IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rigby Foods, Inc. v. B.C. Frozen Foods Ltd.,* 2023 BCSC 352

Date: 20230309
Docket: S224922
Registry: Vancouver

Between:

Rigby Foods, Inc.

Plaintiff

And

B.C. Frozen Foods Ltd.

Defendant

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:	M. Manolis
Counsel for the Defendant:	G. Cameron
Place and Date of Hearing:	Vancouver, B.C. February 9, 2023
Place and Date of Judgment:	Vancouver, B.C. March 9, 2023

Introduction

[1] The defendant applies to set aside a garnishing order before judgment made on June 23, 2022 (the "Garnishing Order"), on the basis that (a) the plaintiff failed to make full and frank disclosure of all material facts and (b) it would be just to do so in all the circumstances. It asks that any amount paid into court be paid out to its counsel in trust and seeks special costs of this application.

[2] The plaintiff opposes all of the relief sought.

Background

[3] The plaintiff ("Rigby") is a California company which supplies frozen fruit from a facility based in Mexico.

[4] The defendant ("BCFF") is a BC company with headquarters in Mission, BC. It has been in business since 1988. It processes and packages a full line of frozen fruits and vegetables for retail and food service private labels, bulk and industrial accounts.

[5] BCFF began purchasing products from Rigby in April 2020. Rigby has supplied frozen fruit to BCFF pursuant to sales orders dated July 3, 2020 and June 18, 2021, involving in excess of US$2.5 million in orders and 113 invoices. Rigby notes that the invoices involved in this application set out wire payment information identifying an account with BBVA Compass Bank and include the following warning:

> Please note WE NEVER CHANGE OUR BANK ACCOUNT WITHOUT PHONING YOU!!!

[6] Relevant to this action, Rigby issued seven invoices totalling US$347,440 to BCFF for seven containers of frozen fruit.

Date	Invoice No.	Amount (USD)
August 5, 2021	RFF-590	$50,400
August 5, 2021	RFF-591	$50,400
August 11, 2021	RFF-597	$50,400

August 11, 2021	RFF-598	$50,400
August 12, 2021	RFF-599	$54,960
August 19, 2021	RFF-608	$45,440
August 19, 2021	RFF-609	$45,440

[7] On September 9, 2021, Rigby's President, Marianne Rigby, informed BCFF's Director of Communications & Logistics, Nadia Shah, that she would be providing new wire payment instructions to BCFF for payments to Rigby going forward. Rigby's bank was merging with a second financial institution, PNC Financial Services.

[8] On the same day, shortly after that call, Ms. Rigby learned that wire payments to Rigby's original bank and account could continue for some time. She emailed Ms. Shah asking her not to wait for new wire instructions to pay Rigby's outstanding invoices. Ms. Shah confirmed she would do so. Ms. Rigby provided the following comment:

> I'd rather not change banking details for this deposit as we are out of time and need the funds, I don't want to risk an error/returns, etc…
>
> I'll send it to you for the next pymt.
>
> Thanks for your pymt. today.

[9] On September 13 and 14, 2021, Ms. Shah and other BCFF employees received emails apparently from Ms. Rigby, asking for payment of invoice RFF-608 and RFF-609 and providing new wire payment instructions involving a different bank, JPMorgan Chase, and account number. The email was actually from an unknown fraudster (the "Fraudster") who was using a slightly modified variation on Ms. Rigby's email address. The email was also a continuation of a legitimate thread between Ms. Shah and Ms. Rigby, which the Fraudster had intercepted.

[10] On September 23, 2021, BCFF paid these two invoices using the Fraudster's wire payment instructions. Ms. Shah sent the real Ms. Rigby a wire payment confirmation. Initially, Ms. Rigby did not review the payment confirmation in detail and did not notice the change in bank and account number. Ms. Rigby believed the

invoices had been paid and authorized release of the two relevant containers to BCFF.

[11] On September 24, 2021, several BCFF employees received emails from the Fraudster impersonating Ms. Rigby asking BCFF to make payment again for invoice RFF-608 and RFF-609 to a new bank account because the account previously provided was “on hold”. The Fraudster provided new wire payment instructions for a different JPMorgan Chase account. The explanatory message was as follows:

> i received your bank slip but our chase bank details which you made the payment to is on hold because a bad check was deposited into it and we dont want to face sifficulties receiving your payments.
>
> please confirm from your bank if the payment can be stopped or reversed so that i can send you our active bank data so you can proceed with payment today.

