

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nelson Penelas, NP Provix Holdco Inc., and Carlisle Investment Group Inc.,
Applicants

AND:

Trevor Cruise, Tyrell Corp., TC Provix Holdco Inc., NT&T Investment Partners
Ltd., Stanmech Technologies Inc., NTO Provix Holdco Inc., Provix Inc., and
1442491 Ontario Inc., Respondents

BEFORE: Kurz J.

COUNSEL: Nathaniel Read-Ellis, for the Applicants

Stephen Brown-Okruhlik, for Respondents Trevor Cruise, Tyrell Corp. and TC
Provix Holdco Inc.

HEARD: March 10, 2025, by Videoconference

ENDORSEMENT

Introduction

[1] This is the second motion before me in this application. The first motion was a request by the Applicants for injunctive relief against the Respondents. The key issue in that motion was whether the principal of the Applicants, Nelson Penelas (“Penelas”), should be restored to his role as a co-officer and director (with the Respondent, Trevor Cruise) of the corporate Respondent, Stanmech Technologies Inc. (“Stanmech”).

[2] In my November 29, 2024 endorsement (the “Injunction Endorsement”), cited as 2024 ONSC 6679, I found that Cruise had wrongfully removed Penelas as a director and officer of Stanmech, and that he had acted in conflict of interest by preferring his interests to those of Stanmech.

[3] My Order of November 29, 2024 (the “Order”), whose terms are set out in the Injunction Endorsement reinstated Penelas as a director of Stanmech, restored his email, IT and banking

access, as well as his compensation and forbade any transaction by Stanmech out of the ordinary course. The Order also forbade Cruise and Penelas from engaging in any substantive discussions with Stanmech's key supplier, Leister Technologies AG ("Leister"), without the participation of the other. The supply of Leister products is Stanmech's main corporate business.

[4] The Order also required Stanmech to include both Cruise and Penelas in all hiring and firing decisions.

[5] I made no order regarding the Respondent, Provix Inc. ("Provix"), a corporation in which Cruise and Penelas held equal indirect interests and which they had recently acquired¹. I refrained from doing so because Penelas both pleaded and represented to the court that he and Cruise had agreed that he would sell his interest in Provix to Cruise at the same price he (or his holding company) had recently paid when they acquired it.

[6] The intent of the Order was to level the playing field between Cruise and Penelas until their dispute over control of Stanmech had concluded. That remains my intent.

Relief Which Penelas Seeks in This Motion

[7] Penelas originally styled this motion as one to enforce certain terms of the Order. However he has now amended his notice of motion to seek relief that extends beyond the enforcement of the Order. He moves for:

1. Declarations that Cruise breached the Order by:
 - Directing Stanmech to pay him \$250,000 in retroactive compensation;

¹ Penelas and Cruise hold their 100% interest in Provix indirectly, through a holding company, NTI Provix Holdco Inc. ("NTI"). Each of Penelas and Cruise have set up their own wholly-owned holding companies to hold their indirect 50% interest in NTI. For ease of convenience, I will treat Provix as being held 50% by each of Penelas and Cruise.

- Paying himself an ongoing salary of \$250,000 per annum as CEO of Stanmech;
- Instructing the law firm, Blaney McMurtry LLP to issue a statement of claim against Penelas on behalf of Stanmech;
- Directing Stanmech to pay his holding companies' legal fees in this litigation;
- Intentionally delaying compliance with my order that Penelas' access to his Stanmech email, IT and banking be reinstated.

2. Orders that:

- Cruise repay the \$250,000 paid to him by Stanmech on November 29, 2024, the date of release of my Injunction Endorsement;
- Set aside Cruise's November 28, 2024 employment contract with Stanmech (the "Employment Contract");
- Cruise and his holding companies repay to Stanmech any funds advanced to them by Stanmech in regard to their legal fees in this proceeding;
- Varying the Order under Rule 59.06(2) on the basis of facts discovered after its release, to:
 1. Suspend Cruise as CEO of Stanmech and to appoint Penelas in his place on an interlocutory or interim basis;
 2. Allow each of Penelas and Cruise to have individual direct discussions with Leister, Stanmech's main supplier;
 3. Direct that Penelas' express consent is required for any payment by Stanmech to any person, party, corporation, trust or entity related to

affiliated with, controlled by, operated by or otherwise associated with Cruise or any member of his immediate family;

4. Allow Penelas to share confidential information regarding Stanmech and Provix with his professional legal and financial advisors for the sole purpose of advising him with respect to a possible purchase or sale of his (indirect) interest in either business, subject to each professional advisor undertaking to maintain the confidentiality of such information.
- Permitting Penelas to amend his Notice of Application to revise the relief he seeks. Those changes include:
 1. The requirement that Cruise be the “trigger” for the “shotgun” buy/sell process for Stanmech;
 2. The withdrawal of his pleading regarding his agreement to sell his interest in Provix to Cruise at the price that he paid for it. Penelas now wishes to seek, instead, an order that the parties deal with Provix by way of a “shotgun” process, with Penelas as the “trigger”.

Penelas’ Rationale for This Motion and Cruise’s Response

[8] Penelas’ main argument in this motion is that Cruise breached the Order in both its letter and spirit. Cruise claims that he entered into the Employment Contract with Stanmech on November 28, 2024, one day before the release of the Injunction Endorsement. Penelas does not accept that the Employment Contract was executed before the release of the Injunction Endorsement. But even if it were, Penelas argues that the contract was executed in full awareness of the fact that Penelas was seeking the relief I granted in the Order. That relief included the prohibition on non-ordinary steps or transactions regarding Stanmech without the express written consent of both of them.

[9] Further, the \$250,000 that Cruise caused Stanmech to pay him, purportedly for past services, were disbursed after the release of my Injunction Endorsement. That payment, Penelas argues violates the prohibition on non-ordinary course steps or transactions set out above. Cruise neither requested nor obtained Penelas' consent to that transaction. In that way, Penelas argues, Cruise acted "badly", both while my decision was under reserve and then after its release. Accordingly, he should not reap the benefits of his unilateral conduct which, if not in breach of the letter of the Order was, in any event, in breach of its spirit.

[10] Penelas adds that the disclosure of Cruise's conduct after the original injunction motion of October 25, 2024 was argued is reason to seek the further relief he claims in this motion. He argues that the additional relief is necessary to place them both on an equal footing to deal with a buy/sell shotgun transaction for control of Stanmech.

[11] Cruise's position is set out in the first paragraph of his factum, which begins with the ironic term "[w]e're back!". Cruise speaks of Penelas' "hubris of partial victory on an injunction motion". He asserts that Penelas has "overstepped his rights and looked to conjure up 'breaches' of the injunction to further improve his position".

