

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Benuva Stiftung v. Abadian*,
2024 BCSC 1206

Date: 20240705
Docket: S2210261
Registry: Vancouver

Between:

Benuva Stiftung

Plaintiff
Defendant by way of Counterclaim

And

Sean Abadian aka Ehsan Abadian and Sea Investments Ltd.

Defendants
Plaintiffs by way of Counterclaim

And

Amir Abadian

Defendant

Before: Associate Judge Harper

Reasons for Judgment

Counsel for the Plaintiff:

M. Nied

Counsel for the Defendants, Sean Abadian
aka Ehsan Abadian and Sea Investments
Ltd.:

D. Yaverbaum

The Defendant, Amir Abadian:

No appearance at this hearing

Place and Date of Hearing:

Vancouver, B.C.
June 3, 2024

Place and Date of Judgment:

Vancouver, B.C.
July 5, 2024

Introduction

[1] The plaintiff, Benuva Stiftung (“Benuva”), seeks an order that the defendants and plaintiffs by counterclaim, Sean Abadian aka Ehsan Abadian and Sea Investments Ltd. provide particulars of allegations made in their counterclaim. Sean Abadian is the sole director of Sea Investments Ltd. The other defendant, Amir Abadian, is Sean Abadian’s father. Amir Abadian took no part in this application. I will refer to the defendants appearing on this application as the “defendants”.

[2] Benuva is a not-for-profit charitable foundation incorporated pursuant to the laws of Liechtenstein. A member of the council of Benuva avers that Benuva’s “principal purpose is to serve the common good, including the advancement of needy communities, institutions and individuals”. The defendants allege in their amended response to civil claim that Benuva was founded by an individual named Jurg Basler for tax-planning purposes and that Benuva was the agent and alter ego of Mr. Basler. Mr. Basler is deceased.

[3] Benuva alleges that, commencing in 2016, it made loans totalling more than \$20 million to the defendants. Benuva sues for repayment of the loans. The defendants seek a declaration that the loan agreements and related mortgages are invalid. The defendants allege that because Benuva was legally prohibited from making commercial investments, the financing arrangements needed to be structured as loans to give the false appearance that Benuva was not making commercial investments. The counterclaim alleges fraudulent and negligent misrepresentations by Mr. Basler and Benuva.

[4] The notice of civil claim was filed in December, 2022. The response to civil claim was filed in March 2023 and an amended response to civil claim was filed in April 2023. The counterclaim was filed in March 2024. The document discovery process has unfolded in the usual way, albeit in a protracted and contentious manner, including applications by both parties for further document disclosure. Document disclosure has been extensive on both sides as indicated by the lengthy

lists of documents contained in the application materials. No examinations for discovery have yet occurred.

[5] I will set out below the paragraphs in the counterclaim and the related demand for particulars.

Paragraph 9:

9. In or about 2016 and at various times throughout 2016 to 2020, Mr. Basler for himself and on behalf of Benuva, represented to Mr. Abadian and Sea Investments that:
 - (a) he was the agent and alter ego and Benuva;
 - (b) he controlled the decisions and affairs of Benuva;
 - (c) Benuva was legally prohibited from making commercial investments, and accordingly, that their arrangements needed to be structured as loans to give the false appearance that no commercial investments were being made (the “Purported Loans”); and
 - (d) Benuva would not enforce the Purported Loans in the event the investments failed (collectively, the “Representations”).

Demand:

- (i) Whether the representations were oral or written, or partly written and partly oral;
- (ii) To the extent the representations were written, the date and identity of the document(s) in which the representations are contained; and
- (iii) To the extent the representations were oral:
 1. When the representations were made;
 2. Where the representations were made;
 3. To whom the representations were made;
 4. The full content of the representations; and
- (iv) The content of each statement which is alleged to be false.

Paragraph 10:

10. Mr. Abadian and Sea Investments reasonably relied on the Representations and in reliance on them, in or around 2016, Mr. Basler, Benuva, and Mr. Abadian and Sea Investments entered into a partly oral and partly written agreement (the “First Umbrella Agreement”) the terms of which included the following:

- (a) Mr. Basler would advance funds through Benuva to replace the parties existing arrangements and to provide a further \$2,500,000.00 for investment;
- (b) the advance would be structured as loans from Benuva, with various forms of security, to give the false appearance that no commercial investments were being made by Benuva;
- (c) Mr. Abadian would invest the funds received from Benuva as directed by Mr. Basler and as agent for Mr. Basler and/or Benuva; and
- (d) Benuva would not enforce the Purported Loans in the event of a failure of those investments.

