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CANADA / JUDGMENT

## Trustees of the IWA v. Wade

2019 BCSC 1085

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COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1085 Trustees of the IWA v. Wade

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trustees of the IWA v. Wade,

2019 BCSC 1085

Date: 20190704

Docket: S157349

Registry: Vancouver

Between:

Trustees of the IWA - Forest Industry Pension Plan

and Trustees of the IWA - Forest Industry Ltd Plan

Plaintiffs

And

Roger Wade

Defendant

Before: The Honourable Madam Justice Church

Reasons for Judgment

Counsel for the plaintiffs:

G.B. Brandt

Defendant, appearing in person:

R. Wade

Place and Date of Trial:

Vancouver, B.C.

February 19 - 22, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 4, 2019

## Introduction

- [1] The Plaintiffs in this action seek judgment against the defendant, Roger Wade ("Mr. Wade"), for \$17,519.64 and also seek full indemnification for actual legal fees incurred to collect that sum. The sum of \$17,519.64 is the amount owing to the Plaintiffs by 608315 B.C. Ltd., doing business as R W Log Transport ("Log Transport"), pursuant to a default judgment dated July 6, 2015 against Log Transport (the "Log Transport Judgment").
- [2] The Plaintiffs are the respective trustees of the IWA - Forestry Industry Pension Plan and the IWA - Forestry Industry LTD Plan (the "Pension Plan" and the "LTD Plan" respectively, and collectively, the "Plans"). The Plans provide benefits to certain union members working in the forestry industry.
- [3] Log Transport was incorporated in June 2000 and operated as a log hauling company until approximately November 2014. Mr. Wade has been the sole director, officer and shareholder of Log Transport since approximately 2007. He operated and controlled Log Transport from 2007 until November 2014.
- [4] In 2012, Mr. Wade, on behalf of Log Transport, signed the relevant collective and participation agreements to become a participating employer in respect of the Plans. In doing so, Log Transport was required to hold employer and employee contributions in trust for its unionized employees, and to send these contributions to the Plans for the benefit of its unionized employees, all of which I will describe in greater depth.
- [5] The Plaintiffs are seeking judgment against Mr. Wade for knowingly assisting Log Transport in its breaches of trust. The Plaintiffs claim that Mr. Wade is personally liable to them for Log Transport's breach of trust in failing to remit contributions to the Plaintiffs, in failing to adequately protect contributions while held in trust in Log Transport's single bank account, and in using those contributions for purposes not authorized by the trust. For various reasons, Mr. Wade, who represented himself at trial, denies those claims.

## Background

- [6] The following facts, which were helpfully summarized in the Plaintiffs' closing argument, are not in dispute. I have therefore reproduced portions of them in my Reasons for Judgment.

## The Pension Plan

- [7] The Pension Plan was, at all material times, governed by the Pension Benefits Standards Act, R.S.B.C. 1996, c. 352 which was repealed and replaced effective September 30, 2015 (the "Former PBSA").
- [8] The participating employers of the Pension Plan are all under collective agreement with one of several locals of the United Steelworkers (the "USW"), which is a successor to the International Woodworkers of America after which the Plans were named.
- [9] The Pension Plan is governed by a Trust Agreement (the "Pension Plan Trust Agreement") first made in 1978. The version of the Pension Plan Trust Agreement in force during the material times is the version amended and restated effective December 13, 2011.
- [10] The Pension Plan is administered by a board of trustees, half of whom are union-appointed and half of whom are industry-appointed (the "Pension Plan Trustees"). The Pension Plan Trustees owe common law and statutory fiduciary duties to the members of the Pension Plan and must act for the benefit of the trust and impartially as between beneficiaries.
- [11] A pension plan text was adopted under the Pension Plan Trust Agreement (the "Pension Plan Text"). The version of the Pension Plan Text in force at the material times is that version amended and restated as of September 1, 2011.
- [12] The Pension Plan is jointly funded by employer and employee contributions. The contribution rates are negotiated between the participating employers and the union. The amount of contributions going into the Pension Plan depends on the amount of eligible hours worked by plan members. Participating employers are obliged to submit contribution reports setting out eligible hours worked in order to calculate the employer and employee contributions.
- [13] If a participating employer fails to submit a contribution report, the Pension Plan Trustees are entitled to calculate deemed eligible hours. The primary method of determining deemed eligible hours, as set out in Article 5.13 of the Pension Plan Text, is by a calculation of the greater of:
- a) the eligible hours for the same contribution reporting period of the previous year; and
  - b) the aggregate of the eligible hours for the preceding 12 months divided by 260 and multiplied by the number of working days (excluding Saturdays and Sundays) in the relevant contribution reporting period.

- [14] The Pension Plan Text also contains provisions for additional remedies against "non-conforming employers" who have contributions outstanding for at least 90 days past their contribution due dates. These remedies include:
- a) The right to issue "Directions to Pay" to recover funds owing to the Trustees from a contractor who has subcontracted work to the non-conforming employer (i.e., from contract payments otherwise payable to the subcontractor), and
  - b) A right to recover costs actually incurred by the Trustees for the purposes of collecting the unpaid amounts from the non-conforming employer, including all legal, audit and other costs.
- [15] Section 43.1(1) of the Former PBSA also imposed statutory obligations on participating employers as follows:

### Deemed trust

43.1 (1) An employer must, with respect to a pension plan to which the employer is required to make contributions, keep separate and apart from the employer's own assets

- (a) all contributions that are due or owing to the pension plan by the employer,
  - (b) all amounts that have been deducted by the employer from a member's remuneration and not yet remitted to the fund holder, and
  - (c) all contributions that have been received by the employer with respect to a member and not yet remitted to the fund holder.
- (2) The amounts referred to in subsection (1) are deemed to be held in trust for members of the pension plan, former members, and any other persons entitled to pension benefits, refunds or other payments under the plan in accordance with their interests under the plan.
- [16] The Former PBSA and its regulations require participating employers to remit required employer and employee contributions no later than 30 days after the end of the month to which the contributions relate.

