

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Luft v. Ball*,  
2013 BCSC 81

Date: 20130121  
Docket: S114281  
Registry: Vancouver

Between:

**Dan Luft and Synergetic Search Inc.**

Plaintiffs

And

**Edward Ball, Christine Ball, Coast Industrial Maintenance & Machine (Canada) Ltd., and Coast Industrial Maintenance & Machine Ltd.**

Defendants

And

**Coast Industrial Maintenance & Machine (Canada) Ltd., Coast Industrial Maintenance & Machine Ltd., Edward Ball, Christine Ball and 0695844 B.C. Ltd.**

Third Parties

Before: The Honourable Mr. Justice Pearlman

## **Reasons for Judgment**

Counsel for the Plaintiffs:

K. Weibe

Counsel for Edward Ball  
and Coast Industrial Maintenance  
& Machine (Canada) Ltd.:

G. Sourisseau  
& R. Robertson

Counsel for Christine Ball:

R. J. Morton

Place and Date of Hearing:

Vancouver, B.C.  
December 6 and 7, 2012

Place and Date of Judgment:

Vancouver, B.C.  
January 21, 2013

**INTRODUCTION**

[1] The plaintiffs, Dan Luft and Synergetic Search Inc. (“Synergetic”), apply for an order that the defendants, Coast Industrial Maintenance & Machine (Canada) Ltd. (“Coast Canada”) and Edward Ball, be found in contempt of the orders of Master MacNaughton made January 5, 2012, and July 12, 2012. Those orders required Coast Canada to retain and pay an accountant to prepare audited financial statements for the years 2008 through 2011.

[2] The plaintiffs also seek an order requiring Coast Canada to retain and pay Clearline Chartered Accountants the sum of \$80,000 within 14 days of this Court’s order, and a further order that in the event that defendant fails to comply, the plaintiffs be granted judgment against Coast Canada for damages and costs to be assessed.

[3] Mr. Luft and Synergetic seek special costs in any event of the cause payable by the defendants Coast Canada and Edward Ball.

[4] Finally, the plaintiffs apply for an order that the defendant Christine Ball’s summary trial application for an order dismissing the plaintiffs’ action as against her be adjourned generally, with leave to reapply following receipt of the audit or further order of this Court.

**BACKGROUND**

[5] The plaintiff Synergetic and the defendant Coast Industrial Maintenance & Machine Ltd. (“Coast B.C.”) each hold 50 percent of the shares in Coast Canada. Dan Luft is the principal of Synergetic and Edward Ball is the principal of Coast B.C.

[6] Mr. Luft and Mr. Ball are the only directors of Coast Canada. Mr. Ball is the president and sole officer of Coast Canada.

[7] Until the falling out between the plaintiffs and the defendants, which gave rise to this litigation and ultimately resulted in the cessation of the company’s operations, Coast Canada supplied personnel to the oil and gas industry in northern Alberta.

[8] The defendant Christine Ball is the wife of Edward Ball, although Mr. and Ms. Ball have been separated for some time. Coast Canada employed Christine Ball as an administrative manager and paid her an annual salary of \$55,000 until May 2009. Notwithstanding the termination of her salary, Ms. Ball continued to perform some unpaid work for Coast Canada until April 2010, when the company ceased to carry on any business. Ms. Ball was never a director or shareholder of Coast Canada. She was the vice president of finance and administration for Coast B.C. until she resigned from that position in or about April 2010.

[9] Christine Ball, Edward Ball and Dan Luft had signing authority for Coast Canada's accounts with the Royal Bank of Canada ("RBC"). Each had sole signing authority for amounts up to \$10,000. Cheques for more than \$10,000 required two signatures. Mr. Luft's signing authority effectively came to an end when Coast Canada terminated his employment as chief executive officer on or about April 17, 2009.

[10] In this action, the plaintiffs allege that the defendants Edward Ball, Christine Ball and Coast B.C. have embezzled funds from Coast Canada. The plaintiffs also claim damages from the Defendants Edward Ball and Christine Ball for fraudulent misrepresentation and deceit. Mr. Luft as a director of Coast Canada, and Synergetic as a shareholder, also claim that the defendants engaged in acts of corporate oppression by failing to appoint an auditor for Coast Canada as required by the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, failing to provide the plaintiffs with audited financial statements, and preventing the plaintiffs from reviewing the financial records of Coast Canada.

[11] There is also litigation in Alberta involving these parties and others. In the Alberta action, Coast Canada claims that Mr. Luft diverted business from it to his own companies. The plaintiffs in the Alberta action, Coast Canada and Coast B.C., obtained an Anton Piller order against Mr. Luft. On April 9, 2009, Mr. Luft and Synergetic filed a counterclaim in the Alberta action against Coast Canada, Coast BC and Edward and Christine Ball by which they claimed damages and other relief

for corporate oppression. Mr. Luft also counterclaimed for damages for wrongful dismissal from his employment as chief executive officer of Coast Canada.

[12] On January 5, 2012, Synergetic, as a shareholder in Coast Canada, applied before Master MacNaughton for an order pursuant to the *Canada Business Corporations Act* requiring Coast Canada to retain an accountant to prepare audited financial statements for the years 2008 through 2011. Master MacNaughton ordered that:

... within 21 days of this order, Coast Canada must retain a Certified General Accountant or Chartered Accountant ... and direct them to prepare audited financial statements for the years 2008 through 2011.

[13] The Master rejected Mr. Ball's submission that Coast Canada could not afford to retain an auditor. She held that the *Canada Business Corporations Act* imposes a mandatory requirement for the appointment of an auditor at each annual meeting unless the shareholders unanimously consent not to do so, and that this requirement was not contingent on the financial resources of the corporation.

[14] Master MacNaughton's order of January 5, 2012 also required Coast Canada to notify its shareholders of the name of the auditor, provide the auditor with a copy of her order, and distribute the financial statements, when completed, to the shareholders.

