COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *IDSS Enterprises Ltd. v. Dynasty P.G. & Grandsons Holding Inc.,* 2013 BCCA 354

Date: 20130729
Docket: CA040229

Between:

IDSS Enterprises Ltd.

Respondent
(Plaintiff)

And

Dynasty P.G. & Grandsons Holding Inc.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Bennett
The Honourable Madam Justice A. MacKenzie

On appeal from: An order of the Supreme Court of British Columbia, dated August 21, 2012 (*IDSS Enterprises Ltd. v. Dynasty P.G. & Grandsons Holding Inc.*, 2012 BCSC 1246, Vancouver Docket S116447)

Counsel for the Appellant:	D. Gautam and M. Thomas
Counsel for the Respondent:	G. E. Sourisseau and R. Robertson
Place and Date of Hearing:	Vancouver, British Columbia June 21, 2013
Place and Date of Judgment:	Vancouver, British Columbia July 29, 2013

Written Reasons by:
The Honourable Madam Justice A. MacKenzie

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Madam Justice Bennett

Summary:

Dynasty P.G. & Grandsons Holding Inc. appeals from an order awarding IDSS Enterprises Ltd. $316,900 in damages and double costs of the trial. Dynasty and IDSS were equal shareholders in a company. When their relationship deteriorated, Dynasty agreed to purchase IDSS's shares in the company and to share "profits", defined as the difference between the accounts receivable and accounts payable, equally. IDSS agreed to share the "liabilities" equally. However, the required accounting and payment were not provided to IDSS. IDSS then successfully sued Dynasty for breach of contract. As Dynasty's accounting evidence was inadmissible and unreliable, the judge used the company's bank statements to assess "profits" at $633,922.11. In supplementary reasons, the judge dismissed Dynasty's application to reopen the trial and ordered double costs against Dynasty on the basis IDSS had made a formal offer to settle for less than the ultimate judgment against Dynasty. Dynasty appeals on the grounds the judge erred in failing to consider Dynasty's counterclaim for one-half of the company's liabilities, erred in drawing an adverse inference against Dynasty regarding disclosure of its financial documents, erred in his assessment of the profit to be divided between the parties, and erred in awarding double costs. Held: Appeal allowed. In assessing damages, the judge did not address IDSS's responsibility to share half of the company's liabilities. In particular, he overlooked the uncontested shareholders' loans of $400,000, and the award should be reduced to $116,900. This reduction in damages means the judgment is less than IDSS's formal offer to settle, so it is not entitled to double costs. Finally, the judge was justified in drawing an adverse inference against Dynasty, given the dismal state of its financial and accounting records. IDSS is awarded ordinary costs on the appeal and in the trial court.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

[1] The parties, both family owned businesses, ended their unhappy partnership by agreeing Dynasty P.G. & Grandsons Holding Inc. ("Dynasty") would buy out the 50% interest of IDSS Enterprises Ltd. ("IDSS"). Although the parties agreed to share "profits" and "liabilities" equally, the required accounting and payment were not provided to IDSS. IDSS then successfully sued Dynasty for breach of contract. Mr. Justice N. Smith of the Supreme Court awarded IDSS $316,900 in damages. In supplementary reasons, he dismissed Dynasty's application to reopen the trial for adjudication of its counterclaim, thus effectively dismissing the counterclaim. The judge also ordered double costs against Dynasty.

[2] Dynasty appeals from these orders, contending the judge erred:

1. in failing to adjudicate on the counterclaim;
2. in drawing an adverse inference against Dynasty regarding disclosure of its financial documents;
3. by making palpable and overriding errors in assessing the profit to be divided between the parties; and
4. in awarding double costs.

[3] For the following reasons, I would allow the appeal and set aside the award of damages and double costs. I would substitute an award of damages of $116,900 and ordinary costs of both the trial and the appeal of this matter.

Background

[4] Dynasty is a holding company controlled by the Sangha family and IDSS is a holding company controlled by the Dosanjh family.

[5] In 2006, Dynasty and IDSS became equal shareholders in four companies that together carried on the business of “trans-loading” agricultural products. The entire organization was referred to in the trial judge’s reasons for judgment by the name of the operating company, Global Agricultural Trans-Loading Inc. (“Global”).

