

CANADA / JUDGMENT

Her Majesty the Queen v. B & B Barges Ltd.

2021 BCSC 279

COURT

Supreme Court of British Columbia

DECIDED

23 February 2021

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2021 BCSC 279 Her Majesty the Queen v. B & B Barges Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Her Majesty the Queen v. B & B Barges Ltd.,

2021 BCSC 279

Date: 20210223

Docket: S196584

Registry: Vancouver

Admiralty Action In Rem Against:

The Ship "Colleen Z" and the Ship "Meldella"

and In Personam

Between:

Her Majesty the Queen

in right of the Province of British Columbia

Plaintiff

And

B & B Barges Ltd.

and the Ship "Colleen Z" and the Ship "Meldella"

and all others interested in those Ships

Defendant

Before: The Honourable Madam Justice Sharma

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff, appearing via teleconference:

R. Doerksen

M. Kleisinger

Counsel for the Defendant, B & B Barges Ltd., appearing via teleconference:

G. Beaubier

Place and Date of Hearing:

Vancouver, B.C.

November 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 23, 2021

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I. INTRODUCTION

- [1] This is an application for contempt brought by the plaintiff, Her Majesty the Queen in Right of the Province of British Columbia (the "Province"). It alleges that the defendant, B & B Barges Ltd. ("B & B"), is in contempt of a court order issued by Justice Baird on December 13, 2019. He issued an injunction ordering B & B to permanently remove the defendant ships "Colleen Z" and "Meldella" and all of their component parts (the "Barges") from Crown lands before January 31, 2020 (the "Order"). His judgment is reported at 2019 BCSC 2160 ("Injunction Judgment").
- [2] B & B concedes that it has not complied with the Order. Even without that concession, I am satisfied that the Province adduced evidence that proves beyond a reasonable doubt that the Barges have remained in place after the Order was issued.
- [3] However, B & B submits its dire financial situation either precludes the relief sought by the Province, or alternatively, raises a reasonable doubt as to its wilful non-compliance with the Order. In response, the Province submits B & B's position depends upon a misapprehension of the applicable legal principles.
- [4] I agree that B & B's position relies on case law inapplicable to these facts. The Order does not involve payment of money. Therefore, B & B's financial situation does not bar a finding of contempt provided the Province has adduced evidence proving all other elements beyond a reasonable doubt. I find the evidence does establish, without a doubt, that B & B has failed to comply with the Order. Indeed, B & B admits it has not complied with the Order. Therefore, the Province's application is granted.
- [5] I add that even if, in the alternative, B & B's financial circumstances were relevant, my conclusions would remain the same. I have also considered the Court's discretion not to make a finding of contempt. However, I am not satisfied that is appropriate on the facts before me to exercise that discretion. Specifically, I am not satisfied that B & B made good faith efforts to comply with the Order.
- [6] As such, I find that B & B is in contempt of the Order.

II. FACTS

- [7] B & B relied on a number of affidavits at the hearing which took place before Justice Baird on November 25, 2019, four of which it also relied upon in opposition to the contempt application.
- [8] Those four affidavits are:

- a) one made in July 2019 by Mark Butler, who is a director and shareholder of B & B, as well as another company, Twenty Ten Timber Products Ltd. ("Twenty Ten");
 - b) one made in July 2019 and another made in October 2019, both by William Baumel, a director of both companies; and
 - c) one made in July 2019 by Robert Garrett, who is the manager of B & B and a shareholder of Twenty Ten.
- [9] All three also filed affidavits in September 2020 in response to the contempt application. B & B relied on both sets of affidavits in opposing the Province's application for contempt.

A. The Barges

- [10] B & B owns the Barges, which were used together as a self-contained, floating logging camp. One barge was a cookhouse, and the other a bunkhouse for a logging crew.
- [11] In his July 2019 affidavit, Mr. Butler stated that B & B rented the Barges to Twenty Ten "for periodic payments sufficient to repay the Barge Loan". Mr. Butler attached to his affidavit a one-page, hand-written document dated June 17, 2016 documenting the agreement between B & B and Twenty Ten. He signed that agreement on behalf of B & B, and Mr. Baumel signed on behalf of Twenty Ten. I note the agreement post-dates some of the events described in the following paragraphs.
- [12] In August 2015, Twenty Ten moved the Barges to Jennis Bay in Drury Inlet, British Columbia, in order to accommodate crews for its logging operations situated nearby.
- [13] The cookhouse was anchored about 15 feet outside of the boundary of Twenty Ten's license of occupation. Dacen Brooks (a natural resource officer with what was, in 2019, the Ministry of Forests, Lands, Natural Resource Operations and Rural Development) issued a trespass notice in October 2015.
- [14] Twenty Ten disputed that notice. A regional manager reviewed the trespass notice and found it valid. However, Twenty Ten was given a further 10 days to comply with the trespass notice.
- [15] Officer Brooks issued another trespass notice about two weeks later because Twenty Ten had not complied with the first notice. He also issued a penalty.
- [16] Without notice to the Province, Twenty Ten successfully obtained an injunction preventing the Province from taking any action upon the trespass notices. However, the court set aside that order in late November 2015.
- [17] By December 2, 2015, the Barges had been moved in compliance with the trespass orders.

