

CANADA / JUDGMENT

Douez v. Facebook, Inc.

2023 BCSC 1224

COURT

Supreme Court of British Columbia

DECIDED

17 July 2023

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2023 BCSC 1224 Douez v Facebook, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Douez v Facebook, Inc.

2023 BCSC 1224

Date: 20230717

Docket: S122316

Registry: Vancouver

Between:

Deborah Louise Douez

Plaintiff

And:

Facebook, Inc.

Defendant

Before: The Honourable Justice Iyer

Ruling on Procedural Applications

In Chambers

Counsel for the Plaintiff:

A. Sharon

Counsel for the Defendant:

M.A. Gelowitz

A.G. Manasterski

Place and Date of Hearing:

Vancouver, B.C.

May 19, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2023

OVERVIEW

- [1] In these applications, Ms. Douez seeks orders relating to Facebook's reply to a notice to admit dated October 14, 2022 ("Notice"). Ms. Douez also seeks an order extending its examination for discovery, with a change in Facebook's representative for that extended discovery ("Extension").
- [2] By way of background, the certification order in this class action was initially made in 2014 and amended with respect to one issue by the Court of Appeal in 2018. In 2019, I granted Ms. Douez's application to vary the order. The certification order states eight common issues relating to the class and one common issue relating to the resident subclass. Three of the issues common to the class and the issue relating to the resident subclass concern liability; all of the other issues relate to damages. Very generally, the claim is that Facebook used class members' names and images in its advertising program called Sponsored Stories ("Sponsored Stories") without their consent.
- [3] In January and May 2021, Ms. Douez examined Facebook's representative, James Squires, for discovery for about six and a half hours. Facebook responded to requests outstanding from that discovery in March and July 2021. The sufficiency of those responses is disputed.
- [4] In September 2021, Ms. Douez served her first notice to admit on Facebook. It admitted the authenticity of all of the specified documents, and admitted or denied most of the facts for which admission was sought.
- [5] In November 2021, Ms. Douez applied to have all of the common issues determined by way of summary trial. I heard that application in January 2022. In my reasons for judgment delivered in June 2022 (2022 BCSC 914), I determined that the four common issues relating to liability were suitable for summary determination and found in Ms. Douez's favour on those issues. I found that the issues relating to damages were not suitable for summary determination and dismissed that part of the plaintiff's application for summary trial.

- [6] Ms. Douez then served the Notice on Facebook, seeking admissions of fact and of the authenticity of documents related to the damages issues.
- [7] In its reply, dated October 28, 2022, Facebook admitted the authenticity of the documents specified in the Notice. It admitted certain facts, denied others, and refused to admit or deny certain facts for stated reasons.
- [8] On October 24, 2022, I set trial dates for four weeks for the damages trial, commencing on November 20, 2023.
- [9] Ms. Douez filed the present applications on March 28, 2023.

NOTICE APPLICATION

- [10] Rule 7-7 governs notices to admit. Briefly, a party may request another party to admit the truth of a fact or the authenticity of a specified document for the purposes of the underlying action (Rule 7-7(1)). Under Rule 7-7(2), the party who receives the notice is deemed to admit the fact or authenticity of the specified document unless the party, within 14 days of service of the notice to admit:
- (a) specifically denies the truth of the fact or the authenticity of the document,
 - (b) sets out in detail the reasons why the party cannot make the admission, or
 - (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.
- [11] An unreasonable refusal attracts a penalty under Rule 7-7(4):

If a responding party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document specified in a notice to admit, the court may order the party to pay the costs of proving the truth of the fact or the authenticity of the document and may award as a penalty additional costs, or deprive a party of costs, as the court considers appropriate.

- [12] The purpose of Rule 7-7 is to focus the parties on the real issues in dispute by encouraging them to make appropriate concessions. That is why it permits admissions and denials but requires that a refusal to admit or deny be accompanied by a detailed and reasonable explanation.
- [13] Facebook submits, relying on *Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.*, 2020 BCSC 1608, that Rule 7-7(4) means that the court cannot assess the adequacy of reasons for refusal on a pre-trial application because Rule 7-7(4) means that the reasonableness of the refusal must be determined by the trial judge. However, *Bene* itself was a pre-trial ruling on the adequacy of a receiving party's reply to a notice to admit, including the reasonableness of its refusal to admit.

[14] Rule 7-7(4) permits a trial judge to impose a costs penalty for unreasonable denials or refusals. It does not preclude a pre-trial application relating to notices to admit, such as that filed by Ms. Douez here.

[15] The two questions in this application are first, do Facebook's replies comply with Rule 7-7 and second, to the extent they do not, what is the appropriate remedy?

