REW's application for a protective order with respect to the source code was heard by Justice Hughes on November 4, 2022. On November 10, 2022, Justice Hughes granted the protective order, prohibiting Mr. Miller from accessing the source code. The conditions for the protective order and the records consented to be disclosed were drafted in a single order ("November 2022 Order").

[21] Appendix A of the November 2022 Order sets out the categories of documents to be produced. For present purposes, I will set out in part Appendix A:

1. All relevant records, not already produced, including but not limited to emails...Slack...related to correspondence amongst and between the members of the REW development team working on the Platform...
2. All relevant records related to the development of the Platform including but not limited to...planning and structuring documents, ...software and database architecture documents...
3. All source code and other records...containing the algorithms and functionality for handling the following specific issues...
4. All relevant records from REW's internal service ticketing system(s) including but not limited to all records from Google Sheets, Zendesk...
5. All relevant records from REW's version control system(s), including but not limited to all ...code updates, GIT (or other) commit comments and explanations...relating to development...in respect of the Platform.
6. All relevant records not yet produced from REW's internal project management system(s) and bug reporting including but not limited to REW's use of JIRA or other internal management system(s) in respect of the Platform.
7. All relevant records from REW's support services group(s) on Facebook...
8. All relevant records from Google GSuite...including...all Google sheets or docs prepared or used by REW...
9. [not used]
10. All agreements for any and all Autonomous Services...

[22] Paragraphs 4 and 5 of the November 2022 Order set out how production of Jira and GitLab was to occur:

Access to Jira and GitLab

4. BY CONSENT, the Defendant shall, on or before November 16, 2022, provide the Plaintiff with documents in categories 3, 5 and 6 of Appendix A to this Order by providing to counsel for the Plaintiff a comprehensive electronic export of the Defendant's Jira and GitLab databases relating to the platform

developed pursuant to the Enterprise Client Service Agreement between the parties dated May 31, 2017 (the “Platform”), which Platform is the subject of this Action (the “Access”).

5. BY CONSENT, the Defendant shall provide such Access by delivering to counsel for the Plaintiff a comprehensive electronic export of the Defendant’s Jira and Gitlab databases relating to the Platform which can be imported into Jira and Gitlab databases on behalf of the Plaintiff.

[23] The terms of the protective order in regard to the source code are set out in paras. 6 to 24 of the November 2022 Order.

[24] On November 17, 2022, REW exported two Jira projects related to the Platform labelled C21 and REWCRM and one GitLab repository related to the Platform labelled C21. REW produced additional documents on November 21, 2022.

[25] As I understand it, Jira is a project management tool used by software developers. Jira includes features that allow developers to plan a project, assign tasks to team members and track work. GitLab is a version control system for software developers that allow developers to build source code, make changes to it and merge those changes into the main code. It is a collaborative system used for maintaining software artifacts. GitLab is a repository of the source code that has been developed over time. Each change made to the software is done through a commit, which includes information on the commit author, the commit timestamp, a commit message or description and a commit hash.

[26] On December 13 and 14, 2022, C21 examined for discovery Morgan Carey, the chief executive officer of REW. C21 made 118 requests during the examination. One of these requests was for the source code that related to how data was pulled from the different MLS Feeds.

[27] On January 17, 2023, after further investigation of the request made to Mr. Carey for source code related to how REW pulls data from MLS Feeds, REW exported to C21 two additional GitLab repositories, labelled C21-raw and C21-master. C21 asked about any Jira projects related to the issue, and reiterated its position that it expected a comprehensive export of the Jira and GitLab databases relating to the

Platform, including REW's handling of data from property listings. Later the same day, counsel for REW responded that REW has conducted a search and have not found any other Jira projects.

[28] On January 25, 2023, REW delivered responses to the 118 requests from the examination of Mr. Carey.

[29] On February 3, 2023, the parties exchanged expert reports.

[30] On February 16 and 17, 2023, REW conducted its examination for discovery of Mr. Miller, leaving 40 requests.

[31] On February 21 and March 3, 2023, C21's application to vary the November 2022 Order was heard by Justice Hughes. C21 sought to vary the confidentiality provisions to allow Mr. Miller access to the source code. On March 3, 2022, Justice Hughes dismissed C21's application.

[32] On March 3, 2023, Associate Judge Harper granted C21's application to examine Christopher Manning and Michael Audet as third-party witnesses. I understand they are former employees of REW.

[33] On March 10, 2023, C21 delivered its responses to the requests left at Mr. Miller's examination for discovery and some further disclosure. The further disclosure included spreadsheets relating to deficiencies in the Platform, PowerPoint presentations created by T3 Sixty to update C21 on the progress of the project, and information on C21's testing teams.

[34] On March 16, 2023, Mr. Manning was examined by C21. He worked at REW from August 2018 to February 2020 as project manager for the development of the Platform. He reported to Matt Pinneo, the head technical lead and Aayam Kapoor, the head project manager. Mr. Manning testified about technical debt, which he explained as referring to programming errors that build up in software over time. Mr. Manning testified that due to the technical debt, "when you try and add on top of it, it becomes a bit of a house of cards where everything that you add on top could break something

somewhere else”. Mr. Manning was of the view that technical debt impacted the development of the Platform. He also testified he believed the members of the development team used a Slack channel for communications on the Platform.

[35] On March 22, 2023, REW’s counsel advised that she was of the view the trial was not ready to proceed on April 11, 2023. C21 opposed an adjournment of the trial date. REW filed a notice of application seeking an adjournment on the basis that there was insufficient time to complete discovery steps required before April 2023.

[36] On March 27, 2023, C21 consented to an adjournment. By consent, the trial was adjourned to June 24, 2024. REW was not to seek any further adjournments of the trial.

