

CANADA / JUDGMENT

Equustek Solutions Inc. v. Jack

2021 BCSC 1641

COURT

Supreme Court of British Columbia

DECIDED

20 August 2021

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2021 BCSC 1641 Equustek Solutions Inc. v. Jack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Equustek Solutions Inc. v. Jack,

2021 BCSC 1641

Date: 20210820

Docket: S112421

Registry: Vancouver

Between:

Equustek Solutions Inc., Robert Angus,

and Clarma Enterprises Ltd.

Plaintiffs

And

Morgan Jack aka Matt Garcia aka Matt Garci aka Ian Taylor,

Andrew Crawford aka Derek Smythe, Datalink Technology Gateways Inc.,

Datalink 5, Datalink 6, John Doe, Datalink Technologies Gateways LLC,

Lee Ingraham aka Darren Langdon, Mike Bunker,

Igor Cheifot aka Jolio Fernandez, Alexander Cheifot aka Randy Schtolz,

Frank Geiger aka Felix Fernandez, Alfonso Doe, and

Colin Marsh and Kathleen Marsh

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraph 24 on October 29, 2021

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Re Plaintiff's Application for Sanderson and Bullock Orders

Counsel for the Plaintiffs:

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Written Submissions of the Plaintiffs:

January 29, 2021; and

March 22, 2021

Written Submissions of the Defendants:

February 26, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 20, 2021

Introduction

- [1] Robert Angus, his design and manufacturing company Equustek Solutions Inc. ("Equustek"), and his holding company Clarma Enterprises Ltd. ("Clarma") (collectively "the plaintiffs") brought an action against Morgan Jack, Andrew Crawford, several entities operating under the name Datalink, Lee Ingraham, Mike Bunker, Alexander Cheifot, Igor Cheifot and Colin Marsh (collectively "the defendants"). The plaintiffs alleged the defendants conspired to use the plaintiffs' trade secrets to develop a product that would unfairly compete with the plaintiffs' products.
- [2] The reasons for judgment from trial can be found at 2020 BCSC 793. The plaintiffs succeeded against Andrew Crawford, Morgan Jack, Alexander Cheifot, Igor Cheifot and the Datalink defendants. The actions against Mike Bunker, Lee Ingraham and Colin Marsh were dismissed.
- [3] In terms of costs rulings, I determined that Mr. Bunker was entitled to double costs as a result of the plaintiffs' failure to accept a settlement offer prior to trial: indexed at 2021 BCSC 544. Mr. Ingraham and Mr. Marsh both applied unsuccessfully for double costs and have judgments for costs at Scale B: indexed at 2021 BCSC 569 and 2021 BCSC 568, respectively.
- [4] I ordered special costs to the plaintiffs against Mr. Crawford: indexed at 2021 BCSC 1180.
- [5] Mr. Jack, the Datalink defendants and the Cheifots exited the litigation well before trial. Their precise whereabouts are unknown and the plaintiffs' ability to satisfy costs orders against them is correspondingly nil.
- [6] The plaintiffs now apply for Sanderson and Bullock orders to compel the successful defendants to obtain their costs from the unsuccessful defendants, rather than from the plaintiffs.

The Law

- [7] In *Provost v. Dueck Downtown Chevrolet Buick GMC Ltd.*, 2021 BCCA 15, the Court considered the foundation for Sanderson and Bullock Orders:
- [16] It is not disputed that Dueck, as the successful party, is entitled to its trial and appeal costs. The question is whether these costs should be paid by the plaintiffs (Cst. Provost, the AG, and Ms. Brundige) or by the unsuccessful defendants (Mr. Bolton and the Minister) under Rule 14-1(18) of the Supreme Court Civil Rules, which provides the basis for what are commonly referred to as Sanderson and Bullock orders. As this Court noted in *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528:
- [50] In *Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia*, 2nd ed. looseleaf (Markham: LexisNexis, 2007), the authors explain at para. 38.19:

Rule 14-1(18) provides that the court may order that a successful plaintiff pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant. Such order is commonly known as a Bullock order. The Rule also provides that the court may, as an alternative, order that the unsuccessful defendant pay the costs of the successful defendant directly. Such order is commonly known as a Sanderson order. A court may make such order where there is more than one defendant in an action and also where actions have been consolidated for trial or ordered to be tried at the same time.

..Where all parties are solvent, it does not matter much which form of order is made. The advantage of a Sanderson order in such a case is confined to avoiding circuitousness.

If the unsuccessful defendant is insolvent, then the Bullock form of order imposes a hardship upon the plaintiff who may recover nothing from the unsuccessful defendant and yet has to pay the successful defendant. A Sanderson form of order, on the other hand, imposes the hardship upon the successful defendant. Where the successful defendant is blameless, the courts have generally refused to make a Sanderson order.

[Emphasis added.]

[17] The threshold test for a Sanderson or Bullock order is whether it is reasonable for the plaintiff to have joined the successful defendant in the action. If this is satisfied, the question becomes whether it "would be just and fair in the circumstances" for the unsuccessful defendant to pay the successful defendant's costs: Davidson at paras. 53-56. In Grassi v. WIC Radio Ltd., 2001 BCCA 376 at para. 32, Justice Southin described the secondary consideration as whether the unsuccessful defendant "ought" to pay the costs of the successful defendant. The decision to award a Sanderson or Bullock order is a matter of discretion, which must be exercised judicially based on the judge's assessment of the circumstances of the case: Robertson v. North Island College Technical and Vocational Institute (1980), 119 D.L.R. (3d) 17 (B.C.C.A.) at para. 14.

