

CANADA / JUDGMENT

Clarke Communication Contracting Inc. v. Black Diamond Limited Partnership

2024 BCSC 465

COURT

Supreme Court of British Columbia

DECIDED

20 March 2024

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2024 BCSC 465 Clarke Communication Contracting Inc. v. Black Diamond Limited Partnership

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clarke Communication Contracting Inc. v. Black Diamond Limited Partnership,

2024 BCSC 465

Date: 20240320

Docket: S49146

Registry: Penticton

Between:

Clarke Communication Contracting Inc.

dba CC Contracting Inc.

Plaintiff

And

Black Diamond Limited Partnership,

Jager Contracting Inc. aka Jager Construction Inc.

aka JHI Contracting and Justin Deitterle

Defendants

And

Before: The Honourable Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

M.E.A. Danielson

Counsel for the Defendants Jager Contracting Ltd. and Justin Deitterle:

L. Richardson

Place and Date of Hearing:

Penticton, B.C.

January 16, 2024

Place and Date of Judgment:

Penticton, B.C.

March 20, 2024

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Introduction

- [1] The defendants, Jager Contracting Ltd. and Justin Deitterle (collectively, "Jager"), apply to set aside a pre-judgment garnishing order obtained by the plaintiff, Clarke Communication Contracting Inc. ("CC Contracting").
- [2] The garnishing order was obtained as part of an action which involves a series of subcontracting agreements and a dispute over non-payment of invoices for construction-related work. A central issue at trial will be what the terms of the contract were between Jager and CC Contracting; Jager say it was a verbal agreement, the majority of the terms of which are unknown at this time.
- [3] On November 23, 2023, CC Contracting filed a requisition seeking a pre-judgment garnishing order against Jager. The next day, CC Contracting obtained the garnishing order ex parte by desk order (the "Garnishing Order").
- [4] On or about November 29, 2023, as a result of the Garnishing Order being served on Valley First, A Division of First West Credit Union ("Valley First"), the amount of \$12,574.76 was debited from Jager's bank account and paid into court.
- [5] Jager seeks to have this Garnishing Order set aside and the funds returned.
- [6] I note that a notice of discontinuance has been filed against the defendant, Town of Princeton, on November 23, 2023. As such, the style of change should be amended to remove the Town of Princeton as a defendant. I have done so in these reasons.

Preliminary Objection

- [7] As a preliminary matter, CC Contracting objected to the admissibility of some of the evidence in Affidavit #1 of Justin Deitterle (the "Deitterle Affidavit"), sworn and filed on December 4, 2023 in support of this application. CC Contracting argues that the affidavit contains hearsay, impermissible opinions and arguments, irrelevant statements, and conclusory statements of fact and law.

Rules of Admissibility of Affidavit Evidence

- [8] Rule 22-2(12) of the BC Supreme Court Civil Rules [Rules], provides that an affidavit must be confined to the facts the deponent is permitted to state in evidence at trial, subject to R. 22-2(13).
- [9] Rule 22-2(13) provides that hearsay evidence may permitted on interlocutory applications only when the source of the information and belief is given. It is not sufficient to specify the source without naming the individual: *Coast Building Supplies Ltd. v. Superior Plus LP*, 2016 BCSC 1867 at paras. 9-13 [Coast Building]. Failing to identify the source is inconsistent with the notion of reliability: *Coast Building* at para. 12.

- [10] A corporation or other legal entity cannot be the source of hearsay; the source must be "an identified person": *Canada (Attorney General) v. Steelhead Aggregates Ltd.*, 2022 BCSC 34 at para. 18.
- [11] Authorities are clear that affidavits cannot contain opinions or arguments: *Coast Building* at para. 14. As this Court stated in *Home Equity Development Inc. v. Crow*, 2002 BCSC 546:
- [30] Opinion evidence is inadmissible unless given by an expert witness. Personal opinions or a description of the deponent's or another person's reaction to events is inappropriate and is nothing more than argument in the guise of evidence. It should not be admitted, and those portions of the affidavits containing opinion and reaction will be struck unless the plaintiffs did not object to them.
- [12] Legal arguments, analysis, positions, opinions, and conclusions that are not statements of fact are not admissible: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at paras. 9-10.