[37] On August 1, 2023, C21 wrote to REW expressing concerns about REW’s document disclosure. C21 advised that the C21 Jira project contained references to undisclosed Jira projects called IDX and BREW48. The REWCRM Jira project contained many references to other undisclosed Jira projects, for example, REWCRM-654. C21 expressed concerns about non-disclosure of records from group Slack channels as referenced by Mr. Manning. C21 referred to some recordings of visual demonstrations of the Platform that had not been produced, as well as the fact that Zendesk tickets that had been produced did not include ticket numbers.

[38] On August 9, 2023, REW responded. REW was looking into the Jira and GitLab issues and asked for additional examples of missing Jira issue tags. REW advised it had produced the videos requested. REW in turn requested C21 to produce videos made by T3 Sixty. REW advised it was looking into whether there were any additional Slack records, and asked for any Slack records of communications between C21 and T3 Sixty.

[39] On August 21, 2023, REW advised it disagreed that the BREW48 Jira project was relevant, as it was created in 2016 for the purpose of enhancing REW’s base CRM¹ product for all REW clients. REW confirmed the source code developed in the

¹ I understand CRM refers to customer relationship management.

BREW48 Jira project that related to CRM features or enhancements in the Platform had been produced. REW advised it disagreed that the IDX Jira project was relevant, as it was used to discuss and share changes made to the core feed code used by all of REW's clients. The Platform diverged from the core feed in light of the customizations requested by C21. REW confirmed that the IDX feed code exported to C21 on January 17, 2023, contained all of the feed code included in the Platform. REW asked C21 if it had any further examples of missing issue tags from the REWCRM Jira project. REW advised it was still working on the production of Slack records, and advised the ticket numbers for the Zendesk tickets had been provided.

[40] On August 21, 2023, REW sent a document demand to C21, seeking production of internal communications including Slack records; recordings of Platform demonstrations; agreements between C21 and T3 Sixty relating to the Platform and this action; records for training and instructions to testing groups; all records generated by C21's and T3 Sixty's use of Asana or other project management software; contracts between C21 and MoxiWorks related to the development of a replacement for the Platform; and various C21 and T3 Sixty financial and payment records.

[41] On September 21, 2023, C21 responded. C21 advised that C21's Slack channels had been decommissioned and C21 had submitted a request to Slack to recover its channels; that C21 and T3 Sixty's Asana programs had been decommissioned and C21 had submitted a request to Asana to recover those records; C21 offered to produce the MoxiWorks contract on a counsel's eyes only basis; and C21's position was that its financial records and those of the C21 marketing fund were irrelevant. C21 disagreed that the BREW48 and IDX Jira projects were irrelevant, as those Jira projects relate to the core code on which the Platform was built. C21 referenced Mr. Manning's evidence that technical debt in the core code impacted the Platform.

[42] On October 16, 2023, REW responded. REW had investigated the use of Slack and learned that some employees and teams did use Slack to discuss the Platform. REW had retrieved Slack communications and was reviewing the Slack records. REW

offered to remote access the prior exports to ensure the REWCRM and C21 Jira projects which C21 had received in November 2022 were complete.

[43] On November 24, 2023, REW conducted a review of C21's REWCRM and C21 Jira projects via remote access. REW concluded that the exports were complete except for some change history data associated with a subset of issue tags that were not captured due to limitations on the cloning process. On December 13, 2023, REW reported the results of the comparison to C21 and provided a changelog spreadsheet that included the subset of missed issue tags.

[44] On December 14, 2023, C21 provided REW an update on REW's document request. C21 advised that the Slack records could not be recovered; that the video recording requested could not be recovered from Zoom; that records from Asana would be produced; and that C21 maintained its position that its financial records and those of the C21 marketing fund were not relevant.

[45] On December 20, 2023, REW responded, asking for details of C21's attempts to recommission the Slack channels. On December 29, 2023, REW produced Slack records.

[46] On January 12, 2024, C21 filed this application. On the same day, REW filed its application for production of Slack records, Asana records and financial and payment records.

The Evidence in C21's Application to Strike

[47] C21 relies on an expert report of Dr. Ivan Beschastnikh of UBC's Computer Science Department. He provided two affidavits. As well, C21 relies on affidavits from two paralegals.

[48] Dr. Beschastnikh identifies the following as missing from the disclosure already provided:

- The IDX Jira project. He identifies references made to the IDX Jira project in the c21-raw and c21-master GitLab repositories. In his view, changes

made to the Platform were made with explicit references to the IDX Jira project. His view is that without the IDX Jira project, it will be challenging to understand how c21-raw and c21-master were developed and why they were developed in that fashion.

- Technical documentation for the database design and data export. Dr. Beschastnikh's opinion is there is little technical documentation in the materials provided by REW. His view is technical documentation describing the structure and rationale for the design of REW's databases as well as database data is necessary to assess how the Platform functioned.
- The BREW48 Jira project. Dr. Beschastnikh found many references to the BREW48 Jira project. His view is the Platform was developed based on an earlier version, which was developed through thousands of commits that refer to the BREW48 Jira project.

[49] On January 15, 2024, REW did further investigation into the missing Slack records identified by channel name in C21's application. REW discovered a separate workspace which had not been reactivated. REW continued its efforts and identified additional workspaces.

[50] On February 20, 2024, REW produced further documents including: exports of the IDX Jira tickets specifically identified by C21's expert; further recovered Slack communications; additional technical documentation and a CRM data snapshot. REW also produced the links identified as missing resources in Dr. Beschastnikh's report except for one, which could not be located.

[51] On February 27, 2024, REW produced the exports of the BREW48 Jira tickets specifically identified by C21's expert.

