IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Optimil Machinery Inc. v. Taylor,* 2023 BCSC 265

Date: 20230224
Docket: S218817
Registry: New Westminster

Between:

Optimil Machinery Inc.

Plaintiff

And

Robert Lew Taylor personally and doing business as RL Taylor Co. (also known as RL Taylor, Amark Services Ltd., and ABC Company #1

Defendants

And

Shane Leslie Braddick
Optimil Machinery Inc.

Defendants by Counterclaim

And

Robert Lew Taylor, RL Taylor Co., Amark Services Inc., and Jane/John Doe

Third Parties

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:	M.A. Pytlewski D.W. Framingham
Appearing in Person and as Representative of the Corporate Defendants:	R.L. Taylor
Place and Dates of Trial:	New Westminster, B.C. August 8-12, 2022 August 15-19, 2022 August 22; 24-25, 2022
Place and Date of Judgment:	New Westminster, B.C. February 24, 2023

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I. INTRODUCTION

[1] This case arises out of a scheme by a former manager of the plaintiff to defraud his employer using fraudulent purchase orders.

[2] The plaintiff, Optimil Machinery Inc. (“Optimil”), is a family-owned business located in Delta, British Columbia. Optimil designs and builds machines that are used in the sawmill industry to process logs into lumber.

[3] Shane Leslie Braddick was a senior management-level employee of Optimil. Over the course of about 15 years, Mr. Braddick carried out a scheme of fraud and theft that cost Optimil approximately $3 million. The scheme evolved over time, and took on several forms. It essentially revolved around orders for industrial computer parts. At various times, Mr. Braddick caused Optimil to order parts it did not require, sold surplus parts from Optimil’s inventory, and approved payments for parts that Optimil never received.

[4] Optimil settled its claims against Mr. Braddick before the trial.

[5] The remaining defendants are Robert Lew Taylor and his companies, Amark Services Ltd. (“Amark”) and RL Taylor Co. I will refer to these three entities together in these reasons as the “Taylor Defendants”. The Taylor Defendants were suppliers of non-industrial computer parts to Optimil.

[6] Optimil alleges that the Taylor Defendants were active and knowing participants in Mr. Braddick’s schemes. Mr. Taylor issued invoices and packing slips for parts that Mr. Braddick ordered. He sold parts that Mr. Braddick stole from Optimil. He collected payments from Optimil and others, paid Mr. Braddick large sums of cash and kept a share for his own benefit. He also failed to remit the Goods and Services Tax (“GST”) on the payments he collected from Optimil.

[7] At trial, Mr. Taylor denied any knowledge of Mr. Braddick’s fraud or theft. He claimed to have acted at all times on instructions from Mr. Braddick, believing him to be a legitimate supplier of parts for Optimil. He claimed to have been

deceived by Mr. Braddick on many aspects of the transactions, including the source of the parts and the purpose of the payments to Mr. Braddick.

[8] I have found that Mr. Taylor knowingly assisted Mr. Braddick's breach of his fiduciary duties to Optimil. I have found that Mr. Taylor knew, from the outset, that Mr. Braddick's conduct was dishonest, even if he did not know he was participating in the fraud by Mr. Braddick. I have also found fraud against Mr. Taylor for the GST claimed in all of his invoices to Optimil.

[9] As part of its settlement with Mr. Braddick, Optimil amended its notice of civil claim to waive its right to recover from the Taylor Defendants any portion of the loss it sustained which the Court attributes or apportions to the fault of Mr. Braddick.

[10] I have apportioned 80% of the fault for the procurement scheme to Mr. Braddick. As a result, Optimil is entitled to recover 20% of its total losses from the scheme from the Taylor Defendants. In addition, Optimil is entitled to recover damages from the Taylor Defendants for the fraud relating to the GST.

[11] I have dismissed a counterclaim by the Taylor Defendants for five unpaid invoices, representing five final invoices by RL Taylor Co. on which Optimil stopped payment after it discovered the fraud by Mr. Braddick.

[12] The Taylor Defendants also counterclaimed against Mr. Braddick for damages for fraud, breach of fiduciary duty, breach of trust and defamation. On May 11, 2022, Justice Jenkins ordered that the trial of this counterclaim be severed from the trial of Optimil's claims against the Taylor Defendants. It is not addressed in these reasons for judgment.

II. BACKGROUND

A. Optimil's Parts Procurement Process

[13] A brief description of the design process and how Optimil orders parts is important to understand the procurement scheme at the heart of this case.

[14] Optimil builds large and complicated industrial machines and control panels. It custom builds each project to meet the requirements of a specific customer. The projects range from a singular module costing about $1 million, to a complete log processing machine that may cost over $10 million.

[15] Programmable logic controllers (“PLCs”) are industrial computers that control and optimize the performance of a machine. Within Optimil, the controls group is responsible for designing and building PLCs to perform machine-specific functions for the log-processing machines. The PLCs are assembled by Optimil into panels from components that are plugged into a rack, connected with wires and programmed with specialized software. A completed PLC panel may be comprised of hundreds or thousands of PLC parts.

[16] When Optimil receives a request for a proposal from a potential customer, designers in the controls group create a list of the parts they will require for the PLC systems to run the machinery. The PLC systems are included in the quote by Optimil for the project as a whole. On a recent project, the quote for the PLC systems alone was over $600,000.

[17] Optimil provides fixed price quotes to its customers. If the customer places an order, Optimil will deliver the machine for the quoted price. The only exception is if there is a major change in the scope of the job. Otherwise, if Optimil requires more parts than budgeted during the design phase, the cost of these additional parts comes out of its profit margin.

[18] If an order is placed, the controls group creates detailed drawings and a “bill of materials” or “parts list” of the components for the project. Once complete, the designers pass the parts list on to the purchasing department, where a “purchaser” (an Optimil employee) issues a purchase order to the appropriate supplier.

[19] Sometimes, on a complex project, when parts are required urgently, or when the purchaser is away from the office, a senior manager may place an order with a supplier.

[20] Each brand of parts has a designated supplier. Westburne Electric Supply Ltd. (“Westburne”) is the designated supplier of Rockwell Automation (“Rockwell”) parts and the authorized distributer of Rockwell parts in British Columbia. Rockwell owns Allen Bradley, which manufactures most of the PLC parts that Optimil uses in its machines. For these reasons, Westburne is the normal supplier of PLC parts on Optimil’s projects.

[21] Parts arrive at Optimil from the suppliers in several shipments over the course of a project. An employee in the receiving department signs the packing slip from the supplier to confirm receipt of the parts. The employee also compares the packing slip against the purchase order, and fills in the “Qty. Rec’d” column on the purchase order, indicating the number of parts received.

[22] Sometimes, when parts are required in the field, Optimil may arrange delivery to a customer’s location. If the part arrives at a customer’s location, its receipt may be confirmed verbally with an Optimil employee.

[23] Once someone with authority has indicated that the parts have arrived, the receiving department forwards the paperwork to the accounting department. An employee in the accounting department compares the packing slip against the purchase order and, if the documents align, approves the supplier’s invoice for payment.

[24] When the deliveries arrive at Optimil, PLC parts are sent to the panel shop, where the PLC panels are assembled. The PLC parts are stored on pallets or on shelves in the shop, organized by the project for which they were ordered. As the project progresses, Optimil employees assemble the PLC panels from the parts in this inventory.

[25] Optimil does not maintain a formal inventory tracking system. The company orders parts as they are required for specific projects. Excess parts from one project may be used on another project. Optimil does not resell parts.

[26] Once the PLC panels are assembled, an engineer programs their functions and they are installed in a larger panel or a machine. Ultimately, the completed product is delivered to the customer and “commissioned” by an Optimil employee on site.

B. Shane Braddick

[27] Mr. Braddick was hired by Optimil in 1998. He has a background in industrial automation, particularly in forest and sawmill related industries. He was recruited by Optimil to be the manager of robotics and automation. By 2005, his responsibilities included managing the day-to-day operations of the controls group.

[28] As a manager, Mr. Braddick had the authority to order parts and the authority to instruct employees in the purchasing department to order parts. He also had the authority to confirm receipt of parts, sign packing slips and authorize payments to suppliers.

C. Robert Taylor

[29] Mr. Taylor lives in Vanderhoof, British Columbia. His business is built around sourcing parts and accessories and arranging delivery for his customers.

[30] Mr. Taylor supplied office computers and related parts and accessories to Optimil, beginning in about 2004, through his company Amark. In about 2010, Mr. Taylor created RL Taylor Co. to deal exclusively with Optimil.

[31] Mr. Taylor is not an authorized retailer or supplier of PLC parts. He did supply some used PLC parts to Optimil, by sourcing the parts on eBay, but only on a limited basis.

[32] For many years, Mr. Taylor provided good service to Optimil. Optimil does not make any claim against him relating to any orders for office computers or related parts and accessories.

[33] The claim that Optimil makes against Mr. Taylor relates to the anomalous PLC orders and thefts that Optimil identified in the investigations described below.

D. The Investigation by Optimil

[34] Optimil first learned of a possible scheme involving PLC parts in December 2018, when two employees approached the president of the company to say they suspected Mr. Braddick was ordering parts Optimil did not require.