[6] Soon after, conflict developed between the Dosanjh and Sangha families and the relationship deteriorated to the point where they could no longer remain co-owners of Global. On May 31, 2007, the families met, along with respected members of their community, to attempt to resolve the matter. Following what the judge described as a “shotgun” procedure, a total value of $7 million was placed on the business. Dynasty was given the first option to buy IDSS’s shares in Global for half that amount and had until noon the following day to make its decision.

[7] The matters agreed to at the May 31, 2007 meeting were recorded in a handwritten document signed by the parties. In addition to the purchase price, the handwritten agreement included the following term:

> All payable and receivable will be 50%-50% shared by both original owners up to May 31st/2007.

The handwritten agreement also provided that a lawyer known to both parties would draw up the legal documents and Dynasty would make an immediate initial payment of $500,000, with final payment on or before July 16, 2007.

[8] On June 1, 2007, Dynasty elected to proceed with the purchase of IDSS's shares in Global. The parties entered into a formal share purchase agreement (the "Share Purchase Agreement"), which included the following provisions:

> 3.02 The Purchaser shall be entitled to all profits of the Companies from June 1, 2007 and responsible for all liabilities of the Companies from June 1, 2007. In the event the Purchaser fails to complete the transaction on July 16, 2007, the Purchaser shall continue to be entitled to all profits of the Companies from June 1, 2007 to July 15, 2007 and responsible for all liabilities of the Companies from June 1, 2007 to July 15, 2007.
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> 3.03 The Vendors shall pay one-half of all outstanding liabilities of the Companies incurred in the ordinary course of business up to and including May 31, 2007 including but not limited to the Mortgage, Loan, trade payable and indebtedness due to government agencies including but not limited to source deductions, GST payable, PST payable, corporate income taxes, social service tax payable, and Workers' compensation. In addition, the Vendor shall be entitled to one-half of all profits of the Companies up to and including May 31, 2007.
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> 3.04 The Vendor covenants and agrees to indemnify and hold harmless the Purchaser from and against one half of any and all liabilities of the Companies, whether accrued, absolute, contingent or otherwise existing up to and including May 31, 2007, including but not limited to any government agency, any breach of representation, warranty of covenant in this agreement, or trade payables to, and assessment or reassessment by Revenue Canada or from any and all actions, suits, proceedings, demands, assessments, judgments, costs and legal and other expenses incident to any of the foregoing. The Purchaser covenants and agrees to indemnify and hold harmless the Vendor from and against one-half of any and all liabilities of the Companies, whether accrued, absolute, contingent or otherwise existing up to and including May 31, 2007, including but not limited to any government agency, any breach of representation, warranty of [*sic*] covenant in this agreement, or trade payables to, and assessment or reassessment by Revenue Canada or from any and all actions, suits, proceedings, demands, assessments, judgments, costs and legal and other expenses incident to any of the foregoing.
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> * * *

> 4.5 The Purchaser covenants and agrees that on the Closing Date it shall provide the Vendor the Vendor's share of the profits of the Company up to and including May 31, 2007. The Purchaser also agrees to provide the Vendor with an accounting of the same and all documentation supporting such accounting.
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> [Emphasis added.]

[9] Consistent with the handwritten agreement, the Share Purchase Agreement set July 16, 2007, as the closing date for the transaction and the transfer of shares. The closing occurred on that date, but the parties agreed to extend the date for the accounting and payment under clause 4.5 of the Share Purchase Agreement to August 31, 2007. However, Dynasty never made the payment.

[10] IDSS brought an action against Dynasty, claiming it should have received over $300,000 after the accounts payable and other liabilities were paid out. In its counterclaim, Dynasty argued that IDSS owed Dynasty in excess of $2 million for Global's liabilities under the Share Purchase Agreement. That amount was reduced to $132,000 when Dynasty applied to reopen the trial.

Reasons of the Trial Judge

[11] At trial, IDSS's position was the parties intended to equally divide receivables and payables as of May 31, 2007, as set out in the handwritten agreement. IDSS argued this agreement was not altered by the word "profit" in the Share Purchase Agreement. Dynasty's position was the Share Purchase Agreement was the only binding agreement and it clearly required a division of "profit", based on an accounting. Dynasty argued that when the accounting was finally completed on May 8, 2009 (two years after the May 31, 2007 "cut-off" date), it showed that Global lost approximately $470,000 in the five months before May 31, 2007.

