IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bear Ridge Railing MFG Inc. v. D.K. Railings Ltd.,* 2024 BCSC 1995

Date: 20241031
Docket: S140369
Registry: Kelowna

Between:

Bear Ridge Railing MFG Inc.

Plaintiff

And

D.K. Railings Ltd.

Defendant

And

Bear Ridge Railing MFG Inc., Falcon Railing and Superdeck Inc., Mona Lamb, Barry Olsvik, Donald Olsvik, and Steve Olsvik

Defendants by Counterclaim

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim, Bear Ridge Railing MFG Inc.:	T.M. McCaffrey
Counsel for the Defendant:	M.S. Moorhouse
Place and Date of Hearing:	Kelowna, B.C. July 25–26, 2024
Place and Date of Judgment:	Kelowna, B.C. October 31, 2024

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I. INTRODUCTION

[1] These reasons for judgment address an application to set aside two garnishing orders before judgment.

[2] The plaintiff, Bear Ridge Railing MFG Inc. (“Bear Ridge”) is a manufacturer of railing materials. The defendant, D.K. Railings Ltd. (“DK Railings”) is a railing installer. Bear Ridge brings this action against DK Railings in debt and breach of contract for unpaid invoices for railing systems, gates and fabricated aluminum products. It applied for garnishing orders without notice to DK Railings. The orders were granted by a registrar by way of desk orders. One of them has been partially satisfied by a bank.

[3] DK Railings advances three reasons why the garnishing orders should be set aside:

a) First, it argues that the orders do not meet the statutory prerequisites in s. 3 of the *Court Order Enforcement Act,* RSBC 1996, c. 78 [*COEA*], primarily because the claim, it submits, is not a claim for a liquidated sum;

b) Second, it argues that Bear Ridge failed to disclose material facts relating to the terms of the contract, and disputes over pricing and financing charges; and

c) Third, it argues that the Court should exercise the discretion in s. 5 of the *COEA* to release the garnishment where that would be “just in all of the circumstances”.

II. LEGAL BASIS

[4] Garnishing orders are a unique and extraordinary remedy. When a garnishing order is issued before judgement, the defendant is deprived of the funds until trial, with no undertaking from the plaintiff as to damages. As a result, the courts have developed a requirement that there must be meticulous or strict (although not perfect) compliance with the statutory prerequisites: *Politeknik Metal San ve Tic A.S.*

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v. AAE Holdings Ltd., 2015 BCCA 318, at paras. 20–23 [*Politeknik*], citing *Knowles v. Peter* (1954)*,* 12 W.W.R.(N.S.) 560 (B.C.C.A.).

[5] The prerequisites are set out in s. 3(2)(d) of the *COEA* which provides that to obtain a prejudgement garnishing order, the applicant must state in an affidavit:

> **Attachment procedures and exemptions**
>
> 3 …
>
> (2) …
>
> (d) …
>
> (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,

A "debt due" is defined in s. 3(1) of the *COEA* to include a debt, obligation and liability that is "owing, payable or accruing due".

[6] Section 3(2)(d)(iv) of the *COEA* has been interpreted to mean that the claim underlying a prejudgment garnishing order must be a claim to a liquidated sum: *Politeknik* at para. 24, citing *Pe Ben Industries Company Ltd. v. Chinook Construction & Engineering Ltd*., [1977] 3 W.W.R. 481 (B.C.C.A.). Unliquidated damages, whether arising in tort or in contract, cannot be the subject matter of a garnishing order: *Pe Ben,* at 486.

[7] A garnishing order will be set aside on an application by the defendant under Rule 8-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*] if the order and supporting materials do not meet the statutory prerequisites, including the requirement of a liquidated claim after making all just discounts: *Politeknik,* at para. 25.

[8] A garnishing order will also be set aside on an application under R. 8-5(8) if the plaintiff failed to disclose material facts: *Politeknik,* at para. 27, citing *Ridgeway-*

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Pacific Construction Limited v. United Contractors Ltd., [1976] 1 W.W.R. 285 (B.C.C.A.), at 287.