[35] John Chapman led a comprehensive investigation into the allegations. Mr. Chapman is a former Optimil executive officer who started the controls group. He is related to the current president, Ross Chapman, and the head of accounting, Holly Chapman. He gave detailed evidence of his investigation at the trial.

[36] Working with controls group designers Terry Richards and Darrin Stanley, Mr. Chapman reviewed purchase orders for PLC parts and compared them with the parts lists and project requirements. Initially, he went back three years, but later expanded the investigation back to 2008. (This was as far back as Optimil's records went.)

[37] Mr. Chapman and the designers noticed that orders had been placed with RL Taylor Co. for various PLC parts that had already been ordered on the same project from Westburne. They also discovered orders placed with RL Taylor Co. for parts for which there was no use on the project with which the orders were associated. In some cases, they found orders that were placed before a bill of materials was even created for the project.

[38] Mr. Chapman and the designers then went back through all of the purchase orders and stamped each order as falling into one of three categories:

(1) orders on which they did not identify any anomalies, which were stamped "parts required", meaning that everything lined up;

(2) purchase orders that they stamped "parts not required", meaning that they had determined that the parts were not required for the project on which they were ordered; and

(3) orders that were unclear, meaning that they could not clearly determine that the parts were not required and accordingly stamped "parts required".

[39] Mr. Chapman and the designers reviewed a total of 236 projects and associated PLC parts orders in particular. They identified 82 projects that had orders for PLC "parts not required".

[40] A number of the purchase orders for "parts not required" were designated with a "- S" number and signed by Mr. Braddick, meaning that Mr. Braddick had placed the orders himself. Other orders for "parts not required" were designated with a "– C" number and signed by a purchaser, meaning that the orders were placed by the purchasing department. Corresponding with most of these latter orders, Mr. Chapman found emails from Mr. Braddick instructing the purchaser to issue the purchase order in question.

[41] The vast majority of the purchase orders for "parts not required" were orders from RL Taylor Co. A small number of the purchase orders for "parts not required" were from Westburne.

[42] The completed purchase orders and packing slips corresponding with these orders indicated that the "parts not required" were received by Optimil. Given that the parts were not required, however, Mr. Chapman had no confidence the parts in question were in fact received.

[43] Mr. Chapman determined that Optimil paid the suppliers for almost all of the "parts not required". For a limited number of the suspect orders, RL Taylor Co. issued "credits", after which the accounting department put the payments on hold. Mr. Chapman could not determine why RL Taylor Co. had issued these "credits".

E. The Dismissal of Mr. Braddick

[44] By early March 2019, Optimil's executives decided they had enough evidence with which to confront Mr. Braddick. To prepare for a meeting with Mr. Braddick, Mr. Chapman reviewed the packing slips on four recent projects. He could not locate the parts from RL Taylor Co. that the paperwork indicated had been received and should be on site.

[45] On March 4, 2019, Ross and John Chapman met with Mr. Braddick and told him that they had been looking into purchase orders involving excess parts and Mr. Taylor. Mr. Braddick asserted that the parts ordered from Mr. Taylor had been received by Optimil. The Chapmans and Mr. Braddick went to the panel shop and searched for parts on various ongoing projects. They found the parts that were required for the projects, but they could not find the parts ordered from RL Taylor Co. Mr. Braddick said he would take another look for the parts.

[46] The following day, the Chapmans and Mr. Braddick searched again and still could not find the missing parts from RL Taylor Co. Mr. Braddick said he would pick up the parts from Mr. Taylor or have Mr. Taylor deliver them.

[47] Immediately following this meeting, Mr. Braddick placed an order with Westburne for the same PLC part numbers that Mr. Chapman had identified as missing parts from RL Taylor Co.

[48] On March 6, 2019, the Chapmans attended at an address in Richmond which they understood to be the address from which RL Taylor Co. shipped the parts to Optimil. The men who answered the door said they had not seen Mr. Taylor for a long time.

[49] That afternoon, Optimil terminated Mr. Braddick's employment for cause. Mr. Braddick was subsequently seen loading PLC parts into the back of his pickup truck, apparently the same parts he had just obtained from Westburne.

F. The Final Five Invoices From Mr. Taylor

[50] Mr. Chapman instructed the accounting department to stop processing five as-of-yet unpaid orders from RL Taylor Co. that he had identified as "parts not required".

[51] Mr. Chapman spoke with Mr. Taylor on March 7, 2019, and told him the PLC parts for the final five orders could not be located. Mr. Taylor claimed that the parts had been sent by courier to Optimil. He said Optimil had signed for the parts on the packing slips, which struck Mr. Chapman as odd, because any signed packing slips would be internal Optimil documents.

[52] In subsequent emails, Mr. Taylor demanded payment for the invoices on which Mr. Chapman had stopped payment, suggesting that he had information about the missing parts, which he would provide only if Optimil paid his invoices.

[53] On May 28, 2019, Holly Chapman asked Mr. Taylor to provide tracking numbers for the deliveries. Mr. Taylor did not provide any tracking numbers. Instead, he claimed that Mr. Braddick had signed for the deliveries. He said he would contact his "supplier" for "delivery receipts". Two minutes later, he wrote to Mr. Braddick asking Mr. Braddick for copies of "any receiving receipts you can provide".

[54] In a conversation with Mr. Chapman on June 5, 2019, Mr. Taylor claimed that Mr. Braddick had confessed to a scheme in which he ordered surplus parts and sold them to third parties. Mr. Taylor alleged that Mr. Braddick had embezzled more than $3 million from Optimil over the course of 15 years.

[55] In a subsequent email dated June 10, 2019, Mr. Taylor made further allegations against Mr. Braddick, sought $100,000 in "compensation" and again

demanded payment of his outstanding invoices, after which payment he said he would be willing to provide evidence and documentation to assist Optimil.

[56] Optimil declined to pay Mr. Taylor for information or documents.

[57] The five unpaid invoices from RL Taylor Co. are the subject of Mr. Taylor's counterclaim in these proceedings.

G. Additional Investigations by Optimil

[58] Mr. Chapman reviewed the documents that Mr. Taylor produced in this litigation. He identified RL Taylor Co. invoices to third parties that matched closely in time with Optimil orders from Westburne for the same parts. He concluded from these connections that Mr. Braddick ordered parts from Westburne that were paid for by Optimil and then sold by Mr. Taylor to the third parties.

[59] In some instances, Mr. Chapman discovered that the same parts that Optimil purchased from Westburne and sold to Mr. Taylor were then reordered by Optimil from the third party to whom Mr. Taylor had sold them, and sold back to Optimil.

[60] Mr. Chapman also reviewed the banking records for Amark and RL Taylor Co. that Optimil obtained by court order in this litigation, from 2014 (the earliest that records could be obtained) to 2021.

[61] Mr. Chapman found that almost all of the deposits into the bank accounts of Amark and RL Taylor Co. for this time period were payments from Optimil, totalling approximately $2.4 million.

[62] Mr. Chapman also identified regular withdrawals of large amounts of cash from the bank accounts, almost exclusively in amounts of $9,500, totalling approximately $1.6 million.

[63] Mr. Chapman created spreadsheets summarizing his review of the invoices and payments to and from Mr. Taylor's companies. Mr. Chapman gave extensive and detailed evidence at the trial explaining and documenting his calculations in the spreadsheets.

[64] In short, Mr. Chapman determined that Mr. Taylor invoiced Optimil for parts that Optimil did not require or that were sold to other parties, received payments from Optimil that appeared to be the sole source of income for RL Taylor Co., deposited these payments from Optimil in a bank account and withdrew large amounts of cash from the account in regular increments of $9,500.

[65] During this litigation, Mr. Taylor produced approximately 127 documents that he called the "BK spreadsheets". The BK spreadsheets are documents that Mr. Braddick and Mr. Taylor sent back and forth by email in which they kept track of various line items. With some adjustments, Mr. Chapman's calculations correspond with the BK spreadsheets, confirming the reliability of Mr. Chapman's findings and conclusions.

H. The GST Issue

[66] One of Mr. Chapman's notable findings was that, while Amark and RL Taylor Co. charged Optimil GST on their invoices, neither remitted any GST on these payments. Mr. Chapman subsequently determined that neither Amark nor RL Taylor Co. was registered with a proper GST number.

[67] Concerned that Mr. Taylor's failure to remit GST could create a tax liability for Optimil for incorrectly claimed input tax credits, Optimil took steps to refile its GST returns for four years (the limitation period). Optimil determined that it owed an additional $22,877.71 in GST. The Canada Revenue Agency ("CRA") subsequently levied interest charges against Optimil totalling $4,528.30.

I. Expert Evidence

[68] Optimil tendered two expert reports by Spencer Cotton and qualified Mr. Cotton as an expert in business accounting, including loss quantification and forensic analysis.

[69] Mr. Cotton prepared an interim report based on Optimil's internal documentation and letters by Mr. Chapman, Mr. Stanley and Mr. Richards confirming their review of the parts lists for the 82 projects identified during their investigation as having orders for PLC "parts not required".

[70] Mr. Cotton prepared a further report following review of the bank records and documents of the Taylor Defendants that Optimil was able to obtain during this litigation. Among other documents, Mr. Cotton reviewed all of the purchase orders and invoices for PLC parts from Amark or RL Taylor Co. dating back to 2006.