[15] Coast Canada appointed Clearline Chartered Accountants to conduct the audit. Coast B.C. paid Clearline \$5,000, representing one-half of the initial retainer of \$10,000 required by Clearline. The total fee that Clearline requires for performance of the audit is \$80,000. The defendant Edward Ball proposed to the plaintiffs that they pay one-half of the cost of the audit. Synergetic and Mr. Luft declined to do so and informed Mr. Ball that the plaintiffs intended to bring an application for contempt in the event that Coast Canada did not pay the full amount of Clearline's fees for the audit.

[16] Mr. Ball and Coast B.C. applied to Master MacNaughton for a variation of her order of January 5, 2012, to provide that each of Coast Canada's shareholders be responsible for payment of one-half of the cost of the audit.

[17] The plaintiffs took the position that the order of Master MacNaughton was clear and that when Coast Canada was ordered to retain an auditor, that order required Coast Canada to not only appoint an auditor, but also bear the full cost of the auditor's services.

[18] Master MacNaughton's Reasons for Judgment of July 12, 2012 are indexed as *Luft v. Ball*, 2012 BCSC 1032. Paragraphs 28 through 30 of the Master's Reasons explain the result:

[28] It is primarily the evidence with respect to Coast Canada's impecuniosity on which the applicant respondents rely to vary the Order. This evidence was available to the applicant defendants before the Order was granted. However, accepting that Mr. Ball was self-represented, and may not have understood that not all the material in a file is before a decision-maker on an application, I have considered that evidence to determine whether, if admitted, it would probably have changed the outcome.

[29] I conclude that it would not. I cannot, on the material before me, meaningfully assess the credibility of that evidence. The characterization of Coast BC's advances to Coast Canada continues to be in issue between these parties. It is Coast Canada's financial position which is central to the overall issues in dispute in this action. Further, while the applicant defendants say that the existing financial statements erroneously refer to a loan Coast Canada made to Coast BC that error is significant and I would have expected better evidence about it. The auditors who prepared the financial statements have not, for example, explained the error. Finally, Mr. Ball and Ms. Ball do not explain the two cheques which they signed on behalf of Coast Canada and issued to Coast BC.

[30] As a result, I deny the applicant defendants' application to admit fresh evidence and reconsider. The Order was directed to Coast Canada and required it to retain auditors. The meaning of "retain" was clear, Coast Canada was to secure and pay for the services of an auditor.

[19] Thus, the Master declined to vary her order of January 5, 2012, and held that her order directing that Coast Canada to retain auditors within 21 days was clear and required that defendant to secure and pay for the auditor's services.

## CONTEMPT

[20] The plaintiffs bear the onus of establishing beyond a reasonable doubt on evidence that would be admissible at a trial that the defendants Coast Canada and Edward Ball are in contempt of the orders of Master MacNaughton. Although neither order has been entered, it was common ground on the hearing of this application that the Master's orders require Coast Canada to secure and pay for the audit. The plaintiffs seek relief against Mr. Ball pursuant to Rule 22-8(2) of the *Supreme Court Civil Rules*, which provides:

(2) If a corporation wilfully disobeys an order against the corporation, the order may be enforced by one or more of the following:

- (a) imposition of a fine on the corporation;
- (b) committal of one or more directors or officers of the corporation;
- (c) imposition of a fine on one or more directors or officers of the corporation.

[21] Counsel for the plaintiffs asserts that Mr. Ball has demonstrated a flagrant disregard for the Court's process that would warrant a finding of criminal contempt against him. The plaintiffs say that Mr. Ball has repeatedly disregarded his obligation to make discovery of documents. On June 29, 2012, the plaintiffs applied for and obtained an order from Mr. Justice Fitch compelling Coast B.C. and Mr. Ball to produce certain corporate and personal bank statements. The plaintiffs also obtained an order from Master Baker requiring Mr. Ball to amend the prolix and confusing pleadings in his Response to the Notice of Civil Claim after he had refused requests from plaintiffs' counsel that he do so.

[22] Mr. Justice Groberman explained the difference between criminal contempt and civil contempt in *Majormaki Holdings LLP v. Wong*, 2009 BCCA 349 at para. 13:

[13] Deliberate breach of a court order may constitute either civil or criminal contempt. The difference between the two is that criminal contempt requires, in addition to a deliberate violation of a court order, an element of public defiance. Public defiance is seen as a particularly troublesome aspect of contempt, as it is calculated to lessen societal respect for the courts (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, particularly at 931-32 [United Nurses of Alberta]).

[23] In *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 14, the Court said this respecting the requirement of intention for contempt:

[14] If one removes the element of "public defiance" – which is obviously not necessary for civil contempt – one is again left with the requirement that the conduct constituting disobedience of the court order must have been intentional, as opposed to accidental or unintentional, and with the fact that intention may be inferred from the circumstances. As this court stated in *Topgro Greenhouses Ltd. v. Houweling*, 2003 BCCA 355, "[t]o knowingly breach a court order is to commit a contempt of the court. All that is necessary to establish the contempt is proof of deliberate conduct that has the effect of contravening the order; an intent to bring the Court into disrepute or to interfere with the due course of justice or with the lawful process of the Court is not an essential element of civil contempt". (Para. 6.) This is consistent with the formulation provided in *Stancomb v. Trowbridge*, quoted above, and with the principle stated in *Sheppard* that the offence of contempt "consists of the intentional doing of an act which is in fact prohibited by the order."

[24] Here, the plaintiffs by their Notice of Application seek findings of contempt against Coast Canada and Edward Ball for violation of the orders of Master MacNaughton dated January 5, 2012, and July 12, 2012. The plaintiffs have not established that Mr. Ball, in his capacity as a director and sole officer of Coast Canada, or in any other capacity, engaged in any act of public defiance of the orders of Master MacNaughton which are the subject of this application. Therefore, there is no basis for a finding of criminal contempt against Mr. Ball.