Analysis

- [13] I will address each of the paragraphs of the Deitterle Affidavit that are objected to.
- [14] CC Contracting argues that paragraphs 12-13, and 15 of the Deitterle Affidavit contain hearsay evidence without adequate identification of the source. These paragraphs identify "Black Diamond" or "a Black Diamond representative" as the source of the belief or information. I agree that since no individual is identified as the source of the hearsay statements in these paragraphs, they should be struck. Paragraphs 12-13 are also inadmissible on the basis that Mr. Deitterle is opining about the motives underpinning Black Diamond's actions, which he is not in a position to provide.
- [15] CC Contracting also objects to paragraphs 19-23 on the basis that the statements are irrelevant and are the evidence of counsel on disputed facts. The evidence given in each of these paragraphs is prefaced with the words, "Counsel for Jager informs me that, during the telephone conversation on November 2, 2023, counsel for Clarke was made aware that ". Each paragraph sets out what Daryl Clarke was purportedly told about Jager's positions in the action before CC Contracting filed for a garnishing order. I do not agree that the contents of these paragraphs are irrelevant in light of Jager's position that full and frank disclosure was not made to the Registrar, as I will outline in more detail below. However, there were other avenues available to counsel to have this evidence admitted in a way that conforms with the Rules and safeguards the principle of reliability, such as attaching a copy of correspondence between counsel confirming what was discussed. I agree that these paragraphs should be struck.
- [16] The third area of objection is in relation to parts of the Deitterle Affidavit which CC Contracting say contain argument and/or conclusory statements of fact and law. In paragraphs 24-26, Mr. Deitterle states that Jager does not owe any debt to CC Contracting,

that if a debt is owed it must be set off by the cost incurred by Jager to remedy CC Contracting's deficient work, and that Jager has not breached any terms of the contract. In paragraph 29, Mr. Deitterle states that it is impossible, without knowing the terms of the agreement, to determine what debt is owed. These statements contain legal arguments and conclusions that Mr. Deitterle is not in a position to make. Further, I note that the defendants did not plead the defence of set off. For these reasons, paragraphs 24-26 contain inadmissible evidence and are struck.

Relevant Background

- [17] CC Contracting is a site services installation contracting company. The principals are Daryl Clarke and Angela Malkovich.
- [18] Jager is a company that provides a variety of groundwork services. At all material times, Justin Deitterle was the sole director of Jager.
- [19] The Town of Princeton engaged Black Diamond Limited Partnership ("Black Diamond") as the general contractor for a BC Housing Management Commission temporary housing project (the "Project") to be located in Princeton, British Columbia.
- [20] Mr. Clarke says that from late August 2022 through to October 2022, he had discussions about CC Contracting being subcontracted by Jager to perform groundwork on the Project. He met with Mr. Deitterle at the Project on September 9, 2022. After this meeting, Mr. Deitterle sent Mr. Clarke site plans and other materials for the Project. Mr. Deitterle advised that Jager was in the process of being approved by Black Diamond as a vendor on the Project.
- [21] According to Mr. Clarke, sometime in September 2022, Mr. Deitterle told Mr. Clarke that Jager had been subcontracted by Black Diamond. Jager says that it entered into a contract with Black Diamond on October 15, 2022. Mr. Clarke says he was not aware of the terms of the Black Diamond subcontract. Jager says that a term of the contract required that Jager have all subcontractors approved by Black Diamond before engagement.
- [22] Mr. Clarke says that throughout October 2022, he sought quotes from suppliers for materials for the Project. After obtaining those quotes, he provided Mr. Deitterle with an oral quote for \$143,152.80 inclusive of taxes for the work to be provided by CC Contracting (the "First Oral Quote"). Mr. Deitterle said he had obtained a lower quote from another company but that company was not able to start the work until January 2023. The Project was supposed to be completed by the beginning of December 2022. Mr. Clarke says that Mr. Deitterle accepted the First Oral Quote.