[71] In his reports, Mr. Cotton concluded that Mr. Braddick conducted a procurement scheme in which he diverted funds from Optimil using falsified purchase orders. Mr. Cotton further concluded that Mr. Taylor was closely involved in Mr. Braddick's procurement scheme. He opined that Mr. Taylor took on the role of co-conspirator and money launderer in the misappropriation of approximately $3 million of Optimil's assets.

[72] I have not put any weight on these conclusions in Mr. Cotton's report. In my view, these conclusions are unnecessary and inadmissible as expert evidence. It is for the Court to determine the nature and extent of Mr. Taylor's knowledge and involvement in the actions of Mr. Braddick.

[73] However, Mr. Cotton's reports are necessary and admissible for his review and forensic analysis of the documents and information produced by the parties. Importantly, Mr. Cotton reviewed Mr. Chapman's spreadsheets and concluded that they are fundamentally sound. His independent and expert

analysis supports and corroborates the results of Mr. Chapman's investigation. Mr. Cotton also provided necessary and admissible evidence of Optimil's losses.

J. Mr. Braddick's Evidence

[74] Mr. Braddick testified at the trial under a subpoena from Optimil.

[75] On August 11, 2022, I made an order declaring that Mr. Braddick's testimony at the trial was compelled testimony and qualified in that regard for the protection against self-incrimination set out in s. 4 of the *Evidence Act*, R.S.B.C. 1996, c. 124, s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and s. 13 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[76] In his testimony, Mr. Braddick admitted that he: caused Optimil to order PLC parts it did not require; approved payments by Optimil for PLC parts it did not require; stole surplus Optimil PLC parts and arranged for them to be sold to third parties; and caused Optimil to pay for PLC parts that never existed.

[77] According to Mr. Braddick, Mr. Taylor was a knowing participant in all of his schemes involving the PLC parts. Mr. Braddick testified that Mr. Taylor: issued invoices and packing slips for the unnecessary PLC parts that Mr. Braddick ordered; sold Optimil's surplus PLC parts that Mr. Braddick had stolen from Optimil; collected the payments on Mr. Braddick's dishonest and fraudulent transactions; and paid or "gifted" Mr. Braddick his share of the proceeds of the schemes.

[78] I have approached Mr. Braddick's evidence with caution. He is an admitted liar. For years, he deceived his employer, misled employees who reported to him and created false documents.

[79] Mr. Braddick's description of how the schemes worked is corroborated by the results of the investigation by Mr. Chapman, as confirmed by Mr. Cotton, and is therefore reliable. His evidence of his own misconduct is also inherently

reliable because, despite my ruling that his testimony is subject to a claim of use immunity, the admissions of serious wrong-doing are against his interests and reputation.

[80] However, Mr. Braddick's evidence of Mr. Taylor's knowledge and involvement in the schemes is self-serving and flatly denied by Mr. Taylor. Where Mr. Braddick's evidence conflicts with Mr. Taylor's explanation of the transactions, I have weighed the conflicting testimony in light of the competing probabilities that emerge from the evidence as a whole.

i. The Surplus Parts Order Scheme

[81] Mr. Braddick first met Mr. Taylor in about 2000 when Mr. Taylor was a representative of Sovo Computers. After Mr. Taylor left Sovo Computers and set up Amark, Mr. Braddick began dealing with Mr. Taylor as a supplier of office computers and related parts and accessories.

[82] Mr. Braddick testified that he and Mr. Taylor came up with a workaround solution to the fact that Mr. Braddick's authority was limited on what he could purchase for Optimil. When Mr. Braddick identified office computer equipment his department required but he was not authorized to purchase, he would place the order with Amark, and Mr. Taylor would acquire the equipment Mr. Braddick wanted, but invoice Optimil for equipment that was within Mr. Braddick's authority.

[83] This unauthorized procurement scheme for office computers did not benefit Mr. Braddick financially, but it evolved into the schemes involving PLC parts.

[84] The original scheme involving PLC parts was what I will refer to as the "Surplus Parts Order Scheme". Mr. Braddick described it as follows.

[85] Mr. Braddick identified a PLC part or parts that Optimil required for a project, but already had in its inventory. Mr. Braddick issued a purchase order, or

instructed an employee to issue a purchase order, to Amark for the same part numbers. Upon receipt of the purchase order, Mr. Taylor caused Amark to generate a packing list and an invoice for the parts. When the packing list and invoice arrived at Optimil, Mr. Braddick provided the existing parts from Optimil's surplus inventory to an employee who unknowingly checked off the parts as received and forwarded the paperwork to accounting for payment. Once he received the payment from Optimil, Mr. Taylor paid a share to Mr. Braddick.

ii. The Surplus Parts Theft Scheme

[86] Mr. Braddick next described what I will refer to as the "Surplus Parts Theft Scheme".

[87] Mr. Braddick identified parts in Optimil's inventory that were surplus and not required for an Optimil project. Mr. Braddick informed Mr. Taylor of the part numbers and Mr. Taylor issued a packing slip and invoice to an Amark customer for the same parts. Mr. Braddick then delivered the parts or arranged to have them delivered to Amark's customer from Optimil's inventory. Mr. Taylor and Mr. Braddick split the sale proceeds as above.

[88] This scheme continued after Mr. Taylor moved his business with Optimil to RL Taylor Co. Mr. Braddick specifically identified a September 22, 2011, invoice from RL Taylor Co. to VSP Consulting, which he testified was for parts taken from Optimil's inventory.

[89] Mr. Braddick also explained a variation of the Surplus Parts Theft Scheme in which he identified surplus parts which Mr. Taylor sold to Radwell Industries, a PLC parts clearinghouse.

[90] Mr. Braddick specifically identified an email he sent to Mr. Taylor on March 21, 2016, which he testified was a list of PLC parts that were surplus in Optimil's inventory. Mr. Braddick then identified an email from Mr. Taylor on June 16, 2016, confirming that he had sold the parts to Radwell Industries.

iii. The Westburne Order Theft Scheme

[91] In what I will refer to as the "Westburne Order Theft Scheme", Mr. Braddick testified that he caused Optimil to order parts it did not require from Westburne, and Mr. Taylor then sold the same parts through Amark and later RL Taylor Co. and split the proceeds with Mr. Braddick.

[92] Mr. Braddick specifically identified a purchase order dated May 22, 2014 that an Optimil employee issued to Westburne on Mr. Braddick's instructions for a part that was not required by Optimil, and a matching invoice dated May 28, 2014 from RL Taylor Co. to VSP Consulting.

iv. The Phantom Order Scheme

[93] Lastly, Mr. Braddick described what I will refer to as the "Phantom Order Scheme" and the most obvious example of fraud. This scheme began after Mr. Taylor moved his business with Optimil to RL Taylor Co.

[94] Mr. Braddick or an employee under his direction generated a purchase order to RL Taylor Co. for a PLC part or parts that Optimil did not require. Mr. Taylor generated an invoice and packing slip for the PLC parts, but did not ship any parts. Mr. Taylor sent the documents to Mr. Braddick, who took the packing slip to an employee and told the employee that he had received the parts, when none in fact had been received. Mr. Braddick or an employee on his directions signed the packing slip as received. Optimil paid Mr. Taylor's invoice, and Mr. Taylor split the proceeds with Mr. Braddick.

[95] Mr. Braddick specifically identified purchase orders dated January 10, 24 and 25, 2019, and corresponding invoices from RL Taylor Co. dated January 14 and 28, as orders for PLC parts that he said were not delivered to Optimil. Mr. Braddick said he knew the parts for which Mr. Taylor invoiced Optimil were not delivered because most of his business with Mr. Taylor during this time period involved non-existent parts.

v. Payments to Mr. Braddick

[96] In the early days, Mr. Braddick testified, Mr. Taylor retained 15% to 20% of the payments from Optimil, and paid Mr. Braddick the remaining proceeds. Initially, it appears that Mr. Taylor paid Mr. Braddick by cheque. At some point, he also provided Mr. Braddick with a debit card so that he could withdraw his share from a bank account.

[97] In about 2010, following the transition to RL Taylor Co., Mr. Braddick testified, Mr. Taylor began to provide him with payments by sending him envelopes containing $9,500 in cash through Purolator.

[98] Mr. Braddick testified that he and Mr. Taylor used the BK spreadsheets to keep track of the purchase orders, invoices, and payments and amounts owing to Mr. Braddick. He testified that, in the time period covered by the BK spreadsheets, Mr. Taylor retained a 7.5% “commission” and “gifted” the balance to Mr. Braddick by way of the cash payments they tracked on the BK spreadsheets.

[99] Mr. Braddick referred to the payments as “gifts” because he never held himself out to Mr. Taylor as a business, and never had a company name. As such, he said, he explained to Mr. Taylor that for their relationship to work, there would need to be another way for Mr. Taylor to pay him (presumably meaning cash or other “gifts”, instead of traceable payments).

