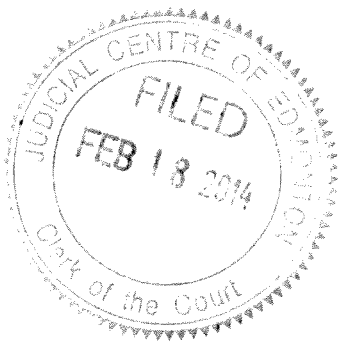

Court of Queen's Bench of Alberta

Citation: FIC Real Estate Fund Ltd v Lennie, 2014 ABQB 105

Date:
Docket: 1003 03313
Registry: Edmonton

Between:

FIC Real Estate Fund Ltd.

Plaintiff

- and -

Malcolm Lennie, 1316576 Ltd. and Kenneth Horne

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] This is an application by the plaintiff, FIC Real Estate Fund Ltd., for a declaration that the defendant Kenneth Horne is in contempt of court, and for an award of costs against him in relation to his alleged contempt.

[2] Mr. Horne denies that he is in contempt of court, and argues that costs of the proceedings against him should be in the cause, and not determined now at a very early pre-production and pre-questioning stage of the proceedings.

Facts

[3] There is a lengthy history among these parties. Mr. Lennie and Mr. Horne are long-time friends. Mr. Lennie, an Edmonton lawyer, represented Mr. Horne in various real estate

transactions. He also acted as solicitor for FIC in some transactions. At some stage in their dealings, Mr. Horne, Mr. Lennie and FIC participated in a real estate venture that involved the purchase for development of a piece of property owned by Mr. Horne. One of the development entities was the defendant 1316576 Alberta Ltd., a company owned by Mr. Lennie and Mr. Horne.

[4] Ultimately, that deal did not close because FIC allegedly did not make the final payment owed to 1316576 Alberta Ltd.

[5] When 1316576, Mr. Lennie and Mr. Horne treated the payments made by FIC as forfeited because of FIC's default, FIC commenced action against Mr. Lennie, Mr. Horne and 1316576 and filed a caveat against the lands.

[6] For some yet unexplained reason, Earle Pasquill, the principal of FIC, discharged the caveat in the spring of 2013 notwithstanding that the litigation involving FIC and the defendants and the land had not been resolved. That left the property unencumbered, and Mr. Lennie and Mr. Horne were able to complete a pending sale without having to deal further with Mr. Pasquill, FIC or the caveat. The discharge of caveat was done directly by Mr. Pasquill and FIC, and did not involve FIC's lawyers.

[7] When FIC learned that the monies resulting from the sale of the land had been paid out and were not being held in relation to the litigation, it applied *ex parte* on May 15, 2013 before Lee J. for an order requiring that Mr. Lennie and Mr. Horne immediately pay the funds they had received for the sale of the lands into court.

[8] The order was brief and clear:

1. An order that all amounts received by the Defendant, Kenneth Horne ("Horne"), in respect of the sale of the Horne Lands (as defined herein) being the amount of $1,000,000.00 be paid into Court and held to the credit of this action until further order of this Court.

2. An order that all amounts received by the Defendant, 1316576 Alberta Ltd. ("131"), in respect of the sale of the 131 Lands (as defined herein) being the amount of $1,615,000.00 be paid into Court and held to the credit of this action until further order of this Court.

3. An order directing the Applicant to provide copies of this application and the supporting material and to serve the order arising out of this application on counsel for the Defendants, forthwith.

4. An order directing that the Defendants may, on 48 hours' notice to counsel for the Plaintiff, bring an application to seek to set aside or vary all or part of the order granted *ex parte*.

5. There are no costs arising from this application.

[9] That order was served on counsel of record for both Mr. Lennie and Mr. Horne (not counsel on this application) on May 15 via email and fax. That lawyer had filed a statement of defence on behalf of all defendants in the action. No issue is taken with the manner of service of the order on the defendants' lawyer of record. FIC was entitled to serve the order on the defendants' counsel and to be able to rely on the effectiveness of that service.

[10] As a belt and suspenders approach, a copy of the order was also served on the lawyer of record by courier on May 16, 2013, and Mr. Lennie was served personally on May 16, 2013. All of these services are documented in affidavits of service and these have been filed in the action.

[11] On May 27, counsel for the defendants filed an application to set aside the May 15 order, serving a notice of application on counsel for FIC. The application is clear that it seeks relief for all of the defendants, as all defendants were affected by the May 15 order.

[12] The affidavit of Malcolm Lennie dated May 22, 2013 was filed in support of the application. The application to set aside the order was heard on May 30 by Ross J. She refused to set aside or vary the May 15 order and instead adjourned the application *sine die* pending cross-examination of Mr. Pasquill.

[13] She expressly ordered that "the defendants are required to comply with the terms of the May 15th Order". She also provided a mechanism for security to be paid by FIC for any monies paid into court by any of the defendants.

[14] The order from the May 30 application before Ross J. was approved by counsel for the defendants, and was filed on June 25.