[52] On February 28, 2024, REW filed its response to C21's application to strike. REW filed an expert report of Dr. Ali Mesbah of the Department of Electrical and Computer Engineering at UBC, two affidavits by Richard de Groot, REW's engineering manager and an affidavit by William Blackwell, REW's IT administrator.

[53] On March 6 and 7, 2024, REW produced internal communications from Google Chat Spaces and the Feeds Site referenced by Mr. de Groot that was inadvertently not produced on February 20, 2024.

[54] In Dr. Mesbah's opinion, the missing resources described in Dr. Beschastnikh's report are not required to assess functionality of the Platform; the IDX and BREW48 Jira projects are simply project management tools that aid in understanding the history of changes to REW's software. To assess functionality of a software platform, understanding its history of changes can be beneficial, though not always necessary. In practice, it is more common to assess functionality by examining the current state of the platform, i.e. the existing code, its documentation and how it would function in its present form. In Dr. Mesbah's view, technical debt is a concept that captures the long-term costs and consequences of suboptimal software development practices. Technical debt can be a strategic tool to create value when managed wisely. It is common in software development projects and nearly impossible to avoid due to the dynamic nature of software requirements, time constraints, and the continuous evolution of technology.

Application to Strike REW's Pleadings

Position of C21

[55] C21 applies pursuant to R. 22-7(5) and (6) to strike REW's pleadings for intentional or negligent non-compliance with the November 2022 Order and the *Rules*. C21 argues REW was made aware since October 2020 of the categories of documents being sought. Those categories included internal Slack records of communications between members of the REW development team working on the Platform; all relevant records related to the planning, structure, and architecture of the Platform; and all internal project management systems including Jira.

Slack Records

[56] There was evidence from documents produced in March 2021, April 2022, and January 2023 that Slack was used for internal communications on the Platform. Mr. Manning in his examination for discovery in March 2023 testified that Slack was

used by the development team. Despite the November 2022 Order which explicitly stated Slack communications were to be produced, REW did not take any steps to investigate the use of Slack until the spring of 2023. C21 did not receive any Slack records until December 2023. REW made no attempts to explain the delay in looking for Slack records.

Planning, Design and Architecture Documents

[57] C21 requested planning, design and architecture documents in October 2020. They were ordered to be produced in the November 2022 Order. REW has only recently produced a few documents in this category that were specifically referenced in Dr. Beschastnikh's report. Mr. de Groot and Mr. Blackwell only looked for the documents referenced by C21's expert, and they provided no evidence as to whether these are all the design and planning documents REW has in relation to the Platform and why these documents were not produced earlier.

IDX and BREW48 Jira Projects

[58] C21 argues REW was requested and ordered to produce a comprehensive export of Jira and GitLab databases relating to the Platform. While REW exported two Jira and one GitLab database in November 2022, it has been shown this export was not comprehensive. In January 2023, REW produced two additional GitLab projects, c21-raw and c21-master, in relation to the development of the Platform. C21 was advised at the time there were no additional Jira projects in relation to the Platform. However, upon examination, C21 expressed concerns starting in August 2023 that two additional Jira projects—IDX and BREW48—were referenced and appeared to relate to the development of the Platform. REW takes the position that IDX and BREW48 Jira projects were used in relation to the base code, and not the custom code required for the Platform. C21 disagrees with this position, arguing that the November 2022 Order provided for the production of all core and custom code. C21 argues the expert report explained that due to the many references to IDX and BREW48 in the GitLab repositories, it is clear that these Jira projects were used in relation to the Platform. C21 argues REW did not comply with the November 2022

Order to provide a comprehensive export of the Jira projects related to the development of the Platform. REW's action in not providing the IDX and BREW48 Jira projects is negligent and obstructive.

Adverse Inference

[59] C21 asks the Court to draw an adverse inference against REW for its failure to provide evidence from Mr. Pinneo, Mr. Kapoor or Mr. Carey in this application. C21 argues these individuals were senior employees of REW who worked on the Platform and they would have been far better placed to provide evidence to explain the delay in producing documents. In these circumstances, C21 argues the Court can draw an inference that their evidence will be detrimental to REW. C21 argues the Court can find that REW has and continues to suppress the production of documents.

Alternative Relief

[60] If the Court does not strike REW's pleadings, C21 seeks alternative relief: that REW comply with the November 2022 Order and produce the documents within 21 days; C21's counsel and two independent experts be granted access to REW's computer systems; that REW produce an affidavit verifying its list of documents; and that C21 be permitted to examine for discovery Mr. Pinneo as the representative of REW.

Position of REW

Admissibility of Evidence

[61] REW argues as C21 is seeking to strike REW's pleadings, this is a final order and C21 cannot rely on lay opinion or hearsay evidence. REW argues the affidavit no. 1 of Mr. Miller contains inadmissible opinion evidence, as Mr. Miller is not an independent witness nor a properly qualified expert. C21 also cannot rely on an email neither sent nor received by Mr. Miller describing deficiencies in the Platform for truth. Further, REW argues Mr. Manning's evidence is inadmissible lay opinion on various topics, including the meaning of technical debt, how it arises, how it impacted the Platform, and that REW failed to properly manage the project.

[62] With respect to an adverse inference, REW argues there is no basis for the Court to draw one. Mr. de Groot and Mr. Blackwell were the employees tasked with searching REW's databases to identify and produce outstanding records. They are well placed to provide evidence on REW's efforts to identify and produce relevant records. There is no basis to draw an adverse inference against REW for providing evidence from Mr. de Groot and Mr. Blackwell on this application to strike. REW argues C21 has not established that Mr. Pinneo, Mr. Kapoor or Mr. Carey are better placed to provide evidence on REW's efforts to find and produce the requested documents.

