
CANADA / JUDGMENT

Crema v. Apple Inc.

2020 BCSC 1767

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1767 Crema v. Apple Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Crema v. Apple Inc.,

2020 BCSC 1767

Date: 20201119

Docket: S188008

Registry: Vancouver

Between:

Nicholas Stephen Crema

Plaintiff

And

Apple Inc. and Apple Canada Inc.

Defendants

Before: The Honourable Madam Justice Matthews

(via video conference)

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Hearing:

Vancouver, B.C.

September 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2020

Overview

- [1] The plaintiff, Stephen Crema, seeks to amend his notice of civil claim for the second time in this proposed class action pertaining to the battery life of Apple iPhone batteries. The proposed amendments are to plead:
- a) the claim in trespass amounts to contraventions of certain provisions of the Criminal Code of Canada, R.S.C., 1985, c. C-46 that deal with unauthorized use of a computer and/or mischief in relation to property including computer data;
 - b) Apple misrepresented the iPhone's speed, power, battery life and the content of its operating software updates in violation of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2; and
 - c) Apple's representations about functionality, speed, power and battery life of its iPhone constitute implied terms pursuant to Apple's Terms and Conditions of Sale and operating software updates.
- [2] The defendants, Apple Inc. and Apple Canada Inc. ("Apple") oppose the application. With regard to the trespass amendments, Apple's position is that there is no cause of action for breach of the Criminal Code and statutory breaches are only relevant to claims in negligence. Therefore, contraventions of the Criminal Code are not relevant for Mr. Crema's claim in trespass and therefore the amendments serve no purpose. Apple further submits the amendments are vexatious and prejudicial for two reasons. First, they unnecessarily attach a scandalous label of criminality to Apple's conduct. Second, and with regard to all of the proposed amendments, this is the fourth time plaintiff has attempted to amend his notice of civil claim in two years and Apple should not be required to contend with pleadings that are a shifting target.

- [3] Mr. Crema submits the Criminal Code amendments are appropriately proposed to be part of its trespass cause of action and are not attempt to plead a breach of the Criminal Code as a stand alone cause of action. He submits that these amendments are necessary because the common law of trespass has not evolved to deal with the type of electronic trespass alleged in this case, while the Criminal Code contains provisions that address the behaviour that amounts to electronic trespass.
- [4] The issues are:
- a) whether the amendments to the trespass claim to incorporate references to the Criminal Code:
 - i. are unnecessary and fail to disclose a cause of action because they attempt to plead breaches of the Criminal Code as a cause of action in trespass when the law does not permit statutory breaches to be stand alone causes of action;
 - ii. are vexatious because, given that the fail to disclose a cause of action, they simply attach a label of criminality to the alleged conduct; and
 - b) whether the amendments are vexatious and prejudicial because serial amendments have been made and proposed.

Amendments to the Trespass Claim

- [5] Mr. Crema submits the amendments he seeks in relation to the Criminal Code allege contraventions of the Criminal Code that are "contained within, and/or an integral part of the trespass to personal property cause of action." He argues that the Criminal Code provisions which create offences for unauthorized use of a computer and mischief by destroying, damaging, or interfering with the lawful use of property including data have addressed the types of wrongs he alleges while the common law of trespass has not advanced to address interference with devices and data in the manner he alleges.
- [6] Apple submits there is no cause of action for breach of a Criminal Code provision and the amendments are unnecessary because they do not advance the trespass cause of action. Furthermore, Apple asserts the allegation of criminal behaviour is vexatious and so ought not to be allowed.

Legal Principles pertaining to amendments

- [7] Rule 6-1(1) of the Supreme Court Civil Rules requires parties to obtain leave to amend their pleadings, save for an initial amendment prior to the notice of trial being served.

- [8] The law pertaining to amending pleadings is that amendments should be allowed as are necessary to determine the real question between the parties. It is a generous approach, allowing for pleadings as they are presented or could be presented so that, as far as possible, all matters in controversy between the parties may be completely and finally determined: *Morriss v. British Columbia*, 2010 BCCA 95 at para. 17, citing *Victoria & Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982), 30 B.C.L.R. (2d) 45 (S.C.) at 46.
- [9] In deciding whether to grant leave to amend pleadings, the court does not hear evidence and considers the pleadings assuming the facts pled are true: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.), [1988] B.C.J. No. 515 at paras. 22-27. Novel pleadings are permitted. So long as the material facts have been pleaded, the case should be permitted to proceed so the court can consider whether it is successful based on the facts as proven at trial: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.
- [10] There are limits to this generous approach. Amendments, when combined with the original pleadings, must abide by the rules governing pleadings, including those pertaining to applications to strike under R. 9-5. The pleadings must disclose a reasonable claim, plead the material facts to do so, and avoid pleadings that are "unnecessary, scandalous, frivolous or vexatious": Rules 3-1(2) and 9-5(1); see also *Victoria Grey Metro Trust Co. Amendments* are necessary where they set out the real question in issue between the parties: *Chouinard v. O'Connor*, 2011 BCCA 121 at para. 13.
- [11] Whether pleadings should be struck for being unnecessary or scandalous is a discretionary matter. In some cases, courts have struggled with this determination. A pleading is unnecessary and so deserving of being struck if it does not advance a cause of action known to law. Claims that are "not necessarily unnecessary," on the other hand, will not be struck: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.) at paras. 47 and 50, 1999 CanLII 5860.
- [12] A scandalous pleading is "one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial." Such pleadings will only be struck if they are irrelevant to the proceedings will distract the trial of the real issue or issues: *Citizens* at para. 47.

Do the trespass amendments fail to advance a cause of action known to law?

- [13] Mr. Crema seeks to amend his amended notice of civil claim by adding to the existing pleading pertaining to trespass. The underlined portion of the following sets out the amendments in the proposed second amended notice of civil claim:
68. Apple's trespass and interference was malicious and oppressive--in order to stave off shutdowns that should not have been occurring in the first place, and without informing the Plaintiff and Class Members, Apple hid performance degrading software in iOS updates, and it said nothing about this feature, nor did it obtain the permission of the affected persons to trespass on or interfere with their devices. Apple knew and intended that its conduct would cause injury to Plaintiff and Class Members, including by way of diminishing the

performance of their expensive premium phones. Apple's unlawful interference with the affected iPhones of the Plaintiff and Class Members substantially impaired or altered the devices condition, quality and/or value resulting in deprivation, loss or damage to the Plaintiff and Class Members.

69. Further, and/or in the alternative, in pushing its iOS updates to unsuspecting users of its iPhones without their authorization and/or consent Apple engaged in conduct amounting to the unauthorized use of computer and/or mischief in contravention of sections 342.1(1), (b) and (c), 430(1)(b) and (c), and 430(1.1)(a), (b) and (c) of the Criminal Code of Canada R.S.C. 1985, c.C-46.
70. When Apple provided iOS updates to the Plaintiff and Class Members they did not know, nor could they in the exercise of reasonable diligence know, that the software updates contained code that would throttle their iPhones, designed solely to further conceal the Defect in those devices.
71. As the Plaintiff and Class Members did not know that the iOS updates contained such throttling code, they did not give Apple authorization and/or consent to access their iPhones to alter and/or intercept the data or computer systems on those devices.
72. Apple provided the iOS updates to the Plaintiff and Class Members as part of scheme or artifice to defraud and deceive. Apple offered iOS updates to Class Members to throttle their iPhones as a means to encourage Class Members to purchase new devices, wrongfully obtaining money from those Class Members.
73. By providing the iOS updates to the Plaintiff and Class Members instead of revealing the truth, Apple obtained, obstructed, interrupted, interfered and/or disrupted or caused the obstruction, interruption, interference and/or disruption of computer services, programs and/or data, when it unlawfully, wilfully, intentionally, fraudulently and/or without colour of right, throttled the Plaintiff's and Class Members' iPhones. The Plaintiff and Class Members did not authorize or consent to having their iPhones throttled and had they known that the iOS updates would throttle their iPhones, would not have installed the iOS updates.
74. Further, Apple impaired the condition, quality and usefulness of the Plaintiffs and Class Members' iPhones, or parts of them, without their knowledge, consent and/or authorization. Such acts constitute an unlawful, wilful, intentional, fraudulent and/or without colour of right, interference with the lawful use, enjoyment or operation of their iPhones.
75. Apple acted unlawfully, wilfully, intentionally, fraudulently and/or without colour of right, because it knew that the Plaintiff and Class Members were downloading computer software onto their iPhones that reduced their performance. The Plaintiff and Class Members only authorized or consented to the installation of iOS updates that would improve performance, not to throttle or diminish performance. Such unlawful, wilful, intentional and/or fraudulent, acts rendered the iPhones of the Plaintiff and Class Members ineffective, inoperative and/or useless so as to cause damage to such devices.

[Underlining in the original and delineating the amendments].

- [14] Mr. Crema also seeks at paragraph 94 of the proposed second amended notice of civil claim, to plead Apple's "violation of the Criminal Code" in relation to its claim of unjust enrichment.
- [15] Apple's submissions focussed on the amendment to paragraph 69 adding the alleged Criminal Code contravention to the trespass claim. The remainder of the proposed amendments to the trespass section are facts relating to the conduct alleged. Apple argues these amendments also should not be allowed, as there is nothing new in them.
- [16] Apple's primary argument is the amendments in paragraph 69 are neither necessary nor relevant to Mr. Crema's claim in trespass because there is no cause of action for an alleged breach of the Criminal Code. Apple further submits the amendments are not permissible because statutory breaches may only be pleaded in connection with claims in negligence.
- [17] The Queen (Can.) v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205 at 227 establishes that statutory breaches do not give rise to a cause of action, but they may nonetheless be relevant as evidence of negligence. The Court described statutory breaches to be properly regarded as "subsumed" in the law of negligence.
- [18] In Ochoa v. Canadian Mountain Holidays Inc., [1994] B.C.J. No. 1309 (S.C.), Mr. Justice Holmes allowed a pleading that "the negligent conduct of the defendants was of a degree that it supports the criminal standard required for conviction of criminal negligence" (at paras. 19 and 24). This plea was not permitted as an independent cause of action, but rather as a plea that the criminal degree of negligence was relevant to the defence of waiver of liability and not just to the standard of care.
- [19] Apple submits the proposed amendments are not permissible because these proposed amendments do not relate to the negligence claims.
- [20] The ratio in Saskatchewan Wheat Pool must be interpreted in the context of that case, where the statutory breach in issue was a breach of a statutory duty. Where, as in this case, the statutory breach is not of a duty, the same reasoning should apply to the delict in issue. It may be novel to take this approach regarding trespass, but that is not a basis on which to deny the plaintiff the opportunity to pursue a claim: Hunt at p. 980.
- [21] Subsequent case law has extended the relevance of statutory breaches to other torts. In D.L.H. v. M.J.M., 2011 BCSC 1228 at paras. 61-68, Mr. Justice Verhoeven relied on Odhavji Estate v. Woodhouse, 2003 SCC 69 at para. 31 to find pleadings alleging criminal conduct under the Criminal Code relevant to the tort of public misfeasance. Indeed, in Odhavji Estate, Justice Iacobucci clarified that Saskatchewan Wheat Pool "does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied."

- [22] For these reasons, I do not understand Saskatchewan Wheat Pool to limit pleading statutory breaches to claims in negligence. Pleadings that describe conduct that the Criminal Code describes as amounting to an offence may be permissible and relevant to whether certain allegations of delict amount to a common law tort.
- [23] In this case, the Criminal Code provisions dealing with unauthorized use of a computer and/or mischief in relation to data may provide a useful reference by which to assess the lawfulness of his allegations of common law trespass to personal property. As such, the proposed amendments go to and advance Mr. Crema's cause of action in trespass and so should be permitted: *Citizens* at para. 47.
- [24] Apple further submits the amendments do not plead the material facts to meet the elements of the offences described in ss. 342.1 or 430 of the Criminal Code. For example, they argue that Mr. Crema has not pleaded that Apple "obtained a computer service," "intercepted" a computer system through listening, recording or acquiring the substance of the system, or used a computer system with the intent to commit a mischief. These assertions relate to three of the four disjunctive means of unauthorized use of computer under s. 342.1 of the Criminal Code.
- [25] I disagree. Mr. Crema's current pleadings allege that Apple hid performance degrading software in its updates. In the proposed amendments, Mr. Crema claims Apple pushed iOS updates to unsuspecting users of iPhones and in doing so intercepted data and "unlawfully, wilfully, intentionally and fraudulently and/or without colour of right throttled the Plaintiff's and the Class Members' iPhones." In my view, the material facts pleaded are sufficient with regard to the disjunctive requirements of obtaining a computer service, intercepting a computer system, or using a computer system with the intent to commit a mischief.
- [26] However, the proposed amendments alleging a "contravention" and "violation of the Criminal Code in paragraphs 69 and 94, respectively, are not permissible because they are capable of causing confusion and are scandalous. These allegations might cause confusion because they could be taken as an attempt to plead a cause of action based on a breach of the Criminal Code. Confusion could also arise regarding the applicable standard of proof.
- [27] These allegations are also scandalous because they are not relevant to the claim in trespass in the sense that it is not the contravention that establishes trespass, but the conduct as it relates to a standard of conduct that the Criminal Code makes unlawful.
- [28] Accordingly, I do not allow the amendments utilizing the language set out in paragraphs 69 and 94 of the proposed second amended notice of civil claim. Instead, Mr. Crema may plead the conduct is a trespass because it amounts to the unauthorized use of a computer and/or mischief in relation to property including data pursuant to the provisions of ss. 342.1 and 430 of the Criminal Code.

[29] Finally, Apple argues that the pleadings are unnecessary because they do not add to the factual underpinning of Mr. Crema's claim. In my view, that argument must fail for two reasons. First, it is bound up with Apple's argument that these amendments are vexatious because there have been too many of them and Mr. Crema should not be permitted to keep amending his claim. For the reasons set out below, I do not accept that is a reason to deny these amendments. Second, the proposed amendments at paras. 68 and 70-75 set out material facts and particulars in relation to the allegations of interference with computers and data. Although Apple asserts that it is trite to say pleadings should not contain evidence, it does not point to any of the amendments as being evidence instead of material facts or particulars.

Are the trespass amendments vexatious?

[30] For the reasons given above, and assuming the amendments pertaining to the Criminal Code do not assert violations or contraventions of the Criminal Code, they do not seek to gratuitously add a criminality label to Apple's conduct. They are not vexatious for this reason.

Are all of the Amendments Vexatious and Prejudicial?

[31] Apple argues that all of the amendments should be refused because Mr. Crema has frequently amended or sought to amend his pleadings over the two years since the claim was commenced. Apple asserts that no new facts have been discovered to justify these amendments and there is no explanation for the timing of the amendments. Apple complains that Mr. Crema's claim is a shifting target.

[32] The amendments sought are proposed in a second amended notice of civil claim and so, if allowed, will be the second set of amendments to the notice of civil claim. Apple argues they are actually the fifth notice of civil claim (and so the fourth set of amendments) because of prior amendments Mr. Crema proposed and then refined, abandoned, or expanded in subsequent proposals.

[33] I do not accept this amounts to vexation or prejudice. These amendments have been brought in what is fairly considered the infancy of this proposed class action. The certification hearing is set to proceed in June 2021. There is no requirement that an amendment be associated with the discovery of new evidence. As such, the lack of new evidence or discovery is not a reason to deny an amendment.

[34] Apple expresses exasperation about the number of amendments Mr. Crema has proposed to date. However, this overlooks the technical nature of this claim, namely the manufacture and sale of goods for which the manufacturer has an ongoing ability to affect functionality through software updates. Mr. Crema's allegations include that the updates were misrepresented and degraded the performance of the devices. I accept Mr. Crema's submission that the law regarding wrongs involving computer systems is not well developed. It is to be expected there will be refinements of the legal claims, even if the facts

have not changed.

- [35] With regard to the number of proposals Mr. Crema has made, the evidence shows he has communicated his proposals for amendments to Apple and as a result of Apple's objections, has reconsidered some of them. This is not improper; indeed, the court expects parties to engage in such negotiation before resorting to judicial processes.
- [36] With regard to Apple's complaint about the timing, there is no cut off date for amendments. Instead, parties must obtain leave before filing an amendment, with the sole exception of an initial amendment before the pleadings are closed. On applications for leave to amend, the court must consider whether the amendments will occasion prejudice which cannot be compensated with an order for costs.
- [37] Apple asserts that the serial amendments are de facto prejudicial. I do not accept that submission. Apple must suffer actual prejudice in the sense of it being concrete and demonstrable. The court must be able to determine the degree of prejudice suffered in order to weigh it against the prejudice caused by refusing amendments that will assist in determining the real questions between the parties: Chouinard at para. 13.
- [38] Mr. Crema asserts that Apple cannot be surprised or caught unawares by the amendments because similar amendments have been made in claims being brought in the United States. Apple disputes that amendments approved in the United States case assist with determining the appropriateness of these amendments because there is different legislation on which the U.S. claim is based. I do not need to decide the question because I am of the view that in the circumstances of this claim, at this time, Apple has not shown any actual prejudice, regardless of what is taking place in other jurisdictions.

Conclusion

- [39] The amendments Mr. Crema proposes in the second amended notice of civil claim are allowed except for the amendments contained in proposed paragraphs 69 and 94 asserting contraventions and violations of the Criminal Code. Mr. Crema has leave to propose amendments in accordance with these reasons for judgment instead of the amendments he proposes in paragraphs 69 and 94.

"Matthews J."

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