[9] If there is a defect in the garnishing order materials, the order must be set aside in its entirety. It cannot be amended or reduced. A plaintiff is only entitled to the benefit of a garnishing order if there has been compliance with the statutory prerequisites: *Politeknik,* at para. 51.

[10] A defendant subject to a valid garnishing order may apply under s. 5 of the *COEA* to be released from the garnishment. If the registrar or judge who hears the application considers it "just in all of the circumstances", he or she may make an order releasing all or part of the garnishment.

[11] On an application under s. 5 of the *COEA,* the court may consider the merits of the action in assessing what is just in the circumstances. By contrast, it is not appropriate to consider the merits on an application under R. 8-5(8), except to determine whether the pleadings disclose a cause of action against the defendant for an unliquidated claim, and whether the plaintiff has given effect to all just discounts: *Politeknik,* at para. 27, citing *Ridgeway-Pacific*, at 287.

[12] In this case, DK Railings relies on both R. 8-5(8) and s. 5 of the *COEA*. It argues that:

a) the claim is not a claim to liquidated damages;

b) Bear Ridge failed to give effect to just discounts;

c) Bear Ridge failed to make full and frank disclosure of the payment terms of the contract, and disputes over pricing and financing charges;

d) Bear Ridge obtained the garnishing orders for an ulterior purpose—namely to damage DK Railings' business;

e) the claim is weak on its merits; and

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f) the garnishing orders are unnecessary.

III. BACKGROUND

A. The Garnishing Order Materials

[13] Bear Ridge filed an affidavit by Barry Olsvik in support of each application. Mr. Olsvik exhibited a copy of the Notice of Civil Claim (the "NOCC") to his affidavits. He deposed that: "The actual amount of the debt, claim or demand in the cause of action is $451,353.83 and that sum is justly due and owing by the defendant to the plaintiff after making all just discounts". He further deposed that: "The allegations of fact in the Notice of Civil Claim are correct."

[14] The NOCC alleges:

a) The parties entered into a contract pursuant to which Bear Ridge agreed to sell, and DK Railings agreed to buy, railing supplies at prices quoted by Bear Ridge and approved by DK Railings (para. 4);

b) The contract provided that 50% of the price of the supplies was due at the time the order was placed and the balance was due within 30 days of the invoice date, with interest accruing thereafter at 2% per month or 24% per annum (para. 5);

c) All of the supplies delivered by Bear Ridge were approved by DK Railings (paras. 6–7);

d) Bear Ridge invoiced DK Railings in accordance with the contract (para. 8);

e) DK Railings owes Bear Ridge the sum of $451,353.83, being the balance due and owing on the invoices listed in paragraph 11 (para. 10);

f) In the alternative, DK Railings owes Bear Ridge the sum of $451,353.83, "as acknowledged by the Defendant from time to time by reason of conversations, circumstances and payments made pursuant to the Statement of Account delivered to the Defendant from time to time" (para. 11); and

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g) Bear Ridge made monthly demands for payment of DK Railings' indebtedness, but DK Railings has refused or neglected to pay the sum owing since April 9, 2024.

[15] Paragraph 11 of the NOCC reproduces a statement of account from May 31, 2022, to April 15, 2024, listing some 500 invoices, payments and financing charges.

[16] Bear Ridge served the garnishing orders on BMO Bank of Montreal and TD Canada Trust. In response, TD Canada Trust debited DK Railings' bank account in the amount of $28,188.44 and paid those funds into the court.

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B. Additional Evidence on this Application

[17] The parties filed extensive affidavit materials on this application. The sufficiency of the garnishing order materials must be assessed based on the affidavits Bear Ridge filed in support of the original applications, and not on the basis of subsequently filed affidavits: *Kenworth v. R. Parker Logging Ltd.,* 1993 CanLII 848 (B.C.S.C.).

[18] However, some additional background is necessary to understand the nature of the claim as well as to assess the interests of justice under s. 5 of the *COEA.* It is therefore helpful to summarize some of the additional evidence and submissions of the parties on this application.

