IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada Life Assurance Company v. Siddoo A.K. Investments Ltd.,* 2024 BCSC 1057

Date: 20240621
Docket: S214414
Registry: Vancouver

2024 BCSC 1057 (CanLII)

Between:

The Canada Life Assurance Company / La Compagnie D'Assurance du Canada sur la Vie

Plaintiff

And

Siddoo A.K. Investments Ltd., Narinder Chauhan, and Gurmeet Sandhu

Defendants

Before: The Honourable Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff:	J.C. Spencer M.L. Teetaert
Counsel for the Defendants:	J.G.M. Foster
Place and Date of Hearing:	Vancouver, B.C. April 3, 2024
Written submissions of the Plaintiff and the Defendants:	June 7, 2024
Place and Date of Judgment:	Vancouver, B.C. June 21, 2024

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Introduction

[1] The plaintiff, Canada Life Assurance Company, seeks an order for document disclosure and costs against the defendants, Siddoo A.K. Investments Ltd. ("Siddoo"), Narinder Chauhan, and Gurmeet Sandhu (collectively, the "defendants"), pursuant to the *Supreme Court Civil Rules*, Rules 7-1(1) and (10)–(14) (relating to the discovery and inspection of documents), Rule 8-1 (relating to applications), and Rule 14(1) (relating to costs).

Background to the Proceeding

[2] The underlying action concerns whether a commercial real estate lease was breached (the plaintiff's position) or frustrated (the defendants' position) and, if breached, to what the plaintiff is entitled.

[3] The plaintiff is a national insurance company extra-provincially registered in British Columbia. The plaintiff owns land with a civic address of 1655 Haro Street, Vancouver, BC (the "Land").

[4] Siddoo is a closely-held, family-owned company incorporated in 1968 and registered in British Columbia. Siddoo was incorporated for the purpose of entering into a 99-year lease agreement with the plaintiff regarding the Land.

[5] Narinder Chauhan is one of Siddoo's two directors and officers. Ms. Chauhan also owns 50% of Siddoo through her holding company. Ms. Chauhan, a Canadian citizen and resident in Vancouver, is 86 years old.

[6] Gurmeet Sandhu is Siddoo's other director and officer and owns the other 50% indirectly through his holding company. Mr. Sandhu, a Canadian citizen and resident in Vancouver, is 89 years of age. He is Ms. Chauhan's brother-in-law.

[7] Siddoo was originally owned by Ms. Chauhan's father and/or mother. Ms. Chauhan and Mr. Sandhu became directors, officers, and indirect owners of Siddoo in around 1992.

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The Lease

[8] The lease in respect of the Land was entered on May 1, 1969 for a 99-year term. The relevant terms of the lease include the following:

a) Siddoo will build a 12-storey residential tenancy building on the land (the "Building").

b) Siddoo will operate the Building as a residential apartment complex.

c) Siddoo will pay the plaintiff basic rent as follows:

   i. for the first period from 1969 to 1999 (the "First Period"), an annual rate of $12,750;

   ii. for the second period from 1999 to 2019 (the "Second Period"), the greater of (i) $12,750 or (ii) 8½% of the land market value (the "LMV") as of January 1, 1998;

   iii. from 2019 to 2039 (the "Current 20-Year Period"), the greater of (i) basic rent payable during the preceding 20-year period or (ii) 8½% of the LMV as of January 1, 2018; and

   iv. from 2039 to 2068, the greater of (i) basic rent payable during the preceding 20 year-period or (ii) 8½% of the LMV as of January 1, 2038

   ("Basic Rent").

d) The LMV was to be determined pursuant to a term of the lease, or, in the event of a disagreement about the calculation, by way of arbitration.

e) Siddoo will pay the plaintiff additional rent, calculated as 20% of the amount by which Siddoo's gross revenue exceeds a certain threshold comprised of Basic Rent, insurance, property taxes, 25% of gross revenue, and an additional sum ("Additional Rent").

[9] Siddoo was entitled to retain any gross revenue that exceeded the rent payable to the plaintiff under the lease each year. According to the affidavit of Ms. Chauhan, Siddoo was incorporated to operate the Building as a residential building for profit. It was Siddoo's understanding and expectation that it would always be able to charge the residential tenants a rent that would cover the obligations under the lease, at the very minimum.

[10] Pursuant to the lease, Siddoo built, owned, and operated the Building. For many years, the company met its contractual obligations to the plaintiff. Siddoo paid rent to the plaintiff every year from at least 2008 until 2019. During this time, Siddoo also provided the plaintiff with monthly rent rolls containing information about the Building and its operations.

[11] Ms. Chauhan Mr. Sandhu received professional advice, including tax advice, on what to do with Siddoo's retained earnings. Ms. Chauhan deposed that, acting on this professional advice, they decided to pay out much of Siddoo's retained earnings on an annual basis.

Disagreement over LMV and Basic Rent Payable

[12] In or about January 2019, the plaintiff advised Siddoo that:

a) as of January 1, 2018, the LMV would be $25,700,000; and

b) based on the increased LMV, Basic Rent payable by Siddoo to the plaintiff for May 1, 2019 to April 30, 2039 would be $2,184,500 per year.

