IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sportstown B.C. Holdings Ltd. v. British Columbia Soccer Association,* 2013 BCSC 2017

Date: 20131105
Docket: S123351
Registry: Vancouver

Between:

Sportstown B.C. Holdings Ltd. and Total Soccer Systems Inc.

Plaintiffs

And

British Columbia Soccer Association

Defendant

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment
In Chambers

Counsel for the Plaintiffs:	Roderick S. Henderson
Counsel for the Defendant:	Eileen E. Vanderburgh
Place and Date of Hearing:	Vancouver, B.C. February 1, 2013 March 7, 2013 June 5, 2013
Further Written Submissions of the Plaintiffs:	dated June 13, 2013
Further Written Submissions of the Defendant:	dated June 27, 2013
Further Written Submissions of the Plaintiffs:	dated July 3, 2013
Further Written Submissions of the Defendant:	dated July 4, 2013
Place and Date of Judgment:	Vancouver, B.C. November 5, 2013

Introduction

[1] In a dispute that concerns amateur soccer in British Columbia, the defendant applies to have the plaintiffs' claim struck out or dismissed.

[2] The plaintiffs, Sportstown B.C. Holdings Ltd. and Total Soccer Systems Inc., a for-profit sports facility and academy, sue the B.C. Soccer Association for damages and injunctive relief. They allege that the defendant's conduct amounts to intentional interference with the plaintiffs' economic interests and relations with third parties. The plaintiffs also assert that this conduct amounts to the torts of intimidation, defamation, and abuse of power.

[3] The B.C. Soccer Association argues that the complaints of the plaintiffs do not constitute actionable wrongs and the pleadings do not contain causes of action. The defendant says that the plaintiffs' complaints are essentially part of a political dispute between it, the society governing amateur soccer in B.C., and the plaintiffs, a for-profit enterprise. The defendant moves to strike out the plaintiffs' claim as not disclosing a cause of action or, alternatively, for summary dismissal of the claim on its merits.

[4] The facts that relate to whether there are actionable claims are largely uncontested and I will set them out in the background section of this judgment.

[5] I will discuss the applications of the defendant in this order. First, I will deal with the application to strike out the pleadings as not disclosing a cause of action. I will then address whether any or all of the claims, if not struck out on the pleadings, ought to be summarily dismissed.

[6] After preparing these reasons in draft, it was unclear to me whether the plaintiffs intended to advance a claim in contract. I sent a memo to counsel and the plaintiffs then proposed amendments advancing claims in express and implied contract. Those amendments are opposed by the defendant. I will discuss at the end of these reasons whether to allow the amendments in whole or in part. I find that I can address the claims in this order because the proposed amendments are distinct and separate from the original pleading.

[7] For the reasons that I will now give, I find that while the claim as presently pleaded before the amendments should not be dismissed on the pleadings alone, because reference must be made to the evidence to be able to understand the factual content of the dispute, it should be summarily dismissed on the evidence as the defendant has demonstrated beyond a reasonable doubt that the claim is bound to fail at trial. However, I have concluded that the plaintiff Total Soccer Systems' proposed amendments should be permitted because it is not plain and obvious that they fail to disclose a reasonable cause of action.

Issues

[8] The issues on this application are:

a. What causes of action are alleged by the plaintiffs?

b. Should any purported cause of action be dismissed on the pleadings without reference to evidence?

c. Should any of the claims be summarily dismissed?

d. Should the new proposed amendments be allowed in whole or in part?

Background

[9] The B.C. Soccer Association (BCSA) is a society that regulates the participation of teams and players affiliated with youth amateur soccer in British Columbia.

[10] The BCSA is a member of the Canadian Soccer Association (CSA), which itself is a member of the Fédération Internationale de Football Association (FIFA). The members of FIFA organize and supervise football or soccer in their countries.

[11] According to the CSA bylaws, the authority for organizing international matches and competitions lies with FIFA. The objective of the CSA is to promote, regulate, and control the game of soccer in Canada, and to respect and prevent infringements of the statutes, regulations, and directives of FIFA and the CSA.

[12] The BCSA has an active membership category. Active members (apart from senior leagues) are those youth district associations "primarily established for the purposes of organizing and administrating youth age soccer in one of the Districts, as defined ... in these Bylaws": BCSA bylaw, Article 3(1)(a). The BCSA also has associate members.

[13] The BCSA rules include provisions for player registration, restrictions on registered players attending competitions outside Canada without permission, prohibition of unregistered members participating in league and cup competitions under the BCSA's jurisdiction, and a requirement that senior leagues must apply to the BCSA for sanction (approval) and then be under the jurisdiction of the BCSA.

[14] Since 1997, the plaintiff, Sportstown B.C. Holdings Ltd. (Sportstown), has operated a sports facility. Its wholly owned subsidiary, Total Soccer Systems (TSS), operates a soccer academy at the Sportstown facility. The plaintiffs are not active members of the BCSA, but TSS is presently what is called a limited associate member. For the contract claims TSS now seeks to assert by the amendments, there may be an issue over whether it is an associate or a limited associate member. TSS does not allege that it is eligible for full membership in BCSA. Limited associate membership in the BCSA "may be granted subject to article 3(2) b) and 3(2) c) [of the BCSA bylaws] to For Profit Soccer Academies and Schools for the sole purpose of granting permission to attend individual events sanctioned by recognized governing bodies if requested and subject to all rules and regulations of the Association".

[15] In order to deal with this application, it was of course necessary to come to grips with what the plaintiffs are asserting in this proceeding. Clearly there are political aspects to this dispute but the plaintiffs assert that they also have legitimate and sound causes of action.

The possible claims

[16] In their written outline, the plaintiffs described their claim in this fashion:

> The thrust of the case of the Plaintiffs is that the Defendant:

> (a) by applying its sanctioning power, if it does in fact have the same, in an improper and uneven fashion; or
>
> (b) by providing an economic preference to its Active Members over third party for profit academies; or
>
> (c) by interfering with the economic relationships between the Plaintiff TSS and third parties concerning tournament or event play; or
>
> (d) by the failure to substantially comply with FIFA rules as to registration of membership for players;
>
> has given rise to one or more causes of action in favor of the Plaintiffs for damages as well as injunctive relief.

[17] I will first deal with and describe the "claims" under headings (a) and (c) of the plaintiff's outline.

> **(a) by applying its sanctioning power … in an improper and uneven fashion; and**
>
> **(c) by interfering with the economic relationships between the Plaintiff TSS and third parties concerning tournament or event play**

[18] A significant complaint of the plaintiffs relates to: the defendant's refusal to approve the plaintiffs' players' participation in certain leagues; the defendant's refusal to register the plaintiffs' players with the BCSA; the defendant's refusal to consent to the participation of the plaintiffs' players in a Washington State league; and the defendant's refusal to consent to the plaintiffs' club participating in a Surrey spring soccer league. The plaintiffs allege the BCSA undertook the above conduct maliciously, as part of a plan to destroy the plaintiffs' business. Specifically, those allegations are that:

a. The BCSA refused to provide a letter to the Puget Sound Premier League in Washington consenting to the plaintiffs' participation in that league;

b. The BCSA refused to approve the Apex Soccer League that was proposed by the plaintiff TSS and other clubs in the Lower Mainland;

c. The BCSA found the plaintiff TSS was ineligible to participate in the EA Sports B.C. Soccer Premier League, a league organized by the BCSA in partnership with and support of the Vancouver Whitecaps.