### The LTD Plan

- [17] The LTD Plan is a long-term disability plan that, among other things, provides long-term disability benefits for union employees of participating employers. It was created by a trust agreement first made in 1982 (the "LTD Plan Trust Agreement"). The version of the LTD Plan Trust Agreement in force at the material times was the version amended and restated as of November 2, 2006.

- [18] As with the Pension Plan, the LTD Plan is administered by a board of trustees, half of whom are union-appointed and half of whom are industry-appointed (the "LTD Plan Trustees", and together with the Pension Plan Trustees, the "Plaintiffs"). The LTD Plan Trustees have fiduciary duties to the members of the LTD Plan and must act for the benefit of the trust and impartially as between beneficiaries.
- [19] The LTD Plan is also jointly funded by employers and employees. The contribution rates are negotiated between the employers and the union. The amount of contributions going into the LTD Plan depends on the amount of eligible hours worked by plan members. As with the Pension Plan, failure of a participating employer to submit a contribution report setting out the eligible hours worked entitles the LTD Plan Trustees to calculate deemed eligible hours based on prior periods and any available records using the same methods available to the Pension Plan Trustees. Like the Pension Plan Trustees, the LTD Plan Trustees have the same additional remedies available against "non-conforming employers", including the right to issue "Directions to Pay" to contractors owing payments to the non-conforming employers and to recover costs for collection of unpaid amounts.
- [20] Finally, the LTD Plan Trust Agreement specifically provides that all employer and employee contributions are deemed to be held in trust by the participating employer.

### Participation in the Plans

- [21] On March 22, 2012, Log Transport entered into a collective agreement with USW Union Local 1-1937. Mr. Wade executed the collective agreement on behalf of Log Transport. In the collective agreement, Log Transport agreed, among other things, to make hourly employer and employee contributions to each of the Pension Plan and the LTD Plan.
- [22] That same day, Mr. Wade, on behalf of Log Transport, signed a letter agreement with USW Local 1-1937 respecting geographic union boundaries and a letter of understanding with USW Locals 1-1937, 1-85 and 2009 agreeing to be bound by Western Forest Product's collective agreement when working within that union's jurisdiction.
- [23] On May 17, 2012, Mr. Wade, on behalf of Log Transport, signed a participation agreement and undertaking with respect to the Pension Plan and a participation agreement with respect to the LTD Plan.
- [24] The undertaking to the Pension Plan Trustees provided that Log Transport agreed to make contributions to the Pension Plan at the contribution rate in effect at that time and otherwise as negotiated in the future and to be bound "in all other respects by the terms of the Trust Agreement and the Plan and the administration of the Plan "

## Log Transport's Financial Difficulties

- [25] Unfortunately, Log Transport began to experience difficulties with respect to its obligations under the Plans very shortly after it became a participating employer. Mr. Wade gave evidence that Log Transport generally experienced predictable, seasonal work stoppages. The company also experienced unpredictable work shortages or rate reductions due to market conditions. These work shortages meant that the company often had issues with cash flow and that bills would go unpaid until conditions improved.
- [26] On July 20, 2012, for example, a representative of USW Local 1-1937 wrote to Mr. Wade advising that the union was "very frustrated" with Log Transport, and that "dues, check offs, or any other paperwork" had not been received for Log Transport employees since April 2012. The letter requested a "proposal to clean up the outstanding contributions to all plans", and asked that Dyer Logging, for whom Log Transport was a subcontractor, guarantee the plan contributions on Log Transport's behalf: see Exhibit 2, Tab 13. Mr. Wade ultimately resolved this issue directly with the USW local.
- [27] Log Transport's business experienced particular difficulties in 2013 and 2014, due to a variety of factors, including weather and equipment issues. Mr. Wade admitted on his Examination for Discovery that there was "no money".
- [28] In September 2013, the Plaintiffs issued a Direction to Pay to Dyer Logging because they had not received contribution reports and contributions from Log Transport. Ultimately, Mr. Chu, on behalf of the Plaintiffs, and Mr. Wade reached an agreement with respect to the outstanding amounts and the Plaintiffs issued a revised Direction to Pay to Dyer Logging reflecting that agreement. Mr. Wade, on behalf of Log Transport, also agreed to remit post-dated cheques to cover additional contributions yet to be calculated.
- [29] Log Transport's financial situation did not permit those amounts to be paid immediately and, on October 29, 2013, Mr. Wade had to telephone the Plaintiffs' office to request that the two post-dated cheques not be deposited. The funds were instead paid by Island Fibre, another employer to whom Log Transport contracted.
- [30] By the time Log Transport ceased its operations in November 2014, the company had significant debts, some of which dated back to the end of 2013. In addition to contributions owed to the Plaintiffs, these debts included significant debts to fuel companies and to a tire company, as well as debts owed to the Canada Revenue Agency and to Island Fibre.