Compliance with Rule 7-7

[16] Ms. Douez identifies four categories of Facebook's refusals as non-compliant:

- a) Facebook's refusal to admit facts relating to regulatory and legal proceedings against Facebook in other jurisdictions concerning Facebook's advertising practices and user's privacy rights on the basis of relevance;
- b) Facebook's refusal to admit facts related to documents and communications between Facebook employees on the basis that the plaintiff is improperly seeking blanket admissions of unspecified facts;
- c) Facebook's refusal to admit facts related to other documents and communications between Facebook employees on the basis that the admissions sought lack sufficient precision to respond; and
- d) Facebook's refusal to admit facts related to indemnification agreements between Facebook and third parties on the basis that they concern issues of mixed fact and law.

[17] A party may refuse to admit or deny a fact whose admission is sought for a number of reasons. These include that the truth of the fact is not capable of evaluation within the time required for a response (although the receiving party must take reasonable steps to inform themselves), or that the fact is not relevant to a material issue: *Ceperkovic v. MacDonald*, 2016 BCSC 939 at paras. 35-38; *Malik v. Eagle Mountain Farms*, 2023 BCSC 836 at para. 9. On a pre-trial application such as this, the material facts are defined by the pleadings.

Admissions About Proceedings in Other Jurisdictions

[18] Ms. Douez says that the admissions she seeks relating to regulatory and legal proceedings against Facebook in other jurisdictions are relevant to her claim for punitive damages because they tend to show a pattern of similar or systemic wrongs, which is an aggravating factor in assessing punitive damages.

[19] A claim for punitive damages must be supported by material facts that are pleaded with some particularity: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 87 (recently cited in *Lee v. Ocean Pacific Hotels Ltd.*, 2022 BCSC 1608 at para. 71:

87 One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said

to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious" (per McIntyre J. in *Vorvis*, supra, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.

[20] Ms. Douez's further amended notice of civil claim ("FANOCC") suffers from the defect identified by Justice Binnie in *Whiten* in that it seeks punitive damages using many unparticularized adjectives to characterize the conduct complained of:

Facebook's use of the plaintiff and Class members' names and portraits without consent was high-handed, outrageous, wanton, reckless, callous, disgraceful, wilful and entirely without care for the plaintiff's and Class members' statutory right to control the use of their own names or portraits, and as such renders Facebook liable to pay punitive damages.

[21] The FANOCC does not plead any facts about the privacy-related sanctions or other regulatory responses that Sponsored Stories (or similar Facebook advertising programs) has attracted in other jurisdictions. Therefore, Facebook's advertising practices and user's privacy rights in other jurisdictions are irrelevant to this proceeding.

Admissions about Facts in Documents

[22] It is convenient to deal with the second and third categories together because both relate to the plaintiff's request for admissions of fact relating to particular documents attached to the Notice. Facebook refuses to admit or deny these facts, saying variously that the plaintiff is seeking a "blanket admission" or her request is "improper" or "insufficiently precise".

[23] The requests in this part of the Notice share a similar structure. The plaintiff identifies a document by its document number and specifies where it is located. She then requests a series of admissions of fact relating to it. In general, the admissions sought in the same paragraph that identifies the document are of facts relating to the document's admissibility, while those in the immediately following paragraphs seek admission of facts relating to the content of the document.

[24] Requests 73-75 are typical of the plaintiff's requests and Facebook's refusals to answer them:

73. The document produced by Facebook in this litigation marked as FB_DOU_00098385 and attached hereto as Tab 17 of "Schedule A", is an internal email chain between Facebook employees and:

- a. the email chain was created by Philip Zigoris and Olaoluwa Okelola, who were Facebook engineers at the time and in the ordinary course of their employment;
- b. Philip Zigoris was one of the product engineers for the Sponsored Stories program;
- c. the email chain includes other recipients who were all Facebook employees at the time;

- d. The email chain contains facts which were recorded by Zigoris and Okelola contemporaneously; and
- e. the email chain was recorded and stored in the usual and ordinary course of Facebook's business.

Refused on the basis that the request is improper, other than that Facebook admits the authenticity of the document and admits that Philip Zigoris and Olaoluwa Okelola were employees of Facebook.

It is improper to seek a blanket admission that documents contain unspecified "facts". A party seeking to rely on a Notice to Admit to prove the truth of the contents of documents must stipulate the specific contents of the document as a fact for which an admission is sought (*Morrissey v. Lydiard* (1993), 35 BCAC 299). Where the Plaintiff's requests for admission stipulate facts from documents, Facebook has responded accordingly. Otherwise, Facebook makes no admission as to the relevance, admissibility, or truth of the contents of the documents, and reserves all rights to make proper objections to the admissibility of documents, including objections based on relevance, truth, or content.

