COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *B & B Barges Ltd. v. British Columbia,* 2023 BCCA 98

Date: 20230301
Docket: CA47327

Between:

B & B Barges Ltd.
and the Ship "Colleen Z" and the Ship "Meldella"
and all others interested in those ships

Appellants
(Defendants)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Plaintiff)

Corrected Judgment: The text of the judgment was corrected on the cover page on March 3 ,2023.

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated February 23, 2021 (*Her Majesty the Queen v. B & B Barges Ltd.*, 2021 BCSC 279, Vancouver Docket S196584).

Counsel for the Appellants:	S.A. Turner D. Han, Articled Student
Counsel for the Respondent:	M.J. Kleisinger R.V.A. Doerksen
Place and Date of Hearing:	Vancouver, British Columbia January 16, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 1, 2023

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch

Summary:

The appellant was found in civil contempt for failing to comply with a mandatory order to remove its barges from Crown land. It challenges the finding of contempt on the basis that the respondent failed to prove that the appellant had the ability and means to comply with the mandatory order. Held: Appeal dismissed. The three-element test for civil contempt, set out in Carey v. Laiken, 2015 SCC 17, applies to both mandatory and prohibitory orders. Ability to comply with a mandatory order should not form an additional element for civil contempt. Questions of ability to comply are best considered within the exercise of the court's discretionary power to decline to make a finding of contempt or as a defence of impossibility of compliance. The judge did not err in her determination that the respondent was only required to prove the three elements of contempt set out in Carey beyond a reasonable doubt, nor did she err in her consideration of the evidence and the exercise of her discretion to decline to make a contempt finding.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] This appeal addresses the test applicable to a finding of civil contempt for failure to comply with a mandatory order. The appellant, B & B Barges Ltd. (B & B) contends that because a mandatory order requires positive steps to be taken to comply, a plaintiff must prove beyond a reasonable doubt, as an additional element of contempt, that the alleged contemnor had the ability and means to comply with the order.

[2] It is well established that civil contempt has three elements that must be established beyond a reasonable doubt: (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order must have had actual knowledge of it; and (3) the party allegedly in breach must have intentionally done the act the order prohibits or intentionally failed to do the act the order compels: *Carey v. Laiken*, 2015 SCC 17 at paras. 32–35.

[3] B & B relies on jurisprudence in this province stemming from this Court's decision in *Swann v. Swann*, 2009 BCCA 335, which addressed contempt for non-payment of child and spousal support orders. The Court held that a plaintiff was required to establish as a fourth element that the debtor was in fact, capable of

complying with the order in the sense of having the means to make the required payments.

[4] The chambers judge rejected B & B's argument that this fourth element was applicable to mandatory orders. She concluded that *Swann* and the cases following it were distinguishable and applied the test set out in *Carey.* There was no dispute that the three elements had been proven and the judge therefore found B & B to be in contempt.

[5] For the reasons that follow, I would dismiss the appeal. In my opinion, the test in *Swann* applies only to orders for the payment of money, generally arising in the context of family law support orders. There is no basis to extend its application beyond payment of money orders given the requirements of the three-element test in *Carey*, which applies to both mandatory orders (failing to do the act the order compels) and prohibitory orders (doing the act the order prohibits).

Factual background

The trespass

[6] B & B was the owner of two barges registered as the ships Colleen Z and Meldella. The barges had been used as a floating cookhouse and bunkhouse for workers employed by Twenty Ten Timber Products Sales Ltd. (Twenty Ten), a company closely related to B & B. Mark Butler and William Baumel were the sole directors of both companies.

[7] The barges had been used for Twenty Ten's logging operations on the British Columbia coast near Bella Bella. In early 2018, after the operations shut down, the barges were moved to floating premises in Donkey Cove off the coast of Denny Island. However, at some point before the end of June 2018, the barges came adrift and went aground about 300 metres to the south, on Crown land on the foreshore of Denny Island.

[8] The respondent (the Province) issued three trespass notices, ordering the removal of the barges. The first was issued to Twenty Ten on June 28, 2018. The

second and third were issued to B & B on September 13, 2018 and November 1, 2018. After receiving the first notice, representatives of B & B went to the location, got the barges to floating level and secured them. After the second notice, Mr. Butler obtained a "ball park quote" of $300,000 to $400,000 to salvage the barges, an amount he said B & B did not have the means to pay. There was no dispute that B & B did not comply with the trespass orders.

The mandatory injunction

[9] On June 10, 2019, the Province commenced the action below claiming trespass and nuisance, and at the same time filed an application for a mandatory injunction requiring B & B to permanently remove the barges from Crown land. On December 13, 2019, in reasons indexed as 2019 BCSC 2160, Justice Baird granted the application and ordered B & B to remove the barges and all their component parts on or before January 31, 2020. B & B had defended the application on the basis that it lacked the funds required to remove the barges and was therefore not able to comply with the injunction sought by the Province. Justice Baird was not satisfied that B & B (or Twenty Ten) was impecunious or that "adequate or any steps" had been taken to secure financing to remove the barges.