[100] Mr. Braddick testified that he and Mr. Taylor used a form of code in their email correspondence to update one another on the payments. For example, on January 26, 2016, Mr. Taylor wrote that he was going to Prince George with “four packages”, meaning that Mr. Taylor was planning to courier a Purolator envelope to Mr. Braddick with four envelopes containing $9,500 each. In another example, Mr. Taylor wrote on June 12, 2018, “Going to PG, today, had to move it up. Double, will be there tomorrow”, meaning Mr. Taylor was going to send Mr. Braddick two envelopes containing $9,500.

[101] From time to time, Mr. Braddick testified, Mr. Taylor purchased personal items for him, such as tools, computers and a television, and deducted the cost of these items with an “up charge”, from the amount owing to Mr. Braddick on the BK spreadsheets.

[102] Mr. Braddick identified a specific purchase order dated February 20, 2019 to RL Taylor Co. and invoiced to Optimil as a PLC part that never existed which he testified he created to cover the cost of a series of purchases Mr. Taylor made for him at Home Depot.

vi. Communications between Mr. Braddick and Mr. Taylor

[103] Mr. Braddick testified that he and Mr. Taylor regularly discussed the schemes and Mr. Taylor knew from the start what was going on.

[104] Mr. Braddick testified that he told Mr. Taylor the parts they were selling came from the surplus inventory on Optimil projects or parts that Mr. Braddick ordered that Optimil did not require. He also testified that Mr. Taylor knew that no one paid Optimil for the parts he sold to third parties such as Radwell Industries.

[105] Mr. Braddick testified he asked Mr. Taylor whether he was remitting GST to the government, and Mr. Taylor said he was keeping the GST as part of his cut of the business.

[106] Mr. Braddick testified that he spoke with Mr. Taylor on the telephone during the days and weeks following his dismissal from Optimil, and they discussed their many years of fraud and theft, including the sale of surplus Optimil parts and the invoices for non-existent parts.

[107] Mr. Braddick testified that Mr. Taylor recommended that he not return to the Optimil facility as the Delta police would be there to arrest him. He testified that Mr. Taylor provided him with information on how to have data on his

computer “professionally wiped”. He testified that Mr. Taylor recommended he dispose of anything that linked them.

[108] Mr. Braddick’s final written communication with Mr. Taylor was by email in late May 2019, when Mr. Taylor asked him for “any receiving receipts” he could provide for the invoices on which Optimil had stopped payment.

K. Mr. Taylor’s Evidence

[109] Mr. Taylor testified in his own defence and as the only witness for the Taylor Defendants.

[110] Much of Mr. Taylor’s evidence was not credible. On a number of occasions, he changed his evidence between his testimony-in-chief and cross-examination. He offered shifting explanations for the results of Mr. Chapman’s investigations, some of which did not make sense. He refused to admit obvious facts that undermined his version of events. In many instances, he simply gave bare denials of Mr. Braddick’s detailed evidence and documented transactions.

[111] Mr. Taylor testified that it was Mr. Braddick’s idea to order PLC parts on Optimil’s behalf from Amark and later RL Taylor Co. According to Mr. Taylor, Mr. Braddick said he knew of companies that had excess PLC stock he could acquire at a discount which Mr. Taylor could then resell to Optimil at a profit. According to Mr. Taylor, Mr. Braddick proposed to take a 10% fee and pay Mr. Taylor a 5% fee.

[112] Mr. Taylor acknowledged that he did not ship any PLC parts to Optimil. Instead, Mr. Taylor testified, he “facilitated” the orders by “drop-shipping” the PLC parts sourced by Mr. Braddick. In other words, Mr. Taylor said he fulfilled the orders by passing them onto to Mr. Braddick, who delivered the parts to Optimil. While Mr. Taylor’s companies appeared on the invoices, he had no role in acquiring, packing or shipping the parts.

[113] In this way, Mr. Taylor testified, he acted as an intermediary between Mr. Braddick and Optimil - in much the same way, in his view, as Amazon might on an order of consumer goods - and Mr. Braddick acted as Mr. Taylor's supplier of PLC parts.

[114] Mr. Taylor described this arrangement as "win–win–win" for all parties because Optimil was able to acquire PLC parts at a lower price, and he and Mr. Braddick were able to collect modest fees for their services.

[115] Mr. Taylor acknowledged that he never disclosed to Optimil that Mr. Braddick was acting as his supplier. He testified that this was none of Optimil's business.

[116] Mr. Taylor also acknowledged that he dealt with Mr. Braddick on a cash–only basis, at least once they started using the BK spreadsheets. Mr. Taylor testified that this was because Mr. Braddick told him that he had located a distributor in the United States, from whom Mr. Braddick could purchase PLC parts and sell those parts at a higher price to customers in Canada, including Optimil.

[117] Mr. Taylor testified that the reason he provided Mr. Braddick with envelopes containing $9,500 was that Mr. Braddick told him he could only transport cash across the border in amounts of less than $10,000.

[118] Mr. Taylor explained that the BK spreadsheets were used to keep track of the payments to Mr. Braddick and confirmed that the difference between column D ("total" received from Optimil), and column G ("owed" to Mr. Braddick) was what RL Taylor Co. kept.

[119] Mr. Taylor described the funds he retained in various ways, including an "up charge", a "service fee" or a "commission".

[120] Mr. Taylor acknowledged that the only service he provided was generating invoices and packing slips, and receiving and distributing funds. As

stated, he did not pack or ship any PLC parts. Instead, he relied at all times on Mr. Braddick to supply and deliver the PLC parts.

[121] Mr. Taylor testified that, with the exception of Rockwell, he did not know where Mr. Braddick was obtaining the PLC parts. He denied knowing that any of the PLC parts came from Westburne or Optimil's own inventory.

[122] Mr. Taylor denied invoicing Optimil for PLC parts that did not exist. He testified that the five invoices on which Optimil stopped payment were based on purchase instructions from Mr. Braddick, on Optimil's behalf, for parts that Mr. Braddick supplied and Optimil received as confirmed on the purchase orders. He acknowledged that he never saw any of the parts on these orders. He testified that his understanding was that Mr. Braddick would handle all aspects of the delivery.

[123] Mr. Taylor also denied using funds received from Optimil to purchase personal items for Mr. Braddick.

[124] Mr. Taylor acknowledged that neither Amark nor RL Taylor Co. remitted GST on the payments they received from Optimil. He also admitted that he used incorrect GST numbers on the invoices he sent to Optimil. He testified that it was his understanding Mr. Braddick agreed to collect and remit the GST on the sales by Amark and RL Taylor Co. He did not explain how this arrangement worked, when it was Amark and RL Taylor Co. who issued the invoices and collected the payments.

III. ANALYSIS

[125] Optimil originally brought this action against Mr. Braddick, the Taylor Defendants and others in fraud, theft and conversion, breach of fiduciary duty and knowing assistance of breach of fiduciary duty.

[126] At trial, Optimil framed the remaining case against the Taylor Defendants in fraud and knowing assistance of Mr. Braddick's breach of fiduciary duty. In my

analysis, I will refer to the Taylor Defendants and Mr. Taylor interchangeably. The two corporate entities are alter egos of Mr. Taylor.

[127] The issues I must decide are:

a) the nature and extent of Mr. Taylor's involvement in the schemes;

b) Mr. Taylor's liability in fraud;

c) Mr. Taylor's liability for knowing assistance of breach of fiduciary duty;

d) whether Optimil's claims are barred by a limitation defence;

e) quantification of Optimil's losses;

f) apportionment of liability as between Mr. Braddick and Mr. Taylor;

g) Optimil's claim to aggravated and punitive damages; and

h) Mr. Taylor's counterclaim for the five unpaid invoices.

A. Mr. Taylor's Involvement in the Schemes

[128] Mr. Taylor's involvement in the schemes by Mr. Braddick varied depending on the particular scheme. I make the following findings of fact.

i. The Surplus Parts Order Scheme

[129] In the Surplus Parts Order Scheme, Mr. Braddick created false purchase orders to one of Mr. Taylor's companies for PLC parts that Optimil did not require. He then falsely confirmed that Optimil had received the parts in a shipment from Mr. Taylor, when the parts were already in Optimil's inventory.

[130] Mr. Taylor issued an invoice and packing slip for the PLC parts. He also received the payments from Optimil and distributed a share of the proceeds to Mr. Braddick. He did not remit GST.

ii. The Surplus Parts Theft Scheme

[131] In the Surplus Parts Theft Scheme, Mr. Braddick stole surplus PLC parts from the Optimil inventory and arranged for the parts to be sold through one of Mr. Taylor's companies to third parties.

[132] Mr. Taylor invoiced the third parties and received the payments from the third parties. He distributed a share of the proceeds to Mr. Braddick. He did not remit GST.

iii. The Westburne Order Theft Scheme

[133] In the Westburne Order Theft Scheme, Mr. Braddick ordered PLC parts from Westburne that Optimil did not require and arranged for the parts to be sold through one of Mr. Taylor's companies to third parties and, in some cases, back to Optimil.

[134] Mr. Taylor facilitated the sales to the third parties and Optimil. He issued the invoices, received the payments and distributed a share of the proceeds to Mr. Braddick. He did not remit GST.

iv. The Phantom Order Scheme

[135] In the Phantom Order Scheme, Mr. Braddick created false purchase orders for PLC parts from RL Taylor Co. He subsequently confirmed that Optimil received the parts when, in fact, no parts existed.

