IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gross v. Peak Products Manufacturing Inc.,* 2023 BCSC 971

Date: 20230426 / 20230427
Docket: S213994
Registry: Vancouver

Between:

Phil Gross

Plaintiff/
Defendant by Way of Counterclaim

And:

Peak Products Manufacturing Inc., Peak Products International Inc., Peak Innovations Inc., Peak Products America Inc., Peak Products USA Corporation, Peak RSG Services Inc., Peak Products Corporation, Peak Products Industries Inc., Peak Products Industrial Inc., Mountaintop Holdings Inc., 561885 BC Ltd., Synergize Innovations Inc., West Coast Summit Holdings, Peak Installations Inc, H2Go Installations Inc., Onpoint Compliance Solutions Inc., Superspike Inc., Synergize International Inc., 6191533 Canada Inc., 6251242 Canada Inc., 7260326 Canada Inc., 7259158 Canada Incorporated, 7258356 Canada Inc., 6504558 Canada Inc., Peak Products Pty. Ltd., Synergize Incorporated, and all corporations and entities, wherever situated, captured by the February 1992 agreement (Individually and collectively referred to as the "Peak Group of Companies") and John Anthony Gross aka John Gross

Defendants/
Plaintiffs by Way of Counterclaim

Before: The Honourable Justice Masuhara

Oral Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	W.G. Wharton R. Basham, K.C.
Counsel for the Defendants:	I.G. Nathanson, K.C. E.M. Patel
Place and Date of Hearing:	Vancouver, B.C. March 27 – 29, 2023 April 14, 2023
Place and Date of Judgment:	Vancouver, B.C. April 26-27, 2023

[1] **THE COURT:** I will start with my usual reservation if a transcript is requested to edit for clarity and insert cases and citations.

Introduction

[2] This ruling deals with several motions that were argued before me, three days at first and then another half day. I will describe them shortly, but I will cover in brief the background to provide some context.

[3] Central to this action is the assertion by Phil Gross Jr., the plaintiff, that he is entitled to an equal share in assets held by his brother John Gross or companies under his control pursuant to an agreement said to have been made in February of 1992. As I understand it, it was an oral agreement which was then reflected into written form, the written form being drafted by a jointly retained solicitor, Mr. Hatch. The document, however, was never signed.

[4] It is common ground that from and after 1996, the brothers were estranged for approximately 25 years, and the only communication between them prior to the commencement of this action on April 22, 2021, was a demand letter from plaintiff's counsel to John Gross dated March 29, 2021, attaching an unfiled notice of civil claim. There is also a subsequent letter to the registered records office delivered to Farris LLP dated April 8, 2021, which also attached a letter and unfiled notice of civil claim.

[5] As I understand it, John Gross and his companies since the mid-1990s have become very successful as a key manufacturer and supplier of building supply products such as roofing and gutter products to Home Depot. The companies are said to be the corporate defendants in this action, and I will refer to them as the Peak Group.

[6] The individual parties' father, Phil Gross Sr., now deceased, had a building supply business previously called Philip's Manufacturing Ltd., where members of the family had involvement, including the parties. It ran into financial difficulties some years ago.

[7] Mr. Wharton says that the value of the business or businesses in which the plaintiff claims an interest is north of $1.7 billion based on a recent transaction he saw involving a business similar to the Peak Group. Mr. Nathanson on behalf of the defence did not comment on this value, but there are other parts in the materials before me from the defendants that indicate considerable value.

[8] The claims here are based upon the assertion of an express or implied trust over the assets, the subject of the agreement, and for cash or other property covered by the agreement as well as oppression under the *Canada Business Corporations Act* and the *Business Corporations Act*. The plaintiff also seeks to amend the response to the counterclaim to allege a procedural abuse of process, relying on many of the same allegations asserted in the proposed amendments to the amended notice of civil claim.

[9] I was assigned case management judge in December of 2022. Prior to my assignment, a number of applications were heard by different judges of this court, which applications were, as I understand it, vigorously contested, including attendance at the Court of Appeal. I understand a decision remains pending from that court.

[10] While a trial for 21 days has been set to start September 11, 2023, and Mr. Wharton expresses the strong desire to get to trial, he laments that little progress is being made. He describes the litigation to date as, in his words, "a bare-knuckle brawl." My sense of the dynamics to this point is that there has been considerable friction and difficulties between the opposing sides. Indicative of this is the unfortunate fact that counsel cannot agree on the order of examinations for discovery and have left that issue among the many others, which I will discuss shortly, to be determined by me. Further, during the last appearance before me, Mr. Wharton advised he intends to seek further amendments to his pleadings, which have already been amended.

[11] I now turn to the matters before me. This ruling deals with a number of applications which were heard over a number of days. They are:

1. A defence application to strike the plaintiff's pleadings contained in the amended notice of civil claim, heard with the plaintiff's application to further amend his amended notice of civil claim.
2. A defence application to amend the response to notice of civil claim and counterclaim.
3. A defence application to sever the issues related to the existence of the agreement and its scope should it be found to exist, and to stay the remaining issues pending a determination of the severed issues.
4. Defence application for production of documents.
5. Plaintiff's application for production of documents.
6. The plaintiff's application for a response to its notice to admit and interrogatories.
7. As I have already mentioned, competing application as to who gets to examine the other first.

[12] The order which I will deal with the application is as follows:

1. The defence application to sever the trial with the existence of the agreement and its scope from the remaining issues.
2. The defence application to strike the plaintiff's pleadings together with the plaintiff's application to further amend its pleadings.
3. The defence application to amend its response to the notice of civil claim and counterclaim.
4. The plaintiff's application for production of documents together with the defence application for production of documents.

5. The plaintiff's application for a response to its notice to admit and interrogatories.

6. The order of examinations for discovery.

Severance and Stay

[13] Starting with the motion for severance and stay. The defendants seek severance of the allegations of an agreement between the plaintiff and John Gross and the question as to whether such an agreement was entered into and if so, its terms be determined first and a stay of all proceedings in respect to the other issues raised in the pleadings, and including discovery, pending a determination of the primary issue. John Gross and the corporate defendants seek severance and a stay of all claims brought by or against the corporate defendants, and it is recognized the applicant bears the burden to establish severance is appropriate.

