

Citation: Northcott v. Allaby et al
2001 BCSC 14

Date: 20010103
Docket: S004132
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GREGORY NORTHCOTT

PLAINTIFF

AND:

**JONATHAN ALBERT ALLABY, CHERYL ALLABY,
NETPOND.COM INTERNET INC., and
WHITAKER CONSULTING LTD.**

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MELVIN

Counsel for the Plaintiff:

P. G. Kent-Snowsell

Counsel for the Defendants:

E. Rice, Q.C.

Date and Place of Hearing/Trial:

December 5, 2000
Vancouver, BC

[1] By a notice of motion issued November 1, 2000, the plaintiff seeks an order that within seven days, the defendants provide the plaintiff with a list of documents which are or have been in the defendants' control, relating to any matter in question in the action and secondly, that within the same time frame, the defendants provide the solicitor for the plaintiff with answers to certain of the plaintiff's interrogatories.

[2] The discovery issue arises as a result of the action commenced by the plaintiff within which the plaintiff alleges that he and the defendant Jonathan Allaby agreed to be equal shareholders in a new company and would share equally in the revenue generated from that company and its affiliates operated under the newly incorporated company. The plaintiff alleges that he and the defendant Jonathan Allaby agreed to incorporate a new company and hold the assets of CondomProject.com and its affiliated websites and the domain names related thereto. CondomProject.com, according to the plaintiff, provided on-line content, a help site, a webmaster community, a message board and resource pages targeted to the webmaster community, promoting the development and implementation of adult on-line websites. The plaintiff further alleges that the defendants ultimately took the

benefit of the assets of CondomProject.com and utilized them inappropriately and for their own purposes without crediting the plaintiff for his equal share in the revenue generated thereby.

[3] In the prayer for relief in the statement of claim, the plaintiff has asked for approximately 20 different types of relief. Generally speaking, however, the relief sought is specific performance of the contract between himself and the defendant Jonathan Allaby and damages, or damages in lieu of specific performance, or an accounting and payment of the monies found to be due to the plaintiff on taking the account.

[4] The defendants oppose the plaintiff's application for the provision of documents, books and records of account relating to the financial aspect of the defendants' operation. They further object to answering question 10 of the interrogatories any further than originally answered. Interrogatory 10 is as follows:

10. Please list all domain names owned by Whitaker Consulting Ltd.

ANSWER:

Condomproject.com, Condomproject.org, otherwise irrelevant.

[5] Whitaker Consulting Ltd. is the company into which the plaintiff alleges the defendants transferred the assets which were the subject matter of the alleged joint venture agreement between the plaintiff and the defendant Jonathan Allaby.

[6] The defence filed on behalf of the defendants denies the existence of the joint venture, although does plead in the alternative that the plaintiff's joint venture interest, if he had one, would be one-third, not one-half.

[7] Rule 26(1) of the Supreme Court Rules states:

- (1) A party to an action may deliver to any other party a demand in Form 92 for discovery of the documents which are or have been in the party's possession or control relating to any matter in question in the action, and the other party shall comply with the demand within 21 days by delivering a list, in Form 93, of the documents that are or have been in the party's possession or control relating to every matter in question in the action.

[8] Although Rule 26(1) is mandatory and imposes an obligation to perform within a fixed period of time, Rule 26(15) allows the court to postpone discovery relating to any issue or question in dispute. In this respect, the Rule states as follows:

- (15) Where the party from whom discovery or inspection of a document is sought objects, the court may, if satisfied that for any reason it

is desirable that any issue or question in dispute in a proceeding should be determined before deciding on the right to discovery or inspection, order that the issue or question be determined first and reserve the question of discovery or inspection.

[9] The document sought to be listed by the plaintiff and subject to the discovery process, and the interrogatory sought to be answered, apparently relate to the financial aspect of the defendants' operations. What has been earned, what assets have been acquired, what fees have been or should have been generated by use of the transferred websites and other links accessed by such use.

[10] The defendants submit that the answers to the interrogatories and the documents that the plaintiff wishes to have listed relate to what compensation, either by way of damages or by way of accounting, that the plaintiff may recover once he has established his claim. The defendants further submit that if the plaintiff is to share in profits as alleged pursuant to an agreement, the issue of the profits if any should be subject to a separate inquiry, that is, an accounting, the right to which arises only if the plaintiff succeeds in establishing his entitlement. Consequently, the defendants submit the disclosure of financial and/or technical information should be postponed pending a determination of the

issue as to whether or not the plaintiff is entitled to share in the defendants' operations.