[136] Mr. Taylor issued an invoice and packing slip for the non-existent parts, received the payments from Optimil and distributed a share of the proceeds to Mr. Braddick. He did not remit GST.

B. Fraud

[137] The Supreme Court of Canada defined the tort of civil fraud in *Hryniak v. Mauldin*, 2014 SCC 7, at para. 87:

> … [T]he tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some

> level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

i. False Representations

[138] The invoices and packing slips were representations by Mr. Taylor.

[139] When Mr. Taylor invoiced Optimil, these documents contained representations by Mr. Taylor to Optimil.

[140] When Mr. Taylor invoiced third parties, however, the invoices and packing slips were representations to those third parties, and not Optimil. For this reason, Mr. Taylor cannot be held liable to Optimil in fraud for its losses in the Surplus Parts Theft Scheme or the Westburne Order Theft Scheme.

[141] Optimil argues that the invoices and packing slips that Mr. Taylor issued to Optimil falsely represented that Amark or RL Taylor Co. was a PLC parts supplier and the supplier of the PLC parts listed in the documents.

[142] On their face, the invoices and packing slips do not represent that Amark or RL Taylor Co. was the supplier of the PLC parts. If the parts for which Mr. Taylor invoiced Optimil were actually supplied to Optimil by Mr. Braddick, the invoices and packing slips would not be false simply because Mr. Braddick was the real supplier and Mr. Taylor was only an intermediary or “drop shipper”.

[143] However, Mr. Braddick did not supply the PLC parts to Optimil. In the Surplus Parts Order Scheme, the PLC parts were already in Optimil’s inventory. In the Phantom Order Scheme, the parts did not exist.

[144] Accordingly, the invoices and packing slips in the Surplus Parts Order and Phantom Order Schemes were false representations. The question to be addressed below is whether Mr. Taylor knew they were false.

[145] In addition, with rare exceptions, Mr. Taylor used false GST numbers on all of the invoices by Amark and RL Taylor Co. All of the invoices contained an

implied representation by Mr. Taylor that he would remit the appropriate GST on the payments he collected from Optimil. That representation was false. Mr. Taylor did not have an intention of remitting the GST.

ii. Mr. Taylor's Knowledge or Recklessness

[146] The knowledge component of fraud requires Optimil to prove on a balance of probabilities that Mr. Taylor knew at the time he issued the invoices that there were no parts corresponding to those invoices or was reckless as to the existence of the parts.

[147] Recklessness requires more than proof that Mr. Taylor ought to have known there were no parts. It requires proof that Mr. Taylor was aware at the time he issued the invoices of the specific risk that he was invoicing Optimil for parts it already owned or non-existent parts, and proceeded in any event with the intent to deceive Optimil.

[148] The only direct evidence that Mr. Taylor knew there were no new parts is Mr. Braddick's testimony. As stated, I have concerns with some aspects of Mr. Braddick's testimony. I do not have confidence in the truthfulness of his evidence that Mr. Taylor knew there were no parts.

[149] Mr. Taylor denies Mr. Braddick's allegations. He claims that he was deceived by Mr. Braddick, just as much as Optimil was deceived. He says he was deceived into thinking that Mr. Braddick was purchasing excess parts from various suppliers. Mr. Taylor claims he relied in good faith on Mr. Braddick's representations when he issued the invoices and packing slips to complete the orders from Optimil. He also says he relied in good faith on the confirmations from Optimil that the parts had been received. He notes that there were no complaints from Optimil about missing parts for more than 15 years.

[150] As stated, I have found Mr. Taylor to be an unreliable witness. I do not accept his evidence that he had no knowledge of Mr. Braddick's schemes.

[151] However, I am unable to reject Mr. Taylor's evidence in its entirety. Mr. Braddick was the architect of these schemes. He brought the idea of ordering PLC parts through Amark to Mr. Taylor. In the early days, Mr. Taylor may have believed Mr. Braddick was supplying the PLC parts for which Mr. Taylor invoiced Optimil. He may not have known that the parts were coming from Optimil's own surplus inventory. He may not have known that Mr. Braddick was ordering unnecessary parts from Westburne.

[152] I am not persuaded on a balance of probabilities that Mr. Taylor knew from the start of the Surplus Parts Order Scheme by Mr. Braddick, in 2006, that there were no PLC parts corresponding with his invoices; nor am I persuaded that Mr. Taylor was reckless from the start as to the existence of the parts.

[153] As the schemes progressed, however, Mr. Taylor's complete ignorance of Mr. Braddick's fraud becomes less believable. The transactions involving Mr. Braddick and the PLC parts, were, at the very least, highly irregular.

[154] As discussed below, there is ample evidence that Mr. Taylor knew that Mr. Braddick was acting dishonestly, even if he believed Mr. Braddick was supplying PLC parts. At some point, he must have known that the entire scheme involving PLC parts was a fraud.

[155] I am persuaded on a balance of probabilities that Mr. Taylor knew the final five invoices, in January 2019, were false. This is because when Optimil stopped payment on these five invoices, Mr. Taylor did not reach out to Mr. Braddick for tracking numbers, courier receipts or any other confirmation that Mr. Braddick had supplied the parts to Optimil. Instead, he asked Mr. Braddick for copies of the "receiving receipts", meaning the purchase orders with checkmarks or numbers in the "Qty Rec'd" column.

[156] In other words, Mr. Taylor knew that the only "evidence" that the parts were received was the purchase orders. He knew that Mr. Braddick did not

supply any parts to fulfill these final five orders. He knew that Mr. Braddick falsely confirmed receipt of the parts.

[157] For these reasons, I find that the final five invoices by RL Taylor Co. in January 2019 were fraudulent representations by Mr. Taylor.

[158] The evidence of Mr. Taylor's knowledge prior to January 2019, is less clear. While I am persuaded Mr. Taylor knew when he issued the final five invoices that Mr. Braddick was falsely confirming receipt, I cannot determine when he acquired that knowledge. I am not prepared to infer from his knowledge in 2019 that he was aware from the beginning in 2006 that there were no new parts.

[159] On the other hand, I find that Mr. Taylor knew the GST numbers on all of the invoices were false. His claim that Mr. Braddick was collecting and remitting the GST makes no sense. That claim is also contradicted by Mr. Cotton's analysis that Mr. Taylor retained 12.7% of the payments from Optimil, including the GST, during the BK spreadsheet time period.

[160] I find that Mr. Taylor retained the GST as part of his share of the business with Mr. Braddick. When he invoiced Optimil, he had no intention of remitting the GST he collected from Optimil to the government.

[161] Mr. Taylor's inclusion of GST in the invoices to Optimil was fraudulent.

iii. Optimil's Reliance and Resulting Damages in Fraud

[162] Optimil did not pay the final five invoices. It did not incur a loss as a result of Mr. Taylor's five fraudulent invoices, except for the cost of investigating the alleged deliveries and defending against Mr. Taylor's counterclaim.

[163] Optimil did incur a loss as a result of Mr. Taylor's fraudulent GST billings. Optimil claimed input tax credits for the GST Mr. Taylor included on the invoices. It was then forced to mitigate its exposure to adverse tax consequences by

refiling its GST returns for four years. The CRA subsequently levied interest charges against Optimil.

[164] The cost of refiling the GST returns and the interest penalties are recoverable as damages for fraud against the Taylor Defendants.

C. Knowing Assistance of Breach of Fiduciary Duty

[165] In *Air Canada v. M & L Travel Ltd.*, [1993] 3 SCR 787 at 809–11, 1993 CanLII 33, the Supreme Court of Canada held that a person who assists another in a breach of fiduciary duty may become liable to the party to whom the fiduciary owed the duty, to the same extent as the person who committed the actual breach. For a person to be liable for "knowing assistance", they must knowingly participate or assist in a fraudulent or dishonest scheme: *Air Canada* at 811–13. The knowledge component is actual knowledge, recklessness or wilful blindness. Negligence or constructive knowledge is not enough: *Citadel General Assurance Co. v. Lloyds Bank Canada,* [1997] 3 SCR 805 at paras. 23, 46–48, 1997 CanLII 334; *Gold v. Rosenberg*, [1997] 3 SCR 767 at paras. 41–42, 1997 CanLII 333.

[166] The criteria for establishing a claim of knowing assistance may be summarized as follows:

a) a fiduciary duty between the fraudster and the victim of the fraud;

b) the fiduciary must have breached that duty fraudulently or dishonestly;

c) the defendant – the stranger to the fiduciary relationship - must have knowledge of both the fiduciary relationship and the fiduciary's fraudulent or dishonest conduct; and

d) the defendant must have participated in or assisted the fiduciary with the fraudulent or dishonest conduct.

i. Existence of a Fiduciary Duty

[167] In the employment context, an employee will owe a fiduciary duty to their employer where the employee has a discretionary power to affect adversely the employer's interests and the employer is vulnerable to the exercise of that power: *Enbridge Gas Distribution Inc. v. Marinaccio,* 2012 ONCA 650 at para. 16 [*Enbridge Gas*]; *Galambos v. Perez,* 2009 SCC 48 at paras. 68–70.