Compliance with November 2022 Order

[63] REW argues the November 2022 Order stipulates that the production of the relevant records under categories 3, 5 and 6 is met by providing "a comprehensive electronic export of the Defendant's Jira and GitLab databases relating to the platform developed pursuant to the Enterprise Client Service Agreement between the parties dated May 31, 2017". REW's position is that the two Jira projects exported in November 2022, the C21 and REWCRM, were the specific Jira projects used in connection to the development of the Platform. REW's position is the IDX and BREW48 Jira projects do not relate to the development of the Platform. They are planning tools used for software changes pertaining to REW's base feed framework and base CRM framework used by all REW customers. These base frameworks were not developed for C21. REW's position is that the IDX and BREW48 Jira projects are not encompassed by the November 2022 Order. REW has produced the specific IDX and BREW48 tickets identified by C21's expert.

[64] REW acknowledges that Slack records are within the scope of the November 2022 Order. REW took steps starting in the spring of 2023 to recover them by recommissioning Slack accounts. The failure to produce Slack records earlier was inadvertent oversight.

Compliance with the Rules

[65] REW argues that R. 7-1(11) applies for demanding additional documents. This is second tier disclosure which requires C21 to identify the additional documents with reasonable specificity. REW advised C21 in August 2023 of its position that IDX and BREW48 Jira projects were not material or relevant. C21 chose not to bring an application pursuant to R. 7-1(13) for production of the documents. REW has produced the specific BREW48 and IDX Jira tickets referenced in C21's expert report. In these circumstances, REW argues it has complied with the *Rules* with respect to document production.

Lawful Excuse

[66] If there has been non-compliance, REW argues it has presented a lawful excuse. The Slack records were overlooked and REW took steps to recover these records and have produced them. With respect to the production of the entirety of the BREW48 and IDX Jira projects, REW's position is these are not within the scope of the November 2022 Order. If REW is found to be incorrect in its position, REW argues it was a reasonable interpretation and a lawful excuse.

[67] REW argues the remedy of striking its pleadings is draconian and ought not be granted.

Alternative Relief

[68] REW argues the alternative relief sought by C21 ought not be granted. With respect to C21's disclosure requests, the following is REW's position:

- Slack Communications: REW has produced the Slack messages it has been able to recover.
- Key planning, design and architecture documents in (a) the IDX Jira project; (b) the BREW48 Jira project; (c) technical documentation; and (d) database data:

- (a) the IDX Jira project: REW has produced portions of the IDX Jira project specifically identified by C21's expert as being referenced in the code commits relating to the Platform;
- (b) the BREW48 Jira project: REW has produced the portions of the BREW48 Jira project specifically identified by C21's expert as being referenced in the code commits relating to the Platform;
- (c) technical documentation: REW produced all existing technical documentation identified in C21's expert report. REW does not have the extensive design documentation for the Platform that C21's expert described that he expects to find. REW produced technical documentation related to feeds that does not relate specifically to the Platform but is general documentation for the Feeds Team.
- (d) database data: REW recovered an archived data snapshot of the Platform as of September 9, 2021 and has produced it.

Analysis

Legal Framework

[69] Pursuant to R. 22-7, the Court has discretion to strike out the response to civil claim and pronounce judgment where there has been a failure to comply with the *Rules* or a court order. The principles that govern applications to strike are set out in *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322:

[103] An order dismissing a claim or striking out a response to civil claim is a draconian remedy, described by this Court as "a blunt tool, to be used sparingly": *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 at para. 28. Nevertheless, in the most egregious of cases, such an order may be justified. In *Rise & Shine Grocery & Gas Ltd. v. Novak*, 2016 BCCA 483, this Court upheld an order dismissing the plaintiff's claim in a negligence action based on its multiple flagrant and unexcused breaches of the *Rules* and court orders. In explaining why, Justice Goepel quoted from *Breberin*, in which Justice Willcock, then of the Supreme Court of British Columbia, summarized the principles that apply:

[35] In *Breberin v. Santos*, 2013 BCSC 560 Willcock J. (as he then was) summarized the jurisprudence dealing with dismissal applications pursuant to Rule 22–7:

[52] Several principles identified in the jurisprudence describe and limit the appropriate application of Rule 22-7.

[53] The order sought by the defendants is not readily granted. Dismissal is a “blunt tool, to be used sparingly” in response to procedural delay: *House of Sga’nisim v. Canada* (Attorney General), 2007 BCCA 483 at para. 28 [House of Sga’nisim]. The remedy is a “draconian” one, “only to be invoked in the most egregious of cases”: *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. It is to be avoided where it is reasonable to do so: *House of Sga’nisim* at para. 30.

[54] Where failure to comply with the Rules or failure to comply with the terms of a court order is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 36 [Balaj]; *Eisele v. B.A. Blacktop Ltd. et al*, 2004 BCSC 521 at para. 15.

[55] In this context, a “lawful excuse” is “one which, in the discretion of the judge acting judicially, is worthy of acceptance”: *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 1252 at para. 24.

[56] Because an action may be struck when the lack of production has been occasioned by negligence, the degree of negligence required should be more than moderate on a scale ranging from mere negligence to gross negligence.

[57] Fundamental failures, such as failure to make appropriate disclosure of documents or records, must be treated as a serious default.

[58] A dismissal order will not usually be granted on a first application for relief arising from procedural delay, even intentional delay. Injustice might result from such a course of action.

[59] A dismissal order will not usually be granted until the plaintiff has been warned that result will follow upon further delay or obstruction.

[60] Lesser sanctions ought to be considered where any are available and appropriate.

[61] A self-represented litigant cannot be held to the same standards as a professional lawyer in terms of compliance with court procedures and rules. That said, a litigant who chooses to represent him- or herself cannot ignore his or her responsibilities with impunity.