**Mr. Wade's Management, Knowledge and Control of Log Transport**

- [31] Mr. Wade acknowledged that, from 2007 to November 2014, he was the company's "directing mind" and was responsible for, among other things, the financial affairs of the company, including payroll and ensuring that contributions were made to the Plans. Mr. Wade was the only person who had authority to verify and approve expenditures on behalf of Log Transport. He also had sole signing authority for Log Transport and sole access to its bank account.
- [32] In respect of the bank account, Mr. Wade admitted that he was aware of the risk of holding the contributions owing to the Plans in Log Transport's only account. Mr. Wade also admitted to using this bank account, and its commingled funds, for purposes associated with the general operations of Log Transport.
- [33] In addition to Log Transport's financial affairs, Mr. Wade played a key role in the management of the business. He was solely responsible for addressing matters with the USW and with the Plans when issues arose in the administration of Log Transport's obligations as a participating employer. For example, Mr. Wade reviewed and signed off on the contribution reports that were generated by his staff and submitted to the Plans.
- [34] From these various management roles in the company, Mr. Wade had knowledge of Log Transport's obligations, capacity, and financial position. Mr. Wade's evidence at trial was that he was aware, in 2013 and 2014, that there was "no money" in Log Transport's business and that, in 2014, Log Transport was unable to meet its financial obligations. Mr. Wade testified, for example, that he knew that some bills of Log Transport were going unpaid.
- [35] Mr. Wade was diagnosed with a heart condition in or about February 2014. It was clear from his evidence that Mr. Wade's life changed dramatically after he was diagnosed. He candidly admitted that this period took a toll on his mind and his focus became his health rather than the day-to-day operations of Log Transport. He immediately put one of his drivers in charge of the day-to-day operations of the logging trucks and delegated much of the administration to his office administrator and bookkeeper.
- [36] His evidence at trial was that, from that point, he had less interest in the affairs of Log Transport. He reduced his level of participation in Log Transport dramatically following his cardiac diagnosis; however, Mr. Wade continued to be solely responsible for the management of the company. Mr. Wade continued his operation and control of Log Transport at a reduced level until he underwent heart surgery in July 2014.
- [37] Despite his health difficulties and his reduced workload, Mr. Wade also remained the sole signatory on Log Transport's bank account and was still responsible for making the ultimate decisions regarding Log Transport's finances. He approved specific spending decisions based on discussions he would have with the employees of Log Transport and the bookkeeper, signed cheques, and, on rare occasions, authorized others to sign his name to Log Transport cheques.

- [38] He also continued to deal with, and have knowledge of, the Plans and the contribution issues. In April 2014, for example, Mr. Wade dealt with the Plans in respect of "a couple" of contribution reports and advised that he would be following up on others. He admitted under cross-examination that he was aware of when contributions reports were being submitted to the Plans. He also admitted that he did not leave specific instructions with Log Transport's office with respect to Log Transport's obligations to the Plans nor did he take any steps to ensure there was enough money in Log Transport's sole bank account to pay the contributions to the Plans. Mr. Wade further admitted that he knew of the cash flow issues in 2014 and that money in the Log Transport bank account that ought to have been remitted to the Plans as employer and employee contributions was instead used to pay operating expenses, such as fuel or payroll. He reached this conclusion because those expenses were paid and the contributions to the Plans were not.
- [39] In September 2014, after a six-week recovery after surgery, Mr. Wade commenced full-time employment as a gravel truck driver. Mr. Wade did not resume the day-to-day operations of Log Transport. Mr. Wade acknowledged that he continued to be responsible for Log Transport's spending decisions but that his primary focus was on his new work.
- [40] While his day-to-day involvement in the business of Log Transport was very limited, Mr. Wade continued to be responsible for the management and control of Log Transport. He visited the office on one or two occasions and spoke regularly with office staff. He continued to make decisions governing the expenditures Log Transport would make, to sign cheques, or to authorize administrative staff to sign cheques. This continued until Log Transport ceased operations in November 2014.

## End of Operations and Destruction of Records

- [41] In his testimony, Mr. Wade said that the entirety of Log Transport's records were destroyed due to vandalism by disgruntled employees. He said he discovered, in November 2014, how far behind Log Transport was with respect to contributions to the Plans as well as other operating expenses. His employees were not working well together. Mr. Wade said that the "whole thing was falling apart because I wasn't there 14 hours a day to hold it all together."
- [42] On November 19, 2014, Mr. Wade advised his employees that Log Transport was ceasing operations. The following Saturday, he travelled from his home in Langford to his business premises in Duncan for the first time in months and discovered the shop door unlocked and that someone had "destroyed" his office. He said that the laptop was smashed, filing cabinets were pushed over and damaged, and the lunch fridge had motor oil spread all over it. At that point, Mr. Wade determined that nothing could be salvaged and disposed of the soiled records by either taking them to the dump or burning them. He did not take any steps to recover any business records from the damaged laptop. Under cross-examination, Mr. Wade denied that there were any salvageable business records.

