# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Axion Ventures Inc. v. Bonner,*
2024 BCSC 198

Date: 20240208
Docket: S210438
Registry: Vancouver

Between:

**Axion Ventures Inc. and Axion Interactive Inc.**

Plaintiffs

And

**John Todd Bonner, Nithinan Boonyawattanapisut, Monaker Group, Inc., William Kerby, Cern One Limited, Red Anchor Trading Corp., CC Asia Pacific Ventures Ltd., Jonathan Chen, HotPlay Enterprise Limited, HotPlay (Thailand) Ltd., Christopher Bagguley, Mark Henry Saft, Longroot, Inc., Jane Doe and ABC Corp.**

Defendants

Before: The Honourable Mr. Justice Walker

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiffs: | P.J. Sullivan<br>S. R. Shuchat<br>S. Macdonald |
| Counsel for the Defendants: | B. Brock<br>O. Regev |
| Place and Dates of Hearing: | Vancouver, B.C.<br>January 15-16 and 30, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>February 8, 2024 |

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## Introduction

[1] On November 2, 2023, I found the defendants, NextPlay Technologies, Inc. (who is still shown in the style of cause by its former name, Monaker Group, Inc.), Todd Bonner, Nithinan Boonyawattanapisut, and Longroot, Inc., in contempt of a sanction order I issued on May 16, 2023 ("May 16 Sanction Order") requiring them to post a bond or an automatically renewing irrevocable letter of credit issued by any one of ten specified financial institutions located in Canada, in the total amount of US $3,437,521. My reasons finding them in contempt ("Liability Reasons") are indexed at 2023 BCSC 1924.

[2] For ease of reference, when I refer to those defendants/contemnors collectively, it is as "Contemnors". There are times when I refer to them individually:

(a) John Todd Bonner as "Mr. Bonner";

(b) Monaker Group, Inc. as "NextPlay" to reflect its name change;

(c) Ms. Boonyawattanapisut as "Jess", since the parties consistently refer to her by that name (and in doing so, I do not intend any disrespect); and

(d) Longroot Inc., now as a result of a name change is Next Fintech Holdings Inc. (and whose shares are owned by NextPlay), as "Longroot Delaware", which refers to where it is based in order to distinguish it from another related entity based in the Cayman Islands, Longroot Limited.

[3] The May 16 Sanction Order required the Contemnors to post the bond or the letter of credit as security for certain shares of Longroot Limited and its Thailand corporate subsidiaries (that are, in part, the subject of the plaintiffs' proprietary claims in this action), in order to purge the Contemnors' prior contempt for failing to place those shares with an escrow agent in the province, pending the outcome of this action, as previously ordered on November 9, 2022 ("November 9 Order").

[4] The Contemnors were also granted the right to apply to reduce the total posted amount upon establishing that they have purged their contempt. The May 16

Sanction Order also stated that nothing in it is intended to reflect the value of the shares of Longroot Limited and the two Thailand entities. The Contemnors were also ordered to pay special costs to the applicants.

[5] The May 16 Sanction Order required the Contemnors to post the bond or letter of credit in instalments, in specific amounts according to the following schedule:

(a) an initial amount of US $1 million by June 1, 2023;

(b) a further US $1 million by June 30, 2023; and

(c) the remaining amount of US $1,437,521 by July 23, 2023.

[6] These reasons address the fit and appropriate sanction that should now be ordered on account of my finding of contempt as set out in the Liability Reasons.

## Background

### Complex Commercial Litigation

[7] Key background facts concerning the nature of this hard-fought, complex commercial litigation, the related actions in this Court, and the prior contempt proceedings that led to the May 16 Sanction Order are summarized in the Liability Reasons. Additional information is also contained in other reasons for judgment issued in this action and in one of many related proceedings (an oppression proceeding, VA S209078), indexed at 2021 BCSC 963, 2021 BCSC 1899, 2022 BCSC 945, 2023 BCSC 149, 2023 BCSC 181, 2023 BCSC 204, 2023 BCSC 213, 2023 BCSC 313, 2023 BCSC 337, 2023 BCSC 973, 2023 BCSC 974, 2023 BCSC 1955, and 2024 BCSC 46. I will not repeat them here.

[8] A brief synopsis of the plaintiffs' claims, all vehemently denied by all defendants, found at para. 15 of the Liability Reasons, will suffice:

> [15] The plaintiffs claim the defendants conspired and acted unlawfully in concert in an evolving civil conspiracy and common scheme to unlawfully take control of the assets of the plaintiff, Axion Ventures Inc. ("Axion Ventures"), and of its subsidiaries, including their intellectual property, digital

> marketing and in-game advertising software, and corporate opportunities. Included in the plaintiffs' claim are allegations that since January 2017, Mr. Bonner and Jess:
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> (a) acted secretly with NextPlay and others to attempt to take control of Axion Ventures and its subsidiaries;
>
> (b) wrongfully used Axion Ventures' funds and funds provided by investors to advance their personal interests;
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> (c) effected an unlawful transfer of control and ownership of the digital assets of Axion Ventures and its subsidiaries, including the plaintiff, Axion Interactive Inc. ("Axion Interactive"), such as its digital marketing and in-game on-line advertising software and intellectual property to entities within their control, including NextPlay, for their benefit; and
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> (d) breached their fiduciary duties owed to the plaintiffs.



[9] Mr. Bonner was a co-founder and formerly a director of the plaintiff, Axion Ventures Inc. ("Axion"), a publicly traded company incorporated in British Columbia, whose shares were traded on the TSX Venture Exchange ("TSXV") until the BC Securities Commission issued a cease trade order in August 2020. Mr. Bonner was employed as Axion's chief executive officer until his position was terminated for alleged misconduct at an Axion board of directors' meeting in July 2021. Jess, who is Mr. Bonner's spouse, was also a director and officer of Axion and some of its subsidiaries, including the plaintiff, Axion Interactive Inc. ("Axion Interactive"), until her position was terminated in July 2021 as well. NextPlay is a publicly traded Nevada corporation with an address in Florida. Its co-chief executive officer, William Kerby, resides in Florida.

