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The case of *Schwarzinger et al. v. Bramwell* et al. did not proceed to trial.

The following reasons for judgment only deal with an interim order, not a final order with respect to the claim.

This case was resolved on terms that remain confidential, with a dismissal order being entered by consent of all of the parties.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schwarzinger v. Bramwell,*
2011 BCSC 304

Date: 20110314
Docket: S100583
Registry: Vancouver

Between:

Karl Schwarzinger and Tag Properties SA

Plaintiffs

And

**Geoff Bramwell aka Geoffrey John Simon Bramwell,
John Bramwell aka Jonathon A. Bramwell, Kevin Fleming,
Nica Projects Ltd., formerly known as Nicaragua Developments Ltd., and
Lighthouse Enterprises Ltd., formerly known as Brammy Bros. Properties Ltd.**

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiffs:	R. Fleming
Counsel for the Defendants, Geoff Bramwell, John Bramwell, Nica Projects Ltd. and Lighthouse Enterprises Ltd.:	H. D. Edinger/S. Ramdin
Counsel for the Defendant, Kevin Fleming:	R. Watts/E. Butt
Place and Date of Hearing:	Vancouver, B.C. January 6 and 7, 2011
Place and Date of Judgment:	Vancouver, B.C. March 14, 2011

Introduction

[1] The plaintiffs Karl Schwarzinger, an American citizen, and Tag Properties SA, a Nicaraguan company that he controls, seek an order striking out the statement of defence filed by the defendants, Geoff Bramwell (also known as Geoffrey John Simon Bramwell), John Bramwell, (also known as Jonathon A. Bramwell), Nica Projects Ltd., (formerly known as Nicaragua Developments Ltd.) ("Nica"), and Lighthouse Enterprises Ltd., (formerly known as Brammy Bros. Properties Ltd.) ("Lighthouse") (collectively, the "Bramwell defendants") pursuant to Rule 22-7(2)(d) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 (the "*Rules*").

[2] The plaintiffs also seek an order pronouncing judgment against the Bramwell defendants pursuant to Rule 22-7(2)(d). Further, the plaintiffs seek an order pursuant to Rule 22-7(5)(g) and (6) that they be allowed to continue in these proceedings against the Bramwell defendants as if no statement of defence had been filed as a result of their failure to comply with orders of this Court.

[3] The plaintiffs contend that there have been numerous breaches of the requirements under the *Rules* and the court orders granted in this proceeding. Many of these breaches have been admitted by the Bramwell defendants. They defend this application on the basis that the gravity of the order sought is not proportional to the seriousness of their defaults. They also submit that they are prepared to remedy their breaches.

[4] There are also allegations against the defendant Kevin Fleming in this proceeding, however, the plaintiffs seek no relief against him on this application. His counsel appeared on this application but did not participate or take any position.

Nature of the Proceedings

[5] The plaintiffs' claim is for damages arising from breach of contract, deceit, fraud, and fraudulent and/or negligent misrepresentations in relation to land that the Bramwell defendants were selling on the Pacific coast of Nicaragua.

[6] Geoff Bramwell and John Bramwell are the two individuals involved (along with Mr. Fleming) in the development of these lands. John Bramwell is the sole shareholder, director, and officer of Lighthouse. Geoff Bramwell is the sole shareholder, director, and officer of Nica. Another company, Brammy Bros. Painting and Restoration Ltd. ("Brammy Bros."), is the wholly owned subsidiary of Lighthouse. Brammy Bros. is a commercial exterior painting company owned by John and Geoff Bramwell.

[7] It appears that the Bramwell defendants and Mr. Fleming were once business partners in relation to the development of the lands. They severed their business relationship in spring 2006.

[8] The plaintiffs contend that they paid the defendants in excess of US$260,000 to purchase certain Nicaraguan lots, but have received nothing in return. Mr. Schwarzinger had dealings with the defendants from October 2005 to December 2008, and entered into three separate transactions to purchase the lots.

[9] While it is not the role of the Court on this application to decide the merits of the plaintiffs' allegations, a summary of the allegations is necessary to understand the level of disclosure that was required of the Bramwell defendants in this action. Such a review is also helpful in understanding the basis upon which the numerous court orders were granted and why the plaintiffs contend that breaches of those court orders dictate the remedy sought.

[10] Further, as discussed below, four judges of this Court have now granted or confirmed the granting of a Mareva injunction against the Bramwell defendants. Accordingly, it is worth bearing in mind that the plaintiffs would have invariably satisfied this Court that they have a strong *prima facie* case or good arguable case in respect of the relief sought: *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (S.C.), as recently approved by the Court of Appeal in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at paras. 17, 28 - 29, 44 and 54.

[11] The three transactions between the parties are summarized by Mr. Schwarzinger as follows:

(a) Isla Mariana

[12] Mr. Schwarzinger was first introduced to the Bramwell defendants at a time when they were selling undeveloped lots in Nicaragua in a development called Isla Mariana. In November 2005, Mr. Schwarzinger agreed to buy two lots in Isla Mariana from Geoff Bramwell personally for a total of US$165,000. Ultimately, he paid a total of US$170,597 to the Bramwell defendants or their agents on account of the Isla Mariana lots.

[13] As part of these sale transactions, Mr. Schwarzinger says that he repeatedly and specifically sought and obtained assurances from the Bramwell defendants on two points: firstly, that the land in question was the equivalent of fee simple with clear title; and, secondly, that title would be guaranteed by way of a title insurance policy from First American Title Insurance ("First American").

[14] The transaction was scheduled to close on December 20, 2005. It appears that Mr. Schwarzinger believed that the transaction had closed. While he did not receive any confirmation of the closing, he assumed that there was simply a delay in reporting on the clear title and title insurance. It was only later, on March 31, 2006, that Geoff Bramwell admitted to him that the transaction had not closed because the Bramwell defendants did not have fee simple title to the lots. He continued to assure Mr. Schwarzinger that they were working on delivering clear title and title insurance, and that completion was imminent. In the meantime, they asked for and received further monies from Mr. Schwarzinger towards a tax bill, presumably relating to the lots.

[15] It was only much later, in March 2007 that Mr. Schwarzinger learned from Mr. Fleming that the Bramwell defendants never had clear title to the Isla Mariana lots that were to be sold to him. In addition, Mr. Fleming confirmed that there was no title insurance on the lots. The lack of title insurance was confirmed in March 2007

when First American advised that the Bramwell defendants had never applied for title insurance in respect of the lots.

[16] Nothing was ever built at Isla Mariana. However, in December 2006, the Bramwell defendants delivered documents to Mr. Schwarzinger which were purportedly "titles" to the lots. Mr. Schwarzinger says that these "titles" appear to be worthless.

[17] Mr. Schwarzinger points to certain evidence that indicates that the Bramwell defendants had, as early as February 2006, learned that all of their titles (including those which were to be sold to the plaintiffs) were questionable. However, the Bramwell defendants did not tell the plaintiffs that there was a problem with the titles.

(b) Tamarindo

[18] Before Mr. Schwarzinger became aware of the difficulties relating to Isla Mariana, the Bramwell defendants persuaded the plaintiffs to buy more land in Nicaragua. Mr. Schwarzinger agreed in May 2006 to purchase another lot from them. This lot was located in a second development, south of Isla Mariana, called "Tamarindo". The plaintiffs agreed to buy a lot in Tamarindo from the Bramwell defendants for US$86,625.

[19] Apparently, disclosure was made by the Bramwell defendants that they had only paid 60% of the purchase price for the lot and that there was a balance owing on a mortgage held by the vendor. For this reason, the parties agreed that the Bramwell defendants would hold US$82,295 of the purchase price in trust until title insurance was granted. Before the plaintiffs paid the deposit of US$4,330, they were assured by Geoff Bramwell that the Bramwell defendants were only waiting on one document before title insurance would be granted.

[20] The Bramwell defendants admitted in February 2007 that they knew as early as February 2006 that their title to Tamarindo was defective. The Bramwell defendants admitted in December 2008 that they had never fully paid for Tamarindo.