**Deemed Contributions for February - November 2014 and Settlement Agreement**

- [43] On October 28, 2014, the Plaintiffs wrote to Mr. Wade with respect to outstanding contribution reports and contributions for periods from January to September 21, 2014. They advised that if the contributions were not received by November 4, 2014, they might initiate legal action. Log Transport had not submitted contribution reports or remitted any contributions with respect to those time periods.
- [44] As no contribution reports had been produced by Log Transport, the Plaintiffs performed a deemed hours calculation up to November 19, 2014 (the "outstanding period"). The deemed calculations for the outstanding period totaled \$43,413.38. The calculation of deemed hours, based on calculated averages for the 12 preceding months, conformed with the Plaintiffs' records and practices for deeming hours as set out in Article 5.13 of the Pension Plan Text.
- [45] The Plaintiffs filed a Notice of Civil Claim against Log Transport on November 28, 2014 seeking the production of documents and an accounting of amounts owing to the Plans (the "Log Transport Action"). Mr. Wade became aware of the Log Transport Action at or around that time.
- [46] Log Transport was a subcontractor for both Island Fibre and Western Forest Products in 2014. In December 2014, the Plaintiffs sought to make arrangements with both Island Fibre and Western Forest Products in an attempt to recover contract payments due to Log Transport from those employers in partial satisfaction of Log Transport's outstanding contributions to the Plans.
- [47] The Plaintiffs provided information to Island Fibre about the deemed contributions on December 2, 2014 and a Direction to Pay outstanding contributions of \$15,224.36 was issued to Island Fibre on December 3, 2014. Payment of that amount was received by the Plaintiffs on December 18, 2014.
- [48] On December 12, 2014, the Plaintiffs provided to Western Forest Products a calculation of deemed hours totaling \$20,052.83 for contributions to the Plans. On December 23, 2014, the Plaintiffs received payment of \$10,669.38 from Western Forest Products on account of those hours.
- [49] As I have already noted, the Plaintiffs' deemed hours calculation for the outstanding period totaled \$43,413.38. The Plaintiffs determined that \$17,519.64 remained outstanding after deduction of the amounts paid by Island Fibre and Western Forest Products in December 2014. Of this outstanding amount, \$15,450.85 was allocated as Pension Plan contributions and \$2,068.79 was allocated as LTD Plan contributions. The Plaintiffs sought to recover these amounts from Log Transport in the Log Transport Action.

- [50] In the course of the Log Transport Action, the Plaintiffs obtained an order requiring production of records to permit the Plaintiffs to conduct an audit of hours. In response to that Order, Mr. Wade provided a statutory declaration stating that he had no records respecting Log Transport in his possession and that Log Transport had ceased operations on or about November 19, 2014.
- [51] Log Transport did not defend the Log Transport Action and, on July 6, 2015, the Plaintiffs obtained the Log Transport Judgment in the amount of \$17,519.64. It was Mr. Wade's evidence that Log Transport elected not to defend the Log Transport Action because it had no assets to do so. Mr. Wade did not challenge the amounts deemed by the Plaintiffs nor the deemed hours calculations in the Log Transport Action.

## The Law

- [52] The leading case with respect to knowing assistance in breach of trust is the Supreme Court of Canada decision in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 [Air Canada]. In that case, a travel agency breached a contractual trust by failing to hold funds it collected from the sale of Air Canada airline tickets in trust for Air Canada as required by contract. The funds were retained in the travel agency's general operating account rather than in the trust account set up for the purpose of holding such funds. The directors of the travel agency company were found to be personally liable to Air Canada for the amount from the ticket sales.
- [53] The Court discussed the general principles regarding personal liability of a third party, or "stranger to a trust", for knowingly participating in a breach of trust at 808-811:

Having found that the relationship between M & L [the travel agency] and the respondent airline was a trust relationship, there is no question that M & L's actions were in breach of trust. M & L failed to account to the respondent for the monies collected through sales of Air Canada tickets. What remains to be decided is whether the directors of M & L should be held personally liable for the breach of trust on the basis that they were constructive trustees. Whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. See *In re Montagu's Settlement Trusts*, [1987] Ch. 264, at p. 285 .

In addition to a trustee *de son tort*, there were traditionally therefore two ways in which a stranger to the trust could be held personally liable to the beneficiaries as a participant in a breach of trust: as one in receipt and chargeable with trust property and as one who knowingly assisted in a dishonest and fraudulent design on the part of the trustees. The former category of constructive trusteeship has been termed "knowing receipt" or "knowing receipt and dealing", while the latter category has been termed "knowing assistance".

The former category of "knowing receipt" of trust property is inapplicable to the present case because it requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as an agent of the trustees.

Thus the only basis upon which the directors could be held personally liable as constructive trustees is under the "knowing assistance" head of liability. To repeat, in *Barnes v. Addy* [(1874), L.R. 9 Ch. App. 244], Lord Selborne L.C. stated that persons who "assist with knowledge in a dishonest and fraudulent design on the part of the trustees" will be liable for the breach of trust as constructive trustees. See also, *Soar v. Ashwell*, [1893] 2 Q.B. 390 (C.A.). This basis of liability raises two main issues: the nature of the breach of trust and the degree of knowledge required of the stranger.

[Underlining added.]

[54] The Court went on to discuss the nature of the breach of trust by the constructive trustee that is required for liability in equity. The Court said at 825-826:

It must be remembered that it is the nature of the breach of trust that is under consideration at this point in the analysis, rather than the intent or knowledge of the stranger to the trust. That is, the issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized. *Barnes v. Addy* clearly states that the stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust. Therefore, it is the corporation's actions which must be examined. The appellant's actions will also be relevant to this examination, given the extent to which M & L was controlled by the defendant directors. The appellant's conduct will be more directly scrutinized when the issue of knowledge is under consideration. It is unnecessary, therefore, to find that the appellant himself acted in bad faith or dishonestly.

Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. Regardless of the type of trustee, in my view, the standard adopted by Peter Gibson J. in the *Baden, Delvaux* case, following the decision of the English Court of Appeal in *Belmont Finance*, *supra*, is a helpful one. I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take.'" In my opinion, this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in *In re Montagu's Settlement Trusts*, *supra*, namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability. This approach is consistent with both lines of authority previously discussed.