[12] Also on September 24, 2021, Ms. Rigby emailed Ms. Shah advising Rigby required payment of invoices RFF-590, RFF-591, RFF-597, RFF-598 and RFF-599. Ms. Shah requested copies, which were provided. The invoices had Rigby’s original wire payment instructions on them.

[13] On September 27, 2021, Ms. Rigby emailed Ms. Shah asking that she provide proof of payment for invoices RFF-590, RFF-591, RFF-597, RFF-598 and RFF-599.

[14] Also on September 27, 2021, Ms. Shah received an email from the Fraudster impersonating Ms. Rigby inquiring whether BCFF had wired payment to the new bank account on September 24, 2021. Another BCFF employee responded that it had. On September 28, 2021, the Fraudster requested an updated wire transfer confirmation. Ms. Shah sent the Fraudster the confirmation that same day.

[15] On October 1, 2021, Ms. Rigby informed Ms. Shah that Rigby had not received the payments for invoices RFF-608 and RFF-609. She believed BCFF had withdrawn the payments and asked if there was a reason for that. Ms. Shah did not respond.

[16] On October 3, 2021, several BCFF employees received copies of Ms. Rigby's October 1, 2021 email, but sent by the Fraudster this time. Ms. Shah said it was not unusual to receive duplicate emails and she did not consider this to be out of the ordinary. A few minutes later, the Fraudster replied clarifying they had received payment for invoices RFF-608 and RFF-609, but had not received two payments relating to the remaining five invoices.

[17] Also on October 3, 2021, Ms. Rigby received an email from the Fraudster, this time impersonating Ms. Shah and using a slight variation of her email address. This was in response to Ms. Rigby's email of October 1, 2021. Ms. Rigby responded to the Fraudster, advising the five containers scheduled to arrive that week would have to be paid for before they would be released.

[18] On October 5, 2021, Ms. Rigby sent an email to Ms. Shah, following up on payment of the invoices. She also phoned and left a message for Ms. Shah.

[19] On October 6, 2021, Ms. Shah again received Ms. Rigby's October 5, 2021 email, but this time from the Fraudster. Ms. Shah said she understood the outstanding payments related to the two payments that the Fraudster indicated had not yet been received. A member of BCFF's accounting department re-sent the wire payment confirmations to the Fraudster.

[20] The shipping containers relating to invoices RFF-608 and RFF-609 were released automatically upon arrival at Port of Vancouver and received by BCFF on October 5 and 6. 2021. Ms. Shah says this was consistent with the Fraudster's advice that payment had been received for those containers. Normally, Rigby would not release containers unless it had received payment for the corresponding invoice.

[21] On October 11 and 13, 2021, Ms. Rigby called Ms. Shah but was not able to reach her. Another Rigby employee emailed Ms. Shah on October 14, 2021 regarding five invoices. Ms. Rigby called again, without success.

[22] On October 15, 2021, Ms. Rigby spoke to Ms. Shah by telephone saying Rigby had not received any wire payments from BCFF and was requesting payment

of the invoices. She sent new account information for a Mexican bank account at which Rigby wanted to receive payment. Ms. Rigby says she told Ms. Shah she would call to confirm she had sent her email with new account information, and Ms. Shah responded it was not necessary to call. Ms. Rigby told Ms. Shah it was Rigby's practice and protocol to do so. Ms. Rigby did follow up her email with a phone confirmation.

[23] Later on October 15, 2021, Ms. Shah sent an email to Ms. Rigby with the September 28, 2021 wire payment confirmation attached.

[24] On October 16, 2021, Ms. Rigby opened the attachment and noticed it had the wrong bank and account information. She immediately notified Ms. Shah via email, advising this was not Rigby's bank information and asking whether BCFF had been hacked. Ms. Rigby also called BCFF's accountant, who forwarded to her the Fraudster's emails from September 13 and 14, 2021. Both parties were now aware a fraud had occurred.

[25] Rigby maintains it was BCFF's email system that was hacked, allowing the Fraudster to issue false payment instructions. Ms. Rigby says on October 18, 2021, she consulted an IT specialist who informed her it was likely that BCFF's email account was compromised by a phishing attack.