[13] Siddoo disagreed with the plaintiff's determination of the new LMV, triggering the arbitration clause of the lease.

The Arbitration Proceeding

[14] While awaiting the results of arbitration, Siddoo continued to pay the plaintiff the amount of Basic Rent it had paid during the preceding 20-year period ($14,520.83 per month) from May 1, 2019 until November 2020.

[15] On November 18, 2020, an arbitrator determined the LMV as of January 1, 2018 to be $25,700,000, resulting in Basic Rent payable of $2,184,500 per year (the "Arbitration Award"). This was a 1,254% increase from the previous period's rate of Basic Rent. On July 29, 2021, the arbitrator awarded the plaintiff its costs in the sum of $285,689.63 (the "Arbitration Cost Award").

[16] Following the Arbitration Award, the plaintiff advised Siddoo that Basic Rent in arrears for the period from May 1, 2019 to the end of 2020 was $3,013,189.80 (the

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"Initial Rent Arrears"), and that a contractual interest rate of 9⅛% would apply to the Initial Rent Arrears if they were not paid within ten days.

[17] At this time, the annual gross rent received from the residential tenants of the Building totalled approximately $1,328,701. At the same time, Siddoo had been statutorily barred from increasing the rent charged to the residential tenants of the Building by more than a certain percentage each year, pursuant to Part 4 of the *Residential Tenancy Regulation*, B.C. Reg 477/2003. For instance, in 2019, rent increases were capped at 2.5%.

[18] On or about January 8, 2021, Siddoo advised the plaintiff of its position that the lease had been frustrated by supervening events that were never contemplated by the parties when they entered into the lease. According to Siddoo, the parties did not contemplate that the value of the Land would increase to such an extent that the Basic Rent formula would result in Basic Rent payable that exceeded the gross rent received by Siddoo from its residential tenants, and that, in combination with this event, Siddoo would be prohibited by law from increasing the rent charged the residential tenants to account for such a substantial increase in Basic Rent.

[19] On account of these circumstances, Siddoo wished to transfer the Building to the plaintiff. On or about February 5, 2021, the plaintiff repossessed the property.

[20] The plaintiff filed its notice of civil claim on May 4, 2021, claiming:

a) payment of Basic Rent arrears;

b) payment of the maintenance cost of the Building;

c) the transfer of residential tenants' rents for February 2021;

d) the transfer of books and records for February 2021 and "proper books and records in respect of the Building residential tenants" ("Books and Records"). No further particularization was made in the notice of civil claim;

e) unjust enrichment (in an unparticularized, pro-forma manner); and

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f) breach of trust against Siddoo—and knowing assistance and knowing receipt against Ms. Chauhan and Mr. Sandhu—concerning the deposits Siddoo held on behalf of the residential tenants (the "Deposits").

[21] The plaintiff additionally claims damages for:

a) the accrued contractual interest on Basic Rent arrears;

b) the Deposits;

c) the benefit of the lease over the unexpired portion of the lease term;

d) the cost of damage to the Building and expenses to repair, restore, and clean the Building; and

e) legal and professional fees.

[22] Erica Penrose, real estate advisor to the plaintiff and vice president of asset management residential for GWL Realty Advisors Inc., deposed that based on records provided by Siddoo, the amount of the Deposits collected and held by Siddoo is $44,448 for the residential damage deposits and $1,565 for other residential deposits.

The Claims that Remain in the Action

[23] After the action was commenced, several of the claims were resolved.

[24] On May 13, 2021, the Deposits were transferred to the plaintiff, as noted in the affidavit of Ms. Penrose. While not in evidence before the Court, counsel advised at the hearing that the residential tenants' rents were transferred to the plaintiff in February 2021.

[25] The claims that remain in the action are the plaintiff's claim for Basic Rent arrears, the alleged cost of repairing the Building, and the benefit of the lease over what the plaintiff terms the "unexpired term".

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The Arbitration Cost Award Enforcement Action

[26] On December 1, 2021, the plaintiff commenced an enforcement proceeding against Siddoo for payment of the Arbitration Cost Award (the "Enforcement Proceeding").

[27] On or about December 21, 2021, the plaintiff scheduled an examination in aid of execution for January 13, 2022.

[28] On January 6, 2022, Siddoo disclosed to the plaintiff its bank account statements and financial statements for the years 2017 to 2021 (the "Financial Documents") as part of the Enforcement Proceeding.

[29] On January 12, 2022, the plaintiff cancelled the examination in aid of execution.

[30] On March 10, 2022, Siddoo was served with an application in the Enforcement Proceeding seeking further document production.

[31] Specifically, the plaintiff sought the production of documents concerning Siddoo's ability to pay the Arbitration Cost Award. The plaintiff also sought to be relieved of its implied undertaking of confidentiality in relation to documents disclosed in that proceeding in order to bring claims against Siddoo and its directors, shareholders, and management for fraudulent conveyance, fraudulent preference, and "related causes of action".