[Underlining added.]

[55] To find liability for knowing assistance in breach of trust, the Court described the necessary degree of knowledge of the "stranger to the trust" at 811-812:

The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice. See [Belmont Finance Corp. v. Williams Furniture Ltd. (No. 1), [1979] 1 All E.R. 118] at pp. 130, 136; In re Montagu's Settlement Trusts, *supra*, at pp. 271-72, 285; Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2), [1969] 2 All E.R. 367 (C.A.), at p. 379. In the latter case, Sachs L.J. stated that to be held liable the stranger must have had "both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust -- though, of course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open." Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.

If the stranger received a benefit as a result of the breach of trust, this may ground an inference that the stranger knew of the breach. The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference.

[Underlining added.]

## Analysis of the Issues

[56] Within the analytical framework outlined in *Air Canada*, the following issues arise with respect to whether Mr. Wade is personally liable for knowingly assisting in a breach of trust by Log Transport:

- a) Did Log Transport breach a trust?
- b) If yes, was Log Transport's breach of trust "dishonest and fraudulent"?
- c) Did Mr. Wade have actual knowledge of the trust and knowingly assist in Log Transport's wrongful conduct in breach of that trust?
- d) If Mr. Wade is liable to the Plaintiffs, what is the proper calculation of the amounts owing to the Plaintiffs?
- e) Are the Plaintiffs entitled to recover their legal costs on a full indemnity basis?
- (a) Did Log Transport breach a trust?

[57] As a preliminary submission, Mr. Wade submits that the Plaintiffs have failed to establish that Log Transport was in breach of a trust because it cannot establish that Log Transport was subject to a trust.

[58] With respect, I cannot accept this submission.

- [59] Section 43.1 of the Former PBSA imposed a statutory trust over both employer and employee contributions to the Pension Plan while in the hands of the participating employer, here, Log Transport. Mr. Wade executed those agreements on behalf of Log Transport; he is therefore deemed to have knowledge of this trust and Log Transport is subject to that trust.
- [60] There was no statutory trust over contributions to the LTD Plan while the funds were in the hands of Log Transport but s. 6.5(c) of the LTD Plan Trust Agreement imposed a contractual trust with respect to employer and employee contributions due and owing to the LTD Plan by Log Transport. Log Transport agreed to comply with the LTD Plan Trust Agreement when Mr. Wade, on behalf of Log Transport, signed the LTD participation agreement on May 17, 2012. Mr. Wade is therefore presumed to know of the contractual trust terms regarding the LTD Plan and Log Transport is subject to that trust.
- [61] Mr. Wade also submitted that the evidence does not show that Log Transport was provided with complete copies of the trust and participation agreements and, therefore, that Log Transport was not subject to a trust. A similar argument was advanced on behalf of Mr. Wade to sustain his personal lack of knowledge of the trust. I address these related arguments at the outset.
- [62] The Plaintiffs' records show only partial copies of the two participation agreements. Both partial copies were entered into evidence and consist of the pages signed by Mr. Wade on behalf of Log Transport. At trial, Mr. Wade did not dispute that he signed those documents and he testified that it was the union which "signed him up" but he could not recall if he received complete copies of the participation agreements. He admitted that he had "no reason to disagree" with the suggestion by Plaintiffs' counsel that he would have been provided with full copies of the agreement but he simply could not recall what he had been given.
- [63] Mr. Gary Luddu, on behalf of the Plaintiffs, testified that it was and continues to be the practice of the Plaintiffs to have the union provide complete copies of participation agreements to the participating employers. Furthermore, their records otherwise show complete copies of similar agreements. Mr. Luddu said that he has no reason to believe that this did not occur in the case of Log Transport.
- [64] There is no evidence that Mr. Wade was not provided with complete copies of the participation agreements, which would be entirely consistent with the practice of the Plaintiffs. Mr. Wade does not dispute that he signed the participation agreements and he admitted under cross-examination that he was aware that, by signing the participation agreements, he would have to remit employer and employee contributions to the Plans.
- [65] In light of the evidentiary record before me, I am not persuaded by Mr. Wade's argument in this regard. I agree with the submission of the Plaintiffs that the complete versions of the participation agreements are the versions to be considered in determining the legal issues arising in this case.

- [66] I am satisfied that, for the purposes of this analysis, Mr. Wade and Log Transport knew of the statutory and contractual trusts pertaining to the Plans and their trust obligations.
- [67] The Plaintiffs submit that Log Transport committed breaches of trust by failing to keep the contribution funds separate from Log Transport's general operating bank account as it was obliged to do, by failing to remit these contributions to the Plans as required under the terms of the participation agreements, and by using the contribution funds for its own purposes without prior authorization of the trust and to the prejudice of the beneficiary of the trust, here, its unionized employees.
- [68] The evidence clearly established that Log Transport did not operate a separate account for the employer and employee contributions as it was obliged to do. Instead, Log Transport maintained a single general account into which the withheld employee contributions were deposited and the employer contributions were to be paid. Trust funds were commingled with company funds in such a manner as to expose them to the demands of other creditors and as to be used for Log Transport's operational expenses, particularly when Log Transport became unable to meet its financial obligations. The evidence of Mr. Wade clearly establishes that Log Transport used the money in this general account, comprising, among other funds, employer and employee contributions to be remitted to the Plans, to pay its operating expenses, such as fuel or payroll. The consequence of Log Transport's conduct was to prejudice its unionized employees and to deprive them of the benefits conferred under the Plans.
- [69] I am satisfied, in these circumstances, that Log Transport breached its duty as a trustee over the contributions to the Plans and was in breach of trust.
- (b) Was Log Transport's breach of trust "dishonest and fraudulent"?
- [70] The Plaintiffs submit that Log Transport's breach of trust was in pursuit of a dishonest and fraudulent design because it took risks that it had no right to take and these risks were to the prejudice of the rights of others, consistent with the description of fraud accepted by the Supreme Court in *Air Canada*.
- [71] The Plaintiffs assert that Log Transport failed to set up a separate bank account for the trust funds contrary to s. 43.1 of the Former PBSA in relation to Pension Plan contributions and contrary to the standard of care required of them under the LTD Plan Trust Agreement as trustee of the LTD Plan contributions. The Plaintiffs also submit that Log Transport failed to take any steps to verify that the trust funds were being paid to the Plaintiffs as required, despite its difficult financial circumstances. This conduct together created a risk that the trust funds would not be remitted to the Plaintiffs as required and, indeed, the contributions held in trust were not, in fact, remitted. The Plaintiffs submit that creating this risk and applying trust funds for its own operational expenses is sufficient to establish Log Transport's breach of trust was "dishonest and fraudulent".

