IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clex Solutions Ltd. v. Gust,*
2025 BCSC 1092

Date: 20250612
Docket: S215301
Registry: Vancouver

Between:

Clex Solutions Ltd.

Plaintiff

And

Nicholas Gust and Andrew Buckley

Defendants

And:

Nicholas Gust

Plaintiff by Counterclaim

And

Clex Solutions Ltd.

Defendant by Counterclaim

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:	B. Dorst
Counsel for Defendant, Nicholas Gust:	I. Ashley
Place and Dates of Trial:	Vancouver, B.C. October 10-13, 2023 February 2, 2024 September 26,2024 November 12 and 24, 2024
Place and Date of Judgment:	Vancouver, B.C. June 12, 2025

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I. Overview

[1] This case originates from a dispute over a bill issued in 2020 for $660.

[2] The parties at the center of this dispute are a corporation (the Plaintiff, Clex Solutions Ltd.) and two persons who performed services for the corporation (the Defendants Nicholas Gust and Andrew Buckley). The services related to a web-based software program that Clex was developing for students. Clex hired Mr. Buckley as a project manager and scrum master; he in turn subcontracted Mr. Gust to develop a website for Clex.

[3] The primary focus of this trial is an allegation that Mr. Gust sabotaged the Clex website after Clex failed to pay his account of $660. The Plaintiff seeks damages against Mr. Gust exceeding $300,000, for breach of contract, conversion, detinue, intentional interference with economic relations, breach of fiduciary duty, loss of opportunity, punitive damages, and slander. The Plaintiff seeks joint and several liability for all damages except punitive.

[4] Mr. Gust's counterclaim against Clex alleges that this action is an abuse of process and was brought in bad faith and for an improper purpose. He seeks damages for breach of contract in the amount of $660, as well as aggravated damages of $100,000. His claim for special costs was abandoned at the conclusion of this trial.

[5] As a separate issue, I am also tasked with assessing the damages for default judgment obtained against Mr. Buckley.

II. The Claim

[6] The Notice of Civil Claim was filed on May 28, 2021 ("NOCC"). It seeks redress for various acts of wrongdoing alleged against the Defendants.

[7] Mr. Buckley did not participate in the litigation, and the Plaintiff obtained default judgment against him on December 1, 2022. The outstanding issues involving Mr. Buckley are:

a) the amount of damages that Mr. Buckley should be ordered to pay the Plaintiff; and

b) whether Mr. Buckley and Mr. Gust should be held jointly and severally liable for damages awarded against the other party.

[8] The nature of the case advanced against Mr. Gust changed several times during the course of litigation. By the end of the trial, Clex had revived its claim for breach of contract against Mr. Gust, and abandoned its claim for intentional interference with contractual relations. Left for my determination are liability and quantum of damages for the following allegations of wrongdoing:

a) breach of contract;

b) conversion and detinue;

c) breach of fiduciary duty;

d) intentional interference with economic relations; and

e) libel.

[9] The above claims are interrelated and share the same factual foundation. As such, I will start with the findings of fact.

A. Agreed Facts

[10] The following is a summary of the salient facts as agreed to by Clex and Mr. Gust. These facts underlie all of the issues before me.

[11] During the period in question, the Plaintiff was in the business of creating a web-based software platform (clexstudy.com) to assist and improve student note taking and studying (the "Software" or “Project”). Mr. Osborne co-founded clexstudy.com and is also the authorized representative of Clex. Colin Liggett came up with the idea for the Software, but was bought out by Mr. Osborne, and is no longer involved with the company.

[12] Fiona Smulders is a naturopathic doctor and a college instructor. She is also Mr. Osborne's stepsister.

[13] The Plaintiff engaged Christopher Greenwood, who developed the initial version of the Software (the “Legacy Code”). Mr. Greenwood was unable to complete the Software.

[14] At all material times, the Plaintiff owned the Software and Legacy Code.

[15] The Plaintiff hired Mr. Buckley as a Project Manager and Scrum Master for the further development of the Software. As a Project Manager and/or Scrum Master, Mr. Buckley was responsible for the overall management of the Software development.

[16] While working on the Software development, Mr. Buckley's responsibilities included:

a) contracting web developers;

b) budgeting;

c) controlling access to Software;

d) documenting and instructing web developers on deliverables;

e) beta-testing and quality control to ensure that deliverables were functional;

f) preserving versions of the Software throughout development; and

g) managing Software development generally.

("Project Manager Responsibilities")

[17] Mr. Buckley owed a duty to the Plaintiff to exercise all reasonable care, skill, diligence, and competence as a Project Manager and/or a Scrum Master while fulfilling these responsibilities. Mr. Buckley was negligent in fulfilling the Project Manager Responsibilities.

[18] As part of his Project Manager Responsibilities, Mr. Buckley subcontracted Mr. Gust to perform web development services in connection with a web-based software development as it related to clexstudy.com (“Clex Software Development”). Mr. Gust has worked in the capacity of professional web development since 2016.

[19] While working on the Proof of Concept[1] and Clex Software Development, Mr. Gust was responsible for back-end web development, while John Gill was responsible for the front-end web development.

[20] While working on the Clex Software Development, Mr. Gust would: log in remotely to the web-based Amazon Web Services (“AWS”) server; deploy code to the server; and log into the server with an SSH Key with the name "nick".

[21] Mr. Gust provided Mr. Buckley with invoice no. 541 dated February 25, 2020 (the "February Invoice").

[22] While working on the CLEX Software Development, Mr. Gust also provided Mr. Buckley and the Plaintiff with invoice no. 542 dated March 6, 2020, for $660 (the "March Invoice").

[23] Mr. Gust stopped providing web developing services as it related to the Clex Software Development and demanded payment of the February Invoice and the March Invoice ("Work Stoppage"). At the time of the Work Stoppage, the Software Code and/or Legacy Code remained functional.

[24] The Plaintiff paid the February Invoice at the end of March.

[25] The March Invoice was never paid. This invoice related to services rendered by Mr. Gust to the Plaintiff for Clex Software Development.

[26] On several occasions, Mr. Gust demanded that the Plaintiff pay the March Invoice, but it was never paid.

[27] Clex arranged with the Boucher College (the "School") to test the Software for an Anatomy course that was scheduled to start on April 1, 2020 (the "Course") and would be taught by Dr. Smulders (the "Proof of Concept").

[28] The School authorized Dr. Smulders to upload the School's course notes (the “Notes") onto the Clex Software for the Proof of Concept.

[29] Dr. Smulders provided Clex with the Notes, which were uploaded onto the Clex Software platform for viewing on the Software. Clex paid Dr. Smulders for the time she spent on this.

[30] Sometime in 2020, the Software's site was re-directed to a Clex web page that read:

> Uh Oh!

> We didn't pay our web developers. The site will be offline until we pay them.
>
> (the “Uh Oh! Page”)

[31] Following the Work Stoppage, the Plaintiff and/or Mr. Buckley were at liberty to retain the services of another web developer as it related to the Clex Software Development.

[32] The Plaintiff retained the services of other web developers through David Shih, a technical project manager at Archive Digital.

[33] In lieu of John Gill testifying, Clex and Mr. Gust agreed to the following additional facts:

a) John Gill did not redirect the Clex web page to the Uh Oh! Page.

b) John Gill remains unpaid for front-end web development services that he provided to Clex.

[34] Before turning to the issues in dispute, I will address the manner in which I have resolved disputes in the evidence.

B. Credibility and Reliability

[35] There are four key disputed events. The first three events ground the claims in this litigation. Specifically, the Plaintiff alleges that Mr. Gust:

a) created a non-functional website;

b) disabled the Notes and re-directed the Clex website to the Uh-Oh Page; and

c) disabled the back end of the Clex website or otherwise sabotaged the Software.

[36] The fourth key event harkens back to April 2019, when an earlier fee dispute arose between Clex and Mr. Gust (the “April 2019 Incident”). Both parties argue that the April 2019 Incident provides similar fact evidence which is probative of the matter before me. In particular, the Plaintiff asserts that in April 2019, Mr. Gust disabled Clex’s access to their website in order to compel payment of his

fees. Mr. Gust argues that the April 2019 Incident provides evidence that Mr. Osborne is prone to making unsubstantiated allegations against Mr. Gust in order to avoid fulfilling his contractual obligations.

[37] Mr. Gust denies that he caused any issues with the website, or that he sabotaged the website in either 2019 or 2020.

[38] I have resolved conflicts in the evidence using established legal principles. I have accepted the evidence of a particular witness where it is uncontroverted. Where the evidence conflicts, I have made my findings of fact having regard to the credibility and reliability of the witnesses and their evidence.

[39] Credibility and reliability are related but distinct concepts. Reliability concerns the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the trustworthiness of their evidence, based on their veracity and sincerity, as well as the accuracy of the evidence provided: *Bradshaw v. Stenner,* 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd [2012] S.C.C.A. No. 392.

[40] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case – a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are recounting, but nevertheless be mistaken in their recollection*: R. v. H.C.,* 2009 ONCA 56, at para. 41.

[41] In *Gichuru v. Smith,* 2013 BCSC 895, at para. 129, aff'd 2014 BCCA 414, 2014 leave to appeal SCC ref'd 2014 CarswellBC 4023, the court noted that demeanour is a factor that a court can consider in assessing a witness' credibility. However, trial judges are cautioned against making credibility assessments based on demeanour alone: *R. v. N.S.,* 2012 SCC 72, at paras. 99–107, Abella J. dissenting; *L.C.T. v. R.K.*, 2017 BCCA 64, at para. 65. This is because the manner in which a witness testifies is a notoriously unreliable measure of credibility. A witness' physical health, personality, cultural and social upbringing, and comfort level with testifying in a courtroom setting, are but some of the things that may affect their demeanour, thereby making it difficult to interpret.

[42] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.), at p. 357 and *Bradshaw*, at para. 186. These factors include whether the witness: modified their testimony; their testimony is in harmony with independent evidence; and whether the testimony seems unreasonable, impossible, or unlikely.

[43] I have applied the above principles when assessing the evidence in this case.

[44] Mr. Osborne testified on behalf of the Plaintiff. I do not have significant concerns about Mr. Osborne's credibility as a witness. He was generally forthright in his evidence, and readily admitted the limits of his knowledge or memory. Nevertheless, Mr. Osborne did display a bias against Mr. Gust – there were parts of Mr. Osborne's testimony that indicated Mr. Osborne was actively attempting to lay blame on Mr. Gust for problems that were not of Mr. Gust's making.

[45] My biggest concern with Mr. Osborne is his reliability. I find much of Mr. Osborne's evidence unreliable, particularly regarding the terms of the agreement between Clex and Mr. Gust, and the functionality of the website. This is because Mr. Osborne did not have direct knowledge of many of the factual issues that are in dispute. Much of what Mr. Osborne attested to was based on information relayed to him by Mr. Buckley verbally or through emails. That information is inadmissible hearsay. Mr. Buckley did not attend the trial; nor did Mr. Gill, who is the only other person (besides Mr. Gust) who had personal knowledge of many of the events in question. While Dr. Smulders and Mr. Shih did testify at the trial on behalf of the Plaintiff, their knowledge is limited to narrow factual issues.

[46] I do not make any adverse inference against the Plaintiff for the failure to call Mr. Buckley as a witness. I accept that the Plaintiff has had difficulty locating Mr. Buckley, who, though having notice of these proceedings, did not participate in the litigation. Similarly, I do not fault any party for not calling Mr. Gill to testify – he was unable to attend for personal reasons and the parties mutually agreed to forego Mr. Gill's *viva voce* testimony in favour of some admissions. Nevertheless, Mr. Buckley's and Mr. Gill's absences leave gaps in the evidence which ultimately impact my findings.

[47] I have mixed views about the reliability of Mr. Gust's evidence and his credibility. Much of his evidence was corroborated by the emails put into evidence. Where his memory was faulty, he accepted that what he stated in his emails was truthful and accurate. He made many admissions against self interest, acknowledged the limits of his memory occasioned by the passage of time, and at times, appeared to be trying to present his evidence in a fair and balanced manner. However, Mr. Gust's credibility varied depending on the issues that he was testifying to. There are a few notable instances where I have concerns about his veracity, and did not find his evidence credible. I have addressed those concerns as they arise in these Reasons.

[48] I do not have any concerns about the credibility of Dr. Smulders. She answered the questions in an impartial and forthright manner, without embellishment. Despite being related to Mr. Osborne, Dr. Smulders did not show any bias towards one side or the other. Any concerns about the reliability of her evidence are addressed where they arise.

[49] Mr. Shih, who provided fact and opinion evidence, was also a credible witness. He was careful in his testimony, and did not veer outside the scope of his expertise or knowledge. He was non-defensive and did not exhibit any bias for or against any party. However, there were instances where I found his evidence unreliable. These are addressed elsewhere as they arise.

[50] I now turn to considering the breach of contract claim.

C. Breach of Contract

[51] The Plaintiff alleges that there was a contractual agreement between Clex and Mr. Gust that:

a) Mr. Gust would invoice and be paid for completion of functional deliverables requested by the Plaintiff through Andrew Buckley; and

b) Clex owned the Software or alternatively, the Legacy Code and all deliverables that it had paid for.

[52] It is alleged that Mr. Gust breached the contract by: (1) delivering a non-functioning website which had "bugs" in it, and refusing to fix the bugs until his

account was paid; (2) re-directing the Clex web page to the Uh Oh! Page, thereby interfering with the ability to use the Software; and (3) deliberately sabotaging the website or otherwise making it inoperable, and refusing to restore the website or divulge passwords or information needed to access the Software until his demand for payment had been met.

[53] Mr. Gust denies the existence of any contractual agreement between Clex and himself and further denies that he committed the alleged breaches.

[54] The fact that there was no written agreement between the parties does not preclude the existence of a contract, express or implied. Nor does the fact that there were no direct communications between Mr. Gust and Mr. Osborne, Clex's authorized representative in this lawsuit.

[55] It is a well-established legal principle that contracts may exist without a written agreement. In *Sojka v. Sojka*, 2023 BCCA 446, the Court of Appeal for British Columbia affirmed the framework governing oral contracts, which was articulated by the trial judge, as follows:

> [15] The judge correctly set out the legal framework at paras. 50–54 of the reasons as follows:
>
> - If a party to an oral agreement acts as though there were a binding contract or the other party relies on the agreement to their detriment the party is unable to rely of the lack of a written agreement as a defence: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 342–345 [*Le Soleil*];
> - An enforceable agreement is reached where parties have reached a meeting of the minds and the parties express themselves outwardly in a manner that indicates an intention to be bound: *Le Soleil* at paras. 322–323;
> - Reasonable certainty of the terms of the agreement are required: *Le Soleil* at paras. 339–340;
> - The existence of an oral agreement is determined by applying the objective reasonable bystander test to consider how the promisor's conduct would appear to a reasonable person in the position of the promise: *Le Soleil* at paras. 324–325;
> - The party alleging the oral agreement must be able to prove its existence on the balance of probabilities: *Bell v. Bell*, 1998 CanLII 3194 at para. 14, [1998] B.C.J. No. 1457 (S.C.).

[56] I am also satisfied that that the evidence supports a finding that at all material times, Mr. Buckley was acting as an agent for Clex, and as a result, Clex

was bound by any agreement entered into between Mr. Buckley and Mr. Gust: *Canadian Western Bank v. Shieldings* Inc., [1994] B.C.J. No. 2760, at para. 166, 1994 CanLII 1535; *Takhar v. Phoenix Homes Limited*, 2025 BCCA 152, at para. 64.

[57] I find that the parties acted as though there were a binding contract and that an oral contract existed between them.

[58] The challenge for the Plaintiff is that, in the absence of any direct evidence from Mr. Buckley, I am left to interpret the terms of the agreement between the parties, based largely on Mr. Gust's testimony.

[59] I turn to the first alleged breach.

1. Non-Functional Website

[60] There is no dispute that:

a) Mr. Gust stopped working on the website on March 1, 2020;

b) When he stopped working on the website, there were still bugs that needed to be fixed; and

c) Mr. Gust refused to perform further work on the website and fix the bugs, until his outstanding accounts were paid in full.

[61] The question before me is whether the above amounts to a breach of contract. The answer to this question turns on the terms of the agreement between Mr. Gust and Clex in relation to billing and deliverables.

a) Was Mr. Gust required to provide a fully functional website prior to March 1, 2020?

[62] Mr. Gust denies that there were any contractual terms, express or implied, that required him to deliver a completely bug-free website to Clex by March 1, 2020. Rather, he submits that Clex retained him to create a demonstration ("demo") version of the Software for use by schools (the "School Version"). Implicit in that agreement was the understanding that the website would likely contain bugs that would need repair at some later point in time.

[63] The evidence supports Mr. Gust's version of events on this issue.

[64] For the reasons that follow, I conclude that the agreement between Mr. Gust and Clex was for him to provide a demo version of the Software for school use by March 1, 2020, rather than a fully functional website.

[65] Mr. Osborne testified that when he founded Clex in 2016, his objective was to create a web-based software that would allow students to upload PDF versions of their class notes to a website, break down the Notes into 'micro-notes', and then use the micro-notes to create quizzes for studying. The software could also be useful for educational institutions, which could use it to convert their course materials into online quizzes, and textbook publishers, who could use it to convert their textbook materials into online quizzes that would supplement textbooks.

[66] As part of his business plan, Mr. Osborne wished to develop the following sources of revenue stream:

a) students who would be offered free accounts which would generate ad revenue through Google Ads as traffic increased, and eventually, premium accounts that would be ad-free and offer additional services;

b) educational institutions (such as schools, universities and colleges); and

c) textbook publishers.

[67] After building the initial version of the software, Mr. Greenwood left the Project around 2018 to pursue other work.

[68] Mr. Buckley hired Mr. Gust and Mr. Gill in December 2018 to complete the Software. Mr. Gill's job was to work on the user interface or "front end" of the website, and Mr. Gust's job was to work on the "back end".

[69] Mr. Gust and Mr. Osborne had very little direct contact with each other. Instructions regarding what work to perform for Clex were relayed through Mr. Buckley. Mr. Buckley also received and forwarded Mr. Gust's invoices to Mr. Osborne for processing, who then paid Mr. Gust directly.

[70] All parties agree that the initial work performed by Mr. Gust and Mr. Gill was to get the Software ready for student use. There is no dispute that this goal was achieved, and that by February 2020, the Software was functional for student use. Indeed, Mr. Osborne testified that in early 2020, the website was "fully functioning for students", meaning that students could individually sign on, create their profile, and upload PDF files and course notes. Mr. Osborne also testified that there was enough traffic on the website from students that Clex qualified for Google AdSense.

[71] Around February 6, 2020, Mr. Gust and Mr. Gill were asked to assist in creating the School Version of the Software, for demo use by the Boucher School. The plan was to test the Software with the Boucher School once it was developed, to make improvements based on the Boucher School trial, then to release the School Version of the Software more broadly in the future.

[72] Clex's relationship with the Boucher School arose through Dr. Smulders, who is Mr. Osborne's stepsister. In early 2019, Mr. Osborne began discussions with Dr. Smulders about using Clex software as an educational tool for her students. Dr. Smulders is a naturopathic doctor and teacher. At the relevant time, she taught anatomy and physiology, as well as herbal medicine, and had a professional relationship with two different colleges in Vancouver. In late 2019, Dr. Smulders arranged for Mr. Osborne to meet with the program advisor at Boucher College, Jason Madden. Mr. Madden expressed an interest in the software program and gave approval for Dr. Smulders to test the Software for her anatomy course.

[73] I pause here to note that there is a divergence in the evidence of Dr. Smulders and the parties about whether the Software was intended for use by the Boucher School or the Institute for Holistic Nutrition ("IHN"). Dr. Smulders, who was affiliated with both institutions, stated during her cross-examination that the Software was for IHN, and further that the Boucher School had no connection with Clex. This evidence directly contradicts the evidence of both Mr. Osborne and Mr. Gust; it also does not align with the Agreed Facts. Given the evidence of the parties, and the Agreed Facts, I conclude that Dr. Smulders' evidence on this point is unreliable, and that she was mistaken in her recollection. However, nothing turns on this finding.

[74] In any event, it is uncontroverted that the anatomy course in question was scheduled to begin on April 1, 2020. In a February 20, 2020, email, Mr. Buckley stated that Clex needed a functional School Version by March 1, 2020, for trial use by the School. He gave Mr. Gust and Mr. Gill a February 28, 2020, deadline to complete the School Version. Sometime prior to March 1, Dr. Smulders set up the anatomy course notes and uploaded the Notes onto the Clex website.

[75] Mr. Gust confirmed with Clex via email that he would be able to complete the features they wanted for the School Version by the end of February.

[76] According to Mr. Osborne, Clex required Mr. Gust to incorporate two key features into the Software to make it ready for School use: (1) to ensure that all of the registered students could access the Notes; and (2) to make the Notes accessible only to registered students in Dr. Smulders' course in order to preserve the School's intellectual property.

[77] Mr. Gust does not deny that these were both features of the Software that he was asked to develop.

[78] Mr. Gust admitted during his cross-examination that after starting work on the School Version, they ran into some problems, rendering the task more difficult than he had estimated. In particular, he was having some difficulty making the Notes show up for the students. Nevertheless, he was able to find a solution, and they were able to get the Software ready by February 28 for demo purposes. This is confirmed in a February 28, 2020, email exchange between Mr. Gust and Mr. Buckley, and a separate exchange held the same day between Mr. Gust and Mr. Gill.

[79] On February 28, 2020, at 2:11 PM, Mr. Gust advised Mr. Buckley that the Software was ready for testing, but that there may be some bugs, and that the "system isn't totally complete, we had to take some temporary shortcuts due to the time constraints". Mr. Buckley asked Mr. Gust and Mr. Gill to ensure that students registered for the program be able to access the Notes. Mr. Gust confirmed on February 28 at 2:46 PM that he had done as asked:

> …
>
> OK, I linked her account up.
>
> I had to change the code though. Right now all the students will get her data. If you need to change anything you'll have to log into her account.

…

[80] A few minutes later, Mr. Buckley emailed Mr. Gust and stated: “Perfect, its working”. Mr. Buckley then asked for assistance from Mr. Gust or Mr. Gill in changing the menu options titles for the school and course menus. Mr. Gust confirmed by 4:16pm the same day that this task had been completed. Mr. Gust did not do any further work for Clex after February 28, 2020.

[81] The emails from Mr. Buckley indicate that he was satisfied with the version of the Software that Mr. Gust and Mr. Gill had prepared by February 28, 2020. It is also apparent that Mr. Buckley was made aware that the Software would have bugs in it which would need to be repaired at some later point in time.

[82] The evidence does not support a finding that Mr. Gust was contractually bound to deliver a fully functional (i.e. bug-free) website prior to March 1, 2020. Rather, Clex only required Mr. Gust to create a demo version of the Software that could be used for testing by the Boucher School. As Mr. Gust testified, presenting a demo version meant that the Software could not be used by people outside of the test environment, as it was still in the development phase. Consequently, the Software created by Mr. Gust never fully went live.

[83] I am also satisfied that Mr. Gust achieved this purpose, and the Software was functional for demo use by the School as of March 1, 2020. I am supported in this conclusion by Dr. Smulders’ evidence. She testified that she personally tested the Software sometime before the end of March 2020. At the time, she found that the program “seemed to be working well”.[2]

[84] In coming to this conclusion, I reject Mr. Osborne’s evidence that the website was missing two key features when Mr. Gust stopped working on it.

[85] Mr. Osborne testified that as of mid-March and into the beginning of April 2020, the Software was missing a drop-down feature which would restrict access to the Notes to only those students that were signed up for the School course. Because of this, the notes uploaded by Dr. Smulders were available in the public domain.

[86] Mr. Osborne admitted that he did not personally observe this issue and could not recall who told him about it. Nevertheless, he brought his concern to

Mr. Buckley.

[87] On March 29, 2020, Mr. Buckley relayed the following to Mr. Gust and Mr. Gill about the drop-down feature:

> …
>
> I spoke with Adam on the topic of accessing the school material. Adam still has concerns that its still possible that anyone registering could still gain access to the school material and this is an issue as the material has IP.
>
> He wants student who sign-up for the school course to have their password compared with a known password called "anatomy", along with school name and course name.
>
> When the student enters this password they will be granted access to the material. This will be the password used for all the students. Public students can have any password they like (as we have today)
>
> Please let me know when this change has been made, we [can't] launch [without] it.
>
> …

[88] Mr. Gust acknowledged receiving this email, which confirms that some concerns about the drop-down feature were brought to Mr. Gust's attention at the end of March 2020. The email does not establish that the drop-down problem articulated by Mr. Buckley on behalf of Mr. Osborne, actually existed beyond being a theoretical possibility. Further, if the problem did exist, the email does not assist in establishing how big the problem was or when it arose. As noted earlier, as at the beginning of March, 2020, the Software was working to everyone's satisfaction and was ready for testing purposes. Consequently, I conclude that Mr. Gust did not breach any contractual obligations to Clex in relation to the drop-down feature.

[89] The second alleged deficiency in the Software Mr. Osborne identified was that the micro notes suddenly disappeared and could no longer be accessed by the students in Ms. Smulders' class. As with the drop-down feature, Mr. Osborne did not observe the disappearance of the micro notes personally. However, Dr. Smulders observed that the notes were gone and relayed her concerns to Mr. Osborne.

[90] Dr. Smulders testified that on the first day of class, she told her students about the Software and emailed them with the login information so they could start using the program. On April 4, 2020, two of her students emailed her as they were not able to access the micro notes. When she tried to go online, she also was no

longer able to access the micro notes. Dr. Smulders testified that she notified Mr. Osborne about the problem, and then told her class to carry on without using the Clex software.

[91] Mr. Gust appears to have been first notified of this issue on April 5, 2020, when Mr. Buckley emailed Mr. Gust and told him that the micro notes content appeared to have been deleted, and all the courses were showing up blank. He asked Mr. Gust whether this could have accidentally been caused by a student, i.e. whether a student may have inadvertently deleted the shared School micro notes when they intended to only delete the content under their own account.

[92] Mr. Gust replied on April 5, 2020, that this might be possible, but that he would have to take a look at it. The following day, Mr. Gust confirmed with Mr. Buckley that, because the students were sharing the study data, their actions could affect each other. He noted that the "system is incomplete" and that they had only "set up enough for the demo but more work is required to make that a complete system".

[93] It is important to note here that according to Mr. Osborne, even though they were facing difficulties with the micro notes and drop-down features, the public part of the website continued to work properly.[3]

> A Well, no, the public part was working the whole way throughout the whole duration, so students were still using it, we were still driving traffic and having new sign-ups and whatnot, the issue -- I -- I never [indiscernible/rapid speech] technical terms, but Andrew Buckley was telling me that there were still bugs that needed to be fixed, and then on the 29th was when it was brought to me that the notes were still open to the public domain. So there was -- he didn't go over the exact glitches that -- that were still being -- sometimes he'd just be like, hey, things are getting fixed and whatnot, so I don't know the exact details of the -- the glitches, but I do know on the 29th of March that the private sign-in for the students was still not completed.

[94] The evidence leads me to conclude that the disappearing notes problem did not manifest until after the Software entered the testing phase. By all accounts, the micro notes were present when the Software was released for testing by the students. It was only after the students started accessing Dr. Smulders' notes that the Notes disappeared, around April 4, 2020. The emails from Mr. Buckley support a finding that Clex considered this problem to be a bug that became evident at the testing phase of the Software, and would require additional time and resources so that Mr. Gust could fix it.

[95] I conclude that Mr. Gust did not breach any contractual obligations to Clex by providing Software which had a bug that could cause the Notes to disappear if a student deleted their copy of a shared file. The Software that Mr. Gust and Mr. Gill had created was still in the testing phase. The purpose of a demo version is to subject the Software to testing, so that any bugs that are not readily evident are revealed and can be fixed. The testing phase is very different than the launch phase for software. There is insufficient evidence that Clex required Mr. Gust to have the Software ready to be launched by the end of February 2020.

[96] There was no contractual requirement that the demo version of the Software be bug-free. Having that requirement would undermine the very purpose of a demo version. Mr. Gust was asked to prepare Software for testing by March 1. He did precisely that, and I find the version of the Software that Mr. Gust provided to Clex before he stopped working on it did not breach the terms of the agreement between the parties.

b) Was Mr. Gust in breach of contract by refusing to fix the "bugs" in the website prior to his account being paid?

[97] I also find that there was no contractual agreement that Mr. Gust was required to fix the bugs in the Software prior to his account being paid. I come to this conclusion based on the following evidence.

[98] When Mr. Gust was retained in December 2018, Clex committed to paying him $55 per hour for his services to design specific features required by Clex. This hourly rate remained the same throughout Mr. Gust's dealings with Clex.

[99] Generally, Mr. Gust would provide a quote for a particular feature and then bill after that feature had been completed. However, Mr. Gust testified that where there was a bigger feature, then he would issue an invoice in between covering the work completed to that date. Mr. Gust would send his invoice to Mr. Buckley, who would forward it to Mr. Osborne for payment. Clex generally paid Mr. Gust's invoices within 30 days after they were issued.

[100] Around April 2019, a fee dispute arose between the parties. As a result of the April 2019 Incident, the parties agreed that Mr. Gust would be paid in advance in hourly blocks which were based on his estimate. It is unclear how long this

practice continued. By February 2020, the parties had reverted to their original practice of Clex paying Mr. Gust after the invoice had been sent to the company.

[101] Importantly, Mr. Gust's invoices were described in hours multiplied by $55 and not by tasks. This supports a finding that Mr. Gust was paid based on his time, rather than for providing "functional deliverables".

[102] The fact that Mr. Buckley required quotes prior to the commencement of certain work does not change the nature of the hourly retainer agreement. I find that the quotes were sought for budgeting reasons, rather than to impute a term into the contract that Mr. Gust would have to deliver a fully functioning feature within that quote.

[103] The fee dispute in this case arose because of Clex's delay in paying Mr. Gust between March and April 2020.

[104] Mr. Gust issued two accounts directly related to the development of the Software for School use. On February 25, 2020, Mr. Gust issued the February Invoice, invoice #NG-541, for $1,375, and then on March 6, 2020, he issued the March Invoice, invoice #NG-542, for $660.When Mr. Gust issued the February Invoice, there was still a prior outstanding invoice.

[105] At the time he issued the February Invoice, Mr. Gust relayed to Mr. Buckley that the bulk of the work was done, but "the bug fixes aren't complete yet". Mr. Buckley asked for clarification as to whether Mr. Gust had completed the "new API work" and was waiting for Mr. Gill's user interface changes, and Mr. Gust emailed that this was correct. During his cross-examination, Mr. Gust explained that "API" refers to the "application programming interface", or the back-end code. Though he could not recall what was meant by the "API work", he conceded that this was likely the work that he had been asked to do in the earlier referenced emails from Mr. Buckley. There is a suggestion from Clex that Mr. Gust misrepresented that the API work was done when he issued this invoice. The evidence does not support such a finding, rather, it indicates that Mr. Gust had indeed done what he had said but was still working on bug fixes.

[106] The March Invoice was the final invoice rendered by Mr. Gust, and it covered the work from February 25 to February 28.

[107] Mr. Gust received partial payment from Clex around March 12, 2020. This covered a previous invoice, as well as part of the February Invoice.

[108] Around the third or fourth week of March 2020, Mr. Gust was asked to provide further assistance in relation to the Software. He told Mr. Buckley that he would not do further work on the Project until his outstanding accounts were paid.

[109] Clex paid the balance remaining from the February Invoice around April 3, 2020, more than 30 days after the invoice had been rendered.

[110] Despite repeated and numerous requests by Mr. Gust, Clex never paid the March Invoice for $660 and that amount remained outstanding.

[111] According to Clex, the website still had numerous bugs and was non-functional. As such, Mr. Gust's March 6 invoice was premature. I disagree.

[112] As I found above, the evidence does not support a finding that there was an agreement between Mr. Gust and Clex that he would only invoice on completion of "functional" deliverables, or that his payment would be tied to such. Rather, the evidence is that Clex agreed to pay Mr. Gust on an hourly basis, including for his time to repair the bugs in the Software.

[113] In keeping with Mr. Gust's expectation that Clex would pay him for further work to address the issue related to the drop-down feature (i.e. non-registered student access), Mr. Buckley emailed Mr. Gust around April 3, 3020, and asked him for a quote "to add a course code into the system to only allow school students to access the course".

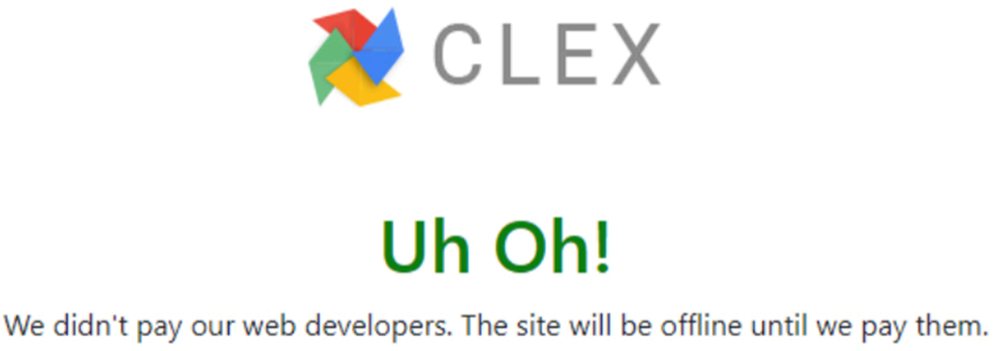
[114] Similarly, it is evident from the emails that Mr. Buckley did not expect Mr. Gust to solve the disappearing notes problem without being paid further. On April 9, 2020, Mr. Buckley asked Mr. Gust for an estimate for a quick fix to solve the disappearing notes problem. Mr. Gust provided a quote of 5 hours for this additional work and stated that he would have to be paid for his outstanding account of $660 before he did any further work for Clex. At this point in time, Mr. Gust's March 6, 2020, invoice had been outstanding for more than 30 days. In my view, it was not unreasonable for Mr. Gust to take that position.

[115] I am satisfied that Mr. Gust was legally entitled to refuse to do further work for Clex until his outstanding invoices had been paid. To that end, the Plaintiff has failed to establish the existence of an express or implied term that Mr. Gust was required to fix the bugs in the website prior to his account being paid, or that his billing or payment was tied to functional deliverables.

2. Re-Directing to the Uh Oh! Page

[116] I turn now to the allegation that Mr. Gust re-directed the Clex website to the Uh Oh! Page.

[117] Mr. Osborne testified that in late April or early May, a potential investor named Ted Stanford notified him that the Clex website was re-directing to the Uh Oh! Page. When Mr. Osborne checked, he saw the following message:



[118] Mr. Osborne immediately contacted Mr. Buckley to figure out what to do. After numerous unsuccessful attempts over the course of an estimated three days to two weeks, they were finally able to re-direct the links back to the Clex homepage. However, when Mr. Osborne checked, he was no longer able to upload PDFs to the website, and the word bank was not working.

[119] Mr. Gust (a) denied that he saw the Uh Oh! Page prior to document production in this litigation; (b) denied that he had anything to do with the creation of this web page or re-directing the Clex website to it; and (c) denied that he had access to the front end in order to do this. I do not find Mr. Gust's denials on this issue credible.

[120] First, I am satisfied that it was within Mr. Gust's technical ability to create a web landing page in the nature of the Uh Oh! Page. Mr. Gust conceded as much

during his cross-examination.

[121] Second, while I accept that Mr. Gill was responsible for doing the front-end or UI work on the Clex site, I am satisfied that Mr. Gust had access to the front end to make changes in the event that Mr. Gill was not able to do so. This is supported by the following email sent by Mr. Gill to Mr. Gust on February 29, 2020, at 2:19 PM:

> …
>
> On that note - do you still feel comfortable with handling any UI issues while I'm away? I'll be gone for the whole of April and May, back early June.
>
> I hope we can get the system stable before I go so that you would only need to make minor changes or bug fixes.
>
> …

[122] In my view, it is against the preponderance of probability that Mr. Gill would have asked Mr. Gust whether he was comfortable “handling any UI issues” in his absence, if Mr. Gust did not have access to the front end to make any necessary changes while Mr. Gill was away.

[123] Third, Mr. Gust had the motive to re-direct the Clex website to the Uh Oh! Page. His account was still outstanding, and his relationship with Clex was starting to devolve with Clex’s continued failure to pay him, and Mr. Gust’s refusal to do further work until he was paid.

[124] Fourth, Clex only had two web developers at the time: Mr. Gust and Mr. Gill, both of whom had outstanding accounts. However, it is an admitted fact in this proceeding that Mr. Gill did not redirect the Clex website to the Uh Oh! Page. This leaves Mr. Gust as the only plausible person who would have put up the Uh Oh! Page.

[125] Finally, the Uh Oh! Page directly mentioned the payment issue that existed between Clex and Mr. Gust. This is far too specific to be coincidental. I find it implausible that an unrelated third party would have been motivated to intervene in the payment dispute between Clex and its web developers, without Mr. Gust’s knowledge and complicity.

[126] While the evidence that Mr. Gust re-directed the Clex website to the Uh Oh! Page is circumstantial, this does not make it less worthy of belief.

[127] In *Ward v Cariboo Regional District*, 2021 BCSC 1495, Justice Taylor emphasized the “important role” circumstantial evidence plays in the fact-finding process: at para. 85. He noted that courts have previously found that circumstantial evidence may satisfy the burden of proof for various claims in tort, including claims for negligence, trespass, and nuisance: *Ward*, at para. 86. The Supreme Court of Canada has also held that causation may be proven on circumstantial evidence alone: *Ward*, at para. 87, citing *British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25.

[128] I conclude that Mr. Gust re-directed the Clex website to the Uh Oh! Page. However, this does not equate to a breach of a contractual term, implied or otherwise. Rather, I find these actions fall beyond the bounds of the terms of the contract.

[129] To be successful in a claim for breach of contract, the plaintiff must show: 1) the existence of a contract; and 2) the breach of a term of that contract: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [*Atlantic Lottery*]. Conduct outside the scope of the terms of the contract will not amount to a breach: *W & M 062 Ventures Ltd. v. Blonski*, 1999 CarswellBC 2258, 1999 CanLII 3650, at para. 39.

[130] The first element from *Atlantic Lottery* is established. As stated above, I have found that Mr. Gust and Clex contracted for Mr. Clex to provide a demo version of the Software for school use by March 1, 2020.

[131] However, Clex’s claim for breach of contract fails to meet the second element set out in *Atlantic Lottery*. On the evidence before me, I find that Mr. Gust performed his duties under the terms of the contract referenced earlier. He delivered Software that was functional for demo use by the School as of March 1, 2020. There is no contractual term (express or implied) that Mr. Gust not re-direct the website to the Uh Oh! Page. Further, his contractual relationship with Clex had ended by the time the Clex website was re-directed.

[132] On April 9, 2020, Mr. Gust told Mr. Buckley that he would not continue to work for Clex until the March Invoice was paid. At that point, it had been more than 30 days since Mr. Gust issued the March Invoice. By May 2020, it was clear from the communication between the parties that their relationship had deteriorated, and Clex did not intend to pay Mr. Gust his invoice. Neither party agreed to renew

or extend their contractual relations, nor performed further contractual duties, after this date.

[133] Additionally, in their agreed statement of facts, the parties also agreed that after the Work Stoppage, Clex was at liberty to retain the services of a different web developer.

[134] As Mr. Gust's conduct in re-directing the website falls outside of the terms of the contract, no breach is established by this conduct. However, the re-direction of the website amounts to other actionable wrongs, which are addressed later in these Reasons.

3. Limiting Access to or Disabling the Back-End

[135] I turn now to the most contentious issue in this litigation. Clex alleges that Mr. Gust breached his contractual relationship with Clex by: (a) refusing to divulge information needed to access the Software until his outstanding account had been paid; (b) refusing to restore the website; and (c) deliberately sabotaging the website or otherwise making it inoperable.

a) Refusal to Divulge Information or Restore Website

[136] The allegations that Mr. Gust refused to divulge necessary information to access the Software or to restore the website, are grounded in communications between the parties in April and May 2020.

[137] On April 6, 2020, Mr. Buckley asked Mr. Gust and Mr. Gill for the codebase so that the Company could do a yearly off-site backup. Mr. Gill replied that all of the code is kept in one central location and that he could share the repository with Mr. Buckley so that Clex could have access:

> …
>
> We do have an online repository (or two) for all the code. **All the code is checked in an [sic] uploaded to Git.** I access the repository for the UI code through a website called BitBucket. If you create a user, I can share the repository with you. It would be best to keep the code here so that we don't have to maintain it in multiple locations. It also means that the code stored here is the most up-to-date.
>
> https://bitbucket.org/
>
> …

[emphasis added]

[138] I infer from the evidence that this email relates to the front-end code that Mr. Gill was developing, and not the back-end code that Mr. Gust was working on (the "Gust Code"). Mr. Gust testified that the back-end code and the front-end code were stored in different locations.

[139] On April 27, 2020, Mr. Buckley asked Mr. Gust to share his codebase so that Clex could have access to the code "if needed at anytime", and so they could keep it as "insurance" for the company to keep their risk low. He also told Mr. Gust that Mr. Osborne advised that he would be paid his outstanding account at the end of the month. It is evident from Mr. Osborne's testimony that neither of these assertions were true.

[140] During cross-examination, Mr. Osborne explained that Clex's intention in seeking this information was to "block" Mr. Gust from the codebase because "we knew at a point that we needed to make sure that Nicholas cannot get in the back end anymore". Mr. Osborne also denied telling Mr. Buckley that he was going to pay Mr. Gust, noting that he did not plan to pay for work "under extortion".[4]

[141] In his reply email sent on April 27, 2020, Mr. Gust stated that he would be "happy to share the codebase" with Clex after he got paid.

[142] It appears that by May 2020, Mr. Gust was advised that Clex would not be paying the March Invoice. On May 26, 2020, Mr. Gust wrote directly to Mr. Osborne, expressing his displeasure with Mr. Osborne's position, and offering to work out a payment plan if Clex did not have the money to pay the invoice all at once. Mr. Osborne responded by accusing Mr. Gust of extortion and theft, and telling him that Clex's legal counsel would be contacting him the next day.

[143] In a separate email sent on May 26, 2020, at 6:02 PM to Mr. Gill, Mr. Gust commented on Mr. Osborne's position, as follows:

> …
>
> Wow, what a piece of work this guy is. No point even responding to this.
>
> You and I both know that we built a proof of concept as discussed with Andrew. You and I didn't "[expletive]" as Adam is now claiming.
>
> I'm not sure why they think I stole their software. How can I steal something that I wrote and wasn't paid for?

…

[144] According to Clex, this email, as well as the earlier one from April 27, 2020, indicate that Mr. Gust was deliberately withholding the password information from Clex, as he believed that he had legal right to do so. During cross-examination, Mr. Gust denied that he intentionally withheld the passwords. He explained that he was very emotional when he wrote the May 26 email to Mr. Gill and was only venting. Further, he testified that Clex already had the necessary information to access the website, and as such, he could not have stolen something that Clex already had.

[145] There is evidence that Mr. Osborne had ownership of the AWS account, that the account was linked to his email, and he access to all passwords.

[146] On May 27, 2020, Clex's lawyer, Mr. Nuraney, sent a demand letter to Mr. Gust.[5] In this letter, Mr. Nuraney demanded that Mr. Gust return Clex's intellectual property, including login information and passwords, and then delete any remaining copies.

[147] On May 27, 2020, Mr. Gust provided a lengthy response to the various allegations in Mr. Nuraney's letter. He provided detailed information about where the Gust Code was stored, and a link for the API server. He also offered to provide further assistance if he was paid. The salient features of his May 27, 2020, letter are as follows:

> …
>
> The claim that I am holding property that belongs to your client is simply untrue. I gave your client all the code that I have in June when I was informed that he wanted to change development teams. That contained copies of all the code to date, including the legacy code developed by Chris Greenwood in a zip file. That zip file was sent to Andrew Buckley (the project manager and my point of contact for this project) on June 30, 2019.
>
> Chris Greenwood's code is stored in a separate code repository on bitbucket.org. That is not something that I have control over or could have control over. Mr. Greenwood is in charge of his own repository, not me or anyone else.
>
> The latest code for the CLEX API is stored on AWS (the hosting server) and is running right now. I have not taken this down and your client has the login credentials to AWS where he has full access to the server and can download the code. The current code contains the legacy code that Mr. Greenwood developed as well as all work to date on this project.

> The API server (the part that I was hired to work on) is live at this url: http://clex-api-may2019.bskqeckwtz.us-west-2.elasticbeanstalk.com/
>
> I did not take that site down and I have not held any code or information. **I can't return something that I didn't take in the first place.**
>
> Your client can go onto AWS right now, as he could have at any point in time during this project, and download all of "the Property".
>
> Your client, or someone on his behalf, has changed the nameservers for the domain clexstudy.com. This was done via the GoDaddy account that manages the domain. The nameserver now points at a static site that has been set up separately from the CLEX project. I don't know who set up this static site or who facilitated the nameserver swap.
>
> I have not removed content from your client's website. That claim is factually incorrect. The API server has been live and running for months. I can produce server logs that show the site has been running uninterrupted for at least 88 days. The same is true of the frontend code for the website. I have not removed any content on your client's website.
>
> …
>
> I'll be willing to help your client sort out his issues with the nameservers and I will also be willing to give your client a zip file containing all code that I have for this project, even though he has always had access to the code via AWS.
>
> In order for me to take these steps, I require that the outstanding balance that is owed to me be paid in full. I trust that we can sort this matter out in a reasonable way and without unnecessary drama.
>
> …
>
> [emphasis in original]

[148] Plaintiff's counsel points to the June 2019 date in the first paragraph of Mr. Gust's May 27 email as evidence that Mr. Gust only ever provided Clex with access to the codebase to that point in time. However, the evidence does not support that conclusion.

[149] Mr. Gust testified that in June 2019, he provided a .zip file to Mr. Buckley which contained the Legacy code developed by Mr. Greenwood and the Gust Code, subsequently developed by Mr. Gust, current to June 2019. In his May 27, 2020, email, Mr. Gust also provided a link from which Clex could access the most recent version of the code from when he last worked on it in February 2020.

[150] During his direct evidence, Mr. Gust explained that the back-end code for the Clex software was stored within the AWS Elastic Beanstalk environment,

whereas the front-end code that Mr. Gill was developing was stored somewhere else. Old or redundant copies of the back-end code were also automatically stored on this server as .zip files.

[151] Mr. Gust's evidence was that the link http://clex-api-may2019.bskqeckwtz.us-west-2.elasticbeanstalk.com/ provided an access point to the Application Programming Interface (API) server where the Gust Code was stored. If someone clicked on to that link, they would be taken to the server. Further, the link provided information about where the server was located within the AWS system. The first part of this link "clex-api-may2019" indicated the name of the environment; "bskqeckwtz" was the code name given this file; "us-west-2" referred to the AWS region where it was located; and "elasticbeanstalk" referred to the web hosting platform.

[152] According to Mr. Gust, the above server was operational at the time that he sent the link to Mr. Nuraney and it was still operational when he clicked onto it at the start of this trial. He was not challenged on this evidence.

[153] During his cross-examination, Mr. Gust denied that he provided an older version of the code to Clex, stating that "the API server link here was the – latest code that I worked on. That's why I gave them that link there." The name of the server bearing the date "may2019" does not undermine this testimony. Mr. Gust agreed that the "may2019" reference in the API server name likely referred to the date on which the original code was made. I accept Mr. Gust's evidence that while the name of the file bore the original date for the creation of the code, the code had been updated by Mr. Gust to the same location.

[154] Mr. Gust's testimony on this point is supported by other evidence. Subsequent email communications between the parties indicate that the real problem was that Clex could not figure out how to access the source code through AWS – rather than Mr. Gust refusing to provide them with access to the source code.

[155] This is explained in a June 9, 2020, email from Mr. Buckley to Mr. Gust asking for instructions on how they could access the Clex codebase from AWS. According to Mr. Buckley, Clex was looking to him to provide:

> …

> 1. Step by step instructions on how to access the CLEX source code on AWS so CLEX can view and edit the code based
>
> 2. List of AWS services and tools that have been setup to support the CLEX source code.
>
> 3. Password(s) setup used to access the source code on AWS so Adam can view and edit the code base.
>
> Without these instructions CLEX cannot access the source code.
>
> …

[156] Mr. Gust replied on the same day that he would not provide further assistance without getting paid. He told Mr. Buckley that what Clex was asking for was “pretty straight forward stuff” and that they could “Google it” for the answers. Consistent with this view, Mr. Gill provided the following commentary on Mr. Buckley’s email to Mr. Gust:[6]

> …
>
> What's funny is that now they know they have access to all their own data and code... but don't know what to do with it or how to access it.
>
> …

[157] In my view, it was sufficient for Mr. Gust to provide a functional link to Clex – Mr. Gust was not obliged to also provide a .zip file to Clex which contained the Gust Code, as he had done in June 2019. While it would have been helpful for him to have done that, the law does not require people to be nice to each other – it only requires that they abide by their contractual obligations. If Clex could not figure out how to access the code using the link provided by Mr. Gust, then it fell on Clex to pay Mr. Gust’s account and retain him to provide further assistance, or retain someone else to show them how to access it.

[158] Mr. Gust also had no obligation to restore the Clex website without being paid for his work.

b) Sabotage of Website

[159] I now turn to whether Mr. Gust sabotaged the Clex website or otherwise made it inoperable. The Plaintiff relies on the following events to support this allegation: (1) the micro notes had disappeared; (2) the Clex website had been moved to GoDaddy and was landing on an older web page rather than the version that Mr. Gust had created; (3) users could no longer upload PDFs and the word

banks were not functioning; (4) Mr. Shih was unable to find a complete version of the codebase on the AWS server, and was unable to restore the website; (5) a person using the user name “nick” accessed the back end on six different dates between December 2020 and February 2021, and created, added, and deleted content.

[160] As I will explain later, the missing micro notes were eventually discovered and there is no evidence that their content had been tampered with. There is insufficient evidence that this was caused by any deliberate act of sabotage on the part of Mr. Gust. Rather, I conclude that the Notes disappeared accidentally, because the students were sharing the same study data file with each other. This occurred due to a bug in the software which was discovered when the software went into the testing phase.

[161] I come to a similar conclusion regarding the Clex website landing on an older web page and the issue regarding the inability to upload PDFs and malfunctioning word banks. There is insufficient evidence that either of these issues were due to an act of sabotage by Mr. Gust.

[162] There is no dispute that at some point after Mr. Gust stopped working for Clex, the Clex website was re-directed to an older home page. Mr. Shih testified that he was retained by Clex around August 2020 to restore its website. At the time he was retained, he noted that users were being directed to a very simplified one-page website for Clex. Mr. Shih understood that this was a very early version of the landing page that had been built prior to Mr. Gust’s involvement.

[163] Mr. Gust himself was aware of this issue by at least May 27, 2020, when he brought it to the attention of Clex’s legal counsel. He testified that sometime after he stopped working on the Project, “somebody changed the DNS routing of the site” so that it pointed to an older version of the Clex website, and they hosted this on GoDaddy instead of AWS. He advised Clex of this in the May 27 letter and denied that he was the person who directed the Clex website to the older home page. The evidence supports Mr. Gust’s denial, and indeed, indicates that it was Mr. Osborne and Mr. Buckley who likely did this, intentionally or inadvertently.

[164] Mr. Osborne described a lengthy and complicated process that he and Mr. Buckley engaged in to try to redirect the URL from the Uh Oh! Page back to

the Clex homepage. He testified that this process lasted up to two weeks, as they kept landing on old web pages, and they had to painstakingly work through each one to redirect the URL back to the most recent Clex home page. He stated that it took Mr. Buckley and him many attempts to do this. When they had the website at the landing page they wanted, the software did not work. They could not upload any PDFs and the word banks were not functioning.

[165] The evidence leads me to conclude that it was Mr. Osborne and Mr. Buckley who re-directed the Clex website to the older home page, and not Mr. Gust. This occurred when they attempted to move the website away from the Uh Oh! Page. I also find that during this process, it is more probable than not that they accidentally affected the PDF uploading function and functionality of the word banks. I discuss whether or not Mr. Gust should have foreseen this in the section dealing with damages.

[166] I turn now to Mr. Shih's unsuccessful attempts to restore the website, and his opinion about the cause of these difficulties.

[167] The Plaintiff called Mr. Shih as an expert and as a fact witness. Consequently, he was permitted to provide *viva voce* testimony about his opinion, and his expert report was marked for identification purposes only. This is in accordance with the procedure outlined by the Court of Appeal in *Ford v. Lin*, 2022 BCCA 179, at paras. 61-62, 79-80.

[168] Many of the Defendant's objections about Mr. Shih's opinion relate to his expert report July 18, 2023, which is not in evidence for the aforementioned reasons. During his *viva voce* evidence, Mr. Shih reiterated some, but not all, of the conclusions that he arrived at in his report. I have addressed concerns about those opinions as they arise.

[169] Mr. Shih was tendered as an expert in the field of internet website development and internet website project management. He has been working in this field since about 2011. He graduated from UBC in 2010 with a combined degree in microbiology and computer science.

[170] Mr. Shih explained the difference between his area of expertise, technical project management, and the role of a technical web developer (the work that

Mr. Gust was doing), as follows:[7]

> …So a technical web developer would be someone who's very proficient with, you know, the coding, the -- you know, writing the code and building the website, layout, understanding how, you know, the back end function, work with front end and how it interact with database. That will be a technical developer, whereas the technical project manager will understand that on a higher level. So they understand how things work. They're not necessarily capable of doing the programming.

[171] Mr. Shih explained that a technical project manager has the skills of a junior technical web developer, combined with the skills of a regular project manager.

[172] During his cross-examination, Mr. Shih explained that while he has a lot of experience doing front-end coding, he has not done back-end coding since his university days. He noted that front-end coding is a "lot easier compared to…back-end logic".

[173] This distinction is significant given that Mr. Shih was asked to work on retrieving the back-end code six months after Mr. Gust had stopped working for Clex, and without the link that Mr. Gust had provided to Clex.

[174] Mr. Shih testified that his company was retained by Clex around August 2020 to restore its website to where it had been in early 2020. Mr. Shih testified that there were three components required to restore any website: front end, back end, and the database. The first phase of his retainer was to try to find a quick solution to this problem. His attempts were unsuccessful.

[175] Mr. Shih's job was made more challenging because of the difficulties in finding a back-end code on AWS, which Mr. Shih described in his August 24, 2020, email to Mr. Osborne as looking for a "needle in a haystack". Mr. Shih explained the problem in his email as follows:

> As of 2020, AWS offers 175 products. It's a needle in a haystack to look for when we don't know where it is. Without the -- without knowing where the website is being hosted and if the service is still active, you will not be able to point back the home page from GoDaddy to AWS.

[176] While Mr. Shih and his team were able to find the database on AWS and they also had a functional front end, they could not find a working version of the back-end code on AWS. Because Mr. Shih could not find the codebase on the live server, he asked Clex to provide him with the backup files. However, the backup

files they were provided did not assist. According to Mr. Shih, the front-end and the back-end code files he was given were saved at different points of their development, so he could not get them to work together.

[177] By late 2020, Mr. Shih and his team had restored the website by using the backup code that Clex provided to them. However, they faced functionality issues because they had the wrong version of the back-end code. Although they were able to find the course material Dr. Smulders had uploaded to the Clex website, Mr. Shih's team was not able to restore the website, which continued to lack the registration function and the PDF function. Mr. Shih noted that this was because they had an earlier version of the back-end code from a point when functionality had not been built in.

[178] Under cross-examination, Mr. Shih was asked about the version of the back-end code he was trying to connect. He stated that Mr. Buckley sent him a link to a cloud storage drive that had a backup of the back-end code. I infer from the evidence that this is the version of the back-end code that Mr. Gust had given Clex in June 2019 as a .zip file. I have already found that this version was outdated and replaced with the updated code that Mr. Gust had saved on the AWS server.

[179] Mr. Shih testified that Mr. Buckley did not provide him with the AWS server link that Mr. Gust gave to Clex in his May 27 email. It is unclear why Mr. Buckley did not do this. According to Mr. Gust, this was intentional as Mr. Osborne was not interested in restoring the website, and preferred pursuing Mr. Gust through litigation to recuperate the cost of its development. There is insufficient evidence to support this assertion by Mr. Gust. Rather, I find that the failure to provide the link was likely due to negligence on the part of Mr. Buckley.

[180] In early 2021, Clex asked Mr. Shih to find ways to connect the Clex application to the latest database and to make it work. This was the second phase of Mr. Shih's retainer. The point was to try to restore the website, rather than to rebuild it.

[181] According to Mr. Shih, while his team was capable of dealing with AWS, they did not have the necessary expertise to understand what was broken in the back end. Mr. Shih brought on an additional contractor who had expertise in using the Ruby on Rails programming language. The goal was to have this person see if

he could patch up the back-end code to make it work. However, these efforts too were not fruitful. Mr. Shih testified that the challenge faced by the Ruby on Rails programmer was also related to the front-end and back-end code not matching up.

[182] Mr. Shih testified to spending considerable energy looking for the back-end code on Heroku. It is unclear whether these efforts were initiated by the programmer, as Mr. Shih testified, or by Clex, as stated in his February 8, 2021, email to Clex. Regardless, these efforts were wasted.

[183] There is no dispute that only a very outdated version of the codebase existed on Heroku. Mr. Osborne testified that while the Clex website was initially set up on the Heroku server, after Mr. Gust was retained, it was moved to the AWS server. It does not appear that Mr. Shih was made aware of this until February 9, 2021, when Mr. Buckley sent him an email and told him that “it would be more useful and cost effective to turn our attention to looking for the latest code versions (front end and back end) on AWS and not to bother with Heroku at this time”. Mr. Buckley’s email was in response to a February 8, 2021, email from Mr. Shih, where he raised concerns that there appeared to be a “disconnect” between his team and Clex. Mr. Shih stated that “we have been working with the Heroku backend throughout the entire process” and that “the work discussed and approved has always been based on connecting the Heroku backend to the AWS database…”

[184] The evidence leads me to conclude that Mr. Shih’s inability to find a complete version of the codebase on the AWS server was not because of Mr. Gust. First, Mr. Buckley did not provide Mr. Shih with Mr. Gust’s link to access the most recent version of the back-end code. Second, Mr. Shih himself lacked the technical expertise to be able to properly diagnose the problem and figure out ways to address it. Third, Mr. Shih was looking for the back-end code on Heroku, which Mr. Buckley and Mr. Osborne knew contained only an outdated version of the code. In my view, it was these mistakes, rather than something done by Mr. Gust, which prevented Mr. Shih from finding the most recent version of the codebase and restoring the website.

[185] I turn to the final allegation of sabotage.

[186] Mr. Shih testified that when they did not find the recent code on Heroku, the Ruby on Rails programmer searched for the back-end code on Elastic Beanstalk. However, the version he found there was broken. In the course of searching the log, he noticed that a user by the name of “nick” had been accessing Elastic Beanstalk.

[187] On March 12, 2021, Mr. Shih downloaded the access logs from December 12, 2020, to March 12, 2021, which showed activity by user “nick” within those three months, as follows: December 18, 2020; January 2, 5, 11, and 20, 2021; and February 18, 2021. Mr. Shih stated that he was not able to access logs prior to December 12, 2020, as the tier of AWS Clex was using did not store logs beyond 90 days.

[188] It is helpful here to understand how internet activity can be connected to a particular person. In *R. v. Bykovets,* 2024 SCC 6 the Court explained IP addresses in this way:

> [4] An IP address is a unique identification number. IP addresses identify Internet-connected activity and enable the transfer of information from one source to another. They are necessary to access the Internet. An IP address identifies the source of every online activity and connects that activity (through a modem) to a specific location. And an Internet Service Provider (ISP) keeps track of the subscriber information that attaches to each IP address.

[189] Mr. Shih testified that he used an IP location lookup tool to trace back the IP address for user “nick” and then traced the log activity from “nick” back to residential neighbourhoods in Abbotsford and Mission. He opined that these addresses were the probable location of user “nick”, who was accessing the Clex back end. The identified neighbourhoods are located in the same municipalities as Mr. Gust’s current and previous residences.

[190] The Defendant objects to Mr. Shih’s opinion on this issue, arguing that it is outside the scope of his expertise. However, I am satisfied that Mr. Shih’s opinion on this point is within the broader scope of his knowledge and expertise with computers and accessing websites and back-end code.

[191] It was Mr. Shih’s opinion that the person logging in as “nick” was using Telus Communications as their internet service provider to access the internet

from residential locations in Abbotsford and Mission. The opinion was supported with documentation showing the two IP address locations.

[192] Mr. Shih testified that, when traced to a residential address, an IP address provides a fairly precise location for where somebody is accessing the internet from. He testified that this is because, when internet service providers hook up service for a residential address, it requires a physical installation and connection to a modem. A specific IP address is assigned to a modem or router and is unlikely to change unless the router is reset. A change in internet service provider would also lead to a different IP address for the same location. In this case, the IP address for the user “nick” was linked to two specific residential addresses.

[193] Under cross-examination, Mr. Shih was asked to explain why two different residential addresses were associated with the same IP address. He opined that this meant the internet service provider had moved the IP address to a different location. According to Mr. Shih, the Mission address was likely the earlier location for the IP address, and the Abbotsford location was more recent. I infer this to mean that the user named “nick” accessed the Clex back end between December 2020 to February 2021, from the Abbotsford location.

[194] The Plaintiff relies on Mr. Shih’s evidence about the location of the IP address to support the assertion that it was Mr. Gust who accessed the back end of the Clex site, using the username “nick”. However, there are several difficulties with this. While Mr. Gust has admitted that he has lived in Abbotsford and is currently living in Mission, the addresses he has provided do not align with Mr. Shih’s evidence.

[195] In his Reply to Notice to Admit dated December 6, 2022, Mr. Gust admitted that between 2016 and August 2019, he resided at an address on Newlands Avenue, in Abbotsford. He also admitted by way of Agreed Facts, that on October 6, 2023, he was living at an address on Mitchell Avenue, in Mission. Mr. Gust was not challenged on either of these points.

[196] Both of Mr. Gust’s proven addresses appear to be some distance away from the residential addresses that the IP is associated with, and I have been provided with no evidence to explain this discrepancy. Mr. Shih testified that it was possible for a person to mask or otherwise change their IP address to hide their

actual location. However, Mr. Gust was not asked about this, and I have no evidence that this is in fact what occurred in this case.

[197] Nevertheless, there is other evidence that supports a finding that Mr. Gust accessed the Clex website on December 18, 2020; January 2, 5, 11, 20, 2021; and February 18, 2021. This evidence comes from Mr. Gust himself.

[198] Mr. Gust initially denied this, both during his examination for discovery and during his direct evidence at trial. However, during his cross-examination, Mr. Gust admitted that he used the Clex AWS command line interface on February 18, but said it was a mistake and he deleted the action afterwards:[8]

> Q Would you agree that is a -- that you access – that on February 18th, you logged on to Clex or Adam Osborne's AWS account?
>
> A I wouldn't say that I logged on. This shows -- like I said, I was using the command line interface. So, what this shows here is that the environment Claimsniper was set up on their account.
>
> Q And you did that through a command line?
>
> A So, I did accidentally do that to that command line, yeah.
>
> Q Okay. Well, how do you know. Do you recall accidentally doing it?
>
> A Yeah. Yeah. And then I deleted it afterwards, once I realized.

[199] Mr. Gust contradicted himself again later in his testimony, when he stated that he was telling the truth on discovery when he said he did not log into the Clex back end on February 18.[9] This changed position goes to his credibility, but does not detract from my ability to rely on his admission that he had in fact accessed the Clex back end on February 18.

[200] Mr. Gust's admission provides very clear evidence that he did in fact access the Clex back end on February 18, 2021. It also provides strong circumstantial evidence that he also accessed the back end in December and January, since the same user name associated with the same IP address also accessed the back end on those dates. The fact that Mr. Gust gave different evidence during his examination for discovery and during his trial testimony, affects my view of his credibility on his claim that this login was accidental.

[201] It was Mr. Gust's position that he logged onto the Clex server accidentally while intending to work on a different website called Claimsniper. Mr. Shih

acknowledged that these kinds of mistakes do happen in his industry, and that even people on his own team have logged on to the wrong account or profile occasionally. However, I agree with the Plaintiff that the facts here are inconsistent with Mr. Gust accidently logging into the wrong account:

a) The log shows activity on six different dates over a three-month period. While it is possible that Mr. Gust could have logged onto the server unintentionally on one or two occasions, it is implausible that someone with Mr. Gust's level of knowledge and expertise would have done so six times.

b) Some of the activities listed in the log included actions which, according to Mr. Shih, would have triggered a confirmation prompt before proceeding. This would have served as a reminder to the person who had logged in that they were in the wrong place.

c) On February 18, 2021, the access log starts at 3:25 and continues until 4:08, resulting in over 5 pages of activity over 43 minutes. It is very unlikely that Mr. Gust would have continued working for this long on the Clex server without noticing that he was in the wrong place.

[202] While I have concluded that Mr. Gust did access the Clex back end without authorization between December 2020 and February 2021, the evidence falls short of establishing that Mr. Gust's activities on the dates in question constituted sabotage or that he otherwise intended to or did actually cause harm to Clex.

[203] According to Mr. Shih, the user "nick" performed the following activities on February 18, 2021: create, add, delete, terminate, and revoke. These activities caused Mr. Shih to form the opinion that the user "nick" was doing more than merely viewing the server, they were taking "sophisticated" actions. Mr. Shih stated that he could not tell from the activity logs what the user was actually doing, as the logs only record the actions that are taken, not the substance. However, he saw evidence of attempts to set up a security group, changes to a security group update setting, and then revocation of access to the security group. Apart from noting that these actions were very sophisticated, he could not explain what was actually being done to the back-end code.

[204] Importantly, Mr. Shih was not able to find any trace of what he considered to be sabotage to the Clex website through the unauthorized access. Mr. Shih also adopted what he told Mr. Osborne in an email sent to him on May 12, 2022:

> The developer has spent 6 hours so far, reconfiguring the data base access to AWS, and trying to pull all records related to the user Fiona. Unfortunately was not able to find any trace of sabotage on the database level. **All the lecture and microsite data appear to be legitimate course content**.
>
> [emphasis added]

[205] I pause here to note that the word “sabotage” implies intent, and it is not for Mr. Shih to determine whether Mr. Gust intended to harm Clex. However, Mr. Shih’s evidence is helpful on the broader question of whether the user “nick” accessed the Clex back-end code accidentally or intentionally, and whether there was any evident harm or damage to Clex’s back-end code through that access.

[206] According to Clex, there is proof that Mr. Gust took actions that impacted the Clex codebase, as it was after Mr. Gust’s unauthorized login that Dr. Smulder’s micro notes reappeared on the AWS server. This argument fails in two respects. First, I do not have any evidence as to when Mr. Shih located the micro notes. Second, if the Notes did appear after the February 18 login, then it would indicate that Mr. Gust was restoring the website rather than damaging it.

[207] Thus, I have no difficulty concluding that Mr. Gust did access the Clex website six times without permission between December 18, 2020 and February 18, 2021, inclusive, and that he may have made some changes to the code on at least one occasion. However, it is unclear whether he left these changes to the code in, or if he deleted them afterwards. Regardless, the evidence falls short of establishing that his actions constituted sabotage or in any other way caused damage to Clex’s software.

c) Was the Unauthorized Access of the Back-End Code a Breach of Contract?

[208] As I have found that Mr. Gust did access the Clex back-end code between December 2020 and February 2021, I will now consider whether this action amounts to a breach of contract.

[209] As with re-directing the Uh Oh! Page, I find that Mr. Gust's conduct in accessing the back-code falls outside the scope of the contract.

[210] The evidence before me establishes that Mr. Gust accessed the back-end code in December 2020, January 2021, and February 2021. These events took place approximately nine months to one year after Clex ceased paying Mr. Gust for his work, and Mr. Gust refused to conduct any further work on the Software. I have already found that Mr. Gust's contractual obligations ended after the Work Stoppage.

[211] As the contract between Mr. Gust and Clex had terminated well before December 2020, Mr. Gust's unauthorized access to the Clex back end fell outside the scope of the contract. Thus, no breach of contract is established.

[212] As I will discuss below, even though accessing the back end of the website was not a breach on contract, that does not mean that Mr. Gust escapes liability for his actions. Rather, I find that accessing the back-end code is better addressed through the law on breach of fiduciary duty.

4. April 2019 Events

[213] Both parties rely on events from April 2019, as constituting similar fact evidence. They argue that the Court should rely on this evidence to make findings of fact in relation to what transpired in 2020.

[214] The circumstances of the April 2019 Incident are remarkably similar to the ones that arose in 2020. April 2019 is when the first payment dispute occurred between Mr. Gust and Clex.

[215] A few months after Mr. Gust was hired, Mr. Osborne found himself short on cash. He delayed paying Mr. Gust's invoice of $1,457. Mr. Gust refused to provide web development services until he was paid his outstanding account. This refusal coincided with Clex losing its connection to their database, such that Clex could not log in, get a password reminder, or register. Mr. Gust refused to assist Clex in fixing this problem until his account was paid.

[216] Mr. Osborne concluded that Mr. Gust had something to do with his inability to access the software and was upset that his software was being held "ransom".

Mr. Osborne testified he was considering taking legal action against Mr. Gust, and that he discussed the matter with Mr. Liggett. In an email dated April 16, 2019, Mr. Liggett relayed to Mr. Gust that Mr. Osborne was threatening Mr. Gust with "financial ruin with lawyer fees" if the website was not fixed. Mr. Gust maintained his refusal to repair the website until his bill was paid.

[217] After Clex paid a substantial portion of Mr. Gust's outstanding invoice, Mr. Gust confirmed that he had "fixed up the Heroku server and the site seems to be functioning as expected".[10] Mr. Osborne apologized for the "misunderstanding" and promised to remit the remaining amount in short order. Mr. Osborne paid Mr. Gust's invoice a few weeks later.

[218] At trial, Mr. Gust maintained that he did not lock Clex out of its own website in April 2019. The Plaintiff points to the following to support its contention that Mr. Gust intentionally disabled the website in April 2019 due to his unpaid account:

a) the timing of the event;

b) Mr. Gust's email communications with Mr. Gill around the same time; and

c) Mr. Gust's failure to bill for the additional work to fix the website.

[219] I agree that the loss of access to the website in April 2019 is suspicious given its temporal correlation with the issues regarding the unpaid account. However, correlation does not equal causation. Something more is required to establish on a balance of probability that Mr. Gust was responsible for disabling the website in April 2019. That evidence is missing.

[220] Mr. Gust's communications with Mr. Gill during the relevant time period do not raise this above the level of suspicion. On April 16, 2019, Mr. Gust reached out to Mr. Gill, to inquire whether he was having similar difficulties with getting his account paid. Mr. Gill confirmed that he had a similar issue, but he was finally able to resolve it. Mr. Gill also advised Mr. Gust that he had received an email from Mr. Buckley on April 15, 2019, asking for "login details to the source code". He asked Mr. Gust if he should hold off on sharing the code. Mr. Gust testified that he

advised Mr. Gill to hold off on sharing the code "[u]ntil I get paid at least. After that, I don't really care."[11]

[221] The fact that Mr. Gust asked Mr. Gill to hold off on sharing the code with Clex until after Mr. Gust's bill had been paid could be viewed as consistent with him being the person who disabled the website in the first place. But it is also equally plausible that Mr. Gust was simply taking advantage of an opportunity provided to him by Mr. Gill, rather than being the instigator of the website disconnection.

[222] Mr. Gust's failure to bill Clex for fixing the website in April 2019, is also not necessarily indicative of his guilt. First, I note that he was not asked about this during cross-examination. Second, given his email communications that he considered it to be a "easy" fix, there is no reason to believe that it would have taken him more than a negligible amount of time to correct the problem. Finally, while it is possible that Mr. Gust considered it an easy fix precisely because he had created the problem in the first place, this remains conjecture.

[223] Thus, I am unable to conclude that Mr. Gust is responsible for disabling Clex's connection to the website in April 2019.

[224] I also do not consider the April 2019 Incident helpful in determining Mr. Gust's culpability in relation to the 2020 events, or Clex's liability in the Counterclaim. While the events are similar, there are key differences in what problems were evident, how the events unfolded, their timing and the sequencing. These require an individual analysis of the facts. That fact specific analysis has led to my conclusions regarding the various allegations advanced in the Claim and Counterclaim.

D. Conversion and Detinue

[225] The claim for conversion and detinue relates to the Plaintiff's allegations that after the Work Stoppage, Mr. Gust: (1) prevented Clex and the students from accessing the clexstudy.com website, Software, or Notes (collectively the "Goods"); (2) refused to divulge the passwords needed to access the software, despite a demand from the Plaintiff; and (3) negligently or deliberately sabotaged the Software beyond repair.

[226] Only the first allegation has been proven. I have already found that Mr. Gust re-directed the website to the Uh Oh! Page, and that he accessed the Clex back-end code without authorization. The below analysis is done with those findings in mind.

1. Did Mr. Gust Commit the Tort of Conversion?

[227] Conversion occurs when a person wrongfully interferes with another person's right of possession of goods: *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, at para. 3. This can include taking, using or destroying the goods "in a manner inconsistent with the owner's right of possession": *Boma Manufacturing v. C.I.B.C.,* [1996] 3 S.C.R. 723 at 746, 1996 CanLII 149 ("*Boma*").

[228] The tort of conversion is not limited to physical goods or tangible chattels. It can apply to intangible goods such as electronic data, websites, and email: *Canivate Growing Systems Ltd. v. Brazier,* 2020 BCSC 232, at paras 70-71 ("*Canivate*").

[229] Preventing an owner from accessing their electronic information, software, or database, can constitute wrongful conversion: *Serinus Energy PLC v. SysGen Solutions Group Ltd.,* 2023 ABKB 625, at paras. 188 and193 ("*Serinus*").

[230] In *McKnight v. Hutchinson*, 2019 BCSC 944, at para. 166, Chief Justice Hinkson (as he then was) endorsed the following articulation of the elements required to establish the tort of conversion, as set out in *Ast v. Mikolas*, 2010 BCSC 127, at para. 126:

> (a) a wrongful act by the defendant involving the goods of the plaintiff;
>
> (b) the act must consist of handling, disposing, or destroying the goods; and
>
> (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

[231] To establish conversion, the conduct of the defendant must be intentional. Dispossession which arises from "[n]egligent dealing with goods does not constitute conversion": *McKnight*, at para. 167, citing Lewis N. Klar, *Remedies in Tort* (Toronto: Thomson Reuters, 2019).

[232] Conversion is a strict liability tort. While the dispossession has to arise because of the defendant's intentional act, "it is no defence that the wrongful act was committed in all innocence": *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81, at para. 8, citing *Boma*, at para. 31.

[233] The wrongdoer may still be held liable for conversion if they did not know that the wrongful act was likely to cause harm or that they took reasonable care to avoid harm: *Boma*, at 746, citing *Marfani & Co. v. Midland Bank, Ltd.,* [1968] 2 All E.R. 573, at pp. 577-78, [1968] 1 WLR 956.

[234] With that framework in mind, I turn to the circumstances of this case.

[235] There is no dispute that: (a) the web-based software platform at the heart of this litigation was owned by the Plaintiff; (b) clexstudy.com was co-founded by Mr. Osborne, who is the authorized representative of Clex; and (c) Clex was in lawful possession of the Notes based on consent from the School and Dr. Smulders. As such, I have no difficulty in concluding that the Plaintiff had a possessory interest in the Software, clexstudy.com website, and Notes, and that these were the "goods of the plaintiff".

[236] The real question is whether Mr. Gust wrongfully interfered with Clex's right of possession of the Goods. I am satisfied, on a balance of probability, that he did.

[237] When Mr. Gust re-directed the Clex website to the Uh Oh! Page, he did so intentionally and without permission from Clex. Mr. Gust knew that taking the Clex website offline meant that existing users of the Clex software would be prevented from accessing the Clex website. The message posted on the Uh Oh! Page makes it clear that Mr. Gust's intention was to take the Clex website offline until such time as he was paid. The fact that Clex had the passwords and login information to re-direct the website back to its home page does not absolve Mr. Gust from his wrongful action of conversion.

2. Did Mr. Gust Commit the Tort of Detinue?

[238] The tort of detinue is closely related to the tort of conversion, though it relates to conduct which follows after conversion has been established. Detinue occurs when a person who has wrongfully retained the goods refuses to return them on demand.

[239] The elements for the tort of detinue have been articulated in different ways by this Court. In *Welander Estate v. Hayton*, 2022 BCSC 1941, at para. 24, Justice Taylor endorsed the following summary as set out in *Neill v. Vancouver Police Department*, 2005 BCSC 277, at para. 29: (1) the property is specific personal property; (2) the plaintiff has a possessory interest in the property; and (3) the defendant has refused to return the property. In addition, Justice Taylor noted that the claim in detinue requires evidence of a "proper demand" to return the property, as well as evidence that the defendant failed or refused to comply with the demand: *Welander*, at para. 25, citing *Oh v. City of Coquitlam*, 2018 BCSC 986, at para. 40.

[240] The tort of detinue was considered more recently in the context of a pre-trial application for return of property: *Viking Air Limited v. Cascade Aerospace Inc.,* 2024 BCSC 841 ("*Viking Air BCSC*"), at paras. 138-139, aff'd *Cascade Aerospace Inc. v. Viking Air Limited*, 2025 BCCA 2. Justice McNaughton (then of this Court) held that the test for detinue required the following three elements: (1) the plaintiff has better rights to the property than the defendant; (2) the plaintiff has requested the return of the property; and (3) the defendant has refused the request for return of the property.

[241] After considering the above authorities, I conclude that the tort of detinue involves the following essential elements:

1) the property is specific personal property, and includes tangible and intangible goods;

2) the plaintiff has a possessory interest in the property which supersedes the interests of the defendant;

3) the plaintiff has requested return of the property; and

4) the defendant has refused the request for return of the property.

[242] The tort of detinue is a continuing wrong. The cause of action may be defeated if the chattel is returned at any time before judgment: *Columere Park Development Ltd. v. Enviro Custom Homes Inc.,* 2010 BCSC 1248, at para. 31.

[243] Based on the principles articulated in *Canivate* and *Serinus*, I find that the right to control intangible electronic information, including a website, is analogous to the right of possession. Thus, the elements of detinue will be made out here if a proper demand was made for return of control, and the defendant refused the demand.

[244] In the May 27, 2020, letter, Mr. Nuraney refers amongst other things, to Mr. Gust re-directing the Clex website to the Uh Oh! Page, and demands that Mr. Gust "restore" Clex's website. This letter is sufficient to constitute a demand for the purposes of the tort of detinue.

[245] However, detinue is defeated if it can be shown that the goods were returned prior to the judgement. In this case, two facts in evidence undermine the establishment of this tort.

[246] First, I do not consider this to be a true detinue situation, as Mr. Osborne had all the necessary passwords that would enable him to bring the website back online, or re-direct the website to his preferred location. Indeed, he did exactly that, which brings me to my second point. Mr. Osborne testified that he was able to re-direct the website to the Clex homepage within two weeks of the Uh Oh! Page reappearing. Thus, by the time the letter was sent by Mr. Nuraney, the website was back online. Consequently, even if the tort of detinue was established, the goods were returned within weeks, such that the tort of detinue is defeated.

E. Breach of Fiduciary Duty

[247] In *Medellin v. Lucion*, 2025 BCSC 180, at paras. 118-123, I set out the applicable framework to establish a breach of fiduciary duty, as follows:

> [118] In relationships or circumstances in which one party has the power to affect the interests of another, fiduciary duties may arise to protect the more vulnerable party: *Sharp v Royal Mutual Funds Inc*., 2020 BCSC 1781, at para. 40, aff'd 2021 BCCA 307, citing *Galambos v. Perez*, 2009 SCC 48. These fiduciary duties are breached when the party that owes a duty acts in their own interest, above the interests of the other party: *Hodgkinson v Simms*, [1994] 3 S.C.R. 377.
>
> [119] Fiduciary duties arise in two ways: in established *per se* categories of relationships or on an *ad hoc* basis, where the duty arises as a matter of fact in particular circumstances: *Sharp*, at paras. 41-42. Not all

> relationships of power-dependency will give rise to fiduciary duties: *Galambos*, at para. 74.
>
> [120] *Per se* relationships include the relationship between a trustee and a beneficiary, or a relationship between an agent and a principal: *Sharp*, at para. 41.
>
> [121] An *ad hoc* fiduciary duty, on the other hand, is only established where the claimant shows vulnerability that arises from the relationship: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 ("*Elder Advocates*"), at para. 36.
>
> [122] This vulnerability is characterized by three general characteristics, as set out in *Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 and adopted in *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574, 1989 CanLII 34:
>
> > (1) The fiduciary has scope for the exercise of some discretion or power.
> >
> > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
> >
> > *Elder Advocates*, at para. 27.
>
> [123] In addition to vulnerability arising from the relationship, the party seeking to establish the existence of an *ad hoc* fiduciary relationship must show:
>
> > (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
> >
> > (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
> >
> > (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
> >
> > *Elder Advocates*, at para. 36.

[248] While *Medellin* involved an application for certification under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, the above principles remain applicable to the broader analysis of whether a breach of fiduciary duty has occurred.

[249] I conclude that a breach of fiduciary duty has been established in this case.

[250] The Plaintiff argues that a fiduciary relationship is established because of the nature of the work that Mr. Gust was doing, which made Clex particularly vulnerable to his actions. The Defendant says that neither the pleadings nor the

evidence support this conclusion. Indeed, Mr. Gust goes so far as to ask that the pleadings for breach of fiduciary duty be struck.

[251] I agree with the Defendant that the pleadings are woefully inadequate with respect to a pleading for breach of fiduciary duty. Aside from alleging under Part 3: Legal Basis, that Mr. Gust committed a “breach of fiduciary duty”, the Notice of Civil Claim fails to set out any of the elements of the breach, or the factual basis for this assertion. There is nothing specifically pled regarding Mr. Gust assuming fiduciary obligations, either express or implied through any contract. However, that does not mean that I should strike the pleadings at this stage, when the evidentiary portion of the trial has concluded.

[252] Unfortunately, neither party provided me with any authority that is of assistance on this issue. As such, I have looked to the *Supreme Court Civil Rules* to guide my analysis.

[253] Rule 9-5(1) of the *Supreme Court Civil Rules* permits this court to order pleadings be struck “at any stage of a proceeding”. On its face, the Rule appears to give the court discretion to strike pleadings even as late as the trial stage. However, it would be inappropriate to consider striking the pleadings at this stage, for the following reasons.

[254] First, the plaintiff has not actually brought an application to strike. No notice of application was filed by the Defendant seeking this relief.

[255] Second, even if the “request” could be characterized as an application to strike, it would not be appropriate to entertain it as a simple matter of fairness. The Defendant could have brought such an application prior to the trial commencing, but chose not to, and provided no explanation for this failure. The trial was conducted on the basis that the pleadings could stand. It would be manifestly unjust now for this court to strike the pleadings and disregard the evidence that I have heard.

[256] Third, under Rule 9-5(2), no evidence is admissible on an application to strike pleadings for disclosing no reasonable claim of action under Rule 9-5(1). Despite the phrase “at any stage of a proceeding,” this strongly suggests that the proper time to seek to strike pleadings on this basis would be before evidence is entered. While the court can and sometimes does disregard improper evidence, it

seems illogical that Rule 9-5 would allow pleadings to be struck for disclosing no cause of action after evidence has been entered, while at the same time evidence is inadmissible on such applications.

[257] Fourth, the Defendant has not suggested any prejudice caused by this Court making a determination based on deficient pleadings. Indeed, there is no indication that any such prejudice exists. The Defendant led evidence and made submissions to address the breach of fiduciary duty argument.

[258] Fifth, the Defendant's reliance on *Andreasen v. Malahat Nation*, 2022 BCSC 363, is misplaced. In *Andreasen* the Court was dealing with applications to strike pleadings. That is not what I have before me here – as I have said, no application to strike was brought in this case.

[259] Finally, there is case law from other provinces and the Federal Court that suggests that such applications should be brought early in the proceedings, and that the court may decline to strike pleadings if a party applies at such a late stage that it will cause "delay, cost and inconvenience*": Lethal Energy Inc v. Kingsland Energy Corp*, 2014 SKQB 10 at para. 32.

[260] In *Berhad v. Canada*, 2002 FCT 298, the Federal Court reasoned that the court may consider a motion to strike for want of a reasonable cause of action at any time in a proceeding because the cause of action "goes to the heart of the matter," but that "technical" challenges to pleadings should be raised early, or else "the aggrieved party must forever hold his or her peace": at para. 12.

[261] Notably, the rules in Saskatchewan and the Federal Court Rules both state that the court may strike pleadings "at any stage". This is the same as the language in British Columbia's *Supreme Court Civil Rules*.

[262] Consequently, despite deficient pleadings, it is appropriate for me to consider the claim in light of the evidence. That evidence supports a finding that Mr. Gust was in an *ad hoc* fiduciary relationship with Clex in relation to the handling of Clex's website.

[263] In *Canivate*, Justice W. A. Baker noted the following:

> [59] The situation before me is entirely different. This is not a case where Canivate says that Mr. Brazier has an ongoing duty to benefit Canivate. Rather, Canivate says that Mr. Brazier has a continuing

> obligation to not harm Canivate, and to not take advantage of Canivate's vulnerability in relation to the domain name – a vulnerability created by the fact that only Mr. Brazier knew he was the sole registrant of the domain name and that Mr. Mueller and others at Canivate, based on a statement made by Mr. Brazier in January 2018, understood the domain name to be owned by the company.
>
> [60] I agree with Canivate. The actions of Mr. Brazier are particularly egregious given that the intention of Mr. Brazier was to deliberately harm Canivate and generate leverage for himself in the other action.

[264] As a website developer contracted by Clex, Mr. Gust was in a unique position. He was hired to do a job which required him to have access to the heart center of Clex's website. This made Clex particularly vulnerable.

[265] Mr. Gust had Clex's passwords, which gave him unrestricted access to the Clex codebase. This meant that he could make any changes he wanted to the user interface and the back-end code. He had the ability to access the codebase remotely at any time, which meant that his actions could go undetected by Mr. Buckley, who had been given the general responsibility for oversight of Mr. Gust's work.

[266] Mr. Gust had, effectively, the virtual keys to Clex's online kingdom. The fact that Clex's kingdom was small, does not negate his fiduciary obligations to ensure that he did not take steps to cause harm to Clex. With those keys came an implied undertaking that Mr. Gust would act in the best interest of Clex when he accessed the website.

[267] I am satisfied that all of the criteria in *Elders Advocates* for the existence of an *ad hoc* fiduciary duty are met. Clex was particularly vulnerable to Mr. Gust's exercise of discretion or control, and had a substantial practical interest that stood to be adversely affected by Mr. Gust's actions.

[268] I find that Mr. Gust's actions in redirecting the Clex website to the Uh Oh! Page, were a breach of his fiduciary obligations to Clex. The fact that Clex was able to ultimately re-direct the website away from the Uh Oh! Page, does not absolve Mr. Gust of his responsibilities.

[269] Similarly, his access to the back end between December 2020 and February 2021, without authorization, was a breach of his fiduciary obligations to

Clex, as Clex was particularly vulnerable to these actions which stood to adversely affect it.

F. Negligence

[270] Clex also argues that Mr. Gust was negligent in his actions towards Clex. This allegation was also inadequately plead, and indeed, barely addressed during oral arguments. Nevertheless, I have addressed it within the context of the detailed submissions of the Defendant on this aspect of the claim.

[271] In *Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority,* 2005 BCCA 567, at para. 18, the Court cited the following passage from *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, 1999 CanLII 706, to explain what is meant by negligence:

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
>
> [Emphasis added]

[272] At para. 21 of *Lawrence*, the Court explained the importance of determining what is a reasonable or unreasonable risk in each case. The Court noted that not all conduct that gives rise to risk will result in liability. Rather, the care required by a party is commensurate with the degree of risk created, such that the "greater the risk of harm, the greater the care required to guard against its realization".

[273] The words "unreasonable risk" reveal a recognition by the courts that virtually all activity will involve some element of risk. The goal is not to eliminate risk entirely, but to ensure that the risk is kept to an acceptable level: *Lawrence*, at para. 22.

[274] Determining whether a particular risk is unreasonable or not is a fact specific exercise. A pole in the sidewalk may present only a small degree of risk for sighted and able-bodied people during daylight hours; that same pole could

pose a substantially different risk in the dark, to a visually impaired person, or to a person who has limitations in motor function: *Lawrence*, at para. 23.

[275] In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, the Court set out the essential elements to establish liability in negligence:

> [77] In a successful negligence action, a plaintiff must demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3; *Saadati*, at para. 13).

[276] There is no dispute that Clex relied on Mr. Gust to provide back-end web development services as it related to the development of the Software.

[277] The Defendant concedes that Mr. Gust owed a duty to Clex, as a web developer, to exercise all reasonable care, skill, diligence, and competence, while working on the Software. However, Mr. Gust's responsibilities were limited to the development of the Software. Mr. Gust's responsibilities did not go beyond the back-end code development.

[278] I am satisfied that Mr. Gust met this standard of care. In particular, I find that Mr. Gust did not create an objectively unreasonable risk of harm while performing his duties for Clex or while estimating the cost for the work that he was asked to perform.

[279] There is no evidence that Mr. Gust's back-end web development services fell below the standard of care while he was performing his duties for Clex. Nor is there any indication that Mr. Gust was incapable of fixing any issues that arose throughout the back-end code development process. Rather, the evidence establishes that writing back-end code is a difficult and complicated task requiring specialized knowledge and expertise. By all accounts, Mr. Gust possessed that knowledge and expertise.

[280] The complexity of the task that Mr. Gust was asked to undertake is underscored by the fact that Mr. Gust was asked to develop a version of the software for testing. The testing phase was important to locate and fix any bugs that were not readily evident at the development phase. The fact that Mr. Gust was asked to have a version of the software ready for testing was a tacit

acknowledgement by Clex that there was a risk that Mr. Gust would not be able to develop perfect code on the first try, and that his code would need to be tested to ensure that it was functional.

[281] The fact that Mr. Gust was contracted to work on an hourly rate basis, rather than flat fee, reinforces this point. Both Mr. Gust and Mr. Shih testified that providing estimates and working on an hourly retainer is a common practice within the industry.

[282] Further, the evidence shows that Clex would give Mr. Gust tasks for which he would provide estimates and, on approval, Mr. Gust would perform his work on an hourly basis. If development issues arose while Mr. Gust was completing the task and these required additional time to complete, then Mr. Gust would advise Mr. Buckley, who in turn would advise Clex and seek its approval for Mr. Gust to perform the work.

[283] Thus, while there was a foreseeable a risk that some bugs would remain in the Software when Mr. Gust delivered it to Clex, this risk was not unreasonable. Similarly, the risk that Mr. Gust might underestimate the amount of time required to perform a task was foreseeable, but not unreasonable.

[284] The parties were aware that there was a possibility that some bugs might remain in the Software, and some tasks may require more hours. There is no basis to find that Mr. Gust was negligent in his duties to Clex.

G. Intentional Interference with Economic Relations

[285] The allegation that Mr. Gust intentionally interfered with the economic relations of Clex is also poorly plead and barely argued. I am indebted again to the submissions of the Defendant's Counsel, which assisted the Court in grappling with this issue.

[286] The elements required to establish the tort of intentional interference in economic relations were set out by the Court in *Muldoe v. Derzak,* 2021 BCCA 199, at para. 33, as follows:

> [33] In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, the Court clarified the elements of the tort of intentional or unlawful interference with economic relations. Justice Cromwell, writing for the Court, described the various terms used to describe the tort but referred to

> it as the "unlawful means" tort: at para. 2. As that nomenclature indicates, an essential element of the tort is that the defendant committed an unlawful act. Justice Cromwell emphasized the narrow bounds of the tort at para. 5, and summarized its elements:
>
> > [23] The unlawful means tort creates a type of "parasitic" liability in a three party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party) … There is no dispute here that this is an intentional tort; the focus of the dispute in this case is on the unlawful means element.
> >
> > [Internal citations omitted; emphasis added.]
>
> The Court elaborated that at its core, the tort has two key ingredients: intention and unlawfulness. The gist of the tort is the intentional infliction of economic harm by unlawful means: at para. 28.

[287] These elements were summarized in *Low v. Pfizer Canada Inc*., 2015 BCCA 506, at para. 77, as requiring the following:

a) an unlawful act committed against a third party;
b) intended to cause economic harm to the plaintiff; and
c) resulting in economic harm to the plaintiff.

[288] There are two wrongful acts that have been proven in this case: the re-directing of the Clex website to the Uh Oh! page, and the unauthorized access to the back-end code.

[289] In *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, the Ontario Court of Appeal defined unlawful conduct for the purposes of the tort of intentional interference as conduct that is "actionable":

> [33] What is clear from this jurisprudence is that, to constitute unlawful conduct for the purposes of the tort of intentional interference, the conduct must be actionable. It must be wrong in law. Conduct that is merely not authorized by a convention or an understanding is not enough…

[290] In coming to this conclusion, the Court rejected the trial judge's broader definition of unlawful conduct, which would have included "conduct that the defendant 'is not at liberty' or 'not authorized' to engage in, whether as a result of

law, a contract, a convention or an understanding": *Agribrands Purina Canada Inc*., at para. 31.

[291] I have already found that Mr. Gust is liable for the tort of conversion and breach of fiduciary duty. In other words, his conduct is actionable for both re-directing the website to the Uh Oh! Page, and the unauthorized access to the back-end code. Therefore, it meets the definition of an unlawful act. Nevertheless, the Plaintiff fails on the first branch of the test articulated in *Low*, because Mr. Gust acted against the Plaintiff, not a third party, when he re-directed the site and when he accessed the back end without permission.

[292] Consequently, the Plaintiff has failed to establish that Mr. Gust intentionally interfered with the economic relations of Clex.

H. Libel

[293] By now it should come as no surprise that the allegation that Mr. Gust committed libel is also poorly plead and barely argued. Nevertheless, the Plaintiff seeks nominal damages of $1,000 against Mr. Gust for slandering Clex when he re-directed the Clex website to the Uh Oh! Page. For the reasons that follow, this claim is dismissed.

[294] Defamation can consist of either slander or libel. "Slander is a spoken defamatory statement, whereas libel occurs when the defamatory statement is made in written form": *Seikhon v. Dhillon*, 2017 BCSC 2525, at para. 114.

[295] To prove a claim in defamation, the plaintiff must establish that: (a) the impugned words were defamatory; (b) the words referred to the plaintiff; and (c) the words were published (i.e. communicated) to at least one person other than the plaintiff: *Grant v. Torstar Corp*., 2009 SCC 61, at para. 28.

[296] If the above elements are established on a balance of probability, falsity and damage are presumed, and the onus shifts to the defendant to establish a defence: *Grant*, at para. 28. However, the exception is slander. Slander requires proof of special damages, unless the impugned words were slanderous *per se*: *Grant*, at para. 28.

[297] Defamation is a strict liability tort. The plaintiff is not required to show that the defendant was careless or intended to cause harm: *Grant*, at para. 28.

[298] In *Weaver v. Corcoran*, 2017 BCCA 160 [*Weaver*], the Court noted at para. 71, that there are three ways in which words can convey defamatory meaning:

a) if the literal meaning of the words complained of are defamatory;

b) if the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or

c) if the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).

[299] In *Hudson v. Myong*, 2020 BCSC 517, at para. 109, Justice Douglas noted that not all unkind or potentially offensive statements about a person will be defamatory:

> [109] Generally speaking, mere words of abuse which injure a person's feelings, insult his or her pride, or cause annoyance or embarrassment are not actionable. The law does not redress solely for wounded sensibilities. Nor is there an action for insults which do not diminish a person's standing in the community; the law regards as innocuous language which is merely offensive and vituperative…

[300] What was specifically understood by the persons to whom the defamatory communication was made, is not the focus of the inquiry. As stated by Justice Prowse in *Kerr v. Conlogue,* 65 B.C.L.R. (2d) 70, at para. 43, 1992 CanLII 924 (S.C.):

> [T]o prove that the article is capable of being defamatory or in fact is defamatory, there is no onus on the Plaintiff to prove that reasonable people actually understood the words in a defamatory sense. Rather, the Plaintiff is only required to prove that the ordinary reasonable person might have understood it in a defamatory sense. The Plaintiff does not have to prove that persons to whom it was published in fact did think less of him: indeed a person may be defamed even though those to whom the statement is published know it to be untrue...

[301] Truth is a defence to defamation. To succeed on this defence, the defendant must show their statement was "substantially true": *Grant*, at para. 33.

[302] The alleged defamatory statement in this case is the assertion in the Uh Oh! Page that Clex did not pay its web developers. I find that the statement "We

didn't pay our web developers" would likely tend to lower the Plaintiff's reputation in the eyes of a reasonable person. It suggests Clex has wrongfully failed to pay its contractors or employees. I also find that the defamatory words referred to the Plaintiff. They appeared when someone was trying to access the Plaintiff's website, below an image of the Plaintiff's logo. Lastly, I find that the words were published. They appeared publicly and could be viewed by anybody who tried to access the Clex website.

[303] However, there is uncontroverted evidence that Clex indeed failed to pay Mr. Gust. Mr. Gust issued a valid invoice, the invoice remained outstanding when the website was re-directed to the Uh Oh! Page, and the invoice was long overdue. Mr. Osborne himself testified that he had not paid the March Invoice to Mr. Gust and that, after the website was re-directed, he did not intend to ever pay the outstanding $660.[12]

[304] I conclude that Mr. Gust has shown, on a balance of probabilities, that the impugned statement was truthful. This is a full defence to the allegation.

I. Damages Against Mr. Gust

[305] I have found Mr. Gust liable for:

a) Conversion and breach of fiduciary duty by re-directing the Clex website to the Uh Oh! Page; and

b) Breach of fiduciary duty for the unauthorized access to the Clex back end.

[306] I now turn to an assessment of general damages against Mr. Gust for these two wrongful acts.

1. General damages

[307] The Plaintiff asks for "general damages for breach of contract, conversion, detinue, and intentional interference with economic relations to be assessed at $200,000 for the loss of the Clex Software plus $100,000 for the loss of the unprecedented opportunity to launch Clex at the start of the COVID pandemic with an institutional investor on board".

[308] While I have found Mr. Gust is liable for conversion and breach of fiduciary duty, the above damages are not proven on the evidence.

[309] First, the $200,000 figure is based on an estimate from Mr. Shih to rebuild the Clex website from scratch. According to Mr. Shih, it is very difficult for a developer to take over the work of another developer. Accordingly, he provided an estimate to rebuild the website rather than to try to repair it and complete it. However, there is no evidence that Clex was required to re-build the website because of actions taken by Mr. Gust.

[310] Second, this figure is for a fully functioning website, rather than a demo version, which is all that Mr. Gust was asked to provide.

[311] Third, neither Mr. Shih nor the Plaintiff have provided any basis on which this court can assess the reasonableness of this figure. The $200,000 figure stems from what Mr. Shih described as a “rough” estimate, and is unsupported by any details, such as the number of hours or hourly rate that it is based on. Nor have I have been provided with precise evidence as to what it cost Clex to get the website to the stage it was at when Mr. Gust left the Project.

[312] I have similar concerns about the $100,000 figure. Clex was still at the testing phase of its software, and the suggestion that it would have been able to successfully launch a bug-free version but for Mr. Gust’s actions, is not supported by the evidence.

[313] Further, Dr. Smulders testified that she would have helped her brother, Mr. Osborne, if the Software were completed. She provided evidence that she had a good working relationship with Mr. Madden, the Program director, and the opportunity to try the Software remained if she reached out to the college. She provided evidence that she had no reason to believe otherwise. The evidence of Dr. Smulders contradicts that of Mr. Osborne, who said he had “mud on the face” after the developments that occurred on the demo day at the Boucher College, and suggested that this opportunity was permanently lost.

[314] Finally, even if I was to find that the damages sought by Clex had been proven, which I do not, they would not be payable due to Clex’s failure to mitigate. I agree with the Defendant that Clex failed to mitigate its loss by paying Mr. Gust for his services and getting his assistance to restore the website’s functionality.

Mr. Gust's invoice was only for $660. Even if Mr. Osborne honestly believed that Mr. Gust did not do the work that he had billed for, he could have paid the invoice conditionally, disputed it in court, and saved the cost of hiring a new person to complete the website. The circumstances from 2019 show that the parties had been able to successfully overcome their difference in an earlier fee dispute that was over a larger sum of money.

[315] I turn then to what would be an appropriate measure of damages for Mr. Gust's actions. The only action that Mr. Gust performed that caused harm to Clex was the re-direction of the Clex website. To that end, Mr. Osborne testified that the re-direction of the website was not the most significant concern for Clex. Though he thought it was defamatory, as he claimed that he always paid his contractors, Mr. Osborne testified that he had control over the domain name, and re-directing the URL back to the Clex website was still possible. Indeed, within two weeks he was able to re-direct traffic back to the Clex website.

[316] It is difficult to quantify the harm suffered by Clex due to Mr. Gust re-directing the Clex website to the Uh Oh! Page. I lack any evidence of how many students were directed away from the website, or the value of the investor that Mr. Osborne says left as a result of the website re-direction. To the extent that people were turned away from Clex because they thought it was a company that did not pay its web developers, that is not a loss that Mr. Gust is responsible for. As I have noted, truth is a full defence to libel.

[317] Difficulty in quantifying damages is not a bar to awarding them.

[318] If a plaintiff has established that a loss has been suffered, the court must do the best it can with the evidence it has: see *Wood v. Grand Valley Railway Co.*, 51 S.C.R. 283, 1915 CanLII 574, and *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 1999 CanLII 705, at para. 99.

[319] The evidence establishes that for a period of up to two weeks, users were re-directed away from the Clex website to the Uh Oh! Page. However, Clex was able to repair this problem within about two weeks. The challenge was that Mr. Osborne and Mr. Buckley damaged the website along the way, and were unable to restore it to the place it had been before Mr. Gust re-directed it. In my view, the damage to the website that occurred when Mr. Osborne and Mr. Buckley tried to

re-direct the website to the proper landing page was due to their negligence and not something done by Mr. Gust.

[320] Further, even if Mr. Osborne and Mr. Buckley had not been negligent, it was not foreseeable that Clex would have had these challenges in re-directing the website to its rightful location. Nor was it foreseeable that Mr. Osborne or Mr. Buckley would try to fix the website problem themselves, rather than paying someone who had proper training to re-direct the website.

[321] Even if it was foreseeable that Clex would suffer this harm as a result of Mr. Gust's actions, which I find it was not, Clex's negligence in not providing Mr. Shih with the proper login information so that he could restore the website in a timely manner, cannot be attributed to Mr. Gust.

[322] To that end, Mr. Gust is not responsible for the amount Clex paid to Mr. Shih to restore the website, as Mr. Shih was correcting a problem of Clex's making and not something that Mr. Gust had done.

[323] I find that Mr. Gust is not responsible for the harm that followed after the two weeks it took to change the direction of the website away from the Uh Oh! Page.

[324] In *Osborne v. Harper,* 2005 BCSC 1683 at para. 4, the court cited *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at para. 73, for the proposition that the "proper approach" to damages for breach of fiduciary duty is restitutionary. The goal is to restore the Plaintiff to their original position.

[325] Doing the best that I can with the evidence I have, I find that an appropriate sum for the harm caused by Mr. Gust's actions, is $7,000. This amount takes into consideration that I have found Mr. Gust liable in conversion and for breach of a fiduciary duty when he used his privileged access to the Clex codebase and also re-directed the website to the Uh Oh! Page; the fact that while both these actions were wrong, only the conversion resulted in some harm to Clex; and the harm to Clex was minimal. This $7,000 amount is subject to a set-off for the amount awarded to Mr. Gust in his Counterclaim, which is addressed below.

[326] The Plaintiff has asked for court order interest to be assessed from October 10, 2023. Under s. 2(e) of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, no interest is payable on an award for non-pecuniary damages if the award arises

from personal injury or death. The award here is for breach of fiduciary duty and wrongful conversion, both of which awards attract interest: see *Osborne v. Harper,* 2005 BCSC 1683, at paras. 4 and 8; and *Cruise Connections Canada v. Cancellieri*, 2012 BCSC 53, at para. 403.

[327] I am satisfied that such an order should be made. The Plaintiff is entitled to court order interest on the non-pecuniary damages award of $7,000, to be assessed from October 10, 2023.

2. Special Damages

[328] I turn to the claim for special damages. The Plaintiff seeks to be indemnified for money it paid to Mr. Shih in attempting to recover the Clex Software. This includes $5,000 paid to Mr. Shih for his unsuccessful attempts to restore the website; and a total of $3,600 paid to AWS for one year (at $300 per month) to keep the website while Mr. Shih tried to restore it. In my view, there is no basis on which to find Mr. Gust liable for these costs.

[329] As I noted elsewhere, Mr. Shih was never provided the link that Mr. Gust had given to Clex to restore the website's functionality, nor was he directed to the correct location for where the back-end code was stored. These failings are Clex's responsibility, and not the fault of Mr. Gust.

[330] The claim for special damages against Mr. Gust, is dismissed.

3. Punitive Damages

[331] I turn finally to the claim for punitive damages. The Plaintiffs ask for punitive damages sufficient to bring the total judgment up to $250,000. It is unclear what the Plaintiff means by this, as the total claim advanced above exceeds $300,000. However, elsewhere during his submissions, counsel sought an award of $50,000 as punitive damages for conversion.

[332] Punitive damages are aimed at retribution, deterrence, and denunciation, rather than compensation: *Whiten v. Pilot Insurance Co*., 2002 SCC 18, at para. 94.

[333] Punitive damages are awarded only when there has been high-handed, malicious, arbitrary, or highly reprehensible conduct and must be assessed in

proportion to the harm caused, degree of misconduct, plaintiff's level of vulnerability, any advantage the defendant gained through their conduct: *Whiten*, at para. 94.

[334] To succeed in a claim for punitive damages the facts must be pleaded with some particularity and rigour: *Whiten*, at paras. 87 and 94.

[335] The pleadings are woefully inadequate in relation to the punitive damages claim. Aside from mentioning under Part 2: Relief Sought, that Clex is asking for punitive damages, no factual or legal basis is advanced for such a claim. Nor was any evidence led to support the claim.