[32] On March 30, 2022, Ms. Chauhan and Mr. Sandhu had their holding companies fund Siddoo's payment of the Arbitration Cost Award in order to end the Enforcement Proceeding and to avoid having to defend another claim from the plaintiff against them personally.

The Plaintiff's Application to be Relieved from the Implied Undertaking of Confidentiality

[33] The plaintiff served the defendants with the following documents on March 29, 2023:

a) the plaintiff's first amended list of documents;

b) a proposed (unfiled) amended notice of civil claim pleading a new claim of fraudulent conveyance and fraudulent preference against Ms. Chauhan and Mr. Sandhu (the "Fraud Claims") and amending its claim of knowing assistance and knowing receipt against Ms. Chauhan and Mr. Sandhu to be integral to and with the Fraud Claims (the "Trust Claims");

c) a letter indicating that the Fraud Claims and the Trust Claims were based on information the plaintiff had received in preparation for an examination in aid of execution of the Arbitration Cost Award Enforcement Proceeding; and

d) a document demand pursuant to Rule 7-1(10) and (11) demanding documents that relate to the proposed Fraud Claims and Trust Claims in the unfiled amended notice of civil claim (the March 29, 2023 Document Demand").

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[34] On April 2019, 2023, the defendants advised the plaintiff that the March 29, 2023 Document Demand was premature, as it concerned documents relating to the unfiled amended notice of civil claim. The defendants further noted that the plaintiff itself had identified that, in order to use the documents in the March 29, 2023 Document Demand, the plaintiff must first be relieved from the implied undertaking of confidentiality. The defendants requested to know when the plaintiff was intending to bring an application to be relieved from the implied undertaking.

[35] The plaintiff never responded to the defendants' request to identify the documents in the March 29, 2023 Document Demand relating to the filed notice of civil claim (rather than the unfiled amended notice of civil claim).

[36] On April 21, 2023, the plaintiff served the defendants with an application to be relieved from the implied undertaking (the "Implied Undertaking Application"). The plaintiff did not consult with defendants' counsel with respect to the hearing date.

[37] On October 3, 2023, following a number of adjournments, the plaintiff's Implied Undertaking Application was heard by Justice Groves, who dismissed the plaintiff's application and adjourned generally the defendants' cross-application for alternate relief. No appeal was taken from Groves J.'s order.

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Justice Groves' Decision Regarding Relief from the Implied Undertaking Application

[38] Justice Groves, in his oral reasons for judgment on the Implied Undertaking Application (*Canada Life Assurance Company v. Siddoo A.K. Investments Ltd.* (October 3, 2023), Vancouver (S214414) (B.C.S.C.)), held as follows:

> [11] The argument advanced by Canada Life can best be summarized as this: Canada Life believes that Siddoo has been involved in fraudulent conveyances and fraudulent preferences. They say this based on the fact that money was paid over the years to the directors by Siddoo. They are essentially saying that these directors, to use my language, not theirs, should have used a crystal ball or something equivalent to know that there would be a 1,254% increase in the base rent on the lease in 2019. And, therefore, in the years leading up to 2019 they were involved in a fraudulent preference or fraudulent conveyance by paying money out of Siddoo to the directors. Those two directors, on the contrary, say we were just following tax and investment advice.
>
> [12] I said during the course of the proceedings, and perhaps I did not say it this way, but I will say now that it would seem to me that absent better evidence of some direct effort to deplete the value of Siddoo contemporaneously with the award of the arbitrator, it is a stretch, if not a likely-to-fail position advanced by Canada Life that there was a fraudulent preference or conveyance.
>
> [13] Simple business practice suggests, and corporate governance suggests that directors and corporations do not have to anticipate every contingency of future markets in order to avoid being accused of fraudulent conveyances and fraudulent preferences. According to Canada Life's advanced principal, perhaps the owner of Blockbuster Video, should have anticipated, while it was a going concern, having hundreds, if not thousands, of locations in North America for video rentals, that there would have been some change in technology which would make the rental of videos pretty much irrelevant and that they should have never paid money out of Blockbuster Videos to the directors because that was a real possibility or some possibility in the future.
>
> […]
>
> [16] It may very well be the case that, as a result of some subsequent application, Canada Life obtains these documents in this proceeding. Counsel for the defendant say that they are not relevant. That is for a later day. Based on the status of what I have before me today, I am not satisfied that Canada Life has made out a claim to be released from the implied undertaking. Their claim against the individual defendants, on my summary view of it, and it is a summary view only, is weak, if not nonexistent, and clearly the Siddoo documents are documents which Canada Life wants to use to establish a claim against someone other than Siddoo.

[39] Ultimately, Groves J. dismissed the plaintiff's claim with costs to the defendants.

[40] From when the Implied Undertaking Application was heard on October 3, 2023 to December 4, 2023, there was no communication between the plaintiff and the defendants or their respective counsel concerning an intention to bring an application for document production.