The contempt proceeding

[10] On July 29, 2020, the Province applied for an order finding B & B in contempt of the order of Baird J. (the Order) and the matter was heard by Justice Sharma on November 17, 2020. B & B conceded that it had not complied with the Order but again defended the contempt application on the basis that its "dire financial situation" either precluded a finding of contempt or raised a reasonable doubt as to its wilful non-compliance.

[11] In reasons indexed as 2021 BCSC 279, Sharma J. found the Province had adduced evidence that established beyond a reasonable doubt that B & B failed to comply with the Order. As noted, she relied on the three-element test set out in *Carey* and distinguished *Swann* and subsequent cases as involving orders requiring the payment of support in the context of a family law matter. She did not consider

the mandatory injunction in this case to "deal with the payment of money at all" and characterized it as "an injunction to move the Barges in order to rectify an ongoing trespass": at para. 81.

[12] The judge went on to address B & B's alternative position that its asserted financial inability to comply with the Order raised a reasonable doubt as to its wilful non-compliance. She noted, however, that B & B did not identify the legal basis on which financial difficulties could preclude a finding of contempt apart from relying on the four-part test stemming from *Swann*. Nevertheless, she reviewed the evidence adduced by B & B regarding its financial status and identified inconsistencies between information in its affidavits and in its response to the application, as well as significant gaps in the information: at paras. 89–90. She concluded:

> [91] Based on the foregoing, I find the evidence is inadequate to conclude that B & B is impecunious. I confirm the evidence does not meet the civil standard of balance of probabilities, nor does it establish a *prima facie* case. At best, it is suggestive that B & B may have financial difficulties.

[13] The judge also found the evidence inadequate to draw any conclusions about the cost of removing the barges. She referred to a preliminary quote of $950,000 B & B received by email in August 2020, but was not convinced that a single email represented the cost to comply with the Order, especially since the Order did not dictate how the barges and their component parts were to be removed: at paras. 92–95.

[14] Finally, Sharma J. considered her discretion to decline a finding of contempt, referring (at para. 108) to the following passage from *Carey*:

> [37] For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt… While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

[15] She did not find that B & B had made genuine efforts to comply with the Order. Her concerns included B & B failing to follow up on the initial quote it had obtained for over seven months, failing to make any attempt to remove or repair the barges, and claiming its financial difficulties would preclude a finding of contempt without providing thorough financial information: at paras. 112–114.

[16] She therefore declined to exercise the court's discretion in favour of B & B and found the company in contempt of the Order.

On appeal

[17] B & B acknowledges that it was at all times since December 13, 2019 aware of Baird J.'s order requiring it to remove the barges and admits, as it did before Sharma J., that it did not comply with it. B & B continues to maintain, however, that it did not have the financial resources necessary to pay for their removal.

[18] B & B submits that the judge erred in placing the burden on it to prove that it was incapable of complying with the Order given its mandatory nature, and because the Province led no evidence as to its ability to comply, it failed to discharge its burden of establishing civil contempt.

[19] The Province submits that the judge correctly applied the applicable law, appropriately weighed the evidence and reasonably exercised her discretion to find B & B in contempt of the Order.

The issue and standard of review

[20] Generally, a finding of contempt involves a question of mixed fact and law. The standard of review of a contempt finding depends on the issue raised on appeal, described as follows by this Court in *Friedlander v. Claman*, 2016 BCCA 434:

> [52] … If the issue involves a question of law, the standard of review is correctness. If the issue is about the judge's exercise of discretion, the standard of review is reasonableness. If the appeal is from findings of fact and inferences of fact, or the application of a legal standard to the facts, the standard of review is a deferential one requiring the appellant to demonstrate a palpable and overriding error …

[21] The issue raised by B & B in this appeal is a narrow question of law, reviewable on a standard of correctness: to establish civil contempt for a failure to comply with a mandatory order, is a plaintiff required to prove beyond a reasonable doubt, in addition to the three elements set out in *Carey*, that the alleged contemnor has the ability to comply with the order?

[22] B & B's submission that the Province failed to meet its burden because it adduced no evidence about B & B's ability to comply rests entirely on this issue. It does not assert as an alternative ground of appeal that in any event, the judge did not properly exercise her discretion to decline to impose a contempt finding. B & B submits only that the evidence of its financial circumstances was sufficient to raise a reasonable doubt, as it was untested.