[19] The contract was an oral agreement. However, each order was documented by a series of purchase requests, sales orders, trailer forms and invoices. The process appears to have been as follows: DK Railings submitted an order with drawings or a parts list; Bear Ridge issued a sales order that included parts numbers, unit prices and total prices; DK Railings picked up the order and signed for the receipt; after the order was picked up, Bear Ridge issued an invoice; and Bear Ridge recorded the invoices and payments in a statement of account.

[20] The current dispute revolves primarily around two issues: (a) pricing; and (b) payment terms.

[21] The NOCC (as affirmed by Mr. Olsvik) alleges that DK Railings authorized all of the goods that Bear Ridge supplied, and that all of the invoices were issued in accordance with the contract. In essence, Bear Ridge alleges that the invoices record the prices that DK Railings agreed to pay.

[22] DK Railings alleges that the prices were supposed to be charged at rates competitive with those charged by its former supplier, DekSmart. This position appears to be based on discussions between DK Railings and Falcon Railings ("Falcon"), which acted as DK Railings' supplier immediately before Bear Ridge. Falcon and Bear Ridge share common ownership. From DK Railing's perspective, the changeover from Falcon to Bear Ridge was in name only, and the processes for ordering and invoicing supplies were to remain the same.

[23] Bear Ridge's position is that Falcon is a separate company, and there was never any agreement by Bear Ridge to use DekSmart pricing.

[24] DK Railings says the disagreement over pricing goes to the heart of these proceedings. Bear Ridge, on the other hand, says there was no disagreement over pricing until DK Railings filed its affidavits in support of its application to set aside the garnishing orders.

[25] With respect to payment terms, the NOCC alleges (and Mr. Olsvik affirms) that 50% was payable at the time the order was placed, and the balance was due within 30 days of the invoice, with interest accruing thereafter at 2% per month.

[26] DK Railings argues that there were two distinct timeframes relevant to the payment terms. Prior to October 2023, the invoices said "Due on receipt". After October 2023, they said "50% Deposit".

[27] DK Railings argues that most of the post-October 2023 invoices were paid, and the real dispute is the pre-October 2023 invoices. It argues that Bear Railings did not enforce the "Due on Receipt" term of the pre-October 2023 invoices. Instead, Bear Ridge allowed DK Railings to make sporadic lump sum payments and maintain an outstanding balance.

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[28] DK Railings argues that the parties agreed to vary the contract and enter into what its counsel describes as a “revolving line of credit”. Because there was no agreement on when and how Bear Ridge could call on full payment of the line of credit, DK Railings argues, the principle from *R.E. Lister Ltd. v. Dunlop Canada Ltd.,* [1982] 1 S.C.R. 726, applies, and Bear Ridge cannot now proceed with what counsel describes as a “seizure” without first providing reasonable notice of a demand for payment.

[29] Bear Ridge disputes these submissions. It argues that there is no evidence of any agreement on a revolving line of credit; there is only evidence of outstanding invoices and patience shown by Bear Ridge on collecting the full amount due and owing.

[30] In October 2023, Bear Ridge says, it realized that DK Railings was never going to catch up, so it offered to convert the existing debt to long-term debt with a fixed amount payment each month for the old debt, and a 50% deposit on new orders with the full balance being paid within 30 days. Bear Ridge says DK Railings agreed to these terms, but wanted to do a reconciliation of the entire account.

[31] The parties’ bookkeepers exchanged various documents, but the parties never reached an agreement on an account reconciliation. At one point, a certified professional accountant sent a letter to Bear Ridge with a proposed account reconciliation based in part on a comparison between the prices charged by Bear Ridge and those charged by DekSmart. This letter caused a heated argument between the parties. The accountant withdrew his letter, but the business relationship between the parties was irreparably damaged. Words were exchanged and angry correspondence was sent by Bear Ridge. These proceedings followed.