[26] BCFF maintains it was Rigby's email system that was hacked. Ms. Shah says BCFF retained a cybersecurity firm to analyze its systems and was informed that it was highly unlikely the Fraudster had gained access through BCFF's system.

[27] On October 21, 2021, Ms. Shah sent Ms. Rigby an email which included the following passage:

> I realize you are frustrated and stressed, you also mentioned that you are worried Yasir is pointing the finger at you and blaming you. This is the hackers fault and it sucks. It's a huge loss. You know we have purchased many containers of product from you in good faith and wished to do so in the future. The reality is that we were provided wire transfer instructions and paid for the product. At no point did you state the new banking information needs to be confirmed via the phone. Most instructions I receive are either on an invoice or a letter head.

[28] BCFF says it learned from multiple unidentified people in the industry that Rigby's email or system had been hacked in the past, resulting in another customer paying a fraudster.

[29] Ms. Rigby says she told Ms. Shah that in 2018 Rigby had been the victim of a phishing attack. It was discovered early and nearly all of the funds were retrieved. Following the incident, Rigby adopted protocols and practices to address email security and prevent wire payment fraud.

[30] On October 27, 2021, Rigby authorized the release of the remaining containers to BCFF despite the fact that the parties had not yet come to an agreement about responsibility for the fraud.

[31] Rigby demanded that BCFF pay the seven invoices. BCFF denied that it was at fault for the fraud and maintained there was no balance owing.

[32] The parties subsequently had discussions about how to resolve matters. Rigby put forward evidence relating to their settlement discussions, which BCFF objected to as privileged. These do appear to be covered by settlement privilege and as such I have not considered them.

[33] In January 2022, BCFF made a payment to Rigby. Rigby refers to this in its pleadings and affidavit material and credited the payment against the balance it says that BCFF owes. BCFF objected to the payment being referred to because it was made in the course of settlement discussions. For purposes of this application, I will simply note that BCFF made a payment and Rigby credited it against the balance it says is owing for purposes of their application for the Garnishing Order.

[34] On June 20, 2022, Rigby filed its notice of civil claim. It includes an assertion that the email accounts and systems of BCFF had been compromised or hacked by persons unknown, who then monitored email correspondence between BCFF and Rigby relating to their supply agreements and used this to perpetrate a theft and fraud upon BCFF.

[35] On June 23, 2022, Rigby obtained the Garnishing Order in the sum of $376,892.50. The supporting affidavit was sworn by Ms. Rigby. She states:

> 2. This action is pending and was commenced on June 20, 2022. A copy of the Notice of Civil Claim is attached as Exhibit "1" to this my affidavit.
> 3. The nature of the cause of action for which this action is brought is for breach of contract and debts owed by the Defendant, B.C. Frozen Foods Ltd. (the "Defendant") to the Plaintiff.
> 4. In respect of that cause of action, the Defendant is justly indebted to the Plaintiff for the sum of $376,737.50, being the Canadian dollar equivalent of $297,440.00 United States dollars (based on a conversion rate of 1.2666, being the foreign exchange rate for the purchase of United States Dollars as of June 20, 2022 as posted by the Bank of Montreal …
> 5. I am not aware of any allegation of or claim for a just discount for any sum, liquidated or otherwise, on the part of the Defendant.

[36] Pursuant to the Garnishing Order, in July 2022, TD Canada Trust paid $376,832.50 into court from BCFF's account.

[37] On July 7, 2022, Rigby served the notice of civil claim and Garnishing Order on BCFF.

[38] On September 14, 2022, BCFF filed a response to civil claim and counterclaim:

a) In its response to civil claim, it denies that its email accounts and systems were hacked and say that hackers gained access to the parties' email communications through Rigby's email accounts and systems due to its negligence. BCFF made payments to the hacker due to Rigby's negligence. In the Legal Basis section, BCFF denies that it is indebted to Rigby as alleged or at all. It also asserts a right of legal or equitable set-off.

b) Its counterclaim is for negligence and seeks general damages, special damages, damages in the Canadian dollar equivalent amount of US$347,102.30 pursuant to the *Foreign Money Claims Act,*

> R.S.B.C. 1996, c. 155 ("*FMCA*") and interest pursuant to the *FCMA* or alternatively the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[39] On October 11, 2022, Rigby filed a response to counterclaim.