[14] The basis for the relief sought is the alleged agreement as pleaded. Plaintiff seeks a declaration of a 50-percent interest in the Peak Group. The applicants note the extensive list of relief sought by the plaintiff. There are at least 11 listed in the pleadings. I will not repeat them here, but I have reviewed them.

[15] The applicants argue that the Peak Group are a dedicated supplier to Home Depot, both in Canada and the United States. Their assets are very substantial, as are their revenues, and the assessment of damages for the alleged breach of fiduciary duty and breach of trust would involve a massive analysis by experts of the values of the various companies in the Peak Group. Consequently, it is argued that the extent of the operations of the Peak Group, the disruption of costs associated with the relief sought by the plaintiff would be destructive of their businesses and their relationship with Home Depot. It is argued this massive undertaking with enormous associated costs would only arise in the event the plaintiff establishes the alleged agreement made in February of 1992. It is argued that if the plaintiff fails to establish the alleged agreement or his action is statute barred, there will be no need to engage the issues involving the defendant corporations in any of the pre-trial or trial processes.

[16] It is mentioned that the defendant corporations are privately held, and their businesses and affairs are confidential. Moreover, the interests in these entities is not only that of John Gross. It is submitted that the order sought by the defendants would result in a considerable savings of time and expense, not only for the parties but also of the court's resources insofar as trying all of the issues.

[17] The plaintiff, in opposition, submits that the defendants seek severance and a stay to avoid their disclosure obligations under the Rules and force the plaintiff to try his case without the benefit of discovery. As well, it is submitted that the motivation for severance is an attempt to delay the process and impose additional costs on the plaintiff. As examples, the plaintiff submits that severance will require multiple sets of discoveries and multiple attendances by witnesses. Severance of issues will lead to a difficult discovery process, which will see the litigants before the courts on numerous occasions to determine whether a question is within or outside the specified pleadings severed into the initial trial.

[18] The plaintiff also submits that credibility will be a key issue and that severance would serve to limit the objective assessment, as all of the evidence will not be available. The plaintiff also points out that issues such as the following are interwoven throughout the entirety of the action and that:

1. The case is factually complex, including many disputed questions of fact and law.
2. This case concerns a very large quantum.
3. This case will require the determination of questions of fact and law that should be determined on the basis of a full record and after a trial on the merits, not in slices as proposed by the defendants.
4. The defendants have not complied with the Rules and refuse document disclosure, putting the plaintiff at a disadvantage by being forced to try his case without the benefit of full disclosure,

discovery rights, and any inference is a legal conclusion that will be drawn from the same.

5. The defendants have provided selective disclosure in order to bolster their defence while concealing documents created at the same time period which would bolster the plaintiff's case.

6. The main action and the counterclaim allegations are inextricably intertwined. The events that relate to the alleged defamation arise from the very same facts involving the brothers' agreement.

7. That there are multiple duplicative judicial proceedings will arise. It is noted that both actions have common witnesses, who will then have to testify twice over the same facts. Documents will not be available in determining the scope of the agreement. Without the specifics of the Peak Group, a determination on the scope of the agreement will be made in a vacuum. It will be necessary to determine the pre and post-contract conduct of the two occasions.

8. The concern with respect to the counterclaim having been brought for the purpose of intimidating the plaintiff and attempting to have him abandon the main action.

[19] Plaintiff also argues that the limitation/acquiescence defence pleads that the plaintiff knew or ought to have known of the activities of the Peak Group, and their association with John Gross would not be able to proceed without evidence on what the companies were doing and when they were doing it.

[20] In sum, the plaintiff argues that the benefit of severance only accrues to the defendants and that the counterclaim against him alleging serious wrongs should not be left hanging over him and is deserving of a timely resolution.

[21] As an alternative, the plaintiff argues that the severance application is premature and suggests that each party be able to examine for discovery the other for a maximum 15 hours on the full breadth of the issues and then to return to address severance, as there would be a much broader record for the court to decide on the issue.

[22] The benefit identified by the defence is that considerable savings can be achieved through its proposal, which would include the limitation and acquiescent defences and the counterclaim being heard, and all of this can be completed within two weeks.

[23] The defence notes the plaintiff's acknowledgment or concession that there would be some severance of certain issues required in any event, such as the accounting, valuation and related matters. As a result, it is submitted that the plaintiff has conceded the utility of severance. Thus, leaving only the question as to the degree of severance.

[24] I will note that Mr. Nathanson also advised during the course of the hearing on this topic that he had received instructions from his clients that they would not appeal the decision arising from the severed proceeding until all issues in the entire action are decided. Thus, avoiding the concern of the plaintiff of inordinate delays through litigating in increments.

[25] I have been provided various authorities to assist in this consideration. A leading case is *Nguyen v. Bains*, 2001 BCSC 1130, Punnett J. in *Watt v. Health Sciences Association*, 2015 BCSC 2468, in following *Nguyen v. Bains* provided helpful commentary on the considerations in this regard. He stated:

> The Rule itself does not say how that power should be exercised. Rather, assistance is provided in two ways. The first is found in Rule 1(5). The second is in previous decisions of the Court.
>
> Rule 1(5) sets out the overall object of the Supreme Court Rules. That object is "to secure the just, speedy and inexpensive determination of every proceeding on its merits." Rule 39(29) must be interpreted with that object in mind.

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

[26] Punnett J. goes on:

> The first of these points is that the Court must be satisfied that there is a real likelihood of a significant saving in time and expense. More than a bare, or mere, assertion that there is a real likelihood of a significant saving in time and expense is required to satisfy the Court. That is, there must be case specific information that there will likely be a significant saving in time and expense.

[27] He notes other practical concerns, such as scheduling of a second hearing, unforeseen events such as a party, a lawyer or even a judge may become permanently unavailable for varying reasons. Another is preparing for the case more than once, and another is the memory of the evidence. The evidence will not have to be repeated if the same judge hears the first and second part of the trial.

[28] In my view, the bifurcation proposed in these circumstances would lead to considerable savings in judicial and court time as well as the parties' time of about four to six weeks. A determination of the first part of the case would obviate the need for further process, obviously, if the defence successful.