[12] The judge accepted that the Share Purchase Agreement represented the final contract between the parties and prevailed to the extent it conflicted with the handwritten agreement. The question then, as articulated by the trial judge, was "what the share purchase agreement required and, in particular, what was meant by the words 'accounting' and 'profit' as they were used in that agreement" (para. 20).

[13] The judge applied the settled rules of contractual interpretation as summarized in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107. He noted the Share Purchase Agreement did not define how Global's profits were to be determined. In response to Dynasty's position that the Share Purchase Agreement made payment subject to an accounting and it had produced such an accounting, the judge observed:

> [22] The accounting Dynasty relies on includes financial statements prepared by a chartered accountant, Arvinder Bubber, in May 2009. In preparing those statements, Mr. Bubber relied on documents, including a trial balance and general ledger, prepared by a bookkeeper, Beverley Gunn, who was retained by Dynasty in February 2008 and started work on Global's books in July 2008.

The judge concluded:

> [23] In my view, Dynasty's submission ignores the fact that paragraph 4.5 requires payment of the "vendors share of the profits" on the closing date and requires an accounting in the context of that payment. In other words, Dynasty was required, when tendering payment on the closing date, to account for how the amount of the payment had been determined. Paragraph 4.5 does not make payment subject to an accounting to be performed at an unspecified later date.
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> [24] The closing date was July 16, 2007, although the parties agreed to extend the date for the payment under paragraph 4.5 to August 31, 2007. In view of the surrounding circumstances, and particularly the far from amicable relationship that gave rise to the agreement, it could not have been within the reasonable contemplation of the parties that IDSS would be bound by an accounting prepared entirely on Dynasty's instructions and completed only after Dynasty had been in full control of all of Global's finances and records for almost two years.
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> [Emphasis added.]

[14] The judge also found that the accounting on which Dynasty relied was neither admissible nor reliable as evidence of Global's financial position as of May 31, 2007.

[15] The judge held that the documents prepared by Ms. Gunn, and on which Mr. Bubber relied to prepare Global's financial statements in May 2009, were not admissible as business records under s. 42(2) of the *Evidence Act*, R.S.B.C. 1996, c. 124, because they were prepared long after the fact.

[16] The judge also held that even if Dynasty's accounting documents were admissible, they were unreliable because there was clear evidence to support the inference they were prepared with the purpose of minimizing the amount owing to IDSS, rather than fairly representing Global's financial position.

[17] I quote the following from the judge's reasons because, in my opinion, it demonstrates the extent to which, as I later observe**,** Dynasty itself is responsible for its complaints in this case:

> [34] Even if Dynasty's accounting documents were admissible, I find them to be unreliable. There is clear evidence to support the inference that they were not prepared primarily to fairly represent the company's financial position, but to minimize the amount owing to IDSS.
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> [35] For example, Ms. Gunn increased the accounts payable as of May 31, 2007 by accruing approximately $237,000 in later expenses to that period. These include legal fees paid to Johnny Sangha's criminal defence lawyer in relation to the charges that arose out of the incident on May 29, 2007—-the incident that was the last straw in the breakdown of the relationship between the two families. It is difficult to see how that is proper corporate expense and, even if it is, why any part of it should be payable by the plaintiff.
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> [36] Ms. Gunn also included in the accounts payable a number of bills from another lawyer, Tony Bhullar, who initially provided Mr. Sangha with independent legal advice on the share purchase agreement, then became involved in a number of subsequent matters. For example, it was Mr. Bhullar who later advised Mr. Sangha that he could revoke the signing authority over the old Global bank account that had been given to Mr. Vinning and Mr. Samra. Each party was to get its own legal advice on that agreement and I have received no reasonable explanation as to why only one party should be able to charge that cost to the company and accrue that cost to the period pre-dating the agreement.
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> [37] Ms. Gunn also included her own fees as expenses incurred prior to May 31, 2007, although she was not retained until more than a year later, and recorded wages to members of the Sangha family that were not in fact paid during the relevant period, if at all.
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> [38] Counsel for the defendant argues that the plaintiff has challenged only some of Ms. Gunn's entries and that, even if those are discounted, there is still a substantial amount payable to the defendant. However, in my view the fact that Ms. Gunn, on the instructions of Mr. Sangha, was prepared to include items such as the ones discussed above calls into question the reliability of the entire exercise.
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> [39] One item that is particularly troubling is an account purportedly from Mr. Bhullar dated July 29, 2007. Although the bill appears on Mr. Bhullar's letterhead, it is not signed and Mr. Bhullar testified that it was not prepared by his office. It is not clear if or how that specific bill was incorporated into the