[41] In December 2023, the plaintiff filed this document production application and again set a hearing date without consulting counsel for the defendants, who were not available. The plaintiff alleged that the matter was urgent because it needed the documents to amend its pleadings to include claims that might arise from the documents, which had a limitation period set to expire January 6, 2024. The plaintiff, however, has refused to say what claims arise from the as-of-yet unproduced documents, other than that it was discovered in the Arbitration Proceeding.

[42] The defendants were unable to appear before the New Year. Despite denying that any claims arise from the demanded documents, the defendants agreed to enter into a standstill agreement concerning any claims that might arise from the unproduced documents so that the plaintiff would agree to adjourn the application to a time when their counsel was available.

[43] The plaintiff now not only seeks a shortened version of its March 29, 2023 Document Demand, but also documents that were never previously demanded—in particular, documents concerning the Deposits.

[44] As of the application hearing date, the plaintiff's proposed amended notice of civil claim remained unfiled.

[45] On April 24, 2024, after this application was heard on April 3, 2024, the plaintiff filed an amended notice of civil claim ("ANOCC"), pleading additional causes of action against the individual defendants for fraudulent conveyance and fraudulent preference. Both parties agree that the amendment has no bearing on the present application (except, the defendants argue, as further evidence that this application is

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an abuse of process). I will base my reasons on the pleadings as described in the original notice of civil claim, as the plaintiff only argued relevance to those causes of action, which were not altered or removed by the amendment.

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Positions of the Parties

The Plaintiff

[46] The plaintiff claims that the documents it seeks are necessary to prove or disprove the material facts in issue in the action, including, but not limited to, its claim for breach of contract and the relief sought for restitution, unjust enrichment, tracing, and accounting of profits made or benefits received.

[47] The plaintiff says that the demanded documents help prove or disprove Siddoo's claim that the lease or its commercial purpose have been frustrated by open market conditions and/or by law. The plaintiff further argues that documents related to the period from "May 1, 1969 (the 'inception date') to February 5, 2021 (the 'abandonment date')" (together, the "Relevant Period") will provide the most complete information for the plaintiff to perform reliable financial analysis of the returns achieved by Siddoo under the lease. The plaintiff argues that this is particularly important given the long-term and cyclical nature of a ground lease with periodic determinations of the basic rent, like the lease at issue in this action.

[48] The plaintiff says it requires an accurate picture of Siddoo's rate of return over the course of the entire lease, and not just at one point in time. The plaintiff argues that historical financial maintenance and operation records over the entire Relevant Period are important and relevant to determining whether the plaintiff properly maintained the Building. It says that this will help it determine whether Siddoo's own actions caused their diminished rate of return (i.e., because of excessive spending or a failure to properly upkeep and maintain the Building over time).

[49] The plaintiff submits that the financial statements are also relevant, as they too will show the amount of capital expended by Siddoo in relation to the maintenance, supervision, and management of the Building. The plaintiff says that

the financial statements will help it prove whether Siddoo was in breach of its obligations under the lease and determine Siddoo's annual rate of return from the inception date to the abandonment date in order to calculate its damage.

[50] The plaintiff also seeks the following documents:

- property tax assessments;
- monthly rent rolls from the inception date;
- residential tenant vacancy and annual turnover records;
- appraisal reports;
- salary information;
- personal expenditures;
- financial statements from the inception date;
- all other annual income received by Siddoo from residential tenancies from the inception date;
- building reports; and
- a summary of deposits.

The Defendants

[51] The defendants' position is that the plaintiff has failed to make a document demand based on the filed notice of civil claim and, instead, seeks to rely on the March 29, 2023 Document Demand made in the context of an unfiled amended notice of civil claim. The plaintiff refused to respond to the defendants' inquiry about which documents related to the filed notice of civil claim. Instead, the plaintiff waited to bring this application until after its failed attempt to secure the documents through the Implied Undertaking Application.

[52] The defendants submit that the plaintiff failed to meet the high bar necessary for relief from its implied undertaking of confidentiality, and ought not to have a "second bite at the cherry" on this application. The defendants say that, on its Implied Undertaking Application, the plaintiff did not argue that it needed the

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Financial Documents to prove its case or disprove the defendants' case as pleaded. Rather, the plaintiff argued that it needed the Financial Documents in order to bring the unfiled Fraud Claim and Trust Claim against Ms. Chauhan and Mr. Sandhu. Justice Groves rejected this argument in refusing to grant relief on the Implied Undertaking Application.

[53] The plaintiff now takes the formal position that it requires the Financial Documents to prove its case and disprove the defendants' case as pleaded. The defendant argues that this is really a thinly-veiled attempt to obtain the information it requires to bring additional claims against Ms. Chauhan and Mr. Sandhu, which amounts to an abuse of process. According to the defendants, the plaintiff has indicated in writing that its actual intention is to obtain documents so that it can amend its pleadings to bring additional claims that the Financial Documents allegedly disclose.

[54] The defendants say that the plaintiff appears to base this application on the disclosure it obtained in the Arbitration Enforcement Proceeding. On January 6, 2022, counsel for the defendants provided the plaintiff with a number of documents in connection with that proceeding, including unaudited financial statements. As Groves J. noted, those financial statements showed periodic payments over many years by Siddoo to its two directors.