**Contempt Proceedings**

[10] The Contemnors' failure to comply with the share/escrow terms of the November 9 Order resulted in follow-up applications and a finding of contempt, which then led to the May16 Sanction Order.

[11] Excerpts from my reasons at 2023 BCSC 213 and 2023 BCSC 973 provide a useful summary of the context in which the Contemnors were found in contempt of the November 9 Order that ultimately led to the May 16 Sanction Order and the further finding of contempt set out in the Liability Reasons.

[12] From 2023 BCSC 213, released on February 9, 2023:

> [3] The terms of the November 9 Order which ground the plaintiffs' contempt application concern the shares of Longroot Limited, a subsidiary of Longroot Delaware, based in the Cayman Islands, and shares of Longroot Holding (Thailand) Co., Ltd. and Longroot (Thailand) Co., Limited, who are subsidiaries of Longroot Limited and based in Thailand.
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> [4] Those terms provide:
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> THIS COURT ORDERS that:
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> 1. The shares of Longroot Limited that are held and/or controlled by or on behalf of any one or more of the Defendants, the shares of Longroot Holding (Thailand) Co,. Ltd. and Longroot (Thailand) Co., Limited, shall be placed in escrow or in trust (the "**Escrow**") in Vancouver, British Columbia, pending determination of the Action, or upon further order of this Court.
> 2. The Escrow in paragraph 1 above must be completed as soon as reasonably practicable, and in any event within thirty (30) days of this Order, or as otherwise agreed to in writing between the parties to this Action or by further court order.
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> [Bold in original]
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> …
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> [6] Those terms were proposed by the defendants in an effort to overcome what they described as a mistake made in an order I made on August 24, 2022, concerning Longroot Delaware. Factual context in respect of the defendants' position concerning that mistake, the nature of the claims and defences in this action, and the circumstances in which they proposed that the shares of Longroot Limited and its two corporate subsidiaries based in Thailand be incorporated in an order, are found in my reasons for judgment indexed at 2023 BCSC 149 and at 2023 BCSC 204.
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> …
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> [29] No evidence was adduced nor any submission made to establish or suggest whether the shares of Longroot Limited and its Thai subsidiaries are, in fact, located at their principal places of business. No evidence was adduced or submissions made to establish or suggest that Streeterville has been made aware of the November 9 Order or asked for its agreement to move the impugned shares to be held by an escrow agent acting under court order (for that matter, no evidence has been adduced to show or suggest that Streeterville is aware of the plaintiffs' proprietary and constructive trust claims to some of the assets that NextPlay has pledged to Streeterville, despite the many requests of the plaintiffs for confirmation). Nor did the defendants suggest any different construction of the meaning or effect of NextPlay's loan transaction agreement documents ("Loan Transaction Documents") in submissions.
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> …
>
> **Conclusion**

> [47] In summary, the terms of the November 9 Order in issue were made following the proposal of the defendants to preserve the impugned shares pending the outcome of this litigation. The defendants have failed to establish impossibility of compliance with the November 9 Order. The current state of the evidence concerning NextPlay's financial circumstances, the defendants' continued refusal to say whether Streeterville is aware of the November 9 Order or of this litigation in view of the warranties and representations they made in the Loan Transaction Documents, and the absence of a standstill agreement or other forbearance agreement, lead me to find that the impugned shares are at risk of foreclosure. The defendants have failed to put forward a reasonable, realistic proposal to protect the impugned shares pending the outcome of this action, despite opportunities to do so, and have failed to demonstrate a *bona fide* intention to comply.
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> [48] In all of these circumstances, I have determined that there is no basis to engage my discretion to refrain from finding contempt.
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> [Bold in original]

[13] The reference to Streeterville in para. 29 of the excerpt is to one of NextPlay's secured creditors, whose loan agreements NextPlay said, at a hearing that took place well after the November 9 Order was issued, prevented the Contemnors from complying with the share/escrow terms of the November 9 Order.

[14] The Contemnors did not purge their contempt which I found on February 9, 2023. Further hearings ensued, including hearings in March 2023 that led to a further order on March 30 (giving the Contemnors further options in which to purge their contempt) and ultimately to the May 16 Sanction Order, which was issued after I delivered reasons on May 15 and 16, 2023 (excerpts from the May 15 reasons are provided in part below).

[15] From 2023 BCSC 973, released on May 15, 2023:

> [2] The Contemnors have yet to purge their contempt, despite numerous extensions agreed to by the plaintiffs and granted by the court (all predicated on the Contemnors' assurances that they would comply).
>
> [3] By March 30, 2023, matters had come to the point where I provided the Contemnors with two final options. The first was to comply by a certain date with the terms of my order issued on November 9, 2022 ("November 9 Order"), to bring the shares of Longroot Limited and two related Thailand entities into the jurisdiction by December 9, 2022, to be held in escrow pending the outcome of the plaintiffs' proprietary claims in this action, and to provide a further opinion of their Thailand legal expert, Mr. Sukawong, concerning certain matters.

[4] The second option was to post a bond representing the value of those shares in an amount to be agreed upon by the plaintiffs or, failing agreement, to have me determine the value.

[5] I issued an order with terms reflecting those options (“March 30 Order”).

[6] The Contemnors have not complied with the first option. In respect of the second option, the Contemnors resist their court-ordered obligation to post a bond and now seek a further extension of the time in which to meet the first option. Alternatively, they apply to vary the time limits in the March 30 Order. Failing either, they propose that the bond be limited in amount, on account of what they contend are liquidity issues, in the range of $500,000 to $1 million.

…

[12] The delay in compliance rests wholly with the Contemnors who, I find, have attempted to avoid compliance, including bringing meritless prior variation applications. It is only after being chased by the plaintiffs for compliance and being left with no other option but to comply, that the Contemnors have put in motion the retainer of a Thailand lawyer to assist them in the process of attempting compliance. Even now, the Contemnors do not come to court with assurances that they will comply by a specific date or, in fact, be able to comply, and that they will be able to provide the opinion evidence stipulated by the March 30 Order by a certain date.