[40] On January 18, 2023, Rigby filed this application.

Applicable Law

[41] Section 3(2) of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 ("*COEA*") provides that a pre-judgment garnishing order may be issued under certain circumstances:

> (2) A judge or a registrar may, on an application made without notice to any person by
>
> (a) a plaintiff in an action, …
>
> on affidavit by himself or herself or his or her solicitor or some other person aware of the facts, stating,
>
> ...
>
> (d) if a judgment has not been recovered,
>
> (i) that an action is pending,
>
> (ii) the time of its commencement,
>
> (iii) the nature of the cause of action,
>
> (iv) the actual amount of the debt, claim or demand, and
>
> (v) that it is justly due and owing, after making all just discounts,
>
> and stating in either case
>
> (e) that any other person, hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and
>
> (f) with reasonable certainty, the place of residence of the garnishee,
>
> order that all debts due from the garnishee to the defendant, judgment debtor or person liable to satisfy the judgment or order, as the case may be, is attached to the extent necessary to answer the judgment recovered or to be recovered, or the order made, as the case may be.

[42] Pre-judgment garnishing orders are normally made on a without notice basis and may be set aside under Rule 8-5(8) of the *Supreme Court Civil Rules* or s. 5 of the *COEA*.

[43] Rule 8-5(8) is as follows:

> Setting aside orders made without notice
>
> (8) On the application of a person affected by an order made without notice under subrule (6), the court may change or set aside the order.

[44] Section 5 of *COEA* is as follows:

> Payment by instalment
>
> **5** (1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment, and if a judgment has been entered against him or her, for payment of the judgment by instalments.
>
> (2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment and if he or she does and a judgment has been entered, he or she must set the amounts and terms of payment of the judgment by instalments.
>
> (3) An order under subsection (2) may be made without notice to any person, and the registrar or judge may, if he or she considers it just in view of changed circumstances of the judgment debtor, vary an instalment order at any time on application by the judgment creditor or debtor and on 3 days' notice in writing of the application being given to the other party.

[45] In *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 at para. 17, Justice Voith, as he then was, set out the applicable general principles:

> [17] The relevant case law establishes a number of propositions which are directly relevant to the resolution of the issues before me. I have set these propositions out below:
>
> > a) A garnishing order before judgment is an extraordinary remedy which creates an exception to the normal rule that there is to be no execution before judgment: [citations omitted].
> >
> > b) The principal object of the remedy is to provide a plaintiff with security for the claim being advanced: [citations omitted]….
> >
> > c) The remedy requires strict and technical compliance with statutory requirements. In practice, this requirement has more recently been relaxed: [citation omitted].
> >
> > d) The amount being garnished must be a liquidated amount. …: [citations omitted].
> >
> > e) The plaintiff must recognize and make adjustment for "all just discounts", which has been defined as a liquidated claim advanced by way of "set-off or counterclaim": [citation omitted].

> f) The standard required of a defendant to set aside a garnishing order which fails to recognize an alleged just discount is set out in *Eaglecrest* at para. 19: "If the defendant alleges a liquidated claim by way of set-off or counterclaim and provides evidence which, if ultimately accepted at trial, will establish that some or at least some part of it is due to defendant, that will be sufficient to set aside the plaintiff's garnishing order unless the plaintiff has taken it into account and given an allowance for it."
>
> g) An error in failing to adjust for all just discounts results in the garnishing order being set aside in its entirety: [citations omitted].
>
> h) Section 3(2) of the *Act* allows a garnishing order, which is unjust in the circumstances, to be set aside.
>
> i) What constitutes such "unjustness" was described by Bouck J. in *Webster* at 177:
>
> > One can only assume s. 3B was intended to provide a remedy where there is undue hardship, abuse, or the order is unnecessary. I do not mean these examples to be exhaustive; rather they are tests which may help in deciding what is just in all the circumstances.
>
> j) …
>
> k) The court can, in considering the circumstances, consider the apparent strength of the parties' respective cases. The issues raised are not, however, to be determined*:* [citation omitted].