[15] The application to set aside the May 15 order is, as at the date of this decision, still pending. Mr. Pasquill was cross-examined in the summer of 2013 but no further steps have been taken relating to the application.

[16] The parties first appeared before me on July 3, 2013 on FIC's application to enforce the terms of the May 15th order against Mr. Horne. As at that time, Mr. Horne had not complied with any aspect of it. Mr. Lennie had by then provided the statutory declaration required of him by the terms of the May 15th order and Justice Ross's May 30 order. The statutory declaration indicated that the monies Mr. Lennie received in respect of the sale had been transferred to 1746437 Alberta Ltd., a company owned by Mr. Lennie, and members of his immediate family. That led to the amendment of the statement of claim to include 1746437 Alberta Ltd. as a defendant.

[17] Mr. Lennie's statutory declaration and records provided with it gave some information as to what had happened to the sale proceeds to Mr. Horne, and through this disclosure, FIC learned that substantial funds had been paid to Mr. Horne and deposited in Mr. Horne's account at Servus Credit Union in Sherwood Park.

[18] On the July 3 application, counsel for the defendants advised me that he had not been in contact with Mr. Horne, and that attempts to send materials to Mr. Horne's last known address had been unsuccessful. That was not surprising, as the last known address was the property that had been sold after the caveat was discharged. He advised that he had no instructions from Mr. Horne and that he was ceasing to act. He took no further role in the application on July 3.

[19] I granted an order in favour of FIC freezing Mr. Horne's accounts with Servus Credit Union and requiring Servus to provide bank statements for any of Mr. Horne's accounts starting April 1, 2013 as well as copies of any documents evidencing the disbursement of funds from these accounts.

[20] The May 15 order had been served on Mr. Horne through his lawyer of record, and Mr. Horne, through his counsel, had made an application to set aside the May 15 order. His counsel was present when Justice Ross denied the application at that stage, adjourned the application and

directed that the defendants (including Mr. Horne) comply with the May 15 order. As at July 3, Mr. Horne had taken no steps to comply with the May 15 order. I accordingly issued a warrant directing that he be taken into custody and brought before the court to show cause why he should not be held in contempt.

[21] The warrant was not enforced, as Mr. Horne learned of it and voluntarily came forward on July 10, 2013 to deal with the matter.

[22] There have been a number of applications or appearances before me since July 10 as to Mr. Horne's compliance with the May 15 order. These appearances relate only to Mr. Horne and not the other defendants.

[23] Since that time, Mr. Horne has been working through his new counsel to comply with the terms of the May 15 order. As at the last appearance on December 17, 2013, Mr. Horne has accounted for the funds received. Some monies have been paid into court, some monies are frozen in accounts, and security has been given by some third parties involved. Some portion of the funds has not yet been paid into court as a result of the involvement of another third party. Other proceedings are contemplated by FIC involving that third party.

[24] I am satisfied that at this stage, Mr. Horne has done what is reasonably within his power to do to comply with the May 15 order, short of using other funds or resources to pay money into court.

[25] Since July 3, FIC has been seeking a declaration that Mr. Horne is in contempt of the May 15 order and the May 30 order, and for an order granting it solicitor and client costs of the proceedings they have taken to enforce the May 15 order. I have continued to adjourn the issues of contempt and costs to allow Mr. Horne an opportunity to comply with the orders and purge any contempt (if indeed he has been in contempt of court).

[26] As at December 17, it was clear that the time was appropriate to determine these issues.

Positions of Parties

FIC

[27] FIC's position is simple. It obtained an order from Justice Lee on May 15, requiring that certain things be done. That order was served on Mr. Horne in the manner contemplated by the *Rules of Court*, namely on his lawyer of record. Having been properly served, Mr. Horne failed to comply with the May 15 order, in that he did not pay any monies into court and he did not file the required statutory declaration. Through his counsel he applied to set aside the May 15 order, and although he was not personally present in court on May 30 when Ross J. heard the application, his lawyer was there. Subsequently, he failed to comply with either the May 15 order or Justice Ross's direction that it be complied with. Instead, the day after Justice Ross's order, he transferred money out of the province and to third parties. His failure to comply with the order is a contempt of court.

[28] Trying to get compliance with the orders, and securing funds disbursed by Mr. Horne following the orders, has been very expensive for FIC, and they should not be out of pocket. Thus a declaration of contempt and an award of solicitor client costs are appropriate. Because none of the enforcement issues is attributable to anything done by the plaintiff, costs should be

on a solicitor and his own client basis, not just solicitor and client. These costs are currently in excess of $50,000.

[29] Counsel argues that FIC should be able to recover these costs immediately from funds paid into court, and that Mr. Horne should be required to replace those funds forthwith.