[55] Based on that information, the plaintiff wrote on March 29, 2023 seeking relief from the implied undertaking rule, informing the defendants that it wished to amend its notice of civil claim, and demanding the financial statements and other documents. However, as noted above, the plaintiff's notice of civil claim had not been amended by the time this application was heard.

[56] On December 8, 2023, the plaintiff sent counsel for the defendants a letter asking them to agree to suspend upcoming limitation dates for prospective claims "that might arise in respect of certain of your clients' financial records". The letter states that "[if the documents] are ordered to be produced in this Action, then any amendments may be done without any issue with the implied undertaking rule".

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According to the defendants, this letter reveals that the plaintiff's prevailing motivation in bringing the application is not to obtain documents that are relevant to proving the claim as filed.

[57] The defendants further allege that the plaintiff has mischaracterized the facts and pleadings in its explanation of why the documents are material and relevant to the claim as filed at the time of the hearing.

[58] For instance, in its application, the plaintiff refers to Additional Rent owed under the lease as being a percentage of the gross revenue earned by Siddoo. The defendants assert that Gross Revenue is in fact calculated as a percentage of the amount by which the gross revenue exceeds certain other amounts.

The Law Governing Document Demands

[59] Rule 7-1 of the *Supreme Court Civil Rules* concerns discovery and inspection of documents. Within 35 days of the end of the pleading period, parties must prepare and serve a list of all documents in their possession or control that could be used by a party to prove or disprove a material fact, or which that party intends to refer to at trial: Rule 7-1(1). If a recipient party believes that a document meeting these requirements has been omitted from the list, under Rule 7-1(10), that party may demand in writing that the party who has served the list include this document. Under the former rules of discovery, parties were additionally required to list all documents that "related to a matter in question." Under the new rules, "the assumption appears to be that in many, if not most cases, [producing documents that could be used to prove or disprove a material fact] will be sufficient": *Beal v. Strang*, 2010 BCSC 1391 at para. 14. This is consistent with the objective in Rule 1-3(2) of "securing the just, speedy and inexpensive determination of a proceeding on its merits": *Beal* at para. 14.

[60] While parties are no longer entitled as of right to additional documents that "relate to a matter in issue in the action", Rule 7-1(11) allows a party to demand those documents if the party identifies the documents sought with reasonable specificity and indicates why those documents should be disclosed. In this manner,

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Rule 7-1 creates a two-tiered obligation: the initial production obligation, and, if certain elements are satisfied, the further production of demanded documents that "relate to any or all matters in question in the action": Rule 7-1(11).

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[61] If the party who has received a demand under Rule 7-1(10) or (11) fails to comply within 35 days, the requesting party may apply to the court for an order to require compliance: Rules 7-1(13)–(14).

[62] On such an application, courts should first consider whether this document was required to be listed under Rule 7-1(1) (i.e., whether it "could be used by any party to prove or disprove a material fact").

[63] What constitutes a "material fact" was considered by Justice C. Ross in *Araya v. Nevsun Resources Ltd.*, 2020 BCSC 511, who noted the following at para. 73:

> [73] […] Material fact refers to an issue that is in dispute, the resolution of which will have legal consequences between the parties to the dispute. It is a fact put in issue by the pleadings. In *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2017 BCSC 19 at para. 90, Justice Adair stated:
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> > What qualifies as a "material fact" was discussed by K. Smith J.A. in *Jones v. Donaghey*, 2011 BCCA 6, at paras. 9-10 and 18. An "issue" is a disputed fact the resolution of which will, without more, have legal consequences as between the parties to the dispute. Such facts are referred to as "material" facts. Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. On the other hand, facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.

[64] If the document cannot be used to prove a "material fact", the court may go on to consider whether it should be disclosed because it "relates to a matter at issue in the action". To qualify, the connection between the documents sought and the issues must be beyond a mere possibility; there must be some air of reality between the documents and the issues in the action: *Przybysz v. Crowe*, 2011 BCSC 731 at paras. 28–30; *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633 at para. 28.

[65] Rule 7-1(11) demands a higher duty than Rule 7-1(10) to satisfy the other party or the court, with reasonable specificity, of "why such additional documents or

classes of documents should be disclosed": *Przybysz* at para. 30. In *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166, Justice N. Smith reasoned that:

> [8] [...] if the court is to be persuaded that the broader document discovery made possible by rule 7-1(14) is appropriate in a particular case, some evidence of the existence and potential relevance of those additional documents will be required. The examination for discovery is the most likely source of such evidence.

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[66] Even where the Rule 7-1 requirements are satisfied, the court retains the discretion to refuse the disclosure request: Rule 7-1(14)(a). In exercising this discretion, courts "must look to the objectives of the [Rules]"—and proportionality in particular: *Przybysz* at paras. 30, 32.