[25] Mr. Ball's failure to make full document production, either on his own behalf, or on behalf of Coast B.C., and his deficient pleadings have been addressed by the orders of Mr. Justice Fitch and Master Baker respectively, each of which sanctioned Mr. Ball's failure to comply with the *Supreme Court Civil Rules* by requiring that he pay the costs of those applications in any event of the cause.

[26] On this application, the plaintiffs have not alleged that Mr. Ball has disobeyed those orders. Accordingly, the issue arising on this application is whether Coast Canada deliberately contravened the Master's orders and thereby committed civil contempt. If the Court finds Coast Canada committed civil contempt, it must also determine whether Mr. Ball, as a director and sole officer of that company, should be

committed or fined for facilitating, aiding and abetting Coast Canada's wilful breach of Master MacNaughton's orders.

[27] The principles applicable on an application for contempt involving the breach of a court order are summarized in *Jackson v. Honey*, 2009 BCCA 112 at paras. 12 and 13:

[12] The principles governing a contempt application were summarized by Donald J.A. in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, 21 B.C.L.R. (4th) 340 (C.A.):

[18] The principles governing a motion of contempt are uncontroversial. I would summarize the principles relevant to this case in this way:

1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd.* (1960), 33 W.W.R. 145 (B.C.S.C.) at 151.
2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.) at 229.
3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Ont. Gen. Div.) at para. 13; see also *Skybound Developments Ltd. v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (B.C.C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (B.C.C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.

[13] The facts in support of a finding of contempt must establish, beyond a reasonable doubt, that the contemnor wilfully disobeyed a court order that was clear and precise in its meaning. In *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316, 29 B.C.L.R. (4th) 214 Newbury J.A., for the Court, cited *Re Sheppard and Sheppard* (1976), 67 D.L.R. 592 where the Ontario Court of Appeal described the act of contempt as "the intentional doing of an act which is in fact prohibited by the order": para. 12. Madam Justice Newbury went on to cite *Topgro Green houses Ltd. v. Houweling*, 2003 BCCA 355, 184 B.C.A.C. 118 where the Court described the act of contempt as "deliberate conduct that has the effect of contravening the order": para. 14.

[28] *Jackson v. Honey* provides an example of circumstances where impossibility of compliance with a court order constitutes a defence to contempt. The order of the

court directed the defendant to return certain property to the plaintiff. The defendant was no longer in possession of that property when the order was pronounced. The Court of Appeal held that the defendant had not wilfully or deliberately disobeyed the order as it was impossible for her to have complied with it: *Jackson v. Honey* at para. 14.

[29] A party who has by an intentional act or omission breached an order of the court cannot escape a finding of contempt for its failure to comply with the order by asserting that it took all reasonable steps to avoid breaching the order, short of compliance: *Silver Rill Corn Ltd. v. Island View Golf Centre Ltd.*, 2007 BCSC 865 at paras. 26 and 27.

[30] In *Silver Rill Corn Ltd.*, the court went on to say this at paras. 28 and 29:

[28] The party moving for a finding of contempt must show that the actions or omissions of the alleged contemnor violated an order of the court. The same party must show that the acts or omissions of the alleged contemnor were intentional – not that the alleged contemnor intended to breach the order of the court, but that he or she intended to perform the act, or refrain from doing an omission – beyond a reasonable doubt.

[29] Once that has been established, the alleged contemnor must prove, on a balance of probabilities only, that the acts or omissions alleged to be contemptuous were accidental or unintentional.

[31] Thus, where the defence raised to a contempt application is that the act or omission that breached the court's order was not intentional, the alleged contemnor bears the onus of establishing on the balance of probabilities that its act or omission was accidental or intentional. Here Coast Canada does not argue that the breach was accidental. Rather, it says that it did not, and does not have the means to pay for the audit.

## **CONTEMPT AND IMPECUNIOSITY**

[32] In the case of an order for payment of money, the plaintiff alleging contempt must establish, beyond a reasonable doubt, not only that the defendant deliberately breached an order of which it had notice, but that the defendant had the capacity to pay the amount: *Swann v. Swann*, 2009 BCCA 335.

[33] In *Swann v. Swann*, the issue was whether the payor husband's inability to pay excused his failure to comply with a maintenance order and provided a defence to the wife's contempt application. At paras. 10- 12 and 14-15, Groberman J.A., for the Court, stated:

[10] With respect to the principal argument on this appeal, I am not persuaded that the judge misstated the elements that the plaintiff had to prove in order to establish contempt of court for non-payment of maintenance ordered by the court. There are four elements that must be established: that the debtor had notice of the order, that he or she did not comply with the order, that the non-compliance was "wilful" (i.e., deliberate, as opposed to accidental or unintentional), and that the debtor was, in fact, capable of complying with the order (i.e., that he or she had the means to make the required payments).

[11] The chambers judge's summary of the law was non-technical; that is not surprising given that the defendant was self-represented. There is no indication, however, that he misconstrued the elements of contempt. It may be that at some points in his judgment, the judge conflated the concept of "wilful non-compliance" with the question of whether the defendant had the ability to pay, but any such error is of no consequence, since inability to pay is an excuse for failure to comply with a court order for the payment of money.

[12] The difficulty in this case, then, is not the legal test for contempt, but rather the basis upon which the chambers judge found that the defendant lacked the capacity to pay.

...

[14] I am not persuaded that this argument is meritorious. On a contempt application, the applicant must demonstrate, beyond a reasonable doubt, that the respondent has committed contempt (See *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316, at para. 10). In this case, it was established, beyond a reasonable doubt, that the defendant knew of the order, that there had been non-payment, and that the non-payment was wilful, in the sense of being deliberate rather than accidental. The remaining element was that of whether the defendant had the means to pay.