[12] Cruise denies that he did anything wrong. He contends that he signed the Employment Contract a day before my Injunction Endorsement was released. He admits that he had Stanmech pay him \$250,000 in purported retroactive compensation following the release of my Injunction Endorsement because I did not expressly forbid such executive compensation. He asserts that he earned the payments set out in the Employment Contract because he has continued to run Stanmech while Penelas is working at another lucrative job in Spain. He does not set out the reason he did not request a clarification of my order if the term regarding non-ordinary steps or transactions was unclear.

[13] Cruise adds that he complied with the Order, including by giving Penelas the access to Stanmech information which I ordered. But he adds that Penelas has ginned up evidence of a lack of access. He blames Penelas for his failure to obtain the compensation that I ordered on his behalf because until shortly before this motion was argued, he was unwilling to sign the

necessary tax documentation. Cruise adds that replacing him as Stanmech CEO with Penelas, who currently resides in Spain, would be disastrous for the company.

[14] Cruise contends that, having received most of what he sought in the Order, Penelas now seeks to resile from positions which assisted him in getting that Order, in order to obtain even greater relief. He argues that it would be improper to grant Penelas the additional relief he now seeks.

Issues

[15] This motion raises the following issues:

1. Should the Court set aside the Employment Contract?
2. If so,
 - Should the Court order the repayment by Cruise to Stanmech of the \$250,000 in retroactive compensation he received on November 29, 2024 and that Stanmech not treat the repayment as a loan?
 - Should Cruise and his holding companies be required repay to Stanmech all funds that Stanmech advanced to them or paid on their behalf in respect of salary under the Employment Contract or as legal fees for these proceedings?
3. Should the Court issue the declarations regarding Cruise's conduct requested by Penelas?
4. Should Cruise be replaced with Penelas as Stanmech's CEO?
5. Should the Order be varied to allow Penelas to share confidential Stanmech and Provix information with his professional advisors?
6. Should the Order be varied to allow each of Cruise and Penelas to speak to Leister without the other?

7. Should the court allow Penelas to amend his pleadings to call for a shotgun process for the sale of Provix?
8. Should the court allow Penelas to amend other portions of his Application?

Brief Summary of this Decision

[16] For reasons that follow, I order as follows:

1. The Employment Contract is set aside. Cruise shall immediately rescind any registration of the Employment Contract under the *PPSA*;
2. Cruise is required to repay to Stanmech the \$250,000 in retroactive compensation he received on November 29, 2024. As the repayment has already voluntarily occurred, Stanmech shall not treat the repayment as a loan;
3. The Respondents shall repay to Stanmech all funds which Stanmech advanced to them or paid on their behalf in respect of the Employment Contract or as legal fees for these proceedings within 14 days;
4. Other than as set out in the Order, no payments shall be made by Stanmech to either Cruise or Penelas or to any person, party, corporation, trust or entity that is related to, affiliated with, controlled by or operated by or otherwise associated with either Cruise or Penelas without the express written consent of the other or an order of this court;
5. I dismiss Penelas' request for declarations regarding Cruise's conduct;
6. I dismiss Penelas' request to replace Cruise with Penelas as Stanmech's CEO;
7. I dismiss Penelas' request to vary the Order to allow Penelas to share confidential Stanmech and Provix information with his professional advisors;
8. I dismiss Penelas' request to vary the Order to allow each of Cruise and Penelas to speak to Leister without the other;

9. I dismiss Penelas' request to amend his pleadings to call for a shotgun process for the sale of Provix;

10. I adjourn the balance of Penelas' request to amend his Application *sine die*.

Background

[17] The background to this matter is set out in the Injunction Endorsement. In essence, this case is a corporate divorce between two individuals who have lost confidence in each other and feel highly aggrieved with the other. It is unfortunate that the parties were unwilling or unable to mediate the issues in this case and in particular, the mode of their corporate divorce. Rather, they continue to spend vast amounts of money to litigate this case and to keep their lives in limbo for months on end.

[18] There is no dispute that in his Application, Penelas sought:

a separation of the ownership interests (direct and indirect) of ... [Penelas and Cruise] by requiring Mr. Cruise to purchase Mr. Penelas' interest [in Provix] ... and directing them to engage in a shotgun buy/sell mechanism with respect to the shares of NT&T Investment Partners Ltd. [the Respondent holding company which is the parent company of Stanmech].

[19] Penelas further pleaded that following negotiations he and Cruise had:

... agreed in broad strokes to achieve the corporate separation on the basis that Mr. Cruise would purchase Mr. Penelas' interest in Provix and that their interest in Stanmech would be the subject of a shotgun buy/sell arrangement, with Mr. Penelas as the 'trigger' (i.e. naming the price at which Mr. Cruise could then choose to be a buyer or seller).

[20] However, Penelas pleaded that the negotiations had broken down when Cruise was insistent that the Provix sale take place immediately while Stanmech would be "left on a 'to be discussed' basis".

[21] In his factum for the injunction motion, Penelas wrote that the issue of ownership of Provix was not in dispute. He added that the "parties have agreed that Mr. Penelas would sell his interest in Provix to Mr. Cruise for the value at the time of acquisition" and that "Mr. Penelas

continues to be willing to sell his interest in Provix to Mr. Cruise for the amount he paid”.

Penelas also stated in his factum for that motion that he and Cruise had agreed on a shotgun transaction for Stanmech but that Cruise had resiled from that position.

[22] At the time that the October 25, 2024 motion was argued, Cruise was unwilling to agree to a shotgun process for Stanmech. But on December 6, 2024, his counsel wrote to Penelas’ counsel, stating that his clients “agree to the relief that your client is seeking in paragraphs 1(b) and (c) of the Notice of Application [i.e. Cruise to buy Penelas’ share of Provix and a shotgun process for Stanmech].” Cruise’s counsel included a draft order with his letter.

[23] One area of concern which Penelas raised in the October 25, 2024 motion was that Cruise had shut him out from dealing with Leister. He sought an order that neither speak to Leister without the other.

[24] Cruise was not present when the original injunction motion was heard because he was participating in a meeting at Stanmech’s office with a representative of Leister who visiting from Zurich, Switzerland. Cruise asserts without contradiction that Penelas, who was originally present at court on October 25, 2024, left the courthouse early to catch a flight to Zurich; not coincidentally, the same flight that the Leister representative was taking.