[11] Rule 26(15) makes clear that the court has a discretion "if satisfied that for any reason it is desirable that any issue or question in dispute should be determined ...".

[12] The rule, on its face, does not impose any limitations; however, when the court exercises this discretion in favour of identifying a discreet issue which would lead to the postponement of the discovery process, it should do so on a principle basis. As previously stated, the discreet issue here, identified by the defendants, is the issue relating to an examination of the defendants' books of account and financial statements in question.

[13] Rule 26(15) relates to discovery and inspection of documents. It is not designed as a means to sever trial issues (for example, Rule 5, Rule 39). Its purpose is to postpone or isolate an issue relating to discovery of documents when discovery may be dependent upon the resolution of a major issue. In the case at bar, the major issue is the defendants' liability to the plaintiff in a joint venture as alleged by that plaintiff. The existence of a joint venture is the major issue, the resolution of which in favour of the plaintiff is necessary for an accounting as ordered. In my

view, an accounting is the primary remedy sought by the plaintiff insofar as the use of any assets of the plaintiff may have been established.

[14] It is submitted by the defendants that at present the plaintiff is operating with a potential competitor of the defendants. The evidence of such on this hearing is not persuasive; however, the evidence does indicate that postponement of disclosure of financial documents pending a resolution of liability may be prudent.

[15] The factors I take into consideration on granting the order sought by the defendants postponing the examination for discovery of the financial records of the defendants, including its list of assets, its earnings and its customers are as follows:

- (1) The plaintiff's entitlement to this information is dependent upon its establishment of the defendants' liability;
- (2) The liability of the defendants to the plaintiff can be resolved without access to this information;
- (3) An order under Rule 26(15) postponing discovery will not delay or otherwise prejudice the trial;

(4) There is some evidence that the plaintiff has a loose association with a potential competitor of the defendants.

[16] All these factors, in my view, lead to the conclusion that the discretion which is to be exercised under Rule 26(15) should be postponed until the issue concerning the defendants' liability to the plaintiff has been established. Secondly, the question posed in the interrogatories which leads to a disclosure of the defendants' assets and financial information is dismissed. On this latter point concerning the interrogatories, the plaintiff will have leave to apply in the future in the event the plaintiff is successful in its cause of action.

[17] In *Belzberg v. North American Trust Co.*, [1994] B.C.J. No. 3326, Master Joyce reviewed a number of authorities and extracted what he perceived to be the essential principles arising from them with reference to Rule 26(15). These were (1) that the documents relate to an issue the determination of which can conveniently be postponed; and (2) the resolution of the first issue must be such that its resolution may make discovery of the documents unnecessary. Master Joyce also considered other factors which were relevant to the decision

before him in the exercise in the discretion granted to the court by the Rules.

[18] In the course of his reasons, he referred to an unreported decision of Master Donaldson in **Noonan v. Johnston**, Kelowna Registry No. 16373, November 24, 1993, and stated that Rule 26(15) should be restricted to exceptional cases and should not be applied too liberally.

[19] In that respect, I disagree. The issue is not whether or not the rule should be applied liberally; the issue is whether or not there is a discreet issue which is convenient to be postponed until a major or other issue has been resolved. The convenience should relate to factors previously touched on, bearing in mind that whatever order is made it should not prejudice the opportunity of the plaintiff to prove its case.

[20] More recently, the issue of the applicability of Rule 26(15) arose in the decision of **AR Sixteen Holdings Ltd. v. Down** [1997] B.C.J. No. 284, a decision of Mr. Justice Burnyeat dated February 4, 1997. In the course of his reasons, Mr. Justice Burnyeat, dealing with Rule 26(15), stated:

It is clear that the court has a wide discretion to make such an order especially in cases where the determination of the issue to be referred

will provide a final determination of the litigation.

[21] He further states:

Because the court has been provided with a broad jurisdiction to make such an order and as none of the cases reviewed would indicate that the courts of our province have indicated that courts should only make this order rarely, I do not equate the fact that such orders under Rule 26(15) have not been made in great numbers with an assumption that they should only be made on rare occasions. In any event, I am satisfied that it is an appropriate order to be made here.

[22] Hence, supported by authority, and a consideration of the principles relating to the applicability of Rule 26(15), I am satisfied that the plaintiff's application to compel the defendants to list and produce the documents previously referred to, and to answer further Interrogatory 10, is dismissed.

[23] Costs of this application will be costs in the cause.

"F.A. Melvin, J."
The Honourable Mr. Justice F.A. Melvin