[46] As the application for a garnishing order before judgment is made without notice to the defendant, the applicant is obliged to provide full and frank disclosure of matters which are relevant and material to the prescribed content of the affidavit filed in support. See *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342 at para 51:

> [51] For the most part, I accept the very comprehensive analysis of Voith J., but with this *caveat*: the required disclosure must be that which is relevant and material to the prescribed contents of the affidavit. An application for a garnishing order is not free-standing; it is authorized by statute and the statute prescribes the criteria for obtaining the relief. A registrar or judge is entitled to have for consideration all material that is relevant and material to these criteria. The tendered material may be narrower in scope than would be required to obtain an *ex parte* injunction. The standard I have identified respects the legislative intent as expressed in ss. 7 and 8, that is, that satisfaction of the prescribed criteria is sufficient, with the gloss that the full context of the criteria must be presented to the registrar or judge.

[47] See also *Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd.*, 2015 BCCA 318 [“*Politeknik*”] at para. 30:

> [30] One of the alternate arguments made by the defendants is that the garnishing order was properly set aside because the plaintiff did not make full and frank disclosure of all material facts when it obtained the order. I agree with the defendants that, in addition to defects in the supporting affidavit as to the matters set out in s. 3(2)(d) of the *COEA*, a garnishing order obtained without notice to the defendants should not be sustained if the facts set out in the supporting affidavit as to the cause of action against a defendant (or in a notice of civil claim attached to the affidavit) are misleading or otherwise fail to disclose all material facts with respect to the cause of action.

[48] Factors considered for an application under s. 5(2) of the *COEA* are summarized in *Politeknik* at paras. 26–27:

> [26] In addition to making application under Rule 8-5(8), s. 5 of the *COEA* provides a second alternative to a defendant whose funds have been garnished. Under s. 5(2), the court may order that all or part of the garnished funds be released if the court "considers it just in all the circumstances". The types of circumstances contemplated by s. 5(2) include those where the garnishment creates an undue hardship, or is an abuse or is unnecessary: see *Min-En Laboratories Ltd. v. Westley Mines Ltd.* (1983), 57 B.C.L.R. 259 at 261 (B.C.C.A.). Another example is where it is demonstrated that some of the monies in the garnished bank account were held by the defendant in trust for a third party: see *Mutual of Omaha Insurance Company v. Gestion Professionnelle (Autorema) Inc.*, [1990] B.C.J. No. 1807 (S.C.).
>
> [27] There is one important distinction between an application under Rule 8-5(8) to set aside a garnishing order and an application under s. 5 for the release of some or all of the garnished funds. On an application under s. 5, it is appropriate for the court to consider the merits of the action in assessing what is just in the circumstances: see *Min-En Laboratories Ltd.* at 260. In contrast, it is not appropriate on an application under Rule 8-5(8) to consider the merits of the claim except to the limited extent of considering evidence to determine whether the applicant for the garnishing order has given effect to "all just discounts": see *Ridgeway-Pacific Construction* at 287. This does not, of course, preclude the court from examining the pleadings to ascertain whether they disclose a cause of action against the defendant whose debt has been garnished because, if the plaintiff does not have a cause of action against that defendant, the garnishing order should not have been issued.

Analysis

Full and Frank Disclosure / All Just Discounts

[49] BCFF argues that Rigby failed to disclose that there was a dispute between the parties as to whether there was a debt owing at all, whether Rigby was

responsible for the fraud based on its email account or system being hacked, failing to disclose that its system had been hacked in the past and not disclosing that it had agreed to release the containers relating to the seven invoices to BCFF.

[50] Rigby argues that it did take into account and apply all just discounts. It credited BCFF with the payment made in January 2022. BCFF's counterclaim seeks general and other damages and Rigby was not obligated to account for a potential set-off of unliquidated claims.

[51] Ms. Rigby's affidavit sworn in support of the application for the Garnishing Order does not refer to the system hack dispute and phishing fraud in the body of her affidavit. Her affidavit does attach a copy of the notice of civil claim as Exhibit "1". She does not assert that the facts set out in it are true. The notice of civil claim does describe the fraud from Rigby's perspective and discloses that BCFF paid US$347,440 to a Fraudster. Rigby characterizes the fraud as BCFF's fault and fails to mention that BCFF had taken the position that the fraud was Rigby's fault.