IV. ANAYSIS

A. Is this Claim a Claim for Liquidated Damages?

[32] A pleading that a specific amount is due and owing does not necessarily mean the plaintiff is making a liquidated claim. On a challenge to the validity of a

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garnishing order, the court must look behind the plaintiff's quantification and determine the true nature of the claim. When the amount to which the plaintiff will be entitled can be determined by simple arithmetic, it is said to be liquidated. But when the amount to be recovered depends on the circumstances of the case and must be assessed based on what is reasonable or just, then the claim is unliquidated. Put another way, if the true nature of the claim is an action for damages at large, it is not a liquidated claim, even if the plaintiff puts a precise number on the damages they are claiming. *Dhaliwal v. Bonterra Resources Inc*., 2019 BCCA 303, at paras. 33–37.

[33] Other questions that might be asked include, but are not limited to:

> [38] …
>
> 1. Is [the amount claimed] ascertainable by calculation or by referring to a fixed scale of charges?
>
> 2. Can the calculation be made by reference to the agreement between the parties itself, or, at least, implied by the agreement?
>
> 3. Was the price or method of calculation of the price agreed upon by the parties?
>
> 4. Has the defendant obliged him/herself to pay a specific sum of money? and
>
> 5. Was a reasonable estimated cost established by the parties?
>
> …

[*Dhaliwal*, at para. 38]

[34] In my view, the claim as alleged in this case is a claim for liquidated damages. While there was no written contract or fixed price list, the plaintiff alleges that the defendant approved the prices on each invoice. The plaintiff further alleges that all of the invoices were issued in accordance with the contract. Lastly, the plaintiff alleges that the unpaid invoices are all due and payable according to the contract. The total amount claimed by the plaintiff can be calculated with simple arithmetic using the amounts invoiced and the payments received.

[35] It may be necessary for the trial judge to hear evidence of the ordering and invoicing process to determine whether Bear Ridge, in fact, approved the prices on the invoices. However, the claim does not depend upon an assessment of the value

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of the goods supplied. Rather, the claim is based on the prices that DK Railings signed for and Bear Ridge invoiced and recorded in the statement of account.

[36] This case is not like *Dhaliwal,* where the defendant's obligation to pay was conditional on a further agreement between the parties. Nor is it like *Ocean Floors Ltd. v. Crocan Construction Limited*, 2010 BCSC 409, where the claim was based on an estimate rather than an agreement on price.

[37] Bear Ridge argues that the NOCC misstates the terms of the contract. It argues that, prior to October 2023, the agreement was in effect a revolving line of credit that now requires a demand to be enforceable. Bear Ridge also argues that the invoices were based on the wrong pricing, inflated pricing or commercially unreasonable pricing.

[38] In my view, these are arguments on the merits of the claim, and not whether the claim is a claim to liquidated damages.

[39] While the Court must look behind the plaintiff's characterization to determine the true nature of the claim, it does not adjudicate the merits of the claim. That the defendant disputes the amount owing does not mean the claim is a claim to an unliquidated sum. Put another way, a claim to a liquidated sum based on unpaid invoices does not become a claim to general damages to be assessed simply because the defendant disputes the pricing on the invoices.

[40] I am satisfied that the claim is a claim to a liquidated sum.

B. Did Bear Ridge Fail to Take Account of Just Discounts?

[41] An applicant for a garnishing order must make "all just discounts". This requires the plaintiff to recognize liquidated claims by the defendant by way of set-off or counterclaim which, if ultimately accepted at trial, would establish that the amount claimed or some part of it is due and owing by the plaintiff to the defendant: *Flintstone Concrete v. Peace River et al.,* 2003 BCSC 1137, at paras. 51, 67 and 92(B)(ii).

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[42] A defendant who challenges a garnishing order on the basis the plaintiff failed to make just discounts must show that the set-off or counterclaim is a liquidated claim: *Ocean Floors,* at para. 30.

[43] DK Railings argues that Bear Ridge ought to have made a number of just discounts based on the letter from the accountant mentioned above, which outlined various amounts that were disputed by DK Railings, including:

a) Issues with specific invoices totalling $17,274.41;

b) An issue with the finance charge invoices totalling $51,981.33; and

c) Issues with overcharging for materials totalling $332,553.46.