[15] The evidence of the defendant's means, here, was limited. It consisted only of his Form 89. The fact that the form had been sufficient, in earlier civil proceedings, to convince a court that the defendant had the means to pay is not determinative of the question of whether his subsequent capacity to pay was established beyond a reasonable doubt. There are at least two reasons for this. First, the standard of proof on a contempt application is higher than on an application for child support or spousal maintenance. Second, circumstances may have developed that would show that the court's order was beyond the capacity of the defendant to fulfil. Still, it was open for the chambers judge, in the absence of evidence to the contrary, to infer from the Form 89 and the previous orders of the court that the defendant had the capacity to pay the amounts that he was required to pay under the orders. In

deciding whether to draw that inference, the chambers judge would have had to examine the Financial Statement in some detail, however, and not simply rely on the fact that maintenance orders had been made. [Emphasis added.]

[34] The defendants also refer to *Stevenson v. Stevenson* (1977), 3 B.C.L.R. 7 (S.C.), a family law case where the wife applied for the imprisonment of her husband for contempt of a spousal and child support order. In the course of discussing the court's jurisdiction to commit a contemnor to prison for non-payment of money, Craig J., (as he then was), said this at para. 22:

Although the courts in this jurisdiction have held that the process of contempt is not available for non-payment of money because of the provisions of *The Arrest and Imprisonment for Debt Act*, they have not held that failure to pay could never in any circumstances be treated as contempt. Wilful disobedience of an order of the court, other than an order for payment of money, amounts to contempt of court and makes the disobedient person liable to committal for the contempt. There is no logical reason why wilful refusal of a person to obey an order for payment of money, if he has the means, should not also amount to contempt, even though he cannot be committed for the contempt.

[35] I understand the court to have said in *Stevenson* that in order to find a person in contempt of an order for payment of money, there must be a wilful refusal to pay by a person with the means to pay.

[36] In *Canadian Imperial Bank of Commerce v. Sayani* (1996), 25 B.C.L.R. (3d) 310 (S.C.), the defendant had transferred over \$1,500,000 from British Columbia to India in order to put her assets beyond the reach of potential creditors, and then breached an order requiring her to pay \$750,000 in trust. At para. 17 of his Reasons for Judgment, Hall J. (as he then was), stated:

Counsel for the defendant points out correctly that mere failure to pay money is not generally a contempt of court. In connection with that argument, reference was made to a judgment of our Court of Appeal, in *The Royal Bank of Canada v. McLennan* (1918), 25 B.C.R. 183. However, Huddart J. (as she then was), noted in *Manolescu v. Manolescu* (1991), 31 R.F.L. (3d) 421 at p. 433:

Wilful breach of a court order will always be a contempt of court. A deliberate refusal to pay money pursuant to a court order when one has the ability to pay will constitute a civil contempt of the court. It is also a private injury or wrong to the person who is the beneficiary of the order.

That case concerned a husband who had consistently refused to obey court orders concerning arrears and support. Counsel for the defendant suggested that case was distinguishable but I believe it to be a correct statement of legal principle. The learned judge in that case found that the conduct was a deliberate contempt going beyond a mere failure to pay money. I believe likewise that this case involves much more than a simple failure to satisfy a judgment debt by paying money to a judgment creditor. ...

[37] The court found the defendant had engaged in a deliberate course of conduct designed to put her assets beyond the reach of any creditor and to interfere with the due administration of justice. The defendant in *Canadian Imperial Bank of Commerce v. Sayani* had the capacity to pay, but attempted to hide her assets in order to avoid payment of any monetary judgment obtained against her. *Canadian Imperial Bank of Commerce v. Sayani* provides further support for the proposition that the deliberate refusal to pay money pursuant to a court order by a defendant who has the ability to pay constitutes contempt.

[38] Impecuniosity is an excuse for non-compliance with an order for payment of money: *Swann* at para. 11. If the alleged contemnor adduces evidence that raises a reasonable doubt about its capacity to pay, it will not be found in contempt of court.

[39] Have the plaintiffs established beyond a reasonable doubt that Coast Canada is in contempt of the orders of Master MacNaughton?

[40] Here, Coast Canada and Mr. Ball had knowledge of the order of Master MacNaughton. Mr. Ball was present when the Master pronounced her order of January 5, 2012, and received the Master's Reasons for Judgment of July 12, 2012. The terms of the order requiring Coast Canada to secure and pay for the services of an auditor, particularly as explained in the Reasons for Judgment of the Master of July 12, 2012, were clear and unequivocal.

[41] The plaintiffs are not required to establish that the defendant intended to disobey an order of the court. The conduct constituting disobedience of the court order must be intentional, rather than accidental or unintentional: *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 14. Here, Coast Canada's failure to

pay the amount required for the audit was deliberate, in the sense that it was neither accidental nor unintentional.

[42] The issue to be decided on this application is whether Coast Canada has the means, or ability to pay, for the services of the auditors.

[43] The plaintiffs submit that Coast Canada had the means to pay for the audit when Master MacNaughton made her orders and continues to have the means to comply with those orders. The plaintiffs rely upon the debt of \$321,927 due from Coast B.C. to Coast Canada as recorded in Coast Canada's unaudited financial statement for 2010 as the source of funds available to Coast Canada for payment of the auditors.

[44] Mr. Ball and Coast B.C. contend that the accountants have made an error. Mr. Ball has sworn that Coast B.C. loaned money or expended credit for the benefit of Coast Canada, but not the other way around. At para. 16 of his affidavit sworn November 10, 2011, Mr. Ball deposed:

... Coast B.C. and Manpower had loaned money to Coast Canada to fund Coast Canada's operation starting in 2007 and well into 2008. Coast Canada had no credit history and could not get any loans or credit of its own without guarantees or help from Coast B.C. and me, Dan and Christine. The Royal Bank of Canada started lending money to Coast Canada in 2008 initially based on a credit facility of \$300,000 which was later increased. The loans to Coast Canada were necessary so that Coast Canada would not have to continue borrowing money from Coast B.C. or from Manpower after the dispute with Manpower came to a head in early 2008.

[45] Mr. Ball also deposed that the debt owed by Coast Canada on the RBC line of credit, which stood at \$500,000 in 2010, is now being repaid in monthly installments of \$10,000 under forbearance agreements made between RBC and Coast Canada, with Coast B.C. providing the funds for each monthly payment to Coast Canada.