[52] BCFF relies heavily on *Opus Consulting Group Ltd. v. Ardenton Capital Corporation*, 2019 BCSC 1847 ["*Opus Consulting*"], a decision of Justice Mayer. That case involved an application to set aside a garnishing order before judgment obtained in a case involving a phishing fraud. There the fraudster's email instructions providing the false payment instructions were sent from an email address using the plaintiff's actual email domain. In dealing with full and frank disclosure and just discounts, at paras. 10–13:

> [10] I adopt the reasons of Justice Voith in *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857, in which he found that notwithstanding that the form of affidavit required for a prejudgment garnishment order is statutorily prescribed, that there is a broader duty of disclosure. In my view this broader duty required Opus to disclose to the registrar the fact that Ardenton took the position that it had paid the relevant invoices pursuant to wire transfer instructions received via an Opus email account.
>
> [11] Section 3(2) of the *Court Order Enforcement Act* requires that the affiant filing an affidavit in support of a prejudgment garnishment order set out the facts establishing that the debt is justly due and owing. In my view the question of whether $186,200.36 was paid as a result of a potential breach of Opus's email system was relevant and material to the question of whether the

> funds sought to be garnished were justly due and owing. It goes to the heart of the question of whether there is a debt at all. As was found by the BC Court of Appeal in *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342, the party seeking a prejudgment garnishment order has a broad duty to disclosure information which is relevant and material to the prescribed contents of the affidavit. The full context of the criteria must be presented to the registrar or judge on an application for a garnishment order.
>
> [12] In this case the deponent, Richard Brown, president of Opus, simply stated in his affidavit:
>
> > The defendant was justly indebted to the plaintiff for the principal in the liquidated amount of $186,200.36 after making all just discounts, and that sum is justly due and owing.
>
> [13] The evidence submitted on this application makes it clear that prior to commencing this action, Opus was aware that there was, at a minimum, a dispute with respect to whether or not its email system had been hacked by fraudsters and that this hack resulted in the issuance of the fraudulent second set of wire transfer instructions. I consider that this information should have been disclosed to the registrar and that the failure to do so constitutes a breach of the content requirements for affidavits in support of a garnishing order set out in s. 3(2) of the *Court Order Enforcement Act*.

[53] Rigby argues that *Opus Consulting* is distinguishable in several ways.

[54] First, Rigby argues that in *Opus Consulting* the defendant had clearly taken the position that by paying as directed via an email address which belonged to the plaintiff, that it had effectively paid the invoices and there was no balance owing.

[55] In this case, the fraudulent payment instructions came from an email address which was not Rigby's actual email address domain, and there was no term in their agreement which provided that BCFF was entitled to rely on any payment instruction received from a Rigby domain email address. Phone confirmation of any change was necessary.

[56] In this case there were genuine contemporaneous communications between Ms. Rigby and Ms. Shah regarding changes to the wire payment instructions. It is arguable whether payment actions taken by BCFF were reasonable in the circumstances. This is an issue that will ultimately have to be resolved at trial. For purposes of this application, it is not clear that BCFF's responses to the various payment instruction changes diverged materially from the requirements of the

parties' agreement or arrangement. I am not inclined to distinguish *Opus Consulting* based on the Fraudster having used a modestly divergent email address or BCFF having failed to obtain phone confirmation of email modifications to payment instructions.

[57] Rigby further argues *Opus Consulting* is distinguishable based on BCFF never having taken the position it had paid Rigby's invoices. Rigby also argues that BCFF's claim is not a liquidated claim. Consistent with the position BCFF later took in its counterclaim, it is claiming against Rigby in negligence and is seeking general damages. It says this constitutes an unliquidated claim and as such Rigby was not obliged to account for a potential set-off of it when disclosing all just discounts. See for example, *Care Tops International Limited v. PPN Limited Partnership*, 2022 BCSC 2252 at paras. 61–62.

[58] It appears from the material before me that BCFF may not have taken the position that its transfers to the Fraudster constituted payment of Rigby's invoices, but there clearly was an allegation that the Fraudster had accessed via Rigby's system, making the hack Rigby's responsibility. At the time of these exchanges, counsel was not directly involved on either side and the parties were not exchanging polished positions framed in formal "legalese". It is clear however that they were both referring to the specific, calculable sums that BCFF had transferred to the Fraudster relying on the false payment instructions. I am satisfied these constituted a liquidated claim against Rigby. While Rigby did disclose the phishing fraud to the extent it attached the notice of civil claim to Ms. Rigby's affidavit, it should have gone further and acknowledged that BCFF had a closely connected cross-claim for the amount it had transferred to the Fraudster.