Mr. Horne

[30] Mr. Horne acknowledges that he was represented by counsel, but in his statutory declaration dated July 22, 2013, says that he only learned of the May 15 order on July 4. He explained that the litigation was essentially dormant between the summer of 2012 and the summer of 2013, and he was not in contact with counsel. He was not aware of the May 15 order, nor was he aware that an application was being made to set it aside. He did not give counsel instructions to make that application, and was unaware of it being made, or of the result of the application until on or after July 4.

[31] He points to the underlying cause of these proceedings: that Mr. Pasquill discharged the caveat and is now trying to undo the effects of that. He denies transferring any funds in knowing contravention of any court orders. He says that he has since learning of the May 15 and May 30 orders done everything in his power to comply. Any shortcomings in compliance are because he cannot control third parties who now have some involvement in the matter, having received some of the funds.

[32] He says that the plaintiff's claim is by no means certain to succeed, and argues that any costs (other than costs I have directed to be paid along the way) should be dealt with at the end of the matter. Alternatively, he disagrees that costs should be on a solicitor and client or solicitor and own client basis.

[33] As for contempt, Mr. Horne denies that he is in contempt of any order, as he did not have personal knowledge of the May 15 or May 30 orders until July 4. Everything complained of by FIC occurred in the interval between April 23 (when he received funds) and May 31 when the funds were largely disbursed. Personal knowledge is an essential element in contempt proceedings, and he did not have personal knowledge.

[34] While his lawyer may have known of the orders, that knowledge was not communicated to him and for the purposes of a contempt application should not be attributed to him.

Analysis

Personal Knowledge

[35] This case illustrates the difficulties commonly encountered when there is a dispute as to whether a client has actual knowledge of something served on his or her lawyer of record. Communications between solicitor and client are protected by privilege, so it is frequently difficult to verify a client's claim that he did or did not have any particular communication with his or her lawyer.

[36] It also illustrates the challenge for lawyers whose clients are difficult to contact, and for clients whose lawyers do not communicate with them on a regular or frequent basis.

[37] Nevertheless, the *Rules of Court* are clear as to service of documents on the party's lawyer of record. That has been the case for at least 100 years in Alberta, and has innumerable

benefits: ease, effectiveness and cost being the most obvious. It places the burden on the opposing lawyer to ensure that the other party's lawyer is fully informed of all steps, and places the burden on counsel to keep his or her client informed.

[38] A lawyer who takes a step of some sort is presumed to do so with the knowledge and instructions of his or her client. That is something which cannot normally be tested having regard to solicitor and client privilege.

[39] Effective communication between a solicitor and his or her client is a matter for the Law Society to deal with, and certainly not opposing counsel and the courts.

[40] I have Mr. Horne's sworn evidence that he was not aware of the May 15 or May 30 orders until July 4. Inferentially, if his evidence is to be accepted, he cannot have known about these orders when he transferred money out of Alberta or to third parties. And he cannot have made a conscious decision to ignore the requirement to pay money into court or provide a statutory declaration when he did not know he was obliged to do so.

[41] He was not questioned on his communications with his solicitor or with Mr. Lennie between April 23 and July 4. I am thus left with no evidence to the contrary.

[42] His statutory declaration evidence is similar to what I was told in court on July 3, namely that his lawyer had not had any communications with Mr. Horne for some time and was not sure how to contact him.

[43] It may well be that until that time, Mr. Horne was content to have Mr. Lennie, his long-time friend and lawyer, deal with their joint lawyer. And their lawyer may have been content to take instructions from both of them (and the company) through Mr. Lennie. But that does not absolve the lawyer from keeping all clients informed, especially where the client is required by court order to do something forthwith.

[44] In any event, most of these issues are between Mr. Horne and his former lawyer in the matter.

[45] Nevertheless, I am satisfied on the evidence before me that Mr. Horne did not have personal knowledge of the May 15 order until July 4. Inferentially, he did not know about Justice Ross's May 30 order until July 4 or later.

Service

[46] An order is not a commencement document as defined in the *Rules of Court*, nor is a notice of application, so it may be served in a number of different ways on the lawyer of record.

[47] "Lawyer of record" is dealt with in *Rule* 2.24:

> 2.24(1) The lawyer or firm of lawyers whose name appears on a commencement document, pleading, affidavit or other document filed or served in an action as acting for a party is a lawyer of record for that party.
>
> (2) When there is a lawyer of record, the party for whom the lawyer of record acts may not self-represent unless the Court permits.
>
> (3) A lawyer of record remains a lawyer of record until the lawyer ceases to be a lawyer of record under these rules.

[48] Service of documents other than commencement documents is dealt with in *Rules* 11.20 and 11.21:

> Service of documents, other than commencement documents, in Alberta
>
> 11.20 Unless the Court otherwise orders or these rules or an enactment otherwise provides, every document, other than a commencement document, that is to be served in Alberta may only be served by
>
> (a) a method of service described in Division 2 for service of a commencement document,
>
> (b) a method of service described in rule 11.21,
>
> (c) recorded mail under rule 11.22, or
>
> (d) a method of service agreed to under rule 11.3.
>
> Service by electronic method
>
> 11.21(1) A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and
>
> (a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and
>
> (b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.
>
> (2) Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.
>
> (3) In this rule, "electronic" and "electronic agent" have the same meanings as they have in the Electronic Transactions Act.