[19] The plaintiffs claim that the BCSA intended to destroy the plaintiffs' business in refusing to permit the plaintiff TSS to participate in these three leagues, and that the BCSA's conduct violates the principles of the BCSA constitution.

[20] Further, the plaintiffs allege that inquiries made by the BCSA in connection with an event called the Western Canada Showcase were inquiries of the BCSA that amounted to intentional interference with the plaintiffs' business that caused the plaintiffs damages.

(b) by providing an economic preference to its Active Members over third party for profit academies

[21] The plaintiffs claim the BCSA engaged in conduct inconsistent with the purposes of its constitution in operating for pecuniary gain by entering into a commercial association with the Vancouver Whitecaps. The plaintiffs assert that the BCSA operated for pecuniary gain by entering into a commercial association with the Vancouver Whitecaps, because it was thereby able to make a profit for its members by charging players fees in excess of expenses for specialized training.

(d) by the failure to substantially comply with FIFA rules as to registration of membership for players

[22] The plaintiffs claim that the BCSA is bound by and breached the FIFA rules. In particular they point to FIFA Regulation 19bis2 which provides that all associations such as the BCSA are obliged to ensure that:

> … all academies without legal, financial or de facto links to a club:
>
> a) run a club that participates in the relevant national championships; all players shall be reported to the association upon whose territory the academy operates, or registered with the club itself; or
>
> b) report all minors who attend the academy for the purpose of training to the association upon whose territory the academy operates.

[23] The plaintiffs allege that BCSA incorrectly interpreted this rule as not requiring the BCSA to register TSS players directly with the BCSA, and only requiring the BCSA to ensure the TSS reported its players to the BCSA. The plaintiffs allege the BCSA's incorrect interpretation of FIFA Regulation 19bis2 prevented TSS players from participating in provincial youth team selections, unless they were registered in a Youth District that was a member of the BCSA.

What causes of action do the existing pleadings purport to assert?

[24] Although I found these claims somewhat confusing, according to plaintiffs' counsel the case in the pleadings is most precisely summarized at paragraphs 42 and 47 of the amended notice of civil claim, which read:

> 42. The Plaintiffs further say that all such conduct of the Defendant BCSA was done with malicious intent, as part of a plan or design to destroy the business of the Plaintiffs which the said Defendant perceives to be in competition with aspects of its operations. The actions of the Defendant BCSA with respect to the Plaintiffs, including:
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> (a) the continued refusal to approve the membership application of the Plaintiffs for full membership to the Defendant BCSA;
>
> (b) the refusal to register players within the Plaintiff Total Soccer Systems Inc. academy in accordance with FIFA Rules and to allow them to participate in the provincial team selection process;
>
> (c) the refusal to sanction or provide consent for participation of teams of the Plaintiffs in leagues in foreign jurisdictions or within British Columbia; and
>
> (d) the continued intentional interference with the business relationships of the Plaintiffs with others;
>
> are egregious and abusive to the Plaintiffs and inconsistent with the Purposes for the Defendant BCSA as set out in the Constitution. While refusing admission by the Plaintiff TSS to full membership in the Defendant BCSA, which would enable such leagues to be sanctioned in the normal course, the Defendant BCSA has placed itself in a position of using its preferable administrative position within the Province of British Columbia for the purpose of attempting to destroy its competition for revenue received from players for participation for training and competition and to enable its own Member coaches to obtain income from business referred through District Active members of the said Defendant.
>
> …
>
> 47. The actions by the Defendant BCSA were done with the knowledge that the business of the Plaintiffs would be severely damaged by the actions

> of the said Defendant, including the termination of the possible involvement of teams of the Plaintiff TSS in leagues in foreign jurisdictions and local jurisdictions as well as the limited ability of high-performance athletes training with the Plaintiff Total Soccer Systems Inc. to participate in the Provincial Team program, possibly to the point where the financial viability of such business of the Plaintiffs was threatened.
>
> [Emphasis added.]

(a) What are the causes of action alleged by the plaintiffs?

[25] In my assessment, the pleadings do not clearly state the precise causes of action alleged by the plaintiffs. During argument, and because of lack of clarity of the pleadings, I asked plaintiffs' counsel to advise me what causes of action the plaintiffs were asserting in this action. Mr. Henderson filed a supplementary brief in which he submitted that the amended notice of civil claim gives rise to claims in intentional interference with economic relations, intimidation, defamation, and abuse of power. On the other hand, counsel for the defendant, Ms. Vanderburgh, argues that the pleadings do not disclose a cause of action and that on the evidence filed on the application, the civil claim should be summarily dismissed.

[26] From a review of the pleadings and the submissions of counsel, it appears the plaintiffs' intention is to assert what they allege are causes of action in:

(1) intentional interference with economic relations;

(2) intimidation;

(3) defamation; and

(4) abuse of power.

[27] It appears that there might be other causes of action that the plaintiffs are asserting. To the extent that the plaintiffs may be advancing causes of action other than those summarized by Mr. Henderson, I will address that later.

(b) Should any of the claims be dismissed on the pleadings without reference to evidence or after reference to the evidence on the application?

[28] The defendant's application to strike out the whole of the plaintiffs' amended notice of civil claim is brought under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*,

B.C. Reg 168/2009. The alternative application is under Rules 9-6(4) and 9-6(5)(a) for summary judgment dismissing the plaintiff's action.

[29] Let me set out some basic aspects of an application for dismissal on the pleadings or for summary dismissal.

[30] Under Rule 9-5(1) no evidence is admissible on an application to strike pleadings. This is clear from the rule itself:

> **Rule 9-5 – Striking Pleadings**
>
> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> ...
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs. …
>
> **Admissibility of evidence**
>
> (2) No evidence is admissible on an application under subrule (1) (a).
>
> [Emphasis added.]

[31] On such an application the court assumes the facts in the pleadings to be true and only dismisses a claim if it is plain and obvious that the claim must fail: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17 and 22:

> The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> ...
>
> A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are

> manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses.

[32] The defendant's application is also under Rules 9-6(4) and 9-6(5)(a), the summary dismissal rule. It provides:

> **Rule 9-6 – Summary Judgment**
>
> …
>
> **Application by answering party**
>
> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> …
>
> **Powers of court**
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly.

[33] The test to be applied under Rule 9-6(4) is:

> ... an application brought by a defendant under Rule 9-6(4) will be granted under that subrule if the claim is bound to fail.
>
> Frederick Irvine, *British Columbia Practice*, loose-leaf (consulted on 26 April 2013), 3d ed (Markham, ON: LexisNexis, 2006), ch. 9 at 121.
>
> [Emphasis added.]

[34] The predecessor to Rule 9-6(4) was Rule 18(6), which was discussed in *Skybridge Investments Ltd. v. Metro Motors Ltd. (c.o.b. Metro Ford)*, 2006 BCCA 500 at paras. 10-12:

> A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.
>
> If insufficient material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a *bona fide* triable issue.

> If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
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> [Emphasis in original.]

[35] Under Rule 9-6 (the summary judgment or summary dismissal rule) evidence is permitted: see *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Ltd.*, 2011 BCCA 149 at paras. 12-14.