The test for civil contempt

[23] As noted above, *Carey* confirms three elements for civil contempt, which must be established beyond a reasonable doubt: (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order must have had actual knowledge of it; and (3) the party allegedly in breach must have intentionally done the act the order prohibits or intentionally failed to do the act the order compels: *Carey* at paras. 32–35. The emphasized words make it clear, in my view, that these elements apply to both mandatory and prohibitory orders.

[24] I do not accept B & B's submission that a mandatory order is in material respects the same as an order to pay money such that the reasoning in *Swann* and other payment of money cases is applicable. Although I accept that the Order implicitly requires the expenditure of funds to comply, the same can be said for many kinds of orders. B & B acknowledges this is so by recognizing that even in prohibitory orders, there may be aspects that require the expenditure of funds. In my opinion, there is a clear distinction between an order for the payment of money, which necessarily specifies an amount, and a mandatory order, which may require the expenditure of unspecified amounts of money in order to comply.

[25] Moreover, orders for payment of money have historically been treated differently from other orders. Prior to 1975, legislation in this province prohibited a court from committing a person for contempt for non-payment of money. This history was reviewed in *Stevenson v. Stevenson*, (1977) 3 B.C.L.R. 7 (S.C.), where Justice Craig (as he then was) observed:

> [22] Although the courts in this jurisdiction have held that the process of contempt is not available for non-payment of money because of the provisions of The Arrest and Imprisonment for Debt Act, they have not held that failure to pay could never in any circumstances be treated as contempt. Wilful disobedience of an order of the court, other than an order for payment of money, amounts to contempt of court and makes the disobedient person liable to committal for the contempt. There is no logical reason why wilful refusal of a person to obey an order for payment of money, if he has the means, should not also amount to contempt, even though he cannot be committed for contempt.
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> [Emphasis added.]

[26] This requirement of having the means to pay is reflected in *Swann*. There, the chambers judge had dismissed an application to find the respondent in civil contempt for failure to pay the full amount of child and spousal support required by court orders. In doing so, the judge had interpreted *Stevenson* to stand for the proposition that there must be a wilful refusal to pay "occasioned by someone with the means to pay" to find contempt for non-payment.

[27] On appeal in *Swann*, the appellant's principal argument was that the chambers judge had erred in finding that the respondent's contempt was not wilful because of his impecuniosity. Justice Groberman, for the Court, was not persuaded that the judge had "misstated the elements the plaintiff had to prove in order to establish contempt for the non-payment of maintenance" and, in this context, he went on to state:

> [10] … There are four elements that must be established: that the debtor had notice of the order, that he or she did not comply with the order, that the non-compliance was "wilful" (*i.e.*, deliberate, as opposed to accidental or unintentional), and that the debtor was, in fact, capable of complying with the order (*i.e.*, that he or she had the means to make the required payments).
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> [11] The chambers judge's summary of the law was non-technical; that is not surprising given that the defendant was self-represented. There is no indication, however, that he misconstrued the elements of contempt. It may

> be that at some points in his judgment, the judge conflated the concept of "wilful non-compliance" with the question of whether the defendant had the ability to pay, but any such error is of no consequence, since inability to pay is an excuse for failure to comply with a court order for the payment of money.

[28] These comments demonstrate that an inability to comply with an order for the payment of money does not serve to negate the element of wilful non-compliance but rather is a separate matter. However, whether it is considered as a fourth element of civil contempt or an excuse for failure to comply may in many circumstances amount to the same thing.

[29] Decisions that followed *Swann*, most notably *Potratz v. Potratz*, 2015 BCSC 1608 and *Hokhold v. Gerbrandt*, 2018 BCSC 183, recognized that the fourth element applies only where the alleged failure to pay is the substance of the contempt application.

[30] It is noteworthy, in my view, that these payment of money cases generally arise in the context of family law proceedings. In *Hokhold*, Justice Abrioux (as he then was) aptly noted that the civil contempt remedy should be exercised with great caution in family law proceedings and should not be granted if there are other adequate remedies: see paras. 23, 28. While the contempt power should always be exercised cautiously, its use in family law proceedings can be especially counterproductive: see *Bassett v. Magee*, 2015 BCCA 422 at paras. 42–43. These important considerations also serve to limit the addition of a fourth element for civil contempt to failure to comply with orders for the payment of money in this context.

[31] There is another reason why the ability to comply with a mandatory order should not form an additional element for civil contempt: evidence about the ability to comply is within the knowledge of the alleged contemnor. To require a plaintiff to prove this may lead to applications for pre-hearing disclosure, discovery or cross-examination. This would, in many cases, be inconsistent with the summary nature of civil contempt proceedings, in which the court exercises an inherent jurisdiction to maintain its authority and prevent abuse of its process.