[29] The present estimate of four weeks for the trial of all of the issues as presently understood is in my view optimistic. The central issue in this case is whether an agreement was entered into and its terms or scope. I can see that this issue can be compartmentalized along with the counterclaim and the other features, which Mr. Nathanson has agreed on behalf of his client would be included in the first phase.

[30] I also think the working assumption is that I will be the presiding judge over both phases of the trial. I also observe that there are basically only two principal parties here, the two brothers, so scheduling will not be as difficult as if there were multiple parties. Though I recognize there are corporate defendants.

[31] With this bifurcation, I can see the parties being able to focus the case for a trial on the merits and avoid the pre-trial difficulties that have occurred to this point. However, as I have explained during the course of the hearings, in responding to the concerns raised by Mr. Wharton, if difficulties are encountered, such as a continuation of disputes regarding such things as the scope of discovery questions, disclosure of documents, pleading amendments and other contested matters, that demonstrate that the process will continue to be prolonged and that severance is not going to achieve the benefits envisioned, then I will be open to revisiting the merits of the severance, either on my own motion or by a party.

[32] That concludes my ruling on this matter.

[33] Turning, then, to the defence application to strike plaintiff's pleadings and plaintiff's application to --

[34] CNSL I. NATHANSON: Justice, I apologize for interrupting, but I would like to clarify one point.

[35] THE COURT: Yep.

[36] CNSL I. NATHANSON: I did say that I had instructions that my client would not appeal if there was a severance any of the issues until the trial was completed,

but I did state apart from the issue of damages or quantum. Because my friend had conceded that would have to be severed off in any event. So I am not resiling from what I told the court, but I did qualify it by saying after all of the liability issues have been determined as separate from the question of damages. And that may make a difference to you, but I thought I should raise it with you.

[37] THE COURT: Okay.

[38] CNSL W.G. WHARTON: I thought the undertaking was or at least the representation was that it would not be appealed until the end so that there would be perhaps one appeal instead of a number of appeals.

[39] THE COURT: Well, I think that is the way I took it, Mr. Nathanson. Am I wrong?

[40] CNSL I. NATHANSON: Well, I understand that I did say I had these instructions, but I -- having said that, I did say apart from the question of damages. On the other hand, if the court says this is a critical factor in your determination, then I will accept that your understanding is to govern your reasons. I just wanted to point that out, but I am content if the court says, well, my reasons were based on what I understood you to say, then I will live with that.

[41] THE COURT: Well, the way I took it, is that all of the issues would -- and if I am wrong, you need to tell me now. That is a critical feature to how --

[42] CNSL I. NATHANSON: Yes.

[43] THE COURT: -- I arrived at my determination --

[44] CNSL I. NATHANSON: I understand. Then I will accept your reasons, and I will not press the point.

[45] CNSL W.G. WHARTON: If I might, justice. I am just a little unclear on the identification of the issue that has now been severed. For example, the pre-trial

factual matrix we say is relevant to the issue of the contract. I take it that is part of the issue that we can explore.

[46] THE COURT: Yes. Yes.

[47] CNSL W.G. WHARTON: Okay.

[48] THE COURT: As well as post- -- the post-alleged agreement conduct; right?

[49] CNSL W.G. WHARTON: Yes. For reasons such as performance, if nothing else.

[50] THE COURT: Yeah.

[51] CNSL W.G. WHARTON: And on the scope question, just so we can save a trip back here, part of the scope issue is for companies that are in this business, the building-materials manufacture and distribution business, to the extent that these companies are in that business, am I correct that questions concerning or the scope of the first part would include what these companies do and how their structured, in the sense of who the -- who are the shareholders? We will not know --

[52] THE COURT: Well, you already have -- you already -- well, who the shareholders are, I think in your -- I am getting ahead of myself, but ... you already have admissions with respect to the shareholdings; right?

[53] CNSL W.G. WHARTON: What we have is in the negative, that in some cases John Gross is not the shareholder in some of these companies but does not mean that he is not the shareholder of a company -- a holding company that holds one of these companies. We do not know the share structure yet and the connectivity. And we would need to know that --

[54] THE COURT: Well, okay --

[55] CNSL W.G. WHARTON: -- to answer a scope question.

[56] THE COURT: I think we are going to go over 10 o'clock here today, since my reasons are going to keep going. But we are going to have to return, then. Because what I will -- what I will say to you is that we are dealing with the scope of the agreement, but we are not going to get deeply into how far any of these other entities would fit in.

[57] CNSL W.G. WHARTON: Okay. I think I understand.

[58] THE COURT: Okay. So that you can identify the company, and you can ask questions what do they do, but in terms of a determination of whether the companies would come within the scope of the agreement is a separate question. I want to deal with the agreement, was there agreement, and what does the agreement mean?

[59] CNSL W.G. WHARTON: What is the agreement. I think I understand --

[60] THE COURT: What does the agreement mean?

[61] CNSL W.G. WHARTON: Yes.

[62] THE COURT: So I do not want to get too deeply in the first part of the trial, because my belief is that we can contain this within a short period of time, get to that, and then if we get to the second stage, then we do an exploration. Well, it is up to the parties then to say whether they are in or not with its scope.

[63] CNSL I. NATHANSON: I understand, justice. And we throughout -- I do not know if you have said this. My notes are -- my note taking is not great, but the severed issue about the agreement involves the existence of an agreement, whether it applied to any of these companies, and whether the defences of acquiescence or limitations apply.

[64] THE COURT: And the counterclaim.

[65] CNSL I. NATHANSON: And the counterclaim, yes, thank you.

[66] THE COURT: Yes. Well, you just mentioned, though, whether the agreement applies to these companies, and is that what you are saying, Mr. Nathanson, that --

[67] CNSL I. NATHANSON: Yes.

[68] THE COURT: Is that -- okay. Well, that would be, then, consistent --

[69] CNSL W.G. WHARTON: It is the point I was raising --

[70] THE COURT: Right. I thought --

[71] CNSL W.G. WHARTON: -- avoid the application --

[72] THE COURT: I thought we were going to reduce this, but if that was in contemplation, do the Peak Group fall within the -- or do any of the individual companies fall within the scope of the agreement.

[73] CNSL W.G. WHARTON: Yes.