[13] For factor (b), the reasons for the delay, the Contemnors have provided, over time, various inconsistent reasons ranging, from:

a) "We will comply, and need only a matter of a short time to do so," to

b) "We simply cannot do it due to Thailand securities laws and regulations," to

c) "We cannot do it because it will compromise our relationship with our key lender, Streeterville," to

d) "We want to do it but we do not know how or what to do,"

e) and more recently, prior to the March 30 Order, to, "We will be able to do it in accordance with Thailand law, but much depends on the nature of the agreement that is entered into concerning the placing of the shares in escrow."

[14] Except for the most recent explanation coming from their Thailand legal expert, suggested prior to the March 30 Order, the Contemnors' various stated reasons, I find, are of questionable credibility and, in any event, lacking in reliability.

[15] In terms of factors (d) and (e), prejudice, there is no prejudice to the Contemnors as the order I have determined should be made (set out below) allows them to apply to vary the dollar amount upon establishing that they have, in fact, purged their contempt. In other words, there is no order prohibiting them from purging their contempt; the choice remains up to them to do so.

> [16] On the other hand, based on the history of the Contemnors' conduct in this case, allowing further time through an extension or variation is to the prejudice of the plaintiffs, as they will no doubt incur ongoing significant costs as they continue to chase for compliance, all while the Contemnors, some of whom are not parties and hence outside the jurisdiction of the court, have unfettered control of the shares in issue.
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> …
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> [20] Therefore, I return to the March 30 Order stipulating that a bond should be ordered. As the intention is to have security posted representing the value of the impugned shares, it could be a bond or a letter of credit.
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> [21] The issue is the value of the shares that should have been brought into the jurisdiction and held by an escrow agent. I reject Mr. Bonner's evidence concerning the financial liquidity available to Longroot Limited, its parent, and Thailand subsidiaries, and his evidence concerning the declining value of those shares, all as wholly unreliable. It is squarely at odds with his public statements to potential investors, at odds with valuation reports that he and other defendants have provided in this litigation, including a report from WithumSmith+Brown, PC (“Withum”) he provided in response to the plaintiffs’ evidence on this sanction hearing, and inconsistent with Monaker’s filings with the Securities and Exchange Commission (“SEC”) in the United States, and past evidence.
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> [22] The most reliable, objective evidence, concerning value comes from filings with the SEC, specifically forms known as 10-K (in this case, the one filed in June 2022), and a 10-Q (filed on January 18, 2023), and the evidence of the price paid to acquire the shares of Mr. Morton and the Withum reports in evidence.
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> [23] I have determined that the appropriate value representing the Contemnors' direct and indirect interests is US $3,437,521, the amount stated for goodwill in the 10-K.
>
> [24] The Contemnors shall post that amount in a bond or an automatically renewing letter of credit within 10 days, subject to allowing the Contemnors to return to court tomorrow morning to provide cogent submissions as to why they should be allowed a longer period of time (i.e., the 30 days they suggested this afternoon). The Contemnors have liberty to apply to reduce the amount posted in the event that they can establish that they have complied with the November 9 Order and, in fact, have purged their contempt.
>
> [25] The order I have made achieves the goal of securing compliance with the November 9 Order. It also engages the principles of specific and general deterrence in that it sends a clear message that compliance that only comes as a result of the constant pursuit by other party at significant expense to their prejudice will not be countenanced.

[16] The Contemnors did not comply with the March 30, 2023 order referenced above and instead maintained in the application that led to my findings on May 15, 2023, also referred to above, that it was impossible for them to comply because they

lacked assets and the financial means to do so, a position that I again rejected as having no merit (see also 2023 BCSC 974, issued May 16, 2023, at paras. 2–4).

[17] The Contemnors have not posted the bond or letter of credit. They have not sought any further relief nor a stay of any of my contempt and sanction orders. Instead, it is the plaintiffs who have pursued compliance.

[18] When the plaintiffs applied for a finding of contempt of the May 16 Sanction Order, the Contemnors continued to assert their impossibility to purge position, a defence they again failed to establish. To the opposite, I found there were assets available for them to effect compliance. For example, I found that Jess has assets available to her, from real property she owns in Thailand with substantial equity, from her British Virgin Islands-based holding company (and a defendant in this action), Cern One Limited, and from her co-ownership with Mr. Bonner of another corporate entity and co-defendant, Red Anchor Trading Corp. I also found the Contemnors had not acted in good faith to comply with the May 16 Sanction Order and that they had not been candid in their disclosures to the Court: Liability Reasons at paras. 103–145.

## Positions of the Parties

### The Plaintiffs

[19] Axion and Axion Interactive submit that in light of the Contemnors' ongoing patent disregard for orders of this Court and needless consumption of court time with meritless applications, I should make the following two orders.

[20] First, I should strike the Contemnors' response pleadings in this action. In seeking that relief, the plaintiffs advised me in submissions that they would not seek default judgment against the Contemnors if their response pleadings are struck. The plaintiffs confirmed they would still have to proceed to prove their claims, either on a renewed summary trial application (there is one extant that was adjourned) or at trial.

[21] Second, I should issue an order requiring NextPlay and Mr. Bonner, who are plaintiffs in a related action (VA S217835), which is scheduled to be heard at trial at the same time as this action and other related actions, to seek leave to bring any interlocutory applications and to proceed to trial in that action. The claim in VA S217835 is for an alleged debt owed by Axion to NextPlay or alternatively, Mr. Bonner and other parties related to him ("Debt Action").

[22] The plaintiffs' position is that these are the only meaningful sanctions available at this juncture since it is clear that fines of any meaningful amount will not be paid and a custodial sentence is not available because Mr. Bonner and Jess reside in Thailand and there are no individual officers, directors, employees, or agents of the corporate contemnors present in the province.