[49] It is clear from *Rule* 11.17 that subsequent documents in an action can thus be served on the Lawyer of Record:

> Service on lawyer of record
>
> 11.17(1) A commencement document may be served on a party by being served on the lawyer of record for the party

> (a) by being left with the lawyer, being left at the lawyer's office, or being left at another address specified by the lawyer, or
>
> (b) by being sent by recorded mail, addressed to the lawyer, to the lawyer's office.
>
> (2) Service is effected under this rule,
>
> (a) if the document is left with the lawyer or at the lawyer's office or at another address specified by the lawyer, on the date it is left, or
>
> (b) if the document is sent by recorded mail, on the date acknowledgment of receipt is signed.

[50] I have not looked at the statement of defence filed on behalf of Mr. Horne to see if a fax number is provided by his lawyer, or an email address. If either was provided, it is clear that the order was validly served on May 15. If not, and if there was no established pattern of serving documents by fax or email between FIC's counsel and the defendants' counsel, the order was in any event effectively served on May 16 when it was left at the lawyer of record's office.

[51] There is also no doubt that until July 22 when Mr. Horne provided a statutory declaration as required by the May 15 order, he had neither complied with that order nor with Justice Ross's May 30 order. It remains in issue between FIC and Mr. Horne as to whether he has fully complied with the May 15 order. That is not before me on this application.

[52] While Justice Ross's decision on May 30 was oral, and the formal order taken out following the appearance before her was not filed until June 25, orders speak from pronouncement. Appeal periods in some cases may not run until the formal order or judgment has been filed and served, but when a judge makes an order in court, the order speaks from then and is not in limbo and ineffective until the lawyers finalize the terms and file and serve it. It is valid unless and until it is set aside or varied.

[53] Mr. Horne's lawyer of record was in court when Justice Ross pronounced her orders on May 30, and Mr. Horne is deemed to know what his lawyer knows about what happened in court (***Bhathager v Canada***, *infra*, at para. 23). So I do not think that anything turns on the fact that the formal order was not filed until June 25.

[54] If I look simply at the May 15 order, there are three things not in dispute: it was granted and is still in effect, it was filed on May 15 and served on Mr. Horne's lawyer on May 15 (or May 16 at the latest) and it was not complied with by Mr. Horne until July 22 at the earliest.

[55] To be added to the facts, however, is my finding that Mr. Horne did not personally know about the order until July 4. Between July 4 when he learned of the order, he retained new counsel and prepared and filed his July 22 statutory declaration. The May 15 order gave him 72 hours to comply "from receipt of the order". It took him far longer than 72 hours from July 4 to provide the accounting by way of statutory declaration.

[56] There are thus two issues: one is whether Mr. Horne could be in contempt of an order that he did not have personal knowledge of; the other is whether he was in contempt of the May 15 order once he learned of it because it took him some 18 days to provide a statutory declaration instead of the allotted three days.

Civil Contempt

[57] Counsel for FIC refers to *Rule* 10.52 relating to civil contempt:

> 10.52(1) Except when a person is before the Court as described in subrule (3)(a)(ii) or (v), before an order declaring a person in civil contempt of Court is made, notice of the application in Form 27 for a declaration of civil contempt must be served on the person in the same manner as a commencement document.
>
> (2) If a lawyer accepts service of a notice of an application seeking an order declaring the lawyer's client to be in civil contempt of Court, the lawyer must notify the client of the notice as soon as practicable after being served.
>
> (3) A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,
>
> (ii) is before the Court and engages in conduct that warrants a declaration of civil contempt of Court,
>
> (iii) does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the Court to show cause why the person should not be declared to be in civil contempt of Court,
>
> (iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the person is ordered by the Court to answer,
>
> (v) is a witness in an application or at trial and refuses to be sworn or refuses to answer proper questions, or
>
> (vi) does not perform or observe the terms of an undertaking given to the Court, or
>
> (b) an enactment so provides.

[58] Counsel for FIC also raises a number of cases:

Koerner v Capital Health Authority, 2011 ABQB 191

Bhatnager v Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217

College of Dental Surgeons of British Columbia v Wu, 2013 BCSC 1986

Petty v Johnston, 2001 ABQB 280

Re McDonald Estate, 2012 ABQB 704

Point on the Bow Development Ltd. v William Kelly & Sons Plumbing Contractors Ltd., 2007 ABCA 204

Dreco Energy Services Ltd. v Wenzel, 2005 ABCA 185

Zelazo v Masson, 1992 CanLII 6171 (ABQB)

Everywoman's Health Center Soc. (1988) v Bridges, 1991 CarswellBC 50 (BCCA)

Georgia Pacific Canada Inc. v International Brotherhood of Boilermakers, 1999 ABQB 182