[62] A persistent pattern of delay on the part of the plaintiff, as well as a persistent failure to comply with the Rules of Court and court orders, may result in a dismissal order. Defaults must be seen in

context. The plaintiff's conduct of the claim from its inception does have a bearing on the seriousness of the default before the court.

[63] When persistent conduct prevents the litigation from progressing at all, and when trial dates are lost through deliberate defaults, the failures may have an irreparable negative effect on the just determination of a case. Failing to comply with an order in a manner that causes an adjournment of trial is seriously prejudicial to the defendants.

[64] Refusal to comply with an order for reasons raised before the court and rejected amounts to an overt and deliberate flouting of the court order: *Balaj*; *House of Sga'nisim*; *Dhillon v. Pannu*, 2008 BCCA 514; *Kemp v. Dickson*, 2006 BCSC 288.

[70] The ultimate question on a R. 22-7(5) application is whether the order sought serves the interests of justice. The Court is to consider whether a lesser remedy will suffice, as the objective of the *Rules* is to promote a determination on the merits: *Barrie* at paras. 104–106.

Has There Been Non-compliance with the Rules?

[71] C21 relies on R. 22-7(2)(d), 22-7(5) and 22-7(6) in this application to strike. R. 22-7(2)(d) and 22-7(5) relate to non-compliance with the *Rules*, while R. 22-7(6) relates to non-compliance with a direction of the court.

[72] In my view, it cannot be said that there has been non-compliance with the *Rules*. The documents that C21 complains that have not been disclosed were initially demanded pursuant to R. 7-1(11) on February 22, 2022. REW responded on April 1, 2022, stating that in its view, the request was overly broad, ambiguous and did not identify the additional documents with reasonable specificity. REW disclosed some documents and provided reasons for why it would not disclose others. REW complied with R. 7-1(12) by providing a response within 35 days stating the reasons why it was not making some of the requested documents available.

[73] The demand for documents made on February 22, 2022 resulted in the November 2022 Order. The documents that C21 are seeking flow from the November 2022 Order. At no time after the November 2022 Order did C21 make another document demand pursuant to the *Rules*. While C21 argues now the non-disclosed

documents should have been first tier disclosure pursuant to R. 7-1(1), that was not how C21 framed its initial demand. In my view, C21 cannot retroactively recast how the demand was framed for the purpose of evaluating REW's compliance with the *Rules*.

[74] I find C21 has not proven there has been non-compliance of the *Rules* by REW.

Has There Been Non-compliance with the November 2022 Order?

[75] C21 argues there has been non-compliance with the November 2022 Order in three ways:

1. REW did not provide, before November 21, 2022, all relevant Slack messages, as required in para. 2.
2. REW did not provide all relevant records relating to planning, structuring and architecture documents by November 21, 2022, as required in para. 2.
3. REW did not provide by November 16, 2022, "a comprehensive electronic export of...Jira and GitLab databases relating to the platform", as required by para. 4.

[76] With respect to the Slack messages, the evidence is clear that REW did not provide these until December 2023, and it turned out those were incomplete.

[77] With respect to the planning, structuring and architecture documents, the evidence is clear they were not provided by November 21, 2022. As I understand C21's argument, their position is these documents are in the IDX and BREW48 Jira projects, which have not been disclosed. There were some specific technical documents identified in C21's expert report and these were produced in 2024.

[78] With respect to a comprehensive electronic export of REW's Jira and GitLab databases relating to the Platform, C21 takes the position that IDX and BREW48 ought to have been included in the export. IDX and BREW48 are Jira projects containing the project management history for issues relating to the base code of REW's non-custom

products. C21 argues as the Platform was built out from REW's base framework, it is necessary to have access to the history of the base code. REW takes the position these projects are not specific to the Platform, pre-existed the Platform and that it is not necessary to have a complete history of the development to be able to assess the functionality of the Platform. In any event, for the purpose of this application to strike, REW takes the position that the November 2022 Order did not include other Jira projects which were not specific to the development of the Platform.

[79] I find C21 has proven there has been non-compliance with the November 2022 Order. REW did not produce the Slack messages or planning, history and architecture documents by the date required. As for the IDX and BREW48 Jira projects, I find based on the evidence that they are related to the Platform. C21's expert found numerous references to both the IDX and BREW48 Jira projects in the GitLab repositories for the Platform, indicating that issues for the Platform were co-mingled with issues on these two Jira projects. Dr. Mesbah did not dispute this but stated in his view, it was not necessary to access these two additional Jira projects to evaluate the current functionality of the Platform. However, in my view, that does not mean the IDX and BREW48 Jira projects are not related to the development of the Platform.

[80] I find C21 has proven there has been non-compliance by REW of the November 2022 Order.

Is There a Lawful Excuse for the Non-compliance?

[81] REW argues its position that the IDX and BREW48 Jira projects are not encompassed by the November 2022 Order is a reasonable interpretation. REW provided the Jira and GitLab databases that were specifically used for the Platform in November 2022. When REW became aware in January 2023 that there were two additional GitLab databases specific to the Platform, REW produced those. REW argues because IDX and BREW48 are Jira projects related to the base code and not specific to the Platform, REW took a principled approach in refusing to disclose them.

[82] In my view, REW has provided a lawful excuse for its failure to produce the IDX and BREW48 Jira projects. The relevance of these two Jira projects to the litigation is

by no means clear, and REW cannot be faulted for its position. REW advised C21 of its position that these two Jira projects were not subject to production in August 2023. C21 could have filed an application compelling production. In complex litigation, courts have recognized counsel can reasonably disagree on the relevance of certain documents, and cases with large scale document production involve an ongoing process of evaluation: *Barrie* at para. 101.