First American did not have a title insurance policy or commitment to the Tamarindo lot in the spring of 2006.

[21] There also appears to be some confusion about who was selling this lot. Although Mr. Schwarzinger signed a contract to buy the Tamarindo lot from the Bramwell defendants, Lighthouse is represented in the contract as the owner of the lands. However, in other correspondence the Bramwell defendants state that Toucan Properties SA owns the lot. The Bramwell defendants later filed a disclosure statement in British Columbia which stated that no sales had been made and that the lands were owned by Colon Investments SA. Both of these last named companies appear to be controlled by the Bramwell defendants.

(c) Suenos

[22] In August 2006, before Mr. Schwarzinger became aware of the difficulties relating to Isla Mariana and Tamarindo, Geoff Bramwell advised him that the Bramwell defendants could not obtain title insurance on Tamarindo at that time. They also advised him that they had purchased land on the south tip of the island where both Isla Mariana and Tamarindo were located for a new development called "Suenos". Geoff Bramwell also told Mr. Schwarzinger that he had a commitment letter from First American which would form the basis of title insurance on Suenos.

[23] On the strength of these representations, Mr. Schwarzinger agreed to buy a lot in Suenos for US$90,000 in place of the Tamarindo lot. The terms of the purchase were that he would pay a further US$3,375 to the Bramwell defendants and release the US$82,295 cheque being held in trust on the Tamarindo purchase for the express purpose of building infrastructure at Suenos. The parties agreed that Mr. Schwarzinger would have a lot of his choice at Suenos. On Christmas day in December 2006, Mr. Schwarzinger chose a lot at the south point of the island on which all three developments were located.

[24] In June 2007 and December 2008, the Bramwell defendants admitted that they had never purchased any of Suenos, or alternatively, had not fully paid for Suenos. Finally, they admitted that they had never owned the lot in Suenos that

Mr. Schwarzinger chose as his lot in December 2006. Geoff Bramwell admitted subsequently that the Bramwell defendants did not purchase Suenos until 2008.

[25] First American confirmed in March 2007 that there had never been any policy on any lands owned by the Bramwell defendants except a portion of the Isla Mariana development that did not include the plaintiffs' lots. It appears that First American did give some consideration to insuring Tamarindo later in 2007. Nevertheless, in April 2008, First American informed Mr. Schwarzinger that it had never received a request to insure any property in Suenos.

[26] No infrastructure of any kind was ever built at Suenos, and no titles or title insurance were ever delivered.

[27] The Bramwell defendants dispute the allegations of the plaintiffs and assert that they have a meritorious defence. They contend that the plaintiffs got exactly what they bargained for. In particular, they submit that:

(a) Mr. Schwarzinger received a "Nicaraguan equivalent estate in fee simple" to the Isla Mariana lots and that, in accordance with the contracts, these lots are "worthy" of title insurance from First American or Stewart Title Insurance such that Mr. Schwarzinger can, as agreed, request title insurance at his expense;

(b) Mr. Schwarzinger would have received title to the Tamarindo lot (which would also have been "worthy" of title insurance from First American at Mr. Schwarzinger's expense) but title transfer was delayed to late 2008 due to a change in government policy; and

(c) although they were unable to secure title to the Suenos land, the plaintiffs remain entitled to their rights under the Tamarindo offer which they have refused to accept.

[28] The plaintiffs seek various relief against the Bramwell defendants, including damages for deceit and breach of contract and judgment in the amount of

US$260,405. The relief sought also includes declarations of resulting or constructive trust and equitable tracing of the funds paid by the plaintiffs to the Bramwell defendants.

Procedural History

[29] This proceeding was commenced on January 23, 2010.

[30] The plaintiffs immediately thereafter sought an *ex parte* Mareva injunction, which was granted by Mr. Justice Pitfield on January 26, 2010 (the "Pitfield Order"). In typical fashion, the Mareva injunction provided that the defendants (including the Bramwell defendants) were enjoined from selling, mortgaging, pledging, transferring, assigning, diminishing or otherwise disposing of their world-wide assets pending the trial of the action. These assets specifically included three bank accounts in British Columbia, land in Vancouver (owned by Lighthouse), land on Mayne Island (owned by John Bramwell and his wife), and, finally, properties in Nicaragua. This injunction also applied to entities held indirectly by the Bramwell defendants. The order specifically did not prohibit the Bramwell defendants from spending a reasonable amount for their ordinary living expenses and for legal advice.

[31] Brammy Bros. is not involved in the development of the Nicaragua properties, and it is not a party to these proceedings. It is an operating company that engages in contracting work in the Lower Mainland. I am advised that is an important source of the livelihood of Geoff and John Bramwell and their families. Given the reach of the terms of the Pitfield Order, the assets and operations of Brammy Bros. were affected. As a result, there were immediate difficulties in conducting its normal day-to-day business operations and the Bramwell individuals were also negatively affected.

[32] On February 9, 2010, the Bramwell defendants applied to set aside or vary the Pitfield Order. The parties subsequently agreed to a compromise of the Pitfield Order. On application by the Bramwell defendants on March 9, 2010, and with the consent of the plaintiffs, Mr. Justice Walker granted an order (the "Walker Order"). The Walker Order essentially confirmed the Pitfield Order except that the injunction

no longer applied to various bank accounts in the name of Brammy Bros., Nica, Lighthouse, and Geoff and John Bramwell. In return, however, the Bramwell defendants were to provide weekly reporting of all bank accounts. That reporting was to include copies of general ledgers, bank statements, cheques and wire transfers and documentation, including invoices, for any transactions over $500. Further, Geoff and John Bramwell were limited to spending $4,000 per month from their accounts for ordinary living expenses and reasonable sums for legal advice and representation. Nica's spending was limited to $1,500 per month beginning in April 2010. Nica, Lighthouse and Brammy Bros. were restricted to spending in the ordinary course of their businesses.

[33] The Walker Order also provided that the plaintiffs were at liberty to apply for more comprehensive disclosure and/or the imposition of more restrictive terms if it appeared that the Bramwell defendants were either engaged in transactions not in the ordinary course of their business or if they were not complying with the terms of the order.

[34] A statement of defence was filed by the Bramwell defendants on March 3, 2010. In addition to the matters noted above, they deny that this Court has jurisdiction over them in respect of the claims made against them in this action.

[35] On April 20, 2010, the Bramwell defendants applied to this Court for an order that it decline jurisdiction in favour of the courts of Nicaragua on the basis of *forum non conveniens*. That application was heard by Madam Justice Gray on July 30, 2010. The Bramwell defendants did not seek an adjournment or stay of this application or suggest that this prevented the Court from dealing with the application on its merits. Rather, they submit, and I agree, that it is one factor to be considered by the Court in the exercise of its discretion. In any event, the reasons of Gray J. were released just recently and the application was dismissed: 2011 BCSC 283.

[36] Despite the fact that the outcome of the application to decline jurisdiction remained outstanding until recently, the litigation continued with full vigour and without prejudice to the jurisdiction issue.

[37] The reporting requirements under the Walker Order have proved, in retrospect, to be a continuing source of conflict between the parties. The plaintiffs say that the Bramwell defendants made no real effort to comply with their obligations under the Pitfield Order and the Walker Order in the period leading up to September 2010. In particular, the plaintiffs allege that the Bramwell defendants had failed to produce supporting documentation for cash withdrawals, failed to produce supporting documentation for cheques issued and direct debits, failed to produce supporting documentation for deposits, failed to produce any documentation for a land sale in Nicaragua which was said to be in breach of the Mareva injunction and failed to provide general ledgers, or provided inadequate general ledgers, for subsequent reporting periods. The plaintiffs say that they brought these discrepancies to the attention of the Bramwell defendants on June 8, July 7, and July 12, 2010, and in their submissions to this Court on July 30, 2010 before Gray J. However, the plaintiffs submit that the Bramwell defendants have made no effort to address them.