Analysis – Rule 9-5(1)

[36] Is it plain and obvious that the pleadings in this case do not disclose a cause of action? The plaintiffs suggest that there are causes of action in intentional interference with economic relations, intimidation, defamation, and abuse of power (it is not clear whether the plaintiffs have advanced a claim for inducing breach of contract; in any event I propose to deal with that possibility in the next section of these reasons).

[37] The first question is whether this application can be decided without reference to evidence. The defendant says that it can, but I disagree.

[38] Although the evidence that was filed – namely, affidavits from Roger Barnes, the president of the BCSA, and Colin Elmes, a director of the plaintiffs – was not particularly controversial, I found that it was necessary to refer to it to understand the nature of the plaintiffs' claim. Perhaps the defendant might have sought particulars of the plaintiffs' claim which, on its face, is unfocussed and somewhat obscure, but in order to decide whether there were reasonable causes of action pleaded, I found that I had to refer to more than just the pleadings. That included evidence of the defendant's constitution, as well as information relating to some of the plaintiffs' complaints. I also found that I had to refer to the affidavit evidence before me to understand the nature of the defendant society, its regulations, and its relationship with the CSA and FIFA.

[39] Accordingly, as I must refer to evidence to decide the defendant's application, the action cannot be dismissed on the pleadings rule as not disclosing a cause of action.

Analysis – Rule 9-6

[40] I now turn to the application under Rule 9-6.

[41] The test under the summary judgment or summary dismissal rule is the same as it was under the previous rule (Rule 18(6)) – that is, whether the applicant has demonstrated that there is no *bona fide* triable issue. I have set that test out briefly above, but it is aptly stated by Chamberlist J. in *D&G Developments Ltd. v. Crystal Cove Beach Resorts Inc.*, 2006 BCSC 1432 at para. 26:

> In *Douglas Lake Cattle Company v. Smith, Smith, Brewer and Murphy*, 54 B.C.L.R. (2d) 52, Cumming J.A. had this to say at p. 59:
>
> > The approach to be taken by a chambers judge in exercising his discretion whether to make a final determination in a proceeding brought by petition under R. 10(1)(b) is expressed clearly by Mr. Justice Taggart in *Bank of B.C. v. Pickering* (1983), 62 B.C.L.R. 136 at 138 (C.A.), where he applied to a proceeding, in that case an application for an order nisi of foreclosure in which the respondent sought that a trial be ordered under R. 52(11), the R. 18 summary judgment test enunciated by Mr. Justice Seaton in *Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193 at 202, 29 C.P.C. 105 (C.A.):
> >
> > The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue?
> >
> > It can be seen that the question is not whether there is *any* dispute as to facts or law, but rather whether there is a dispute to facts or law which raises a reasonable doubt, or which suggests that there is a defence that deserves to be tried.

[42] In *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Limited*, 2011 BCCA 149 at paras. 12-14, the Court of Appeal explained that evidence can be filed on an application under Rule 9-6, and indeed "[i]t is … inconceivable … that a defendant could obtain summary judgment without

presenting sworn evidence" (at para. 14). The former rule that the deponent must swear on an application to summarily dismiss that the action is bound to fail no longer appears to be a requirement.

[43] On an application under Rule 9-6, the judge does not weigh the evidence. As discussed above, Thackray J.A. in *Skybridge Investments Ltd.* described the role of the court when evidence is filed on a summary dismissal application as limited to a determination of whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law.

[44] I will discuss the four torts the plaintiffs' counsel says are alleged in the present pleading in order to consider whether it is established beyond a reasonable doubt that any are bound to fail. I will then consider whether there are any remaining claims that should be considered.

(1) Intentional interference with economic interests

[45] The plaintiffs make allegations in their notice of civil claim that they say amount to the tort of intentional interference with economic interests. The plaintiffs describe these allegations as instances of conduct of the defendant *vis-à-vis* third parties with whom the plaintiffs have business relationships, including leagues, owners of showcase events, and players. The plaintiffs say that the defendant failed to act in an even-handed manner with the plaintiffs, as compared to the defendant's members, who conduct operations that the plaintiffs say compete with theirs.

[46] In summary, the allegations appear to be that the defendant has refused to allow the players within the plaintiffs' academy to participate in the provincial team selection process, and that the defendant has refused to sanction (by which I take it the plaintiffs mean grant permission) the plaintiffs' teams to participate in leagues in foreign jurisdictions or within British Columbia.

[47] This is expressed in the pleadings by the plaintiffs as the intentional interference with the business or economic relationships of the plaintiffs with others. Has the defendant demonstrated beyond a reasonable doubt that the plaintiffs' claims of intentional interference with its business or economic relationships will fail?

[48] A cause of action for unlawful interference with economic interests will be made out where the plaintiff establishes : (i) interference with the plaintiff's trade or business; (ii) by unlawful means; (iii) with an intent to injure the plaintiff; and (iv) actual economic loss to the plaintiff caused by the defendant's conduct: Adam Fanaki and David Faye, "Civil Conspiracy and Other Economic Torts" in James Musgrove ed., *Fundamentals of Canadian Competition Law* (Toronto: Thomson Carswell, 2007) ch. 13 at 236.

[49] The elements of that tort are set out in *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, a decision of the Ontario Court of Appeal that followed Lord Hoffmann's majority judgment in the House of Lords, the leading case on this tort: *OBG Limited v. Allan*, [2007] U.K.H.L. 21. In *Alleslev-Krofchak*, the Ontario Court of Appeal also followed its decision in *Correia v. Canac Kitchens* (2008), 91 O.R. (3d) 353 and said that "to qualify as 'unlawful means' [for the purposes of this tort], the defendant's actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff" (at para. 60).

[50] The real question here is whether the plaintiffs have asserted an unlawful act for the purposes of this cause of action. Is it beyond a reasonable doubt that the plaintiffs have not established a requisite unlawful act for this tort? The tort requires that the action against the third party must be unlawful because otherwise conduct that interferes with another's business may simply be competitive behaviour. Let me examine the conduct that the plaintiffs rely on as unlawful.

[51] The unlawful conduct that is alleged implicitly, and in one instance explicitly, involves communications by the defendant with third parties denying permission to the plaintiffs' teams or players to participate in certain leagues or tournaments, or contacting leagues and indicating the inability of the plaintiffs' players to participate. The plaintiffs also point to the defendant's refusal to register players of the plaintiff, or the plaintiffs. In summary, that is the conduct that the plaintiffs assert is unlawful in connection with third parties.

[52] I am unable to see how any of this could amount to an unlawful act for the purposes of the tort of intentional interference with economic relations.

[53] The plaintiffs also point to the refusal of the defendant to register the plaintiff's players with the defendant. That, I think, misses the point of the tort: the function of the tort is to provide a remedy when the claimant is harmed through the instrumentality of a third party. That harm, directed at the plaintiff through the third party, must be actionable by the third party and, if not actionable, this must be only because the third party has not suffered any loss: *Alleslev-Krofchak* at paras. 54-57.

[54] Here the acts that presumably are alleged to amount to unlawful interference with economic relations are simply not unlawful, as they are not actionable by the third parties, leagues or tournaments in which the plaintiffs seek to participate.