[23] The plaintiffs also submit that the sanctions they propose are the only meaningful orders in circumstances where the Contemnors' ongoing conduct demonstrates they ignore court orders with impunity and only comply when they are left with no other choice. Any lesser sanction would effectively permit the Contemnors to continue to do so as a cost of doing business, while the plaintiffs continue to chase compliance at their great expense.

[24] The plaintiffs rely on my authority under the Court's contempt power and Rules 22-7(6) and 22-7(5)(g) of the *Supreme Court Civil Rules* [*Rules*].

**The Contemnors**

[25] In their application response, the Contemnors assert that lesser sanctions are available and appropriate. They reiterated that position in their oral submissions during the instant sanction hearing, but at the same time told me they had no submission regarding lesser sanctions to put forward.

[26] The Contemnors said that in view of their appeals of orders finding them in contempt, they were not prepared to elaborate on any such potential lesser sanctions as they did not wish to prejudice their rights on appeal (though in the latter part of their oral submissions, they drew my attention to one aspect of the alternative

relief in the plaintiffs' amended notice of application – to strike certain portions of the Contemnors' response pleadings – for consideration). The Contemnors did not cite any authority to support that position despite being pressed to do so by the plaintiffs. Nor have the Contemnors applied for a stay of the contempt order grounding this sanction hearing, nor, for that matter, any of the other orders holding them in contempt that are under appeal.

[27] The Contemnors' stated objection to the sanctions proposed by the plaintiffs is on the grounds that they are disproportionate, not in the interests of justice and if granted, would promote inefficiencies in this and the related actions, including the Debt Action (which will be tried at the same time commencing January 2025), and impede the fair and efficient resolution of the plaintiffs' claims in this action.

[28] The Contemnors also oppose the sanctions sought by the plaintiffs on the ground that they would be precluded from proceeding with their extant spoliation application where they seek to strike the plaintiffs' claim in its entirety. The Contemnors do not raise the spectre of their appeals (for which no steps, including any applications for a stay, have been taken since their notices of appeal were filed) to resist the sanctions sought by the plaintiffs.

[29] Mr. Bonner and Jess each filed a further affidavit for the instant sanction hearing, Mr. Bonner on his own behalf and on behalf of Longroot Delaware, and Jess on her own behalf and on behalf of NextPlay. The contents of the affidavits are identical and appear to suggest that the Contemnors did not adduce any further evidence concerning their attempts to purge because they believe they are precluded from doing so by court order. However, during oral submissions, the Contemnors, through their counsel, explained that was not the Contemnors' position. In oral submissions, the Contemnors confirmed that they understand that although they are precluded from rearguing prior (unsuccessful) impossibility to purge defences, they are not prevented from adducing new evidence in respect of their ability to purge. Following on that clarification, the Contemnors advised in oral submissions that other than an apology, their recognition that they are obliged to

comply with court orders, and a statement concerning the continued ownership of the shares of Longroot Limited and its Thailand subsidiaries, as set out in those new affidavits from Mr. Bonner and Jess, they had no further evidence to tender.

## Striking the Contemnors' Response Pleadings

### Sanctioning Principles

#### *Under the Contempt Power*

[30] The Court of Appeal pointed out in *Larkin v. Glase*, 2009 BCCA 321, court orders must be followed unless they are varied or overturned on appeal. Otherwise, the rule of law, which lies at the heart of our society, is jeopardized:

> [7] A court order must be obeyed until and unless it is reversed. Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society. If court orders can be disregarded with impunity, no one will be safe. Our free society cannot be sustained if citizens can decide individually what laws to obey and what laws to disregard. Madam Justice McLachlin, as she then was, stated in *United Nurses of Alberta v. Alberta (Attorney General),* [1992] 1 S.C.R. 901 at 931:
>
> > Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.
>
> Mr. Glase must understand that if he can select what laws to obey, others may do so as well, to society's and his personal detriment.

[31] In determining the appropriate sanction under the Court's contempt power, I am to consider these factors: (a) individual and general deterrence; (b) the seriousness of the offence; (c) the protection of the public; (d) the ability to pay a fine; (e) the degree of intention in the contemptuous conduct; (f) the past record and character of the Contemnors; (g) whether there was any past contempt; and (h) any aggravating and mitigating factors. The sanction must be proportional and commensurate with the gravity of the offence: *Law Society of British Columbia v. Gorman*, 2011 BCSC 1484 at para. 39; *College of Physicians and Surgeons of British Columbia v. Ezzati*, 2021 BCCA 422 at paras. 56 and 64.

***Under the Rules***

[32] Rules 22-7(6) and 22-7(5)(g) specifically empower the court with jurisdiction to strike pleadings and order a proceeding to continue as if no response to civil claim had been filed when a defendant refuses or neglects to comply with an order or direction without a lawful excuse.

[33] Many of the sanctioning principles engaged on an application to strike are the same or mirror those under the contempt power. The plaintiffs' written submissions appropriately identify the principles and factors discussed in the various case authorities:

(a) a persistent pattern of delay or failure to comply with court orders may result in striking pleadings: *Breberin v. Santos*, 2013 BCSC 560 at para. 62;

(b) a party's overall conduct provides context that bears on the seriousness of their non-compliance: *Breberin* at para. 62;

(c) striking a response pleading must be proportionate in the circumstances and must be avoided where it is reasonable to do so, as it is a draconian remedy that deprives a litigant of their right to defend on the merits: *Breberin* at para. 53; *Besic v. Kerenyi*, 2012 BCCA 187 at para. 16;

(d) proportionality is engaged, particularly if a lesser remedy is available to cure the default and inspire confidence that court orders will be followed in the future: *Schwarzinger v. Bramwell*, 2011 BCSC 304 at paras. 118–124, 128, 134;

(e) a non-compliant party is generally entitled to a "second chance" before its pleading is struck: *Schwarzinger* at paras. 113–115;

(f) the usual practice is to put a party on notice that an order to strike may follow unless there is compliance: *Schwarzinger* at paras. 113–116; *Breberin* at para. 59;

(g) lesser sanctions should be considered where any are available and appropriate: *Breberin* at para. 60; and

(h) a party offering an apology and providing reasons for its transgressions is more likely to be given another opportunity to comply; however, the question is whether the apology is sincere when the contemnor only concedes matters when trapped by the evidence or continues to deny their transgressions: *Schwarzinger* at para. 137; *Majormaki Holdings LLP v. Wong*, 2008 BCSC 374 at para. 8 [*Majormaki SC*], aff'd 2009 BCCA 349 [*Majormaki CA*].