[168] Mr. Braddick was a senior manager of Optimil. He had discretionary powers that included the authority to order parts, instruct employees to order parts, sign packing lists confirming the receipt of parts, instruct employees to sign packing lists and authorize payments to suppliers.

[169] Optimil was vulnerable to the exercise of those powers. Optimil is a family-owned company in which significant responsibilities are entrusted by the owners to the senior management team. Mr. Braddick had the authority and the opportunity by reason of his trusted position within Optimil to manipulate the parts procurement process for his personal benefit.

[170] Accordingly, I find that Mr. Braddick owed a fiduciary duty to Optimil.

ii. Dishonest or Fraudulent Breach

[171] Unquestionably, Mr. Braddick breached his fiduciary duty to Optimil.

[172] Mr. Braddick admits that his breach was dishonest and fraudulent: he created false purchase orders; he stole surplus parts; he caused Optimil to pay for unnecessary or non-existent parts; and he personally profited in the form of cash payments and personal items purchased for him by Mr. Taylor.

iii. Mr. Taylor's Knowledge and Participation in the Breach

[173] Mr. Taylor was closely involved in Mr. Braddick's schemes:

a) Mr. Taylor acted as an essential intermediary by taking on the role of the apparent supplier to Optimil who issued the invoices and to whom Optimil

made the payments, without disclosing Mr. Braddick's role in the transactions.

b) Mr. Taylor received the payments from Optimil, provided the benefits of the schemes to Mr. Braddick and reconciled the funds.

c) Mr. Taylor retained a service fee or commission.

[174] Without Mr. Taylor's assistance, Mr. Braddick could not have operated the schemes so successfully, undetected, for so many years.

[175] There is ample evidence that Mr. Taylor knew from the outset that Mr. Braddick's conduct was a dishonest breach of his duties to Optimil.

[176] Essentially, Mr. Taylor's explanation is that Mr. Braddick was acting as both the purchaser and the supplier of the PLC parts. At a minimum, Mr. Taylor knew that Mr. Braddick was in a conflict of interests. Taking his evidence at face value, Mr. Taylor knew that Mr. Braddick was acquiring PLC parts for less than Mr. Taylor was reselling them to Optimil. Mr. Taylor also knew that Mr. Braddick was selling PLC parts to third parties while he was employed by Optimil. He knew that Mr. Braddick was receiving a fee or commission on these transactions.

[177] Mr. Taylor knew from his days sourcing office computer parts for Mr. Braddick that Mr. Braddick's authority was limited by his duties to Optimil. He knew that Mr. Braddick did not have authority from Optimil to buy and sell new PLC parts through Mr. Taylor's companies.

[178] Mr. Taylor knew that Mr. Braddick did not disclose to Optimil his role as a supplier and seller of parts, or his fees on these transactions. Mr. Taylor himself took steps to ensure that Mr. Braddick's name did not appear anywhere in the record.

[179] Mr. Taylor also knew that Mr. Braddick was handling large amounts of cash. Mr. Taylor regularly drove 160 km round trip from his home in Vanderhoof

to Prince George to withdraw and courier increments of $9,500 to Mr. Braddick. Mr. Taylor made 104 separate withdrawals of $9,500 each and sent over a million dollars to Mr. Braddick in this way.

[180] The use of cash in this way was further evidence of dishonesty. While, as Mr. Taylor says, cash is legal tender, envelopes of cash sent by courier and taken by hand across an international border is not a legitimate way of paying for large and reoccurring orders.

[181] It may be recalled that Mr. Taylor claimed he provided the cash in batches of $9,500 because Mr. Braddick said he could only transport sums of less than $10,000 across the border.

[182] This makes no sense. The amount of cash that Mr. Taylor withdrew from the bank at one time had no bearing on how much cash Mr. Braddick took across the border. Moreover, Mr. Taylor acknowledged that he often sent more than $10,000 to Mr. Braddick, occasionally sending up to $38,000 when he combined multiple “packages”.

[183] The only plausible explanation for Mr. Taylor’s uniform cash withdrawals is that he knew Mr. Braddick’s scheme was dishonest and Mr. Taylor sought to conceal his own participation by making the withdrawals below his understanding of a financial reporting requirement.

[184] The BK spreadsheets record that from September 4, 2015 to December 10, 2018 RL Taylor Co. received total payments of $1,214,048 from Optimil and paid $1,022,308 to Mr. Braddick. There is no record of the cost of PLC parts or other legitimate business expenses. Instead, it appears that Mr. Taylor acted as a direct conduit of money from Optimil, through RL Taylor Co. to Mr. Braddick, allowing Mr. Braddick to conceal the source of the funds.

[185] Mr. Taylor’s involvement in what amounted to money laundering belies his claim of a good faith belief that Mr. Braddick was engaged in a legitimate business.

[186] Mr. Taylor's claimed ignorance of Mr. Braddick's dishonesty is also inconsistent with his purchase of personal items for Mr. Braddick. The evidence is that Mr. Taylor purchased the items first, and Mr. Braddick then issued a purchase order for PLC parts to cover their cost. There is no legitimate explanation for these transactions.

[187] There is also evidence that Mr. Taylor occasionally paid himself large sums from the funds that were purported to be used by Mr. Braddick to purchase PLC parts. For example, he purchased a $56,000 pontoon boat. He also used funds from Optimil for home improvements.

[188] In short, Mr. Taylor knew that Mr. Braddick was acting in dishonest breach of his duties to Optimil, concealing his dishonesty from Optimil and profiting that dishonesty.

[189] In *Enbridge Gas,* the Ontario Court of Appeal held that "liability for knowing assistance requires only that the assister knew of the dishonest nature of the fiduciary's conduct" (para. 27). Knowledge, at the time, that one was participating in a fraud is not necessary to establish the knowledge component of liability for knowing assistance of breach of fiduciary duty.

[190] The defendants in *Enbridge Gas* were a labourer and an accountant. They prepared invoices for repair work by subcontractors in which the operations manager of the plaintiff had an interest. The manager approved the invoices for payment; but no work was actually done. The defendants deposed that they were unaware of the fraud by the manager. They claimed they believed the work was being done by the subcontractors.

[191] On a summary judgment application, the chambers judge held that the question of whether the defendants knew the scheme was fraudulent raised a genuine issue requiring a trial. However, the Court found that it was a breach of the manager's fiduciary duty to be involved in a venture that resulted in him receiving any payment, and the defendants were aware of that breach and took

steps in furtherance of it, regardless of whether they believed the work had been done.

[192] The Court of Appeal upheld the decision of the chambers judge finding the defendants liable for knowing assistance of breach of fiduciary duty:

> 27 I agree with the motion judge. In the context of a claim for knowing assistance in the breach of a fiduciary duty, dishonest and fraudulent conduct signify a level of misconduct or impropriety that is morally reprehensible but does not necessarily amount to criminal behaviour. The term fraudulent does not signify that an additional degree of corruption is necessary to make out the tort; it simply emphasizes the required dishonest quality of the fiduciary's act. As Buckley L.J. stated in *Belmont Finance Corp. v. Williams Furniture* Ltd. (No. 1), [1979] 1 All E.R. 118, at p.130, cited with approval in *Air Canada*, at p. 815:
>
> > ... I do not myself see that any distinction is to be drawn between the words 'fraudulent' and 'dishonest'; I think they mean the same thing, and to use the two of them together does not add to the extent of dishonesty required.
>
> In *Air Canada*, at p. 826, Iacobucci J. described the type of conduct captured by the two terms used together as "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary." By extension, liability for knowing assistance requires only that the assister knew of the dishonest nature of the fiduciary's conduct.
>
> 28 Here, both Piro and Montaldi knew that Marinaccio took a wrongful risk that prejudiced Enbridge. They knew that Marinaccio worked for Enbridge. Piro knew and the motion judge found that Montaldi knew that Marinaccio had authority to retain outside contractors and to approve invoices for payment by Enbridge. Piro and Montaldi also knew that Marinaccio had a conflict of interest by participating in the scheme. They knew that he wanted to conceal his involvement in the scheme from Enbridge and they assisted him in doing so. And they knew that he secretly profited from the scheme at the expense of Enbridge.
>
> 29 In short, Piro and Montaldi knew that Marinaccio's conduct was dishonest, and indeed morally reprehensible, and that his conduct harmed Enbridge. They cannot escape liability by their assertion that they did not know at the time that they were participating in a fraud.

[193] As in *Enbridge Gas,* Mr. Taylor cannot escape liability by his assertion that he did not know at the time that he was participating in a fraud. Regardless of when he became aware Mr. Braddick was committing fraud and theft, Mr. Taylor knew from the start that Mr. Braddick was acting dishonestly.

[194] Every transaction involving PLC parts was tainted by Mr. Braddick's dishonesty and Mr. Taylor's knowledge of that dishonesty.

[195] The proof that Mr. Taylor knowingly assisted a dishonest breach of fiduciary duty by Mr. Braddick is sufficient to establish the knowledge component of liability for knowing assistance, without proof that Mr. Taylor also knew he was participating in a fraud involving purchase orders for non-existent PLC parts.

D. Limitations Defence

[196] Mr. Taylor points out that Optimil's claims against him date back more than 13 years before it commenced these proceedings. The first impugned invoice from Amark is dated May 11, 2006.

[197] Optimil filed the original notice of civil claim on September 19, 2019.