74. As of January 19, 2011, Facebook employees had raised privacy issues regarding Sponsored Stories.

Refused. The request lacks sufficient precision to respond, including because the specific Facebook employees are not identified. Additionally, January 19, 2011 predates the introduction of Sponsored Stories.

75. Facebook applied Social Ads opt-out to users that opted out of Social Ads before the launch of Sponsored Stories.

Refused. The request lacks sufficient precision to respond.

[25] Facebook also says that Ms. Doe's requests for admissions of facts relating to the preconditions for admissibility are improper because admissibility is a question of law. It relies on *R. v. Heltman*, 2019 BCCA 224 at para. 25.

[26] There is nothing improper about these requests for admissions. Neither *Morrissey v. Lydiard* (1993), 35 B.C.A.C. 299 (C.A.), 1993 CanLII 553 nor *Heltman* support Facebook's position.

[27] Contrary to Facebook's assertion, *Morrissey* does not stand for the proposition that "[t]he notice to admit regime goes no further than authenticity with respect to documents." In *Morrissey*, the receiving party failed to respond to the notice to admit. The remedy ordered by the court in that case was to deem admission of authenticity of documents, but not the truth of their contents (para. 15). Rule 7-7 expressly includes admissions of authenticity and of facts.

[28] In *Heltman*, the Court of Appeal affirms the uncontroversial proposition that admissibility is a question of law.

- [29] A trial judge determines admissibility by applying evidence law to particular facts. For example, s. 42(2) of the Evidence Act, R.S.B.C. 1996 c. 124 provides that a statement of fact in a document is admissible as evidence of the fact if the document was made or kept in the ordinary course of business, including recording that fact within a reasonable time of its occurrence. Seeking admissions about facts related to admissibility is not the same as seeking agreement that a document is admissible.
- [30] Ms. Douez's requests for admission of facts relating to admissibility promotes the efficiency purposes of Rule 7-7 and are entirely proper. Facebook is free to admit or deny any of these facts. Its refusal to do so does not comply with Rule 7-7.
- [31] I now turn to the admissions sought for facts relating to the content of specified documents. Facebook's claim that these requests lack sufficient precision and/or seek blanket admissions is equally flawed.
- [32] Rule 7-7 requires that the fact for which admission is sought must be communicated to the receiving party with enough precision that they are able to understand what they are being asked to admit. That is why Rule 7-7(3) requires a copy of each document to be attached to the Notice. In this case, reading each document specified in the Notice together with the admissions sought in respect of it, the fact for which admission is sought is clear. Facebook is able to understand each request.
- [33] For example, Document FB_DOU_00098385 is an email chain that copies named individuals and a group called "privacy-eng", all of whom have Facebook email addresses. The subject line reads "loading data into privacy_base." The date of the emails in the chain is January 21, 2011. The content of the document refers to the forthcoming launch of Sponsored Stories, an attendant risk of privacy concerns, and the decision to apply an opt-out from Sponsored Stories to users who had previously opted out of the Social Ads program.
- [34] The admissions sought in Requests 74 and 75 relate directly to what is stated by the authors of these emails or what was done by Facebook employees. Facebook is free to choose to admit or deny each of these facts. It cannot say it does not understand the question.
- [35] *Nouhi v. Pourtaghi*, 2021 BCSC 1779 does not support Facebook's position. There, the basis for refusal was lack of personal knowledge. Justice Skolrood (as he then was) agreed that lack of personal knowledge can be a valid reason for refusal if the receiving party has taken steps to inform themselves. It was in that context that he said that the reasonableness of these refusals should be assessed at trial:

55 In the present case, it is not possible on the record nor is it appropriate for a judge in chambers to parse each alleged fact and each reply to determine whether the reply is reasonable or whether the plaintiff took adequate steps to inform himself. To the extent that the plaintiff here has provided a reason for refusing to admit facts, the reply satisfies the technical requirements of the rule. Whether that position is reasonable will have to be determined at trial.

- [36] Facebook's reason for refusing to answer the requests in categories two and three are not based on lack of personal knowledge. They relate directly to the statements and actions of its employees. Rejecting Facebook's characterization of the requests as seeking blanket admissions and as insufficiently precise does not require me to parse each alleged fact and reply.
- [37] Facebook's refusal to answer these categories of requests does not comply with the Rules.