[38] The Bramwell defendants say in reply that they have made efforts to comply with the disclosure requirements to the best of their ability. They admit that there is truth to the allegation that the reporting has not been perfectly timely or accurate. However, they explain that these issues are a result of their busy schedules and their decision to run their business without the benefit of a full time bookkeeper.

[39] In the meantime, difficulties also emerged regarding document disclosure. A demand for discovery of documents was served in the usual fashion and the Bramwell defendants provided their list of documents. The plaintiffs considered the disclosure to be inadequate and applied to the Court for an order that a supplementary list of documents be provided relating to various categories of documentation.

[40] On June 18, 2010, the Bramwell defendants consented to an order by Master Donaldson (the “Donaldson Order”) that the Bramwell defendants produce all documents related to:

(a) when, where and how the funds paid to the Bramwell defendants by the plaintiffs were spent;

(b) the Bramwell defendants' relationship with First American;

(c) the Bramwell defendants' relationship with International Living (a magazine which was promoting the developments);

(d) the Bramwell defendants' relationship with Kevin Fleming;

(e) the financing of the three developments in issue, known as "Isla Mariana", "Tamarindo Beach", and "Suenos", including all banking and other financial records from March 2005 to the present date;

(f) when and how each piece of property that was offered to the plaintiffs was purchased by the Bramwell defendants; and

(g) the knowledge of the Bramwell defendants as to the state of title to the lots which were under contract to the plaintiffs, including legal opinions given as to the state of title.

[41] The plaintiffs say that these documents are key to their ability to prove their case. Based on the allegations in their statement of claim, I agree that they are relevant. At the very least, the Bramwell defendants also appear to concede that these documents are relevant to the issues given their consent to the Donaldson Order.

[42] A supplemental list of documents was produced by the Bramwell defendants on June 28, 2010. Counsel for the plaintiffs wrote to counsel for the Bramwell defendants contending that the list failed to include certain documents to be provided and was inadequate in relation to others. He asked for compliance failing which he was seeking instructions to apply to strike the defence.

[43] The plaintiffs subsequently became aware that the Bramwell defendants had sold property in Nicaragua, apparently in violation of both the Pitfield and Walker

Orders. This sale was disclosed in the general ledger of Nica on April 19, 2010, which records a sale of land in the amount of $57,820, although the Bramwell defendants said that the sale was actually concluded before the Pitfield Order was granted.

[44] As a result, on September 2, 2010 the plaintiffs served an application to strike the statement of defence of the Bramwell defendants and to obtain judgment in default. The contention was that there had been non-compliance with the Pitfield, Walker and Donaldson Orders. In response, the Bramwell defendants delivered 245 pages of new supporting documents, presumably in compliance with those orders. Further, on September 14, 2010, Geoff Bramwell also deposed that the Bramwell defendants had produced all documentation required by the Donaldson Order, with the exception of certain TD bank statements in the name of Nica which had been requested and were to be provided "when they are available".

[45] The application was heard by Mr. Justice Silverman on October 1, 2010. On that application, and as reflected by the subsequent order, the Bramwell defendants admitted that they were in default of and had "failed to fully comply" with the Walker and Donaldson Orders. Specifically, they admitted that they had failed to produce cheques from Brammy Bros., documentation for transactions of Brammy Bros. over $500, and accurate general ledgers, which was all required by the Walker Order. They also admitted that, in violation of the Mareva injunction in the Walker Order, Brammy Bros. had sent money to Nicaragua that was not in the ordinary course of its business. Finally, they admitted that they had failed to produce all documents relating to the financing of the developments in issue, including all banking and other financial records from March 2005 to the present, as required by the Donaldson Order.

[46] On October 1, 2010, Mr. Justice Silverman ordered, with the consent of the Bramwell defendants, that the Bramwell defendants fully comply with their obligations under the Pitfield, Walker, and Donaldson orders (the "Silverman Order"). The Silverman Order specifically provides that "the Bramwell defendants are put on

notice that if further significant non-compliance is proven, this Court may impose more serious sanctions."

[47] In particular, Mr. Justice Silverman ordered that, by October 22, 2010, the Bramwell defendants were required to do the following:

(a) produce all documents relating to the financing of the three developments in issue, including all banking and other financial records from March 2005 to the present date;

(b) produce all documents related to their relationship with First American, or, in the alternative, provide a form of consent to counsel for the plaintiffs so that they could obtain these documents themselves;

(c) produce all documents related to when, where and how the funds paid to the Bramwell defendants by the plaintiffs were spent and each deliver to the plaintiffs an affidavit deposing to when, where and how these funds were spent;

(d) provide accurate and complete general ledgers for each reporting period to date, and each deliver to the plaintiffs an affidavit deposing that the general ledgers produced up to October 22, 2010 are complete and accurate.

[48] The admissions of default by the Bramwell defendants, as reflected by the Silverman Order, were made notwithstanding evidence then before the Court that the Bramwell defendants had already produced all of the documents in their possession or control, save for the Nica TD Bank statements. That evidence was contained in Geoff Bramwell's affidavit, which was sworn on September 14, 2010.

[49] As set out in the Silverman Order, there were other outstanding issues raised by the plaintiffs on the application which were not fully addressed by the Bramwell defendants. The Silverman Order therefore provided that the Bramwell defendants had until October 22, 2010 to "fully address the issues raised in [the application]".

The matter was adjourned to October 29, 2010. Significantly, the Silverman Order provided that:

> 5. When the Strike Out Application returns on October 29, 2010,
>
> (a) if the Plaintiffs demonstrate that the Bramwell Defendants are not in compliance with the Pitfield Order, the Walker Order, the Donaldson Order or this Order, this Court may impose more serious sanctions including striking the Bramwell Defendants' Statement of Defence and granting judgment to the Plaintiffs against the Bramwell Defendants;

[50] The application returned to Court after October 29, 2010 when it was heard by Mr. Justice Sewell on November 12, 2010. On that date, the plaintiffs referred to new evidence that suggested that some of the reporting documents disclosed by the Bramwell defendants in response to the Walker Order were fabricated. Mr. Justice Sewell ordered, by consent, that the application to strike the defence be adjourned to January 6, 2011.

[51] In their September 2010 notice of application to strike the defence, the plaintiffs sought in the alternative an order that the full Mareva injunction (per the Pitfield Order) be re-imposed on the Bramwell defendants. After a delay of some months, many of the serious allegations of non-compliance raised before Silverman J. had not been addressed by the Bramwell defendants. In addition, further breaches of the Pitfield Order were raised by the plaintiffs. Accordingly, the plaintiffs applied to the Court and the original Mareva injunction per the Pitfield Order was granted by Mr. Justice Armstrong on December 23, 2010 (the "Armstrong Order").

[52] Much of the evidence advanced by the Bramwell defendants in response to this application was filed only days before the hearing and after the Armstrong Order.

[53] I am advised that the plaintiffs have filed a notice of trial setting the matter for trial for September 6, 2011 for nine days. Given the status of this proceeding, it is, in my view, very unlikely that the matter will be able to proceed at that time.

Alleged Deficiencies and Breaches of Court Orders

[54] The plaintiffs seek judgment against the Bramwell defendants based on non-compliance with the *Rules* and the Pitfield, Walker, Donaldson and Silverman Orders.

[55] Some background on the Bramwell defendants' response to this application is instructive. In their application response dated September 14, 2010, they stated that "[t]he Bramwell Defendants have complied with the Mareva Order, the Amended Mareva Order, and the Order of Master Donaldson". However, this clearly did not prevent them from consenting to a further order of this Court confirming the required disclosure pursuant to the Silverman Order dated October 1, 2010. In their written submissions, they now state that they have "substantially" or "meaningfully" complied with the various orders. This theme of partial compliance was carried forward in their counsel's oral submissions on this application. As discussed in more detail below, it was only during oral submissions that any offer was made to remedy what they admitted were deficiencies in their compliance with the orders.