[44] More specifically, DK Railings argues that Bear Ridge ought not to have included the financing charges because the interest rate charged was contrary to the *Interest Act,* R.S.C. 1985, c. I-15. Section 4 of the *Act* requires that, where an agreement makes interest payable at a rate for a period of less than a year, it must state an equivalent annual rate. The invoices at issue in this case state that "Overdue Invoices may be subject to financing charges of 2% per month (24% per annum)". DK Railings argues that the 2% financing charges compounded monthly, meaning that the effective annual rate of interest was 26.82%, and not 24% as stated on the invoices. As a result, DK Railings argues, s. 5 of the *Act* limits the allowable interest rate to 5% per year.

[45] In my view, the disputes over pricing and interest charges are substantive defences to the claim by Bear Ridge, and not set-offs or liquidated counterclaims that must be accounted for as "just discounts" on an application for a garnishing order.

[46] An example of a set-off or liquidated counterclaim would be if Bear Ridge agreed to provide a refund or a credit towards future orders, or if DK Railings provided installation services for which Bear Ridge agreed to pay.

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[47] The letter from the chartered accountant on which DK Railings relies as evidence of "just discounts" was disputed by Bear Ridge and withdrawn by the accountant. There is no evidence that the parties agreed any of the amounts identified by the accountant were to be deducted from the amount owing to Bear Ridge.

[48] DK Railings may have an argument that the damages awarded to Bear Ridge should be reduced based on DekSmart pricing or reasonable pricing in the industry. It also has an argument that the contractual interest that may be claimed by Bear Ridge is limited to 5% per annum. However, these are defences to the total amount claimed, and not liquidated discounts that must be recognised by Bear Ridge when applying for a garnishing order before judgment.

[49] I am satisfied that Bear Ridge did not fail to take account of any necessary just discounts.

C. Did Bear Ridge Fail to Disclose Material Facts?

[50] As stated, a garnishing order will be set aside if the applicant failed to disclose material facts. A material fact is a fact that may have affected the outcome of the application for a garnishing order: *Politeknik,* at para. 33, citing *Evans v. Umbrella Capital LLC,* 2004 BCCA 149, at para. 33.

[51] The required disclosure for a garnishing order may be narrower than would be required for a without notice injunction. An applicant for a garnishing order must disclose information which might influence the registrar on the prescribed statutory criteria in s. 3 of the *COEA* for a garnishing order before judgement: *Environmental Packaging Technologies, Ltd. v. Rudjuk,* 2012 BCCA 342, at para. 32.

[52] The decision of the Court of Appeal in *Politeknik* provides an instructive example of a failure to disclose material facts. The NOCC in that case defined a parent company and its subsidiary collectively as "Apex", and then alleged that "Apex" entered into the agreement at issue. The plaintiff obtained a garnishing order against the subsidiary. The Court of Appeal found that the pleading was misleading

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because only the parent company entered into agreements with the plaintiff. Further, the Court found that the plaintiff failed to disclose the material fact that the agreement had been amended to remove all references to the subsidiary. Had this information been disclosed, the Court held, the registrar may well not have issued the garnishing order against the subsidiary because the facts did not support a claim against the subsidiary (paras. 33–37).

[53] DK Railings argues that Bear Ridge failed to disclose the following material facts on its applications for the garnishing orders:

a) There was no written agreement;

b) Payment on the invoices prior to October 2023 was “due on receipt”;

c) Bear Ridge did not enforce the requirement of due on receipt, but instead allowed sporadic lump sum payments and a revolving line of credit;

d) Bear Ridge did not make a formal demand for full payment of the revolving line of credit; and

e) DK Railings disputed the pricing on the invoices and the financing charges.

[54] DK Railings argues that these facts were material because, if properly disclosed, they could have changed the characterization of the cause of action from a straight forward claim on outstanding invoices to a more complex contractual dispute with no agreed upon pricing mechanism.

[55] While I agree that Bear Ridge did not disclose these matters, I do not agree that it breached the duty to disclose material facts.

[56] Although the NOCC provides minimal particulars, it is not misleading. The evidence that, prior to October 2023, the invoices said “due on receipt”, and not “50% deposit”, does not alter the nature or substance of the claim. The change in payment terms would not affect the outcome of the garnishing order applications. On

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either set of terms, the claim was a claim to a liquidated sum that was due and owing after just discounts.