- [23] CC Contracting received some updated specifications for the water and sewer plans which required that the water line for the units be increased. As a result of receiving updated pricing for the pipe and fitting requirements from suppliers, Mr. Clarke verbally advised Mr. Deitterle of the revised pricing for the work which was \$176,983.80 (the "Second Oral Quote"). Mr. Clarke says that Mr. Deitterle told him the Second Oral Quote was acceptable.
- [24] In late October 2022, CC Contracting had materials and equipment delivered to the Project site. Work commenced around October 31, 2022.
- [25] On November 2, 2022, Mr. Deitterle asked Mr. Clarke to put the Second Oral Quote in writing. That day, CC Contracting provided a written quote to Jager for the site water and sewer service installation in the amount of \$166,556.00 plus taxes (the "First Written Quote"). Inclusive of taxes, the First Written Quote was for \$174,883.80. Mr. Clarke believes the \$2,100 difference between the Second Oral Quote and the First Written Quote had something to do with a contemplated change order that was never made.
- [26] Ultimately, CC Contracting invoiced Jager in the amount of the Second Oral Quote.
- [27] There is a dispute on the evidence respecting a conversation about the costs being inflated. Mr. Deitterle says he believed that the First Written Quote was inflated by approximately \$105,000. Mr. Clarke claims that this concern was never communicated to him. Mr. Clarke says that after he communicated the Second Oral Quote, Mr. Deitterle raised no concerns and instructed CC Contracting to start work on the Project. There was no documentary evidence provided in the application record supporting any concern regarding the quotes.
- [28] On November 15, 2022, at the request of Mr. Deitterle, CC Contracting provided a new quote in the amount of \$25,400 plus taxes (the "Second Written Quote") for the supply of a storm and catch basin and drainage dry well, which was work that fell outside the scope of work included in the First Written Quote. Mr. Clarke says that Mr. Deitterle accepted the Second Written Quote.
- [29] On November 17, 2022, CC Contracting sent Mr. Deitterle four invoices in the cumulative amount of \$184,590.88 addressed to Jager. The particulars were:

Invoice Number

Invoice Date

Work Description

Invoice Amount (Tax Inclusive)

2223-26

November 17, 2022

Water & Sewer [Line] Installation + Materials

\$143,152.80

2223-27

November 17, 2022

Water & Sewer Line Increase in Costs

\$33,831.00

2223-28

November 17, 2022

Electrical line installation support

\$3,721.54

2223-29

November 17, 2022

Drainage Basin and Dry Well Concrete Delivery/Return and Restocking Fee

\$3,885.00

Total

\$184,590.34

[30] In the covering email to Jager dated November 17, 2022, it states: "Let Daryl know if there are any issues."

[31] Mr. Clarke explains that invoices 2223-26 and 2223-27 (cumulatively, \$176,983.80) represent the price of the Second Oral Quote, plus the increase in costs for the change from the original specifications of the water service line. Invoice 2223-28 related to extra costs for electrical line installation support, which Jordan Wilson of Black Diamond requested CC Contracting provide, which was outside the scope of work under the Second Oral Quote and First Written Quote. Invoice 2223-29 related to costs of returning drainage basin and drywall concrete due to a change in the requirements of the Project.

[32] Mr. Clarke says that Mr. Deitterle was aware of the additional work requested by Black Diamond and agreed that CC Contracting should invoice Jager for the electrical installation work reflected on invoice 2223-28 on a "time and materials" basis.

[33] Mr. Clarke says Jager never told him that CC Contracting should be invoicing Black Diamond or that Jager was no longer responsible for paying CC Contracting directly.

[34] In mid-November 2022, Mr. Deitterle asked CC Contracting if it would perform additional site preparation for the sidewalks for the Project. Mr. Clarke agreed to do so on a "time and materials" basis. He says they did not discuss labour or equipment rates, but that he intended to charge Jager its usual rates. Mr. Deitterle agreed for Jager to pay CC Contracting

on that basis and instructed Mr. Clarke to proceed. The work was performed on November 21 and 22, 2022. Mr. Clarke says that Mr. Deitterle did not advise him that Jager was not authorized to request the work nor that Black Diamond was responsible for paying for it.

- [35] On December 15, 2022, CC Contracting sent invoice 2223-34 to Jager in the amount of \$10,621.28, inclusive of taxes, for the extra sidewalk work.
- [36] CC Contracting completed the requested work on the Project by the end of 2022. Mr. Clarke says that, as of the end of 2022, Mr. Deitterle had not expressed any concern with CC Contracting's work or invoicing.
- [37] Jager claims the last day it worked on the Project was in January 2023, being the date the contract between Black Diamond and Jager dissolved.
- [38] In February 2023, Black Diamond subcontracted CC Contracting to repair some of Jager's work on the Project which was unrelated to the work CC Contracting had done. CC Contracting also performed work for Black Diamond pursuant to three purchase orders; this work was unrelated to the work CC Contracting had previously performed for Jager. The invoices for this work were sent by CC Contracting to Black Diamond.
- [39] In January and February 2023, Mr. Clarke made numerous phone calls to Mr. Deitterle seeking payment of CC Contracting's invoices. On March 10, 2023, Mr. Deitterle sent a text message to Mr. Clarke in which he stated:

Good morning daryle.