West Lincoln (Township) v Chan, 2001 CarswellOnt 1885 (SCJ)

Kent v Martin, 2012 ABQB 467

Jackson v Trimac Industries Ltd., 1993 CanLII 7031 (ABQB)

Mo v Ha, 2012 ABQB 29

[59] Counsel for Mr. Horne referred me to:

Schitthelm v Kelemen, 2013 ABQB 42

[60] The starting point for an analysis of civil contempt is ***Bhatnager v Canada***. As noted by Sopinka J. for a unanimous court, "an allegation of contempt is a matter of criminal (or at least quasi-criminal) dimension" (at para. 14). The requirement for actual knowledge of the order is emphasized, and a declaration of contempt requires proof of all required elements beyond a reasonable doubt.

[61] Sopinka J. noted that the common law has "always" required personal service or actual personal knowledge of the court order as a precondition to a finding of contempt. (at para. 15).

[62] He referred to the "rebuttable presumption" arising when service has been effected on the solicitor, recognizing that there is the initial onus of proof on the part of the party alleging contempt, and that service or knowledge will often be proven circumstantially. (at para. 17)

[63] From the perspective of civil contempt under the *Rules of Court*, I think it is safe to say that the party alleging contempt will have in most circumstances satisfied the onus of proof relating to service and knowledge if the order has been served on the defaulting party's solicitor in accordance with the *Rules of Court*. That element will be proven on the reasonable assumption that the solicitor will immediately notify the client of anything the client should be aware of.

[64] That will only be *prima facie* proof, however. It will remain open to the party him or herself to rebut the presumption.

[65] This is the common law position, which is applicable to contempt proceedings in Federal Court. The applicable contempt rule in the *Federal Court Rules* is *Rule* 466:

> 466. Subject to rule 467, a person is guilty of contempt of Court who

> (a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;
>
> (b) disobeys a process or order of the Court;
>
> (c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;
>
> (d) is an officer of the Court and fails to perform his or her duty; or
>
> (e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.

[66] That rule is to be contrasted with Alberta *Rule* 10.52(3):

> (3) A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,

[67] The wording of the Alberta rule makes it clear that for civil contempt purposes in Alberta, it is not necessary to prove that the person sought to be declared in contempt have actual knowledge of the order he or she is alleged to have breached. It is sufficient if the order has been served in accordance with the rules, as is the case here: service on the lawyer of record.

[68] ***Schitthelm v. Kelemen***, cited by Mr. Horne, notes at para. 45 that "actual knowledge of the existing requirement or order is normally required", recognizing by inference that there may be situations where actual personal knowledge many not be required.

[69] For the purposes of this case, I will assume that *Rule* 10.52(3)(a) is valid and has replaced the common law in Alberta. The contrary was not suggested in argument and I leave it to another day to determine the constitutional validity of the rule.

[70] The analysis does not end at determining whether the court has the power to declare an order-breaker in civil contempt. The real issue here is whether the court should exercise that power.

[71] The law of civil contempt in Alberta is discussed in ***Koerner v. Capital Health Authority*** (followed in ***Kent v. Martin***) and in ***Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.***

[72] ***Bhatnager*** is binding in its determination that all elements civil contempt must be proven beyond a reasonable doubt. ***Koerner*** and ***Point on the Bow Development Ltd.*** hold that there must be an existing requirement of the court, notice to the person alleged to be in contempt, an intentional act constituting a breach of the requirement and no reasonable excuse for the breach.

[73] I am satisfied that FIC has established the first three elements beyond a reasonable doubt. Justice Lee's order is clear, as is Justice Ross's. Justice Lee's order was properly served by FIC on Mr. Horne's lawyer of record. There is also no doubt that the order was not complied with at any time before July 3, 2013.

Reasonable Excuse

[74] It remains to be determined if Mr. Horne had a reasonable excuse for failing to comply. There is an initial question as to this element: who has the onus relating to "reasonable excuse"? Does the applicant have to establish the absence of a reasonable excuse, or is there an onus on the order-breaker to prove that he or she had a reasonable excuse, or at least cast reasonable doubt on the absence of a reasonable excuse?

[75] Since this is a quasi-criminal proceeding, it is appropriate to look at the criminal law to see how it deals with the *mens rea* element. The closest analogy I can think of is the area of regulatory offences for prosecutions under legislation such as worker safety legislation or environmental legislation. Reasonable excuse is dealt with in cases such as ***R. v. City of Sault Ste. Marie***, [1978] 2 S.C.R. 1299.

[76] Civil contempt is certainly in the nature of a public welfare offence. The underlying purpose for the civil contempt power is discussed in para. 31 of ***Koerner v. Capital Health Authority***:

> The purpose of a court's civil contempt power is to achieve compliance with court orders and to uphold the court's authority...