[56] There are a myriad of complaints by the plaintiffs concerning the disclosure of documents and the level of compliance with the various orders. For the purposes of this application, the plaintiffs rely on the following specific allegations in support of the relief sought:

(a) disclosure deficiencies arising from the Walker Order;

(b) production of false accounting documents;

(c) failure to disclose documents (including those relating to First American and banking records); and

(d) contempt of the Mareva injunction.

I will deal with the allegations separately below.

(a) Disclosure Deficiencies Arising from the Walker Order

[57] Silverman J. gave the Bramwell defendants until October 22, 2010 to remedy the reporting deficiencies previously identified in ordering that they produce "accurate and complete" general ledgers for each reporting period.

[58] The plaintiffs say that the Bramwell defendants did not comply with the Silverman Order. They also say that in addition to new, unsupported deficiencies identified in the new general ledgers, as below, there remained $364,000 of unsupported transactions. Further, they say that the payroll reports disclosed are incomplete, and these represent a further $63,000 of unsupported transactions.

[59] Even the Bramwell defendants would concede that the general ledgers that they produced are of poor quality and that their compliance with the reporting requirements has been imperfect. The ledgers do not properly track the reporting periods. The ledgers were also missing days and were produced late, or, in some cases, not produced at all. It is apparent to me that the extensive reporting requirements have been matched, for the most part, by extensive efforts to comply with them. I have no doubt that the process of assembling the necessary material required a great deal of effort for a small company like Brammy Bros.

[60] Since the date of the Silverman Order, the Bramwell defendants have produced new general ledgers for Nica, Lighthouse, and Brammy Bros. Those new general ledgers encompass part of the entire reporting period since January 26, 2010, which was the date of the Pitfield Order. That reporting has been voluminous; the materials in the application record, which includes these reports, comprise eight binders of documents. The plaintiffs say that the new general ledgers produced as a result of the Silverman Order are themselves incomplete and internally inconsistent.

[61] Nevertheless, the plaintiffs have continued to doggedly pursue complete disclosure. Given the transactions discussed in more detail below, this vigilance appears to be warranted. The plaintiffs have consistently advised on gaps in the reporting and have requested that those gaps be addressed.

[62] I am unable on this application to determine based on the evidence whether or not the Bramwell defendants have complied with the requirement to provide "accurate" general ledgers. What is apparent, however, is that they have not produced the general ledger for Lighthouse from January 28 to February 28, 2010. Of more importance, these new general ledgers disclose new transactions that were not previously disclosed in previous general ledgers covering the same period. The total value of these new transactions is approximately $256,000. Approximately $159,000 of those transactions (from September 2010) is without supporting documentation.

[63] The Bramwell defendants have not responded to these allegations. This is despite the fact that the application was served approximately four months before the hearing. Moreover, these deficiencies were identified in Ms. Kaiser's affidavit filed two months before the hearing.

[64] I have concluded that the plaintiffs have shown that the Bramwell defendants have not complied with the disclosure requirements in the Walker and Silverman Orders. They have not provided details and supporting documentation on the transactions identified in Ms. Kaiser's affidavit. Significantly, these allegations have been outstanding since September 2010. The Bramwell defendants failed to address them either before or at the time of this application. This was the case despite a two month delay between the date of Ms. Kaiser's affidavit and the hearing.

(b) Production of False Accounting Documents

[65] The plaintiffs contend that the Bramwell defendants have committed a fraud on the Court by producing false accounting records in response to the Walker and Silverman Orders.

[66] Roy Wong is a licensed private investigator hired by the plaintiffs. He attended six of the projects identified on invoices from subcontractors of Brammy Bros. that the Bramwell defendants disclosed as part of their obligations under the court orders. Mr. Wong says that three of the projects identified do not exist. Accordingly, the plaintiffs contend that the invoices for these projects were falsified

and essentially represent a means to extract monies from Brammy Bros. in violation of the Mareva injunction.

[67] John Bramwell addresses these allegations in a recently filed affidavit sworn on December 30, 2010. There, he deposed that there were clerical errors on the part of the subcontractors and Brammy Bros. As a result, revised and "corrected" invoices were produced.

[68] This matter certainly raises suspicions. If these were errors, one would have expected a more fulsome explanation than what was offered. Such an explanation could have included, for example, affidavits from the subcontractors themselves.

[69] The plaintiffs assert that this is an attempt to further exceed the spending limits in the Walker Order, and that it casts a cloud over the credibility of the defendants. Despite having concerns about the adequacy of the evidence submitted by the Bramwell defendants on this point, I am not able to conclude that there has been any fraud on their part for the purposes of this application.

(c) Failure to Disclose Documents

[70] The plaintiffs contend that the Bramwell defendants have failed to make meaningful discovery of documents pursuant to the Donaldson Order. That order provided that the Bramwell defendants produce all documents related to:

(a) when, where and how the funds paid to them by the plaintiffs were spent;

(b) their relationship with First American;

(c) their relationship with International Living;

(d) their relationship with Kevin Fleming;

(e) the financing of the three developments in issue, known as "Isla Mariana", "Tamarindo Beach", and "Suenos", including all banking and other financial records from March 2005 to the present date;

(f) when and how each piece of property that was offered to the plaintiffs was purchased by them; and

(g) their knowledge as to the state of title to the lots which were under contract to the plaintiffs, including legal opinions given as to the state of title.

[71] The failure to provide the items in (a), (b) and (e) was noted in the Silverman Order. There, the Court again ordered that the items be provided on or before October 22, 2010.

[72] These documents include banking and financial records and details on the flow of funds paid by the plaintiffs to the Bramwell defendants which follow from the allegations of fraud and the trust and tracing remedies sought. They also include documents relating to First American, which relate to the allegations concerning the title insurance, a matter which was clearly discussed between the parties and addressed in the contract documentation. As such, the document production on these issues relate to the ability of the plaintiffs to establish their claim in this action.

[73] Despite the various orders, the Bramwell defendants have produced banking records for Lighthouse for only four days, from September 4, 2006 to September 8, 2006. These records were historical statements apparently printed from the internet.

[74] As indicated above, Geoff Bramwell swore under oath in September 2010 that all documents had been produced, except for certain TD bank statements of Nica that had been requested. Geoff Bramwell stated that they would be available "when they are available". The Bramwell Defendants repeated this in the amended application response dated January 4, 2011.

[75] In their written submissions, they stated that it was not clear that production beyond the four days was required since those records did not appear to pertain to the financing of the developments. Further, they questioned the production of all records from 2005 on the basis of relevancy. They also repeated that a request had been made for Nica's TD bank statements, with no further information on when they

might be “available”. These seemed to be new arguments that weren’t raised before either Master Donaldson or Silverman J. After all this, the Bramwell Defendants made the somewhat incredible submission that the bank statements from 2005 can be produced “immediately”, although more time may be needed for the older accounts. In my view, it is clear that the Bramwell defendants have had access to the statements requested and have not produced them.

[76] It is not clear why these records have not been produced since the initial demand for documents was made in early 2010. Nor is it clear why the records were not produced by October 22, 2010. In my view, both orders were clear in their terms as to the production of banking records. The deadline in the Silverman Order was equally clear. If there was any question concerning the interpretation of the orders, particularly in the face of the repeated demands from the plaintiffs that the records be produced, they should have applied to the Court for clarification. They did not do so. I am inevitably drawn to the conclusion that the demand for documents and two court orders were ignored by the Bramwell defendants in relation to the banking records.

[77] The same can be said of the financing documents which were to be produced. Geoff Bramwell deposed that “John and I have spent over $700,000 and taken in over $650,000 from investors to get the cornerstone title in a solid condition.” Counsel for the Bramwell defendants stated in argument that there was no traditional bank financing but that monies from other purchasers were used for funding. He states that there is some ambiguity in the Silverman Order as to whether any documents relating to such financing have to be produced.