Invoice has been accepted. I should see payment by March 17th. The minute the hold is off the funds I'll get a cheque to you!

Apologies for the wait! And thank you for your [patience].

[Underlining in original.]

- [40] CC Contracting did not receive a cheque on March 17, 2023 and continued to contact Jager in March and April 2023.
- [41] On April 28, 2023, CC Contracting received a cheque from Jager in the amount of \$75,000. The re line on the cheque states: "Payment #1 Princeton Seniors Housing".
- [42] On May 8, 2023, CC Contracting emailed Jager confirming receipt of the \$75,000 and advising that over \$120,000.00 remained outstanding. There was no response to the email. In May and June 2023, Mr. Clarke sent a number of text messages to Mr. Deitterle which were not answered. He says he also attempted to contract Mr. Deitterle by phone, but his calls were not answered.

- [43] On May 24, 2023, CC Contracting emailed Black Diamond advising that just over \$120,000.00 remained owing and asking whether or not Jager had been paid in full and when the remaining amount would be paid. A further email was sent to Black Diamond on June 19, 2023. It is not clear what position Black Diamond is taking since no response to civil claim was filed as of the date of the hearing on January 16, 2024.
- [44] On July 6, 2023, counsel retained for Jager wrote a letter to Mr. Clarke. She advised that CC Contracting had breached the implied contract terms between CC Contracting and Jager and, as such, CC Contracting was not entitled to further remuneration. She further demanded that Jager cease correspondence with Black Diamond and Jager regarding the Project and any alleged outstanding payments. It is not clear to me why she demands that CC Contracting not communicate with Black Diamond since it does not appear she represents that entity. She then demanded a series of documents.
- [45] Mr. Clarke retained a lawyer and filed a Builder's Lien against the land but agreed to discharge it since it was filed out of time.

Overview of the Proceedings

- [46] The notice of civil claim was filed on October 3, 2023. It alleges that CC Contracting invoiced Jager in the sum of \$195,214.62 for the supply of labour and materials for the construction of water and sewer line installation, electrical line installation support, installation of drainage basin and dry well concrete and site preparation, and related services (the "Work") on the Project. As of August 8, 2023, CC Contracting claims that \$120,211.62 is still owing. CC Contracting also claims against Jager and Mr. Deitterle for breach of trust and against Mr. Deitterle for knowing assistance and knowing receipt in breach of trust.
- [47] It was agreed between counsel that Jager would have until December 1, 2023 to file its response to civil claim.
- [48] On November 23, 2023, CC Contracting filed a requisition seeking a pre-judgment garnishing order together with Affidavit #1 of Ms. Malkovich made November 7, 2023.
- [49] On November 24, 2023, CC Contracting obtained the Garnishing Order ex parte by desk order.
- [50] On or about November 29, 2023, as a result of the Garnishing Order being served on Valley First, \$12,574.76 was debited from Jager's bank account and paid into court.
- [51] On December 4, 2023, Jager filed the response to civil claim. In it, Jager claims that it never received any further funds from Black Diamond for the work done by CC Contracting beyond the \$75,000.00 that was paid to CC Contracting. Based on Jager's pleadings and subsequent oral submissions, it seems that its primary position is that, at some point in the fall of 2022, Black Diamond severed the relationship between Jager and CC Contracting and effectively assigned that relationship and payment obligations to itself and that as such, any debt owing from Clarke to Jager was assigned to Black Diamond. Jager also alleges that CC

Contracting did not complete the work in a "good workmanlike manner", did not provide the required proof of work, did not comply with work safety standards or failed to provide documentation of such, and poached the contract for services with Black Diamond from Jager causing lost revenue and profit.

[52] On December 4, 2023, Jager also filed a notice of application seeking an order to set aside the Garnishing Order and that the funds be released to them (the "Application").

[53] CC Contracting filed its application response on December 11, 2023.

[54] The parties appeared before me on January 16, 2024 to make submissions on the Application (the "Hearing").

[55] On January 17, 2024, Jager filed a third-party notice against Black Diamond.

The Garnishing Order

Legal Framework

[56] Section 3 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 [COEA] provides for the ex parte process for obtaining a pre-judgment garnishing order. Section 3(2) sets out what must be included in the statutorily required supporting affidavit. In support of a garnishing order, someone aware of the facts must depose to the following: (i) that an action is pending; (ii) the time of its commencement; (iii) the nature of the cause of action; (iv) the actual amount of the debt, claim or demand; and (v) that it is justly due and owing, after making all just discounts: COEA, s. 3(2)(d).