[77] As confirmed in ***Sault Ste. Marie***, the requirement of proving intent in a regulatory or public welfare offence is dispensed with:

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. (per Dickson C.J.C. at p. 1325)

[78] Once the basic elements of the offence (the *actus reus*) have been proven beyond a reasonable doubt, the order-breaker has the opportunity to establish on a balance of probabilities that he or she did not act negligently or in other words had a reasonable excuse. That is not the same as creating a reasonable doubt as to *mens rea*, but rather is a positive burden of establishing the presence of a reasonable excuse.

[79] I accept that as the proper process to follow in a contempt application. The applicant must prove beyond a reasonable doubt the essential elements of the "offence" but for the absence of reasonable excuse. Once that burden is discharged, the onus switches to the order-breaker to establish a reasonable excuse, on the balance of probabilities standard. There are many ways that burden can be discharged, not all of which involve evidence from the order-breaker.

[80] I recognize that this may be at odds with ***Schitthelm v. Kelemen***, cited by Mr. Horne. In that case, Yamauchi J. says at para. 23 that the applicant must prove *mens rea* (intent). He refers to ***Calgary (City) v. Chisan***, 32 MPLR (3rd) 256 (ABQB) as to the intentional element. With the greatest respect, I prefer to follow the route for public welfare cases, which essentially reverses the onus relating to *mens rea* onto the "accused".

[81] Civil contempt is only quasi-criminal, like regulatory offences, and I see no evil in requiring that a person who has committed the *actus reus* of civil contempt be put to the onus of proving on the civil standard that he or she had a reasonable excuse for non-compliance.

[82] That would seem to be in keeping with ***Michel v. Lafrentz***, 1998 ABCA 231:

> [21] It must not be thought that contempt of court always requires an intent to disobey the court, or even an intent to do an act which is in fact forbidden. Where someone is ordered by the court to do something, he or she must use a sufficient degree of diligence to perform, or to have the act performed...

[83] That case was quoted with approval in ***Broda v. Broda***, 2004 ABCA 72 at para. 7.

[84] Thus I consider that it is up to Mr. Horne to prove that he had a reasonable excuse for not complying.

[85] Mr. Horne's sole excuse here is that he did not know about the May 15 order.

[86] Here, Mr. Horne's uncontradicted evidence is that he did not know about the order until July 4. There is corroboration of that in his lawyer's representations to the court on July 3. I have no basis to disbelieve Mr. Horne, so he has rebutted the presumption on the balance of probabilities.

[87] At common law, this would be a full answer to the charge. But the Alberta rules allow for contempt to be found even in the absence of personal knowledge. The question then becomes whether the absence of personal knowledge can still amount to "reasonable excuse".

[88] In some cases, the absence of personal knowledge will amount to a reasonable excuse. The rhetorical question "how can I be punished for not doing something I didn't know I had to do" has some logic to it. An innocent miscommunication may fall into the reasonable excuse category. An honest but mistaken belief may also satisfy the burden. The absence of negligence or any type of questionable conduct or misbehaviour may also satisfy the burden. These examples are not intended to be a closed list.

[89] On the other hand, where someone is perceived as playing games with court process and there is a history of difficulties getting service of process, compliance with deadlines, production of records, compliance with undertakings and full compliance with orders, the record may make it much more difficult to discharge the burden of establishing a reasonable excuse.

[90] A finding of civil contempt is at the end of any analysis a discretionary remedy in civil proceedings, keeping in mind the underlying rationale for the remedy: ensure compliance with orders and promote respect for the proceedings.

[91] Here, from the evidence before me, the lawsuit had not been particularly active for some time before the May 15 order. There was no apparent need for Mr. Horne and his lawyer to be in regular contact concerning this matter. This is the first indication of any lack of compliance with procedural matters.

[92] I am satisfied that Mr. Horne has provided reasonable excuses for not complying with Justice Lee's May 15 order and Justice Ross's May 30 order. His uncontradicted evidence is that he was unaware of either order until July 4, when he learned of my July 3 order and warrant. While the timing of events is suspicious – a major transfer of funds the day after Justice Ross

confirmed the need for compliance with the May 15 order – suspicions are not a proper basis for a finding of contempt.

[93] As to whether Mr. Horne was in contempt of the May 15 order after he learned of it on July 4, I recognize that he took some two and a half weeks to provide a statutory declaration. It is arguable that because of the time taken, he was in contempt. However, his statutory declaration addresses this to some extent and he says on learning of the order he immediately began "taking steps to prepare the within Statutory Declaration". I am aware that since that time, discussions have continued between his new counsel and counsel for FIC as to payment into court of funds and providing or arranging security for other funds, as well as other issues.

[94] I am not prepared, on the evidence before me, to conclude that Mr. Horne's actions since learning of the May 15 order meet the requirements for contempt, being a deliberate or wilful failure to act, without adequate excuse. This is not a situation where Mr. Horne ignored the order after July 4; he took reasonable steps to comply with the statutory declaration aspect of the matter. Retrieving funds paid to third parties or out of province has proven difficult, and Mr. Horne has been cooperative in doing what is within his power. Failure to pay monies is generally not something for which contempt remedies are available in any event.