[25] Penelas responds that the flight to Zurich was just the most efficient way to get home to Valencia, Spain. That is a dubious proposition, considering that Zurich is, according to Google Maps, 1400 km northeast of Valencia.² It is far out of the way for a flight from Toronto to

²https://www.google.ca/search?q=distance+between+zurich+and+valencia&sca_esv=5522b92e4be46ee0&sxsrf=AHTn8zq1bcNCFuOsfYbjOWf5y5oMqEWWw%3A1742854939036&ei=G9vhZ7r1Aa_Ap84Pm_2DiQU&ved=0ahUKEwj67qTM4KOMAxUv4MkDHZvIFEQ4dUDCBA&uact=5&oq=distance+between+zurich+and+valencia&gs_lp=Egxn3Mtd2l6LXNlcnAijGRpc3RhbmNlIGJldHdlZW4genVyaWNolGFuZCB2YWxlbnNpYTIFECEYoAEyBRAhGKABSOW-UABYrDxwAXgBkAEAmAHgAaABiR2qAQcyNC4xMi4xuAEDyAEA-AEBmAlmoALMHsICBBAjGCfCAgoQixiABBgnGloFwglTEC4YgAQYxwEYJxiKBRiOBRivAcICCAAGIAEGJECGIoFwglILEC4YgAQYkQIYigXCAGsQLhiABBixAxiDAclCDhAuGIAEGLEDGNEEDGMcBwglOE4YgAQYsQMYgwEYigXCAGoQABiABBhDGIoFwglQEC4YgAQY0QMYQxjHARiKBclICEBAAGIAEGLEDGEMYGwEYigXCAGsQABiABBixAxiDAclCBRAuGIAEwglTEC4YgAQYsQMYQxjHARiKBRivAcICDRAAGIAEGLEDGEMYGigXCAGsQABiABBiSAXiKBclCCBAAGIAEGLEDwglQEAAyGAAQYsQMYQxjJAXiKBclCCBAuGIAEGLEDwglIEAAyGAAQYkgPCAGsQABiABBixAxiJA8ICBRAAGIAEwglKEAAyGAAQYFBiHAsICBhAAGBYHsICBBAAGBYHChgewglLEAAyGAAQYhgMYigXCAGgQABiABBiiBMICBBAAGKIEGikFwglFEAAy7wXCAGcQIRigARgKmAMA4gMFEgExIECSBwcyMi4xNS4xoAetjgKyBwcyMS4xNS4xuAflHg&scient=gws-wiz-serp

Valencia. When cross-examined about his travels to and from Toronto to Valencia for the court hearing, Penelas was unable to recall his flight itinerary to Toronto and unwilling to provide his passport, itinerary or receipts for his flights.

[26] There appear to have been hiccups in implementing the terms of the Order regarding Penelas' access to information regarding Stanmech. They were discussed in a case conference before me. However, they appear to have been more or less ironed out as they were not the subject of much argument of this motion. I am not in a position, based on the conflicting evidence in this motion and the submissions of counsel, to determine the extent, if any that Cruise violated the term of the Order regarding Penelas' access to Stanmech information, but he appears to now have that access restored.

[27] On or about November 28, 2024 Cruise signed the Employment Contract with Stanmech which he had drawn up when he was solely in charge of that corporation. There is no dispute that he was in a conflict of interest regarding that contract, having negotiated on behalf of both sides of the agreement and as a result receiving a significant benefit; one denied to Penelas.

[28] The key terms of the Employment Contract are the following:

1. Cruise is described as being employed by Stanmech as its CEO since February 4, 2022 ;
2. Cruise's ongoing salary is \$250,000 per year;
3. Cruise is to be paid \$250,000 for services already performed;
4. Cruise is eligible for a bonus of up to \$500,000 at the discretion of the Stanmech Board (of which Cruise was at the time the sole member);
5. Cruise is entitled to unlimited benefits and expenses;

6. Should Cruise's employment be terminated by Stanmech without cause or by himself with good cause³ or should there be a change in management of Stanmech, he will be entitled to a severance payment. That payment would be equal to twelve months of compensation before February 4, 2027 and 15 months if the termination should occur on or after that date. Since compensation includes Cruise's average bonus over the three previous years, that severance payment would almost certainly be greater than \$250,000.

7. Cruise is granted a security interest in Stanmech which operates "by way of a specific and fixed mortgage and charge". It is a "security interest in all right title, and interest which [Stanmech] now has or may hereafter acquire in all of its present and after-acquired personal property, assets and undertaking... of any kind whatsoever, whether tangible or intangible, wherever located...". The security interest is subordinated to any security interest of BDC Capital Inc. but Cruise has leave to register the agreement under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA").

[29] I set out below the reasons that I order that the Employment Contract be set aside.

Issue No 1: Should the Court set aside the Employment Contract?

[30] Cruise says that the Employment Contract is completely proper. It was not forbidden by the Order since it was signed before the Order was granted. He adds that my order did not specify any limits on his executive compensation. Thus, even the payment of the \$250,000 in retroactive compensation did not violate the Order even though it was paid out just after my Injunction Endorsement was released on November 29, 2024.

[31] Cruise points to the fact that he had proposed a term that would have limited the determination of any compensation for an officer of Stanmech "above prevailing market rates". I did not need to include that term in the Order. It already prohibits any transaction by

³ The Employment Contract prohibited any "material reduction in duties, title, or responsibility without written consent".

Stanmech out of the ordinary course of business. Undeniably, the terms of the Employment Contract were outside of Stanmech's ordinary course. Until Cruise caused the Employment Contract to be drafted and signed, neither party had entered into such an agreement with Stanmech. I do not see how the inclusion of Cruise's proposed term in the Order would have made the prohibition which applies to the Employment Contract any more clear. In fact, that term would have implied that Cruise was at liberty to enter into an employment agreement with Stanmech which included remuneration at what he felt to be "prevailing market rates".

[32] Cruise justifies the generous terms of the Employment Contract by saying that he quit his job to run Stanmech, something Penelas never did. Penelas had earlier deposed that he and Cruise had agreed that they would not quit their jobs to run Stanmech. However, Cruise claims that before their conflict arose, Penelas previously had agreed that Cruise would be paid for his management role towards Stanmech. That alleged agreement, if it is in writing, is not disclosed in the materials before me. If that agreement was an oral one, it was predicated on each of them being paid the same amount. As I stated at para. 16 of my Injunction Endorsement, Cruise and Penelas represented themselves to interested parties in Stanmech's "Confidential Information Memorandum" as "co-presidents". At para. 18, I described their intentions at the time of Stanmech's acquisition they were to hold "co-equal positions with the newly acquired firm".

[33] I point out that at no time during the argument of the original injunction motion on October 25, 2024 did either party raise the issue of Cruise's salary or a potential employment contract, let alone the generous terms which Cruise granted himself in the Employment Agreement.

[34] Penelas was not consulted regarding the drafting of the Employment Contract. No equivalent salary or benefits were offered to Penelas. All of this occurred at a time that Penelas not only had an equal indirect financial stake in Stanmech to that of Cruise but had been improperly ousted from his role as officer and director of Stanmech. There is no dispute that the Employment Contract would not have been approved by Stanmech but for Penelas' improper ouster by Cruise.