[46] Mr. Ball has also sworn that in late 2008 and 2009, a number of Coast Canada's large contracts for the supply of labour to the oil and gas industry in

Alberta came to an end and were not replaced by any purchase orders for personnel. According to Mr. Ball, the decline in orders was a major reason for the decline in Coast Canada's revenues between the 2008 and 2009 fiscal years. Mr. Ball also says that Mr. Luft's diversion of business and customers from Coast Canada and the commencement of Coast Canada's Alberta action against Mr. Luft, Synergetic and others in March 2009, disrupted Coast Canada's Alberta business operation, and resulted in Coast Canada incurring substantial expenses.

[47] Mr. Ball has sworn that Coast Canada has not operated its business since early 2010. According to Mr. Luft, Coast Canada has not done any business since February 2009. The unaudited "review engagement" financial statement prepared for Coast Canada for the year ended June 30, 2010 by Aylett Grant shows \$321,927 due from Coast B.C. to Coast Canada. Note 5 to that financial statement provides:

The amounts due from shareholders are non-interest bearing, have no set repayment terms and are secured by promissory notes. The shareholders have postponed repayment in favour of the bank. Accordingly, the advances from shareholders have been classified as a long term liability. The likelihood of collectability of the amount is uncertain at this point. There has been no provision made for the uncertainty of realizing the amount owing from the shareholder. Prior to financial statement report date, the shareholder entered into a Forbearance Agreement with its creditor. It is strongly recommended that financial statement users consult with corporate lawyers and the shareholder's financial institution to discuss collectability of the amount owed.

[48] The defendant Christine Ball has attached to her third affidavit, sworn October 5, 2012, copies of journal entries prepared by Aylett Grant relating to a series of inter-company transactions between Coast Canada and Coast B.C. Those journal entries set out a series of accounting adjustments relating to what the accountants describe as "inter-company accounts" and an "income tax reconciliation for an income tax refund received by Coast B.C."

[49] Neither Coast Canada nor the plaintiffs have sought any further explanation from Aylett Grant regarding the \$321,927 allegedly due from Coast B.C. to Coast Canada.

[50] The 2010 financial statement prepared by Aylett Grant also records that \$258,019 is due to Coast Canada from Christine and Edward Ball and from the plaintiff and his wife, Tyra Luft. In a rare display of unanimity, Mr. Luft and Mr. and Ms. Ball all agree that they do not owe these amounts of Coast Canada. The purported loans by Coast Canada to Mr. and Mrs. Luft and Mr. and Ms. Ball relate to two properties located in Lamont and Edmonton, Alberta, which were registered in the names of those parties but were paid for by Coast Canada. Apparently, Aylett Grant recorded \$258,019 as the total amount due to Coast Canada from “related parties” because title to the two properties was registered in their individual names, although Coast Canada paid the cost of acquiring and holding the properties. I find that the \$258,019 shown on the 2010 financial statement as an amount due to Coast Canada from related parties does not constitute a source of funds currently available to Coast Canada for the purpose of paying its auditors.

[51] On July 16, 2012, Mr. Ball informed the plaintiffs that Coast Canada needed to borrow funds in order to pay for the audit as ordered by Master MacNaughton. He proposed that Coast B.C. would lend 50 percent of the money required to pay for the audit. Mr. Ball informed the plaintiffs that he expected Coast Canada would have to pay interest at seven percent on the funds borrowed. Mr. Ball inquired whether the plaintiffs were prepared to lend a portion of the money to Coast Canada on those terms, and if not, whether the plaintiffs would consent to Coast Canada borrowing the full amount.

[52] The plaintiffs did not respond to Mr. Ball’s proposal. They take the position that Master MacNaughton’s order imposes the obligation to pay for the audit on Coast Canada.

[53] Neither Synergetic nor Coast B.C., as shareholders in Coast Canada, were obliged to pay the debts of the company. The plaintiffs were not prepared to assist Coast Canada in paying for the audit, either by advancing a portion of its cost, or by consenting to Coast Canada borrowing funds. I infer from the fact that the plaintiffs now say that they will pay the full cost of the audit if the defendants fail to do so, that

Mr. Luft and Synergetic had the ability to put up to 50 percent of the \$80,000 required to pay for the audit, had they chosen to do so.

[54] Coast Canada had ceased to carry on its business by early 2010. That company has been engaged in litigation with Mr. Luft and Synergetic in Alberta and British Columbia since March of 2009 and is subject to a forbearance agreement with RBC.

[55] Master MacNaughton was not able on the evidence before her, to resolve the conflict between the parties concerning Coast Canada's alleged impecuniosity.

[56] On this application, the plaintiffs bear the burden of proving beyond a reasonable doubt that Coast Canada is in contempt of Master MacNaughton's order. Here, the plaintiffs have the onus of establishing, beyond a reasonable doubt, that Coast Canada has the means to pay for the audit ordered by Master MacNaughton. I find that I am left with a reasonable doubt concerning Coast Canada's capacity to pay for the audit. The plaintiffs identify the \$321,000 recorded as due from Coast B.C. to Coast Canada in the unaudited financial statements for the fiscal year ending June 30, 2010, as the source of funds available to Coast Canada to pay for the audit. However, the uncertainty of Coast Canada collecting that amount, as reflected in the accountants' note to the financial statements, the undisputed fact that Coast Canada has not operated since April 2010 at the latest, and as a consequence has not generated revenues from the sale of its services, and Mr. Ball's evidence that Coast B.C. has advanced monies to Coast Canada but has not borrowed funds from that entity, raise a reasonable doubt that Coast Canada had or has the ability to pay for the audit. Accordingly, the plaintiffs have failed to establish that Coast Canada is in contempt of court. Nor have they shown that Mr. Ball, either in his capacity as a director and officer of Coast Canada, or otherwise, has committed contempt of the orders of Master MacNaughton.