- [18] In April 2016, Twenty Ten moved the Barges to Yeo Cove near Bella Bella to commence logging on Yeo Island. Twenty Ten completed that logging operation and in approximately December 2017, relocated to another timber sale license in Drury Inlet, where it already had a floating camp.
- [19] Mr. Butler deposed it was B & B's intention to have the Barges remain near Bella Bella anticipating that Twenty Ten may get future logging work in the same area. However, Mr. Butler also stated that in December 2017, on behalf of B & B, he entered into a verbal agreement to have the Barges moved.
- [20] B & B's agreement to move the Barges was with Ivan de Bagheera. Mr. de Bagheera agreed to tow the Barges from Yeo Cove to his premises at Donkey Cove where he would secure them. Twenty Ten agreed to compensate him \$10,000. However, rather than paying that amount outright, B & B gave him 7,000 litres of diesel fuel and agreed to pay a monthly fee for securing and looking after the Barges.
- [21] Mr. Butler deposed that Mr. de Bagheera did tow the Barge with the cookhouse to Donkey Cove as agreed. However, unknown to Mr. Butler at that time, Mr. de Bagheera failed to tow the other barge to Donkey Cove; it remained at Yeo Cove.
- [22] In early January or February 2018, Mr. Butler was informed by Twenty Ten's employees that the bunkhouse, which remained at Yeo Cove, was listing heavily, sliding off the Barge and onto the shore and into the ocean. Mr. Butler deposed he immediately flew up to Yeo Cove to deal with the matter. He described what he did:

I brought in some heavy machinery, removed the bunkhouse from the Barge, and piled to the debris on the adjoining land (which formed part of Twenty Ten's license of occupation). I then burned the debris. I was acutely aware that herring were about to spawn in Yeo Cove and were not to be disturbed by any activity in the water, due to the herring's spawning in Yeo Cove the previous year (at that time Twenty Ten had to shut down its logging operation in that location).

- [23] He stated that after the cleanup was complete, Twenty Ten towed that Barge to Mr. de Bagheera's floating premises at Donkey Cove where it was secured.

B. The Trespass

- [24] In June 2018, the Province received a complaint about the Barges now both located in Donkey Cove. Through investigations conducted at that time, provincial officials determined that B & B did not have authority to moor the Barges at Donkey Cove. In June 2018, officer Brooks sent a trespass notice for the Barges to Twenty Ten, care of Mr. Butler and Mr. Baumel, by email and registered mail.

- [25] Mr. Butler informed the Province of B & B's agreement with Mr. de Bagheera. Mr. Butler stated that he learned for the first time at that point that Mr. de Bagheera had no authority to secure his floating camp at Donkey Cove, even though it had been there for years. Mr. Butler further understood that Mr. de Bagheera had applied for a license of occupation, but it was unlikely that his application would be approved.
- [26] Mr. Butler stated that "the next information received by us" was that the Barges had broken away, or been set adrift, and had gone aground in Donkey Cove about 300 meters from Mr. de Baheera's floating premises.
- [27] Mr. Butler asked Mr. Garrett and Fred Parsons to travel to Donkey Cove to deal with the matter.
- [28] Mr. Garrett deposed that upon arrival at Donkey Cove, he found that the cookhouse and bunkhouse were tied together side by side. The bunkhouse was hard aground, "hung up on rocky bottom". There was a hole ripped in the hull and two of the four compartments were flooded. The cookhouse was also flooded.
- [29] Mr. Garrett and Mr. Parsons brought in several large water pumps and spent five days trying to get the water out of the Barges to keep them afloat. They had limited success.
- [30] According to Mr. Garrett, on the third day of working at Donkey Cove, officials from the Department of Transportation arrived and assisted him and Mr. Parsons. They discussed B & B's plan to try to move the Barges further up the shoreline to reduce the risk of any further damage to the hulls.
- [31] Mr. Garret deposed that Department of Transportation officials stated they should not move the Barges until an official could certify that the vessels were seaworthy, and approve of their transport plan.
- [32] Mr. Butler attached to his affidavit what he described as an email confirming an "order" issued by the Department of Transportation. Rather than an order, what is attached to his affidavit is an August 24, 2018 email from K.J. Singh, a senior marine inspector, to Mr. Garett. The email stated, in part:

As per our telephone conversation, prior to moving the barge from present location; Holes in the barge are to [be] repaired/patched to the Transport Canada Marine Safety "satisfaction". Barge to be certified seaworthy by a Marine Surveyor/insurance company, and report to that effect to be [sent] to us. Towing and passage plans to be provided and approved by TCMS No person will be allowed on the barge when being towed.