> records prepared by Ms. Gunn, but its existence goes to the general credibility of financial records created after May 31, 2007.
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> [40] Therefore, if the share purchase agreement in fact required a full accounting and a payment based on Global's true financial position, including properly determined profit or loss, as of May 31, 2007, there is no evidence on which that amount could be determined. Such evidence would probably have to come from an accountant who had prepared audited financial statements or who had at least reviewed the statements prepared by either Mr. Dhaliwal or Mr. Bubber, along with the material on which they were based, in sufficient detail to express an opinion on their reliability. It is not the function of the court to perform an audit, either at trial or on a reference to the registrar.
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> [Emphasis added.]

[18] Despite these grave difficulties in discerning any accurate facts from the accounting documents adduced by Dynasty, the judge concluded the Share Purchase Agreement did not require a complete analysis of Global's financial position as of May 31, 2007, as the word "profit" in the Share Purchase Agreement meant the difference between the accounts receivable and accounts payable, as contemplated by the handwritten agreement. The judge summarized his conclusion as follows:

> [45] Based on the plain words of paragraph 4.5 and on the surrounding circumstances, I find that the only reasonable interpretation of the requirement for an accounting is that Dynasty was required to explain how it had calculated the amount that it was required to pay to IDSS on the closing date.
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> [46] I further find that the payment required by that paragraph was one half of the amount by which accounts receivable exceeded accounts payable on May 31, 2007. The fact that this payment was not required until the closing date provided Dynasty with time to pay or collect those accounts as required and, perhaps, to identify any accounts receivable that may not have been collectable. Dynasty failed to make the required payment and was and remains in breach of the contract.

[19] Turning to damages, the judge found there was no direct evidence of the state of Global's accounts receivable or accounts payable as of May 31, 2007. He further found that Dynasty was in control of all records necessary to determine those amounts.

[20] The judge noted Avtar Dhaliwal, Global's in-house accountant at the time of the Share Purchase Agreement, had, on June 14, 2007, prepared interim financial statements for Global as of May 31, 2007. With respect to these statements, the judge said:

> [48] In this case, the financial statements prepared by Mr. Dhaliwal in June 2007, identify an excess of accounts receivable over accounts payable of $647,930. Like the statements prepared much later by Mr. Bubber, those statements were prepared on a "notice to reader" basis and cannot, in themselves, amount to an admissible opinion on the financial position of Global. However, the statements are based on transactions that Mr. Dhaliwal had himself recorded at or about the time they took place. More important, Mr. Sangha signed the statements, indicating at least that he believed them to be accurate at the time and was prepared to make representations to that effect.
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> [Emphasis added.]

[21] The judge concluded, therefore, that damages should be assessed by looking at the bank statements of what he referred to as the "old Global account" existing at the time of the agreement and kept open for the purpose of processing the receivables and payables.

[22] The judge also noted that Mr. Dhaliwal had identified $196,787.64 in accounts receivable incurred before May 31, 2007, for which he was unable to account. Relying on *Ticketnet Corp. v. Air Canada*, 154 D.L.R. (4th) 271, 105 O.A.C. 87 (Ont. C.A.), leave to appeal refused, 161 D.L.R. (4th) viii (S.C.C.), the judge concluded Dynasty was the only party capable of giving evidence that those accounts had not been paid. Because it had not done so, the judge drew the adverse inference that those amounts had been collected and deposited in a different bank account.