[74] THE COURT: Then I am open to that. And so we can embed that within the phase 1 --

[75] CNSL W.G. WHARTON: Yes.

[76] THE COURT: -- phase; okay. And so questions with respect to who are those companies? What do they do? And who the owners are. They -- would be relevant questions because they would then come within -- within the question as to the scope of the agreement. My thought was to construe the agreement issues probably a little more narrowly, but since Mr. Nathanson is agreeable, we will include them.

[77] CNSL W.G. WHARTON: I am content. Yes.

[78] THE COURT: Okay. Thank you.

Defence Application to Strike and Plaintiff's Applications to Further Amend the NOCC

[79] I will deal next with the defence application to strike the plaintiff's pleadings and the plaintiff's application to further amend its notice of civil claim.

[80] The defence application is to strike the plaintiff's amended notice of civil claim in respect to the Peak Group. The applicant relies upon Rule 9-5(1), Rule 3-1(2), Rule 12-5(67), and the inherent jurisdiction of the court. I have considered this application with Phil Gross's application to file a further amended notice of civil claim under Rule 6-1(1), in line with *Health Sciences Association of British Columbia v. Hewitt Associates Corp.*, 2019 BCSC 208.

[81] The proposed amendments sought by the plaintiff in contention are in the defendants' application response and are identified as paragraphs 177A to 177R, 200A, 202A, 208 to 212, as well as to paragraph 5 at Division 2 of the amended response to counterclaim.

[82] The plaintiff's key amendments are the assertions that John Gross is the sole or controlling shareholder and directing mind of the defendant corporations and as such has directed them to deprive Phil Gross Jr. of the benefits under the agreement and that the defendant companies had actual and/or constructive notice of the interest held by the plaintiff, yet wrongfully received and utilized assets in which the plaintiff has an interest. Further, John Gross and the corporate defendants' conduct has been oppressive and that they have suffered no financial loss and that the allegations of extortion, defamation, contractual interference, and financial loss are untrue and were to create fear of financial harm and dissuade the plaintiff from pursuing his contract claim.

[83] The key arguments of the defence are:

1. that the actions of the plaintiff to belatedly amend to plead various causes of action against the corporate defendants constitutes an abuse of process; and

2. that it is plain and obvious that the disputed amendments are bound to fail as a result of being defective, defects being that the material facts have not been pleaded and consequently do not disclose a cause of action.

[84] In terms of abuse of process, the defendants rely upon the comment by Mr. Wharton to Macdonald J. in an earlier hearing, to the effect that the defendants are only named to secure assets under the control of the plaintiff, John Gross. The proposed amendments asserting wrongs by the defendant corporations are a contradiction of position in that the proposed claims against the corporate defendants amount to a "complete about-face" from the earlier representation to Macdonald J. The defendants cite in support *Halagan v. Reifel*, 1997 CarswellBC 4040 at para. 8; *Totzauer Holdings Ltd. v. Nanaimo Forest Products Ltd.*, 2014 BCSC 2185 at para. 24; *Northmont Resort Properties Ltd. v. Golberg*, 2017 BCCA 404 at para. 15, among others cited in their submissions.

[85] Further, in respect of the claim of oppression, the defence argues that the plaintiff does not have standing to seek relief from oppression. It is submitted that since the plaintiff's complaint is founded on the existence of an agreement and the conduct of the defendants denying his status as a beneficial shareholder or designed to dissuade him from seeking such status, the question of status should be decided first. Cases cited include *Lee v. International Consort Industries Inc.*, (1992) 10 BCAC 137 and *Newcastle Projects Inc. v. Percon Projects Inc.*, 2010 BCCA 56 at para. 29.

[86] Defendant also submit the plaintiff's oppression pleading is an attempt to avoid the strict requirements of pleading the tort of abuse of process; reliance is placed on the case of *Oei v. Hui*, 2020 BCSC 214 at paras. 39 and 47.

[87] With respect to inconsistency, Mr. Wharton argues that the alleged inconsistency made to Macdonald J., has been taken out of context. He says that that discussion with the court was not directly on that specific point but on a different topic. Moreover, in order to find the inconsistency relevant to this issue, there would

have to be a deliberate statement or a confession. Mr. Wharton submits that the state of the litigation is at a stage where little has been exchanged in terms of disclosure. There is no basis for the plaintiff to make a deliberate concession or expression of the position. He submits that the defendants' application is premature.

[88] At this point, I am not persuaded of the abuse of process argument. The purpose of the statement and definitiveness of counsel's statement referred to is not apparent when taken in context, and here it is distinguishable from the cases referred to in the cases such as *Halagan*, *Totzauer Holdings Ltd.*, and *Northmont Resort Properties Ltd.*

[89] With respect to the claim of oppression, neither party has been able to locate authorities to support their respective position. Though there are strong legal principles that would apply. However, Mr. Wharton argues the absence supports his position that the pleadings should remain, as there is an open question as to the viability of the claim.

[90] At this point, given my determination to bifurcate the proceedings, a ruling on the oppression aspect is not critical. Also, as I understand things, a decision from the Court of Appeal is pending and may provide some commentary. Though I am not clear on the issues that were argued before that court. I think absolute privilege was an issue in the case. In any event, there is a justification not to make a determination at this point on the oppression pleadings.

[91] Defence further seeks to strike the plaintiff's claim based on the fact the plaintiff has not accurately reflected a key provision of the agreement and left out a significant passage, which alteration was in their words deliberate and affects the terms of the alleged trust. The defence also argues that the plaintiff's paragraphs 157 and 158, in the pleadings, are inconsistent with the agreement. More specifically, that the Peak Group have been in the business of manufacturing and supplying building products and derivative good and services and that the companies are captured under the terms of the agreement and that 50 percent is held in trust by John Gross for Phil Gross Jr.

[92] As well in paragraph 152A, the plaintiff has inserted a term in recital 1 of the agreement, a phrase "the company is in the business of manufacturing and supplying building products are referred to in the agreement as a family business. It is submitted that this subtle and significant addition was an attempt to define family business as simply companies in the business of manufacturing and supplying building products and to reposition the definition of family business, which in the agreement defined to be businesses in which the brothers and Phil Gross Sr. at different times and different capacities had been and would continue to be involved with.