[78] These documents have not been produced, and there is no legitimate explanation for the failure to do so. Again, in my view, there is no ambiguity in the Silverman Order. It does not provide that the financing documents only had to relate to traditional bank financing. If this was the case, the order would have stated so. Since the Bramwell defendants consented to this order, I can only conclude that they knew what these documents were and that they did not involve traditional bank

financing. Even if there was any ambiguity, the Bramwell defendants should have applied to clarify the matter before the deadline of October 22, 2010. Based on my conclusion as to the interpretation of the Silverman Order, counsel for the Bramwell defendants concedes that there is "partial compliance". This follows from their written submissions which generally refer to "substantial" and "meaningful" compliance.

[79] As will be discussed in more detail below, the approach of the Bramwell defendants appears to be that they are the sole interpreters of court orders and they and they alone may decide whether these court orders are to be obeyed or not.

[80] In addition, the Bramwell defendants have not produced any contemporaneous banking records showing where the plaintiffs' money was sent and how those monies were subsequently spent, in accordance with the Donaldson and Silverman Orders. As noted above, the Bramwell defendants clearly have access to these documents. Instead of producing them, they have produced a number of records that they claim relate to work conducted on the projects. The Bramwell defendants depose that the plaintiffs' money funded approximately 60% of these total costs. However, the plaintiffs say that, based on this ratio, it would appear that they were, or nearly were, the only buyers on the projects. This is in marked contrast to advice given by the Bramwell defendants at the time that almost all lots were sold, which would have meant that the plaintiffs were only one buyer of a group of 50. Mr. Schwarzinger deposed that he visited the properties on three occasions and observed that work had not been conducted.

[81] The Bramwell defendants say that many of the expenses were paid with the credit cards of Geoff and John Bramwell. However, those credit card statements have not been produced.

[82] The final complaint relates to documents from First American. The plaintiffs say that these documents will conclusively demonstrate what the Bramwell defendants' state of knowledge was regarding the property that they 'sold' to the plaintiffs at the time that they 'sold' it. Geoff Bramwell gave evidence that they had

spent $150,000 over a period of 15 months on a “full time research endeavour” with a team of people with the intention of collecting evidence on the chain of title of the properties in issue. The plaintiffs say that contemporaneous emails demonstrate that there are over 60 pages of these documents along with at least two legal opinions. Despite this, the Bramwell defendants have produced only a few documents relating to this issue. It has not been explained why they do not have what can only conceivably be substantial documentation on this issue.

[83] In reply, they deny that they have any further documents. Rather, they say that they have unsuccessfully tried to obtain documents from First American. It appears that there were communications between the Bramwell defendants and First American in an effort to do so in October 2010. The end result was a communication from First American’s counsel they were not under any duty to release these documents. Left unexplained is why these requests were made so late after the Donaldson Order in June 2010. Rather, I was advised that the “next step” was to apply for letters rogatory to be enforced in Florida where First American is located. Counsel’s submission was to the effect that the Bramwell defendants had a choice as to which approach they adopted; they could have obtained the documents themselves or provided a consent.

[84] This explanation flies in the face of the Silverman Order which provided that the documents were to be produced by October 22, 2010 or, alternatively, the Bramwell defendants were to provide the consent by October 8, 2010. Neither has been produced or provided, despite repeated requests from counsel for the plaintiffs. Contrary to the assertion of the Bramwell defendants, First American has not refused production of documents and the plaintiffs may succeed in obtaining them by way of that consent.

[85] My conclusion is that the Bramwell defendants have improperly refused production of banking records, financing records, records relating to the plaintiffs’ payments, and documents and the consent relating to First American. This refusal is contrary to the express terms of the Donaldson and Silverman Orders.

[86] Counsel for the Bramwell defendants concedes that there has been partial compliance with the orders and suggests that any deficiencies can be remedied quickly.

(d) Contempt of the Mareva Injunction

[87] The plaintiffs contend that since the Silverman Order, the Bramwell defendants have continued to violate the Pitfield, Walker, and Silverman Orders. They make the following allegations:

(i) Brammy Bros. Pays $13,000 to Geoff Bramwell for a 'Shareholders Loan'

[88] The Walker Order prohibits payments by Brammy Bros. other than in the ordinary course of its business. In this case, the amount owing to Geoff Bramwell was recorded on the general ledger. The plaintiffs' principal complaint is that there is no evidence as to whether or not this payment by Brammy Bros. to Geoff Bramwell of $13,000 complies with the Walker Order. In these circumstances, the onus lies on the Bramwell defendants to prove that any payments made by Brammy Bros. were in the ordinary course of its business.

[89] Geoff Bramwell deposes that these payments were in the ordinary course of business**.** This statement, without more, is not particularly informative. It is nothing more than the conclusion on the ultimate issue. Accordingly, the Court is left to speculate.

[90] The general ledger discloses that this was a pre-existing debt, and it would not be unusual for a shareholder to obtain repayment of such amounts in the ordinary course of business. In these circumstances, for the purposes of this application, I am not prepared to find that this is a direct violation of the Walker Order.

(ii) Nica Writes Cheques to Simon Lewis Totalling $20,000

[91] Nica provided cheques to Simon Lewis totalling $20,000. These consisted of 40 post-dated cheques, each for $500. Nica submits that the payment obligation

arises from an oral agreement providing for a return of Simon Lewis' deposit. No supporting documentation has been produced. Since the cheques presumably do not exceed the limit of $1,500 per month, they do not violate the Walker Order.

[92] These payments are not documented to a degree sufficient to permit a determination of the true nature of the arrangement. They are questionable, and arguably not within the "spirit" of the Walker Order. However, I do not find that these actions give rise to any finding that there has been a violation of the Walker Order.

(iii) Brammy Bros. Pays Christine Bramwell $10,000 for 'Storage'

[93] This payment by Brammy Bros. to Christine Bramwell of $10,000 on October 21, 2010 was not disclosed in the general ledger. Christine Bramwell is Geoff Bramwell's wife. As such, it has attracted, and justifiably deserves, special scrutiny in the circumstances.

[94] The Bramwell defendants say that the amount was paid to Ms. Bramwell as a one-time bill for storage services rendered over 21 months from January 2009 to present. The only other evidence is an invoice for that amount**.**

[95] In my view, the evidence from the Bramwell defendants on this point is wholly unsatisfactory. Where is the affidavit from Christine Bramwell or Geoff or John Bramwell on behalf of Brammy Bros. attesting to the agreement to pay storage fees? Where are the documents relating to that agreement? Why were storage fees not paid commencing in January 2009 if there is a valid agreement? What are the terms of this agreement? Why is the amount of the invoice such an unusually round number? These questions remain unanswered.

[96] Counsel for the Bramwell defendants conceded that the evidence on this issue was not sufficient. In the circumstances, I conclude that this was not a valid debt that was paid in the ordinary course of Brammy Bros.' business. This payment was simply a mechanism to extract money from Brammy Bros. in violation of the Walker Order.

(iv) Brammy Bros. Sends Money to Nicaragua

[97] The most serious allegations concern various payments made in direct violation of the Mareva injunction.

[98] On August 17, 2010, Brammy Bros. sent US$10,000 to Nicaragua in violation of the Pitfield and Walker Orders. The Bramwell defendants admitted to Silverman J. that Brammy Bros. had sent these funds to Nicaragua. They also admitted that this transfer was a violation of the Walker Order as not being in the ordinary course of business.

[99] At the time of this admission, the only evidence before the Court concerned this single wire transfer. In fact, Brammy Bros. had wired a further US$10,000 to Nicaragua on September 23, 2010. That matter was not disclosed to the plaintiffs at the time or to Silverman J. on October 1, 2010.

[100] Counsel for the Bramwell defendants wrote to the plaintiffs' counsel on October 8, 2010 to confirm that this second payment had been made. Counsel also wrote to advise that the projects in Nicaragua were ongoing and that further funds had to be advanced by Brammy Bros. for the purpose of covering certain development expenses. As noted above, Brammy Bros. does not do business in Nicaragua. As such, they asked for permission from the plaintiffs to proceed, as opposed to seeking a variation of the Walker Order. The plaintiffs refused.

