IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chohan v. Chohan,*
2023 BCSC 268

Date: 20230215
Docket: S1910965
Registry: Vancouver

Between:

Kulwant Chohan and Kulbir Chohan

Plaintiffs

And

Sukhdev Chohan and Hardeep Kaur Chohan

Defendants

And

River Nursery Ltd. and River Nursery 2018 Ltd.

Defendants by Way of Counterclaim

Before: Master Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs and Defendants by Way of Counterclaim:	E.M. Hatch N. Virk
Counsel for the Defendants:	A. Robertson
Place and Date of Hearing:	Vancouver, B.C. February 10 & 15, 2023
Place and Date of Judgment:	Vancouver, B.C. February 15, 2023

[1] **THE COURT:** This is an application by the defendants, Sukhdev Chohan and his wife, Hardeep, to compel the production of documents from the plaintiffs, Kulwant Chohan and Kulbir Chohan, some dating as far back as 1986 and some from third party record holders as far back as 1979. The defendants rely upon both *Supreme Court Civil Rule* 7-1(1), the materiality threshold, and *Supreme Court Civil Rule* 7-1(11), the broader relevancy threshold.

[2] The litigants are brothers who have conducted business together since 1986. Detailed background to their business arrangements and the dispute are set out in parallel proceedings heard by Mr. Justice Milman in *Chohan v. Chohan*, 2021 BCSC 1488, and in the decision of Master Taylor in *Chohan v. Chohan*, 2021 BCSC 577.

[3] The within action centers upon the legal and beneficial ownership of 16328, 56th Avenue, Surrey, British Columbia, which is a nursery business. It is alleged by the plaintiffs that in late 1986 the three brothers agreed to purchase the nursery business and would each be one-third owners and would share any benefit derived. The defendant, Sukhdev, was to purchase property in Prince George where he worked at the time, and the three brothers would share any benefits derived from the Prince George properties.

[4] The plaintiffs allege they both solely covered the purchase price of the Surrey nursery but all three brothers remain registered owners. The plaintiffs allege that in addition to fronting the entire purchase price, they did all the work on the nursery property and made the greatest proportion of payments between 1986 and 2019. However, the plaintiffs allege the defendants sold the Prince George properties but did not share the proceeds with the plaintiffs as part of their alleged pooling agreement.

[5] The defendants in their pleadings deny any pooling agreement to share the proceeds as alleged by the plaintiffs and they deny any basis for unjust enrichment, express, resulting or a constructive trust. Despite the defendants pleading in the response to civil claim, the defendants submit that the brothers have historically pooled money and efforts and that the benefits have been a two-way street.

[6] By way of example, the defendant loaned the plaintiffs $200,000 in seed money so they could set up a construction company known as Harbel Construction. Although the plaintiffs paid the money back without interest, they went on to run the company without sharing the benefits. The defendant alleges the brothers all went onto mortgages together, had joint lines of credit, some exceeding a million dollars which tied up the defendants' credit.

[7] The defendant, Sukhdev, alleges this gave value to the plaintiffs and their financial well-being is in part a result of the defendants' contribution. The defendants submit that the relationship between the brothers is steeped in mutual benefit, and in order to meet the case against them the defendants need all the evidence, historical and otherwise, to sort out what was a messy family business arrangement that spanned decades.

[8] The plaintiffs oppose the application of the defendants for further discovery of documents. First, the plaintiffs submit that the matter is on the eve of trial. When the application first came before the court there were 11 days before trial, and only six business days. The application itself was served 18 days before trial. Given the breadth of the document request going back as late as 1979 and into the 1980s, and the fact that some of the requests will require obtaining documents from third party sources, the plaintiffs submit it is simply too late in the day given the trial is scheduled to commence February 21, 2023.

[9] Second, the plaintiffs submit that the document demand has not complied with the rules, and compliance is not optional.

[10] Third, with respect to the request directed at Kulbir, five of the eleven requests do not involve a proper written demand.

[11] Finally, the plaintiffs submit that the application ought to be dismissed because it has no air of reality as there are less than two weeks before trial and the defendants appear to be alleging a joint family venture when their pleadings make

no such express allegation. Indeed, it is arguable that the pleadings specifically deny such an arrangement at para. 14 where the defendants pled:

> There was never a "Pooling Agreement" as alleged, or at all, between Sukhdev and the Plaintiffs, either individually or collectively, or between Sukhdev and anyone else in relation to the Property nor in relation to the incorporated company 330127 B.C. Ltd.