Analysis

The Plaintiff Has Failed to Serve a Proper Written Demand

[67] In *Lit v. Hare*, 2012 BCSC 1918, Justice Fitch (as he then was) rejected applications for document production made in a family action and a trust action where the requesting party failed to make a formal written demand, stating as follows:

> [65] Compliance with R. 9-1(7) and (8) of the *SCFR* (and its equivalent in the *SCCR,* R. 7-1(10) and (11)) is not optional and failure to observe its requirements will not readily be forgiven. I do not read *Przybysz* as suggesting otherwise, nor do I think that it particularly assists the applicant in this case. In fact, the case sounds a clear cautionary note about the failure to observe the requirements of this Rule. While I note that in *Balderston v. Aspin*, 2011 BCSC 730 [*Balderston*], a similar application for document production was entertained on its merits in the face of non-compliance with the companion civil rule, that was a case where no objection was taken by the party from whom additional documents were sought. The parties in that case essentially agreed to proceed on the basis that the request for the listing and/or production of additional documents had been made and declined.
>
> [66] Further, I do not accept the applicant's contention that requests for documents made in the context of examinations for discovery or the filing of the application itself should be regarded as sufficient substitutes for compliance with the terms of the Rule itself. While granting relief from non-compliance may, at first blush, seem expedient, doing so without good cause may also work to undermine the important objectives the Rule is designed to foster.
>
> [67] The Rule is designed to promote dialogue between the parties, informal resolution of document production disagreements where that is

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> possible and, where it is not, targeted litigation that focuses on those well-defined issues that remain contentious. The Rule operates to restrain the impulse to litigate document production issues as a course of first resort where those issues might be resolved through discussion, including by requiring the parties to articulate and defend their respective positions. In my view, the Rule is also designed to facilitate the adjudicative process by narrowing the issues and argument and particularizing, to the extent possible, the documents or categories of documents sought before an application is made. As Master Bouck observed in *Balderston*, at para. 29, in the context of the *SCCR*:
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>> The intent of Rule 7-1(11) is to inform the opposing party of the basis for the broader disclosure request in sufficient particularity so that there can be a reasoned answer to the request. The Rule allows the parties to engage in debate or discussion and possibly resolve the issue before embarking on an expensive chambers application.
>
> [68] […] Had the written demand process mandated by the *Rules* been followed, I think it reasonable to suppose that many of the difficulties associated with this application would not have arisen. Moreover, had the procedure mandated by the *Rules* been observed, I think it is unlikely that it would have been necessary to file the volume of material that accompanied these applications.

[68] Here, as in *Lit*, the plaintiff has failed to make a proper formal demand before bringing this application for disclosure. Its March 29, 2023 Document Demand was made in connection with its unfiled amended notice of civil claim and did not indicate why such additional documents should be disclosed in connection to the action as pleaded, even after the defendants specifically requested this information. Further, the requested documents that pertain to the residential tenants' deposits were never included in any document demand.

[69] The defendants never waived these procedural irregularities, which are "not readily […] forgiven": *Lit* at para. 65. This failure to comply with the procedural requirements, even when prompted to do so by the defendants, is relevant to my later discussion of how I should exercise my discretion under Rule 7-1(14).

The Documents Are Neither Material Nor Relevant to a Matter in Issue

[70] I find that the requested documents do not meet the test for materiality under Rule 7-1(10), and are of limited potential relevance to the action under Rule 7-1(11).

[71] The plaintiff is seeking records dating from the inception date (in 1969) to the abandonment date (in 2021) on the basis that “they will provide the most complete information for [the plaintiff] to perform reliable financial analysis of the returns achieved by Siddoo under the [l]ease”. The plaintiff adds that its “analysis includes determining whether Siddoo’s own actions caused the rate of return (which return Siddoo says was not a reasonable one) at the start of the Current 20-Year Period because of Siddoo’s failure to properly upkeep and maintain the Building up to that point in time”.

[72] I will consider the materiality and relevance of each requested category of documents in turn.

Financial Statements

[73] The plaintiff says that the financial statements must be disclosed because these documents will help the plaintiff prove its breach of contract claim by showing that Siddoo made inadequate investments in building upkeep, and disprove Siddoo’s frustration claim by showing that Siddoo could have planned better financially to make it financially possible to perform its obligations following the 2019 rent reset. The plaintiff also claims that the financial statements will allow the plaintiff to calculate its damages for loss of benefit by revealing Siddoo’s annual rate of return throughout the lease period.

[74] I accept the defendants’ position that the financial statements are of minimal relevance to the plaintiff’s breach of contract claim for failing to maintain the Building. The amount that Siddoo spent on building maintenance and repair does not indicate whether the Building was properly maintained—the best evidence of this is expert evidence based on the state of the Building.

[75] I also find that Siddoo’s historic financial performance is of limited relevance to disproving the defendants’ frustration claim. The plaintiff’s argument is, in essence, that Siddoo could have continued to operate the Building at a significant loss if it had saved up enough funds over the preceding decades. However, the defendants’ evidence is that Siddoo paid out most of its retained earnings to its two

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directors over the years, as it was legally permitted to do. It would not be commercially reasonable to expect the defendants to accumulate the company's profits in its retained earnings for over 50 years to account for the possibility that, in the future, it may be required to operate for the remainder of the lease at a substantial loss. If Siddoo had indeed had more effective financial management in those pre-2017 years, presumably, these additional profits would have also been paid out to its directors. The plaintiff does not claim that the lease required Siddoo to keep a certain amount of funds in its retained earnings—the plaintiff appears to have protected itself from risk by ensuring that it could seize Siddoo's most valuable asset, the Building, which, in fact, is what occurred.