[57] DK Railings' argument that the parties varied the contract and entered into a revolving line of credit is, in my view, a legal argument, and not a material fact.

[58] In assessing compliance with s. 3 of the *COEA*, the registrar does not weigh evidence, find facts or decide issues of law. The registrar does not adjudicate the merits of the claim, except to confirm that there is evidence of a debt that is justly due and owing. If the claim is weak, the remedy available to the defendant is to apply under R. 9-6 (summary judgement) or 9-7 (summary trial) of the *SCCR* to have the claim dismissed.

[59] Had Bear Ridge provided the registrar with copies of the pre- and post-October 2023 invoices showing the change in payment terms and evidence of sporadic lump sum payments, it would likely have also provided the registrar with copies of all of the purchase requests, sales orders, trailer forms and invoices and other evidence that could be used to prove a debt due and owing, and no line of credit. Had all of the documents and evidence to which I was referred on this lengthy chambers application been provided to me as registrar, I cannot say I might have refused the application for a garnishing order.

[60] Likewise, I cannot conclude that the disputes over pricing and financing charges might have altered the outcome of the application. These are disputed issues to be decided on all of the evidence, not material facts to be disclosed to the registrar. The facts relied on by DK Railings may give rise to defences, but they do not make the claim an unliquidated claim and they are not just discounts. The issues may be more complex than the simple contract alleged in the NOCC, but complexity is not a reason to refuse a garnishing order.

[61] Bear Ridge was not required to disclose the letter from the chartered accountant setting out various issues with the invoices. The letter was withdrawn

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and marked “Void” by the accountant before Bear Ridge applied for the garnishing orders. There was no agreement to reduce the amount owing based on the letter.

[62] For these reasons, I would not set aside the garnishing order on the basis of material non-disclosure.

D. Is it Just to Release All or Part of the Garnishment?

[63] As stated, DK Railings applies under s. 5 of the *COEA,* which, in subsection (2), authorizes the court to release all or part of the garnishment if it would be “just in all of the circumstances”. The types of circumstances contemplated by s. 5(2) include those where the garnishment creates an undue hardship, or where the garnishing order is an abuse of process or unnecessary: *Politeknik,* at para. 26.

[64] The factors to consider include: the merits of the case, the existence or potential for undue hardship arising out of the garnishment, and whether a garnishing order is necessary: *Dhaliwal,* at para. 88.

[65] An applicant who applies for relief from garnishment need not establish exceptional circumstances to succeed: *Min-En Laboratories Ltd. v. Westley Mines Ltd*. (1983), 57 B.C.L.R. 259 at 261 (C.A.).

[66] DK Railings argues that the garnishing orders are an abuse of process because they were sought by Bear Ridge to harm DK Railings’ business.

[67] There is evidence of a heated argument and some statements by Bear Ridge’s owner escalating the dispute with a suggestion of self-help by Bear Ridge.

[68] After he received the letter from the accountant, Mr. Olsvik went to the DK Railings’ office to confront Dax and Kaid Olafson. He deposes that the Olafson brothers told him that DK Railings would “not pay Bear Ridge one dime”. Dax Olafson deposes that Mr. Olsvik said he would “make it [his] life’s work to bury [their] company”.

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[69] Mr. Olsvik acknowledges that he contacted various contractors and asked them to pay any funds owing to DK Railings into the trust account of Bear Ridge's lawyer.

[70] Mr. Olsvik also acknowledges that he wrote an email to Kaid Olafson in which Mr. Olsvik said Bear Ridge would take legal action and he would personally "do everything I possibly can to put you out of business", and that he would "get [the money owing] one way or the other".

[71] On the other hand, Mr. Olsvik denies writing an email entitled "BEWARE OF DK RAILINGS!!" that disparaged the owners of DK Railings and alleged that "they have rung up significant balances with their suppliers and clearly do not intend to pay them." Mr. Olsvik deposes that he had nothing to do with this email and never saw it until he received a copy from Bear Ridge's lawyer.