- [33] Mr. Garrett deposed that they finally succeeded in moving the Barges about 100 feet to a better location on the beach. They tied the Barges to trees to prevent their drifting away. He and Mr. Parsons patched small holes in the cookhouse and managed to get it afloat. However, except for a few hours, they were unsuccessful in getting the bunkhouse afloat.

C. Evidence about B & B's Financial Status

- [34] In his July 2019 affidavit, Mr. Butler deposed that B & B was incorporated for the "sole purpose" of buying and holding the Barges. Mr. Baumel adopted this fact in his October 2019 affidavit.
- [35] In his September 2020 affidavit, Mr. Baumel repeated that B & B's "sole purpose" was to be a holding company. However, he then added that B & B had a secondary purpose to expand its facilities for recreational sports fishermen at coastal regions of Vancouver Island. He did not explain this contradiction as to B & B's purpose.
- [36] In his 2019 affidavit, Mr. Butler also stated that B & B has always been a holding company and that it "does not carry on any business other than simply holding the Barges and, to cover their costs, renting them to Twenty Ten" and that B & B "does not maintain a bank account, it does not have any money, and it does make any other revenue [sic], and has no assets other than the Barges". Mr. Baumel's October 2019 affidavit contains identical wording about B & B.
- [37] Mr. Butler stated that he arranged a \$350,000 loan for purchasing the Barges, although his affidavit is silent on when or from whom they were purchased.
- [38] In his September 2020 affidavit, Mr. Baumel repeated that B & B owned no assets other than the two Barges. He stated it had no cash flow "other than what is received" from Twenty Ten. He also deposed that the financing B & B obtained to purchase the Barges was "private financing", and that the Barges' previous owner was a company with whom Mr. Baumel had done business with over the years. He also stated that Twenty Ten's rent "was paid directly to the party that had lent the initial purchase monies for the barges".
- [39] In his July 2019 affidavit, Mr. Butler claimed that B & B had been trying to "solve the difficulty" of the Barges' ongoing trespass on Crown land. He stated he received a "ball park quote" from Amix Towing for it to "travel to Donkey Cove to salvage the Barges" at a cost of \$300,000-\$400,000. He also had discussions with Shearwater Marine Ltd. about possibly repairing the Barges and moving them to a marina, to use as breakwaters. Apparently, the Heiltsuk First Nation was also looking into a possible solution. However, he gave no further details or documentation about any of these discussions.
- [40] Mr. Garrettt attached to his July 2019 affidavit a document from Heiltsuk Horizon, which did provide a quote for the following scope of work: "provision of labour, materials, equipment and services required to remove and disposed of two derelict barges that have run ashore in Bella Bella". The total quote is \$470,000.
- [41] In his September 2020 affidavit, Mr. Garett stated that he followed up the "ballpark" quote contained in Mr. Butler's July 2019 affidavit. However, he did not make that enquiry until August 2020.

- [42] He attached some portion of his email correspondence with AMIX. In it, AMIX asked if he was "being told to move these or?" Mr. Garrett responded, that "[w]e are ordered to move them as they are trespassing on crown land" and "DOT says we can't move them until they are repaired" and that the Province told them to "move them right away".
- [43] AMIX responded that preliminary pricing based on "barge recovery & decon done on continuous basis until completion" would be \$950,000 for both. Among the work included in that quote were: mobilizing divers, a crane barge and support barge; pumping water out; welding the Barges; preparing the Barges for floating/lifting; towing them to Campbell River, and; conducting a full decommission.

D. The Province's Evidence

- [44] The Province relies on 10 affidavits, some of which attach proof of personal service of the Order and correspondence amongst counsel. The primary affidavits supporting the application were made by officer Brooks and Diana Chang.
1. Officer Brooks' Evidence
- [45] Officer Brooks made an affidavit in June 2019, and two affidavits dated July 29, 2020.
- [46] Officer Brooks is a member of the North Island - Central Coast Field Unit, which has responsibility for among other locations, Jennis Bay, Yeo Cove, Yeo Island and Donkey Cove. The Field Unit collaborates with and relies on the Heiltsuk Integrated Resources Management Department ("HIRMD") regarding issues of mutual interest that arise in the Heiltsuk's traditional territory, some of which falls within the West Coast Region's boundaries.
- [47] Officer Brooks deposed it is his normal practice to conduct company searches to inform himself of directors of companies conducting logging in the West Coast Region. In that capacity, he has knowledge of various companies with logging operations in the West Coast Region for which Mr. Baumel and Mr. Butler are or were directors. He attended Twenty Ten's logging operations in Greenway Sound, Jennis Bay and Yeo Cove on many occasions, at which time he observed the Barges.
- [48] Officer Brooks had specific knowledge based either on personal observations or on information provided by other officials of the Barges at times relevant to these proceedings, including:
- a) in September 2015, he observed that the Barges were moored outside of Twenty Ten's license of occupation in Jennis Bay;
 - b) on December 2, 2015, he observed that the Barges had been moved from Jennis Bay;
 - c) on June 18, 2018 he observed the Barges at Donkey Cove;