[35] At a case conference before me, Cruise agreed to repay the \$250,000 in retroactive compensation to Stanmech. However, the funds are now segregated and booked by Stanmech as a loan. Cruise continues to receive the salary set out in the Employment Contract and the severance/change of management terms remain in place.

[36] In written submissions offered subsequent to the argument of this motion, Cruise proposed the following terms to deal with the Employment Contract until the issue of control of Stanmech is resolved:

If the relief sought on the Respondents' pending April 23, 2025 motion proceeds (i.e. to close the Provix transaction on the terms previously agreed and a shotgun for Stanmech with Mr. Penelas as trigger), Mr. Cruise will consent to a provision in the Shotgun order that would release any claims under the Employment Contract at the time of the transaction in the event that he is the "seller". That would include any claims by Mr. Cruise for the \$250,000 of retroactive compensation or the other contingent incentives in the agreement that Mr. Penelas complains of (bonuses, options, etc.).

[37] Penelas responds that the court should not be taken in by this proposal. Penelas cites:

1. Its contingent nature (i.e. the release would apply only if Cruise is successful in his motion regarding a shotgun process for Stanmech with Penelas as the trigger and Penelas sells his interest in Provix to him at cost).
2. The fact that this proposal ties control of Provix to misconduct related to Stanmech.
3. The proposal would result in the court avoiding the determination of all of the issues Penelas raises in this motion, including his request for the declarations cited above.
4. Penelas' concern that Cruise's proposal does not "remedy" the ongoing salary that Cruise negotiated for himself, which Stanmech continues to pay.

[38] There appears to be no dispute that Cruise "negotiated" the Employment Contract with himself at the time that my decision in the injunction motion was under reserve. Cruise knew or

should have known (he was represented by excellent counsel in this proceeding⁴) that he was in a clear conflict of interest regarding the Employment Contract. He claims to have declared that conflict, albeit not to Penelas or anyone else who could have a say in the terms of the Employment Contract. This is a clear example of self-dealing.

[39] Cruise entered into the Employment Contract at a time he knew that Penelas was seeking to reverse his ouster and have himself reinstated to his previous position as co-officer and director of Stanmech. Cruise knew or should have known that if Penelas was successful, he never would have approved the terms of the Employment Contract.

[40] Cruise's consultation with outside counsel does not offer him the fig leaf he seeks for this transaction. In fact, that outside counsel suggested that another director engage in the negotiations on behalf of Stanmech. But of course, there was no other director because Cruise had ousted him. So, Cruise "negotiated" with himself.

[41] In the hours immediately following the release of my Injunction Endorsement on November 29, 2024, Cruise caused Stanmech to issue a cheque for \$250,000 to himself, representing the retroactive payment. Nonetheless, he did not have the cheque run through Stanmech's usual payroll system, meaning that there were no source deductions. I agree with Penelas that this reflected both haste and a risk to Stanmech because of the failure to make those source deductions.

[42] Then, on the afternoon of November 29, 2024, Cruise caused Stanmech to issue a statement of claim against Penelas, using the same law firm that advised him/Stanmech on the Employment Contract.

[43] Cruise argues that the terms of the Employment Contract are fair and commercially reasonable, especially in light of the fact that, unlike Penelas, he left his previous job to assume his role with Stanmech. He has a family to support. He also points out that technically,

⁴ There is no evidence or reason to believe that Cruise's counsel in this proceeding had any involvement in the drafting or execution of the Employment Contract.

as the sole officer and director of Stanmech until my Endorsement was released, he had the legal authority to enter into the Employment Contract on behalf of Stanmech.

[44] I have already found that the Employment Contract was outside of Stanmech's ordinary course of business. So too was a lawsuit by Stanmech against one of its "co-presidents".

[45] In *Kuang v. Young*, 2023 ONSC 2429, at para. 23, Kristjanson J. considered the meaning of the term, "usual and ordinary course of business" within the context of an interim preservation order in a family law proceeding. She found that the term "must be interpreted consistent with both the overall purpose of the interim order (preservation of the assets pending the hearing of the preservation motion) and the specific paragraphs preventing the sale, encumbrance, or disposition of assets."

[46] Here, there were no specific provisions dealing with an employment agreement. That is one rationale offered by Cruise for his decision to enter into the Employment Contract on both his personal basis and on behalf of Stanmech at a time that Penelas had no opportunity to object.

[47] At paras. 24 – 25, Kristjanson J. considered this passage from the Ontario Court of Appeal's decision in *Re Stelco Inc.*, 2007 ONCA 483, 226 O.A.C. 72, a case dealing with restrictions under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The Court of Appeal, in turn, at paras. 97 – 99 cited the Alberta Court of Appeal decision in *Gainers Inc. v. Pocklington Holdings Inc.* (2000), 271 A.R. 280 (C.A.), which adopted the following definitions:

1. The transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation"⁵;
2. The transaction "must be one of the ordinary day to day business activities, having no unusual features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior

⁵ Citing *Aubrett Holdings Ltd. v. Canada*, [1998] G.S.T.C. 17 (T.C.C.).

reference back or subsequent report to his superior authorities such as, for example, to his board of directors".⁶

3. In general, any matter which transpires as a matter of normal and incidental daily customs and practices in business.⁷

[48] At para. 25, Kristjanson J. then adopted the following six factors also cited in *Re Stelco* in determining whether a transaction occurred "in the ordinary course of business", being whether the transaction:

- a) is distinguishable from the normal course of the company's operations because of its particular complexity or its far-reaching or otherwise unusual nature;
- b) arose out of some special or peculiar situation;
- c) required approval from the company's shareholders or board of directors;
- d) was given special notice by the company;
- e) was an unusual or isolated undertaking as opposed to a routine one; or,
- f) is reflective of standard practice in the relevant industry.

[49] To the credit of his counsel, Cruise did not attempt to argue that the Employment Contract was within the ordinary course of business of Stanmech. It reflected none of the factors above, although the evidence of industry standards for CEO's is sparse in this motion.

[50] Whether the Employment Contract was signed just hours before or after the release of my Injunction Endorsement, it was clearly, as Penelas submits, a blatant form of self-dealing. It offered Cruise, an equal shareholder and until his ouster of Penelas, an equal "partner" in Stanmech an extraordinary series of benefits denied to Penelas.

[51] The Employment Contract also represents a "poison pill" in Cruise's favour; one which tilted the balance of any buy/sell shotgun transaction in Penelas' favour. It meant that if Penelas were the successful party in the shotgun arrangement, he will have purchased a

⁶ Citing *Roynat Inc. v. Ron Clark Motors Ltd.*, 1 P.P.S.A.C. (2d) 191 (Ont. Gen. Div.), which in turn cited the New South Wales decision, *Re Bradford Roofing Industries Property Ltd.*, [1966] 1 N.S.W.R. 674.