[23] The judge assessed the difference between accounts payable and accounts receivable on May 31, 2007, at $633,922.11, and awarded IDSS $316,900 as its 50% share of the profits under the Share Purchase Agreement.

Supplemental Reasons

[24] Dynasty brought an application to reopen the trial on the basis the judge had not addressed its counterclaim. Specifically, Dynasty argued there were liabilities that did not fall under the accounts payable which should have been divided, and which were recoverable by Dynasty under its counterclaim.

[25] In supplementary reasons given April 5, 2013, the judge dismissed the application because the counterclaim was different than originally advanced and in a far different amount. The judge also held that even if he were prepared to consider the counterclaim, it was based on financial records he had already found to be both inadmissible and unreliable.

[26] Finally, the judge ordered double costs against Dynasty on the basis IDSS had made a formal offer to settle for $300,000 (less than the ultimate judgment against Dynasty) five days before the trial.

Discussion

[27] Dynasty does not contest the judge's interpretation of the Share Purchase Agreement that profits were to be determined by the difference between the accounts receivable and the accounts payable.

[28] I turn to Dynasty's grounds of appeal.

1) Did the judge err in failing to adjudicate the counterclaim?

[29] Clause 3.03 of the Share Purchase Agreement provided that IDSS would pay "one-half of all outstanding liabilities of [Global] incurred in the ordinary course of business up to and including May 31, 2007…". Clause 3.04 provided IDSS would agree to "indemnify and hold harmless [Dynasty] from and against one half of any and all liabilities of [Global] … existing up to and including May 31, 2007…".

[30] On appeal, Dynasty submits the trial judge focused on IDSS's claim to its share of profits under the Share Purchase Agreement, but never considered

Dynasty's counterclaim for one-half of Global's liabilities, resulting in an injustice in the accounting between the parties. Dynasty says evidence of these liabilities includes Mr. Dhaliwal's unaudited financial statements, which set the amount of liabilities, including a cash deficit but excluding the accounts payable and accrued liabilities, at $560,292; Mr. Bubber's unaudited financial statements, which set that amount at $675,385; and audited financial statements prepared in October 2012 by Stefan Ferris after the trial, which set that amount at $501,110. Mr. Ferris's financial statements are the subject of Dynasty's fresh evidence application, which I will address later in these reasons.

[31] At a minimum, Dynasty says the judge had uncontroverted evidence there were outstanding shareholders' loans for $400,000, and this liability should have been shared equally between the parties. Dynasty says its $200,000 withdrawal from the Global account was a repayment of its shareholders' loan. When IDSS became aware of this payment, it brought an action (S114769) against Global and, on August 27, 2009, IDSS obtained an order for repayment of its shareholders' loan of $200,000.

[32] IDSS submits the counterclaim was adjudicated and dismissed; it says the order made after trial dismisses Dynasty's counterclaim and the trial judge's interpretation of the Share Purchase Agreement (which Dynasty does not contest) resulted in a dismissal of Dynasty's counterclaim by necessary implication. IDSS notes the trial judge interpreted the terms "profit" and "liabilities" in the agreement to mean IDSS was entitled to 50% of the amount by which accounts receivable exceeded accounts payable on May 31, 2007. IDSS contends the judge's reasoning encompassed consideration of the whole contract, including the use of the word "liabilities" in clause 3.03 of the Share Purchase Agreement.

[33] IDSS's position on this issue seems to be that the judge's interpretation of the Share Purchase Agreement means that IDSS does not have to share Global's liabilities apart from accounts payable. However, clauses 3.03 and 3.04 of the

Share Purchase Agreement required IDSS and Dynasty to share all Global's liabilities equally and the judge recognized this when he said:

> [43] The handwritten agreement refers to a division of accounts receivable and accounts payable up to May 31. The share purchase agreement establishes the Plaintiff's responsibility for 50% of "all liabilities" and entitlement to 50% of all "profits" up to and including May 31, 2007. If "profit" was intended to mean the net profit from all operations as shown on financial statements, that calculation would, by definition, have included both income and expenses and there would have been no need for the separate reference to sharing of liabilities.
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> [Emphasis added.]

[34] The judge also recognized IDSS's contractual responsibility to share the liabilities in his supplementary reasons when he said, at para. 2, "As counsel for the defendant pointed out, there was a separate reference in the contract to division of liabilities that I considered in arriving at my definition of profit."