- d) on August 20, 2018, he received from HIRMD photographs taken of the Barges in Donkey Cove, and he confirmed (by referring to a resource mapping system maintained by the Province) that the Barges were located on Crown land;
- e) in a conversation on September 13, 2018, Mr. Butler informed officer Brooks that he expected the cookhouse barge would be repaired by September 19, and after that, B & B would arrange a tugboat to tow the Barges to Campbell River;
- f) in the same conversation, Mr. Butler stated that having until October 31, 2019 would be adequate time to have the Barges removed from Crown land, and on that basis, officer Brooks issued the second trespass notice requiring the Barges to be removed from Crown land by October 31, 2018;
- g) on October 30, 2019, officer Brooks received photographs from HIRMD confirming that the Barges remained on Crown land;
- h) on November 1, 2018, he issued another trespass notice to B & B along with a \$1,000 administrative penalty for failure to comply with the previous trespass notice; I understand that penalty remains unpaid;
- i) in an email to officer Brooks, Mr. Garrett claimed that B & B had been ordered by Transport Canada not to move the Barges;
- j) on November 16, 2018, HIRMT confirmed the Barges had not been removed from Crown land, and there appeared to be no sign of them being prepared for removal;
- k) on November 27, 2018, officer Brooks attended a telephone conference with officials from Transport Canada in which it was agreed that K.J. Singh would provide further clarification to B & B about its options to comply with both the trespass order, and Transport Canada's requirements;
- l) K.J. Sing forwarded to officer Brooks email correspondence including a November 6, 2018 email from Mr. Garrett stating that "people at Shearwater are considering buying both barges" and "[s]hould know in the next few days";
- m) on December 5, 2018, officer Brooks invited Mr. Garrett, Mr. Butler and Transport Canada officials to attend a meeting to discuss expectations and requirements with regard to the Barges, but Mr. Garrett declined;
- n) he received a complaint from a resident of Denny Island dated March 11, 2019 attaching photographs with a statement that one of the Barges had sunk, and the structure of the other one was slipping into the water;
- o) HIRMD informed officer Brooks on April 30, 2019 that as of that date, it saw no evidence that the cookhouse had been secured to its barge;
- p) HIRMD reported as of February 3, 2020 that the Barges remained on Crown land;

- q) Officer Brooks attended Donkey Cove on February 10, 2020 and observed that the Barges had neither been repaired nor removed;
 - r) on February 10, 2020, he observed that the cookhouse had slid from the middle of the Barge, was hanging over the edge by about ½ metre and one side was resting on the sea floor; he also observed that the other Barge was completely resting on the sea floor and had large rust holes in its hull;
 - s) in addition, on February 10, 2020, he saw debris in the water and on the sea bed below both Barges, including siding apparently from the cookhouse, scrap steel, a BBQ and a tarp; and
 - t) Officer Brooks again travelled to Donkey Cove on July 22, 2020 and observed that the Barges remained unrepaired and had not been removed from Crown land; he saw no significant change from his February 2020 observations.
- [49] Officer Brooks had an email exchange with K.J. Singh about the Barges on August 20, 2018 in relation to steps he might take to enforce the trespass order. He wanted to ensure he would not be "ordering B & B to do anything that would contradict an order from Transport Canada". In further correspondence, he also informed K.J. Singh that the Province had received complaints from the "local First Nation about the barges and the environmental concerns".
- [50] K.J. Singh responded in a September 11, 2018 email that Transport Canada "was not in a position to set a time frame". Its only concern was to ensure that when the Barges were towed, they be seaworthy. He also confirmed his last communication from B & B on August 28, 2018 was that the cookhouse had been repaired and it "had hired a Marine Surveyor for inspection".