[198] Given the age of the initial claims, I must determine:

a) which Limitation Act applies, as between the former *Limitation Act*, R.S.B.C. 1996, c. 266 [Former *Act*], which governed limitation periods when the claims first arose, and the current *Limitation Act*, S.B.C. 2012, c. 13 [Current *Act*], which came into force in June 2013;

b) whether the basic limitation period for the claims has expired; and

c) if not, whether the ultimate limitation period has expired.

i. Which Limitations Act Applies?

[199] To determine which Act applies, I am guided by Justice Punnett's step-by-step analysis in *Block v. Block,* 2020 BCSC 702 at paras. 19–24.

[200] First, the claims based on acts or omissions which took place after June 2013 are subject to the Current *Act* by virtue of having occurred after the effective date and coming into force of the new legislation.

[201] Acts and omissions that took place before June 2013 are governed by the transition provisions in s. 30 of the Current *Act*:

a) the claims based on pre-June 2013 acts or omissions are "pre-existing claim[s]" as defined in s. 30(1); and

b) such pre-existing claims may be postponed under s. 6 of the Former *Act*, meaning that the claims did not expire under the Former *Act* prior to the Current *Act* coming into force in June 2013.

[202] Section 6(3) of the Former *Act* provided an exception which postponed the running of the limitation period as provided in subsection (4) for cases:

> …
> (d) based on fraud or deceit;
> (e) in which material facts relating to the cause of action have been wilfully concealed;
> …

[203] All of Optimil's claims against Mr. Braddick fall within s. 6(3)(d) and (e) because Mr. Braddick committed fraud and wilfully concealed his misconduct from Optimil.

[204] Optimil's pre-existing (pre-June 2013) claims against Mr. Taylor relating to the GST fall within s. 6(3)(d) and (e) because Mr. Taylor committed fraud and wilfully concealed his fraud from Optimil.

[205] Optimil's pre-existing (pre-June 2013) claims against Mr. Taylor based on the procurement schemes have been made out on the basis of knowing assistance of breach of fiduciary duty, not fraud by Mr. Taylor.

[206] In my view, a claim against Mr. Taylor based on actual knowledge of a fraudulent breach of fiduciary duty by Mr. Braddick would also be a claim "based on fraud" within the meaning of s. 6(3)(d) of the Former *Act*. However, I have not found that Mr. Taylor had actual knowledge of the fraud prior to January 2019

and the final five invoices. Accordingly, s. 6(3)(d) of the Former *Act* does not apply.

[207] In my view, Optimil's pre-existing (pre-June 2013) claims against Mr. Taylor for knowing assistance do fall within s. 6(3)(e) of the Former *Act* as a claim in which material facts relating to the cause of action have been wilfully concealed. The meaning of "wilful concealment" was summarized by Justice Holmes in *Cimolai v. Hall et al.,* 2005 BCSC 31 at para. 355, aff'd 2007 BCCA 225:

> … "Wilful concealment" in s. 6(3)(e) thus refers to knowingly keeping secret material facts relating to the cause of action, such that it would be unconscionable to allow a limitation defence to defeat the plaintiff's claim. Such may occur even where the motive for concealment is not a dishonest one. The "fraud", in the equitable sense, is inherent in knowingly preventing the plaintiff from seeking legal redress.
>
> [Emphasis added.]

[208] Mr. Taylor knowingly kept secret material facts relating to the pre-June 2013 cause of action. He concealed from Optimil his knowledge that Mr. Braddick was the supplier of the PLC parts and his knowledge that Mr. Braddick received a commission or fee on the sales to Optimil.

[209] Section 6(4) of the Former *Act* provides the discovery rule for the claims falling within s. 6(3):

> Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant of respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[210] As stated, Optimil first learned of a possible scheme involving PLC parts in December 2018. There is no evidence Optimil had any knowledge of the schemes by Mr. Braddick before June 2013.

[211] Accordingly, time did not begin to run against Optimil before the Current *Act* came into force in June 2013. For this reason, the Current *Act* applies to all of the claims against the Taylor Defendants in this action.

ii. Has the Basic Limitation Period Expired?

[212] The basic limitation period under the Current *Act* is in s. 6(1). It is two years after the day on which the claims were discovered. An action cannot be commenced on a claim more than two years after it was discovered.

[213] Section 8 of the *Limitation Act* provides that a claim is discovered by a person on the first day the person knew or reasonably ought to have known all of the following:

> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[214] In my view, a reasonable person in Optimil's position would not have known that Mr. Taylor was involved in the scheme by Mr. Braddick until early March 2019, when Mr. Chapman completed the first stage of his investigation and could not locate the parts purportedly delivered by RL Taylor Co.

[215] Accordingly, I find that Optimil discovered the claims of knowing assistance against Mr. Taylor in early March 2019. For this reason, the basic limitation period did not expire before Optimil filed the notice of civil claim in September 2019.

iii. Has the Ultimate Limitation Period Expired?

[216] The Current *Act* also has an ultimate limitation period in s. 21(1) that may bar a claim that arose more than 15 years ago, even if it was only discovered recently within the basic limitation period.

[217] Section s. 30(4)(c)(ii) of the Current *Act* provides that Part 3 ("Ultimate Limitation Period") applies to the pre-existing (pre-June 2013) claims as if the acts or omissions on which those claims are based occurred on the later of (A) the effective date (June 2013), and (B) the day the acts or omissions took place under s. 21(2) of the Current *Act*.

[218] This means that the pre-existing claims are deemed to have occurred in June 2013. The claims based on acts or omissions which took place after June 2013 are deemed to have taken place on the day on which the claims were discovered, which, as I stated above, is early March 2019 and after September 2019: Current *Act, s.* 21(3).

[219] As June 2013 is the date on which the pre-June 2013 claims are deemed to have taken place, the ultimate limitation period of 15 years does not expire until June 2028.

[220] For these reasons, Optimil's claims against the Taylor Defendants are not barred by the expiry of any limitation period.

E. Optimil's Loss and Damages

[221] Mr. Taylor does not seriously dispute Optimil's calculation of its total losses. His own calculation of the "misappropriated funds" is remarkably similar to the calculations by Mr. Chapman and Mr. Cotton.

[222] Optimil provided a breakdown of its damages arising from the fraud and theft by Mr. Braddick. I find that Optimil's calculations are reliable based on the evidence of Mr. Chapman, as confirmed by Mr. Cotton, and the supporting documentation.

Amark Invoices – May 11, 2006 to February 9, 2010	$257,307
RL Taylor Co. Invoices – July 29, 2011 to August 28, 2015	$1,444,915
RL Taylor Co. Invoices – BK spreadsheets - September 4, 2015 to December 10, 2018	$1,214,048
Sales of Surplus Optimil Parts to Third Parties by Amark or RL Taylor Co.	$468,582
Personal Items Purchased for Mr. Braddick and Paid for with Purchase Orders to Amark or RL Taylor Co.	$46,116
Total:	**$3,430,968**

[223] Optimil also provided evidence of its damages as a result of the false GST billings by Mr. Taylor.

Costs Associated with Refiling GST Returns for 2018 to 2021	$22,878
Interest and Arrears Paid by Optimil to CRA	$4,528
Total:	**$27,406**

F. Apportionment of Liability

[224] In *Enbridge Gas,* the Ontario courts held that the defendants who knowingly assisted the dishonest breach of fiduciary duty were jointly and severally liable for the full amount of the loss caused by the defendant who committed the actual breach.

[225] In this case, Optimil settled with one of the joint tortfeasors, Mr. Braddick, and amended its notice of civil claim to waive its right to recover from the Taylor Defendants any portion of the loss it sustained which the Court apportions to the fault of Mr. Braddick.

[226] This is often referred to as a "BC Ferries clause", after a decision of the Court of Appeal that recommended an express waiver in the plaintiff's pleadings to accomplish the intent of the settlement with the former defendant. In that decision, *British Columbia Ferry Corp. v. T&N plc* (1995), 16 B.C.L.R. (3d) 115, 1995 CanLII 1810 (C.A.), Justice Wood said at para. 15:

> …In order to avoid any uncertainty that may arise with respect to the need for a determination at trial of the degree of fault, if any, attributable to non-defendants, I am of the view that the express waiver should properly form part of the pleadings in this action, and that a further amendment should be made to the Statement of Claim, wherein the substance of that waiver is clearly set out. When that is done, there will be no doubt as to the limits of the plaintiffs' claim for damages, nor will there be any uncertainty as to the obligation of the trial judge to determine what fault, if any, for the plaintiffs' loss is attributable to others than the defendants...

[227] In light of the settlement with Mr. Braddick and the BC Ferries clause in the pleadings, I must apportion liability for the plaintiff's loss in this case between Mr. Taylor and Mr. Braddick.

