

CANADA / JUDGMENT

DeltaQ Technologies Corp. v. Pylon International Limited

2020 BCSC 2059

COURT

Supreme Court of British Columbia

DECIDED

23 December 2020

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2020 BCSC 2059 DeltaQ Technologies Corp. v. Pylon International Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

DeltaQ Technologies Corp. v. Pylon International Limited,

2020 BCSC 2059

Date: 20201223

Docket: S171031

Registry: Vancouver

Between:

Delta-Q Technologies Corp.

Plaintiff

And

Pylon International Limited

Defendant

Before: Master Scarth

Reasons for Judgment

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K.K. Strong

Place and Date of Hearing:

Vancouver, B.C.

November 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 23, 2020

Introduction

- [1] Delta-Q Technologies Corp. ("DeltaQ") and Pylon International Limited ("Pylon") have been in business together since 2002 when they entered into an agreement for the manufacture and supply of battery chargers. In 2017, DeltaQ filed this action claiming that Pylon is in breach of the agreement by manufacturing or supplying battery chargers that copied significant design features of DeltaQ's chargers.
- [2] Pylon filed a Response to Notice of Civil Claim in March 2017 denying these allegations, and then in 2019 filed an amended response stating that it is not manufacturing battery chargers, that manufacturing occurs in "a factory in China not owned by Pylon".
- [3] DeltaQ now applies under Rule 6-2(7)(c) of the Supreme Court Civil Rules to add two corporations and two individual directors to this action and to amend its second Amended Notice of Civil Claim. The application is opposed by Pylon, and by the proposed defendants Green Power Design Astri Limited ("Green Power Design"), Greenpower Electronics (Int'l) Limited ("Greenpower Electronics"), Jackson Lam and Raymond Lam. For the purpose of this judgment I will refer to them collectively as the "Proposed Defendants", unless otherwise individually stated.
- [4] Rule 6-2(7)(c) provides that:

At any stage of a proceeding, the court, on application by any person, may

...

- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

Issues

- 1) Is there a question or issue between DeltaQ and the Proposed Defendants that relates to the relief, remedy, or subject matter of the proceeding?
- 2) Is it just and convenient to decide the issue between the parties in this proceeding?

Analysis

- [5] The threshold on the first issue is a low one. DeltaQ is only required to establish that there is a real issue between it and the Proposed Defendants that is not frivolous, or that it has a cause of action against the proposed parties: *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329, at para. 45.
- [6] The proposed amendments identify Green Power Design and Greenpower Electronics as Hong Kong corporations. Jackson Lam is stated to be a director of Pylon and the sole director and sole shareholder of Green Power Design. Raymond Lam is stated to be a director of Pylon.
- [7] At paras. 14-16 of the proposed amendments, DeltaQ sets out allegations of breach of contract by Pylon, alleging that Pylon acted on its own and/or through the Green Power Design and Greenpower Electronics. Paragraphs 19-21 of the proposed amendments set out the following:

Unjust Enrichment

[19.] The Defendants have been unjustly enriched at the expense of Delta-Q by virtue of Pylon's breaches of the [manufacturing agreement] (including but not limited to breach of Pylon's duty of good faith), particulars of which benefits include but are not limited to the receipt of proceeds for the sale of chargers that were manufactured and distributed by Pylon, either on its own and/or through Green Power Design and/or Greenpower Electronics, in breach of the [manufacturing agreement].

Piercing the Corporate Veil

[20.] At all material times, Pylon, Green Power Design, and Greenpower Electronics (collectively, the "Defendant Corporations") operated as a single entity, with the Defendant Corporations under the effective influence and control of Jackson Lam and/or Raymond Lam (collectively, the "Lams") and exercising no independent discretion. As such, the Defendant Corporations and the Lams are each the alter egos of one another. The Defendant Corporations and the Lams are each liable for the acts and omissions of one another.

[21.] The full extent of the interconnections among the Defendants are exclusively within the knowledge of the Defendants and full particulars will be provided after the completion of examinations for discovery.

...

[8] Under Part 3 (Legal Basis), DeltaQ sets out claims in breach of contract, breach of the duty of good faith, breach of confidence, and unjust enrichment. The proposed amendments refer to Pylon acting on its own ". . . and/or through Green Power Design and/or Greenpower Electronics". Paragraph 28 of the proposed amendments is headed "Piercing the Corporate Veil":

At all material times, the Defendant Corporations operated as a single entity, with the Defendant Corporations under the effective influence of the Lams and exercising no independent discretion. As such, the Defendant Corporations and the Lams are the alter egos of one another. The Defendant Corporations and the Lams are each liable for the acts and omissions of one another.

...

[9] DeltaQ submits that the proposed amendments are sufficient to satisfy the low threshold on the first issue under Rule 6-2(7)(c) and simply relate to adding the Proposed Defendants to the breach of contract claim on the basis that "a wrong by one is a wrong by all".

[10] DeltaQ relies on *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.*, [1986] B.C.J. No 802 where the court allowed an amendment to a counterclaim adding a corporation alleged to be the majority shareholder of DeltaQ on the basis that the plaintiff corporation was the "alter ego" of its majority shareholder. Justice Lysyk held that:

[12] It is at least arguable, therefore, that it is not necessary for Bow Valley to establish an agency relationship with all of the attendant legal consequences. The relationship of the parent and the subsidiary companies may be sufficiently close that a court in appropriate circumstances, will treat the two as a single economic unit. See also *Nedco Ltd. v. Clark and Communication Workers of Canada Local No. 4* [1973] 6 W.W.R. 425, (Sask C.A.), where Chief Justice Culliton, in outlining the situations in which a court will lift the corporate veil stated:

The court has done so when one company is in fact the agent of the other; or, where one company is being used as a cloak for the actions of the other; or, for the just and equitable enforcement of a tax law. The court has also done so when it has concluded that, while the corporations are separate in law, one may be under the control of the other to such an extent that together they constitute one common unit.