[93] As well, the defence argues that paragraph 153 of the plaintiff's pleadings which states:

> The agreement stipulates among other things that any legal or beneficial interest in any asset or any real or perm property of any of the family businesses, successor corporation, or corporation herein after established shall be held in trust by the recipient as to an undivided one-half interest. There is for the benefit of the other to the intent and purpose that any such asset or real or personal property shall be shared equal by Phil Gross and John Gross.

is deficient in that it fails to reference a “corporation herein after established” as being a continuation of the family business.

[94] The plaintiff in response notes the irony of the defendants having pleaded that the asserted agreement is fictitious, defamatory, and alleged for the purpose of extorting John Gross, yet now purports to interpret the agreement while simultaneously making new allegations of fraud through counsel's submissions based on the plaintiff's interpretation of the agreement.

[95] Having considered the defence submissions, I am not satisfied that the striking of the pleadings or the amendments is justified. In my view, while I was at first concerned with the differences between the terms of the agreement and what is reflected in the plaintiff's pleadings, I am satisfied that there is a basis for the plaintiff's pleadings as argued by the plaintiff, including those that are contained in

the written submission handed up in response to the defence chart of asserted inconsistencies and omissions and additions.

[96] The plaintiff points to provisions in the agreement that are sufficient to support the assertion that the agreement covers new and future building supply companies; that transfer or distribution can be effected through shares which are personal property; that paragraphs 157 and 158 are viable in relation to the agreement and the available evidence. These, of course, are all matters to be decided at trial.

[97] I also note the agreement was provided to the defence at an early point, and that Mr. Hatch, the solicitor who drafted the document, would be made available by affidavit. I am not persuaded the pleadings are deficient as to when the oral agreement was made and its terms. The approach to pleadings is to be generous. I have already determined these issues will now be the subject of phase 1 of this bifurcated proceeding.

[98] In conclusion, I find the amendments are viable and permitted, and the defence application to strike is not approved.

[REASONS CONTINUE ON APRIL 27, 2023]

[99] THE COURT: I will carry on from yesterday, but before that I want to add a couple points. I think I mentioned yesterday that the demand letter attached the unfiled notice of civil claim. That is not correct. It was with the next one.

[100] The other comment that I have, and I am sure you may have some comments, is when I was discussing the issue of the claim of oppression, I wanted to add there that that issue may become clearer once the determinations in phase 1 were made, and that would have included the counterclaim, which may be a consideration as well.

Defence Application to Amend its Pleadings and Counterclaims

[101] Now, I left off having made the determination on defence application to strike the plaintiff's pleadings and plaintiff's application to further amend its notice of civil

claim. I am moving on now to the defence application to amend its pleadings and defence and counterclaim. The defence applies to amend its response to the amended notice of civil claim and counterclaim. The plaintiff does not oppose the application to amend the response, given that leave is granted to file the further amended response to the amended notice of civil claim.

[102] However, the plaintiff's view is not the same with respect to the application to amend the counterclaim. What is sought there is that the 26 corporate plaintiffs by counterclaim seek to remove themselves from the counterclaim. Further, John Gross will seek only general damages and punitive damages for defamation and abuse of process and excludes the claim for compensatory damages. Further, with respect to the application, the defendants concede the plaintiff is entitled to costs.

[103] Phil Gross, the defendant by counterclaim, opposes the application. The counterclaim was filed originally in October 2021 and contains allegations of criminal fraud, defamation, and extortion against the defendant by counterclaim, as well as allegations that each suffered interference with contractual relations and suffered financial loss and damages.

[104] Phil Gross notes his motion to strike the counterclaim on the basis that the letters and questions were covered by absolute privilege was successfully opposed by the corporate plaintiffs by counterclaim with the incongruity that now the same corporate parties seek to withdraw themselves from those very allegations prior to the obligations to provide evidence in support of their counterclaim.

[105] With respect to the issue of costs, plaintiff argues that special costs should be awarded. Plaintiff in support submits there was unreasonable delay by the defendants and points to the correspondence for its demands for documents in respect to the claims in support of contractual interference and defamation. It is submitted that it must have been known at an early stage there was no financial impact. Yet the corporate entities delayed. They refused to produce documents and then sought to stay their own action. Only when a notice to produce was filed to the corporate defendants in the words of counsel "throw in the towel."

[106] Further, there is a suggestion that the counterclaim was brought for an improper purpose and that the removal of the corporate defendants is an attempt to avoid disclosing evidence that would show that their claim was an abuse of process and that permitting the removal of the corporate defendants should be conditional upon disclosure of evidence that demonstrates that the counterclaim was not brought for an improper purpose.

[107] Further, in terms of the amendment in regard to defamation, Phil Gross submits that the pleading is insufficient as it does not provide sufficient particularization. Phil Gross focuses on the failure to identify a person or persons upon which the publication was made.

[108] As I have mentioned, the plaintiff does not oppose the proposed further amendments to the response to the amended notice of civil claim. Therefore, leave to file a further amended response is granted.

[109] With respect to the corporate defendants, though the applicant has not selected in my view the appropriate rule for which to make the application, I will approach this matter as one that would be brought under Rule 6-2 or 9-8. The rule permits a plaintiff to discontinue against a defendant. In the circumstances, I see no valid reason to not permit in whole or in part a discontinuance by the corporate defendants.

[110] The removal of the corporate defendants is approved in the context of the dynamics leading up to the bases for the counterclaim as well as the unsuccessful application to strike the counterclaim, I am not persuaded by the argument that as a condition of the removal, that evidence be adduced by John Gross or the Peak Group demonstrating they did not bring the counterclaim for an improper purpose. Again, I note the dynamics and stage in the litigation.

[111] In terms of costs, costs are awarded. I leave it to further submissions as to the level, which may be spoken to when all the issues in contention have been determined.

[112] With respect to the issue of deficient pleadings regarding defamation, the publication has been identified as the unfiled notice of civil claim sent by plaintiff's counsel to Farris LLP, a law firm, which is the registered records office of the Peak Group.

[113] In my view, the identity of the documents drafted by plaintiff's counsel, including the addressee of the documents, provides sufficient particulars. It is apparent that Farris LLP received a letter, and personnel there viewed it. I am not persuaded that the minimum requirement for the claim of defamation has not been met. I agree with Mr. Nathanson that the particularization Mr. Wharton seeks is properly related to the question of quantum.