[34] In an application to strike, the onus rests on the non-compliant party, in this case, the Contemnors, to establish a lawful excuse and explain the reasons for non-compliance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 33, citing *Dhillon v. Pannu*, 2008 BCCA 514 at paras. 34–35; *Breberin* at para. 54.

**Analysis**

[35] Applying those factors to this case, this is not the first instance where the Contemnors have failed to comply with court orders. On the contrary, they have failed to comply with multiple court orders, and in one instance, deliberately so, admitting they were prepared to be found in contempt as they preferred their business interests ahead of compliance with a disclosure order. When they do comply, it is when left with no other option after being chased by the plaintiffs at great expense and the use of court time. The Contemnors continue to engage in an ongoing pattern of delay when faced with contempt applications, adducing evidence and taking positions inconsistent with prior applications. The Contemnors have assets available to them to facilitate compliance and yet have failed to use those identified in these and prior reasons to attempt partial compliance.

[36] Although the Contemnors, through affidavits from Mr. Bonner and Jess, say they respect court orders and convey apologies, their statements are belied by their conduct summarized in these reasons and described in the other reasons for judgment identified above. These comments of Justice Hinkson (as he then was) in *Majormaki SC* are apposite to this case:

> [8] If I believed that William Wong's apology was genuine and something more than an attempt to minimize the sanction that he might otherwise face for his contempt, it would be a mitigating factor in terms of the appropriate sanction. Given his track record in these proceedings of only conceding matters when trapped by the evidence, I am not prepared to accept his apology as genuine.

[37] So too are these comments of Justice Fitzpatrick in *Schwarzinger* at para. 137:

> [137] Further, a party who comes to the Court apologizing and providing reasons for their transgressions is more likely to be given another chance by the Court. To use a religious metaphor, confession must necessarily precede penance. A party who continues to deny their transgressions must necessarily raise in the Court's mind the question as to whether that party is truly reformed. If the breaches will only continue, effectively the Court has only delayed the inevitable further application to strike.

[38] In the Liability Reasons, I found that the Contemnors have not acted in good faith to comply with the May 16 Sanction Order and another sanction order I made on June 8, 2023 ("June 8 Sanction Order") in respect of another contempt for their failure to post security for good behaviour in the amount of $250,000:

> ***Conclusion***
>
> [145] In all, the Contemnors have not established that it is impossible to comply with the Sanction Orders. The Contemnors have not attempted partial compliance with either or both Sanction Orders. Nor have they come to court with fulsome evidence with candid disclosures of their efforts to comply with the Sanction Orders. I decline to exercise my discretion to avoid finding contempt of the Sanction Orders because I am satisfied and find that the Contemnors have not acted in good faith to comply with the Sanction Orders. Instead, I find, they continue to demonstrate a consistent pattern of disrespect for orders of this Court.
>
> [Bold and italics in original]

[39] In the face of those findings in the Liability Reasons, the Contemnors continue to engage in such conduct. At a subsequent hearing to consider an appropriate sanction for their contempt of the June 8 Sanction Order, the Contemnors made selective disclosure. My reasons imposing a sanction for contempt of that order (2024 BCSC 46) contain findings in those respects, including:

> [9] In their application response, the Contemnors say that lesser sanctions are available and appropriate. In August 2023, prior to the hearing

of the contempt application, the Contemnors advised the plaintiffs that they would deliver a proposal for an appropriate sanction if they were found in contempt. None was provided despite follow-up requests from the plaintiffs. At the sanction hearing, the Contemnors told me in their submissions that they had no proposal or suggestion to put forward. In effect, their contempt of the June 8 Sanction Order would continue.

…

[14] Although NextPlay agrees that the number of Axion Shares in issue is properly stated by Axion, NextPlay took inconsistent positions in its submissions and tendered inconsistent evidence concerning its ownership of all of the Axion Shares (my findings are set out in the next section).

…

[49] In all of these circumstances, I reject Mr. Bonner's evidence that the Axion Shares held by Cern One are not owned by NextPlay. That evidence is wholly inconsistent with NextPlay's filings with the SEC, its statements to the public, its position taken with this Court, the evidence it put before the Court of Appeal, and the position NextPlay ultimately took at this sanction hearing.

…

[67] There is no evidence from the Contemnors addressing the inconsistency between Mr. Bonner's valuation and the value NextPlay continued to ascribe to the Axion Shares in its reports to the SEC. There is no evidence to support the Contemnors' oral submissions that generally speaking, since market values for publicly traded shares change daily, it is possible that Mr. Bonner's valuation is correct. Nor is there any evidence to explain the inconsistency between the Contemnors' oral submission that the value in the 10-K represents "book value" (as opposed to market value) and NextPlay's reference to market price in its valuation statements in the 10-K and 10-Q (excerpted in paras. 58 and 61 in these reasons). There is also no evidence from the Contemnors to explain the difference between Mr. Bonner's valuation evidence and their position prior to the sanction hearing that there was little to no value in the Axion Shares as part of their impossibility to comply with the Sanction Order defence.

[68] I find the only reliable evidence of value comes from NextPlay's reporting to the SEC, which it certified to that regulatory authority as accurate. Based on the evidence adduced at this sanction hearing, I find the value of the Axion Shares to be US$4,415. I reject the Contemnors' submission that the Axion Proposal if ordered would result in a "windfall" to Axion.

…

[70] Applying those factors to the present circumstances, and as shown in the Liability Reasons and the other reasons for judgment referred to in para. 7, this is not the first instance where the Contemnors have failed to comply with orders of this Court.