[55] The plaintiffs also appear to rely on the defendant not following its constitution as establishing the requisite "unlawful means". In *Correia*, the case that discussed this tort, and was later applied in *Alleslev-Krofchak*, the Court of Appeal for Ontario explained that a party not following its constitution was not an unlawful act, as contemplated by this tort. This is clear from paras. 103-104 of *Correia*:

> Lord Hoffman summarized his definition of unlawful means as acts against a third party that are actionable by that third party, or would have been actionable if the third party had suffered a loss. This excludes criminal conduct that is not directed at the third party and is not otherwise actionable by that party. In contrast, Lord Nicholls of Birkenhead views the breadth of conduct under the rubric of "unlawful means" as encompassing any conduct that is deliberately intended to harm the plaintiff and in breach of a legal or equitable obligation under either civil or criminal law. He views the true rationale of the tort as providing a remedy for intentional economic harm "caused by unacceptable means", which includes all means that would violate an obligation under the law: para. 153.
>
> Lord Nicholls' approach may be viewed as similar to the one espoused by the decision of this court in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 … which adopted Lord Denning's characterization of unlawful means in *Torquay Hotel*, *supra*, note 2, at p. 530 All E.R., as acts which the tortfeasor "is not at liberty to commit". In *Reach M.D.*, the defendant association made a ruling that was beyond its powers against one of its members, which the court found to constitute "unlawful means". However, Rouleau J.A. in *Drouillard*, *supra*, at paras. 19-25, distinguished *Reach M.D.* and limited its scope, when he concluded that Cogeco's conduct in not following its internal corporate policy or acting in bad

> faith did not amount to unlawful means and that the tort of intentional interference with economic relations was therefore not made out in that case.
>
> [Emphasis added.]

[56] To the extent that the plaintiffs say that the defendant did not apply its constitution in an even-handed manner, I find that is not an allegation of an unlawful act directed at a third party.

[57] Simply put, the plaintiffs have not alleged or pleaded material facts to establish that any actions of the BCSA directed against third parties were unlawful.

[58] Allegations that the defendant preferred its members over the plaintiffs; that it violated general duties under its constitution; or that it failed to give permission to third parties to allow the plaintiffs or their players to participate in leagues or tournaments, are simply not unlawful acts that are actionable by a third party if it had suffered loss.

[59] The allegations on the evidence cannot constitute unlawful interference with economic relations.

[60] Accordingly, I conclude that the defendant has demonstrated beyond a reasonable doubt that the plaintiffs' claim in intentional interference with economic relations is bound to fail and must be dismissed.

(2) Defamation

[61] The next cause of action that the plaintiffs say they assert is defamation.

[62] The plaintiffs allege that the defendant committed the tort of defamation by emailing the owners of the Western Showcase event to ask if the plaintiff had been properly registered, which the plaintiffs allege is a communication that implies "the plaintiff is doing something improper".

[63] Is it clear beyond doubt that the plaintiffs' claim in defamation is bound to fail? Defamation is the dissemination of information that tarnishes the good name of people, causing their standing in the community to be impaired, or causing them to

be pitied. Words which appear innocent on the surface may be defamatory to certain people who are aware of certain facts, not generally known, in relation thereto. The law of defamation recognizes two different situations in this regard: (1) words which have a technical or slang meaning, or a meaning which depends on some special knowledge possessed by a limited number of persons only, and (2) ordinary words which may on occasion bear some special meaning other than their natural and ordinary meaning because of some extrinsic facts or circumstances: Allen Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, ON: LexisNexis, 2011) at 758 and 764.

[64] The claim in defamation is far from seriously advanced. The pleadings do not actually use the term defamation and do not claim damages for defamation. The defendant says the plaintiffs have not pleaded the alleged defamatory words or that they were published, and therefore any claim for defamation must fail. While the plaintiffs' counsel acknowledges that the claim for defamation is not a strong part of the action, I think that it is clear beyond a reasonable doubt that there is in fact no case on the pleadings and the evidence for the defendant to meet.

[65] The claim for defamation is dismissed.

(3) Abuse of power

[66] The plaintiffs assert that they have advanced a claim for the tort of abuse of power. They assert that the principles of abuse of power that apply to a statutory administrative body should apply to a sport-governing body in the circumstances of the defendant. Alternatively, the plaintiffs assert that the law relating to abuse of power of a statutory officer should be extended to the defendant.

[67] The plaintiffs say that the defendant carries even greater responsibilities than many statutory officers who exercise statutory authority. Given that the defendant receives government funding, and has detailed obligations under its charter documents and policies, the plaintiffs say that the defendant should not be considered to be in a different position than a statutory officer. The plaintiffs argue that the test for a public officer, defined as someone in the public service, should be

extended to a person who discharges any duty in which the public is interested and is paid out of moneys that are provided for this public service. Pursuant to this argument, the plaintiffs say the defendant owes an obligation to deal with the plaintiffs in an even-handed fashion, and that breach of this obligation is an abuse of power.

[68] Moreover, the plaintiffs say that if the existing category of "public officers" only applies to public officers, and the defendant is not caught by that definition because its duties are not governed by statute or regulation, a separate tort of abuse of statutory authority ought to apply to a sport-governing body in cases where such powers are not specifically granted by statute.

[69] The tort of abuse of statutory authority is synonymous with the torts of "abuse of public authority", "abuse of public office", and "misfeasance in public office": *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, 2001 MBCA 40 at para. 18. The requirements of this tort are: (a) the actor must be a public official; (b) the public official must have engaged in wrongful conduct in his or her capacity as a public officer; and (c) the wrongdoing must be intentional: Lewis Klar, *Tort Law*, 5th ed. (Toronto: Thomson Reuters, 2012) at 328.

[70] In *Paul v. Vancouver International Airport Authority*, 2000 BCSC 341, the court said, at paras. 104-105:

> In *First National Properties Ltd. v. District of Highlands*, [1999] B.C.J. No. 2246 (B.C.S.C.), (1 October 1999), Victoria Registry, 95/1435 at para. 49, Quijano J. refers to *Francoeur v. Canada* (1994), 78 F.T.R. 109 (F.T.D.) which formulates the broad test for abuse of public office:
>
> > … Such unlawful action may arise either when a statutory actor purposefully exercises a power which they do not possess with the foreseeable result of an injury to the plaintiff, or when a statutory actor exercises a discretion or power under a statute with malice, thereby rendering the action unlawful.
>
> It is noteworthy that in each of the cases relied upon by Mr. Paul, the relevant parties were statutory actors. For example, in *First National*, *supra*, the defendants included the Corporation of the District of Highlands and the Province of British Columbia. … [Citations omitted.]

[71] The tort of abuse of statutory authority only applies to statutory officers and public officers.

[72] The plaintiffs' argument must fail because the defendant does not fall within the definition of a statutory actor for the tort of abuse of power. It does not apply to the situation of a private society and, in my view, it is not appropriate to extend the tort to the facts of this case. This claim is dismissed.

(4) Intimidation

[73] The plaintiffs assert that the conduct of the defendant amounts to the tort of intimidation. They put it this way: "the [d]efendant, in its contacts with third parties operating leagues or tournaments, or in its communications directly with the [p]laintiff, expresses or implies sanctioning [used in the sense of punitive] action that may be taken relating to the participation of the players or teams involved with the [p]laintiff's operations".

[74] On the tort of intimidation, Lewis Klar in *Tort Law*, 5th ed. (Toronto: Thomson Reuters, 2012) said this, at 726:

> Its essence lies in threats of unlawful acts directed by A against B in order to coerce B into doing something which is damaging either to B's own interests, or those of a third party.