[35] As I stated earlier, the judge faced formidable difficulties in discerning any accurate facts from the evidence adduced by Dynasty. He did the best he could in the circumstances. However, in assessing damages, although the judge recognized the separate reference to "liabilities" in the Share Purchase Agreement, he did not address IDSS's responsibility to share half of Global's liabilities. In particular, he overlooked the identifiable and uncontested shareholders' loans of $400,000.

[36] There was no dispute that each of IDSS and Dynasty had provided Global $200,000 as shareholders' loans; the existence of this liability is supported by IDSS's judgment against Global for $200,000 for repayment of its loan. The judge in this case quite properly added Dynasty's withdrawal of its $200,000 loan back into his assessment of Global's account at the relevant time in that Dynasty neither repaid IDSS its shareholders' loan, nor advised IDSS of the repayment to itself. However, because IDSS later obtained judgment for $200,000 in a separate action as repayment for its shareholders' loan to Global, IDSS will recover its loan twice unless it is offset from its damage award in this action.

[37] The other alleged liabilities were smaller amounts. As IDSS pointed out at the hearing of this appeal, there are yet other amounts, for example two sums of $10,000 each, that would have increased IDSS's share of the profit and were not taken into account at trial. These amounts would have gone some distance in offsetting the asserted additional liabilities. However, this Court is not undertaking a lengthy accounting exercise. As the judge said, he was attempting a "reasonable estimation" of damages (para. 54). If we address the significant liability of the shareholders' loans by offsetting the amount from the award of damages to IDSS, a reasonable estimation can be achieved.

[38] Furthermore, with the exception of the undisputed shareholders' loans, the record does not include admissible, credible, or reliable evidence of liabilities. The judge ruled Dynasty's accounting evidence inadmissible or, alternatively, unreliable. In my view, that finding is unassailable given the judge's finding is supported by the record.

[39] Dynasty submits that because the judge relied on certain of Mr. Dhaliwal's accounting evidence, this Court should rely on his liability figure of $560,292. However, the judge found Mr. Dhaliwal "never had all of the information he needed to make a full assessment" of Global's financial position on May 31, 2007.

[40] In summary, I would offset the award of $316,900 to IDSS in this action by the $200,000 IDSS was awarded in its other action. This reduces the award of damages to $116,900 and pre-judgment interest from August 31, 2007.

2) Did the judge err in drawing an adverse inference against Dynasty?

[41] Dynasty submits the trial judge erred in applying *Ticketnet* to draw an adverse inference against Dynasty that all outstanding accounts receivable had been collected.

[42] The trial judge followed the approach to damage assessment summarized in *Encorp Pacific Canada v. Rocky Mountain Return Center Ltd.,* 2008 BCSC 779, which applied the principle in *Ticketnet* as follows:

> [128] The plaintiff cites the maxim that in assessing damages "everything is presumed against the spoiler or wrongdoer", or *omnia praesumuntur contra spoliatorem.* The authorities indicate that where the nature of the wrong itself makes it difficult for the plaintiff to establish a loss or where the critical facts are peculiarly within the defendant's knowledge, this maxim will be invoked for the plaintiff's benefit: *Ticketnet Corp v. Air Canada* (1997), 154 D.L.R. (4th) 271 at para. 85, 105 O.A.C. 87 (Ont. C.A.), leave to appeal to S.C.C. refused, 161 D.L.R. (4th) viii.
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> [129] Although the general burden of proof lies upon a plaintiff to prove the loss for which compensation is claimed, courts have consistently held that if a plaintiff establishes that a loss has been suffered, the difficulty of determining the amount of it does not excuse the wrongdoer from paying damages: S.M. Waddams, *Law of Damages,* loose-leaf (Aurora, Ont.: Canada Law Book, 2007) at 13-2; *Webster v. Ernst & Young*, 2000 BCCA 229, 75 B.C.L.R. (3d) 169 at para. 22 leave to appeal to S.C.C. refused, 2000 S.C.C.A. No. 263.