Demand:

- (i) Whether the agreement was oral or written, or partly written and partly oral;
- (ii) To the extent the agreement was written, the document(s) in which the agreement or any portion thereof is contained;
- (iii) To the extent the alleged agreement was oral:
 - 1. The date and time at which the alleged agreement was made;
 - 2. The location at which the alleged agreement was made; and
 - 3. The individuals who made the alleged agreement;
 - 4. The parties to the alleged agreement;
 - 5. The full terms of the alleged agreement; and
 - 6. The specific individuals who entered into the alleged agreement on behalf of the corporate parties.

Paragraph 13:

13. In or around 2019, Mr. Basler advised Mr. Abadian that he wanted to use Benuva to invest further funds in British Columbia real estate. Mr. Basler repeated the Benuva Representations to Mr. Abadian and Sea Investments.

Demand:

- (i) Whether the representations were oral or written, or partly written and partly oral;
- (ii) To the extent the representations were written, the date and identity of the document(s) in which the representations are contained; and
- (iii) To the extent the representations were oral:

1. When the representations were made;
 2. Where the representations were made;
 3. To whom the representations were made;
 4. The full content of the representations; and
- (iv) The content of each statement which is alleged to be false.

Paragraph 15:

15. Mr. Abadian and Sea Investments reasonably relied on the Representations and in reliance on them, in or about 2019, Mr. Basler, Benuva, Mr. Abadian and Sea Investments entered into a partly oral and partly written agreement (the “Second Umbrella Agreement”) the terms of which include the following:
- (a) Mr. Basler would arrange to advance through Benuva the sum of \$10,000,000;
 - (b) this advance would be structured as loans from Benuva, with various forms of security, to give the false appearance that no commercial investments were being made by Benuva;
 - (c) Mr. Abadian would invest the \$10,000,000 received from Benuva with Port Capital, as agent for Benuva; and
 - (d) Benuva would not enforce the Purported Loans and the related security in the event of the failure of the investment with Port Capital.

Demand:

- (i) Whether the representations were oral or written, or partly written and partly oral;
- (ii) To the extent the agreement was written, the document(s) in which the agreement or any portion thereof is contained;
- (iii) To the extent the alleged agreement was oral:
 1. The date and time at which the alleged agreement was made;
 2. The location at which the alleged agreement was made; and
 3. The individuals who made the alleged agreement;
 4. The parties to the alleged agreement;
 5. The full terms of the alleged agreement; and
 6. The specific individuals who entered into the alleged agreement on behalf of the corporate parties.

Applicable Legal Principles

[6] Rule 3-7 of the *Supreme Court Civil Rules* sets out the requirements for particulars and the procedure for applying for particulars.

[7] The court may order a party to serve further and better particulars of a matter stated in a pleading (Rule 3-7(22)) after a party has demanded particulars in writing from the other party (Rule 3-7(23)).

[8] Benuva has demanded particulars under two different categories: allegations of fraud and misrepresentation (Rule 3-7(18)) and “a matter stated in a pleading” (Rule 3-7(22)), namely, allegations about agreements.

[9] Rule 3-7(18) applies:

If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[10] The functions of particulars, as summarized in *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (C.A.) at para. 15 are:

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
- (2) to prevent the other side from being taken by surprise at the trial;
- (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial
- (4) to limit the generality of the pleadings;
- (5) to limit and decide the issues to be tried, and as to which discovery is required, and
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

[11] As stated in *Sidhu v. Hiebert*, 2018 BCSC 401 at para. 40:

Rule 3-7(18) requires that a party alleging misrepresentations provide full particulars of each instance on which an alleged misrepresentation was made. This requires providing the factual underpinnings of the misrepresentations, which are: the nature of the misrepresentations, the circumstances in which they were made, when, how and by whom they were made, and how they were relied on to the detriment of the plaintiff.

[12] Our Court of Appeal has recently restated the fundamental principles with respect to orders for the production of particulars in *Steelhead LNG Limited Partnership v. Arc Resources Ltd.*, 2022 BCCA 128 [*Steelhead*]. Neither party referred to *Steelhead* in their application materials. In my view, this decision is required reading for any party facing an issue about particulars. At para. 23, Justice Willcock states: “While we should restate the fundamental principles with respect to orders for the production of particulars, we should not lay down hard and fast rules, and should refrain from attempting to reconcile cases which may be in tension with each other”. What is necessary for the purpose of pleading and preparation for discovery must be determined on a case-by-case basis: *Steelhead* at para. 71.

Issues

[13] With respect to the allegations of fraud and misrepresentation, do paragraphs 9 and 13 of Part 1 of the counterclaim comply with the requirements of Rule 3-7(18)?

[14] With respect to the allegations regarding agreements as set out in paragraphs 10 and 15 of the counterclaim, are further particulars necessary?

Analysis

[15] Benuva says that the defendants’ allegations of fraudulent and negligent misrepresentation and collateral agreements are vague and not properly particularized.