2. HIRMD's Evidence

- [51] Ms. Chan is a Natural Resource Manager at HIRMD with personal knowledge of matters relevant to this application. She made affidavits dated June 10, 2019 and October 2, 2019.
- [52] Ms. Chan provided some background about the Heiltsuk First Nation. It is an Indian band within the meaning of the federal Indian Act, comprising Aboriginal peoples within the meaning of s. 35 of the Constitution Act, 1982. The Heiltsuk derive from five tribal groups and are jointly governed by Heiltsuk Tribal Council, an elected body, and the hereditary chiefs of the Heiltsuk Nation.
- [53] Donkey Cove lies within the traditional territory of the Heiltsuk and is home to manila clams, which are part of Heiltsuk's commercial and traditional clam harvest.
- [54] HIRMD is the stewardship arm of the Heiltsuk, responsible for planning and managing the Heiltsuk's natural and cultural resources. Within HIRMD, the Aquatic Department plays a major role in the stewardship and management of marine resources. The Department is comprised of a manager, Guardian Watchmen and other staff.

- [55] HIRMD responds to complaints by contacting the appropriate federal or provincial agency.
- [56] Ms. Chan described the Guardian Watchmen program, which works to protect the health of cultural and natural resources in Heiltsuk traditional territory. Six individuals are Guardian Watchmen and, weather permitting, they patrol Heiltsuk traditional territory daily by boat to collect data, and to observe, record and report activities taking place within the territory.
- [57] Ms. Chang deposed that the Guardian Watchman provided photographs of one of the Barges at Yeo Cove on February 27, 2018. That Barge was listing.
- [58] Guardian Watchmen informed her that the Barges were moved from Yeo Cove to Kliktoatli Harbour (which includes Donkey Cove). On June 8, 2019, the Guardian Watchmen informed her that the Barges rested on a manila clam bed in the harbour during low tide and sent her photographs taken that day.
- [59] Kliktoatli Harbour contains eelgrass beds which form an integral part of the marine ecosystem, and is habitat for variety of marine species important to Heiltsuk, including herring and juvenile salmon.
- [60] Ms. Chang described some potential environmental impacts of the Barges' location, but confirmed the full impact would be unknown until the Barges are removed.
- [61] Ms. Chan observed the Barges on April 15, 2019 and observed deterioration of the bunkhouse. She saw debris in the water underneath both Barges.
- [62] Ms. Chan received confirmation from the Heiltsuk Marine Use Planning Coordinator that the annual survey of the manila clam bed in Donkey cove could not occur in July 2019 because of the Barges.
- [63] In her September 26, 2019 affidavit, Ms. Chan confirmed that HIRMD continued to receive "frequent complaints and inquiries from the public expressing their concern and frustration with respect to the presence of the Two Barges" and asking for their removal.

E. Litigation History

- [64] The Province filed its notice of civil claim in June 2019. It seeks, among other things, a declaration that the Barges are trespassing on Crown land and a mandatory injunction requiring B & B to remove the Barges. It also filed an application for the injunction on the same day (the "Injunction Application").
- [65] B & B filed both a counterclaim and a third-party notice against Mr. de Bagheera on July 17, 2019, and it filed its response to civil claim on July 18, 2019.
- [66] In its response to civil claim, B & B identifies only the following in Part 3, Legal Basis: (i) it contests whether the Barges are on land under Provincial jurisdiction, and (ii) it claims the matter is only within federal jurisdiction.

- [67] Mr. de Bagheera filed his response to third party notice on April 7, 2020. Among other things, he denies a contractual relationship existed between him and B & B.
- [68] B & B's response to the Injunction Application was filed on July 30, 2019. In addition to claiming that the test for an injunction could not be met, B & B submitted granting the injunction would be premature given other statutory remedies it alleged were available, and that the matter fell within federal jurisdiction.
- [69] The Province amended its civil claim on October 21, 2020 to add Twenty Ten as a defendant. However, counsel confirmed that Twenty Ten had not been served with the contempt application. Therefore, it did not appear at the hearing. In addition, Mr. de Bagheera did not participate in the hearing; his counsel informed counsel for the Province that he takes no position on the contempt application.
- [70] As noted, the Province's Injunction Application was heard by Justice Baird on November 25, 2019. He ordered B & B to permanently remove the Barges and their component parts on or before January 31, 2020.