[57] The plaintiffs' application for orders finding the defendants Coast Canada and Edward Ball in contempt of court, and punishing them for contempt, is dismissed.

**Plaintiff's Application to Adjourn Defendant Christine Ball's February 6, 2013 Summary Trial Application**

[58] The plaintiffs apply for an order adjourning generally Ms. Ball's summary trial application, currently set for February 6 - 8, 2013, with leave to reapply following the receipt of audit results.

[59] I do not propose to review the evidence in any more detail than is necessary to determine the plaintiffs' application to adjourn the summary trial. The findings of fact I make are made solely for the purpose of deciding the adjournment application.

**Position of the Plaintiffs**

[60] Mr. Luft and Synergetic submit they will be prejudiced if Ms. Ball is permitted to proceed with her application for the dismissal of their claims against her before the plaintiffs have the results of the audit. The plaintiffs argue that despite their best efforts to seek full disclosure of Ms. Ball's involvement in the financial affairs of Coast Canada, they require the audit in order to obtain a complete understanding of her role in Coast Canada. The plaintiffs submit that the results of the audit may assist them in establishing that Mr. and Mr. Ball engaged in fraud and embezzlement, as alleged in the plaintiffs' amended Notice of Civil Claim.

[61] Although Ms. Ball was not a director or officer of Coast Canada, she was employed by that defendant, and was a signatory to every cheque issued by Coast Canada. The plaintiffs submit that if there was fraud, Ms. Ball may have orchestrated it.

[62] The plaintiffs say they have made every reasonable effort to obtain the audit. Mr. Luft and Synergetic submit that if Ms. Ball were permitted to bring her application for summary dismissal of the plaintiffs' claims against her without the audit results, the decision on the summary trial application could unfairly give rise to an issue estoppel. Further, if a subsequent audit revealed acts of fraud other than those currently alleged by the plaintiffs, there would be the potential for a further action by the plaintiffs against Ms. Ball on those matters which were not *res judicata*. In short,

the plaintiffs say that to permit Ms. Ball's summary trial application to proceed without the results of the audit ordered by Master MacNaughton would be both unfairly prejudicial to them and an inefficient use of the court's resources.

### **Position of the Defendant Christine Ball**

[63] Counsel for Ms. Ball makes two submissions in response. First, he argues that the plaintiffs lack the evidence to make out a claim of fraud or embezzlement against his client. In essence, the plaintiffs assert they might obtain evidence to support those claims when and if the audit is performed. Ms. Ball submits that the plaintiffs have had ample opportunity to marshal evidence in support of their case but have failed to do so.

[64] Second, Ms. Ball submits that even if the audit were to identify transactions providing evidence of conversion or embezzlement, the claim for recovery of any funds diverted to the defendants would be a derivative claim of Coast Canada, rather than a claim maintainable by the plaintiffs.

### **The Plaintiffs' Claims**

[65] The plaintiffs' claims against the defendants for embezzlement and misrepresentation are set out in paragraphs 14 through 20 of the Amended Notice of Civil Claim:

14. The Plaintiff Luft states that sometime in or around 2008 the Defendants Edward Ball and Christine Ball represented to him that CIMM [Coast Canada] needed to procure a line of credit from the Royal Bank of Canada for the temporary and sole purpose of covering payroll while the Company had employees working in northern Alberta for Berry Y & V Ltd. (the "Representation").
15. Induced by and relying on the Representation the Plaintiff Luft provided a personal guarantee over the debts of CIMM to the Royal Bank.
16. The Representation was false and the Defendants Edward Ball and Christine Ball and CIMM BC [Coast B.C.] used the line of credit with the Royal Bank along with the cash and resources of CIMM for personal and non business related expenses without

corporate authorization or in the alternative, without proper corporate authorization (the "Embezzlement").

17. The Plaintiff Dan Luft was terminated as an officer and employee of CIMM by the Defendant Christine Ball in February 2009 and immediately thereafter was barred access to any financial information regarding CIMM.
18. The Defendants then initiated legal action against the Plaintiff Dan Luft and 13 other personal Defendants in Alberta seeking various injunctions and relief against them preventing any of them from contacting their clients. Counterclaims and Defences were filed on both sides and all pleadings were filed and closed by April 9, 2009.
19. The Embezzlement began four months later on August 20, 2009 and proceeded into late 2010 during which time the Defendants and CIMM BC diverted cash and receivables from the corporate bank account of CIMM to their personal use or for the use of CIMM BC the particulars of each transaction are, *inter alia*, as follows:
  - a. Cheque payable to CIMM BC dated April 12, 2010 for \$550,000.00;
  - b. Cheque payable to CIMM BC dated November 1, 2009 for \$41,317.26;
  - c. Cheque payable to Christine Ball dated October 20, 2001 for \$4116.71;
  - d. Payment made on August 20, 2009 to Telus in the amount of \$522.07 for the phone lines of the Defendants or CIMM BC;
  - e. Payment made on September 10, 2009 to Price - Langevin and Associates in the amount of \$11,943.75;
  - f. Payment made to Telus on September 10, 2009 in the amount of \$843.58 for the phone lines of the Defendants or CIMM British Columbia;
  - g. Payment made to Ricoh B.C. on September 10, 2009 for \$253.00;
  - h. Such further and other particulars as may be discovered the knowledge of which lies solely with the Defendants.
20. The Defendants Edward Ball and Christine Ball then conspired to hide the Embezzlement by, *inter alia*, preventing the Plaintiffs from accessing the financial records, bank statements and reports of CIMM.

[66] At paragraph 24 of the Amended Notice of Civil Claim, the plaintiffs allege that the defendants Edward Ball and Christine Ball in conjunction with Coast B.C. conspired together to cause the plaintiffs damage by effecting the embezzlement, and to cover up the embezzlement by preventing the plaintiffs from reviewing financial records of Coast Canada.

