

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Green Community Society v.  
Whittle*,  
2024 BCSC 1342

Date: 20240618  
Docket: S231861  
Registry: Victoria

Between:

**Cowichan Green Community Society**

Plaintiff

And:

**Christopher Patrick Whittle, Trend Contracting Co., Trend Painting Co.,  
1241024 B.C. Ltd. and Shea Christopher Stonehouse**

Defendants

Before: The Honourable Justice Morley

## **Oral Reasons for Judgment**

### **(Damages Assessment on Default Judgment)**

(In Chambers)

Counsel for the Plaintiff:

J. A. Bloomenthal  
S.C.J. Evans

For the Defendants:

No appearance

Place and Date of Trial/Hearing:

Victoria, B.C.  
June 13, 2024

Place and Date of Judgment:

Victoria, B.C.  
June 18, 2024

[1] **THE COURT:** These are oral reasons for judgment. If anyone orders a transcript of these reasons, I reserve the right to edit it for errors, omissions, repetition and clarity. The result will not change, nor will the basis for it.

**Introduction**

[2] This is a damage assessment on a default judgment against one of multiple defendants, namely Christopher Patrick Whittle. Mr. Whittle carries on business as Trend Contracting Co. and Trend Painting Co. On the evidence before me they are not legally distinct persons and when I refer in these reasons to Mr. Whittle, that will include him as a sole proprietor carrying on business as either Trend Contracting Co. or Trend Painting Co.

[3] The plaintiff claims \$100,800 in compensatory damages, pre- and post-judgment interest, punitive damages in the amount of \$70,000 and special costs.

[4] The plaintiff is a non-profit charitable society called Cowichan Green Community Society (“CGC”). CGC’s mandate is to improve food security by promoting local and sustainable food production and processing. CGC planned to build a large commercial building known as a “Food Hub” in Duncan to provide a space for local agricultural producers and processors and for services, research and education related to its mandate. It obtained a commitment to over a million dollars in government grants for the construction.

[5] The action arises out of an agreement negotiated by Mr. Whittle purportedly on behalf of the defendant 1241024 B.C. Ltd. (the “Corporate Defendant”) with CGC, ostensibly for contracting consultant services in relation to the Food Hub project (the “Contract”). Under the Contract, CGC agreed to provide two deposits, one for \$10,000 plus G.S.T. for “billings against consultant activities and services” and one for \$50,000 plus G.S.T. for “billings against any related construction services”.

[6] In a subsequent invoice an additional deposit for \$36,000 plus G.S.T. for “painting/drywall/interior fit-up” was demanded. CGC paid Mr. Whittle all the deposits, which added up to \$100,800.

[7] Shortly after he received the deposits, Mr. Whittle transferred the money out of the business account of the Corporate Defendant, which he controlled. He used the deposit money to pay for personal expenses, including a cross-Canada trip, surf lodges, motorsports, pet supplies, vaporizers, restaurants, pubs and liquor and cannabis purchases.

[8] The Notice of Civil Claim alleges this to be a breach of trust and to result in unjust enrichment of Mr. Whittle. Since this is a default judgment, I will accept these allegations as proven.

**Procedural History**

[9] This action started before it was revealed that Mr. Whittle had spent the deposit funds on personal expenses. CGC filed a Notice of Civil Claim on May 26, 2023 against Mr. Whittle, the business names he carries on business as and the Corporate Defendant for breach of the Contract. A Response to Civil Claim was filed on behalf of all the then-defendants on July 25, 2023.

[10] On December 1, 2023, Justice Saunders made a freezing order against the then-defendants. This was served on Mr. Whittle on December 18. In defiance of the freezing order, Mr. Whittle listed \$47,479 of assets on Facebook Marketplace in January and February of 2024. On March 27, 2024, Associate Judge Bouck ordered that the Response to Civil Claim be struck with respect to Mr. Whittle and his alter egos for the flouting of the freezing order. Default judgment was entered through the registrar on April 5 with damages to be assessed. This is that assessment.