⁷ Citing *Black's Law Dictionary*, 6th ed.

wrongful dismissal lawsuit by Cruise where substantial damages and enforcement were already baked into the Employment Contract.

[52] The security agreement term of the Employment Contract is clearly one-sided. It is unlikely to have been agreed upon in any arms-length transaction between Stanmech and an outside employee. In the event that Penelas were the successful shotgun party, the security agreement term would impair Stanmech's operations until Cruise was paid the significant benefit he had unilaterally negotiated for himself.

[53] I add that Cruise knew that Penelas was seeking a shotgun arrangement to determine ownership of Stanmech when he entered into the Employment Contract. While he opposed that arrangement in the argument of the first injunction motion before me, he changed his mind after the Order was made. It is hard to separate that concession from the "poison pill" term that Cruise had granted himself as a distinct advantage in the shotgun process.

[54] In short, Cruise knew or ought to have known that the Employment Contract represented just the kind of unilateral conduct which was the subject of Penelas' injunction motion. Yet Cruise doubled down on conduct that he knew or should have known was in conflict of interest in his role with Stanmech. That conduct was oppressive of both Penelas' interests and those of Stanmech itself.

[55] Under Rule 59.06, of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as am., the court, on a motion, has the jurisdiction:

1. To vary an order which requires amendment in any particular on which the court did not adjudicate (r. 59.06(1));
2. to set aside or vary an order, based on facts discovered after it was made (r. 59.06(2)(a));

[56] Further, under Rule 60.12, the court may make such order as is just if a party breaches an interlocutory order.

[57] I find that I have the jurisdiction under those provisions to set aside the Employment Contract and to order the repayment to Stanmech of the funds payable under that contract as:

1. Cruise acted in a conflict of interest in negotiating it with himself.
2. To the extent that any of those actions occurred after the release of the Injunction Endorsement, they breached the Order because they were out of the ordinary course of Stanmech's business.
3. Cruise's conduct regarding the Employment Contract was just the kind of unilateral and improper conduct which led to my Order.
4. Had Cruise requested leave to enter into the Employment Agreement when the injunction motion was argued on October 25, 2024, I would have denied leave absent consent. I would have done so because it was outside of the ordinary scope of Stanmech's business since it was acquired on behalf of Cruise and Penelas.

[58] Although this motion was not argued on the basis of oppression, I add that Cruise's conduct in regard to the Employment Contract was oppressive of the interests of both Penelas and Stanmech.

[59] The only remedy which can adequately deal with the manner in which the Employment Contract was entered into and its one-sided terms is to set it aside. I so order.

[60] I further order that Cruise immediately rescind any registration of the Employment Contract under the *PPSA*.

Issue No 2a: Should the Court order the repayment by Cruise to Stanmech of the \$250,000 in retroactive compensation he received on November 29, 2024 and that Stanmech not treat the repayment as a loan?

[61] In light of my order above, setting aside the Employment Contract, the \$250,000 in retroactive compensation paid to Cruise under that Employment Contract must be returned. Cruise has already voluntarily done so. However, as set out above, it has been booked as a "loan" in Stanmech's internal records. It is not a loan. Should Cruise obtain control of Stanmech, he can account for it in any legal manner he wishes. But for now, it shall not be recorded as a loan on Stanmech's books. Thus, I find and order that Cruise is required to repay to Stanmech the \$250,000 in retroactive compensation he received on November 29,

2024. As the repayment has already voluntarily occurred, Stanmech shall not treat the repayment as a loan.

Issue No 2b: Should Cruise and his holding companies be required to repay to Stanmech all funds that Stanmech advanced to them or paid on their behalf in respect of salary under the Employment Contract or as legal fees for these proceedings?

[62] Regarding the salary Stanmech has paid to Cruise under the Employment Contract, my order called for the restoration of Penelas' compensation (including indirect compensation paid to his spouse) effective September 1, 2024. In making that order, I had assumed that it would mean that Penelas and Cruise would receive equal compensation, not that Cruise would give himself a unilateral raise. I suggest that the parties negotiate whether Penelas should be paid exactly what Cruise has received as employment compensation or whether Cruise should repay that amount. If the parties cannot resolve that issue, they may bring it to my attention during the course of Cruise's motion on April 23, 2025.

[63] That being said, I see the funds which Stanmech advanced to pay for Cruise's counsel in this action or in regard to any ancillary action which Cruise caused Stanmech to initiate against Penelas are outside the bounds of its ordinary course of business and thus in breach of my order. Those funds shall be repaid to Stanmech by Cruise within 14 days.

[64] Further, other than as set out in the Order, no payments shall be made by Stanmech to either Cruise or Penelas or to any person, party, corporation, trust or entity that is related to, affiliated with, controlled by or operated by or otherwise associated with either Cruise or Penelas without the express written consent of the other or an order of this court.

[65] Regarding the latter term, Penelas requested that it be directed solely to Cruise. But I am not clear on what payments were made by Stanmech to or on behalf of the either side. As it is my intent to offer a level playing field to both sides, I apply this term to both Penelas and Cruise. I suggest that their counsel negotiate what each party should receive in accord with the Order.

Issue No. 3: Should the court issue the declarations regarding Cruise's conduct requested by Penelas?

[66] Penelas seeks more than substantive relief. He seeks declarations of wrongdoing by Cruise. But he fails to offer a compelling explanation for the necessity of those declarations when the substantive relief he seeks requires the finding of facts, as I have done above. For the reasons that follow, I exercise my discretion to deny the granting of declarations in addition to my findings of fact.

[67] In *Roof Tile Management Group Inc. v. Forget*, 2024 ONSC 2161, at paras. 26 – 28, I stated the following about the nature and limits of declaratory relief:

26 In *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363, at para. 62, the Court of Appeal for Ontario described the nature and limits of declaratory relief as follows:

62 A declaratory judgment is "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs": Harry Woolf & Jeremy Woolf, *Zamir & Woolf: The Declaratory Judgment*, 3rd ed. (London: Sweet & Maxwell, 2002), at p. 1. Declaratory relief, being restricted to a declaration of the parties' rights, "is mainly sought in commercial matters to help parties define their rights" and contains no provision ordering any party to do anything or any form of sanction: *Harrison v. Antonopoulos* (2002), 62 O.R. (3d) 463 (S.C.), at paras. 27-28.

27 In *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60, the Supreme Court of Canada spoke of the discretionary nature of declaratory relief and the criteria for granting it as follows:

Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought.