III. ANALYSIS

A. The Test for Civil Contempt

- [71] The test for civil contempt is set out in *Carey v. Laiken*, 2015 SCC 17 at para. 38. The Supreme Court of Canada states that the essential element is for the applicant to prove beyond a reasonable doubt that the alleged contemnor committed an intentional act or omission that clearly breached an order of which he or she had notice (para. 38).
- [72] In the same paragraph, it added that to "require a contemnor to have intended to disobey the order would put the test "too high" and would result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" and "[i]nstead, contumacy or lack therefore goes to penalty to be imposed following a finding of contempt".
- [73] In *Law Society v. Gorman*, 2011 BCSC 1484 this Court stated there are three steps in the test for civil contempt: (i) the existence of a court order; (ii) the alleged contemnor's knowledge of the order and its terms; and (iii) alleged contemnor's failure to abide by those terms (paras. 27 and 28).
- [74] B & B does not dispute that the first two steps have been met. Nor does it contest that the Order has not been complied with. However, it relies on case law stating that the test for civil contempt has four steps.
- [75] The first two are notice and non-compliance, which B & B concedes have been met. However, B & B's submits the Province has not proven two additional steps and therefore, its application should be dismissed. B & B submits those two additional steps are the requirement to prove beyond a reasonable doubt that: (i) the alleged contemnor's non-compliance was "willful" and deliberate as opposed to accidental or unintentional, and; (ii)

the alleged contemnor was, in fact, capable of complying with the order in the sense of being capable of paying the required funds.

- [76] I do not agree that in this case, the test for civil contempt has four steps. The cases upon which B & B rely on for that proposition are easily distinguished.
- [77] B & B relies heavily on *Hokhold v. Gerbrandt*, 2019 BCSC 183. That case involves allegation of contempt for non-compliance with court orders to pay money as support in the context of a family case. In *Hokhold*, Justice Abrioux found that *Carey* did not apply to situations involving the non-payment of a monetary order (at para. 26): "There is nothing in *Carey* from which it can be concluded that the Supreme Court of Canada had in mind a situation such as existed in *Swann*, that is, the context-specific factor of ability to pay."
- [78] *Swann v. Swann*, 2009 BCCA 335 is also a case involving the non-payment of support. It is cited in *Potratz v. Potratz*, 2015 BCSC 1608, which is quoted at length in *Hokhold*, and relied upon by Justice Abrioux. *Potratz* concerns the failure to pay court-ordered support.
- [79] Justice Abrioux's comments upon which B & B rely, emanate from a line of authority which concern the non-payment of support in the family law context. He found that the factor of an inability to pay survived *Carey* and continued to apply to situations involving non-payment of monetary orders (para. 28):

In any event, *Potratz* considered both *Swann* and *Carey* and concluded that, in this province, there is a fourth element that the applicant must establish beyond a reasonable doubt when the alleged failure to pay is the substance of the contempt application. I consider myself bound by this reasoning.

[Emphasis added].

- [80] Counsel provided no case citing *Carey* in which the "fourth factor" was applied to a situation involving non-compliance with an injunction.
- [81] Not only does the present application not involve the alleged contempt of an order requiring the payment of support in the context of a family matter, the Order does not deal with the payment of money at all. It is an injunction to move the Barges in order to rectify an ongoing trespass. Accordingly, B & B's statement of the applicable law is erroneous, and its position cannot succeed.
- [82] Thus, on the undisputed evidence, and confirmed by B & B's concession that it has not complied with the Order, there is no dispute that the Province has met all three elements of the test for civil contempt.

B. B & B's Alternate Position

- [83] During the hearing, I understood B & B to develop an alternate position that its asserted financial inability to comply with the Order raises a reasonable doubt as to its "wilful non-compliance" with the Order. That position is not included in either its response to civil claim, or its application response.
- [84] More problematic, the submission does not differ at all from B & B's reliance on Hokhold.
- [85] To accede to B & B's position on this point would amount to inserting in the test for civil contempt a requirement that the Province not only prove that B & B did not comply with the Order, but that it "intended to disobey" the Order. That approach was explicitly rejected by the Supreme Court of Canada in *Carey* (above, paras. 71 and 72).
- [86] B & B's position rests on its assertion of impecuniosity. Apart from its framing of a four-part test for civil contempt, B & B did not identify the legal basis upon which financial difficulties could preclude a finding of contempt on the facts before me.
- [87] The Province submits that the Court should view B & B's evidence about its financial status with great caution. Specifically, it notes that while B & B asserts impecuniosity, scant financial documents are appended to any of the affidavits.
- [88] B & B emphasizes, correctly, that it does not bear the evidentiary onus in this application; the Province does. However, that burden is to prove the essential elements of civil contempt, which the Province has done on the basis of undisputed evidence.
- [89] I agree with the Province that the evidence about B & B's financial status leaves much to be desired. There are inconsistencies between information in B & B's affidavits filed in 2019, and those made in response to this application. There are also significant gaps in the information that is provided.
- [90] Specifically, I note the following (all paragraphs references are to this judgment):
- a) in their affidavits filed in 2019 opposing the injunction, both Mr. Butler and Mr. Baumel make categorical statements about B & B. They stated in identical words that B & B has always been a "holding company that does not carry on any business other than simply holding the Barges and, to cover their costs, renting them to Twenty Ten" and that "B & B has no bank account, has no money, makes no revenue and has no assets other than the Barges" (paras. 36 and 38);
 - b) However, other information appears at odds with that description of B & B, including:
 - i. In his September 2020 affidavit, Mr. Baumel repeated his statement that B & B has no cash flow, but he then appeared to qualify that statement by adding "other than what it received from Twenty Ten for the rental of the [Barges], in any event, those rental obligations were paid directly to the party that had lent the initial purchase monies for the [Barges]" (para. 38);