[43] In applying *Ticketnet* to draw an adverse inference against Dynasty, the judge said:

> [52] As said above, Mr. Dhaliwal identified $196,787.64 in accounts receivable incurred prior to May 31, 2007 that he was subsequently unable to determine the status of. If any of those accounts had not been paid, Dynasty was the only party capable of giving that evidence, along with evidence of what efforts, if any, had been made to collect them. No such evidence was given and I draw the inference that those amounts were likely collected, but deposited into a different bank account.

[44] Dynasty says *Ticketnet* should not have been applied in the circumstances of this case, and points to the following passage from *Ticketnet*:

> [84] The maxim, everything is presumed against the wrongdoer, cannot apply to a damage assessment against every wrongdoer in a breach of contract case. …
>
> [85] In my view, the maxim should only apply where the wrongdoer's acts make it difficult or impossible for the innocent party to prove its loss or where the facts needed to prove the loss are known solely by the wrongdoer and the wrongdoer does not disclose these facts to the innocent party. …
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> [Emphasis added.]

[45] Dynasty says IDSS was not prevented from proving its loss, as it consented to an order of March 18, 2008, in which it agreed to give IDSS complete access to Global's financial records. Dynasty further says it gave IDSS the opportunity to view the working papers and supporting documents for Mr. Bubber's financial statements.

[46] However, I agree with IDSS that Dynasty's position that it did not fail to disclose any records is contrary to the evidence and to the trial judge's finding that "the financial records necessary to determine those amounts with any precision are within the control of the defendant" (para. 47). As IDSS says, Dynasty was in sole control of the Global bank account, did not produce the requested documents and information necessary to complete an accurate or reliable accounting of the accounts payable and accounts receivable, and opened other bank accounts in Global's name without producing documents from those accounts. This can hardly amount to proper disclosure.

[47] Thus, it was clearly open to the trial judge to conclude Dynasty had made it difficult or impossible for IDSS to prove its loss. It was properly within his discretion to apply *Ticketnet* and draw an adverse inference against Dynasty. In my opinion, by choosing to tender the inadmissible, unreliable accounting records, when Dynasty's responsibility under the Share Purchase Agreement was to provide IDSS "an accounting … and all documentation supporting such accounting" (clause 4.5), Dynasty is hard-pressed now to complain about the judge's application of the principle in *Ticketnet*. This exercise of discretion was justified, given the dismal state of Dynasty's financial and accounting records, as described by the trial judge.

[48] I would not accede to this ground of appeal.

3) Did the judge make palpable and overriding errors in assessing the profit to be divided between the parties?

[49] To assess the profit to be divided between the parties, the judge examined the bank statements of the old Global account.

[50] First, the judge noted that in October 2007 Dynasty withdrew $200,000 from the Global account, leaving a cash balance of $148,936.39. As the $200,000 was an undisclosed repayment to Dynasty of its shareholders' loan without a similar repayment to IDSS, the judge quite properly added that amount back into the account balance, resulting in an adjusted bank balance as of October 10, 2007, of $348,936.39.

[51] Secondly, the judge noted IDSS identified a number of transfers from the Global account that did not appear to be related to any accounts payable, including automatic deductions for mortgage and equipment lease payments and an unexplained transfer of $40,000. The judge added the total amount of these items ($88,198.08) back into the account balance.

[52] Finally, the judge added to the account balance the $196,787.64 in accounts receivable incurred before May 31, 2007, for which Mr. Dhaliwal was unable to account and which the judge inferred was ultimately collected.

[53] This resulted in a total assessment of $633,922.11, about which the judge said:

> [54] I find that assessment more likely than not reflects a reasonable estimation of what the difference between accounts payable and accounts receivable would have been on May 31, 2007. I note that it is slightly lower than the amount Mr. Sangha specifically endorsed in June 2007. The plaintiff was entitled to half of that amount, which I round off to $316,900.

[54] Dynasty submits the judge made palpable and overriding errors in this assessment.

[55] Because this ground of appeal depends heavily upon Dynasty's application to adduce fresh evidence, I will address that application first.