[see also: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 831.]

28 In *Bryton Capital*, at para. 64, the court spoke of reasons to deny declaratory relief. Courts must be wary of using the application process and the declarations available under that process, to take the place of the full evidentiary hearing available under the trial process. The Court stated:

[64] As indicated in *S.A*, declaratory relief is discretionary. A non-exhaustive list of reasons why a court may deny declaratory relief includes "standing, delay,

mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility": *Gook Country Estates Ltd. v. Quesnel (City of)*, 2008 BCCA 407, 73 R.P.R. (4th) 241, at para. 10. Delineating whether a specific procedure is amenable to declaratory relief is important, as the burden of proof, determination of urgency, and limitation of actions may differ in favour of the litigant who chooses the declaration over other routes to relief: Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016), at pp. 52-53. **There is a real risk that, "to permit the issuance of a declaration where another suitable remedy exists is to effectively erode the divisions between recourses and subsume all relevant writs and motions under the umbrella of the declaratory proceeding"**: *Sarna*, at p. 53.

[Emphasis added in *Roof Tile Management Group Inc.*]

[68] Here, I have made findings of fact which speak for themselves. I have done so in order to grant the substantive relief set out above. Nothing is added by granting declarations which only repeat findings of fact, particularly when declarations add nothing to that substantive relief. Rather, as the Court of Appeal put it in *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363, 8 C.B.R. (7th) 22, if I were to pile declaratory relief upon the substantive relief already granted, and the findings of fact which are the foundations of that relief, I would "effectively erode the divisions between recourses and subsume all relevant writs and motions under the umbrella of the declaratory proceeding": at para. 64. I choose not to do so.

Issue No 4: Should Cruise be replaced with Penelas as Stanmech's CEO?

[69] Penelas asks that the court order that he temporarily replace Cruise as Stanmech's CEO. He makes that request in light of the self-interest that Cruise displayed in regard to the Employment Contract.

[70] Penelas has a point. But that point is not strong enough to require the relief he seeks. I say that because:

1. Penelas is living in Spain. In the earlier motion, he told the court that his time in Spain is temporary. I am less certain of whether I can take him at his word that I was

on October 25, 2024, when the injunction motion was argued. He told the court that the move would only last 3-9 months from September 2024. Six months have already passed without any indication of when he will return. When cross-examined on the point, he refused to say when he plans to return to Canada.

2. If Penelas does remain a resident of Spain, that fact raises the risk of adverse tax consequences for Stanmech if its “mind and management” is found by the Canada Revenue Agency to reside in Spain. It may no longer have the tax advantages available to a Canadian Controlled Private Corporation. I cannot decide the tax issue, but the risk to Stanmech, on the evidence, is a real one. Stanmech’s tax accountant described such a potential tax ruling by CRA as a “complete mess”.
3. Stanmech’s previous owners of 20 years’ duration offered the opinion that the corporation cannot be run remotely. That opinion is compelling. Cruise points to a roof leak at Stanmech’s office which occurred on February 18, 2024. It required a hands-on response, which only Cruise was able to offer.
4. Cruise’s motion, which may settle the issue of ownership of Stanmech, is now less than a month away. A change of management so close to that date could only cause instability for Stanmech. That would not be in the corporation’s best interests.
5. If it is Penelas who is the purchaser of Cruise’s indirect share of Stanmech, that ownership change will likely occur in the not-too-distant future, with little prejudice to him.

Issue No. 5: Should the Order be varied to allow Penelas to share confidential Stanmech and Provix information with his professional advisors?

[71] Penelas requests an order that he be allowed to share confidential Stanmech and Provix information with his professional advisors, both legal and financial. There has never been an issue regarding any independent outside professional advisors, such as lawyer, accountants, chartered business valuers and the like. Cruise does not object to that process. This is really a request to share confidential business information with one individual: Luis

Fonseca. Cruise has objected to the sharing of information with Mr. Fonseca, whom he does not trust and whom he sees as a rival rather than an independent advisor.

[72] The parties already consented to an order regarding the release of confidential information and Mr. Fonseca in particular, on October 25, 2024. I have been presented with no new evidence that calls for a change to that consent order. I dismiss that request.

Issue No. 6: Should the Order be varied to allow each of Cruise and Penelas to speak to Leister without the other?

[73] The Order prohibits either of Penelas or Cruise from having any substantive discussions with Leister without the other participating. That term was one which Penelas rather than Cruise requested. He did not trust Cruise to speak to Leister alone and Cruise reciprocated the feeling. Now he seeks to reverse the order that he sought. Again, he offers no evidence of any change that would justify varying or amending the Order.

[74] Cruise opposes the request. Frankly, he deeply distrusts Penelas and his motives. The feeling is mutual.

[75] In his factum and arguments, Penelas offers arguments for the business efficacy of speaking to Leister. He also cites the conduct of Cruise since the time of the Order. He pledges not to seek to gain an advantage over Cruise or to disparage him to Leister. He just wants to speak to Leister about whether it would continue to do business with Stanmech if he were to take over management and to discuss with it some potential business plans that he has in mind.

[76] The obvious question is why he cannot raise those issues in a joint conversation or communication involving each of him, Cruise and Stanmech. He answers that they should not be put in a position where they police themselves. Besides, there is a risk that any joint conversation with Leister would be unproductive and may even turn Leister off of both of them.

[77] Other than the Employment Contract, none of this is new or something that Penelas could not have considered when he requested the original term of the Order. He not only knew

that control of Stanmech would be determined by a shotgun process, he requested it. I add that there is no evidence of an unsuccessful attempt at a joint discussion with Leister.

[78] Cruise points out that Penelas' argument on October 25, 2024 was for a level playing field. There is nothing that Penelas wants to know from Leister that Cruise does not want to know. While Penelas claims that he wishes to discuss his potential business plans with Leister, he refuses to offer any information about what plans he wishes to discuss.

[79] There is good reason to be cautious with Penelas' evidence on this count. He has not offered a credible reason for his leaving court early to take a flight to Zurich when he resides in Spain. As set out above, that flight just happened to coincide with the flight of Leister management team members who were visiting Stanmech while the October 25, 2024 motion was being heard.

[80] Penelas' answers on this subject at his cross examination do not assist his case. He stated that the reason he and Cruise cannot speak together to Leister is that there is too much "dysfunctionalism". Whatever that term means it was true, when he requested the term prohibiting individual discussions with Leister.

[81] If Penelas wishes to know Leister's position on either party winning control of Stanmech, both parties, with the assistance of their able counsel, can draft a letter to Stanmech. With regard to business plans, Penelas can either set them out in the letter (they will likely be irrelevant if he loses control of Stanmech) or wait until he wins control.