[71] In one instance, Mr. Bonner and Jess admitted in cross-examination that their non-compliance with an order to produce a contract document was intentional and that they were prepared to risk being found in contempt (see 2023 BCSC 313 at paras. 150–172; 2023 BCSC 978 at paras. 60–74).

> [72] Although the Contemnors did eventually purge their contempt of court orders that led to the Security, it was, as I found (see excerpts below from 2023 BCSC 978), only as a consequence of the plaintiffs' continued efforts to pursue compliance: …
>
> …
>
> [74] There is no evidence, let alone submission, from the Contemnors to explain what efforts they have undertaken to raise funds from available assets that I have found (see the Liability Reasons) are more than sufficient to post the Security. Nor have they offered to pledge or post any of the Axion Shares they acknowledge they beneficially own in an attempt to purge their contempt. They have made no efforts towards partial compliance. Instead, the Contemnors' position is that no sanction order should be made. These aggravating factors highlight the serious nature of the ongoing contempt.
>
> [75] It is difficult to discern any mitigating factors.



[40] The Contemnors' conduct towards compliance with court orders has not only put the plaintiffs to ongoing expense, it has consumed a significant amount of judicial resources; over 36 days of court time have been taken up to hear applications related to compliance.

[41] The Contemnors have been given numerous opportunities to comply with the share/escrow provisions of the November 9 Order and with orders requiring them to post a bond or letter of credit instead.

[42] They have also been put on notice that their response pleadings could be struck if they failed to comply with orders requiring them to post a bond or letter of credit. As far back as March 2023, when I adjourned the sanction hearing that was to deal with their contempt in failing to comply with the share/escrow provisions of the November 9 Order, I issued that warning to the Contemnors:

> … And then I set over to a date certain a continuation of the sanction hearing with a clear warning to the - - the contemnors that if they don't - - that they've got to deal with it and, if they don't, then a clear warning that it - - that it's very likely that I'll be striking the pleadings.
>
> I think that engages the step-up principle. It lets them have the opportunity to purge the contempt…
>
> …
>
> … And I'll adjourn the sanction hearing over for a specific date to allow the contemnors the opportunity to purge their contempt with my strong warning to the contemnors that, in view of the state of the evidence they've adduced to

> date, the context in which the November 9th order was made and the amount of time they've had thus far to purge their contempt may well lead to striking of some or all of their response pleadings in the action. So there's a clear warning. …

[43] The Contemnors argue that they "have complied with the spirit of the November 9 Order by preserving the status quo of the shares encompassed by the November 9 Order". However, the Contemnors remain in control of the shares that should have been brought into this jurisdiction per the November 9 Order and in turn, remain in control of the entities that own, directly and indirectly through a corporate chain, the license (issued by the Thailand authorities for one of Longroot Delaware's Thailand subsidiary's online cryptocurrency portal) that is one of the assets at the heart of the plaintiffs' claim for proprietary relief. As noted by the plaintiffs in submissions, the Contemnors have not provided any evidence regarding the current status of that license.

[44] The Contemnors submit that striking pleadings can only be appropriate in cases where a failure to comply with court orders impedes the progress of litigation or results in dissipation of assets covered by *Mareva* injunctions. That submission does not align with the case authorities. In *Breberin,* Justice Willcock (as he then was) noted the nature of a breach is just one of multiple factors analysed by the court when deciding whether pleadings should be struck: *Breberin* at paras. 52–64; see also *Schwarzinge*r at paras. 109–140. For example, in one instance, a breach of a failure to comply with a consent order for payment was found significantly serious to warrant striking pleadings: *612797 B.C. Ltd. v. Ferguson*, 2009 BCCA 404 at para. 19.

[45] The Contemnors further submit that I must only consider their conduct for which they have been found in contempt which has not impeded the effective prosecution and defence of this action. First, as pointed out above, this approach contradicts the caselaw guidance on analysing the breach of court orders in the context of the entire action: e.g., *Breberin* at para. 62*; Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322 at paras. 103

and 111. And second, the submission ignores the Contemnors' conduct that has delayed the prosecution of the case.

[46] The plaintiffs' summary trial/injunction application was adjourned generally when the Contemnors alleged in the midst of the hearing of that application that the plaintiffs committed a fraud on the court in the oppression proceeding. That allegation was withdrawn partway through the hearing of that claim and moreover, Justice Ross, who presided over the oppression proceeding, determined from the evidence that no fraud on the court had been committed: 2023 BCSC 337 at para. 72.

[47] The trial of this action and the related actions, scheduled to commence in January 2024, was adjourned for a year, in light of the Contemnors' application to remove plaintiffs' counsel for allegedly reviewing documents protected by solicitor-client privilege. That relief was abandoned just prior to the start of the hearing of the application. All the while, the Contemnors have, through their failure to comply with court orders, remained in control of the entities that own the license without having to post security.

[48] Moreover, the Contemnors have not established a lawful excuse for their failure to comply with the May 16 Sanction Order for which they have been found in contempt.

[49] Their conduct, viewed in context of the facts discussed in these reasons, rises to the level of refusing to comply with the May 16 Sanction Order and an intention to avoid compliance with other orders until left with no other choice. As Willcock J. said in *Breberin* at para. 64, "Refusal to comply with an order for reasons raised before the court and rejected amounts to an overt and deliberate flouting of the court order: [citations omitted]."

[50] The Contemnors' conduct strikes at the rule of law itself: *Majormaki CA* at para. 25.

[51] As for the Contemnors' suggestion that striking their response pleadings could pose inefficiencies in this action, none have been shown. Nor, as the Contemnors' assert, will striking their response pleadings impede the fair and efficient resolution of the plaintiffs' claims in this action on their merits since the plaintiffs must still prove each of them at trial, where many of their claims, advanced as defences in the Debt Action, will not only be tried at the same time, but open to attack.

[52] No other defendant has come forward to suggest that striking the Contemnors' pleadings could prejudice their ability to defend against the plaintiffs' claims without the participation of the Contemnors.