[75] As Lord Denning said in *J.T. Stratford & Son Ltd. v. Lindley*, [1964] 2 All E.R. 209 at 216:

> Very recently it has become clear that the tort of intimidation exists not only in threats of violence, but also in threats to commit a tort or a breach of contract. The essential ingredients are the same throughout; there must be a coercive threat to use unlawful means, so as to compel a person into doing something that he is unwilling to do, or not doing something that he wishes to do; and the party so threatened must comply with the demand rather than risk the threat being carried into execution.
>
> [Emphasis added.]

[76] The plaintiffs say that the acts that are included in this tort include the threat of sanctioning and restricting player participation without registration through an active member of the defendant. The plaintiffs say the actions may amount to coercion, and unlawful means may be involved.

[77] I find that there is no evidence, nor in fact a plea, of a threat to do an unlawful act to coerce the plaintiffs or the fact of doing an unlawful act to coerce the plaintiffs. The plaintiffs have had ample opportunity to make that assertion if they had intended to do so. The claim of intimidation must fail.

(c) Other claims and miscellaneous comments

[78] At the time of drafting the first portion of these reasons, there was no specific allegation of a contractual relationship between the plaintiffs and the BCSA, or a breach of a contractual relationship between the plaintiffs and BCSA. The plaintiffs' pleadings only alleged a violation by the defendant of the principles of its constitution. I will deal with the proposed amendments shortly; however, before I get to them it is necessary to first address a number of miscellaneous points.

[79] The plaintiffs have abandoned their allegation that the defendant engaged in unfair competition contrary to the *Competition Act*, R.S.C. 1985, c. C-34.

[80] The plaintiffs may be asserting that it is unfair that they do not have full active membership status in the defendant society. There is, however, no cause of action for unreasonable or unfair membership requirements of a society. In *Bandel v. Shalom Branch #178 Building Society*, 2007 BCSC 780, MacKenzie J., as she then was, said at para. 21:

> There is no cause of action at law of which I am aware for "unreasonable or unfair membership requirements" in a society.

[81] I will turn now to the tort of inducing breach of contract. It is unclear whether the plaintiffs have in fact advanced this claim, but I will discuss it. To succeed on this basis, the plaintiff must prove the four elements of the tort, which are as follows:

1) the plaintiff had a valid and enforceable contract with a third party;

2) the defendant was aware of the existence of this contract;

3) the defendant intended to and did procure the breach of the contract; and

4) as a result of the breach, the plaintiff suffered damages: see *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 at para. 26.

[82] If the four elements of the tort have been made out, and I find that they are not, I then need to consider whether the defence of justification is available to the defendant: *Drouillard* at para. 26. There is no evidence that the defendant procured a breach of contract, nor is there evidence that it intended to.

[83] As the pleadings stand, the claim – if is indeed advanced – would have to be dismissed.

The proposed amendments to plead breach of express or implied contract

[84] After preparing these reasons in draft, because of the uncertainty of the pleadings I asked the parties for further submissions on whether a possible claim in breach of contract was being advanced by a member of a society against the defendant society. I have now received those further submissions. The plaintiffs have proposed certain amendments in order to raise a claim in express or implied contract – a claim that had not been pleaded before. The parties agree that the appropriate test on this application is that the amendments should be allowed unless it is plain and obvious that they do not disclose a cause of action.

[85] The proposed amendments, which were opposed by the defendant, are lengthy and are stated in these terms:

> Contract
>
> 42. The Constitution of the Defendant BCSA provides, in "2) PURPOSE" and "6) PURPOSE OF GAIN", that the said Defendant's purpose is:
>
> (a) to foster, develop and promote the game of soccer, in all its branches, in the Province of British Columbia;
>
> (b) to govern the rules of play of the game of soccer in the Province of British Columbia;
>
> (c) to generally provide whatsoever other assistance is available to support and encourage the game of soccer in the Province of British Columbia; and that
>
> (d) it shall be operated without purpose of pecuniary gain to any of its members and that any its [sic] surplus shall be used solely for its purposes of the Defendant BCSA and the promotion of its objectives.

43. The Bylaws of the Defendant BCSA include the following provisions in relation to "Associate Members" found in Article 3, namely:

    (a) Associate Members are organizations, whether incorporated or not, which have similar objectives to the Defendant BCSA (Article 3 (2));

    (b) Associate Members shall make application for membership renewal annually on or before March 30 of the current year on a form to be provided (Article 3 (2)(b); [sic]

    (c) The Board of Directors of the Defendant BCSA may admit an organization as an Associate Member for a short term of 30 days where that admission is a benefit to the members of the Defendant BCSA and that short term admission supports the objectives of the said Defendant (Article 3(2)(c));

    (d) Limited Associate Membership may be granted subject to Article 3(2)(b) and 3(2)(c) to For Profit Soccer Academies and Schools for the sole purpose of granting permission to attend individual events sanctioned by recognized governing bodies if requested and subject to all rules and regulations of the Defendant BCSA.

44. The Rules and Regulations of the Defendant BCSA include the following, namely:

    (a) The Defendant BCSA has the power to prohibit the teams and players under its jurisdiction from playing with or against any team which is not a member of the Canadian Soccer Association or an affiliated association (Rule 4(a));

    (b) No player registered with the Defendant BCSA shall be entitled during the valid period of such registration to compete in any competition for any club outside Canada without first obtaining permission from the Defendant BCSA. Any violation of the rule will immediately cancel the registration and render the player ineligible to compete again in Canada during the current playing season (Rule 5(a));

    (c) Any player or official not registered with the Defendant BCSA shall be determined to be ineligible to participate in league and cup competition under the jurisdiction of the Defendant BCSA and is no longer eligible for any benefit from membership in the Defendant BCSA (Rule 5(g));

    (d) Failure to register all players by any district, league or affiliated association shall result in a directive from the Board leading to the expulsion and/or suspension of that district, league or affiliated association from the Defendant BCSA (Rule 5(h));

    (e) No player shall be permitted to register for more than one team at any one time, or play in more than one provincial, district or inter district cup competition under the jurisdiction of Defendant BCSA without first receiving written permit from the Defendant BCSA, with exceptions for Provincial All- star and

school teams, as well as Associate member teams with the consent of the Associate member league (Rule 5(i));

(f) All youth (U6-U18) residing in the Province of British Columbia shall be eligible for registration as a youth player in the Defendant BCSA (Rule 5(v));

(g) Youth age players, to be considered eligible for youth district cup, inter district cup or provincial cup play; must have played at least one league game in a properly constituted youth league (Rule 5(bb);

(h) For the purposes of the Tournament Rules section (Rule 19), a tournament is defined as a Competitive Event spanning a time line of no more than 10 calendar days, and the competition committee has final authority to determine the status of any event (Rule 19(a));

(i) Teams and players shall not compete in any match or competition that has not been approved by the Defendant BCSA (Rule 20(f));

(j) A youth age player, to retain youth status, must register and play within the district which administers soccer for the area in which that player resides at the time of their first league game of the season (except as otherwise specified) (Rules 23(a)(b) and (d));

(k) The Defendant BCSA oversees the operation of the BC Soccer High Performance League (the "BCHPL"), and the BCHPL shall be managed by a board of governors operating under bylaws approved by the Defendant BCSA and shall be open to Youth Players whose parents or guardians are residents of British Columbia (Rules 28(a), (b) and (d)); and

(l) Youth players involved with the BCHPL will register directly with the BCHPL (Rule 28(e). [sic]

45. As a sport governing body for soccer in the Province of British Columbia exercising a power to sanction play, the Defendant BCSA has contractual obligations to any persons or organizations which wish to participate in organized soccer in the Province of British Columbia, whether or not they are members of the Defendant BCSA.