- [72] I agree with this submission. By failing to set up a separate bank account for the contribution funds, as it was required to do, Log Transport took a risk that the funds would be commingled with other monies in the general account and not remitted to the Plans as required. The prejudice arising from its actions was twofold. First, there was prejudice to the Plans because of the risk of failure to remit all required contributions. Second, there was prejudice to Log Transport's union employees because of the risk of failure to provide them with the appropriate benefits conferred by the Plans. Log Transport had no right to take such a risk to the prejudice of others as there was a statutory and a contractual trust obligation on it to keep contributions to the Plans separate from its own assets.
- [73] I find that Log Transport's breach of trust was therefore in pursuit of a "dishonest and fraudulent design" as described in *Air Canada*.
- (c) Did Mr. Wade have actual knowledge of the trust and knowingly assist in Log Transport's wrongful conduct in breach of that trust?
- [74] A stranger of the trust cannot be held personally liable for knowing assistance in breach of trust if the stranger did not have knowledge of the trust. Furthermore, to determine "knowing assistance", it is necessary to determine whether Mr. Wade knew that Log Transport's conduct was a fraudulent or dishonest breach of that trust. It is not necessary to find that he personally acted in bad faith or dishonestly. As the Court noted in *Air Canada*, at 812, where a trust is imposed by statute, the stranger to the trust will be deemed to have knowledge of it. Where the trust was contractually created, whether the stranger knew of the trust will depend on his familiarity or involvement with the contract.
- [75] In his January 5, 2018 affidavit, Mr. Wade disputed some of the evidence with respect to the participation of Log Transport in the Plans. He submitted that, although he did sign participation agreements with respect to each of the Pension Plan and the LTD Plan on behalf of Log Transport, the participation agreements do not mention any obligation to hold the contributions to the Plans in trust for the union employees or in a separate bank account. He claimed he was never provided with a copy of the Pension Plan Text or the LTD Plan Trust Agreement. Accordingly, Mr. Wade submits that he was unaware that the employer and employee contributions were to be held in trust by Log Transport in a bank account separate from Log Transport's general bank account.
- [76] It is clear from his undertaking that Mr. Wade, on behalf of Log Transport, agreed to make contributions to the Pension Plan at the rate then in effect or at any other rate later negotiated between the USW and the industry associations and to otherwise be bound by the terms of the Pension Plan Trust Agreement.
- [77] In the Pension Plan participation agreement, Mr. Wade, on behalf of Log Transport, agreed to participate in the Pension Plan as a participating employer, pay the employer's contributions, and deliver contribution reports. If Log Transport failed to deliver contribution reports, the Pension Plan could deem the eligible hours.

[78] With respect to costs, the Pension Plan participation agreement provided as follows:

The Applicant acknowledges and agrees that if it fails to pay any amount which it owes to the Pension Fund, it shall reimburse the Pension Fund for and indemnify the Pension Fund against all legal and other costs actually incurred by the Trustees in order to collect the unpaid amount, and the amount of such costs shall be deemed to be part of the next Employer's Contribution due from the Applicant in addition to the amount otherwise due pursuant to the Plan as the Applicant's Employer's Contribution.

[79] In the LTD participation agreement, Mr. Wade, on behalf of Log Transport, agreed to participate in the LTD Plan as a participating employer, comply fully with the terms of the LTD Plan Trust Agreement, pay the employer's contributions, and deliver contribution reports. As with the Pension Plan, if Log Transport failed to deliver contribution reports, the LTD Plan could deem eligible hours. The LTD Plan Trust Agreement also included a similar provision to the Pension Plan participation agreement that required a participating employer to reimburse the Plaintiffs for and indemnify the Plaintiffs against all legal, audit and other costs actually incurred by the Plaintiffs in order to collect any unpaid contributions.

[80] Again, Mr. Wade argued that there was no evidence that he was given full copies of the relevant agreements to establish that he had the requisite knowledge of the trust and Log Transport's trust obligations for the purposes of this inquiry.

[81] However, there is no evidence that Mr. Wade was not provided with complete copies of the participation agreements, which would be entirely consistent with the practice of the Plaintiffs. Mr. Wade submitted that he did not have any recollection of being provided with the undertaking and participation agreements, having signed those documents, or having returned them to the Plaintiffs. He did not, however, dispute that he did sign the participation agreements. Mr. Wade's evidence was that, in any event, he would not have reviewed those documents' provisions.