[101] Despite this exchange, the Bramwell defendants violated the Walker Order for a third time by wiring a further US$10,000 to Nicaragua on October 26, 2010. Brammy Bros. then violated the Walker Order for a fourth time by withdrawing US$10,000 in cash on November 19, 2010. That withdrawal was supported only by a handwritten note stating that the money was "for Nicaragua trip".

[102] The response of the Bramwell defendants to these allegations is nothing short of extraordinary.

[103] Firstly, they refer to these payments as having "not yet been approved by the court". It appears that they consider themselves able to act as they wish and, if required, seek court approval *ex post facto*. Secondly, they say that these payments are within the "spirit" of the Walker Order since they determined that these development expenditures in Nicaragua were in fact for the benefit of the plaintiffs. The fact that the plaintiff disagreed with this proposition does not seem to have deterred them. Thirdly, they say that even if the payments were in violation of the order, there was no dissipation of assets since the plaintiffs' claim is "substantially secured in any event". This last contention seems to arise from the terms of the Walker Order which does not secure assets, in the usual sense of that word, but protects dispositions of assets. What this argument fails to recognize is that the assets have been removed from the jurisdiction of this Court and, if the plaintiffs are successful in this action, these payments may have prejudiced their collection efforts here.

[104] The lack of regard that the Bramwell defendants have displayed in relation to their obligations under the Walker Order has been consistent and alarming. Given the explanations that are advanced on this application, I can only conclude that they have no intention of obeying orders of this Court. As stated above, they did not come to the Court at the start of this application seeking the indulgence of this Court and with an offer in hand to remedy the situation. It was only during the submissions of their counsel that there was any such offer. This is discussed below.

Analysis

[105] Rule 22-7 provides that the Court may strike out a response to civil claim (formerly a statement of defence) and pronounce judgment if the defendant refuses or neglects to comply with a direction of the Court or to produce documents, and may order the proceeding to continue as if no response had been filed.

[106] Counsel for the parties are in agreement that the applicable authorities are found in seven decisions of our Court of Appeal: *Needld v. Pezamerica Resources Corp.*, [1985] B.C.J. No. 2356 (C.A.); *Muscroft v. Eurocopter S.A.*, 2003 BCCA 229;

MacGougan v. Barraclough, 2004 BCCA 651; *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 ("*Chief Mountain*"); *McIsaac v. Healthy Body Services Inc*., 2007 BCCA 580; *Dhillon v. Pannu*, 2008 BCCA 514, and *612797 BC Ltd. v. Ferguson*, 2009 BCCA 404 ("*Ferguson*").

[107] There is no doubt that the relief sought in this case involves an exercise of discretion. Nevertheless, that discretion must be exercised in a principled manner. The overarching principle requires that the Court consider whether, in all of the circumstances, justice requires that the defence be struck. The authorities referenced above discuss factors that are to be considered by the Court in the exercise of its discretion.

[108] From these authorities, I take the relevant factors to be as follows.

(1) Draconian measure

[109] The Court must start from the proposition that it will only be in extreme cases that such relief is granted.

[110] In *Muscroft* at para. 4, Southin J.A. stated that striking the defence "is a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence". This principle is enshrined in Rule 1-3(1) which provides that **"**[t]he object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding <u>on its merits"</u> [emphasis added].

[111] I am also cognizant of the fact that the allegations in this action involve fraud and fraudulent misrepresentation. Accordingly, the nature of this claim is more serious than most other claims. In this case, the Court must be especially concerned about the consequences to a party whose pleading may be struck.

[112] The Bramwell defendants submit that the breaches by Brammy Bros. should not attract the same degree of rebuke by the Court since it is not a party. With respect, I disagree. The Court in *Ferguson* observed at para. 19 that the fact that an

order was interlocutory "did not mean it was anything less than an order." Likewise, because Brammy Bros. has been affected by the terms of the Mareva injunction, the orders deserve the same respect and compliance irrespective of the fact that it is not a party. In addition, this is not a case where Brammy Bros. is a person entirely independent from the parties to the action. Here, the Bramwell individuals own and control Brammy Bros. There can be no doubt that Brammy Bros has acted through those individuals who had knowledge of the Mareva injunction and the means to ensure its compliance.

(2) Second Chance

[113] Our courts have generally recognized that parties are entitled to a "second chance" before such relief is granted. In *Neeld*, Mr. Justice Taggart stated:

> [28] As I understand it, the usual practice in these matters is that when a motion such as that presented by the plaintiffs comes on for hearing, unless there are unusual circumstances apparent to the Chambers judge, an order is made directing the person subject to examination for discovery to attend at a stipulated time and place. It is usual in the course of such an application for the judge to [indicate] that that will be the last opportunity to avoid such an examination for discovery. If an appearance pursuant to that order is not made, then counsel for the party adverse in interest is generally at liberty to proceed to seek an order for the action against the other party to proceed as if no appearance had been entered and no defence filed. So, the process is really a two stage process.

[114] The usual practice, adopted in *Neeld*, is that a party is first put on notice by the court that an order to strike will likely follow unless there is compliance. Notice is effectively given by dismissing a first application to strike, making certain orders for compliance and, then, if there is still lack of compliance, possibly granting the second application to strike.

[115] The decisions of this Court have generally adopted this approach. The claim was struck in *MacIsaac* only after numerous efforts had been made to arrange for discoveries and two orders had been made directing that the examination take place. In *Dhillon,* the Court ordered that a claim be struck following two orders requiring compliance with the rules of civil procedure. In *Ferguson*, following a consent order requiring payment, the defence was struck after compliance did not

occur even after two further court applications provided the party an opportunity to do so.

[116] Here, the Bramwell defendants were in default of the Walker Order as a result of failing to comply with their disclosure obligations and the Mareva injunction. They were also in default of the Donaldson Order as a result of not producing documents that were clearly relevant to the issues in this action. This non-compliance was raised before the Court in October. A further order, the Silverman Order, was made in an attempt to secure compliance with the previous orders. The Bramwell defendants were expressly put on notice in the Silverman Order that failure to comply could result in more serious consequences. Now, instead of complying with these three orders of this Court, the Bramwell defendants have merely produced fresh examples of their apparent contempt for the authority of this Court.

[117] In terms of the production of documents, the Bramwell defendants have now received three opportunities to comply (the demand, and the Donaldson and Silverman Orders). With respect to the Mareva injunction, the Bramwell defendants were given two chances to comply after the initial order (the Walker and Silverman Orders). Further, this application has been outstanding since September 2010, was adjourned to November 2010, and was then heard in early January 2011. There was ample time during that period for the Bramwell defendants to fully comply. Nevertheless, they did not.

(3) Proportionality

[118] The punishment must fit the crime. This notion was addressed in *Chief Mountain* where the chambers judge struck the claim when the plaintiffs failed to abide by two orders that they deliver particulars to their claim by a certain date. Partial particulars were provided and the plaintiff sought further time without success. Madam Justice Saunders found that the striking of the claim was not justified in the circumstances:

> [24] Over-arching both of these complaints is their submission that dismissal of the action was disproportionate in the circumstances, and that the judge erred in failing to consider lesser sanctions. Those circumstances

> include their partial compliance with the order and the fact that full compliance required obtaining information from the respondents who sought the particulars, that is, that the desired information was already in the hands of the Nisga'a Nation.
>
> [25] There is no doubt that the actions of the plaintiffs appeared to sorely test the patience of the case management judge and he appeared to draw from some previous knowledge unknown to us in saying, "I see nothing but an attempt by the plaintiffs to obfuscate and deflect the purpose of this pre-trial process ...". Whether or not the Nisga'a Nation already possessed the information required to be provided in the particulars, the respondents appeared of the view that the motion they sought to bring under Rule 19(24) could only be brought on the basis of pleadings. Thus the requirement for particulars. The judge hearing that application agreed with the respondents, and the plaintiffs did not seek to appeal the order. They therefore were required to respond to the entire demand, even if only, as Mr. Justice Pitfield observed on September 30, 2005, it was to say that they did not know the detail of the particular ordered to be provided.
>
> [26] Nevertheless, the chambers judge was required to consider proportion in weighing the degree of the delict with the degree of sanction imposed. In my view, his reasons do not reveal the required consideration. Indeed, the chambers judge stated that "no reply [to the order of Mr. Justice Cullen] has been provided by the plaintiffs" and "[the plaintiffs have] not complied with my order, and are therefore in contempt of it." However, both of these statements fail to reflect the partial compliance with the orders in evidence before him and do not address the request for a short period of time within which to completely respond.