**Compensatory Damages**

[11] It is obvious that damages should include compensatory damages for the amounts of the deposits, along with pre-judgment and post-judgment interest. As I have noted, the total of the deposits was \$100,800. These amounts were paid, and they were not returned when they should have been. This is thus both the amount of the loss suffered by CGC, as well as the unwarranted gain of Mr. Whittle. On an unjust enrichment theory, compensatory damages can therefore be assessed at

\$100,800. It is unnecessary to consider other causes of action, since the same amount of compensatory damages would arise.

[12] As of June 13, 2024, the pre-judgment interest calculation for this amount is \$6,447.95. I will award this, along with whatever post-judgment interest accrues under the *Court Order Interest Act*.

**Punitive Damages**

[13] The more difficult question is the amount of punitive damages. In its Notice of Application, CGC asks for \$75,000 in punitive damages, which would amount to 75% of its loss. For the reasons I will set out at more length, I consider this too high and will reduce it to \$21,600 or 20% of the compensatory award.

[14] Punitive damages may be awarded when “the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency”: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 196.

[15] Civil causes of action are generally based on the principle of corrective justice, which is about restoring the parties to the position they would have been in but for the events that led to the cause of action. Punitive damages, by definition, go beyond what is necessary to compensate the plaintiff for a loss, nor are they limited to disgorging the gain of the wrongdoer. They exceed both measures in order to promote the punitive objectives of deterrence, denunciation and retribution. Punitive damages thus play an exceptional role in our system of justices, “straddling the frontier” between civil law (which is ordinarily about compensation for private losses) and criminal law (which is ordinarily prosecuted by the state with evidentiary and procedural protections that do not exist in the civil sphere): *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[16] As Justice Binnie explained at para. 37 of *Whiten*, the anomaly of a civil process being used to engage in punishment is justified by the fact that it would often not be rational for anyone other than a civil plaintiff to invest in a legal process

against a wrongdoer: “Over-compensation of a plaintiff is given for this socially useful service.”

[17] At para. 39 of *Whiten*, Justice Binnie acknowledged the concern that the quantum of punitive damages could be arbitrary and out of proportion to the actual loss. However, he defended them as having a “long and important history in Anglo-Canadian [as opposed to American] jurisprudence.” However in recognition of criticisms of punitive damages, *Whiten* attempted to impose some limits both on their availability and quantum.

[18] With respect to availability, *Whiten* declined to limit punitive damages to particular causes of action, but insisted that they should be resorted to only in exceptional circumstances and with restraint: *Whiten* at para. 69. With respect to quantum, the “restraint” principle means that the amount of punitive damages must be limited to the lowest award that would accomplish the punitive purposes of deterrence, denunciation and retribution: *Whiten* at para. 71. Punitive damages that disgorge the profit of the wrongdoer are more easily justified than those that go beyond either the loss to the plaintiff or the gain to the defendant: *Whiten* at para. 72.

[19] While there is no fixed formula for punitive damages (*Whiten* at para. 73), the dominant principle for quantum is *proportionality* (*Whiten* at para. 74). Proportionality principles in criminal law are relevant. For example, *Whiten* specifically mentions the totality principle: the overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). While *Whiten* does not specifically mention it, this implies the importance of *horizontal* equity, namely that like cases be treated alike, based on both the seriousness of the actions of the defendant and the defendant’s culpability.