[53] I reject the Contemnors' submission that I should not strike their response pleadings in this action because it will prejudice their ability to prosecute the debt claim in the Debt Action given the intertwining of issues raised in both actions (i.e., defences raised by Axion in the Debt Action mirror many of the claims made in this action). Striking their pleadings in this action does not preclude the Contemnors from resisting Axion's defences in the Debt Action (and utilizing their rights of document discovery and examinations for discovery under the *Rules*).

[54] To give effect to the Contemnors' argument would facilitate them remaining in contempt with impunity, abrogating the principles of denunciation and deterrence and the critical importance of the rule of law in our society, all while overlooking their past conduct towards compliance with court orders.

[55] I have considered whether the alternative relief set out in the plaintiffs' amended notice of application to strike certain paragraphs of the Contemnors' response pleadings is an appropriate, proportional sanction. As I mentioned, the Contemnors only referred to it in oral submissions but declined the invitation to address it. I accept the plaintiffs' submission that they did not pursue that relief on the application as it was tied to the relief they sought for judgment with damages to be assessed, which they also did not pursue. Granting judgment with damages to be assessed is not appropriate given the potential impact of deemed admissions arising

from judgment on the determination of claims against other defendants in this action and the issues for determination in the related actions, including the Debt Action.

[56] At the end of the day, I must assess a fit and appropriate sanction for the contempt guided by the factors set out in the case authorities discussed above.

[57] Recognizing that striking a pleading is a "blunt tool, to be used sparingly" (see *Balaj* at para. 32; *Besic* at paras. 16–17), I find that striking the Contemnors' response pleadings in the circumstances is manifestly proportionate given their ongoing conduct and attitude towards compliance with court orders. I agree with the plaintiffs that there is no other meaningful sanction available than to strike the Contemnors' response pleadings in this action.

[58] Otherwise, the finding of contempt would be of no consequence to the Contemnors who have demonstrated a consistent pattern of deciding which orders they will comply with and when, and the result would, to borrow from the remarks of Fitzpatrick J. in *XY, LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 1840 at para. 87, amount to an open invitation to litigants to disregard court orders and be an affront to the administration of justice.

[59] The strike order shall issue but subject to the extant spoliation application brought on behalf of the defendants (including the Contemnors) in this action.

[60] For the spoliation application, the defendants seek to strike the plaintiffs' claims in this action on account of what they allege was the plaintiffs' significant destruction of material evidence. Allegations of that nature are significant and highly concerning, as they not only bear upon the propriety of the plaintiffs' conduct but also on the administration of justice. It is a matter that has no bearing on the Contemnor's non-compliance with court orders. It is an independent issue potentially affecting the ability of the plaintiffs to pursue their claim in this action.

[61] The plaintiffs advised me during oral submissions that they do not oppose an order permitting the Contemnors to participate in the spoliation application. It is an order that I am satisfied should issue in addition to striking the Contemnors'

response pleading. Accordingly, my order shall also include a term permitting the Contemnors to intervene in the spoliation application.

**Ordering Restrictions in the Debt Action**

[62] The plaintiffs also seek an order that the Contemnors who are plaintiffs in the Debt Action, must seek leave before bringing any interlocutory applications in that action and proceeding to trial. The plaintiffs submit that the case authorities recognize that a sanction order issued against a party for its contempt of an order in one action may include terms affecting it in a related action. The plaintiffs drew my attention to *Innovation and Development Partners/IDP Inc. v. Canada* (1994), 114 D.L.R. (4th) 326, 1994 CanLII 10962 (F.C.A.) and *Larkin* in support of the order sought. There is no suggestion at this juncture that the Debt Action should be struck.

[63] *Innovation* concerned the contemnor's failure to comply with a document production order issued in the context of three actions set to be tried together. The Federal Court of Appeal upheld the decision of the judge below to stay all three actions until the two principals of the contemnor have signed and filed affidavits attesting that each and every order of the court has been fully complied with. Justice Decary, writing for the court, determined that the general rule that a party in contempt in one action should not be prevented from bringing an application in another proceeding was overcome in the circumstances, where the three actions were so closely connected that it would frustrate the purpose of the general rule to allow the contemnor to proceed with the other two actions while the other was stayed: *Innovation* at para. 17.

[64] The contemnor's "flagrant and systematic disregard for [four] court orders" grounded Decary J.A.'s conclusion that it would be "useless to commence further contempt proceedings to force" compliance: *Innovation* at para. 20.

[65] In those circumstances, the order issued by the Federal Court of Appeal prohibited the contemnor from pursuing the other related actions until the prior orders of the Federal Court were complied with and the requisite affidavits were filed:

> [24] Exercising ourselves the discretion the motions judge has failed to exercise judicially, we have reached the conclusion that this is a most obvious case where the "general rule that a party in contempt will not be heard in the proceedings until the contempt is purged" (*Magder, supra,* at p. 699), should apply. To use the words of Stone J.A. in *Apple Computer Inc., supra,* at p. 13, the conduct of the respondent "betrays an attitude of defiance or even indifference . . . toward compliance with court orders" such, in the present circumstances, that it cannot but lead to a refusal to grant the respondent an audience before the court until the contempt is purged. It is manifestly impossible in this case to conclude that the respondent's continuing contempt of the order of McKeown J. to pay costs of $500 and its past conduct did not impede the course of justice nor the ability of the court to enforce its orders. Even as we write these reasons, we simply cannot even assume, considering its past attitude, that the respondent will show more respect for orders of this court than it has until now for orders of the Trial Division.
>
> [25] Even though the appellant in Her motion to quash did not expressly ask to stay the proceedings, it is implicit, in our view, when such a motion is made because the other party remains in contempt of orders of this court, that the motion is also one for stay of proceedings until the contempt is purged. Section 50(1)(*b*) of the *Federal Court Act,* R.S.C. 1985, c. F-7, empowers the court, in its discretion, to stay proceedings in the interest of justice. In the case at bar, the respondent's continuing defiance and arrogance amount to an abuse of process that cannot be too severely condemned. The respondent can simply not be allowed to continue to "use the court as its own private playground without abiding by its rules": *Ontario* (*Attorney-General*) *v. Paul Magder Furs Ltd.* (1991), 5 O.R. (3d) 560 at p. 565, 29 A.C.W.S. (3d) 782, 14 W.C.B. (2d) 250 (Gen. Div.), Somers J. therefore shall order that until the respondent abides by the orders of the Federal Court, including the present order, in any and all of actions nos. T-1535-90, T-2616-91 and T-54-92, and approaches the court with clean hands, these three actions be stayed. Furthermore, in view of the past attitude of the respondent and as an additional safeguard that the authority of this court will be respected, we shall older the stay to continue unless and until the two principals of the respondent, Mr. Michael Willinsky and Mr. Alastair Samson, have both personally signed and filed with the court an affidavit attesting that each and every order of the court, including the present order, in any of the three actions, has been fully complied with.
>
> [Emphasis added]