[95] In the result, I do not find Mr. Horne guilty of contempt.

Costs

[96] However, that does not end the matter. He has failed to comply with a court order. Had he complied with the May 15 order, the majority of the funds in question would have been easily frozen. The plaintiff has been put to considerable expense to get him to comply with the order, and to put itself in the same position it would have been in had the order been complied with. None of the expenses in BC would have been incurred.

[97] I have already required Mr. Horne to pay FIC's solicitor and client costs in connection with the security arrangements relating to some of the funds which are in third party hands.

[98] FIC seeks payment of its other costs on a solicitor and own client basis.

[99] The costs provisions of the *Rules of Court* are found in *Rules* 10.29-10.31:

> General rule for payment of litigation costs
>
> > 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to
> >
> > > (a) the Court's general discretion under rule 10.31,
> > >
> > > (b) the assessment officer's discretion under rule 10.41,
> > >
> > > (c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

> (c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;
>
> (d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.
>
> (4) The Court may adjust the amount payable by way of deduction or set off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.
>
> (5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.
>
> (6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

[100] It is trite to say that costs are in the discretion of the Court. Here, FIC has been mainly successful in enforcing Justice Lee's May 15 order. Having regard to the underlying problem caused by FIC's allegedly inadvertent or mistaken discharge of the caveat against Mr. Horne's lands, I do not consider it appropriate to award any costs of that application or steps leading up to it. Those costs are more properly in the hands of the eventual trial judge, as are the costs of the application before Justice Ross on May 30.

[101] The costs of the application before me on July 3, 2013 and the expenses incurred in relation to it, and the subsequent appearances to ensure compliance with the May 15 order, should be dealt with now. These are all costs and expenses which would not have been incurred by FIC had Mr. Horne immediately complied with the May 15 order.

[102] As is clear from Rule 10.31, the court has the jurisdiction to award a range of costs from no costs to Schedule C costs to full indemnity costs. In this regard, I am not assisted by most of the cases cited by FIC. Most of the costs awards in those cases followed a finding of civil contempt, which is not the case here.

[103] ***Everywoman's Health Center Society (1988)*** is of little assistance. While it does not focus on costs where contempt has been found, it deals with alleged misconduct (overzealous advocacy) in litigation.

[104] Ultimately, I am left with ***Jackson v. Trimac Industries Ltd.***, 1993 7031CanLII (ABQB). While there have been countless Alberta decisions dealing with costs since then, including many from the Court of Appeal, this cases is probably the most often cited and gives unchallenged clear direction on the available options. ***Mo v. Ha*** quotes extensively from ***Jackson v. Trimac***.

[105] Paras. 28 – 32 of ***Jackson v. Trimac*** are instructive:

> [28] The plaintiffs are seeking indemnification from the defendants for the cost of the lawsuit initiated by them to recover monies which they claim were rightfully payable to them. Indemnification in this instance is equivalent to solicitor and his own client costs and not solicitor-client costs, adopting the

meaning found by Veit J. in Sonnenberg (supra). In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include:

> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (Reese);
>
> 2. cases in which justice can only be done by a complete indemnification for costs (Foulis v. Robinson);
>
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (Sonnenberg);
>
> 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (Olson);
>
> 5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (Dusik v. Newton);
>
> 6. defendants found to be acting fraudulently and in breach of trust (Davis v. Davis);
>
> 7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (Kepic v. Tecumseh Road Builder et al.),
>
> 8. fraudulent conduct (Sturrock);
>
> 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (Pharand).

[29] Mention of Stevenson J.A. and Côté J.A. unleashes a plethora of cases involving the application of R. 601(1) referred to in that work at pp. 1414 to 1417 inclusive (1992 edition). Approximately 100 examples are given where sufficient grounds exist or do not exist for awarding party and party costs on a solicitor and client basis. This demonstrates that a careful analysis has to be made of the facts in each case and also illustrates the wide discretion to be exercised by the trial judge who had the benefit of seeing and hearing the witnesses and distilling the essence of the lawsuit.

> [30] Two major propositions appear to mitigate against an award of solicitor-client costs. The first is that it is the conduct of the action and not the conduct of the party that gives rise to the action that determines an award of solicitor-client costs. Secondly, punitive damages or damages should not be confused with a costs award.
>
> [31] Madam Justice Veit appears to agree with the above propositions but goes on to decide that positive misconduct gives the court reason to take such conduct into account [p. 81] "one more time on the costs issue in determining whether the positively misconducting party was 'contemptuous' ... of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his."
>
> [32] Where the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Such positive misconduct must be taken into account one more time on the costs issue to use the words of Madam Justice Veit in Sonnenberg.