- ii. In early 2018, Mr. Butler stated that he "brought in heavy equipment" capable of removing the bunkhouse and that it was eventually towed to another location (paras. 22-23). It is unexplained how B & B, as a mere holding company, could arrange for that work, equipment, and towing, and how it would pay for those things;
- iii. Mr. Garrett described in the summer of 2018 of his using water pumps and having some success at some aspect of repairing one of the Barges (para. 29). His and Mr. Butler's affidavit are vague on the timing of these events (paras. 28 and 29). Also, it is left unexplained how B & B paid for that work and from where and how it obtained and paid for the use of the equipment;
- iv. B & B apparently paid a rental fee to Mr. de Bagheera (para. 20). It is unclear how it did so if it had no revenue;
- c) Mr. Butler referred to the original loan B & B obtained to buy the Barges, which was for \$350,000 (para. 37). However, he gave no details about the loan, or its status. In his September 2020 affidavit, Mr. Baumel stated that the loan was arranged through "private financing" with a company that he had done business with for years, but he does not name the company, nor confirm if it was at arm's length from B & B or Twenty Ten. No other details about that loan are given, including whether any amount remains outstanding;
- d) It appears however that the loan was being repaid by Twenty Ten's rental of the Barges, although Mr. Butler stated only that that B & B rented the Barges to Twenty Ten "for periodic payments sufficient to repay the Barge Loan" (para. 11). B & B's affiants did not state what the rental fee was, or how B & B would receive the fee, given statements by Mr. Butler and Mr. Baumel that B & B had no bank account, and that it was merely a holding company;
- e) I also note the contradiction about the purpose for which B & B was incorporated. Mr. Baumel's affidavit contains an apparent contradiction, and is inconsistent with Mr. Butler's evidence (paras. 34 and 35). This discrepancy about such basic information about the company is troubling;
- f) The affidavits do not attach any of B & B's corporate financial statements or tax information.
- [91] Based on the foregoing, I find the evidence is inadequate to conclude that B & B is impecunious. I confirm the evidence does not meet the civil standard of balance of probabilities, nor does it establish a prima facie case. At best, it is suggestive that B & B may have financial difficulties.
- [92] In concert with its purported impecuniosity, B & B also relies on what it claims would be its cost to comply with the Order. I also find that evidence inadequate to draw any conclusions about the cost of removing the Barges from Crown land.
- [93] B & B relies on an email exchange from one company with a preliminary quote of \$950,000 (para. 41-43). B & B submitted the quote represents what it would cost for it to comply with the Order. I am not convinced that one can draw that conclusion from the evidence, nor do I find that such an inference could reasonably be drawn.

- [94] The Order does not dictate how or in what way the Barges and their components are to be removed from Crown land. If B & B needs to move the Barges through water, it must get Transport Canada's approval of its plan to do so. However, there is no evidentiary basis to conclude that it is absolutely necessary to move the Barges (as vessels) through water to comply with the Order. The Province pointed out that it is reasonable to think there could be a way to dismantle them on site and either transport or dispose of the debris.
- [95] In any event, a single email exchange with one company is an inadequate basis upon which to draw any conclusion about the cost of complying with the Order. Moreover, B & B has not been in contact with Transport Canada since the summer of 2018 to seek approval of any plan, much less the AMIX quote.
- [96] Officer Brooks attended a telephone conference with Transport Canada in which its requirements were discussed (para. 49(k)). He attached email correspondence about that conference call. In that correspondence, Transport Canada clarified that its requirement of a plan to certify and safely move the Barges could include salvaging the Barges if they could not be repaired and moved safely. Furthermore, there is no requirement that the Barges be moved simultaneously.
- [97] The point is that Transport Canada has not and does not purport to dictate what is to be done with the Barges, except in the case that they are moved through water as vessels. As already noted however, it is unclear if that must be done to comply with the Order.
- [98] Thus, I am unable to conclude whether the AMIX is a reasonable representation of the cost to comply with the Order. For all those reasons, I do not find B & B's alternate position persuasive.