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[76] As for the viability of future performance, the defendants seek to demonstrate that, given the dramatic increase in Basic Rent, it would be impossible to perform the contract without incurring significant losses no matter how efficiently the Building is managed (i.e., even if Siddoo incurred no expenses), even factoring in that residential tenants' rents will slowly rise over the next 20 years. Siddoo's pre-2017 financial statements are therefore immaterial and irrelevant.

[77] Finally, there is no reason why the plaintiff would need Siddoo's pre-2017 financial statements to calculate the plaintiff's loss of benefit of the lease. Under the lease, the plaintiff would have received a fixed amount of Basic Rent, as well as Additional Rent based on gross revenue. What gross revenue would have been if the contract continued is a function of current and expected future, rather than historic, information and market conditions.

Continuity Schedule of Capital Expenditures

[78] The plaintiff seeks a continuity schedule of all capital expenditures made by Siddoo during the lease term. Similar to their position on the financial statements regarding building maintenance and repair expenses, the plaintiff claims these documents will help determine whether Siddoo breached its obligations under the lease, whether the lease was frustrated by Siddoo's failure to maintain the Building as a prudent owner, and to calculate the plaintiff's damages. For the same reasons

as above, these documents cannot be used to prove or disprove a material fact and are of negligible relevance to the issues in the action.

Property Tax Assessments

[79] The plaintiff also says it requires property tax assessments to help prove whether Siddoo was or ought to have been aware of the anticipated increase in LMV, which it claims is relevant to disproving Siddoo’s frustration claim. According to the plaintiff, property tax assessments also affect Siddoo's annual rate of return (for the purpose of assessing damages) and will assist in calculating the amount of Additional Rent owed under the lease.

[80] The defendants point out that the plaintiff has not pleaded a claim for any Additional Rent owing, so this is not relevant to anything at issue in the action.

[81] As with the financial statements, Siddoo’s historic rate of return is not relevant to damages, or to anything else at issue in this action.

[82] I also accept the defendants’ submission that Siddoo’s awareness of the impending increase in LMV has no relevance to their frustration claim. The test for frustration in contract law is well settled, and requires a situation to arise for which “the parties made no provision in the contract and performance of the contract becomes ‘a thing radically different from that which was undertaken by the contract’”: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para. 53. The supervening event must have been unforeseeable <u>at the time the contract was made</u>: *Croke v. VuPoint System Ltd.*, 2024 ONCA 354 at para. 49.

Monthly Rent Rolls

[83] With respect to the monthly rent rolls, the plaintiff claims that they are relevant to calculating Siddoo’s annual rate of return, which in turn is relevant to the claims for breach of contract and to Siddoo’s frustration claim.

[84] Once again, Siddoo’s annual rate of return prior to 2017 does not relate to a matter in issue in this proceeding.

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Residential Tenant Vacancy and Annual Turnover

[85] For the residential tenant vacancy and annual turnover, the plaintiff says these records are necessary to calculate gross rental revenue and to prove the cyclical nature of a long-term ground lease and, thus, are relevant to the claim for breach of contract.

[86] The plaintiff had not brought a claim for past Additional Rent owing as at the date of hearing, and, as stated, evidence of historic rents and market conditions have minimal relevance to determining how much rent could be earned going forward. The plaintiff has this information for the past three years, beginning from when it repossessed the Building; this recent information, in conjunction with examining market trends, is far more relevant to determining how much Additional Rent would have been paid to the plaintiff under the lease.

Building Reports

[87] The plaintiff seeks building appraisal reports as well as building envelope reports, depreciation reports, or similar reports obtained by Siddoo to show that Siddoo knew or ought to have known about its failure to maintain the Building as a prudent owner. The plaintiff states that the reports will also help determine whether Siddoo knew or ought to have known that the LMV and the Basic Rent was slated to increase for the Current 20-Year Period.

[88] As discussed, Siddoo’s state of mind regarding the increasing LMV is not relevant to its claim that the contract has been frustrated.

[89] I accept that the reports sought, if available, could have some limited relevance to the plaintiff’s breach of contract claim for failing to maintain the Building as a good quality apartment development. However, these reports can only convey the state of the Building at some point in the past. Any breach of contract this evidences would be subject to a two-year limitation period, albeit with a possible argument by the plaintiff that this breach was not discoverable until they retook

possession. Ultimately, the most relevant time for evaluating the state of the Building is the time at which the dispute arose and the plaintiff took possession.

Salary Information and Personal Expenditures

[90] With respect to salary information, the plaintiff argues that these documents will help to reveal whether Siddoo managed, supervised, and maintained the Building as a prudent owner.