[67] In Part 2 of the Amended Notice of Civil Claim, the relief sought by the plaintiffs is as follows:

1. An accounting of all Company accounts or monies converted to the use of the Defendants Edward Ball and Christine Ball and CIMM BC as part of the Embezzlement (the "Embezzled Funds").
2. Judgment against the Defendants Edward Ball and Christine Ball and CIMM BC for the Embezzled Funds.
3. An equitable tracing order and an accounting of the proceeds of the Embezzlement.
4. Damages against Edward Ball and Christine Ball for fraudulent misrepresentation.
5. Damages against Edward Ball and Christine Ball for the tort of deceit.
6. Damages against Edward Ball and Christine Ball for the tort of conversion.
7. Damages against Edward Ball and Christine Ball for the tort of conspiracy.
8. Punitive, or in the alternative aggravated damages for breach of fiduciary duty and the Embezzlement from the Edward Ball and Christine Ball.
9. An order pursuant to S.241 of the *Canada Business Corporations Act* R.S.C. 1985, c-44 (the "Act") removing Edward Ball and Christine Ball as directors of CIMM and appointing the Plaintiff Luft as the sole director of CIMM.
10. An interim order pursuant to S.167 of the Act appointing an auditor and fixing their remuneration;
11. An interim order pursuant to S.241 of the Act that:
  - a. the Company disclose all corporate or financial records of any kind which may assist the auditor in their audit;

- b. Any third party which may have financial statements or bank records directly related to the Company disclose them to the auditor;
  - c. the auditor conduct an audit of all the financial records of CIMM Canada for every year since the company was formed and an audit was not performed or waived by all the shareholders;
  - d. the auditor disclose the results of the audits directly to the Plaintiffs.
12. An interim order pursuant to S.241 of the *Act* that the Company convene an annual general within 14 days of the pronouncement of this order.;
  13. In the alternative, any order or remedy under S.241 of the *Act* that this honorable court deems just.
  14. An interim order pursuant to S.242 of the *Act* that all current and future legal bills of the Plaintiffs Luft and Synergetic Inc. be paid by CIMM.
  15. Special Costs or in the alternative increased costs or in the alternative costs.

[68] In Part 3 of the Amended Notice of Civil Claim, the plaintiffs allege, *inter alia*, that the defendants Edward Ball and Christine Ball “converted the Company accounts and monies to their own use and the use of CIMM BC for which the plaintiffs have and will continue to suffer loss, damage and expense including but not limited to, a depreciation of the value of its shares of CIMM”.

[69] Under the rule in *Foss v. Harbottle*, only the company may sue for a wrong done to it. A shareholder may apply for leave to bring a derivative action on behalf of the company to enforce duties owed to the company. In order for a complaining shareholder to maintain a personal action for breach of duties owed to the company, that shareholder must show that he or she has suffered damage or loss in a manner distinct from other shareholders: *Pasnak v. Chura*, 2004 BCCA 221 at para. 27; *Rogers v. Bank of Montreal* (1985), 64 B.C.L.R. 63 at 87 (B.C.S.C.).

[70] If a plaintiff cannot show that he or she has been affected by the alleged breach of duty other than by the reduction in the value of his or her shares, then the

claim is properly brought on behalf of the company, as a derivative claim: *Bruneau v. Irwin Industries (1978) Ltd.*, 2002 BCSC 757 at paras. 16 and 17.

[71] By a separate application, Synergetic has applied pursuant to s. 239 of the *Canada Business Corporations Act* for leave to bring the claims set out in the plaintiffs' Amended Notice of Civil Claim against the defendants Coast B.C., Edward Ball and Christine Ball on behalf of Coast Canada. This Court has reserved judgment on that application.

[72] On the evidence presently before the Court, it does not appear that the plaintiffs' claim, as particularized in paragraph 19 (a) of the Amended Notice of Civil Claim, that Ms. Ball participated in the embezzlement of \$550,000 paid to Coast B.C. by Coast Canada in April 2010 has any reasonable prospect of success. The banking records produced by the defendants show no net transfer of funds to Coast B.C. from Coast Canada in this transaction.

[73] The banking records disclosed to date in this action include a series of cheques written and funds transferred on April 26 and 27, 2010 by which \$550,000 was paid from a numbered company controlled by Mr. Ball to Coast B.C. and then to Coast Canada on April 27, 2010. On the same day Coast Canada paid \$550,000 to Coast B.C. which in turn paid that amount to the numbered company. Again, on the banking records disclosed by the defendants, there was no net transfer of money out of Coast Canada and no net transfer of money into Coast B.C. The sum of \$550,000 was paid into Coast B.C. and then out to Mr. Ball's numbered company. Coast Canada did not go into bankruptcy. The scheme to create one of Mr. Ball's companies as a secured creditor of Coast Canada does not appear to have been implemented. However, a thorough investigation of the accounting records of Coast Canada may shed further light on this transaction. The plaintiffs should have a reasonable opportunity to conduct that investigation.

[74] Mr. and Ms. Ball maintain that the cheque itemized in paragraph 19 (b) of the Amended Notice of Civil Claim in the amount of \$41,317.26 was for reimbursement of business expenses legitimately incurred by them on behalf of Coast Canada.

Similarly, Christine Ball has deposed that the cheque issued to her from Coast Canada for \$4,116.74 is for business and travel expenses she incurred on behalf of Coast Canada.

[75] Ms. Ball contends that even if there is merit to the plaintiffs' submission that the audit may provide proof of the embezzlement of funds from Coast Canada, and even if the audit were performed and produced such evidence, that evidence would only support a derivative action brought by Coast Canada against Ms. Ball. If Ms. Ball embezzled funds from Coast Canada then Coast Canada, rather than Mr. Luft or Synergetic would be the proper party to pursue a remedy against Ms. Ball, except to the extent that the plaintiffs could show they suffered loss or damage distinct from that sustained by the company.