[106] This case falls into several of the categories described by Justice Hutchinson, but most clearly into 1 – misconduct in the litigation. While I have not found Mr. Horne to be in contempt of court, the absence of personal knowledge is the result of miscommunication, or no communication, between him and his lawyer and that is (*vis-a-vis* the other party) is clear misconduct. No reasonable excuse for the absence of communication has been put forward. There is no evidence at all before me explaining why Mr. Horne was not involved in giving instructions to the lawyer or receiving advice as to the results of applications from his lawyer. His lawyer said on July 3 before me that he had lost contact with Mr. Horne and the only address he had was the property which had been sold.

[107] That may well be the case, but the lawyer commenced an application to set aside the May 15 order on behalf of Mr. Horne and Mr. Lennie. Bringing an application without instructions can easily be characterized as misconduct. I have no information as to the relationship among Mr. Horne and Mr. Lennie in relation to instructing their joint lawyer. The lawyer may have left communications to Mr. Lennie. But these are issues to be sorted out among Mr. Horne, Mr. Lennie and their lawyer. FIC is not responsible for any of that, and ought not be put to extra expense as a result.

[108] Communications between solicitor and client are a two way street. The lawyer should at all times keep his or her client informed. Clients should be proactive and ensure that they are fully informed of significant occurrences in the matters being handled for them by a lawyer. There is shared responsibility – at least *vis-a-vis* the opposing party – for the consequences of failed communications.

[109] Where there is misconduct and the other party has been put to considerable expense as a result of factors entirely within the control of the other party, category 2 of Justice Hutchinson's list is also engaged: the interests of justice.

Conclusion on Costs

[110] I am left to determine whether full indemnity costs (solicitor and his own client) or some lesser measure is appropriate. Mr. Fitz on behalf of FIC has provided copies of his firm's bills to FIC starting with May 31, 2013. Also attached are bills from a British Columbia firm which was involved (and apparently remains involved) to secure funds held in British Columbia. Total fees and disbursements plus unbilled fees and disbursements are $57,059.80.

[111] The British Columbia bills relate solely to enforcing the May 15 order in B.C. None of that would have been necessary had Mr. Horne complied with Justice Lee's order. He should have been aware of it immediately after it was served on his lawyer. He should have been made aware of Justice Ross's order immediately after pronouncement. The costs to FIC could have been avoided entirely if there had been effective communications here. Such communications are essential to the proper conduct of litigation and the effectiveness of court orders. It is appropriate that these expenses be reimbursed to FIC on a full indemnity basis.

[112] Those fees, disbursements and unbilled fees and disbursements should be paid in full by Mr. Horne.

[113] As for the charges by McLennan Ross, it is impossible from the filed materials to determine what portion of the fees relates solely to enforcement of the May 15 order against Mr. Horne. Some of the time billed undoubtedly relates to enforcing the order against Mr. Lennie, and dealing with the application to set aside the order before Justice Ross on May 30. Likely, no fees or disbursements incurred before May 30 should be part of a costs award against Mr. Horne at this stage of the proceedings.

[114] I am aware that there were issues with Mr. Lennie's compliance during the month of June, and to the extent any of those issues are reflected in the bills put forward in the materials filed for this application, they should not be recoverable from Mr. Horne. Similarly, any steps in the action itself, or in defending the application to set aside the May 15 order are not recoverable at this stage. I am aware that Mr. Pasquill was presented for cross-examination during the summer months and I assume the fees and disbursements in relation to that are included in the accounts. Those are not recoverable at this stage.

[115] Ultimately, I conclude that FIC should recover on a full indemnity (solicitor and own client) basis those portions of the McLennan Ross fees and disbursements which relate to enforcement of the May 15 order against Mr. Horne. Had Mr. Horne been aware of the May 15 order in a timely way, FIC would have had the required information as to the funds received and Mr. Horne would not have disbursed the funds in the way he did. All of the major disbursements were made after the May 15 order. FIC has had to spend monies tracing the funds, and bringing numerous proceedings in Alberta and B.C. The B.C. proceedings have been coordinated through Alberta Counsel. It would in these circumstances be inappropriate to require FIC and its lawyers to justify, after the fact, every bit of research and minute of time spent pursuing appropriate remedies.

[116] It may be a difficult task to determine which parts of the accounts and time spent relate to which parts of the litigation.

[117] FIC should provide reasonable detail of their accounts to Mr. Horne. It may be that there will be parts of the time records which should be expurgated to preserve solicitor client privilege as to strategy and the like. If the parties are unable to agree on the total of fees and

disbursements, they may speak to me about a means of resolving any disagreement. It is my hope that the process of finalizing the appropriate amount will not become a major task and become a trial within the trial. The parties should be focusing their efforts on the underlying litigation.

[118] If there is any issue as to the manner of payment of the costs ordered, I will deal with that after the quantum of costs has been determined.

Heard on the 17th day of December, 2013.

Dated at the City of Edmonton, Alberta this 14th day of February, 2014.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Kenneth W. Fitz
McLennan Ross LLP
for the Plaintiff

Greg Lintz
TarrabainRaponi & Company
For the Defendants