[82] In short, there is no compelling reason to grant Penelas' request to vary the term that he requested himself. Thus, I dismiss this request.

Issue No. 7: Should the court allow Penelas to amend his pleadings to call for a shotgun process for the sale of Provix?

[83] Penelas requests leave to amend his Application. His key proposed amendment is one which calls for a shotgun process for the purchase and sale of control of Provix. His current pleading states that he agrees to sell his interest in Provix to Cruise. On October 25, 2024 he submitted to the court that he would do so for the price that he paid for that interest.

Nonetheless, Penelas now wishes to amend his prayer for relief to seek instead a shotgun process for the control of Provix.

[84] Regarding Stanmech, Penelas seeks to add meat to the bones of his request for a shotgun process, and in particular to make Cruise the “trigger”. He also seeks to add the relief regarding the Employment Contract that I have granted above to his proposed Amended Application.

[85] Cruise opposes both the consideration of this request and the relief itself. He argues that he has had to wait patiently and at some cost to enforce what he says are agreements based on Penelas’ own pleadings. Cruise writes that Penelas “should not be permitted to schedule a motion of such significance unilaterally and in disregard of the court’s normal processes”. He says that Penelas’ motion should be adjourned to after April 23, 2025.

[86] Cruise also opposes the proposed amendments on their own merits.

[87] Cruise argues that Penelas’ counsel’s representations of an agreement regarding Provix when the original motion was argued amount to both a binding agreement and an admission. The agreement is for Penelas to sell his interest in Provix to Cruise at the same price he had paid for it. The admission is that there was such an agreement.

[88] Cruise acknowledges that the bar for granting a pleading amendment is generally quite low, but argues that Penelas does not meet it. Cruise asserts that he would be subject to non-compensable prejudice should Penelas be granted leave to amend his pleadings to seek a shotgun process for Provix.

[89] Cruise asserts that he relied on Penelas’ representation that he had agreed to sell his interest in Provix to Cruise at cost. Penelas’ counsel offered this representation when the injunction motion was argued on October 25, 2024. Relying on Penelas’ representation that “Provix is not in dispute”, Cruise took over exclusive management of Provix and engaged in what he described as “hard work” on behalf of Provix. He did so, expecting that Penelas would honour his representation to the Court. Cruise contends that Penelas now seeks to resile from his concession in order to take advantage of that hard work.

[90] Cruise also argues that Penelas' change of position regarding Provix amounts to the withdrawal of an admission – a process which requires leave of the court.

[91] Cruise makes similar arguments regarding Stanmech, referring to correspondence in which Penelas was willing to engage as the trigger in a shotgun process.

[92] Furthermore, part of Penelas' argument regarding Stanmech was predicated on his reasonableness regarding Provix. Now, having been successful in obtaining the injunction which I granted in the Order, he seeks to resile from a key representation which led to the Order. Cruise argues that this is unfair and prejudicial to him.

[93] Cruise is correct regarding the timing of the pleading amendment portion of Penelas' motion. This motion was scheduled at a January 14, 2025 case conference, one of two procedural conferences I held that month in order to move this proceeding along. At Penelas' request, this motion was scheduled to enforce terms of the Order, which Penelas claimed to have been breached. I was not asked to schedule a pleadings amendment motion.

[94] At the same January 14, 2025 case conference, Cruise sought to bring his own enforcement motion as a cross-motion to the Penelas enforcement motion. In that motion, Cruise sought to enforce what he argued was an agreement between the parties over the method of sale of each of Provix and Stanmech. Cruise now points out that he is attempting to enforce what he describes as the very terms that Penelas sought in his Application.

[95] Because there was not sufficient time available to hear the two proposed motions together, I directed Cruise to bring his motion separately and set April 23, 2025 for that motion. That scheduling decision was dictated by the time available to the court and the fact that Penelas moved first, rather than any finding regarding the substance of the two motions.

[96] Had Cruise wished to amend his pleadings, he could have raised the issue at the two case conferences which took place in January 2025. Cruise has been waiting over four months to bring his own motion. Thus, with the following exception, Penelas' motion to amend his pleadings should be adjourned to a date to follow Cruise's motion.

[97] That exception is Penelas' request to amend his Application to seek a shotgun buy/sell process for Provix. Penelas makes that amendment request after: 1) he originally pleaded in his Application that he had agreed to sell his interest in Provix to Cruise; 2) he wrote in his factum that the parties agreed that he would sell his interest in Provix to Cruise at the price he paid for it, and 3) his counsel represented to the court on October 25, 2024 that control of Provix was not an issue as he had agreed to sell his interest to Cruise for the amount that he had paid for it.

[98] Inasmuch as the request to amend the Application in this manner undercuts much of Cruise's enforcement motion and the fact that Cruise has been pushing for months for the relief he seeks in that motion, I find it appropriate to deal with the amendment request at this time. I do so despite the procedural irregularity of Penelas' attempt to bootstrap his amendment motion to the enforcement motion I already granted him leave to bring. It is only fair that the parties know the lay of the land regarding Cruise's Provix motion before April 23, 2025.

[99] Under Rule 26.01 of the *Rules of Civil Procedure*, a court is presumptively required to allow a party to amend their pleadings at any stage of action "unless prejudice would result that could not be compensated for by costs or an adjournment".

[100] Further, the proposed amendment must be tenable at law: *Miller v. State Farm Mutual Automobile Insurance Company*, 2018 ONSC 7150, 89 C.C.L.I. (5th) 267, at para. 22, *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at para. 25.

[101] In determining what prejudice is non-compensable and thus would foreclose a pleading amendment:

1. The prejudice must flow from the amendment and not some other source: *Klassen*, at para. 31, citing *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2009 ONCA 517, at para. 20.
2. Alternatively, the responding party may resist the amendment by proving actual prejudice -- i.e. by leading evidence that the responding party has lost an opportunity

in the litigation that cannot be compensated by an adjournment or an award of costs as a consequence of the amendment. It is incumbent on the responding party to provide specific details of the alleged prejudice: *Klassen*, at para. 32, citing *State Farm Fire*, at para. 25.

3. There must be a causal connection between the non-compensable prejudice and the amendment. The prejudice must flow from the amendment and not from some other source: *Klassen*, at para. 33, citing *State Farm Fire*, at para. 25.

[102] Rules 51.05 and 51.06 deal with admissions and attempts to withdraw them. They read as follows:

Withdrawal of Admission

51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

Order Based on Admission of Fact or Document

Motion

51.06 (1) Where an admission of the truth of a fact or the authenticity of a document is made,

- (a) in an affidavit filed by a party;
- (b) in the examination for discovery of a party or a person examined for discovery on behalf of a party; or
- (c) by a party on any other examination under oath or affirmation in or out of court,

any party may make a motion to a judge in the same or another proceeding for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may make such order as is just.