Facts Related to Indemnification Agreements

- [38] The fourth category of requests concerns facts related to indemnification agreements between Facebook and third parties. For example, Request 151 and Request 156 state:
151. Facebook agreed to indemnify and hold Nestle harmless in relation to any potential legal liability arising in connection with Sponsored Stories.
156. Facebook committed to indemnify Diageo and hold it harmless in relation to Sponsored Stories.
- [39] Facebook refuses to admit or deny on the basis that whether or not there was a contract is a question of mixed fact and law.
- [40] These requests do not ask Facebook to admit that the referenced indemnification agreement is a valid legal contract. They seek admission of facts to which the law of contract will apply, if or when it is necessary to determine their legal validity. Facebook's reason for refusing to admit or deny them does not comply with Rule 7-7.

Remedy

- [41] I have found that Facebook's refusals to answer the admissions requested in the Notice other than those relating to regulatory and legal proceedings against Facebook in other jurisdictions do not comply with Rule 7-7.
- [42] In the circumstances of this case, the appropriate remedy is to require Facebook to deliver an amended reply to the Notice within seven days of the date of this ruling.

EXTENSION APPLICATION

- [43] Rule 7-2 sets out factors the court must consider on an application to extend the time for discovery:
- (3) In an application under subrule (2) to extend the examination for discovery period, the court must consider the following:
- (a) the conduct of a person who has been or is to be examined, including
- (i) the person's unresponsiveness in any examination for discovery held in the action,
- (ii) the person's failure to provide complete answers to questions, or

(iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;

- (b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;
- (c) the conduct of the examining party;
- (d) whether or not it is or was reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);
- (e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

[44] In *Concord Pacific Acquisitions Inc. v. Oei*, 2018 BCSC 1368 at para. 15, Justice Voith (as he then was) explained the test as requiring the party seeking further discovery to show that the person examined has failed to give the examiner the discovery to which they are entitled, or that the complexion of the case has materially changed because of the passage of time or intervening events that have altered the prosecution or defence of the case. He described it as imposing a heavy onus or significant hurdle.

[45] Ms. Douez relies on both prongs of this test. With respect to the adequacy of Mr. Squires' discovery, she says that Facebook improperly objected to questions about the advertising rates it charged and about legal and regulatory proceedings in other jurisdictions, that Mr. Squires was unwilling or unable to respond meaningfully to questions on a number of topics, and that multiple requests remain outstanding. With respect to material change, she says that Facebook filed new affidavits after Mr. Squires' discovery and, while the affiants were cross-examined on them, they were unable to provide meaningful information. She also says that my determination that the damages issues were not suitable for summary trial is a material change.

[46] Facebook says that this application comes too late in the day to succeed. It points to the fact that Mr. Squires' discovery, including Facebook's objections, and its responses to outstanding requests all occurred before the end of July 2021, and Ms. Douez did not take issue with any of them. Rather, she proceeded to seek summary trial of all of the common issues, including the damages issues. It says the outcome of the summary trial is not a material change.

[47] I agree with Facebook. Ms. Douez's summary trial application demonstrated that, as of November 22, 2021, she was satisfied that the evidence she had obtained was sufficient to succeed on all of the common issues. She cannot turn the clock back and now complain that the evidence was inadequate. My decision that the damages common issues are not suitable for summary trial is not a material change that warrants further discovery. That determination was about the appropriate method of proof, not about the facts necessary to establish the claim.

- [48] Three of the affidavits Facebook filed after Mr. Squires' discovery and before the summary trial were made on November 29, 2021. Ms. Douez cross-examined these affiants and decided to proceed with the summary trial as scheduled. I understand she was not able to cross-examine Mr. Parekh on his affidavit of January 10, 2022, which corrected errors made in his affidavit of November 29, 2021. She is entitled to cross-examine him on that affidavit, but this is not a basis for extending discovery of Mr. Squires or another representative of Facebook.
- [49] Ms. Douez acknowledged in her submissions on this application that the outcome of the Notice application would reduce the need for further discovery although she maintained it would still be necessary. I have decided that the other legal and regulatory proceedings are irrelevant, so there is no need for discovery on that issue. I have also required Facebook to admit or deny the requests in all of the other categories. Ms. Douez has not persuaded me that she is entitled to further discovery beyond this.
- [50] In light of that conclusion, it is not necessary for me to consider whether Mr. Schrage should replace Mr. Squires as Facebook's representative.

CONCLUSION

- [51] I grant the Notice application in part. Within seven days of the date of this ruling, Facebook must deliver an amended reply to the Notice, admitting or denying the facts set out in paragraphs 73-75, 77, 7982, 84, 86, 88, 90, 95, 96, 99-101, 104110, 114, 116, 117, 120, 122, 124, 130, 131, 137, 140, 143, 148, 151, 153, 154, 156, 157, 161-163, 166, 167, 169, 170-173, 177, 183, 185, 192, 196, 197, 199 and 203.
- [52] The Extension application is dismissed.

"Iyer J."

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