46. Alternatively, the Defendant BCSA has a contractual relationship with the Plaintiff TSS as a result of the membership of the Plaintiff TSS in the Defendant BCSA, the express terms of which are that the operations of the Defendant BCSA will be governed by the Society Act, the Constitution and Bylaws of the Defendant BCSA as well as the Rules and Regulations adopted by the Defendant BCSA, and that all directors and officers will conduct themselves accordingly and only act within the terms of such statute, Constitution, Bylaws and Rules and Regulations.

47. In addition, implied terms exist with respect to such contract between the Defendant BCSA and its members, which include, but are not limited to, the following:

(a) that the Defendant BCSA will conduct itself with the utmost good faith in its dealings with members;

(b) that the Defendant BCSA will abide by requirements of procedural fairness and natural justice in dealing with its members, including the approval of sanctioning for play in leagues and tournaments and the registration of players;

(c) that the requirements of procedural fairness and natural justice include the consistent and even-handed treatment for members, including but not limited to refraining from participation in operations that may be in competition with members or which may limit the reasonable participation by players in accordance with the Constitutional Purposes of the Defendant BCSA, as well as the sanctioning for play in a manner such that certain members do not benefit in preference to others and players are not disadvantaged.

48. The membership of the Plaintiff TSS with the Defendant BCSA is listed as "Associate Member" and not a "Limited Associate Member". The membership of the Plaintiff TSS is not for a short term of 30 days as provided in Article 3(2)(c) of the Bylaws of the Defendant BCSA, and its membership has been issued and renewed on an annual basis.

49. In any event, even if the Plaintiff TSS was found to be confined to the status of Limited Associate Member under Article 3(2)(d) of the Bylaws of the Defendant BCSA, the Plaintiff TSS would normally be entitled to the granting of permission for its teams to attend "individual events" which are sanctioned by recognized governing bodies.

50. No definition of "individual events" is found in the Bylaws of the Defendant BCSA.

51. The Defendant BCSA has interpreted the membership of the Plaintiff TSS to be that of a Limited Associate Member and that the definition of "individual events" is limited to certain tournament play. Such interpretation is restrictive to the participation of the Plaintiff TSS in regulated play, is not consistent with the treatment accorded other Associate Members, and is also not limited to the only definition for a "tournament" which can be found in Rule 19(a) of the Defendant BCSA, being a "Competitive Event" spanning a time line of no more than 10 calendar days. Decisions by representatives of the Defendant BCSA concerning participation by the Plaintiff TSS teams and players have been unilaterally made based upon such interpretation.

52. Additionally, the participation by the Plaintiff TSS in individual events is also restricted by the interpretation of the Defendant BCSA that only players registered with the Defendant BCSA can attend, that is, sanctioning of play will only be granted to players of the Plaintiff TSS who are registered through other BCSA members and is not to include full time players of the Plaintiff TSS who are not so registered with other BCSA members. And, as Rule 4(a) prohibits teams and players from playing against any team that is not a member of the Canadian Soccer Association or an affiliated association such as the Defendant BCSA, there is an effective prohibition in the Rules for play

by teams or players against a team of the Plaintiff TSS unless the said Plaintiff has its players registered through Active Members of the Defendant BCSA

53. Other Associate members of the Defendant BCSA do not have such restrictions. University players are registered with their own leagues which are not themselves registered or affiliated with the Defendant BCSA, and such registration of university players with their team or league does not automatically grant them BCSA registration privileges. Nonetheless, such teams regularly play unsanctioned games against local youth teams or Vancouver Whitecap teams, that is, without the requirement to register players with the Defendant BCSA, and some university players, in an unsanctioned league, also play in leagues registered or affiliated with the Defendant BCSA. The Plaintiff TSS is, on the other hand, stopped from playing soccer games in individual events such as the Whitecaps Showcase and the Western Canada Showcase with unregistered players.

54. There are no Bylaws or Rules of the Defendant BCSA known to the Plaintiffs which specifically indicate that for-profit academies, as Limited Associate Members or otherwise, can only have game privileges granted to its players who are registered with an Active Member.

55. The Defendant BCSA has treated and continues to treat the Plaintiff TSS as a different type of member than other Associate Members, such as universities and those private for- profit academies which are operated in concert with Active Members which academies would, absent such connection, be in the same situation as the Plaintiff TSS. The Plaintiff TSS has not been able to either rely upon the registration of its players through itself, as is done with other organizations, or register its players directly with the Defendant BCSA, and has not been able to obtain sanctioning from the Defendant BCSA to have its teams participate in leagues or other competitive events and thereby have its players benefit from game experience. The inconsistent treatment of the Plaintiff TSS by the Defendant BCSA in comparison to other members is not in accordance with the general principles of the Constitution of the Defendant BCSA and the punitive aspects of the Rules and Regulations noted above are threatening to any players registered with the Plaintiff TSS. Such conduct of the Defendant BCSA is damaging to the operations of the Plaintiffs.

56. Concerning player registration, the Defendant BCSA has interpreted the FIFA Rules in such a manner as to refuse registration of players involved with the Plaintiff TSS directly with the Defendant BCSA. Such decision is inconsistent with the treatment of other Associate Members by the Defendant BCSA.

57. The Defendant BCSA has also refused or failed to approve participation by the Plaintiff TSS in league play in foreign jurisdictions, which participation should have no adverse impact on the Defendant BCSA, its members or its principles.

58. The application by the Plaintiff TSS to participate in the BCHPL was rejected by the Defendant BCSA, through its direct operation of the

BCHPL. While any applicant to play in the BCHPL must be approved for play in the normal course and not every applicant is expected to be accepted, the ongoing and unequal treatment of the Plaintiff TSS by the Defendant BCSA and the competing interests of participating Active members in the BCHPL contributed to such decision of rejection and made the consideration of the application of the Plaintiff TSS other than in accordance with the principles of natural justice.

59. The Defendant BCSA allows certain other members to participate in soccer contests in the Province of British Columbia, such as within the BCHPL, without having a connection to a territorial region of a district or Active Member, that is, certain other entities have a non-geographical status similar to the Plaintiff TSS without any requirement of a connection to a particular territory. The requirement for players of the Plaintiff TSS to register through an Active Member is inconsistent with the treatment granted other members as well not being within the intent of FIFA concerning registration of players. Such positions taken by the Defendant BCSA are not consistent with the express or implied contractual obligations of the Defendant BCSA to the Plaintiff TSS, as a member or otherwise.

60. The Defendant BCSA, as a result of its position, is in control of the market for non-professional soccer within the Province of British Columbia, which includes the collection of revenue for training of players by its Active Members or for-profit academies run in concert with such members, and exerts its dominance in favour of such Active Members or persons or organizations attached to such Active Members in preference to for-profit academies such as the Plaintiff TSS which are not geographically attached to an Active Member. Such conduct is not consistent with the express or implied contractual obligations of the Defendant BCSA to the Plaintiff TSS, as a member or otherwise.