[59] I have doubts as to whether BCFF's response to civil claim and counterclaim, both filed after Rigby applied for the Garnishing Order, are relevant to a determination of whether BCFF's claim against Rigby constitutes a just discount. To the extent it may be relevant, I am satisfied that these do identify liquidated claims:

a) BCFF's response to counterclaim alleges Rigby's negligence allowed its systems to be hacked and it identifies specific dates and amounts paid to the Fraudster. In part 3, Legal Basis, BCFF denies it is indebted to Rigby as alleged or at all. It also asserts a right of legal or equitable set-off.

b) BCFF's counterclaim identifies the payments BCFF made to the Fraudster by date and amount. In part 2, para. 3, it claims damages in the Canadian dollar equivalent of US$347,102.30. In part 3, para. 1, it alleges Rigby's negligence caused damage and loss of US$347,102 paid to the Fraudster.

[60] Rigby should have disclosed as a just discount that BCFF was claiming that Rigby was responsible for the amounts BCFF paid to the Fraudster as a result of Rigby's systems being compromised.

Just In All The Circumstances

[61] BCFF argues it has an arguable defence that Rigby was responsible for issuance of the false wire instructions. This could defeat or be the basis for a set-off of its claim. Further, BCFF has tendered evidence showing it has the financial means to pay a judgment in the event Rigby were to ultimately prevail at trial. It is an active company with 80 employees. In an average year it processes, packages and sells about $65 million in frozen fruits and vegetables. Pre-judgment security is not necessary in these circumstances.

[62] Rigby says considering the strength of Rigby's claim, the lack of evidence suggesting BCFF is suffering hardship or necessity due to the Garnishing Order and the timing of this application, it would not be just in all the circumstances to set aside the Garnishing Order.

[63] In *Opus Consulting* at paras. 14–16, Justice Mayer considered whether to set aside the garnishing order in that case based on s. 5(2) of the *COEA*, that it would be just in all the circumstances to do so:

> [14] Although I am satisfied that the garnishing order should be set aside on the basis I have outlined above, even if I had not made this finding I would have set aside the garnishing order pursuant to s. 5(2) of the *Court Order Enforcement Act* on the basis that it would be just in all the circumstances of

> this case to do so. In that respect I am satisfied that Ardenton has an arguable defence being that Opus was responsible for the issuance of the fraudulent wire transfer instructions.
>
> [15] The question of whether Opus is responsible for not protecting its email system as is alleged, and other potential failings, or whether Ardenton is responsible for complying with a questionable second set of wire transfer instructions in my view qualifies as a serious question to be tried. To be clear, I am not making any findings of fact with respect to the parties' relative responsibilities, either in contract or in negligence. That is a matter to be determined at trial.
>
> [16] I am also not satisfied, relying on the evidence of its financial consequences provided by Ardenton, that Opus's judgment will go unsatisfied if they are successful at trial. Although the evidence provided by Ardenton with respect to its financial resources could be better, it does establish that they are a substantial company with 70 employees working in nine offices in Canada, the US and the UK and with head offices located in Vancouver. Its managing director has sworn that since January of 2019 it has raised over $50 million in capital and that it has the financial capacity to satisfy any judgment granted to Opus. There is no evidence to contradict this assertion.

[64] On the first point, I am satisfied that BCFF does have an arguable defence or claim for set-off based on Rigby potentially being the initial source of the Fraudster's hack.

[65] On the second point, BCFF only tendered very general evidence regarding its annual sales, number of employees and length of time it has been in business. It did not tender sufficiently detailed evidence regarding its assets, debts, net revenue, prospects and ability to pay a judgment should Rigby prevail at trial. I do not have evidence suggesting it cannot pay; my point is simply that BCFF bears the onus of proof and failed to tender specific evidence addressing this point.

Conclusion

[66] The Garnishing Order is set aside. The registrar of the court is directed to pay out any amounts that were paid into court pursuant to the Garnishing Order, together with any interest that may have accrued thereon, to Fasken Martineau DuMoulin LLP in trust for BCFF.

[67] I do not consider this to be a situation is deserving of rebuke in the form of special costs. BCFF is entitled to costs of the application from Rigby in any event of the cause, but not payable forthwith.

"Master Bilawich"