[16] The defendants do not take the position that they are unable to provide particulars for valid reasons that should excuse them from having to provide further and better particulars, for instance, that the material facts that ought to be pleaded are known only to Benuva. Rather, the defendants say that the counterclaim includes particulars that meet the requirements of Rule 3-17(18) and that, given that the counterclaim is identical to the amended response to civil claim, Benuva “could not be under any misapprehension concerning the issues to be canvassed” in the proceeding.

Allegations of Fraud and Misrepresentation

[17] Paragraphs 9 and 13 of the counterclaim contain allegations of fraud and misrepresentation. The rule is clear: particulars of fraud and misrepresentation must be pleaded. It is not enough for the defendants to argue that Benuva can sift through the volumes of documents that have been disclosed and discern the particulars for themselves.

[18] The defendants say that the pleading adequately sets out the particulars. I do not agree. More specific details are required to be pleaded including dates, how the misrepresentations were made (written or oral), and a description of the circumstances in which oral representations were made (in person? on the telephone? etc.).

[19] The defendants argue that Benuva knows the case it has to meet and no further particulars are required. Because the assessment of whether particulars are necessary is fact driven, an order for particulars is fact driven: *Steelhead* at para. 25. The knowledge of the party seeking particulars is material as is the stage of the proceeding at which particulars are demanded. The death of Mr. Basler could be an important fact in the present application. If the defendants had provided evidence that they were unable to provide particulars because Mr. Basler had sole possession of documents that he concealed, then the court could consider deferring the application for particulars until after examinations for discovery (although, obviously, Mr. Basler cannot be examined for discovery). However, the defendants have not argued on this application that the particulars that Benuva seeks are within its knowledge because the only person who had knowledge of the facts is dead. The defendants must have sufficient information in their hands to answer the demands for particulars because, by definition, misrepresentations are communicated to the party receiving them, namely, the defendants.

[20] The defendants argue that the extensive document disclosure obviates the necessity for particulars. I do not agree. Document disclosure is not a substitute for particulars. Particulars are a requirement of pleading, not a requirement of document

disclosure. When fraud is alleged, particulars are mandatory. Document disclosure has been extensive as evidenced by the lists of documents contained in the application materials. However, the party seeking particulars of the fraud they are alleged to have committed is not required to sift through the documents disclosed and try to discern the facts in support of the alleged fraud claims. In any event, the defendants point to no documents from which Benuva ought to be able to identify the particulars of fraud.

[21] The particulars Benuva seeks in the demands set out above are appropriate.

Allegations about Agreements

[22] Because the assessment of the necessity of particulars is fact-driven, an order for particulars is discretionary. The exercise of discretion is informed by the particular circumstances at play in the case and involves balancing the objectives set out in *Cansulex* as a whole.

[23] Benuva argues that the *Cansulex* factors require the defendants to provide particulars of the claims they advance that pertain to agreements between the parties. Paragraph 10 of the counterclaim refers to a date that is “in or around 2016” and a partly oral and partly written agreement. As I understand the defendants’ argument, they say that Benuva can find the particulars in the documents that have been disclosed. There was no evidence before me that establishes that the facts alleged in paragraph 10 can be discerned from the documents. Although it is clear from the current pleading that the person who made the alleged representations is Mr. Basler and the person to whom the alleged representations were made was Sean Abadian, Benuva is entitled to full particulars of the other material facts relating to the agreements. Benuva has not yet filed a response to counterclaim and is entitled to particulars in order to plead. In addition, given that examinations for discovery will presumably be the next step in the proceeding (given that document disclosure appears to be complete), particulars are required to limit the issues to be examined on at discovery and to prevent surprise at trial.

[24] The defendants are required to particularize the allegations made in paragraph 10 of the counterclaim so that Benuva knows the case it has to meet and so that it can properly prepare for the examination for discovery of both sides' representative.

[25] Paragraph 15 of the counterclaim makes similar allegations to those in paragraph 10. As with paragraph 10, I think it is obvious that the defendants allege that the relevant individuals involved are Mr. Basler and Sean Abadian. However, again, the date frame is broad and there was no evidence before me that establishes that the facts alleged can be discerned from documents. There is no evidence that the defendants are unable to provide more specific details about the relevant dates. Benuva is not required to search for particulars in the documents. The particulars should be pleaded.

[26] To summarize, I agree with the submissions of Benuva on the contractual claims. It is not sufficient to allege that the parties entered into a "partly oral and partly written agreement" "in or about" a particular year and that the agreement had certain terms "including" those pled in the counterclaim. The defendants must particularize when the agreement was entered into, the written document in which the agreement is contained to the extent the agreement is written, the oral communications in which it was made to the extent the agreement is oral, and the full terms of the alleged agreement.

Conclusion

[27] The application for particulars is granted in the terms sought.

[28] The defendants will have 45 days from the date of release of these reasons to comply with the order.

[29] Costs will be in the cause.

"Harper A.J."