[56] The proposed fresh evidence consists of the affidavit of Mr. Sangha, sworn May 14, 2013, in which he deposes that most of the accounts receivable were never received and an amount of $60,914.24 for leasehold improvements was later determined to be not recoverable. The fresh evidence also includes the affidavit of a chartered accountant, Mr. Ferris, attaching as an exhibit audited financial statements of Global Agriculture Trans-Loading Inc. as at May 31, 2007, incorporating an auditors' report dated October 24, 2012. These affidavits are proffered as evidence in support of Dynasty's position that the judge erred in including certain amounts in the calculation of accounts receivable.

[57] The test for the admission of fresh evidence is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial …
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[58] In *Scott v. Scott*, 2006 BCCA 504 at para. 21, this Court commented that the standard of review on a fresh evidence application reflects the fact that:

> … generally speaking, the need for certainty and finality leaves no room for the admission of fresh evidence on appeal: *Bradbury v. I.C.B.C.* (1989), 42 B.C.L.R. (2d) 397 at 399 (C.A.).

[59] Dynasty says the fresh evidence is required to do justice in this case because it could not have anticipated that the judge would reject all its accounting records. But the judge's concerns about Dynasty's records were serious; it is entirely unsurprising that he rejected them as inadmissible, or if admissible, unreliable. Dynasty alone is responsible for this outcome. In my view, the proposed fresh evidence fails to meet the test in *Palmer*. It is a thinly veiled attempt by Dynasty to have this Court retry the case on different evidence that could have been prepared and adduced at trial. Having deliberately tendered such improper accounting records at trial, Dynasty can hardly seek a retrial in this Court on different evidence. It is not the function of this Court to retry the case.

[60] Furthermore, as IDSS says, the proposed evidence of newly created financial statements should be found inadmissible and unreliable for reasons similar to those of the trial judge.

[61] I would dismiss Dynasty's application to adduce fresh evidence.

[62] Given this conclusion, to the extent Dynasty relies on the inadmissible fresh evidence, it is unnecessary to address its submissions on this ground.

[63] Dynasty also relies on a general ledger attached to Mr. Bubber's financial statements adduced at trial to submit the judge erred in including bad debts in his calculation of accounts receivable. However, as IDSS says, the trial judge found Mr. Bubber's evidence to be inadmissible and unreliable. Dynasty persists in rearguing its case on material already rejected by the trial judge for reasons that were grounded in the evidence.

[64] Dynasty went to some effort to show us the $196,787.64 in accounts receivable which Mr. Dhaliwal identified as having been incurred before May 31, 2007, and of which he had been unable to determine the later status, had been reduced by September 2008 to $137,523.40 as set out in the interim balance sheet prepared by Mr. Dhaliwal as of September 14, 2008. Thus, Dynasty said the "profit" should be correspondingly reduced. On the other hand, IDSS demonstrated the figure of $196,787.64 was more accurate as it represented accounts receivable as at October 2007, a year earlier than Dynasty's lower figure, and much closer to the cut-off date of May 31, 2007. This exercise underscores the futility of Dynasty's attempt to have this Court retry the case. Once again, it is not the role of this Court.

[65] Similarly, Dynasty's argument about the $40,000 bank loan also appears to rely upon evidence the judge rejected as inadmissible or unreliable, or on the proposed fresh evidence which I addressed earlier.

[66] Dynasty makes the same argument about the shareholders' loans under this ground of appeal. I have already addressed it.

4) Did the judge err in his exercise of discretion in awarding double costs?

[67] The reduction in IDSS's award of damages set out above under the first ground of appeal means the damages are less than IDSS's formal offer to settle of $300,000, made shortly before trial. Thus, IDSS is not entitled to double costs.

[68] Both parties have had some measure of success in this Court. However, I note that IDSS was forced to sue to recover the sum awarded. Also, the prime difficulties concerning evidence in the case were caused by the failure of Dynasty to furnish accurate records in any timely way. Dynasty had this responsibility under the terms of the Share Purchase Agreement. In these circumstances, I consider that IDSS should have its costs here and in the trial court, all at the ordinary scale.

Conclusion

[69] For the foregoing reasons, I would allow the appeal and set aside the award of damages, substituting an award of $116,900. I would also set aside the award of double costs, and substitute an award of ordinary costs for both the trial and the appeal.

"The Honourable Madam Justice A. MacKenzie"

I agree:

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice Bennett"