[119] The principles outlined in *Chief Mountain* were later considered in *McIsaac.* In that case, the defence was struck when the representative of the defendant failed to attend an examination for discovery. There had been repeated attempts to schedule that examination, including an attempt directed by a court order. There had also been two previous applications to strike the defence. Saunders J.A. stated:

> [17] With respect, I do not agree that the chambers judge failed to take into consideration or gave insufficient weight to relevant considerations. He did not, in my view, err, as alleged, in considering whether there was a lawful excuse for the non-attendance. The presence or the absence of a lawful excuse is a sound starting point for consideration of the application and is a relevant consideration. Had the judge stopped there and not gone on to consider all the circumstances including the degree of non-compliance and the viability of a different order, there may have been a basis upon which to interfere with the order made. However, in my view, one cannot say the chambers judge ignored his obligation to weigh the seriousness of the events. The judge's review of the circumstances of the extensive efforts of Mr. Mclsaac to complete Mr. Kichuk's examination for discovery, the two prior attendances in court when directions were provided and Madam Justice

> Beames ordered the setting of the examination in the face of an application to strike the statement of defence, the warnings advanced by counsel for Mr. Mclsaac that non-attendance would result in an application to strike the statement of defence, and the numerous occasions on which fresh examination dates were sought, demonstrates a thorough consideration by the chambers judge of the serious and continuing defaults on the part of the company's representative. Then, in the portion of the reasons for judgment replicated above, the chambers judge addressed the level of the company's non-compliance.
>
> [18] As I see this case, and notwithstanding the vigorous submissions to the contrary, the circumstances canvassed by the judge support his view that the company was given ample warning of the jeopardy in which its defence was placed. Given the multiple defaults, there was a sufficient basis for the order made such that the order was an exercise of discretion with which we cannot interfere.
>
> [19] Nor do I consider that the reasons for judgment demonstrate a failure to consider a lesser sanction or the question of proportionality as contended. Here the appellant relied upon *Chief Mountain*, wherein I said with reference to *Homer Estate*:
>
> > Striking a claim (or defence) is a blunt tool, to be used sparingly.
>
> [20] Again, in my respectful view, the reasons for judgment demonstrate the chambers judge's awareness of the bluntness of the tool he was asked to implement, the serious consequences of the order he was making, and a measurement of those consequences against the degree of deficiency on the part of the company. And as to the issue of proportionality and the possibility of other sanctions, the reference to the earlier order for costs made by Madam Justice Beames against the company, adequately demonstrates, in my view, a consideration of alternatives to the order he was persuaded to issue.

[120] Proportionality was also considered in *Dhillon,* where the claim was struck by the chambers judge for failure to comply with two previous court orders concerning document production. The decision was upheld on appeal. Mr. Justice Tysoe stated:

> [35] There is nothing in the reasons of the chambers judge to indicate that he misdirected himself. It is not manifest from his reasons that the judge gave no weight, or insufficient weight, to relevant considerations. He was aware of the availability of lesser sanctions because he had imposed a lesser sanction when the dismissal application first came before him on November 6, 2007. It may have amounted to an injustice had the chambers judge dismissed the action on November 6, but I am not persuaded that it was an injustice to dismiss the action of a plaintiff who failed to comply with two successive orders, especially when the chambers judge clearly warned the plaintiff on November 6 of the prospect of the dismissal of his action if he failed to comply with the order made on that day.

[121] In *Ferguson*, para. 20, the Court considered that the chambers judge had properly addressed the issue of proportionality in striking the defence in the circumstances. In that case, a consent order had been granted in a possession action which provided that the defendants paid certain expenses relating to the property. The payments were made for four months and then stopped, despite warnings from the plaintiff that they would apply to dismiss the defence. A later application to dismiss the defence was heard but dismissed. On the next application to dismiss the defence, this Court found that the plaintiffs had no lawful excuse to continue to breach the order. Accordingly, Ross J. gave them another opportunity to comply, which did not occur. Accordingly, the defence was struck.

[122] Based on these authorities and the history of these proceedings, including the fact that the Silverman Order gave ample warning of this very consequence, I consider that an order to strike the defence is not unreasonable in this case.

(4) Alternate Remedy

[123] A consideration of proportionality inevitably leads to the question of whether a lesser remedy would cure the default and inspire confidence that the Court's orders will be respected in the future.

[124] In *Ferguson,* the Court of Appeal considered and rejected the argument that an alternate remedy was appropriate in these circumstances:

> [20] I agree with Ross J.'s conclusion that an order of contempt or costs against the Fergusons would not have been adequate or appropriate. Each would have left the parties mired in the circumstances they have been in for many months....

[125] The Bramwell defendants do not suggest that an order of contempt (and possibly a fine) or an order for payment of costs is an appropriate remedy in these circumstances. In fact, given that the assets are tied up under the Mareva injunction, it is hard to conceive that payment of any amounts would achieve anything.

[126] Rather, in the midst of their submissions, they suggested that the Court should grant another order that provides that the Bramwell defendants shall:

a) within one week, cause Brammy Bros. to pay into Court the amount of $44,000 (this amount relates to the monies forwarded to parties in Nicaragua);

b) within one week, produce all Lighthouse and Nica online bank records;

c) request certain TD Bank records for Nica and produce them upon receipt;

d) request certain TD Bank records for the entity in Nicaragua who obtained the monies to finance the various projects;

e) within one week, produce or alternatively, request all of John Bramwell's credit card statements relating to expenses on the projects;

f) deliver within a reasonable period of time all documents concerning expenses incurred by the Bramwell defendants in relation to the projects; and

g) provide a release form relating to First American.

[127] One can see that the proposed remedy closely parallels my findings in relation to certain breaches of the court order, except for the general ledger transactions which still require documentation and any possible cure relating to monies paid to Christine Bramwell from Brammy Bros.

[128] While it is certainly open to the Court to make such an order, the end to which that order would be made is unclear. There are already numerous court orders in this proceeding. The Bramwell defendants have consistently and blatantly failed to comply with many of the provisions in those orders. Similar to the situation in *Ferguson*, the course of conduct of the Bramwell defendants gives me little confidence that they will comply in the future. If that is the case, the parties would be left in the same position that they presently find themselves.

[129] Both counsel spent considerable time addressing this recent offer of redress, particularly as to the payment from Brammy Bros of $44,000.

[130] Counsel for the plaintiffs points out that the payment from Brammy Bros. does not accomplish anything in terms of remedying the prejudice potentially suffered by the plaintiffs, or in terms of purging the contempt. The income and assets of Brammy Bros. are already protected in the sense that there are restrictions on the income and assets imposed under the Mareva injunctions. It appears that the only way of raising such funds outside of its normal dealings would be to draw down on a line of credit which is secured against the Franklin Street property, which is owned by Lighthouse, a party who is also subject to restrictions under the injunctions. Therefore, the effect of making such an order simply moves the money from the equity in the Franklin Street property into Court. As counsel for the plaintiffs points out, the only true remedy would be a repatriation of the monies from Nicaragua back to British Columbia. This is not proposed by the Bramwell defendants. At best, they propose that the Court protect the equity in the properties by prohibiting further advances under operating loans secured under the mortgages against those properties. Again, this makes little sense since the equity in those properties has already been theoretically protected under the Mareva injunction which prohibits expenditures except in the ordinary course of business or within certain limits.