[82] Despite that, Mr. Wade admitted that he was aware that:

- (a) Log Transport became a participating employer in each of the Pension Plan and LTD Plan;
- (b) Participation in each of the LTD Plan and Pension Plan was necessary in order for Log Transport to employ unionized workers, which it was doing;
- (c) Log Transport was bound by the provisions of the Pension Plan and LTD Plan; and
- (d) Log Transport was required to deduct and remit employee contributions, and to pay employer contributions, required under the Plans.

- [83] After Log Transport became a participating employer, Mr. Wade arranged for employee contributions to be withheld from the relevant employees' wages. Log Transport had only a single general account, into which the withheld employee contributions were deposited and from which employer contributions were paid. Mr. Wade does not dispute that the contributions were not put into a separate account or otherwise kept separate from Log Transport's assets.
- [84] Mr. Wade was fully aware of Log Transport's obligations to remit the employer and employee contributions to the Plans, and that those monies belonged to the Plaintiffs until such time as the funds were remitted. On his Examination for Discovery held on August 12, 2016, Mr. Wade acknowledged his understanding that, to the extent that employer or employee contributions were held by Log Transport, they were held in trust for the Plaintiffs.
- [85] The Plaintiffs submit that the evidence establishes that Mr. Wade had knowledge of the trust obligations imposed by the participation agreements, particularly because he signed those agreements on behalf of Log Transport. Mr. Wade also admitted to knowing that trust funds were owed to the Plaintiffs and that Log Transport's operating expenses were being paid from the same general account that held the trust funds. He acknowledged that, on the occasions when Log Transport had cash flow difficulties, operational expenses were paid in priority to remitting those trust funds to the Plans.
- [86] Mr. Wade's evidence on discovery was consistent with this knowledge. He said he was aware, in 2014, that contributions were being withheld from eligible employees' pay cheques but that those contributions were not being forwarded to the Plans. He further admitted that he continued to authorize payments from Log Transport's general account, continued to make business decisions and approve expenditures, and did not verify whether Log Transport was complying with its trust obligations.
- [87] While the evidence suggests that Mr. Wade had knowledge of the breach of trust by Log Transport, even if he did not, it is clear from his own evidence that, given what he knew about the trust obligations and the financial circumstances of Log Transport, he was willfully blind to the breach of trust or reckless in his failure to realize there was a breach of trust: *Air Canada* at 827-828. It is difficult to fathom that Mr. Wade, as Log Transport's only director, officer, and shareholder and its operating mind, did not have knowledge of Log Transport's actions. As stated in *Air Canada*, the knowledge requirement "will not generally be a difficult hurdle to overcome in cases involving directors of closely held corporations. Such directors, if active, usually have knowledge of all of the actions of the corporate trustee": 827. I consider these statements to be apposite to the facts of this case.
- [88] Mr. Wade clearly received a benefit from Log Transport's breach of trust: *Air Canada* at 828. The breach prolonged the business operations of Log Transport, which was to the benefit of Mr. Wade as the sole shareholder. He continued to authorize payments out of Log Transport's general account, as the operating mind of Log Transport, when he knew that

Log Transport's general account included trust funds and that Log Transport would not be able to meet its obligations to the Plans in respect of the employer and employee contributions as they came due.

- [89] I have no difficulty in concluding that Mr. Wade knowingly and directly assisted in the breach of trust and that he knew that this breach of trust was fraudulent and dishonest. I find Mr. Wade personally liable to the Plaintiffs for that breach.
- (d) What is the proper calculation of the amount owing to the Plaintiffs?
- [90] Mr. Wade submits that the calculation of the deemed contributions is incorrect and, specifically, that the numbers are inaccurate and inflated. Mr. Wade took the position that the Plaintiffs' record-keeping was inaccurate and the deemed eligible hours were calculated using information from the wrong union local.
- [91] He did not raise this argument on behalf of Log Transport in the Log Transport Action and had not previously challenged the amounts deemed by the Plaintiffs until he gave evidence at this trial. He was not able, however, to provide any details with respect to errors in the calculation of deemed hours. This was simply a bald assertion that the deemed contribution amounts claimed were incorrect.
- [92] I agree with the submission of the Plaintiffs that Mr. Wade is not entitled at this stage to challenge the deemed hours calculations because to do so would result in an abuse of process by re-litigation. Mr. Wade acknowledged that he elected to not have Log Transport defend the Log Transport Action. As a result of that decision, a default judgment was entered on the deemed amounts. That judgment represents the Court's determination on the specific amount of Log Transport's breach of trust.
- [93] Even if that were not the case, Mr. Wade has failed to produce a single document in this action. He relies, instead, on his evidence that all of his business records were damaged or destroyed as a result of vandalism in November 2014.
- [94] I share the concern of counsel for the Plaintiffs with respect to Mr. Wade's evidence regarding the loss of his business records. Mr. Wade's recollection of what occurred and how he ultimately disposed of the office's contents was not consistent. At trial, he testified that he probably took everything to the dump for disposal whereas, on discovery, he testified that he had burned everything in a big bonfire.
- [95] I find it somewhat incredible that Mr. Wade did not take any steps to determine what could be salvaged, did not seek assistance to salvage his computer hard drive, and did not attempt to retrieve records from any third parties.
- [96] By contrast, the Plaintiffs produced documentary evidence and Mr. Luddu provided evidence of practice with respect to the calculation of deemed hours. The evidence establishes that deemed hours calculations were made in accordance with the provisions of the Pension Plan Text, Pension Plan Trust Agreement, LTD Plan Trust Agreement and

participation agreements, and were a means of estimating hours where a non-conforming employer has failed to provide contribution reports of actual hours worked. In this case, the evidence of the Plaintiffs was that the calculation was based on contribution reports from the previous 12 months, which was likely less than the actual hours worked in 2014, given Mr. Wade's evidence at trial that work was steadier in 2014 when Log Transport worked primarily for Island Fibre.