[57] There are a number of legal bases on which an applicant can apply to set aside a garnishing order. An applicant may apply to set aside a garnishing order on the basis that the requirements set out in s. 3(2) of the COEA were not satisfied. An ex parte prejudgement garnishing order can also be set aside where the applicant failed to make full and frank disclosure. An applicant can also apply pursuant to s. 5(2) of the COEA on the basis that the court finds it "just in all of the circumstances": *Cummings v. Chen*, 2023 BCSC 266 at paras. 30-31.

Position of the Parties

Position of Jager

[58] Jager seeks to have the Garnishing Order set aside and the funds returned on all of the aforementioned bases.

[59] Counsel argued the statutory requirements for a garnishing order set out in s. 3(2)(d) of the COEA are not met. The main thrust of Jager's submission at the Hearing was that the materials before the Registrar were insufficient to justify that the amount claimed was a liquidated debt. Jager argued that the material facts put before the Registrar in support of the Garnishing Order fell short of the disclosure obligations required for an ex parte order.

Counsel submitted that, on the materials submitted by CC Contracting in support of the Garnishing Order, the Registrar must have speculated about the terms of the agreement between the parties. Jager argued that where there is no certainty of terms of a contract, there cannot be a liquidated demand.

- [60] Counsel for Jager also argued that setting aside the order would be just in the circumstances, pursuant to s. 5(2) of the COEA. It argues that it should be set aside because CC Contracting's claim is weak, Jager has a strong defence, and the Garnishing Order resulted in undue hardship. It argues that, as a result of the Garnishing Order, it was not able to meet its payroll obligations on December 1, 2023, nor meet its obligations to its debtors and suppliers during the week of November 27, 2023.

Position of CC Contracting

- [61] CC Contracting's position is that it would be unjust to set aside the Garnishing Order. It argues that a number of factors weigh in favour of letting the Garnishing Order stand, including that it believes that Jager is insolvent and that it is "almost certain" it will otherwise get a dry judgment against Jager. It argues that Jager cannot rely on its own impecuniosity to defeat a validly obtained garnishing order. It further argues that the fact that Jager believes it has an arguable defence and that CC Contracting is aware of the defence does not preclude pre-judgment garnishment. In any event, it submits that Jager's defence is weak.
- [62] Counsel for CC Contracting took issue with Jager's submissions on the issue of whether the materials put before the Registrar were sufficient and whether the garnishing order was for a liquidated amount since those arguments were not clearly set out as a legal basis in the notice of application. Plaintiff's counsel claimed that he was not aware that such an argument was being advanced prior to the Hearing.
- [63] I note that the "legal basis" set out in the Application was premised primarily on s. 5(2) of the COEA; however, I am satisfied that the "factual basis" clearly sets out the Jager's position that certain material facts were not put before the Registrar and that the claim was not for a liquidated demand. Further, para. 4 of the "legal basis" references a decision, being *Rufus Enterprises Ltd. v. Mikelson*, 2006 BCSC 1815, in which the question of whether the sum was a liquidated amount was clearly at issue. As such, I will consider each of the arguments below. While Jager's arguments on whether adequate disclosure was provided and whether the claim is for a liquidated debt overlap, I deal with them separately for clarity.

Analysis

Is the claim for a liquidated debt?

- [64] In *Dhaliwal v. Bonterra Resources Ltd.*, 2019 BCCA 303 [Dhaliwal], the Court of Appeal discussed the principles governing the granting and release of pre-judgment garnishing orders and the interpretation of s. 3(2)(d) of the COEA, as previously set out in *Politeknik Metal San ve Tic A.Ş. v. AAE Holdings Ltd.*, 2015 BCCA 318 [Politeknik]:
- [24] Tysoe J.A. affirmed that garnishing orders are "unique and extraordinary" because they provide the "only form of pre-judgment execution in circumstances where the defendant has not granted security over its assets to the plaintiff": at paras. 20-21. Consequently, the "law has developed the requirement that there must be meticulous or strict compliance with the statutory prerequisites for the issuance of a garnishing order": at para. 23. The statutory prerequisites are found in the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 ["COEA"].
- [26] Based on the manner in which s. 3(2)(d) of the COEA has been interpreted, the law is clear that the claim underlying a prejudgment garnishing order must involve a liquidated sum: Politeknik at para. 24, citing *Pe Ben Industries Co. v. Chinook Construction & Engineering Ltd.*, [1977] 3 W.W.R. 481 (B.C. C.A.). Pe Ben holds that "unliquidated damages, whether arising in tort or in contract, cannot be the subject matter of a garnishing proceeding": at 486.