- [13] While it may be difficult to establish the evidentiary basis for a conclusion that Denison is liable as if a party to the contract, it cannot be said that the claim is one that is unknown to the law.
- [11] Unlike the amendments considered in *Quintette*, none of the proposed amendments here allege that any of the Proposed Defendants is a majority shareholder in Pylon. The allegation at para. 20 of the proposed amendments is that Pylon, Green Power Design and Greenpower Electronics operate as a single entity under the control of the Jackson and Raymond Lam. The basis of this allegation is not specified in the proposed amendments. DeltaQ relies on documents obtained in corporate searches and a statement in para. 21 of the proposed amendments that particulars will be provided after the completion of the examinations for discovery.
- [12] *Quintette* makes it clear that the principle of alter ego is based on control. Allegations to that effect are an element of the cause of action. While the proposed amendments might be sufficient to support an order adding the Lams on the basis that Pylon is their alter ego, there is nothing in the proposed amendments to tie Green Power Design and Greenpower Electronics to Pylon. The allegation that "each of the defendants are alter egos of the other" suggests a group of alter egos with no one in control and does not satisfy the pleadings requirements set out in *Quintette*.
- [13] Nor is there a proper pleading of an independent tort on the part of the any of the Proposed Defendants, separate and apart from the plea related to piercing the corporate veil. With respect to the Lams, the question before the court where an amendment seeks to add an individual defendant acting on behalf of a corporation is whether the acts alleged, if proved, are tortious: *XY, LLC v. Zhu*, 2013 BCCA 352, at paras. 60-75. Unjust enrichment is pleaded but there is no allegation that either of the Lams have committed an independent tort or fraud. Rather Jackson and Raymond Lam are included as part of the "whole" including the corporate entities.
- [14] In my view, the proposed amendments do not raise a real issue between DeltaQ and the Proposed Defendants, and therefore the application should be dismissed.
- [15] If I am incorrect in this conclusion, I have, in any event, concluded that the application also fails on the second issue, i.e. whether it is just and convenient to add the Proposed Defendants to this action.

- [16] DeltaQ submits that it was taken by surprise by the amended response of Pylon where a "factory in China" is identified as the manufacturer of the chargers. DeltaQ concedes that it knew of the Proposed Defendants but submits that it did not know until receipt of the amended response that it had a claim against them due to the complexities of the different battery chargers on the market and the corporate structure of Pylon and the Proposed Defendants. On DeltaQ's submission, the limitation period would not expire until April 2022, taking into account the life of the notice of civil claim.
- [17] DeltaQ submits that there is no actual prejudice to be considered here, and that the limitation defence upon which the Proposed Defendants rely in opposing this application can be determined at trial, along with Pylon's limitation defence: *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329, at paras. 47-48.
- [18] The option of leaving the issue of the limitation defence to trial, as DeltaQ proposes, is available where the court cannot determine whether there is an accrued limitation defence on the application: *Strata Plan VIS3578*, at para. 48. Turning to the evidence here, DeltaQ's representative's deposes that "to the best of my knowledge, the GPSC series of chargers was first marketed and sold in 2015". This is in response to the evidence on which the Proposed Defendants rely which shows that in 2008 representatives of DeltaQ and Pylon were involved in meetings at the premises of one of the Green Power companies in China, that in November 2010 DeltaQ wrote to Jackson Lam, copying Raymond Lam, raising concerns about Pylon "developing and marketing a competing GreenPower charger" and that in 2010 plaintiff's counsel wrote a demand letter to Jackson Lam at Pylon referencing the 2002 manufacturing agreement and seeking confirmation that Pylon would cease producing chargers in competition with DeltaQ.
- [19] In my view, applying the discoverability analysis in the Limitation Act, S.B.C. 2012, c.13, it is reasonable to conclude that the limitation period expired in 2018 at the latest given DeltaQ's knowledge of the Green Power companies and of the marketing and sale of a competing charger series identified using the Green Power initials.
- [20] The question becomes whether it is just and convenient to add the Proposed Defendants, notwithstanding that they would lose their accrued limitation defence: *Strata Plan VIS3578*, para. 47, subpara.(2). I am not satisfied that it is given that there is also prejudice arising from the delay of the trial booked for April 6, 2021. This prejudice is cited by Pylon in its opposition to the application. I agree that there is little likelihood that the trial could proceed in April if the Proposed Defendants are added, despite DeltaQ's optimistic views to the contrary.
- [21] The underlying rationale of Rule 6-2(7) is to avoid multiplicity of proceedings. But given the state of knowledge of DeltaQ at the time this action was commenced, the lack of a reasonable explanation as to why the Proposed Defendants were not included earlier, and the fact the trial date is at risk if the proposed amendments are allowed, it is fair to conclude that it is not just and convenient to add these parties to this proceeding.

[22] The application is dismissed with costs to Pylon and to the Proposed Defendants.

"Master S. Scarth"

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