Document Production

[114] I turn now to production of documents. Each side complains of inadequate disclosure of documents and seeks an updated list of documents with supporting affidavit verifying the list as being complete. I note that there has been disclosure to this point from both sides. As well, the defence has responded to lengthy notices to admit. Given my ruling bifurcating this action into two trials, the disclosure at this case will be in relation to phase 1, the scope of which we discussed yesterday. I note as well that I have permitted the removal of the corporate defendants from the counterclaim.

[115] The parties are to review their document production demands in light of this ruling and return before me, I am suggesting the next 30 days, in a judicial management conference to raise any issues on document disclosure, as well as any other issues arising as a result of my ruling. The application for the affidavit verifying in respect of this is obviously something that we can revisit then if necessary.

[116] There has also been a complaint raised by Mr. Wharton with respect to delay here; namely that Mr. Nathanson impeded the plaintiff's ability to attend the defendant corporations' registered and records office at Farris LLP. The plaintiff points to an email received from Mr. Nathanson dated August 22, 2022, who was

forwarded Mr. Wharton's letter to Farris LLP on August 18, 2022, seeking to review public records of the 26 companies.

[117] Mr. Nathanson in his email asked for clarification as to which of the listed companies in the letter is a BC corporation and advised Mr. Wharton to postpone attendance at the Farris LLP in order for Farris to ascertain what the public would be entitled to review. I am told no further steps to see the corporate records were taken by Mr. Wharton. In my view, the corporate records people at Farris LLP know what documents are reviewable by the public. It is a well established firm with highly skilled people in the corporate area, among others. Farris LLP was obviously providing a courtesy to its corporate clients as to the request made by Mr. Wharton. I will expect that when Mr. Wharton or his designate wishes to attend to review the documents, arrangements will be made in the normal course.

Notice to Admit #2

[118] Turning, then, to the plaintiff's application regarding the Notice to Admit #2. At this point, examinations for discovery have not occurred. The parties have an application before me, to determine which of the parties should go first in the examination of the other. The plaintiff in this application seeks an order that the defendants, plaintiffs by counterclaim, provide proper responses to facts sought to be admitted to numbers 194 to 245, 253 to 283 in the notice to admit dated November 2, 2022.

[119] Mr. Wharton also indicated he was seeking to have the notices converted to interrogatories. In respect to the admissions sought numbers 194 to 219, the defendants state to each:

> Irrelevant, these companies are abandoned any claim for interference with any existing contractual relationships as a result of the April 8, 2021 letter.

[120] In respect to admission numbers 220 to 245, the defendants state to each:

> Irrelevant, these companies have abandoned any claim for financial loss or damage as a result of the April 8th, 2021 letter.

[121] The subject admissions sought are in relation to a defence that is no longer required given the abandonment. Accordingly, the responses are sufficient, and the order is denied in regards to those questions.

[122] In respect to admissions sought numbers 258 to 283, the defendants state to each:

> Denied, rather this statement is only appropriate for examination for discovery. Moreover, this statement is vague and lacking applicable context in reference to specific documents and not appropriate for a notice to admit.

[123] The defence submits that the response here is a proper denial as required under the rule and that the additional comments are appropriate. I note that the defence has provided their denials and admissions without additional comments for a significant number of the additions sought.

[124] The plaintiff says at paragraph 18 of its notice of application the following with respect to Notice to Admit #1. "On May 31, 2022, the Peak Parties delivered a Reply to Notice to Admit #1 denying that John Gross attended at the office of solicitor Hatch, denying that John Gross provided written and oral instructions to solicitor Hatch, and denying that John Gross received a copy of the asset sharing agreement from Mr. Hatch."

[125] However, I have a problem with what follows in the submission:

> Denying that John Gross was charged criminally and denying that Philip's Manufacturing accountant was charged criminally.

[126] I went to the specific Notice to Admit, and the version that I had did not include that last phrase, and I may be wrong, but in any event my thought is that it arises from the Response to the Notice of Civil Claim. So I will take it that way, but I could not find it in my electronic version.

[127] In any event, the plaintiff submits that a Response to Notice to Admit is not proper and inadequate if it, does not deny the truth of the facts sought to be admitted nor sets out the reasons in detail for not making the admission and that when there has been a failure to respond properly, one of the options is that there is a

mandatory finding that the facts are deemed admitted. The plaintiff notes in support *Skillings v. Seasons Development Corp.* (1992), 70 B.C.L.R. (2d) 14 (S.C.).

[128] Another reference is to *Nouhi v. Pourtaghi*, 2021 BCSC 1779, which indicates that there is a clear distinction between a denial of a fact and a refusal or inability to admit a fact. If there is a refusal to admit, then the question becomes whether the explanation given is sufficient and whether the party took adequate steps to inform themselves before responding.

[129] Having looked at the questions and the responses to 253 to 283, my view is that the responses are not in line with the requirements of Rule 7(7)(2). While "Denied" is stated, the additional comments are dilutive and take the responses into the zone of a "not admitted" category, which is of course is not proper according to the authorities. And as I have mentioned, the defendant in pleadings has already denied the criminal aspects asserts in the notice of civil claim, and I am not persuaded that there is vagueness or a lack of context as to the questions. Though there may be with respect to the potential enumeration of counts. I believe there was a reference to 44 counts.

[130] It seems to me that to move things along and knowing that the duration for examinations for discovery has limits; and as requested by Mr. Wharton, it is expeditious and fair to convert the questions into interrogatories, and that would be for questions 253 to 283. The defendant would then have some opportunity to take adequate measures to inform himself, obviously before responding to the questions, and the interrogatories would be required to be provided within a reasonable time prior to the defendant's examination for discovery.

[131] CNSL I. NATHANSON: Justice, I am sorry, I was having difficulty hearing.

[132] THE COURT: Oh, sorry.

[133] CNSL I. NATHANSON: But it is the very conclusion with respect to these questions 253, I did not make a note of what the order is or direction is.

[134] THE COURT: Oh, the order would be to convert the questions 253 to 283 into interrogatories.