The incorporated company 330127 B.C. Ltd. was the company which purchased the properties in Prince George.

[12] The action was commenced three-and-a-half years ago when the plaintiffs filed a notice of civil claim September 30, 2019. The defendants filed their response to civil claim and counterclaim on November 5, 2019. The plaintiffs filed their response to counterclaim December 5, 2019. The plaintiffs produced a list of documents March 25, 2022, and the defendant on May 9, 2022. I understand that some document disclosure is still ongoing.

[13] The trial management conference took place January 23, 2023, and there wasn't a suggestion at that time the pleadings be amended to allege a joint venture, nor do the trial briefs make any suggestion to that effect.

[14] In the case of *Forstved v. Kokabi*, 2018 BCSC 111, Mr. Justice Kent dismissed an application for document production heard 19 days before trial, primarily on the issue of delay. At paras. 9 and 10, he states:

> [9] For several reasons, I am not prepared to grant the orders sought. The primary one, however, is that these three applications are brought far too late. The first examination for discovery of the plaintiff occurred in 2014. The new trial date has been obtained for some time. The recent follow-up examination for discovery of the plaintiff did not occur until November 29, 2017, a mere 60 days before trial.
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> [10] Many of the documents that are now being demanded were not the subject matter of requests for additional documentation at the examinations for discovery. What has happened here is what occurs all too frequently in these personal injury cases; that is, the defendants tend to wait until the eve of trial before conducting follow-up discoveries and undertaking trial preparation work that could have and should have been done many months before. Absent exceptional circumstances, I am not prepared to grant applications of this sort brought on the eve of trial. It is far too late.

[15] In the case of *Kaur v. Bual*, 2021 BCSC 998, the court applied the *Forstved* decision *supra*, stating at para. 5:

> [5] All of these cases come down to the fact that in order for documents to be produced in this second tier process for document disclosure, absent special circumstances they should be sought in a timely way and must be relevant. In short, a defendant's lack of preparation and timely trial preparation does not entitle them to a last-minute application for production of documents that may impair trial preparation.

[16] I find myself in agreement with the submissions of the plaintiffs that the application of the defendants ought to be dismissed based on the last-minute timing of the application. Acceding to the application will prejudice the plaintiffs by severely impeding their trial preparation five days before trial, or it will result in an adjournment.

[17] Further, the documents sought are arguably not relevant or material to the case as pled. In an application under *Supreme Court Civil Rule* 7-1(11), there must be a link between the documents sought and the pleadings. The defendants' current application is predicated on the unpled allegation that the brothers were engaged in a joint family venture spanning decades. This notion is raised in the within application served 18 days before the trial, but appears nowhere in the pleadings. It comes totally out of the blue. In this regard I rely on *Red Avacado Sales Inc. v. Yao*, 2019 BCSC 996, where the court states at paras. 30 and 31:

> [30] While counsel are required to explain how documents are relevant, and such explanations often involve more detail that the pleadings themselves, the court must always be able to link the explanations to the pleaded allegations. It is not correct for a court to accept submissions of counsel which effectively create whole new unpleaded allegations.
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> [31] In *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2012 BCCA 414, the Court of Appeal found that the trial court had committed a procedural error in deciding a case on an issue that was not pleaded or argued. In the case before me, the Master allowed the defendant to rely on unpleaded allegations to support a document production order which could not stand with reference to the pleadings alone. I find this was an error of the Master for the reasons articulated in *Hawkeye Power Corporation*. A party is entitled to know the case to be met and the theory of liability as articulated in pleadings. The fact that RES and Mr. Kalafchi were before the Master when the new allegations were argued for the first time is not sufficient to overcome the pleadings deficiency.

[18] In the examination for discovery of the Plaintiff Kulbir, the defendants have taken an excerpt as evidence of a joint family venture. However, as plaintiffs' counsel submitted, the passage referenced relates specifically to money being paid to the defendants for the purchase of the Prince George properties. In that context, it would not appear to support the notion of a joint family venture, and in this regard see questions 854 to 863 of the Plaintiff Kulbir's examination for discovery.

[19] Finally, the defendants have not produced categories of documents in their own production that they claim are relevant to the allegation of an alleged joint family venture. There is a lack of historical documents and the sort of comprehensive personal banking records akin to the requests the defendants are seeking in their application herein from the plaintiffs.

[20] For all the above reasons the application is dismissed, and the plaintiffs will have their costs in any event of the cause.

“Master Nielsen”