[32] In this province, Rule 22-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 requires the party seeking an order for contempt to file a notice of application, supported by an affidavit setting out the conduct alleged to be in contempt: Rule 22-8(11)-(12). In accordance with the court's broad discretion in a contempt proceeding, Rule 22-8(13) confirms that the court may give directions as to the mode of hearing, including an order that the matter may be transferred to the trial list. While orders for pre-hearing disclosure, discovery or cross-examination may be granted, such procedures would be appropriate only in more complex cases: see, for example, *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2020 BCCA 365 at paras. 20–24.

[33] To the extent other decisions have applied *Swann* outside the context of orders for the payment of money, I would not endorse them: see, for example, *Luft v. Ball*, 2013 BCSC 81, which involved orders requiring defendants to retain an accountant to prepare audited financial statements.

[34] It is my view that questions of ability to comply are best considered within the exercise of the court's discretionary power to decline to make a finding of contempt even where all three elements have been established, or as a defence of impossibility of compliance. As Justice Cromwell stated in *Carey*, the contempt power is an enforcement power of last resort and should be used "cautiously and with great restraint", and where an alleged contemnor acted in good faith in taking reasonable steps to comply with an order, the court "generally retains some discretion to decline to make a finding of contempt": at paras. 36–37. He left open "the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case": at para. 37. In declining to impose a heightened degree of fault for the required intent, Cromwell J. considered that this "existing discretion not to enter a contempt finding and the defence of impossibility of compliance" provided better answers: *Carey* at para. 41.

[35] I appreciate that there is a distinction between mandatory and prohibitory injunctions. In a contempt proceeding, different considerations may arise that could interfere with a person's ability to carry out the positive action required in a mandatory order. Some courts have related such considerations to a defence of impossibility of compliance that negates a wilful or deliberate disobedience: see *Jackson v. Honey*, 2009 BCCA 112 at para. 14; *Métis Nation – Saskatchewan v. Provincial Métis Council*, 2015 SKQB 259 at paras. 28–31; others have related such considerations more generally to the exercise of the discretion not to make a finding of contempt: see *Fresno Pacific University Foundation v. Grabski*, 2015 MBCA 70 at paras. 22–23, 30–32. Either way, an ability to comply with a mandatory order has never been considered a separate element of civil contempt, and the above passage from *Carey* suggests the better approach is to consider these matters within the court's discretionary power and the defence of impossibility of compliance.

[36] I therefore see no error in the judge's determination that the Province was only required to prove the three elements of contempt set out in *Carey* beyond a reasonable doubt.

The discretionary power

[37] Although B & B does not raise an alternative ground of appeal in relation to the judge's exercise of her discretion, it submits that its untested evidence of the company's financial circumstances was sufficient to raise a reasonable doubt.

[38] The judge considered whether B & B's asserted financial inability to comply with the Order raised a reasonable doubt as to its "wilful non-compliance" but found the evidence inadequate to support a finding that the company was impecunious, either on the civil standard of a balance of probabilities or a *prima facie* case: at para. 91. She also found nothing about B & B's evidence and submissions about its financial status raised a reasonable doubt as to its guilt for civil contempt: at para. 107.

[39] The jurisprudence has not clearly established a standard of proof for raising a defence or establishing a legitimate excuse. Some decisions suggest that balance of

probabilities is the appropriate standard: see *Fresno* at para. 26; *N.H. v. J.H.*, 2017 ONSC 4867 at para. 593. Other decisions only require the evidence to raise a reasonable doubt: see *Envacon Inc. v. 829693 Alberta Ltd.*, 2018 ABCA 313. I note, however, that decisions from Alberta courts raise somewhat different considerations, as their Rules of Court expressly provide that a person may only be held in civil contempt if they fail to comply with an order "without reasonable excuse": Rule 10.52, Alberta *Rules of Court*, Alta. Reg. 124/2010.

[40] In *Carey*, Cromwell J. declined to delineate the full scope of judicial discretion to decline to impose a contempt finding, leaving it open to do so "where it would work an injustice in the circumstances of the case": at para. 37.

[41] I do not consider it appropriate to determine what standard of proof should be applied in the exercise of the discretionary power or in establishing a defence. This question was neither raised nor argued in this appeal, and the broad discretion described in *Carey* suggests that a specific standard may be unnecessary.

[42] In my view, B & B's simple assertion that its evidence, being untested, is sufficient to raise a reasonable doubt is without merit. The judge was entitled to assess the evidence and determine if it was sufficient to establish the fact of impecuniosity. She did so, and rejected it as being both inconsistent and incomplete. She also found that B & B had not made genuine efforts to comply with the Order.

[43] I see no error in the judge's consideration of the evidence. Ultimately, she was not satisfied that it raised a reasonable doubt as to B & B's guilt for civil contempt and was not prepared to exercise her discretion to decline to make a contempt finding. These findings and conclusions are entitled to deference.

Conclusion

[44] I would therefore dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Fitch"