[135] CNSL I. NATHANSON: I apologize. I am -- I am confused. Forgive me for this. But I understand interrogatories, one thing the note -- the response to notices to admit, and I did not quite here --

[136] THE COURT: Okay.

[137] CNSL I. NATHANSON: -- of what I am to do or what the defendants are to do with respect to --

[138] THE COURT: Yes.

[139] CNSL I. NATHANSON: -- those questions.

[140] THE COURT: The request was to convert the notice to admit questions that I have just referenced --

[141] CNSL I. NATHANSON: Oh, I see.

[142] THE COURT: -- into interrogatories, which was the request made, and which -- which is founded on I believe it was ... the -- I think it was *Nouhi v. Pourtaghi* decision. I am -- there is one of the cases that was referred to me which the master I believe in that case, Master Harper I believe made that order.

[143] CNSL I. NATHANSON: The direction was then that upon being converted, the responses would be provided within a reasonable --

[144] THE COURT: Period of time prior to the defendant's --

[145] CNSL I. NATHANSON: Yes.

[146] THE COURT: -- examination for discovery or examination for discovery of the defendant.

[147] CNSL I. NATHANSON: Thank you.

Interrogatories

[148] THE COURT: Turning, then, to the interrogatory responses of the defence. Plaintiff also seeks an order that John Gross answer the interrogatories attached as Schedule A to the notice of application, and I think there are six or seven questions, I believe. The questions are in respect to the nature of John Gross's interest in the corporate defendants, the products and services provided by the corporate defendants since their inception, contributions provided by Phil Gross Sr. to John Gross or the companies since February 1992, source of all finances used by each of the defendant corporations to fund their operations during the first two years of operations.

[149] And I note here that I have bifurcated this case into two trials. There was an indication in the defence response that those questions should be deferred but given the scope of phase 1 and the admissions to date, it seems that at least question number 3 is one that would qualify as dealing with matters within phase 1. It is not clear if those sought, the other ones that are sought are, and I am going to defer making a ruling on that pending submissions from counsel at our next JMC, which I have specified I would like to have set down within the next 30 days just to keep things moving along.

Order for Examinations for Discovery

[150] I am going to move on, to the order of examinations for discovery. Plaintiff relies upon the general proposition that the plaintiff has carriage of the action and as a result should be entitled to go first in examining the other party for discovery. Plaintiff also characterizes the defence's delivery of an appointment first as "jockeying for position" – a frowned upon attempt to gain an unfair advantage and/or to prejudice the fair determination of the case on its merits.

[151] The defence argument in support is that there are conflicting assertions in the plaintiff's pleadings regarding an agreement or agreements, which go further than the plaintiff's proposed application to amend further the notice of civil claim. It is submitted by Mr. Nathanson that the defence should be permitted to understand the

nature of the agreement or agreements or the number asserted upon which the plaintiff relies upon and that this can be achieved by permitting the defence to examine the plaintiff first.

[152] In terms of the positioning that was referred to or described by Mr. Wharton, Mr. Nathanson explained that the appointment taken out, which was first, was based upon the unreasonable positioning of the plaintiff with respect to the need for two weeks to examine and that to cut off the unreasonableness of the proposal, an appointment was taken out by Mr. Nathanson. He refers to the conduct of the plaintiff as being "cavalier" in responding to the defence request for documents referred to his letter of September 8th and the response of October 14th.

[153] As mentioned, the dynamics in this case to date have been contentious, which occurs from time to time. The order of discoveries is usually a matter that counsel are able to agree on, unfortunately sometimes the court is required to deal with the matter. There is no absolute rule covering who gets to go first. Taking out an appointment first does not necessarily secure priority, and in the absence of a meeting of the minds, the court's intervention occurs.

[154] In this case, it is apparent the plaintiff sought to obtain oral discovery dates first. There was the letter dated December 17, 2021, which suggested dates in June, July and August of 2022 for two weeks. That, of course, triggered a reaction from the defence to set down the examination for discovery which was on one of the dates suggested by the plaintiff to examine the defendant.

[155] Having heard considerable detail the competing views of the parties on all aspects of the case, the dynamics and process the parties have undergone to this point, that the defence and counterclaim states in essence a flat denial of any agreement asserted by the plaintiff and that the plaintiff's assertion is "fictitious and is known by the plaintiff to be such"; and my ruling that the case is to be bifurcated, as per the request of the defence; my view is that the order of oral discovery is that the plaintiff will be entitled to go first, and if there are issues, as I have already mentioned, as to the scope of discovery for the first trial, that can be addressed at

the next JMC. But we discussed yesterday the scope, and I have a note here that even before discussion yesterday, that the plaintiff should be able to explore the full history of events leading up to the asserted agreement and subsequent conduct of the parties in relation to the agreement.

[156] That concludes my rulings on all the matters. If there is anything that counsel have at this point they wish to make comments on, they may do so. As I have mentioned, I would like counsel to requisition a JMC in the next 30 days where we can go over all the questions that may arise and review the progress in the preparation of the case for trial.

[157] CNSL W.G. WHARTON: Just a few items, justice. Part of the application included setting a time -- or the time allocation for discoveries --

[158] THE COURT: Yep.

[159] CNSL W.G. WHARTON: -- beyond the seven hours of -- provided in the rules. I think given the proportionality test, more is required. There is a fair amount of history to go through, and a lot of conduct following the breaching of the agreement, we say. So it will be in our view quite restrictive to limit it to seven hours.

[160] THE COURT: Which is the mandated -- or not -- that is prescribed time in the rules --

[161] CNSL W.G. WHARTON: Yeah. Everything from simple fender-benders to whatever, but this is no fender-bender. This is a complicated piece of work. So seven hours is going to be completely inadequate to the task. And it is not a case where you want to plan your discovery with saying I am only going to get seven hours, I might not get any additional time and you plan that way, as opposed to knowing what your time allotment is. So that is one point that I would make.

[162] The other is with respect to the orders that you have given, if you can -- and I do not -- I do not see anything that has happened that would require the court to rely on its inherent jurisdiction. Like, everything that is happened to far is in accordance

with the rules and probably should be stated to be so. I know the Court of Appeal has a view on that, but that is -- that is something that should -- should normally be done, but I do not see anything here for inherent -- inherent jurisdiction.