[83] Similarly, with respect to the Slack records, I find there is no evidence REW refused to produce them, or was negligent in its approach to disclosure. Though there was a delay from the time of the November 2022 Order to when REW began investigating the existence of Slack records, that delay was about four months. During that time, REW had to comply with exporting the Jira and GitLab databases, producing more than 11,000 documents in compliance with the November 2022 Order, attending the examination for discovery of Mr. Carey and providing responses to 118 requests arising from that examination, exporting two additional Gitlab databases, conducting an examination for discovery of Mr. Miller and negotiations to adjourn the trial date of April 2023. In the context of this background, I do not find REW was negligent in not starting to look into Slack records earlier than the spring of 2023. Once REW started investigating the existence of Slack records, it required REW to identify the accounts, to apply to recommission the accounts, track down the individuals who were the “owners” of those accounts and then to export the accounts and review the messages for relevance. It was not a simple process. REW has now produced all the relevant Slack records it has been able to recover.

[84] With respect to the planning, structuring and architecture documents, REW’s position that most of these documents were captured by the Jira and GitLab exports in November 2022 was reasonable. The two Jira projects exported were specific to the development of the Platform. It is reasonable to believe as these were the project management tools used, if there were any planning and design documents, they would have been included. REW has produced the specific documents referenced in C21’s expert report. I do not find the conduct of REW to be negligent with respect to disclosure of these documents.

[85] C21 argues REW has provided no lawful excuse for its failure to disclose and late disclosure. C21 takes the position that the documents sought were set out with reasonable specificity, that the November 2022 Order was clear on what had to be produced and that REW has provided no evidence from a senior employee at REW to explain the steps taken to search for documents.

[86] With respect, I do not agree with that characterization. The initial request and the November 2022 Order use broad language to describe categories of materials. The evidence shows shortly after the November 2022 Order, there was a substantial amount of disclosure provided to C21. This was a complex software development project which spanned from 2017 to 2021. Software development is a technical area requiring an understanding of the process to appreciate what materials may have been generated that ought to be disclosed. While C21 makes much of the fact that there is no evidence from Mr. Carey, Mr. Pinneo or Mr. Kapoor about what steps they took to locate documents, REW has provided evidence from its engineering manager and the IT administrator, two individuals who were tasked with locating materials for disclosure. I note Mr. de Groot was involved in exporting the c21-raw and c21-master Gitlab databases in January 2023, and in a remote review of C21's Jira and GitLab environments in November 2023. I do not find that Mr. Pinneo or Mr. Kapoor would have been better placed to speak to efforts on disclosure. I decline to draw an adverse inference against REW as I do not find Mr. Pinneo or Mr. Kapoor are material witnesses in this application to strike: see *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21 at para. 51.

[87] In my view, REW has shown a lawful excuse for its non-compliance with the November 2022 Order. There was no intentional failure by REW to produce documents. The failure to disclose was also not negligent. REW was not careless or reckless with respect to its disclosure obligations. While there was some delay in locating Slack messages, that delay is explained in the context of the litigation. With respect to the IDX and BREW48 Jira projects, REW had advised shortly after the request that its position was they were not relevant. If C21 did not agree with that position, C21 could have brought an application to compel production. REW's position

was a reasonable interpretation of the November 2022 Order. This is far from a flaunting of a court order.

[88] I find there is no basis to strike the pleadings of REW.

Alternative Relief Sought by C21

[89] Having found no non-compliance with the *Rules*, it is unclear on what authority C21 is seeking the alternative relief. If C21 is relying on R. 22-7(2)(e) to argue the Court can make any other order to further the objective of the *Rules*, that only applies if there has been non-compliance with the *Rules*.

[90] As the orders sought as alternative relief are available under the *Rules* and REW does not object to the authority of the Court to consider if alternative relief ought to be granted, I will consider the alternative relief sought.

Compliance with the November 2022 Order

[91] C21 seeks an order that REW comply with the November 2022 Order and produce the records sought within 21 days.

[92] In my view, this ought to be framed as an application for production of additional documents, pursuant to R. 7-1(11) and (13), for the IDX and BREW48 Jira projects. The Slack records and the technical documents have been produced.

[93] As discussed earlier, in my view, the IDX and BREW48 Jira projects are relevant. While these Jira projects are not specific to the Platform, I agree due to references to them during the development of the Platform, they are relevant avenues of investigation. Information from IDX and BREW48 may assist in understanding how the Platform was developed, and may assist in assessing the functionality of the Platform in different time periods. These materials may lead to a train of inquiry, as set out in *Barrie*:

[96] A demand made under Rule 7-1(11) is a demand for second tier disclosure. Second tier disclosure encompasses documents that meet the broader *Peruvian Guano* relevance test, namely, documents that relate to matters in question in the action. Second tier disclosure encompasses

documents that may enable a party, directly or indirectly, to advance their own case or damage that of their adversary, including documents that may fairly lead to a train of inquiry having either consequence: *Natural Trade* at para. 23.

[94] I find the IDX and BREW48 Jira projects from May 2017 to March 2021 should be disclosed, as that is the time period when the Agreement was in place. I do not find the project management issues which predated the start of the Agreement or issues which arose after the Agreement was terminated to be relevant.

Access to REW's Systems for Inspection

[95] C21 relies on R. 7-1(15), (17) and 7-6(4) to seek access for C21's counsel and two independent experts to inspect REW's systems used to produce the Platform. C21 argues REW has thwarted the discovery process by failing to disclose key documents for years. C21 argues it is appropriate to grant access to REW's systems so C21 can determine if other materials ought to be disclosed and to assess the standards by which the Platform was built.