C. Collateral Attack

- [99] I also find B & B's alternate position unconvincing because it relies very heavily on a collateral attack of the Order.
- [100] B & B's alternate position repeats the position it took before Justice Baird, on almost the identical evidence. At the hearing of the Injunction Application, B & B submitted the injunction should not be issued for two reasons. The first of which was because "it [lacked] the funds required to remove the barges and thus will not be able to comply with the order sought through no fault of its own" (Injunction Judgment, para. 8). Second, B & B argued the Province ought to remove the Barges at public expense and then pursue it for repayment. Mr. Justice Baird rejected both arguments, referring to evidence that he considered was inconsistent with the claim of impecuniosity (Injunction Judgment, paras. 9-11).
- [101] B & B correctly points out that a court cannot rely on previous findings in the same proceedings as a substitute for the facts necessary to ground a finding of contempt: *Palleson-Stallan v. Stallan*, 2014 BCCA 474 at para. 6.

- [102] However, in concluding the Province has met the test for civil contempt, I do not rely on Justice Baird's findings. Furthermore, the Province did not purport to rely on Justice Baird's findings in the absence of, or as a substitute for, its burden to adduce evidence to prove the contempt. To the extent the Province referred to Justice Baird's reasons, it did so to provide necessary background and context.
- [103] Moreover, B & B's submissions on this point (about its financial status) were anchored in what it said were "significant errors" in Justice Baird's reasons. B & B claims it points out those errors not to collaterally attack the Order, but in support of its position that the Province improperly relied on Justice Baird's reasons as evidence in support of its application.
- [104] I do not agree. B & B's written submissions explicitly and repeatedly challenge the Order stating: that Justice Baird's findings at para. 9 of the Injunction Judgment were erroneous; that he "conflated" B & B and Twenty Ten; that there was "no evidentiary basis" for one of his findings; and, that he "completely overlooked" or misinterpreted the significance of other evidence.
- [105] With respect, those submissions are clearly a collateral attack on the Order and they cannot constitute a defence to contempt. Moreover, I do not find them to be a fair representation of Justice Baird's reasons for judgment.
- [106] Even if Justice Baird did err (and I explicitly find that, in my view, he did not) B & B's remedy was to appeal his order. It did not do so.
- [107] Thus, I find nothing about B & B's evidence and submissions about its financial status raises a reasonable doubt as to its guilt for civil contempt.

D. The Court's Discretion

- [108] The court retains some discretion to decline a finding of contempt. This is meant to discourage its routine use to obtain compliance with court orders: Carey, para. 36. The Court continued (para. 37):

For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

- [109] B & B did not explicitly invoke the Court's discretion in its pleading or submissions. However, the tenor of its submissions related to its purported financial status was akin to raising the issue of hardship. I find it appropriate to consider whether the discretion should be exercised in B & B's favour. This requires an assessment of whether B & B made good faith efforts to comply with the Order.
- [110] The relevant period to assess B & B's conduct began when the injunction was issued, lasting up until it filed its response to the application. The Order commands B & B to end its trespass of Crown land. That requires removing the Barges and their component parts from Crown land. I agree with the Province's submission that the Order does not necessarily require repair and towing of the Barges; it could equally involve a demolition on site.
- [111] However, it is not up to the Province or this Court to speculate how, or in what ways, B & B could comply with the Order. That burden rests squarely on B & B, and it has since the Order was issued.
- [112] I do not find that B & B has made genuine efforts to comply with the Order. It did not follow up on the initial quote from AMIX until more than seven months after the Order was issued (see above, para. 41). That timing is not consistent with a party acting in good faith.
- [113] In addition, there is no evidence that B & B has had any contact with Transport Canada since the summer of 2018. Furthermore, the evidence from HIRMD indicates there are no signs that any attempt has been made to remove or repair the Barges since the Order was issued.
- [114] B & B relied on what I have found to be an incorrect legal position by claiming its financial difficulties would preclude a finding of contempt. A party acting in good faith would support its legal position with thorough and detailed financial information. As already discussed, I found B & B's evidence about its financial status was inadequate.
- [115] For all those reasons, I am unable to find that B & B took any steps in good faith to attempt to comply with the Order. I decline to exercise the Court's discretion in its favour.
- [116] It bears repeating that the power to make a finding of contempt is fundamental to this Court's obligation to uphold the rule of law, and to ensure the integrity and dignity of the Court's process. I have not come to the conclusion that B & B is guilty of civil contempt lightly. However, the evidence unequivocally establishes that all three elements of the test for civil contempt have been met, and I am not satisfied any circumstance set out in the evidence justifies exercising the Court's discretion not to make that finding.

IV. CONCLUSION AND COSTS

- [117] For all the foregoing reasons, I find that B & B is in contempt of the Order.

[118] The Province is entitled to its costs; however, it has sought special costs. If B & B does not agree that special costs should be awarded, the parties may request a hearing before me, but that request must be made within 14 days of this judgment.

"Sharma J."

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