[163] The other thing, and I note you have reserved the issue of costs with respect to the removal of the corporate --

[164] THE COURT: Well, okay, well --

[165] CNSL W.G. WHARTON: -- plaintiffs by counterclaim.

[166] THE COURT: Yes.

[167] CNSL W.G. WHARTON: I was also going to ask to reserve costs on the issue of my friend's response to our allegation -- or our amendments. Because the allegation of fraud was raised, and it was raised squarely with respect to counsel. And I was offended by that, and I would like to speak to costs in respect of that.

[168] THE COURT: Okay. We will reserve on costs until all the issues have been determined; okay?

[169] CNSL I. NATHANSON: I am agreeable to say three days of discovery for each side, and then if -- if there is leave for a party to come back and say for one reason or another I could not complete, but -- but not on the basis of I would like more time, but that cogent basis to say why I could not do it in three days. I am agreeable to that. My friend could have three days, but -- but on the basis that there is a serious burden on a part to come back and say why it was not done in three days.

[170] THE COURT: Okay. So we are talking about 12 hours? Is that about right? Have I got that -- 12, 15 hours?

[171] CNSL W.G. WHARTON: I would -- we made the submission before you that we thought that an initial amount of 15 hours would be appropriate, subject to as my friend says, the need for more time, but as a starting point -- and that can be three

five-hour days or four -- three four-hour days and a three-hour day, it depends. But counsel can work that out whether it is three or four -- over three or four days. But if we set it at 15 hours, I think we are pretty much at the same -- at the same mark.

[172] CNSL I. NATHANSON: I do not think it should be spread unduly. We have limited time --

[173] THE COURT: Oh, no, no. If we say three days --

[174] CNSL I. NATHANSON: Yes.

[175] THE COURT: -- then there is five hours per day is what --

[176] CNSL W.G. WHARTON: Yeah --

[177] CNSL I. NATHANSON: I am fine with that.

[178] THE COURT: Okay.

[179] CNSL I. NATHANSON: But that would be done in three days, not pushed into four days, given we are trying to make a trial date --

[180] THE COURT: With -- with leave, though, obviously, to come -- with leave to come back --

[181] CNSL I. NATHANSON: Yes.

[182] THE COURT: -- if more – the burden would be on the person seeking additional time.

[183] CNSL I. NATHANSON: Yes.

[184] THE COURT: So... all right. So three days, five hours per day, 15 hours. But it will be three days, and which is equivalent to 15 hours. So and I am thinking that people are going to have to be a bit flexible because if -- there is often delays. People get stuck in traffic. Maybe they -- you know, they get -- they have other

appointments, and you do not get a full day. And I think I expect counsel will be able to say what is reasonable.

[185] CNSL I. NATHANSON: I understand.

[186] THE COURT: In that regard.

[187] CNSL I. NATHANSON: The other matter I would like to raise is my friend has a further motion to amend, and before we get to discovery and whatever, that should be heard and disposed of at some --

[188] THE COURT: Okay.

[189] CNSL I. NATHANSON: Soon I hope.

[190] CNSL W.G. WHARTON: I was hoping my friend would consider your comments so far on the amendments. Much of the argument I think is the same, so he may want to consider his position on that, but if he does not, then, yes, we would like to have that heard --

[191] THE COURT: Okay. Well, then ... I do not know if I can give you a date specific, but I can give you a range. How long do you think it would be? I mean, we have spent so much time together it is almost like --

[192] CNSL W.G. WHARTON: I know. I have enjoyed it, but it is -- it is -- I would say an hour.

[193] CNSL I. NATHANSON: I think it can be done in an hour.

[194] THE COURT: Okay. So today is the 27th. Okay. Do you have time next week? Next week?

[195] CNSL I. NATHANSON: Yes. In the latter half of next week, I have time.

[196] CNSL W.G. WHARTON: I can make that work, justice.

[197] THE COURT: Okay. So that will be the week of February 1st; right?

[198] CNSL W.G. WHARTON: May 1st.

[199] THE COURT: I am sorry. Why did I say February? Okay. So later in the week would be the 4th or the 5th.

[200] CNSL I. NATHANSON: Yes, either -- the 4th is a Thursday. The 4th or 5th would work for me, [indiscernible].

[201] CNSL W.G. WHARTON: Would that be an ordinary T time, justice, or 9 o'clock -- or 9 o'clock or for.

[202] THE COURT: A T time? Are you suggesting -- what are you suggesting? I do not know. What time are your T times usually?

[203] CNSL W.G. WHARTON: I like to play early, but --

[204] THE COURT: Do you want to do a 9 o'clock --

[205] CNSL W.G. WHARTON: 10 o'clock is fine, then.

[206] THE COURT: 10:00? Well, why do not we just do a 10:00, because --

[207] CNSL W.G. WHARTON: Yeah.

[208] THE COURT: -- maybe I have a T time. I do not know. I do not play golf, though. We will say 10:00 on the 4th, Madam Clerk, if your able to secure that. That would be great. May 4th, Thursday, 10:00 a.m.

[209] THE CLERK: Justice, that was for one hour; correct?

[210] THE COURT: One hour.

[211] I am just going to tell counsel here that we have the September date, and I am assuming it is going to be around two weeks, the trial. We will have to do everything we can to get it done within that time period. There are a number of cases that are coming up for me, and we will just have to sort of work around trying to be as efficient as possible to get it done. I am a little bit worried about some of

these other cases in my schedule, and we may not have a lot of flexibility. So I just mention that now.

[212] Okay. Well, thank you very much. I do not think there is anything -- well, we will see you in -- oh, sorry. So we will have next Thursday potentially, and then a 30 day -- within 30 days the JMC, or --

[213] THE CLERK: [Indiscernible].

[214] CNSL I. NATHANSON: Yes.

[215] THE CLERK: Sorry, justice. I just wanted to confirm before it is [indiscernible].

[216] THE COURT: Thank you very much. Unless you want to make your arguments on the amendment being sought and immediately after that next week -- well, maybe there is not enough time, then, to figure out the progress of the case. Maybe there needs to be a bit more time.

[217] CNSL I. NATHANSON: I think it may be premature --

[218] THE COURT: Yeah. Okay. Well, thank you very much.

"The Honourable Mr. Justice Masuhara"