[96] C21 relies on *Spar Aerospace Ltd. v. Aeroworks Engineering Inc.*, 2007 ABQB 543, aff'd 2008 ABCA 47 and *Sonepar Canada Inc. v. Thompson*, 2016 BCSC 1195 [*Sonepar*]. However, in my view, these cases are factually distinguishable. Both of these cases involve situations where there had been deliberate failures to produce documents. With respect to inspection of hard drives that may contain vast amounts of information unrelated to the action, the Court in *Sonepar* at para. 46 found "in exceptional circumstances where there is evidence that a party is intentionally deleting relevant and material information, or is otherwise deliberately thwarting the discovery process, the court may order the production of the entire hard drive for inspection".

[97] There is no evidence there has been any deliberate destruction or withholding of information by REW. In my view, there is no basis to order an inspection of REW's systems.

Affidavit Verifying List of Documents

[98] C21 seeks pursuant to R. 7-1(8) that REW produce an affidavit verifying its list of documents. Such an order may be made where a party has shown a "dilatatory and

casual attitude to production of documents”, giving the other party “reasonable cause to suspect that either deliberately or by wilful indifference relevant documents may be hidden from them”: *Sysco Victoria Inc. v. Wilfert Holdings Corporation*, 2011 BCSC 1359 at para. 26.

[99] In my view, there is no basis to make this order. There is no evidence that REW has been dilatory or casual in its approach to discovery. The evidence is REW has responded to each of C21’s production demands. REW has taken steps to investigate when C21 provided specific inquiries. While C21 complains that a lot of the disclosure provided was late, on the eve of this application, many of the specific documents sought were not identified until C21’s expert report was filed. While the discovery process took time, and some avenues of investigation may have been initially overlooked, this must be considered in the context of a large, complex file with information stored in various online places.

Leave for Further Examination for Discovery and to Examine Second Representative

[100] C21 relies on R. 7-2(3) and (5) to seek a further examination of discovery and to examine Mr. Pinneo.

[101] The principles to be applied on an application to examine a second representative of a corporate defendant were summarized in *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2012 BCSC 582 at para. 10 and include the following:

1. there is a discretion to permit a second representative to be appointed for examination for discovery;
2. that discretion should be exercised where the party applying shows that the first representative cannot satisfactorily inform himself about the subject of the examination for discovery;
3. this is an objective test and is not determined by the view of the examiner;
4. in determining whether the first representative can satisfactorily inform himself, the Court should consider:
 - a. the responsiveness of the witness under examination;
 - b. the degree to which he has taken pains to inform himself;

- c. the nature and materiality of the particular evidence sought to be canvassed;
- d. the most practical, convenient and expeditious alternative.

[102] In my view, C21 has not shown Mr. Carey is not able to satisfactorily inform himself about the subject of the examination. After his examination, responses for the 118 requests were delivered to C21 on January 25, 2023. There is no evidence from C21 that these responses were inadequate. While there were some passages during the examination where Mr. Carey was reluctant to admit innocuous facts, I note Mr. Carey volunteered his response on the spot when asked about how REW extracts the data from the various feeds. In my view, this shows Mr. Carey was not intentionally being obstructive.

[103] In my view, there ought to be a further examination of Mr. Carey for another six hours, as documents have been produced since his examination in December 2022. However, I decline to order Mr. Pinneo be examined in place of Mr. Carey.

Application of REW for Production of Documents

[104] REW brings an application pursuant to R. 7-1 seeking from C21 production of the following:

1. C21 and T3 Sixty Addendum agreement dealing with this action and any related correspondence;
2. C21's testing records and communications;
3. C21's Asana records and documents related to decision to decommission and replace Asana;
4. C21's financial statements for 2016-2021 and C21 Marketing Fund financial records;
5. Records of payments made by C21 to T3 Sixty and record of hours;
6. Affidavit from C21 verifying its list of documents; and
7. Further examination of discovery of Jack Miller for six hours.

C21 and T3 Sixty addendum and related correspondence

[105] During his examination for discovery, Mr. Miller was asked about any agreement T3 Sixty had with C21 about this action. Mr. Miller responded that T3 Sixty

had “signed an additional amendment or addendum to our contract to cover additional hours required to be participating in this matter”. Mr. Miller denied that the addendum contained a cooperation agreement or that there was any agreement related to legal claims that could be made by C21 against T3 Sixty. A six-page document was listed in C21’s eighth amended list of documents delivered on February 13, 2024, as being covered by litigation privilege. During oral submissions, counsel for C21 produced the addendum to the Court. The Court confirmed that the addendum was more or less as described by Mr. Miller.

[106] C21 argues the addendum is irrelevant and subject to litigation privilege and opposes production. C21 argues the addendum was accurately described by Mr. Miller, and it is not the type of agreement that needs to be produced.

[107] In my view, the addendum and the related correspondence that led to its signing ought to be produced. It is clear the relationship between T3 Sixty and C21 is relevant to the proceedings. REW has claimed contributory negligence, including by T3 Sixty. REW dealt mainly with Mr. Miller in the development of the Platform. It is expected that Mr. Miller will be a witness at trial. The contents and circumstances of any agreements between T3 Sixty and C21 with respect to the Platform or this litigation is relevant: *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2014 BCSC 1560. C21 has led no evidence to prove the addendum is protected by litigation privilege, such as the circumstances and purpose of the creation of the addendum: see *Birring Development Co. Ltd. v. Binpal*, 2021 BCSC 1298 at para. 31. Further, Mr. Miller has testified about the addendum and REW is entitled to review it to see if his description is accurate. I find even if litigation privilege applies, it has been waived in this case.

[108] With respect to the correspondence related to the addendum, in my view, these materials ought to be produced to shed light on the agreement between T3 Sixty and C21.

C21's Testing Records and Communications

[109] REW seeks production of any and all records or communications relating to the training and/or instructions provided to the user acceptance testing groups and all testing records and communications.

[110] I understand some of these documents have been produced by C21, but REW seeks an order to ensure additional documents in this category will be produced.