[Emphasis added.]

- [65] A claim is only a liquidated demand if it is a specific sum that is "already ascertained or capable of being ascertained as a mere matter of arithmetic": Dhaliwal at para. 29, citing *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78 at para. 9.
- [66] The fact that a claim is made for a specific amount does not necessarily mean that the plaintiff is advancing a liquidated claim: Dhaliwal at para. 33; *Primus Electric Inc. v. Ryken Construction Inc.*, 2014 BCSC 421 at para. 43. In *Busnex* at para. 8, the Court stated the following:

If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation, beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages.'

- [67] In *Dhaliwal*, the Court provided the following guidance on the analysis of whether a claim is liquidated:
- [36] Looking behind a plaintiff's quantification of the amount said to be due and owing to determine whether the action actually advances a liquidated claim is necessary given the extraordinary nature of a prejudgment garnishing order. This form of garnishment attaches at a stage of the proceedings in which the plaintiff's allegations have not yet been determined on their merits. As a result, strict compliance with the statutory prerequisites is required. I emphasize this point, while also appreciating that strict compliance does not mean "perfect compliance": *Golder Associates and Politeknik* at paras. 24 and 23, respectively.

[37] As part of the liquidated claim analysis, an important question to ask is "What is the true nature of the plaintiff's claim?": *Mitchell v. Fournier*, [1949] 1 W.W.R. 349 (B.C. S.C.) at 352. Again, as aptly noted in *Primus Electric* (at para. 42):

The point of the analysis is not to determine the precise amount of the claim or what is due under some agreement, the point is to ensure that the "nature of the cause of action" is one that is capable of resulting in a claim that is a liquidated and not an unliquidated amount. [Emphasis added.]

[38] Other questions helpful to the enquiry, although neither mandatory nor exhaustive, are set out in *Holden Day Wilson v. Ashton* (1993), 104 D.L.R. (4th) 266 (Ont. Div. Ct.) at 276:

1. Is [the amount claimed] ascertainable by calculation or by referring to a fixed scale of charges?
2. Can the calculation be made by reference to the agreement between the parties itself, or, at least, implied by the agreement?
3. Was the price or method of calculation of the price agreed upon by the parties?
4. Has the defendant obliged him/herself to pay a specific sum of money? and
5. Was a reasonable estimated cost established by the parties?

As cited in *Primus* at para. 13. See also, *Eades v. Kootnikoff*, [1996] 1 W.W.R. 730 (B.C.S.C.) and *Jefferies v. American Cumo Mining Corporation*, 2013 BCSC 1150 at para. 25.

[68] With these legal principles in mind, I turn to the question of whether the affidavit in support of the application contained enough detail to satisfy the Registrar that what was being claimed was a liquidated debt.

[69] Jager says that the quantification of the money owing to them is not readily ascertainable. They assert the Registrar had to speculate as to the terms of the agreement, including whether the invoices were for a fixed sum or work performed on a time and materials basis.

[70] I note Jagger's reliance on *Hastings v. O'Neill Hotels & Resort Management Ltd.*, 1999 CanLII 6486 (B.C.S.C.) in which Master Patterson provided a list of criteria that a supporting affidavit should meet, including that it should "clearly spell out" among other things, the basis upon which the amount owing is calculated pursuant to the contract, the number of units of work or products delivered, and other terms: at para. 20. Jager says that the absence or inadequacies of these details in the supporting affidavit (and the attached invoices and notice of civil claim) mean the garnishing order cannot stand.

[71] This list of criteria was discussed by Justice Schultes in *Jefferies v. American Cumo Mining Corp.*, 2013 BCSC 1150 at paras. 24-26. Justice Schultes rejected the characterization of this list as a mandatory checklist, stating:

- [25] while Master Patterson ultimately set out what could be read as a mandatory checklist of affidavit ingredients, the decision on which he relied, that of Mr. Justice Shaw in *Eades v. Kootnikoff* (1995), 13 B.C.L.R. (3d) 182 (S.C. [In Chambers]), actually described those factors, which in turn were adopted from *Holden Day Wilson v. Ashton* (1993), 104 D.L.R. (4th) 266 (Ont. Div. Ct.), only as "several useful questions to help identify what is a liquidated demand." Shaw J. did not characterize them as mandatory ingredients of an affidavit in themselves.
- [26] The point of all this is that the rigid technical approach that some of the cases seem to imply should be eschewed in favour of a broader inquiry about whether or not the supporting material conveyed the necessary information to the reviewing master or judge.
- [72] Further, in my view, the Hastings decision is factually distinguishable on the following bases: the plaintiff's claim, as it was set out in the pleadings, was for damages against the defendants; the invoices in question were not attached to the supporting affidavit; and there was no information about the type or amount of services rendered beyond "cryptic" statements: at paras. 9, 17.
- [73] In undertaking this assessment, I note that my "focus must be on the adequacy of the material that was in front of the registrar in the original application extrinsic material cannot save the order if the original material was not adequate in itself": *Jefferies* at para. 17.
- [74] The affidavit in this case is not perfect; it would have been possible for Ms. Malkovich to provide further details about the nature of the work rendered and the basis for the charges. The invoices do not set out in detail the formula by which the invoiced figures were arrived at. While Mr. Clarke provided additional information about how these figures were arrived, the history of the oral and written quotes, as well as the terms of which invoices were for a fixed amount and which were based on a "time and materials" basis in a subsequent affidavit, these details were not before the Registrar. However, I am satisfied that the material facts relevant to the statutory requirements under the COEA were provided. As the Court held in *Dhaliwal*, the standard is strict compliance, not "perfect compliance": at para. 36. In the circumstances, I am satisfied that the "true nature" of the plaintiff's claim is one that is capable of resulting in a claim that is liquidated; it is not more akin to a claim for unliquidated damages: *Dhaliwal* at para. 37.

Did CC Contracting disclose all material facts in applying for the Garnishing Order?

- [75] The principle of full and frank disclosure is applicable to the issuance of garnishing orders (*Cummings* at para. 31; see also *Politeknik* at paras. 30-33), although the tendered material may be narrower in scope than would be required to obtain an ex parte injunction: *Cummings* at para. 33, citing *Environmental Packaging Technologies Ltd., v. Rudjuk*, 2012 BCCA 342 at para. 51.
- [76] The duty of disclosure imposed on a plaintiff applying for a garnishing order is "very high": *Cummings* at para. 33, citing *Politeknik* at para. 31. When applying for a garnishing order, the disclosure required is that which is relevant and material to the statutorily prescribed

contents of the supporting affidavit; a material fact is one that may have affected the outcome: Cummings at para. 32. If the facts set out in the supporting materials provided in support of a garnishing order are misleading or otherwise fail to disclose all material facts with respect to the cause of action, the garnishing order should not be sustained: Politeknik at para. 30.

- [77] The facts that must be disclosed are limited to those relevant and material to the statutory criteria permitting pre-judgment garnishment under COEA: Yinghe Investment (Canada) Ltd. v. CCM Investment Group Ltd., 2023 BCSC 2295 at para. 40. The COEA does not oblige an applicant to disclose all possible defences on an ex parte application for a pre-judgment garnishing order: Cummings at para. 35, citing Li v. Westside Preparatory Society, 2021 BCCA 153 at para. 37.
- [78] In Coombes & Sons Administration Inc. v. Copper Lake Resources Ltd., 2016 BCSC 1433, the Court considered whether additional information about the nature of the of defendant's legal positions should have been before the registrar. Now Associate Judge Muir held:
- [27] That Copper Lake disputes the claim and its amount, says Coombes Inc. subsequently agreed to take shares for debt (which is denied) or that Copper Lake did not have the resources to pay the invoices rendered is completely irrelevant to whether this claim is liquidated. Those assertions show no more than that the claim is disputed, just as Mr. Justice Schultes noted in Jefferies v. American Cumo Mining Corporation, 2013 BCSC 1150 at para. 20:
- [20] In essence, this information shows no more than that there is another side to his claim, something the registrar must assume applies in virtually every case
- [79] While I am mindful of the "extraordinary" nature of this remedy and the need for meticulous adherence to the statutory requirements, I am not satisfied that the plaintiff failed to meet its disclosure obligations in the circumstances. In my view, CC Contracting did not withhold material facts that would have had an impact on the Registrar's decision.
- [80] In addition to their arguments relating to whether enough detail was included to establish that the claim was a liquidated debt, as addressed above, Jager argues that full and frank disclosure was not made since their positions in the action, being that the quality of the work was deficient, that the terms of the agreement are disputed, and that Black Diamond was responsible for paying CC Contracting, were not before the Registrar.
- [81] Jager did not adduce any admissible evidence to support a claim that either Ms. Malkovich or Mr. Clarke had knowledge of these positions at the time the Garnishing Order was applied for. The parts of the Deitterle Affidavit providing as such have been struck for failing to comply with the Rules. There was no other evidence that CC Contracting was aware that Jager was alleging its work was unsatisfactory until the response to civil claim was filed, nor is there evidence that Mr. Clarke was aware of an alleged agreement between Jager and Black Diamond about payment terms. Further, while Jager argued that the terms of its