61. It is impossible for the Plaintiffs to obtain a fair and unbiased resolution of any dispute with the Defendant BCSA within the procedural processes of the Defendant BCSA, given the control of the Defendant BCSA by its Active Members, the control by the Defendant BCSA of the BCHPL, and the financial advantages granted by the Defendant BCSA to for-profit academies run by individuals or organizations in contract with certain Active Members giving them a preference in competition with the Plaintiff TSS.

62. The Defendant BCSA breached the express or implied terms of its contract with the Plaintiff TSS in:

    (a) Refusing consent for the Plaintiff TSS to participate in any sanctioned domestic or foreign soccer matches with its own players without such participating players being registered through other Active Members;

    (b) Refusing consent for the Plaintff TSS to participate in leagues in foreign jurisdictions;

    (c) Refusing participation by the Plaintiff TSS in leagues within the Province of British Columbia;

(d) Refusing direct registration with the Defendant BCSA of the players registered with the Plaintiff TSS which would enable them to participate in sanctioned play;

(e) Treating the Plaintiff TSS in an unequal and inconsistent fashion in comparison to the participation for play of players with other Associate Members;

(f) Establishing a system whereby high performance athletes are channelled to the BCHPL, including paid training by other for-profit academies, in which participation is restricted and the Plaintiff TSS has not been accepted for participation due to the unequal treatment the Defendant BCSA gives to the Plaintiff TSS in relation to other members; and

(g) Supporting the competitive for-profit operations of third parties attached to Active Members in preference to those of the Plaintiff TSS.

Such breaches apply to any contract that exists between the Plaintiff TSS, in its capacity as a member or otherwise, and the Defendant BCSA.

63. The actions of the Defendant BCSA through its authorized representatives as set out above constitute, in whole or in part, omissions, defects, errors and/or irregularities in the conduct of the affairs of the Defendant BCSA as set out in Section 85 of the Society Act.

64. The said breaches of the contracts of a contract between the Defendant BCSA and the Plaintiff TSS has caused damages to be suffered by the Plaintiffs as follows:

(a) Lost revenue from participation in league play and certain tournament play in foreign jurisdictions;

(b) Lost revenue from participation in league and certain tournament play in the Province of British Columbia;

(c) Damages arising from the abuse of the dominance of the market for paid training by soccer athletes within the Province of British Columbia;

(d) Loss of certain athletes due to the inconsistent interpretation of the rights of membership in such a manner so as to limit the ability of the Plaintiff TSS to promote that its training of athletes includes consistent sanctioned game outlets;

(e) Loss of certain athletes from paid training arrangements with the Plaintiff TSS, such athletes moving to the training by for-profit academies connected with Active Members or the Whitecaps organization as a result of the ability to have access to the BCHPL and provincial cup and provincial team play, including restrictions imposed by Active Member clubs in the BCHPL on players training with them in participating in other soccer contests with other teams; and

(f) Damages resulting from contact made by representatives of Defendant BCSA with third parties with whom the Plaintiff TSS desired to activate tournament or league participation, suggesting that the teams of the Plaintiff TSS were not eligible to participate, such suggestions being based upon the interpretation of the Constitution, Bylaws and Rules and Regulations of the Defendant BCSA by its representatives.

Paragraphs currently numbered 42ff under the subtitle "Generally" would be renumbered as 65ff.

Under Part 2, Relief sought, there would be additions as follows:

- a Declaration that the Defendant is in breach of contract with respect to sanctioning decisions for play of the Plaintiff and registration of the Plaintiff's players;
- a Declaration that the breaches of contract by the Defendant constitute defaults in compliance with the Constitution, Bylaws and Rules of the Defendant, thereby resulting in omissions, defects, errors or irregularities in the conduct of the affairs of the Defendant pursuant to Section 85 of the Society Act;
- An Order, pursuant to Section 85 of the Society Act, or otherwise:

  (a) requiring the Defendant to provide the approval for sanction of play in the same manner as for other Associate Members, and in particular for foreign and provincial tournament and league play; and

  (b) requiring the Defendant to register players of the Plaintiff TSS;

  in addition to any other remedies available to the Plaintiffs

[86] What do these claims amount to? I expect the new amendments probably set out the claim that the plaintiffs have always intended to bring – namely, a claim for breach of an alleged express or implied contract against the defendant society.

[87] The question that I must address in considering these amendments is whether it is plain and obvious that the proposed amendments are bound to fail. If not, the amendments ought to be allowed. The defendant made a number of strong arguments that the plaintiffs' claim will fail; however, to succeed the defendant must show not only that the plaintiff's claim is weak but that, on the materials facts pleaded alone or proposed to be pleaded, it has no prospect of success. The potential for the defendant to present a strong defence should not prevent the plaintiff from proceeding with its proposed new claims, so long as it is not plain and

obvious those new claims are certain to fail: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 at para. 36. Clearly, I cannot weigh the merits of the arguments at this stage.

[88] The proposed amendments suggest that there is a contractual relationship between the defendant and any person wishing to participate in organized soccer. That appears to be the underlying basis of the claim by the plaintiff Sportstown, who is not a member of the defendant society. I do not see any basis for that assertion and none was suggested to me. If a person is not a member of a society, and as such is not a party to the bylaws and constitution that ground the contractual claim, there is no basis for an implied or express contractual claim. Accordingly, the proposed amendments by Sportstown must fail.

[89] However, TSS is a member of the defendant society. TSS relies on its membership in the defendant society to advance a claim in contract, both express and implied, the material terms of which include: a duty of utmost good faith; procedural fairness in dealings including applications for sanctioning for play in leagues, tournaments, and the registration of players; and even-handedness, including not participating in operations that may be in competition with its members. TSS asserts it is an associate member, not simply a limited associate member, an assertion that the defendant says is inconsistent with the existing pleadings; however, TSS also advances its proposed amendments on an alternative basis if it is found to be a limited associate member.

[90] The proposed amendments specifically challenge the interpretation of the bylaws that restrict the membership of the plaintiff to that of a limited associate member, and the meaning of “individual events” in Article 3(2)(d) of the defendant society’s bylaws to tournaments.

[91] Paragraphs 61 and 62, which are set out above, appear to be the most succinct statement of the proposed amended claims. The proposed amendments were summarized by the defendant in its written argument this way:

> In paragraph 62 of the Proposed Amendments the Plaintiffs summarize the decisions and actions of the BCSA that they allege constitute breaches of the express or implied terms of the contract between TSS and the BCSA:

> (a) Requiring TSS players to register with the BCSA through an Active member;
>
> (b) Refusing consent to TSS to participate in leagues in foreign jurisdictions;
>
> (c) Refusing consent to TSS to participate in leagues within B.C.;
>
> (d) Refusing to permit TSS to directly register its players with the BCSA;
>
> (e) Treating TSSS [sic] in an unequal and inconsistent fashion in comparison of full Associate members;
>
> (f) Creating the BCHPL for high performance players, including paid training by other for-profit academies, and not accepting the application of TSS to participate in the BCHPL; and
>
> (g) Supporting the competitive for-profit operations of third parties attached to Active members in preference to the operations of TSS.
>
> The Plaintiffs further allege in paragraph 63 that the actions and decisions of the BCSA described in the Proposed Amendments ”constitute, in whole or in part, omissions, defects, errors and/or irregularities in the conduct of the affairs” of the BCSA as set out in section 85 of the *Society Act*.