[20] In *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189, the Court of Appeal awarded \$20,000 in punitive damages on a \$168,934 compensatory award (\$50,000

for aggravated damages and \$118,934 for general damages) when a law firm was found to have mistreated an articling student. The Court of Appeal had the following comments about the principles for quantum of punitive damages:

- a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
- b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
- c) Punitive damages are awarded only if compensatory damages (which to some extent are punitive in nature) are insufficient to accomplish these objectives, and the amount awarded is no greater than necessary to rationally accomplish their purpose;
- d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
- e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant; and
- f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

**Is This An Appropriate Case for Punitive Damages?**

[21] Applying the factors set out in *Ojanen*, I agree with CGC that this an appropriate case for a punitive damage award. Misappropriating a deposit and using it for personal expenses unconnected to the purpose for which it was advanced is the kind of conduct that warrants retribution and denunciation and for which the deterrence implicit in a compensatory award if caught is insufficient. A deposit against which future services will be billed is trust property, with the amount against which there is not yet a billed claim being held for the benefit of the depositor. Where a person given a deposit misappropriates that deposit, this has been found an appropriate case for punitive damages: *McMillan v Bergman*, 2021 BCSC 1360; *Milly v Kapelus*, 2022 BCSC 1730.

[22] When there is a knowing misappropriation without colour of right, there is a risk that a purely compensatory award will not adequately deter the wrongdoer and will not express society's denunciation or proportionate retribution for the conduct, since the defendant loses nothing and the plaintiff is put to the expense of recovering the money.

[23] These factors are aggravated here by the fact that the victim is a non-profit charitable society given public funds (which it may now have trouble accessing again for its charitable purposes) and that the defendant responded to the action by seeking to dissipate his assets in breach of a court order.

**Quantum of Punitive Damages**

[24] However, in applying the principles of restraint and proportionality to the quantum of punitive damages, I must reject the amount requested by CGC, namely \$70,000 on a compensatory award of just over \$100,000. As the Court of Appeal noted in *Ojanen*, "moderate" awards are typically in order, especially in light of the inherent frailties of the civil process as a way of allocating punishment.

[25] I think the lack of horizontal equity can be seen from the cases CGC relies on. \$70,000 would be about 70% of the compensatory award. I note that *Whiten* says that punitive damages must be proportionate to the harm caused which is measured, so far as money can do so, by the compensatory award. It is therefore important to use those proportions to determine whether cases are comparable.

[26] In *McMillan*, the compensatory portion of the award was \$200,000. Justice Forth reduced the requested amount of damages from \$150,000 to \$65,000 (or approximately 1/3 of the compensatory award). In *Milly*, an award of \$70,000 in punitive damages was just over 10% of the compensatory award.

[27] When I look at those cases, they both involve a greater degree of breach of trust compared with this one, although I agree with Mr. Evans' submission that the seriousness of the misconduct here is exacerbated by the non-profit charitable

status of the plaintiff and the fact that the defendant's actions endanger its future ability to fulfill its mandate with public funds.

[28] Although it is dated, a quantitative survey of punitive damages awards in common law Canada showed that 20% of the compensatory award is the median, unless the defendant had a significant profit over that: Neil Vidmar & Bruce Feldthusen, "Exemplary Damage Claims in Ontario: An Empirical Profile", 16 Can. Bus. L.J. 252 (1990) at p. 265.

[29] In my view a 20% punitive damages award would be proportionate here. I add that I have a concern that in the absence of any evidence of Mr. Whittle's financial situation, I cannot know if \$70,000 would be disproportionate to his financial resources. I therefore award punitive damages in the amount of \$21,600.

**Special Costs**

[30] Special or full-indemnity costs are available for "reprehensible" litigation conduct. I agree with Mr. Evans that the conduct of Mr. Whittle meets this standard. The breach of the freeze order is the principal example, but Mr. Whittle also played games about his availability and length of hearing times and lied to registry staff. I agree his litigation conduct was reprehensible and that it would be inadequate to order tariff costs.

**Conclusion and Order**

[31] I therefore award judgment for the plaintiff against Mr. Whittle, including as carrying on business either as Trend Contracting or Trend Painting, assessed as follows:

1. Compensatory damages in the amount of \$100,800;
2. Punitive damages in the amount of \$21,600;
3. Pre-judgment interest in the amount of \$6,447.95;
4. Post-judgment interest in accordance with the *Court Order Interest Act*.



[32] Costs are to be assessed as special costs.

“J. G. Morley, J.”  
The Honourable Justice Morley