[111] The testing records, communications, training and instructions are relevant. How C21 conducted its user acceptance testing is relevant, as REW claims the testing was flawed and misidentified bugs in the Platform, leading to delay as REW had to process these testing reports. These records should be produced.

C21's Asana Records and Documents Related to T3 Sixty's Decision to Decommission and Replace Asana

[112] Asana was the project management tool used by C21 and T3 Sixty during the development of the Platform. It is similar to Jira that was used by REW. Asana was used by C21 and T3 Sixty to track issues related to the Platform. It was decommissioned in February 2020.

[113] I understand C21 and T3 Sixty have taken steps to restore the Asana program so these records can be exported and produced. I understand this is to occur very soon as C21 and T3 Sixty have been able to obtain access to Asana for a three-day window. It appears C21 is not opposing the production of these records.

[114] In my view, the Asana records and documents related to the decision to decommission are relevant and ought to be produced.

C21's Financial Statements and the Financial Records of the Marketing Fund

[115] REW seeks C21's financial records. It argues the availability of funds for C21 to use to develop the Platform is relevant. The Platform was to be funded by the CMF, a trust fund administered by C21 on behalf of agents and brokers. C21 has denied

that it did not devote appropriate resources to support the development of the Platform.

[116] C21 opposes the production of the financial records. It argues what is relevant is the amount of resources that were put into the development of the Platform, not C21's financial statements.

[117] REW relies on evidence from Mr. Miller during his examination for discovery, where he testified there were financial limits to the marketing fund. As I understand it, REW argues C21 and the marketing fund's bottom lines are relevant, as they may have been a factor in C21's decisions regarding the purchase of project change requests or how much more to invest into the Platform generally.

[118] REW relies on *Gray v. Promark Electronics Inc.*, 2018 ONSC 2298, aff'd 2018 ONSC 5500, to argue where a party's state of mind regarding its financial status is in issue, related financial records are relevant. In *Gray*, the plaintiff was claiming damages for wrongful dismissal. He argued he was constructively dismissed when Promark unilaterally reduced his compensation. Promark in its statement of defence claimed it had unfettered discretion to vary the plaintiff's compensation to conform with its business objectives, overall economic circumstances and business realities. Promark had varied the plaintiff's compensation three other times. The plaintiff denied that Promark had this unfettered discretion; the plaintiff claimed the other three times when his compensation was varied, it was negotiated between the parties. The plaintiff challenged the *bona fides* of Promark's professed reliance on profitability to justify the reduction. The plaintiff sought production of Promark's financial records. This was ordered by a Master and upheld on appeal.

[119] REW argues this case is similar to *Gray*. REW relies on para. 12 of C21's Reply, where it is stated in part "...C21 denies that it did not devote appropriate resources or time to support REW...C21 provided all C21 resources as necessary...". REW argues production of C21's financial statements are necessary so REW can test whether C21's financial status was a factor in its decisions in funding the development of the Platform.

[120] In my view, REW has not shown C21's or its marketing fund's financial statements are relevant. In *Gray*, the defendant had directly put its financial status in issue in its pleadings, by referencing an unfettered discretion to vary the plaintiff's compensation due to economic circumstances. Promark's position is it had a discretion to vary the plaintiff's compensation due to concerns about profitability. As such, the plaintiff was entitled to challenge whether the discretion was used properly—i.e. were there financial viability issues with Promark at the time it reduced his compensation? In my view, this case is different.

[121] C21 never put its financial status in issue through the pleadings. C21 denies not providing sufficient resources or time. What is relevant is whether C21 provided the resources to test and provide feedback (para. 30b of amended response to civil claim), provide data and expertise (para. 38 of amended response to civil claim) and provide sufficient staff (para. 57 of amended response to civil claim). To draw a straight line from these claims to production of C21's financial statements is not justified.

Records of Payments Made by C21 to T3 Sixty and Record of Hours

[122] REW seeks records of hours worked and payments made by C21 to T3 Sixty. REW argues these records are relevant to show how much work was put into the Platform by C21 and T3 Sixty, as REW argues contributory negligence on their part.

[123] These records are relevant and should be produced.

Affidavit from C21 Verifying its List of Documents

[124] For the same reasons as above, I find an affidavit from C21 verifying its list of documents is not required. There is no evidence that the approach by C21 to its disclosure obligations has been casual or dilatory. Both parties are identifying additional records, making demands, and responding to those demands. The discovery process is unfolding as it should.

Additional Time to Examine Mr. Miller

[125] I understand C21 does not oppose this request. In my view, an order for a further examination for six hours is justified, as additional documents have been disclosed since his last examination. There will be no restriction on the examination.

Costs

[126] C21 sought special costs in its application to strike. REW sought an award of costs in any event of the cause, payable forthwith.

[127] Both of these costs awards are rejected.

[128] In my view, an appropriate order is costs to REW for both applications in the cause. REW was substantially successful on both applications. On C21's application to strike, the main relief was not granted. On REW's application for production of documents, REW obtained all orders for disclosure sought except one.

[129] REW is awarded costs for both applications in the cause.

Conclusion

[130] The Court makes the following orders:

1. REW will produce by April 17, 2024, the IDX and BREW48 Jira projects from May 2017 to March 2021;
2. C21 is entitled to a further examination of Morgan Carey for another six hours;
3. C21 is to produce by April 17, 2024:
 - (a) C21 and T3 Sixty's addendum agreement dealing with this action and any related correspondence;
 - (b) C21's testing records and communications;

(c) C21's Asana records and documents related to decision to decommission and replace Asana; and

(d) records of payments made by C21 to T3 Sixty and record of hours;

4. REW is entitled to a further examination of Jack Miller for six hours.

"Chan J."