[66] *Innovation* as well as *Apple Computer, Inc. v. Mackintosh Computers Ltd*., [1988] 1 C.F. 191, 1987 CanLII 8932 (F.C.A.), referred to in *Innovation,* were cited with approval by Justice Chiasson in *Larkin* when pointing to the importance of context when considering whether to depart from the general rule:

> [33] Over the years, the scope of the rule was modified so that it only applied between the same parties in the same proceeding (see: *Bettinson*; and *Turner v. Turner* (1967), 59 D.L.R. (2d) 277 (B.C. Co. Ct.)).
>
> [34] More recently, courts have considered the issue more in context: the decision to hear or refuse to hear a party is treated as a matter of the court's discretion.
>
> [35] In *Apple Computer, Inc. v. Mackintosh Computers Ltd.,* [1988] 1 F.C. 191 (C.A.), the Court, on the basis of separate, concurring reasons for judgment, refused an application for a stay of an appeal – which was requested on the basis the appellants were in contempt of court orders. Mr. Justice Urie reviewed much of the authority on contempt, including *Hadkinson, Bettinson* and *Turner.* He stated at p. 206:
>
> > … I think it proper for me to express the view that the preferable rule is that, in the exercise of its discretion to permit an appeal to proceed or to refuse to do so, a court must have regard, inter alia, to the particular circumstances of the contempt and its effect on the proper administration of justice, i.e. whether it constitutes an impediment to the course of justice. Whether or not it will, of course, will be dependant upon the facts of the contempt and the Court's view of their effect.
>
> [36] In *Innovation and Development Partners/IDP Inc. v. Canada* (1994), 114 D.L.R. (4th) 326 (F.C.A.), Décary J.A., for the Court, noted the general rule that a party in breach of a court order is prevented from being heard in another cause, but stated that "[t]he general rule does not prevent the party in contempt for non-obedience in one cause from making an application relating to a distinct matter ...". In his view, the court will look at all the circumstances, including the relationship between the cause in which the disobeyed order was made and the cause under appeal, in considering whether to hear or dismiss the party's application.
>
> [37] Mr. Justice Laskin, whose dissenting judgment was adopted with approval when the case proceeded to the Supreme Court of Canada (2007 SCC 8), followed this approach in *Dickie v. Dickie* (2006), 78 O.R. (3d) 1 (Ont. C.A.), stating:
>
> > 87 The exercise of the court's discretion to refuse to hear the appeal of a litigant who has not cured a wilful breach of a court order obviously applies when the order appealed is the very order the litigant has refused to obey. But the court's discretion may also be invoked when the order appealed is closely connected to an order or orders wilfully breached.
>
> [Emphasis added]

[67] Other cases taking a similar approach are: *XY, LLC v. Canadian Topsires Selection Inc*., 2015 BCSC 2284 (where, relying on *Larkin*, Fitzpatrick J. took into account a party's failure to comply with orders in other actions in denying its

adjournment of trial application); *Dhillon v. Parmar*, 2014 BCSC 1115 (where two related actions were dismissed); and *Dempsey v. Pagefreezer Software Inc*., 2023 BCCA 212 (where an application to extend time to file an appeal was denied due to the applicant's demonstrated tendency to disregard orders of the Court of Appeal and the Supreme Court when they were unfavourable to its position).

[68] The Contemnors who are plaintiffs in the Debt Action argue that no such order should be issued. They contend that since many of the issues involved in the Debt Action mirror those brought by the plaintiffs in this action, a prohibition order would impede their access to justice and also allow the plaintiffs to prove their claims in this action without concern for any evidence and issues that they could adduce and raise in the Debt Action.

[69] I find the remarks of Decary J.A. in *Innovation* to be particularly apposite for my analysis. Context is instructive. The Contemnors should not be permitted to use court time to bring interlocutory applications to pursue their claims as plaintiffs in the Debt Action in light of their conduct in this action, which has consumed significant amounts of court time taken up with contempt applications to compel their compliance with court orders and the Contemnors' meritless variation and extension applications to avoid compliance.

[70] Requiring the Contemnors to seek leave does not deny them access to justice (and ready access to speak to leave for an intended application is facilitated through ongoing case management of the Debt Action with this and other related actions). An order requiring leave provides an important gatekeeping function designed to prevent unwarranted consumption of court time. To borrow from the remarks of Decary J.A., it prevents the Contemnors from using the Debt Action as their "playground" to prosecute their claim through the unconstrained use of court time where they have shown they are not prepared to comply with orders issued in this action.

[71] However, I would not require the Contemnors to seek leave to pursue the Debt Claim at trial. I am not satisfied that denying them their right to trial is

proportional in the circumstances. Denying them their right to trial is a wholly different matter from requiring them to seek leave to prevent their continued use of court time for unwarranted interlocutory applications.

**Disposition**

[72] The Contemnors' response pleadings in this action are struck.

[73] The Contemnors have leave to intervene in the defendants' extant spoliation application.

[74] The Contemnors who are plaintiffs in the Debt Action must seek leave to bring interlocutory applications in the Debt Action, VA S217835.

"Walker J."