[97] The Plaintiffs acknowledged that, during the course of the trial, they became aware of overpayment of \$989.69 made in respect of work by Log Transport in the jurisdiction of Local 1-85 in early 2014 due to the application of an incorrect contribution rate for certain LTD payments. The Plaintiffs thus reduced their claim for LTD contributions from \$2,068.79 to \$1,079.10.

(e) Are the Plaintiffs entitled to recover their legal costs on a full indemnity basis?

[98] With respect to the issue of full indemnity costs, where there is personal liability in a claim for knowing assistance in breach of trust, and there is a sufficiently close relationship between the party in breach of trust and the constructive trustee, such personal liability may include liability to pay costs as agreed by the trustee.

[99] I conclude that the documentary evidence adduced at trial by the Plaintiffs also establishes an entitlement to full indemnity costs. Section 5.09 of the Pension Plan Text and s. 6.10 of the LTD Plan Trust Agreement provide that a participating employer shall reimburse the respective Trustees for all legal, audit and other costs actually incurred in order to collect an unpaid amount. The LTD participation agreement contains a similar provision in section 6(b). Log Transport agreed to these terms when Mr. Wade, on behalf of Log Transport, signed the relevant participation agreements.

[100] It is clear from the evidence before me that the Plaintiffs are entitled to full indemnity from Mr. Wade for legal costs incurred to collect the unpaid amounts, including the costs incurred in this proceeding.

(f) Miscellaneous Issues

[101] Mr. Wade also argued, for the first time at this trial, that the Plaintiffs had recourse under an additional agreement between Island Fibre, a contractor in the industry, and the USW Local 1-85, and that the union's failure to seek all outstanding amounts due from Log Transport precluded the Plaintiffs from seeking the relief sought in this action. Mr. Wade asserted that Island Fibre paid \$15,224.36 to the Plans in respect of Log Transport's outstanding contributions and were liable to pay for all outstanding contributions by Log Transport pursuant to this additional agreement but that USW 1-85 and/or the Plaintiffs underestimated the total amount of the outstanding contributions.

[102] Island Fibre, in this additional agreement with the USW Local 1-85, agreed to pay any outstanding amounts due to the union employees by any subcontractor hired by Island Fibre, here, Log Transport. Mr. Bahen, on behalf of Island Fibre, provided evidence at the

trial that the USW Local 1-85, on behalf of Log Transport's employees and their grievance, did seek recourse under this agreement. It is noteworthy that a settlement agreement was reached between Island Fibre and USW Local 1-85 in December 2014, which governed the payment of \$15,224.36 by Island Fibre to the Plans (the "Settlement Agreement").

[103] Mr. Bahen testified that Island Fibre was contractually required to pay the amounts owed with respect to those employees to both USW and the Plans. As I have said, the Plaintiffs issued a Direction to Pay outstanding contributions of \$15,224.36 to Island Fibre in December 2014. Island Fibre agreed to make this payment, but only this amount, and that if there were still outstanding amounts owing by Log Transport, Island Fibre would not be liable for such amount.

[104] Specifically, paragraph 11 of the Settlement Agreement provided the following:

The Company [Island Fibre] will pay IWA forest Industry Pension Plan the sum of \$15,224.36 further to this the Union understands if the Pension Plan underestimated the amount of monies owed that they would take Legal Action with RW Log Transport (60831S BC Ltd) for the underpayment.

[105] Mr. Wade admitted that he did not become aware of the Settlement Agreement until the fall of 2018. It appears that the Plaintiffs were unaware of this Settlement Agreement until shortly before the trial. At the time of receipt of the funds from Island Fibre, the Plaintiffs applied the funds to the Plans on the basis that they were in response to the Direction to Pay. Although Mr. Bahen speculated that the Plaintiffs must have had knowledge or involvement in the grievance and Settlement Agreement, there was no evidence that the Plaintiffs were parties to the Settlement Agreement or that Mr. Bahen discussed the grievance or Settlement Agreement with the representative of the Plaintiffs, Mr. Chu. Mr. Bahen acknowledged that he did not have any direct knowledge of any involvement by the Plaintiffs in the negotiations with the USW.

[106] Although Mr. Wade suggested at trial that the Plaintiffs could have recovered all of the amounts for the deemed hours owed by Log Transport from Island Fibre, it is clear that neither the Plaintiffs nor Mr. Wade were parties to the Settlement Agreement. The Settlement Agreement is not a bar to the claims of the Plaintiffs against Mr. Wade in this action.

## Conclusion

[107] Mr. Wade is personally liable to the Plaintiffs for knowingly assisting Log Transport in its breaches of trust.

[108] The Plaintiffs are entitled to judgment against Mr. Wade for the total sum of \$16,529.95 as sought, consisting of \$15,450.85 relating to the Pension Plan and \$1,079.10 relating to the LTD Plan.

[109] The Plaintiffs are also entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 and an order that Mr. Wade indemnify the Plaintiffs for their legal costs. There will be a reference to the Registrar for an accounting of the amounts owing to the Plaintiffs for their legal costs, including the preparation and attendance at that reference, and for a certificate to be issued for the amount owed.

"The Honourable Madam Justice Church"

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