agreement with CC Contracting are disputed, it has not set out what it purports the terms to be.

[82] In any event, CC Contracting was not required to disclose every possible defence that Jager may raise to dispute the claims against them. As was held in *Jefferies*, "this information shows no more than that there is another side to [the] claim, something the registrar must assume in every case": at para. 20. In my view, this context, had it been before the Registrar, would not have changed the nature of the dispute between the parties nor the characterization of the cause of action.

[83] I am unable to find any meaningful deficiency in the material that was before the Registrar in support of the garnishing order.

Is the Garnishing Order just in the all circumstances?

[84] Section 5(2) of the COEA provides that a pre-judgment garnishing order may be set aside if it is just in all of the circumstances to do so.

[85] In *Flintstone Concrete Ltd. v. Peace River Contracting Ltd.*, 2003 BCSC 1137, Master Groves (as he then was) held that, when determining what is just in the circumstances, the court must consider the following: the intent of the provisions; the risk of flight; harm and undue hardship; abuse of process; the necessity of the order; and the relative strengths and weaknesses of the plaintiff's and defendant's case is a valid consideration in determining: at para. 92. At para. 94, the Court held:

In determining whether an order should be set aside, the court has the duty to consider all relevant material filed in support of the order and by the parties and from that consider the arguments of the parties in support or defence of the order. The court at this juncture is not to decide the overall issues in the case, but merely weigh the strengths and weaknesses of the case as is necessary in respect of the arguments made. What is important, however, is whether the plaintiff properly adhered to the requirements set out in the Act and whether the defendant provided any just reason why the order should not stand

[86] Whether a garnishing order is necessary in the circumstances will turn, in large part, on whether the defendant is solvent and the risk of a dry judgment: *Li v. Jin*, 2020 BCSC 1324 at para. 77.

[87] For the following reasons, I am not convinced that setting aside the Garnishing Order would be just in the circumstances.

[88] At this stage of the proceedings, it is my view that the plaintiff has a relatively strong claim against Jager. This is, of course, not a final determination as more evidence may well be adduced at trial; however, the evidence before me indicates that Mr. Clarke provided Mr. Deitterle with a number of quotes, which were accepted, and that work was performed pursuant to that agreement. There is no evidence that Mr. Deitterle was dissatisfied with the quality of the work. On the evidence before me, any alleged assignment of debt was done

without consent of CC Contracting. Mr. Deitterle indicated to Mr. Clarke that the invoiced amount was accepted and that payment was forthcoming.

- [89] The hardship caused to Jager and the necessity of the Garnishing Order are interrelated and I consider them together. Mr. Deitterle's evidence is that the removal of \$12,574.76 (about 10% of the total claim) from Jager's account prevented Jager from meeting its payroll obligations and its obligations to other debtors and suppliers. While I accept that Jager appears to be experiencing financial hardship, I am not convinced that it can be said that it is the Garnishing Order that is the cause of this financial difficulty. From Jager's own evidence, it has an extremely limited cash supply and other debtors.
- [90] At the Hearing, counsel for Jager also submitted that unless the Garnishing Order is set aside, Jager will not be able to operate and generate a profit, thereby reducing the likelihood that any future judgment against Jager would be recoverable. Based on Jager's own evidence, I am left with a strong impression that there is a real risk that without the Garnishing Order, there will be a dry judgment.
- [91] In all of the circumstances, Jager has not persuaded me that the Garnishing Order is unjust in the circumstances.

Conclusion

- [92] The defendants seek an order for special costs on the basis that the plaintiff did not make full and frank disclosure and proceeded to garnish Jager's account despite its claim not being for a liquidated debt. I did not find this to be the case and as such, special costs are not appropriate.
- [93] Costs will be to the plaintiff in the cause.

"The Honourable Justice C. Forth"

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Prepared on 30 October 2026 · Esheria