[228] Apportionment of liability in these circumstances under the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 is consistent with the approach of courts in this jurisdiction to apportioning liability for an indivisible loss based on relative degrees of fault. Despite its name, the courts apply the *Negligence Act* to apportion liability between both intentional and negligent wrong-doers. As Justice Fisher wrote as a judge of this Court in *Mainland Sawmills Ltd. v. USW Union Local – 1-3567*, 2007 BCSC 1433:

> [190] The word "fault" in the *Negligence Act* has been given a broad meaning and is not limited to negligence; it also encompasses intentional torts: *Bains v. Hofs, Siegl v. Sylvester* (1987), 47 D.L.R. (4th) 97 (B.C. S.C.), *Anderson v. Stevens* (1981), 29 B.C.L.R. 355 (B.C. S.C.) at p. 359, *Bell Canada v. Cope* (Sarnia) Ltd. (1981), 31 O.R. (2d) 571 (Ont. C.A.); *Long v. Gardner* (1983), 144 D.L.R. (3d) 73 (Ont. H. Ct. Jus); *Sedgemore v. Block*

> *Brothers Realty Ltd.* (1985), 39 R.P.R. 38 (B.C.S.C.); P. Kutner, "Contribution Among Tortfeasors: Liability Issues in Contribution Law" (1985), 63 Can. Bar Rev. 1 at pp. 33-7. Accordingly, the statute permits apportionment of liability between intentional and negligent wrongdoers (*Siegl v. Sylvester; Anderson v. Stevens*) and among intentional wrongdoers only (*Bains v. Hofs*).

[229] Guidance on how to apportion liability in a case like this is provided by Justice Myers's decision in *Drucker, Inc. v. Gui*, 2009 BCSC 542.

[230] The defendant in that case, Mr. Gui, was an employee of the plaintiff, Drucker, Inc. The plaintiff alleged that Mr. Gui took company funds for his own benefit and participated in a scheme with the former president of the company, Mr. Xie, to improperly transfer company funds to Mr. Xie.

[231] Justice Myers found that Mr. Gui committed the tort of conversion, both with respect to the funds that Mr. Gui himself received and the funds that he used to reimburse Mr. Xie for personal items unrelated to the legitimate operations of Drucker, Inc. (paras. 67, 77).

[232] Drucker, Inc. had previously initiated an action against Mr. Xie (among others, though not including Mr. Gui) regarding the same matters, which resulted in a settlement between Drucker, Inc. and Mr. Xie including a BC Ferries clause (paras. 93–101).

[233] Justice Myers found that this settlement with Mr. Xie did not release Mr. Gui from his potential liability to the plaintiff for a share of the entire loss (at para. 108). The Court found that the effect of the settlement agreement was "to leave it open [to] Drucker to recover from Mr. Gui his proportionate share of those amounts based on his fault according to s. 4 of the "*Negligence Act*" (para. 119).

[234] As such, Justice Myers turned to consider the law on allocation of fault under s. 4 of the *Negligence Act*. Section 4(1) requires the Court to determine the "degree to which each person was at fault" where the "damage or loss has been caused by the fault of 2 or more persons".

[235] Citing *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, 1997 CanLII 2374 (C.A.), Justice Myers recognized that apportionment under the *Negligence Act* does not depend on causation principles, but rather is based on relative moral blameworthiness: *Drucker, Inc.* at para. 111.

[236] To guide the Court's analysis, Justice Myers turned to *Aberdeen v. Langley (Township)*, 2007 BCSC 993, rev'd in part 2008 BCCA 420 where Justice Groves summarized the factors the courts have used to assess the relative blameworthiness of the parties in apportioning fault under s. 4 of the *Negligence Act*, including:

(a) the number of acts of fault committed by a person at fault;
(b) the nature of the conduct held to amount to fault….
(c) the gravity of the risk created;
(d) the extent of the opportunity to avoid or prevent the accident or the damage;
(e) whether the conduct in question was deliberate, or unusual or unexpected; and
(f) the knowledge one person had or should have had of the conduct of another person at fault.

[237] In *Drucker, Inc.* Justice Myers observed that: "the amount of the ill-gotten benefit retained by the parties is a factor to take into consideration in the circumstances of this case" (para. 121).

[238] Applying the relevant factors to the facts in *Drucker, Inc.*, Justice Myers found that, the "main beneficiary" of the conversion must "bear the major share of the fault" (paras. 122–24). Where Mr. Gui improperly took expenses for his own use, the Court apportioned 80% to Mr. Gui, 10% to Mr. Xie and 10% to another party. Where Mr. Xie was the primary beneficiary of the diverted funds, the Court apportioned 70% to Mr. Xie, 20% to Mr. Gui and 10% to the other party.

[239] In this case, Mr. Braddick was the primary beneficiary of the ill-gotten benefits of the procurement scheme. His share of the benefits varied over time,

from 80% or 85% in the beginning, to 87.3% according to Mr. Cotton's calculations during the time period covered by the BK spreadsheets.

[240] Mr. Braddick's intentional misconduct was more blameworthy than the knowing assistance by Mr. Taylor. Mr. Braddick was a senior manager with a fiduciary duty to Optimil. He committed multiple acts of conflicts of interest, fraud and conversion. He was the architect of the various schemes. He issued the fraudulent purchase orders. He falsely confirmed receipt of the PLC parts. He could have stopped Optimil's losses at any time.

[241] At the same time, Mr. Taylor was essential to the schemes. He issued the invoices, collected the payments and delivered the benefits to Mr. Braddick. He allowed Mr. Braddick to conceal his conduct from Optimil. He knew Mr. Braddick was acting dishonesty. At some point, he became aware that he was participating in a fraud. His final five invoices, at least, were fraudulent. He continued the deception to the end, even demanding payment after Optimil had discovered the fraud.

[242] I reject Mr. Taylor's claim that he received no more than a 5% fee for his role in the schemes. The evidence proves that he retained at least 12.7% of the payments from Optimil. Moreover, for the reasons just stated, Mr. Taylor cannot limit his liability to his share of the proceeds. He must also bear some responsibility for Mr. Braddick's ill-gotten benefits.

[243] I find that Mr. Braddick should be held 80% responsible and Mr. Taylor 20% responsible for the total losses arising from the PLC parts procurement scheme.

[244] Accordingly, Optimil may recover 20% of $3,430,968, or $686,194, from the Taylor Defendants as damages for knowing assistance of breach of fiduciary duty.

[245] Optimil's cost of refiling the GST returns and the interest penalties is divisible from its losses from the procurement scheme. Mr. Taylor is 100% at

fault for the losses resulting from the GST fraud. The full amount of $27,406 may be recovered by Optimil from the Taylor Defendants as damages for fraud.

G. Aggravated and Punitive Damages

[246] Optimil sought both aggravated and punitive damages against the Taylor Defendants. However, in its closing submissions Optimil addressed only punitive damages.

[247] The Supreme Court of Canada explained the grounds on which punitive damages are awarded in *Honda Canada Inc. v. Keays*, 2008 SCC 39. An "independent actionable wrong" is required, although it need not be a separate tort (at para. 62). The Court further instructed:

> [68] …The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108) ...
>
> [Emphasis added.]

[248] In *Acumen Law Corporation v. Ojanen*, 2021 BCCA 189, the Court of Appeal, citing *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 at para. 94, held that punitive damages should only be ordered in exceptional cases where the conduct in question is deserving of punishment, that is, where there has been "highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" and where the compensatory damages ordered are insufficient to "achieve the objectives of retribution, deterrence, and denunciation" (at para. 78).

[249] Mr. Taylor's demands for payment on the final five invoices in exchange for information and documents to assist Optimil in its claims against Mr. Braddick were highly inappropriate. Even on Mr. Taylor's own evidence, Mr. Braddick had confessed his fraud to Mr. Taylor at the time he made these demands. Mr. Taylor knew he had no right to demand payment for parts that did not exist,

much less payment in exchange for information about the fraud. As addressed immediately below, the counterclaim on the unpaid invoices is an abuse of the process of the Court.

[250] However, in my view, the compensatory damages against the Taylor Defendants of more than $700,000 are sufficient to achieve the objectives of retribution, deterrence, and denunciation. Concerns about Mr. Taylor's conduct in the litigation, including the counterclaim, are better addressed in submissions on costs.

H. The Counterclaim for Unpaid Invoices

[251] The Taylor Defendants counterclaim against Optimil for the full amount of the five invoices by RL Taylor Co. on which Optimil stopped payment.

[252] Despite all of the evidence in these proceedings, Mr. Taylor still relies on the checkmarks in the "Qty Rec'd" column of the purchase orders as evidence the parts were received by Optimil.

[253] The purchase orders are not proof that any parts were received by Optimil. The investigation by Mr. Chapman established that no parts were received. Further, Mr. Braddick testified that he falsely confirmed receipt of the parts and no parts existed.

[254] I have found that Mr. Taylor knew when he issued the final five invoices that Mr. Braddick was falsely confirming receipt of PLC parts that did not exist. I have found that the final five invoices were fraudulent. The counterclaim on those invoices is therefore an abuse of the process of the Court.

[255] As such, the counterclaim is dismissed.

IV. CONCLUSION

[256] The Taylor Defendants are liable to Optimil for $686,194 as damages for knowing assistance of breach of fiduciary duty and $27,406 as damages for fraud.

[257] The counterclaim is dismissed.

[258] Optimil is entitled to judgment against the Taylor Defendants in the amount of $713,600, plus court order interest and costs on a basis to be agreed or determined by the Court.

[259] The parties may speak to interest or costs by requesting to appear before me on a mutually convenient date.

"Elwood J."