[131] The Bramwell defendants suggest, somewhat incredulously, that these payments by Brammy Bros. have likely increased the value of the Bramwell defendants' assets in Nicaragua. This would no doubt be on the theory that if the plaintiffs are successful, they will be able to pursue assets in that jurisdiction. Counsel for the Bramwell defendants also contends in his submissions that the plaintiffs are "substantially secured" by the real property owned by Lighthouse and John Bramwell and that none of the payments from Brammy Bros. have affected the value of the "security" provided by the assets in British Columbia. Needless to say, counsel does not use the word "security" in the usual sense in relation to property. Again, in the ordinary course the ability of the plaintiffs to access these assets would depend on their success in the action and upon which party may be found liable, either directly or indirectly, and based on trust and tracing remedies that may be granted. I can only characterize these submissions as the "so what?" argument.

[132] On this point, each of the parties embarked upon an analysis of what assets were tied up by the Mareva injunction in British Columbia. There are divergent views. The Bramwell defendants assert British Columbia real estate values in excess of $600,000, Nicaraguan assets in excess of US$675,000 and various other assets of Lighthouse and the Bramwell individuals. The plaintiffs calculate the British Columbia real estate values to be approximately $435,000, with the important caveat that the secured debt on the Franklin Street address may be increased beyond the current balances and decrease the equity in that property. I am not convinced that this exercise is useful in these circumstances since no direct security (for example, in the form of a mortgage on the British Columbia real property) is in place. The Bramwell defendants have not suggested that the Court should impose such a remedy in these circumstances in lieu of striking the defence.

[133] The re-imposition of the Mareva injunction under the Armstrong Order of December 23, 2010 has, in part, addressed some concerns by reintroducing the more rigorous restrictions initially imposed under the Pitfield Order. Whether the Bramwell defendants are presently obeying that order is not in evidence. However, I have serious reservations that the Bramwell defendants will regard this order as making a difference to their general approach and disregard for the court orders granted in these proceedings. I was advised that they intend on making an application to amend the restrictions in the Armstrong Order, but am not aware that they have done so.

[134] It is true that there is an alternate remedy to address what has occurred. More orders for compliance could always be granted. However, I have concluded that this alternate remedy is not reasonable. It would effectively change nothing in terms of what has already been ordered. In respect of the money transferred, the offer of payment is not sufficient to address those breaches.

(5) Explanations for Default

[135] The Court must also consider the submissions of the offending party in terms of the explanation offered for the non-compliance. Some reasonable explanation

must be provided. In the words of Saunders J.A. in *McIsaac*, at para. 17, "[t]he presence or the absence of a lawful excuse is a sound starting point for consideration of the application and is a relevant consideration".

[136] In *Neeld*, medical evidence was tendered to explain non-attendance at a discovery. In *MacGougan*, certain disabilities suffered by the plaintiff were a possible explanation for non-compliance with the rules of civil procedure during the trial, and both resulted in the appeal court setting aside the striking of the pleading. In *McIsaac*, at para. 23, the Court noted that only a "flimsy" excuse was offered and that there was a lack of candour in advancing it since the reason for the non-compliance had changed over time. In *Dhillon*, there was no excuse proffered, only the hiring of a lawyer who requested an adjournment. Finally, in *Ferguson*, the Court noted at para. 19 that the party could have provided "clear and convincing evidence" of their inability to abide by the court order. Having not provided that evidence, the defence was struck.

[137] Further, a party who comes to the Court apologizing and providing reasons for their transgressions is more likely to be given another chance by the Court. To use a religious metaphor, confession must necessarily precede penance. A party who continues to deny their transgressions must necessarily raise in the Court's mind the question as to whether that party is truly reformed. If the breaches will only continue, effectively the Court has only delayed the inevitable further application to strike.

[138] I have already alluded to the approach taken by the Bramwell defendants on this application as evidenced by their submissions and the sworn testimony from the Bramwell individuals. Geoff Bramwell stated that there were no breaches of the court orders in relation to document production, save for the failure to produce the further Nica bank statements. When pressed in argument, the admission that there were breaches was forthcoming. However, there was no explanation offered with respect to why the banking documentation and First American consent had not been provided, beyond incredulous interpretations of the court orders. No explanation

was provided for the payment to Ms. Bramwell payment beyond the minimal, and inadequate, evidence of Geoff Bramwell.

[139] The payments from Brammy Bros. are the most egregious matter. Frankly, it is difficult to understand the sworn statement of Geoff Bramwell to the effect that the Bramwell defendants had complied with all court orders when, in fact, he was instrumental in the payments made by Brammy Bros. to Nicaragua. The explanation for the breach is essentially that they did not consider that they were bound to abide by the terms of the court orders. This is despite the fact that they knew that the court orders prohibited those payments and that the plaintiffs did not consent to those payments. The disregard that they exhibited in this regard is nothing short of breathtaking. Again, it was only during submissions of counsel that there was any acknowledgement that the Mareva injunctions had been breached and that the Bramwell defendants were prepared to offer some remedy (albeit inadequate in my view) to address that situation.

[140] Like the courts in *McIsaac*, I have reservations about the intention of the Bramwell defendants to defend this action on its merits. To this point in time, their actions have displayed nothing more than attempts to delay and hinder the attempts of the plaintiffs to advance this matter and protect certain assets pending a determination of the issues on the merits.

Conclusion

[141] Failure to comply with court orders, particularly after one or more warnings, is a serious matter. It can give rise to the striking of pleadings and the granting of judgment in default. Most of the cases considering the striking of pleadings arise where there has been a failure to comply with disclosure and other obligations in the proceedings, thereby impairing the other party's ability to prove its case. This is what has occurred in this proceeding. Further, protections sought and obtained under the Mareva injunctions in light of serious issues of fraud and misrepresentation have been ignored and possibly impaired.

[142] The attitude of the Bramwell defendants to court orders sought and obtained in these proceedings is troubling. In particular, I agree with the plaintiffs that they have flagrantly and repeatedly violated the Mareva injunctions of this Court. The Bramwell defendants have repeatedly been warned by the plaintiffs that they must comply. The Silverman Order unambiguously reinforces that warning.

[143] The Court must ensure that its own orders are obeyed unless there is a valid excuse. If there are breaches of court orders, there must be a meaningful remedy to the aggrieved party. In this case, the plaintiffs have been conducting hard fought litigation for over one year with little progress beyond partial disclosure of documents. Examinations for discovery have been delayed for this reason. They have sought the protection of the Court to preserve assets. Moreover, in the face of breaches of those orders, they have been back before the Court two times to seek relief per the Silverman and Armstrong Orders. They have also sought the enforcement by the Court of our rules of civil procedure when compliance was ignored, only to have the Donaldson Order ignored. When compliance was again ordered per the Silverman Order, it too was ignored. All of this has delayed the plaintiffs considerably. They have no doubt spent tens of thousands of dollars in legal fees in seeking relief.

[144] I am concerned that refusing the application at this time will simply send a message to these litigants, and litigants generally, that parties may disregard court orders as they wish. Confidence in the administration of justice by litigants and the general public is a valid consideration on this application. Respect for court orders is integral to maintaining the public's confidence in the administration of justice. The words of this Court in *R. v. Hume* (1966), 53 D.L.R. (2d) 453 at 458, 53 W.W.R. 406 are apposite:

> Obedience to the orders of the Court or its officers is necessary for the proper administration of justice in a dignified and orderly manner, and it is in the interest of every member of society that such orders should be obeyed and respected in order that the dignity of the Court may be maintained ...

There comes a time when the Court must say "enough".

[145] It is accordingly with some reluctance that I conclude that the only real remedy available in this case is to strike the defence of the Bramwell defendants. I so order. The plaintiffs are granted judgment against the Bramwell defendants with damages to be assessed. The plaintiffs are also granted their special costs of the action which, in my view, are justified in the circumstances.

"Fitzpatrick J."
Madam Justice Fitzpatrick