[72] Mr. Olsvik's statements about putting DK Railings out of business were highly inappropriate, even in the context of a heated business dispute. However, I am not persuaded that Bear Ridge applied for the garnishing orders with the intent of putting DK Railings out of business. Whatever the level of acrimony between the parties, Bear Ridge has a legitimate claim to a substantial amount of money from DK Railings. I am satisfied that it applied for the garnishing orders for the proper purpose of ensuring that funds are available to secure its claim, and not for the improper purpose of forcing DK Railings out of business as an act of retribution.

[73] Mr. Olsvik's request that the contractors pay funds they owed to DK Railings into the trust account of Bear Ridge's lawyer was also highly inappropriate. However, the request did not come from Bear Ridge's lawyer himself, and did not purport to have any legal force. The contractors were free to ignore the requests, which, I am told, they did.

[74] The "BEWARE OF DK RAILINGS!!" email was potentially defamatory. However, there is no evidence before me connecting the email with the garnishing orders. DK Railings' remedy if it has reason to believe someone associated with

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Bear Ridge sent the email is to issue a counterclaim or commence an action for defamation. An unproven counterclaim for defamation would not be grounds to set aside the garnishing orders in the main action.

[75] DK Railings also argues that the claim on which the garnishing orders are based is weak, relying on the submissions summarized above.

[76] I agree that the claim to financing charges based on 2% interest compounded monthly is weak. In my view, DK Railings has a strong defence against the claim of contractual interest, or at least a strong argument that Bear Ridge must amend the claim to limit the contractual interest to 5% per annum.

[77] However, on the basis of the current evidence, I cannot agree that the claim to unpaid invoices for railing supplies is weak. I have been shown documentary evidence that DK Railings signed for the supplies at the prices quoted by Bear Ridge. In my view, DK Railings faces an uphill battle to establish that the invoices were based on the wrong pricing, inflated pricing or commercially unreasonable pricing.

[78] DK Railings also faces an uphill battle, in my view, to establish that the parties entered into a revolving line of credit that now requires a demand to be enforceable. It may not be necessary for DK Railings to prove that separate consideration was given for a line of credit. However, it must still prove the existence of the alleged line of credit on a balance of probabilities. I was not shown any evidence, documentary or otherwise, of any agreement on the terms asserted by DK Railings.

[79] In my view, Bear Ridge currently has the stronger case on the merits, with the notable exception of the financing charges.

[80] DK Railings further argues that the garnishing orders are causing and will cause undue hardship. Mr. Olafson deposes that the funds paid into court were withdrawn from the company’s operating account, and that the garnishing orders are interfering with its ability to service debt, payroll and other supplier obligations.

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[81] DK Railings argues that its financial statements show a business model with significant profits, but significant ongoing expenses as well. It argues that it requires access to all of its available cash to continue operating at current levels.

[82] Conversely, DK Railings argues that there is no risk Bear Ridge will face a "dry judgment" without the garnishing orders. While its current assets are limited by current obligations, DK Railings argues, it has sufficient funds and assets available if Bear Ridge proves some or all of its claim, and there is no risk of insolvency in this case.

[83] Bear Ridge argues, correctly in my view, that there is a real risk of a dry judgment. The evidence shows that DK Railings has fewer capital assets than the amount claimed. The business runs on a tight margin, and revenues are trending lower. If history is any indication of its ability to pay a judgment, the record shows that DK Railings consistently had difficulty paying for the supplies it ordered from Bear Ridge.

[84] Considering all of the relevant factors, I am not persuaded that it is in the interests of justice to release DK Railings from the whole of the garnishment. I would, however, reduce the garnishment by the amount of the claimed contractual interest. My understanding is that the finance charge invoices total $51,981.33. I would reduce the garnishment by that amount pursuant to s. 5(2) of the *COEA*.

[85] As the amount paid into court is less than the reduced amount of the garnishment, there will be no order at this time that funds be paid out to DK Railings.

IV. CONCLUSION

[86] The garnishing orders are reduced to $399,372.50.

[87] The application by DK Railings is otherwise dismissed.

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[88] As it was the substantially successful party, Bear Ridge is entitled to costs of the application and the associated short leave application.

"The Honourable Justice Elwood"

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