(2) Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may make a motion in the same proceeding to a judge for such order as the party may be entitled to on the admission without waiting for the determination of any question between the parties, and the judge may make such order as is just.

[103] In *Antipas v. Coroneos*, [1988] O.J. No. 137 (H.C.), Saunders J. found at para. 5 that when a party seeks to withdraw an admission, the provisions of r. 51.05 rather than r. 26.01 applies. At para. 7 he set out the following three-part test for leave to withdraw an admission in a pleading:

7. A review of the cases indicates that a party requesting leave to withdraw an admission must pass three tests by establishing (1) that the proposed amendment raises a triable issue; (2) that the admission was inadvertent or resulted from wrong instructions; and (3) that the withdrawal will not result in any prejudice that cannot be compensated for in costs. (see *Baydon Corp. Ltd. et al. v. DuPont Glore Forgan Canada Ltd. et al.* (1974), 4 O.R. (2d) 290 and *Gould v. Arliss Haulage Ltd. et al.* (1979), 27 O.R. (2d) 291.).

[104] Cruise is correct that through a combination of his pleading and his representation to the court, Penelas admitted that there was an agreement to sell his interest in Provix to Cruise at cost. Admissions of that nature cannot be withdrawn without leave. Such leave has not been requested, let alone granted. Details of that admission include:

1. In his original Application, Penelas sought an order requiring Cruise to purchase his interest in Provix from Penelas. He pleaded that he “is ready and willing to sell his interest in Provix to Mr. Cruise, who wants to buy.”

2. In his affidavit of September 27, 2024, Penelas deposed that:

I am seeking the following relief as a means of effecting the corporate divorce that both Mr. Cruise and I have agreed is necessary by directing Mr. Cruise to purchase my shares of Provix Holdco at fair value, with an accounting for any shareholder loans, expenses, and other items that need to be reconciled ...

3. In his factum for the injunction motion argued on October 25, 2024, Penelas’ counsel wrote:

- “The parties have agreed that Mr. Cruise will purchase Mr. Penelas’ interest in Provix, so Provix is not really in dispute in this litigation.”

- “By August 9, the parties had agreed that Mr. Penelas would sell his interest in Provix to Mr. Cruise for the value at the time of acquisition (which was the same as fair value).”
- “While Mr. Penelas continues to be willing to sell his interest in Provix to Mr. Cruise for the amount he paid, Mr. Cruise has now resiled from his agreement to use a shotgun method for Stanmech.”

[105] In representations before me on October 25, 2024, Penelas’ counsel advised that the parties had agreed that Penelas would sell his interest in Provix to Cruise at cost (i.e. what he had just recently paid for that interest). Thus, it was not necessary for me to consider relief regarding Provix.

[106] Both parties adhered to that position in case conferences before me. The issue was when the transaction would take place and whether the sale of Penelas’ interest in Provix had to be tied to the shotgun process for Stanmech.

[107] Penelas did not indicate that he is resiling from an agreement to sell his interest in Provix at cost until he served his amended notice of motion approximately one month before this motion was argued.

[108] Other than making vague allusions to the findings in my Injunction Endorsement, Penelas offers no reason for his change of position regarding Provix.

[109] Here, I see no reason to allow Mr. Penelas to withdraw his admission that he had agreed to sell his interest in Provix to Cruise at cost. On the other hand, as stated above, Cruise would be prejudiced if Penelas were allowed to withdraw his admission regarding that agreement. I make this finding for the following reasons:

1. While the proposed amendment may raise a triable issue, there is no evidence of solicitor’s inadvertence or receipt of wrong instructions.
2. But there is evidence of non-compensable prejudice should I grant the amendment. Cruise relied on Penelas’ admission to order his affairs regarding Provix. Unlike

Penelas, he put in work on Provix based on the assumption that Penelas would honour his representation to the court.

3. I add that I have not been referred to any authorities which grant this court the jurisdiction to order a shotgun process that is not agreed upon by the parties, say in a shareholder's agreement. There is no such term here regarding Provix.

Issue No. 8: Should the court allow Penelas to amend other portions of his Application?

[110] Penelas also seeks to amend his Application to specify that he wants Cruise to be the trigger of the shotgun process for Stanmech. Each set of parties agrees that a shotgun process must take place for Stanmech although they do not seem to agree on how it should do so.

[111] Penelas has placed his position on the record in this motion. He wants Cruise to be the trigger. Cruise, who initially rejected but now accepts a shotgun, wishes Penelas to be the trigger. I have not been advised of any reason to find that it is necessary to amend the Application to allow that issue to be argued on April 23, 2025. The positions of the parties are known. Any amendment risks delaying the April 23, 2025 motion.

[112] In light of the fact that there appears to be an agreement to a shotgun process, I urge the parties to negotiate those terms in order to narrow or eliminate the issues for the April 23, 2025 motion.

[113] Saying this, I have not predetermined the motion returnable April 23, 2025. Rather, I am reflecting the arguments on the point which I have heard to date.

[114] Thus, I adjourn the balance of the motion regarding the amendment of the Application, *sine die*.

Conclusion

[115] In conclusion, I order as follows:

1. The Employment Contract is set aside. Cruise shall immediately rescind any registration of the Employment Contract under the *PPSA*;
2. Cruise is required to repay to Stanmech the \$250,000 in retroactive compensation he received on November 29, 2024. As the repayment has already voluntarily occurred, Stanmech shall not treat the repayment as a loan;
3. The Respondents shall repay to Stanmech all funds which Stanmech advanced to them or paid on their behalf in respect of the Employment Contract or as legal fees for these proceedings within 14 days;
4. Other than as set out in the Order, no payments shall be made by Stanmech to either Cruise or Penelas or to any person, party, corporation, trust or entity that is related to, affiliated with, controlled by or operated by or otherwise associated with either Cruise or Penelas without the express written consent of the other or an order of this court.;
5. I dismiss Penelas' request for declarations regarding Cruise's conduct;
6. I dismiss Penelas' request to replace Cruise with Penelas as Stanmech's CEO;
7. I dismiss Penelas' request to vary the Order to allow Penelas to share confidential Stanmech and Provix information with his professional advisors.
8. I dismiss Penelas' request to vary the Order to allow each of Cruise and Penelas to speak to Leister without the other;
9. I dismiss Penelas' request to amend his pleadings to call for a shotgun process for the sale of Provix;
10. I adjourn the balance of Penelas' request to amend his Application *sine die*.

Costs

[116] The results of this motion appear to be divided. I am considering an order of no costs. If the parties are unable to agree on the costs for this motion, I adjourn my consideration of that issue to the April 23, 2025 motion.

Kurz J.

Date: April 14, 2025