[92] The main points advanced by the defendant in opposition to the proposed pleadings are:

- TSS is a limited associate under Article 3(2)(d) of the bylaws and not an Associate Member, and as such does not have the contractual benefits that are asserted;
- the court’s review of domestic tribunals such as this private society is limited to supervising and setting aside orders made without jurisdiction, in bad faith or contrary to the rules of natural justice;
- the court’s jurisdiction does not extend to reviewing whether a decision of the society was correct or was reasonable, but only to reviewing whether there was jurisdiction to make it or whether it was made in denial of natural justice;
- courts are reluctant to interfere with decisions of domestic tribunals where internal remedies such as an appeal process have not been exhausted;

- limitations on the participation of limited associate members are consistent with the bylaws and are an internal matter not subject to review by the courts;
- the requirement that TSS be registered through an active member is also an internal matter not subject to review by the courts;
- differential treatment of limited associate members compared to full associate members and active members is consistent with the bylaws and rules;
- the requirement of fair play or natural justice has been met by the defendant;
- a party seeking relief under section 85 of the *Society Act* must proceed by petition.

[93] The authorities referred to me by the defendant support the general reluctance of the courts to become involved in a supervisory capacity over the decisions of voluntary organizations. However, the relationship of the members to a society is contractual and in some circumstances the court will intervene. The following comments of Prowse J.A. (with McEachern C.J.B.C. concurring) in *Peerless (Guardian ad litem of) v. British Columbia School Sports* (1998), 50 B.C.L.R. (3d) 35 at para. 23 (C.A.), are useful on this application:

> As noted by Madam Justice Newbury at para. 15 of her reasons, the courts have been gradually moving from a policy of non-interference with the decisions of "private bodies" to a reluctant willingness to exercise a limited supervisory jurisdiction depending on the nature of the rights or interests at stake. In my view the rights and interests asserted in this case are significant and engage the limited supervisory jurisdiction of the court. In coming to that conclusion, I note that there are numerous decisions involving similar interests in which the courts have accepted that they have such a supervisory role to play, including: *Parks (Guardian ad Litem of) v. B.C. School Sports* (1997), 145 D.L.R. (4th) 174 (B.C.S.C.); *Sheddon et al. v. Ontario Major Junior Hockey League et al.* (1978), 19 O.R. (2d) 1 (Ont. H.C.); *Smith v. Ontario Federation of Secondary School Athletics* (15 January 1992), (Ont. Dist. Ct.) [unreported]; *Vancouver Hockey Club Ltd. v. 8 Hockey Ventures Inc.* (1987), 18 B.C.L.R. (2d) 372 (S.C.); *Warkenkin v. Sault Ste. Marie Board of Education* (1985), 49 C.P.C. 31 (Ont. Dist. Ct.); *Olson (Re)*, [1988] B.C.J. No. 1642 (B.C.S.C.); and *Clark (Litigation guardian of) v. Ontario Federation of School Athletics Assns.* (1997), 22 O.T.C. 152 (Ont. Ct. (Gen. Div.)).

[94] In my view, it is not plain and obvious that the proposed amendments raised by TSS require the court to step outside its limited supervisory jurisdiction over the decisions of "private bodies", or that the rights and interests asserted in this case are of a nature and degree of significance which does not engage the court's jurisdiction.

[95] I note the fact that TSS's allegations raise issues concerning the interpretation of the defendant society's bylaws is not an absolute bar to the court's intervention. Courts have previously exercised their jurisdiction in interpreting the terms of a "private body's" bylaws. In *Olson (Re)*, [1988] B.C.J. No. 1642 (S.C.), a member of the basketball team of the University of Victoria was ruled ineligible to play on the basis of a decision made by the Eligibility Committee of the Canadian Interuniversity Athletics Union (a private body in which the various competitive universities were voluntary members). That decision was premised on an interpretation of the term "preceding calendar year" in the Union's code, so as to require the student to maintain a minimum academic standard over the course of 12 consecutive months, despite the fact that the student had satisfied the academic requirements in a shorter space of time. While accepting "without question" Mr. Justice Dohm's statement of the law in *Vancouver Hockey Club Ltd. v. 8 Hockey Ventures Inc.* (1987), 18 B.C.L.R. (2d) 372 (S.C.), that the court's jurisdiction to review orders of an unincorporated association is narrow, McKenzie J. rejected the interpretation advanced by the Union and issued a declaratory order that the student was eligible to participate in the inter-collegiate athletics.

[96] The question of the status of TSS as either an associate or a limited associate member, the interpretation of the bylaws, including the meaning of "individual events" under Article 3(2)(d), and the question of whether there was procedural unfairness amounting to a breach of an alleged contract, are questions that might be easily resolved where there is evidence on those questions before the court. But at this stage I am not satisfied beyond a reasonable doubt that the express and implied contract claim should be summarily dismissed without a consideration of that evidence. Even if the propositions advanced by the defendant, which I have set out above, are generally correct, the authorities show that judicial reluctance to review the decisions of "private bodies" is very dependent on the facts

of the dispute and in appropriate circumstances the court will intervene on claims involving alleged implied or express contracts as well as breaches of natural justice.

[97] With respect to the defendant's argument concerning the form of the proceedings, while a member has the ability to file a petition under the *Society Act* for relief in certain circumstances, this fact does not in of itself support the defendant's position that, where a direct claim for breach of contract is advanced by way of notice of civil claim, it is plain and obvious relief under s. 85 of the *Society Act* may not also be sought in the same proceeding.[1]

[98] With respect to the defendant's argument that the plaintiffs have failed to exhaust their internal remedies, the law is clear that there is no obligation to exhaust internal remedies if the remedy is "unreasonable, impractical and ineffective": *Gee v. Freeman* (1958), 16 D.L.R. (2d) 65 (B.C.S.C.) at para. 18, cited with approval in *Vancouver Hockey Club*. I note the case of *Farren v. Pacific Coastal Amateur Hockey Association*, 2013 BCSC 498, relied upon by the defendant, involved a petition for judicial review of a decision of a "private" body, not a direct claim for damages. There is no basis before me to conclude that the plaintiff TSS would be able to obtain its requested relief under its claim for breach of contract from the CSA, and it is not appropriate for me to attempt to resolve that issue on an application to amend pleadings.

[99] For the above reasons, I find it is not plain and obvious that the claims of TSS in the proposed amendments are bound to fail.

[100] Accordingly, while I dismiss the claim by Sportstown and the presently pleaded claims by TSS, I allow the amendments proposed by TSS to advance the claims summarized in paragraphs 60-62 of the proposed amendments.

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[1] For example, in *Sol Sante Club v. Grenier*, 2006 BCSC 1804, which involved an action for trespass, the defendant counterclaimed for reinstatement of his membership in a club under s. 85 of the *Society Act* and for damages. The defendant's claim was allowed to proceed, and he was ultimately successful as to both reinstatement and damages.

Conclusion

[101] The proceeding by Sportstown and its proposed amendments are dismissed. The defendant is entitled to costs, in any event of the cause, payable at the conclusion of the proceeding involving TSS.

[102] The claims of the plaintiff TSS, before the proposed amendments, are dismissed. The amendments proposed by TSS are allowed and costs of the application will be in the cause.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson