

CANADA / JUDGMENT

DaKow Ventures Ltd. v. Daski Contracting Ltd.

2018 BCSC 2128

COURT

Supreme Court of British Columbia

DECIDED

13 November 2018

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2018 BCSC 2128 DaKow Ventures Ltd. v. Daski Contracting Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: DaKow Ventures Ltd. v. Daski Contracting Ltd., 2018 BCSC 2128 Date: 20181113 Docket: S183272 Registry: Vancouver Between: DaKow Ventures Ltd. and David John Kowalski Plaintiffs And Daski Contracting Ltd. and New Wave Energy Services Group Ltd. Defendants And Blu-Water LP Ltd. Defendant by way of Counterclaim Before: The Honourable Mr. Justice Myers Oral Reasons for Judgment - Application to Vary Injunction Counsel for the Plaintiffs and Defendant by Counterclaim: James Goulden Louise D. Hamill Counsel for Defendants: Peter R. Senkpiel Emily L. Hansen Place and Date Hearing: Vancouver, B.C. November 13, 2018 Place and Date of Judgment: Vancouver, B.C. November 13, 2018

- [1] On October 23, I granted an injunction in favour of Daski and New Wave against Mr. Kowlaski, DaKow and Blu-Water prohibiting them from breaching a non-competition clause contained in a share purchase agreement signed by Mr. Kowalski. The injunction hearing took place on October 15 and 19. My reasons are published as 2018 BCSC 2016.
- [2] Blu-Water now applies to be removed from the operation of the injunction, on the basis that that Mr. Kowalski is no longer associated with it.
- [3] The principle evidence relied on regarding Mr. Kowalski's disassociation is:
- a) In early September 2018 Mr. Kowalski said he began the process of "removing" himself from Blu-Water, of which he was a director and 50% shareholder, through a numbered company.
 - b) On September 25, 2018 Mr. Kowalski sold his shares in Blu-Water to Mr. Dohm, an employee of Blu-Water, for \$100. At the same time an option agreement was signed providing Mr. Kowalski the ability to buy back the shares for \$200 at a time of his choosing.
 - c) Also on September 25 Mr. Kowalski resigned as director.

- d) Mr. Kowalski deposes that after I granted the injunction he decided to "move forward with severing all remaining ties that I had with Blu-Water". He therefore terminated the option agreement. He and Mr. Dohm say that Mr. Kowalski no longer has any connection with Blu-Water.
- [4] It is to be noted that all of these steps, save the termination of the option agreement, took place prior to the injunction hearing and after the injunction application was filed on September 5, 2018. Significantly, none of these facts were alluded to in Mr. Kowalski's affidavit filed for the purpose of contesting the injunction. Rather, at the time of the injunction, Mr. Kowalski specifically represented that he was a director of Blu-Water and a 50% shareholder. There was no mention of his numbered company.
- [5] Reconsideration of an injunction is an extraordinary measure and the applicant must show that there has been a material change in the facts or circumstances that constituted the basis for the order. The burden is a heavy one : *Business Depot Ltd. v. Canadian Office Depot Inc.*, [2000] F.C.J. No 1405 (C.A.). Further, the change in circumstances must be unforeseen at the time of the original order: *McLeod Lake Indian Band v. British Columbia*, [1989] B.C.J. No. 2049 (S.C.). See also *Powder Resort Properties v. Friday*, 2001 BCSC 577.
- [6] For the following reasons I am not prepared to vary the order.
- [7] First, the share sale, option agreement and its termination appear to me to be a sham. It is not believable that Mr. Kowalski would have sold his interest in Blu-Water for \$100. The burden being on Blu-Water, it was incumbent on it to show the bona fides of the agreement. On the evidence before me, Mr. Kowalski essentially gave away his 50% interest to a former dispatcher who he recently promoted to manager. That is simply not credible.
- [8] Moreover, the lack of credibility is reinforced by the fact that none of the events which preceded the injunction application were disclosed at the injunction hearing; rather, if his current evidence is accepted, Mr. Kowalski misrepresented his position in Blu-Water at the hearing.
- [9] It is also of note that Mr. Kowalski still is the owner of DaKow and that DaKow has been closely associated with Blu-Water. Employees appear to treat them synonymously. This comes from letters of two former Daski employees provided in an attempt to show that they were not "poached" from Daski in breach of its contract with Mr. Kowalski: · Andrew McGowan stated, "I then proceeded to put in a number of resumes and apply for a job with different companies, DaKow and Blu-Water to be among some of the companies. Then came to a final decision that DaKow and Blu-Water were the best fit for me." · Cainan Murdock stated, "My resume was accepted at DaKow/Blu-Water, and I have accepted their employment offer."
- [10] Second, the events relied on as a change of circumstance were not unforeseen to the respondents at the time the injunction was granted. As I said above, Mr. Kowalski began his plan to disassociate himself from Blu-Water in early September, according to his evidence.

And, once again, all of the relied on facts but for the supposed cancellation of the option agreement took place before the hearing so that much of the evidence now being relied on was available at the time of the hearing. To modify the injunction at this point would be to ignore the rules of res judicata.

- [11] Third, Mr. Kowalski, in breach of his covenant, set up Blu-Water and delivered his knowledge and former Daski clients and contacts to it. Blu-Water must be taken to have knowingly participated in the breach of the restrictive covenant. It now wants to maintain the benefit of that and to compete freely with Daski during the currency of the restrictive covenant. Even if I were to accept that Mr. Kowalski's disassociation was genuine, that would seriously undermine the effectiveness of all restrictive covenants.
- [12] The application is therefore dismissed, with costs to the respondents. The issue of special costs is left to the trial judge. "E.M. MYERS, J."
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Prepared on 25 October 2026 · Esheria