[91] On personal expenditures, the plaintiff similarly says these documents are relevant to the claim for breach of contract and the claim of frustration.

[92] Both of these classes of documents are of limited relevance. Siddoo's past salary and other expenditures information are not relevant to the frustration claim. They are of limited relevance to the breach of contract claim, as examining expenditures is not particularly useful or relevant in evaluating whether Siddoo met or failed to meet Building maintenance and management standards.

Other Annual Income

[93] As with residential tenants' rents and deposits, the plaintiff says that additional income information is relevant to calculating Siddoo's annual rate of return.

[94] As discussed, Siddoo's historic returns are not relevant to any matter at issue in the action. Further, the defendants submit that it is unclear what is meant by "other annual income received by residential tenants", given that Siddoo only received rent and deposits from its tenants.

Summary of Deposits

[95] Finally, the plaintiff says that records showing the deposits received from residential tenants held by Siddoo at the abandonment date are necessary for it to determine its claim for breach of trust. The plaintiff claims, consequently, that these records are highly relevant.

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[96] The defendants point out that this request was not on the March 29, 2023 Document Demand, and the plaintiff has testified that the Deposits have already been paid by the defendants. In light of these facts, the request for these records borders on an abuse of process.

The Application Borders on Abusive

[97] The defendants claim that the plaintiff's application as a whole is an abuse of process. While the plaintiff formally argues that the documents are relevant to issues in the action, the defendants assert that the plaintiff's ulterior motive is to obtain documents subject to an implied undertaking of confidentiality in order to bring additional claims against Ms. Chauhan and Mr. Sandhu. They allege that the plaintiff is trying to relieve itself from its implied undertaking by collateral means, after being unsuccessful in doing so directly.

[98] The doctrine of abuse of process can apply "if the process of the court is used unfairly or dishonestly, or for an ulterior or improper purpose": *Dick v. Coquitlam (City),* 2017 BCSC 2158 at para. 41. It is a flexible doctrine designed to prevent actions that violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *Krist v. British Columbia*, 2017 BCCA 78 at para. 52.

[99] One application of the larger doctrine of abuse of process is when a party brings a proceeding that amounts to a "collateral attack" on an existing order; another is when a party brings an otherwise valid proceeding for an "ulterior or improper purpose": *The Owners, Strata Plan BCS3702 v. Hui*, 2023 BCSC 1420 at para. 25. Proceedings that amount to an abuse of process often attract an order of special costs: *Shih v. Shih*, 2019 BCSC 1681 at para. 66; *Briggs Estate*, 2020 BCSC 2115 at paras. 13 and 17; *McKenzie v. McKenzie*, 2016 BCCA 97 at paras. 31–32;

[100] This application is not a collateral attack on Groves J.'s decision to deny the plaintiff relief from its implied undertaking. As Groves J. contemplated, the plaintiff could "as a result of some subsequent application, […] obtain these documents in

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this proceeding": at para. 16. It is not inherently abusive for the plaintiff to pursue these documents on other grounds for a different (good-faith) purpose.

[101] In written submissions delivered in response to the plaintiff filing its ANOCC on April 24, 2024, the defendants argued that the ANOCC lends further support to their position that this application is an abuse of process. The ANOCC pleads facts the plaintiff claimed it could not determine without the documents sought in this application—such as Siddoo's annual rate of return and gross rental rate—based on documents that were already in the plaintiff's possession. I agree with the defendants that this further supports that the plaintiff's stated bases for bringing the application differed from its actual reasons for doing so.

[102] It appears that the plaintiff is bringing this application for an ulterior purpose, and is thereby using this court's process "unfairly or dishonestly". The stated relevance of these documents to the matters in issue in the action is tenuous at best. I agree with the defendants that the letter they received from plaintiff's counsel on December 8, 2023 indicates that the plaintiff's prevailing intention in bringing this application was to obtain documents it intended to use to amend its pleadings to bring additional claims against Ms. Chauhan and Mr. Sandhu.

[103] A proceeding may be dismissed by reason alone that it amounts to an abuse of process: *Tangerine Financial Products Limited Partnership v. The Reeves Family Trust*, 2015 BCCA 359. However, in these circumstances, I would not make a formal finding of abuse of process. Instead, I will consider the plaintiff's apparent unfair and dishonest conduct as a factor in exercising my discretion under Rule 7-1(14) and in awarding costs.

Conclusion

[104] The documents sought by the plaintiff cannot be used to prove or disprove a material fact. While some of the reports requested by the plaintiff (such as appraisal reports, building envelope reports, or depreciation reports) could have some limited relevance to the matters at issue in the action, I find that most of these documents are wholly irrelevant. Any possible relevance they possess is outweighed by the

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plaintiff's failure to comply with the procedural requirement to make a proper document demand, as well as its seemingly dishonest and unfair use of this application to achieve an ulterior purpose.

[105] This application is dismissed.

Costs

[106] Given the result, the defendants will have their costs of this application in any event of the cause. If the parties cannot agree on the appropriate scale, I grant them leave to appear before me on this issue.

"Maisonville J."

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