[336] As noted in *Whiten*, at para. 94 a punitive damages claim must be assessed in proportion to the harm caused, degree of misconduct, plaintiff's level of vulnerability, and any advantage the defendant gained through their conduct. In *Whiten*, the test is described as limiting the award "to misconduct that represents a marked departure from ordinary standards of decent behaviour." at para. 36.

[337] Mr. Gust's conduct does not meet this high bar. There is nothing in the facts of this case that takes it from an ordinary case of conversion or breach of fiduciary duty, to the level of high-handed conduct required to be established to support a claim for punitive damages. The harm caused was relatively modest and Mr. Gust did not gain any advantage or profit from his actions.

[338] The Plaintiff has failed to meet its burden of establishing that punitive damages are warranted in this case. The claim for punitive damages is dismissed.

J. Damages Assessment for the Buckley Claim

[339] I turn now to the assessment of damages in relation to the claim against Mr. Buckley, for which the Plaintiff obtained default judgment in December 2022.

[340] Mr. Buckley did not file a Response to Civil Claim. Consequently, he does not have the right to participate in the damages trial, though this Court retains the discretion to permit his participation: *XY, LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 1840, at para. 50; see also *Milly v. Kapelus*, 2022 BCSC 1730.

[341] I am satisfied that this damages assessment should proceed in Mr. Buckley's absence. Mr. Buckley has not shown any interest in this litigation, let

alone an interest in participating in the damages trial.

1. Damages Payable

[342] I turn now to determining the amount of damages that Mr. Buckley should be ordered to pay the Plaintiff. The Plaintiff claims general damages, special damages, court ordered interest, and costs.

[343] The agreed facts in relation to Mr. Buckley are set out at paras. 15-17, above. Those facts establish that Mr. Buckley owed a duty to the Plaintiff to exercise all reasonable care, skill, diligence, and competence as a Project Manager and a Scrum Master while fulfilling his responsibilities to Clex while managing the development of the Software, and that he was negligent in fulfilling these duties. Mr. Buckley's responsibilities, the Project Manager Responsibilities, are reproduced below for ease of reference:

a) contracting web developers;

b) budgeting;

c) controlling access to Software;

d) documenting and instructing web developers on deliverables;

e) beta-testing and quality control to ensure that deliverables were functional

f) preserving versions of the Software throughout development; and

g) managing Software development generally.

[344] I agree with the Defendant that Mr. Buckley was the only defendant that failed to meet the standard of care owed to Clex. The evidence in this case establishes that Mr. Buckley was particularly negligent in the following ways:

a) He failed to control access to the Software, which made it possible for Mr. Gust to access the Software to re-direct the website to the Uh Oh! Page.

b) He failed to preserve versions of the Software throughout development, making it difficult to restore the website without the assistance of Mr. Gust.

c) He failed to provide Mr. Shih with the link that Mr. Gust had forwarded him for the back-end code created by Mr. Gust which was stored on AWS.

d) He led Mr. Shih to the misunderstanding that the Gust Code could be found on Heroku, and then did not correct that misunderstanding until after Mr. Shih had wasted valuable resources.

e) He failed to exercise due diligence and caution when working with Mr. Osborne to try to re-direct the Clex website away from the Uh Oh! Page. While Mr. Osborne testified that he and Mr. Buckley were working on this together, the evidence leads me to conclude that at all times Mr. Osborne was relying on Mr. Buckley to provide him with direction and expertise in this arena. Consequently, I attribute most of the accidental loss of function that occurred after the site was re-directed by Mr. Osborne and Mr. Buckley, to be due to Mr. Buckley's negligent failure to perform his responsibilities to Clex.

[345] I am satisfied that the above negligent acts of Mr. Buckley caused damage and loss to Clex. However, I am unable to conclude that the damage and loss are in the magnitude sought by Clex, as discussed in the claim against Mr. Gust.

[346] In my view, Mr. Buckley should be held liable to Clex in the amount of $25,000, which I find is a reasonable figure for the loss of the Clex Software and costs for rebuilding it. This accounts for Mr. Osborne's contributory negligence in the re-direction of the Clex website and the subsequent damage which resulted in the inability to upload PDFs to the website, and the word bank malfunction.

[347] I am also satisfied that Clex did lose an opportunity to launch the Software during COVID. However, it must be borne in mind that the Software was still in the early stages, there were bugs that had to be ironed out, and the future success of the Software was uncertain. As such, there were many variables that would have impacted the success of the Software. I am satisfied that the sum of $15,000 is reasonable to account for this loss.

[348] I also find that Mr. Buckley should be liable to Clex for special damages related to the cost of Mr. Shih's work on trying to restore the website. This figure amounts to $5,000. Added to this is the $3,600 that Clex paid to AWS to maintain

the website for one year. This sum too is reasonable and proven to be directly caused by Mr. Buckley's negligence.

[349] No claim was advanced against Mr. Buckley for punitive damages, and none is warranted in any event, based on the evidence before me.

[350] In conclusion, I find Mr. Buckley liable for the following damages due to his negligence:

a) $25,000 for the loss of the Clex website and cost for restoration;

b) $15,000 for the loss of opportunity; and

c) $8,600 for special damages.

[351] In addition, Clex is entitled to interest on the above award of $48,600 made against Mr. Buckley, pursuant to the *Court Order Interest Act*.

2. Joint and Several Liability

[352] I now turn to the question of joint and several liability. This concept relates to situations where there are multiple defendants, as in here.

[353] Joint tortfeasors are jointly liable for the damages suffered by a party. Joint liability will be found in three scenarios: vicarious liability, agency, and concerted action. There is no suggestion that Mr. Buckley and Mr. Gust were in a vicarious or agency relationship with each other.

[354] Concerted Action may be made out when wrongdoers acted "in furtherance of a common design": *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370, at para. 18.

[355] In *I.C.B.C. v. Stanley Cup Rioters*, 2016 BCSC 1108 at para. 25, the Court adopted the requirements for establishing joint liability on the basis of concerted action as first set out in the U.K. case of *Sea Shepherd UK v Fish & Fish Limited*, [2015] UKSC 10:

> 55. It seems to me that, in order for the defendant to be liable to the claimant in such circumstances, three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act

> be committed; and, thirdly, the act must constitute a tort as against the claimant.

[356] Despite the reference to a "primary tortfeasor" in *Sea Shepherd UK*, the Court of Appeal in *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia,* 2022 BCCA 366 ("*Valeant*") rejected the notion that a primary tortfeasor was required as a precondition for concerted action. Rather, the three requirements to establish concerted action are "substantial assistance, an unlawful object, and an underlying alleged tort": *Valeant* at para. 164.

[357] In *Valley Traffic Systems Inc.* at para. 22, the Court discussed the type of conduct that could satisfy the requirement of a common design or unlawful object as follows:

> …Knowingly assisting, encouraging or even being present as a conspirator at the commission of the wrong could suffice, as could any form of inducement, incitement or persuasion that procures the commission of the wrong...

[358] In my view, joint liability cannot be established on the basis of concerted action in relation to the awards made against Mr. Gust or Mr. Buckley. It cannot be said that Mr. Buckley, who acted negligently, was acting pursuant to a common design with Mr. Gust, who acted intentionally.

[359] Mr. Buckley's purpose for the acts that resulted in harm to Clex, was to help restore the site and keep it functioning; Mr. Gust's purpose in putting up the Uh Oh! Page was to interfere in the proper functioning of the website, so that he could compel payment of his invoice.

[360] I now turn to several liability. "Several" tortfeasors are also referred to as "separate" or "independent" tortfeasors. Their degree of liability for the overall harm depends on whether their actions "combine to produce the same damage" or if they cause different damage: *B.P.B. v. M.M.B*, 2009 BCCA 365 at para. 69.

[361] Insofar as Mr. Gust's action in re-directing the website to the Uh Oh! Page is concerned, I am satisfied that Mr. Gust and Mr. Buckley's acts combined to produce the same damage. Mr. Buckley failed to control access to the Software, which made it possible for Mr. Gust to re-direct the website to the Uh Oh! Page even after he had stopped doing work for Clex. Consequently, I find that Mr.

Buckley is severally liable for the $7,000 damages award that is made against Mr. Gust.

[362] However, the converse is not true. I am unable to conclude that Mr. Gust is severally liable for the damages award made against Mr. Buckley for the loss of the Clex website and cost for restoration; loss of opportunity; and special damages. Mr. Gust's actions did not combine to produce those harms. Rather, those losses are solely attributable to the actions of Mr. Buckley.

[363] The claim for joint and several liability against Mr. Gust and Mr. Buckley, is dismissed, with the exception that Mr. Buckley is severally liable for the $7,000 award made against Mr. Gust in relation to the re-direction of the Clex website to the Uh Oh! Page.

III. The Counterclaim

[364] Mr. Gust advances a counterclaim for damages for: breach of contract related to the non-payment of his invoice for $660; breach of duty of good faith, by bringing this action against Mr. Gust in bad faith; and abuse of process by bringing this action for an improper purpose.

[365] I agree with Mr. Gust that the Plaintiff is liable to him for breach of contract for failure to pay Mr. Gust's invoice of $660. My findings of fact to support this conclusion are set out in my analysis of the main claim. The evidence establishes that Clex agreed to pay Mr. Gust for work performed at the rate of $55 per hour; Mr. Gust performed work for Clex; Mr. Gust issued an invoice that reflected the work that he performed; and Clex failed to pay the invoice even though it was contractually bound to do so.

[366] Consequently, Clex is liable to Mr. Gust in the amount of $660, plus interest in accordance with the *Court Order Interest Act*.

[367] I turn now to the allegations that Clex breached its duty of good faith and that the action was brought in bad faith and is an abuse of process.

[368] I am unable to find that Clex owed Mr. Gust a duty of good faith. To date, a duty of good faith has only been recognized in specific contractual relationships, including in the employment, insurance, and tendering context: *Bhasin v. Hrynew,*

2014 SCC 71, at paras. 53-56. While Clex contracted with Mr. Gust for developer work, Mr. Gust was not an employee of the company, so the duty of good faith generally found in employment contracts does not apply.

[369] Beyond the specific contexts above, the Supreme Court of Canada found in *Bhasin* that there is a “general organizing principle of good faith” and “a duty to perform contracts honestly”: at para. 62.

[370] The evidence shows that Mr. Osborne believed that Mr. Gust had not performed the services for which he had been retained. On that basis, he refused to pay Mr. Gust. This was a breach of the terms of the parties’ contract, but it did not amount to a breach of the duty of good faith because no such duty was owed.

[371] I am satisfied that Mr. Osborne was wrong in concluding that Clex was not liable to Mr. Gust for his outstanding account and refusing to pay that amount. However, that does not mean that the decision to not pay him was made in bad faith. The consequences for being wrong in law are an award for costs, not a finding of bad faith. To that end, I agree with the Defendant that this action was completely avoidable. If Clex had fulfilled its legal responsibility to Mr. Gust and paid his outstanding account, the events that resulted in Clex having to hire Mr. Shih could have been avoided, and this entire action would have been unnecessary.

[372] Similarly, the evidence does not support a finding that Clex participated in an abuse of process.

[373] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79,* 2003 SCC 63, at para. 37.

[374] In *Chernen v. Robertson*, 2014 BCSC 1358, at para. 29, citing *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 1993 CarswellBC 2950, Chief Justice Hinkson held that the categories of abuse of process are open and can include, among others, proceedings where the process of the court is not being fairly or honestly used, proceedings which are without foundation or serve no useful purpose, and multiple or successive proceedings which cause or are likely to cause vexation or oppression.

[375] There is no evidence that the Plaintiff engaged in any of this type of conduct by bringing the action against Mr. Gust.

[376] I am unable to conclude that the Plaintiff brought this action for an improper purpose of recouping its own costs of developing the Software. The allegation that Clex brought the claim for this purpose is pure conjecture on Mr. Gust's part. Rather, the evidence establishes that Mr. Osborne believed Mr. Gust was liable to him on the basis of the claims I have evaluated above.

[377] Further, the evidence establishes that Mr. Gust did participate in two types of misconduct that was alleged by the Plaintiff (re-directing the Clex website and accessing the back-end of the code without authorization).

[378] In conclusion, the claims for bad faith and abuse of process are dismissed.

[379] I turn to the claim for aggravated damages. In *Café La Foret Ltd. v. Cho*, 2023 BCCA 354, at para. 60, the Court of Appeal confirmed that aggravated damages are compensatory in nature and intended to address mental distress experienced by the plaintiff due to conduct of the defendant. They are distinct from punitive damages, which are intended to punish the wrongdoer for egregious or outrageous behaviour:

[380] Counsel for Mr. Gust argues that by commencing this lawsuit rather than paying Mr. Gust his outstanding account, Clex caused Mr. Gust pain, anguish, grief, humiliation, wounded pride, or damaged self-confidence. There is no evidence to support this allegation. While Mr. Gust was no doubt frustrated by not having his account paid and having to defend this action, there is no evidence that he suffered from some form of mental distress due to the actions of the Plaintiff. Further, even if such evidence did exist, Mr. Gust is partly to blame for the situation that he found himself in, given his wrongful conduct related to the Uh Oh! Page and the unauthorized access to the back end.

[381] The claim for aggravated damages is dismissed.

[382] In conclusion, Clex is liable to Mr. Gust in the amount of $660, plus interest in accordance with the *Court Order Interest Act*. This amount may be offset against the $7,000, plus court order interest, that Mr. Gust owes to Clex as a result his wrongful acts.

IV. Costs

[383] Costs ordinarily follow the event. I consider that the success of the parties has been divided. Accordingly, each party should bear their own costs, absent matters of which I am presently unaware, in which case the parties have leave to make further submissions as to costs.

[384] If a party wishes to bring to my attention settlement offers or other matters that I am not privy to which may affect the award of costs, they may prepare written submissions up to a maximum of seven (7) pages in length (excluding attachments), for my consideration. These should be submitted through Supreme Court Scheduling within 45 days of this Order. Responding submissions are to be provided 14 days thereafter and are not to exceed seven (7) pages. Any Reply submissions are to be provided within seven days following receipt of Response submissions, and are limited to three (3) pages.

[385] Absent further submissions, this costs order will stand.

"Shergill J."

[1] Defined at para. 27.

[2] Transcript (Oct. 11, 2023), Direct Examination of F. Smulders at p. 22, lines 9-18, and Re-Direct of F. Smulders at pp. 32-33.

[3] Transcript (Oct. 10, 2023), Direct Examination of A. Osborne at p.15, lines 27-42.

[4] Transcript (Oct. 11, 2023), Cross Examination of A. Osborne at pp. 9-11.

[5] Though the letter was marked without prejudice, the parties waived privilege over it and the subsequent response from Mr. Gust.

[6] Email from John Gill to Nicholas Gust (9 June 2020), Joint Book of Documents at Tab 69.

[7] Transcript (Oct 11, 2023), Direct Examination of D. Shih at p. 42, lines 30-40.

[8] Transcript (Oct. 13, 2023), Cross Examination of N. Gust at p. 59, lines 21-35.

[9] Trial transcript (Oct. 13, 2023), Cross Examination of N. Gust at p. 65, lines 4-20.

[10] Email from Nicholas Gust to Adam Osborne (29 April 2019), Joint Book of Documents at Tab 38.

[11] Email from Nicholas Gust to John Gill (April 16, 2019), Joint Book of Documents at Tab 37.

[12] Transcript (Oct. 10, 2023), Cross Examination of A. Osborne at p. 47, lines 44-47, at p. 48, lines 103, and at p. 49, lines 14-42.