[76] Counsel for Ms. Ball acknowledges that the plaintiffs have made one claim against his client that they are entitled to pursue in their own right. Mr. Luft alleges that Ms. Ball fraudulently misrepresented to him the purpose of the RBC line of credit which Mr. Luft, Synergetic, Coast B.C. and Mr. and Ms. Ball each guaranteed. However, Ms. Ball says that Mr. Luft is unable to establish that he or Synergetic suffered any damage. The only damages specifically alleged relate to a decrease in Coast Canada's share value. That loss is properly the subject of a derivative claim: *Pasnak; Bruneau*.

[77] Ms. Ball intends to argue on the hearing of the summary trial application that neither Mr. Luft nor Synergetic have suffered any damages as a result of the alleged deceit. When Coast Canada was unable to make the payments due to RBC on the line of credit, the bank entered into forbearance agreements with each of the guarantors other than Luft and Synergetic. The bank commenced an action on the guarantee as against Mr. Luft and Synergetic but after it concluded forbearance agreements with the other guarantors RBC discontinued its action against Luft and Synergetic. As part of the consideration for the forbearance agreement, Ms. Ball granted RBC a mortgage against title to her home for \$250,000. Ms. Ball submits that Mr. Luft and Synergetic declined to execute the forbearance agreement, but

received its benefit. In the result, neither Mr. Luft nor Synergetic were required to pay any money to RBC on their guarantees of the line of credit. In order to succeed on their claim against Mr. and Ms. Ball for misrepresentation and deceit, the plaintiffs have to establish to the elements of those torts, including proof of loss. However, that is a matter for another day, either on the hearing of Ms. Ball's summary trial application, or at trial.

[78] Ms. Ball denies that she has sought to subvert or hinder the plaintiffs' efforts to obtain financial disclosure. She points out that she, through her counsel, provided the plaintiffs with the review engagement financial statement for Coast Canada for 2010 and then referred the plaintiffs to the accountants, Aylett Grant, for more financial information.

[79] Ms. Ball says she has had no involvement in Coast Canada since April 2010. The plaintiffs' allegations of embezzlement and fraud against her remain outstanding, call into question her reputation, and jeopardize her opportunities for employment. In these circumstances, Ms. Ball submits that she should have the opportunity to have her summary trial application heard without further delay. In these circumstances, Ms. Ball submits that she will be prejudiced if she is denied the opportunity to have her summary trial application heard without further delay.

[80] Where an application is set down for summary trial under Rule 9-7, both parties are "obliged to take every reasonable step to put themselves in the best position possible". A party cannot "frustrate the benefits of the summary trial process" by failing to take those steps: *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34. Here, Ms. Ball argues that the plaintiffs have had sufficient time to investigate their claims against her.

[81] Ms. Ball did provide the plaintiffs with the unaudited financial statement for 2010 prepared by Aylett Grant, and did refer the plaintiffs to that firm for further information regarding the financial affairs of Coast Canada. However she did so knowing that Aylett Grant's accounts to Coast Canada had not been paid, and that the accountants would be unlikely to respond to inquiries from the plaintiffs that

required the investment of time and effort on their part unless and until their outstanding accounts were paid. As they were entitled to do, the plaintiffs applied for and obtained an order requiring Coast Canada to appoint and pay for the services of an auditor to prepare audited financial statements for the years 2008 through 2011.

[82] While I make no finding of impropriety against Mr. or Ms. Ball on this application, the financial disclosure made by the defendants afforded the plaintiffs reasonable grounds for concern respecting the financial affairs of Coast Canada, and for seeking the audit in order to investigate those concerns. For example, the bank statements for an account in the names of Edward Ball and Christine Ball show several substantial transfers of funds into and out of that account, including \$222,435 in July 2009 and \$105,000 in November 2009. Whether those funds came from Coast Canada and the purpose of these transactions are legitimate areas of inquiry. Similarly, the plaintiffs were entitled to seek an explanation for charges by Mr. and Ms. Ball to their Coast Canada credit cards for items including pet products and home renovation supplies.

[83] During the hearing, the plaintiffs, through counsel, advised that they intend to perform and pay for their own audit in the event Coast Canada does not pay for the services of Clearline.

[84] The plaintiffs have made extensive efforts to obtain full financial disclosure from the defendants. Mr. Luft and Synergetic have had to bring applications to compel the production of financial records by the defendants Edward Ball and Coast B.C. In my view, they should now have a reasonable opportunity to have their own audit performed, and to present any evidence they obtain as a result of that audit that may be material to their claims against the defendants in this action.

[85] In order to permit the plaintiffs time to obtain and analyze the results of an audit without unduly delaying the hearing of Ms. Ball's summary trial application, the summary trial set for February 6 to 8, 2013 is adjourned and will be reset for hearing for three days on a new date, no earlier than June 24, 2013 and no later than

October 4, 2013. In the event that the parties are unable to agree on the new date, they are at liberty to apply through the Registry for directions, and the Court will fix the new hearing date.

## **CONCLUSION**

[86] I have dismissed the application of the plaintiffs for an order finding the defendants Coast Canada and Edward Ball in contempt of court for violating the orders of Master MacNaughton pronounced January 5, 2012 and July 12, 2012.

[87] Consequently, the plaintiffs' application for orders punishing the defendants Coast Canada and Edward Ball for contempt and ordering Coast Canada to pay Clearline Chartered Accountants the sum of \$80,000 within 14 days of this order are also denied. The plaintiffs' application for alternative relief, in the form of an order striking the pleadings of the defendant Coast Canada and granting the plaintiffs judgment for damages and costs to be assessed against that defendant, is also dismissed.

[88] I have ordered the adjournment of the defendants' summary trial application, presently set for February 6-8, 2013 to a new date to be fixed between June 24, 2013 and October 4, 2013 in order to permit the plaintiffs a reasonable opportunity to perform their own audit before the hearing of Ms. Ball's summary trial application.

[89] The costs of the contempt application will be costs to the defendants Coast Canada and Edward Ball in the cause. The plaintiffs will have the costs of the adjournment application as costs in the cause.

"PEARLMAN J."