[18] In Grassi, Justice Southin noted that "[t]here must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs": at para. 33 (emphasis added). Justice Southin elaborated:

34 orders under Rule 57(18) [now Rule 14-1(18)] are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.

- [19] In Davidson, this Court held that "a Sanderson or Bullock order requires some conduct on the part of the unsuccessful defendant in order to justify the award": at para. 54. There, even though the Court found that it was reasonable for the appellant to have joined both defendants in one action, it was not just and fair in the circumstances to make a Sanderson or Bullock order because there was no credible evidence to support the claim against the successful defendant: at para. 56.

[Emphasis in the original.]

The Positions of the Parties on the Threshold Test

- [8] The plaintiffs submit that the threshold test is a low bar and the narrative against each of the defendants was "completely intertwined". They say the core "original sin" of the dispute came about when Mr. Crawford left Equustek to work for Mr. Marsh at Sage using source code and schematics stolen from the plaintiffs. The plaintiffs submit that everyone who became involved in Mr. Crawford and Marsh's project would inevitably be drawn into litigation, which is why they used aliases and destroyed documents.
- [9] Mr. Crawford does not dispute that the threshold test is met. Mr. Marsh, Mr. Ingraham and Mr. Bunker all dispute that the threshold requirement is met. They argue that it was not reasonable to add them as defendants as the conspiracy lacked foundation and evidence of liability. Mr. Ingraham also argues that the plaintiffs could have obtained the same material from him as a non-party.

Conclusion on the Threshold Test

- [10] I am not satisfied that the threshold test is met in relation to Mr. Bunker. He was not involved in the "original sin"; rather, he became involved because he knew Mr. Jack on a casual basis and performed contract work for him. There was no evidence he had any knowledge or control over anything except making changes to Datalink websites at the request of Mr. Jack.
- [11] I mean no disrespect to Mr. Bunker's occupation as a search engine optimizer, but adding him to the litigation was the modern day equivalent of joining the photocopy room personnel in an action because they made copies of things at the behest of a tortious wrongdoer. Mr. Bunker may now pursue his costs before the Registrar.
- [12] I am satisfied the threshold test is met in relation to Mr. Ingraham. He worked on technical aspects of the competing product and used an alias in his work, much like Mr. Crawford did, in order to avoid the scrutiny of the plaintiffs. The decision to do so was ill-advised and the plaintiffs in my view were justified in pursuing Mr. Ingraham as a party rather than taking him up on his offer to provide documents and give evidence if required.

- [13] I am satisfied the threshold test is met in relation to Mr. Marsh. He was involved at the "original sin" stage as the principal of Sage, the entity which marketed the plaintiffs' products through a predecessor company, Equustek. I accept that Mr. Marsh was interested, before he sold Sage to Mr. Jack, in developing his own product line at the expense of Equustek. I also accept that he subsequently walked away from Sage, but for threshold purposes there was a reason to join him in the litigation.

The Positions of the Parties on the Actions of the Unsuccessful Defendant Andrew Crawford

- [14] The plaintiffs say that Mr. Crawford withheld evidence throughout the proceedings by: answering interrogatories as vaguely but correctly as he could; ignoring court orders for the production of arguments; delaying producing a list of documents; concealing the involvement of others. This action resulted in the refusal of plaintiffs' first application for a Mareva injunction and required them to sue the successful defendants in order to "thresh out" who was liable.
- [15] Mr. Crawford's position is that he took no steps whatsoever to bring the successful defendants into the litigation and he ought not to be saddled with their costs. Mr. Crawford never "pointed the finger" at any of the successful defendants: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376, per Southin J.A. On the contrary, he submits that the plaintiffs accuse him of taking actions that prevented the successful defendants from being discovered and enjoined. Mr. Crawford maintains he did not do anything to induce the plaintiffs to claim against any of the three successful defendants.
- [16] Mr. Crawford also maintains that the basis for the plaintiffs' success against him in breach of confidence and breach of copyright was independent of the causes of action asserted against the successful defendants; there was separation between his work and that of Mr. Ingraham; that he had no meaningful contact with Mr. Marsh; and that Mr. Bunker had nothing to do with any technical aspects of developing the rival product.

The Positions of the Parties on the Actions of the Successful Defendants

- [17] The plaintiffs say Mr. Marsh was involved in the "original sin" as noted above and continued to advise Mr. Jack on carrying on business despite the ongoing proceedings and in contravention of court orders. The plaintiffs say that these communications necessitated his addition to the action to "thresh out" who was responsible for the plaintiffs' losses. On that basis, Mr. Marsh cannot be said to be blameless. He used aliases, disclosed almost no relevant documents and admitted he had destroyed relevant documents.
- [18] In response, Mr. Marsh says that the unsuccessful defendants did not cause him to be added as a party, and at trial, none of them tried to shift their responsibility to him. He accuses the plaintiffs of casting too wide a net in their unsuccessful conspiracy claim to be excused from bearing the cost of the litigation in relation to the successful defendants. He also points to

the plaintiffs' significant assets, in contrast to his desperate financial situation, and asserts that a Sanderson order would deprive the successful defendants from collecting their costs from anyone.

- [19] The plaintiffs argue that Mr. Ingraham associated with Mr. Jack, Mr. Crawford, and the Cheifots and used an alias. Mr. Ingraham relied on Mr. Crawford's and Mr. Jack's assurances that Crawford was developing the GW1000 from scratch but did no due diligence in the face of emails that should have raised concerns. He concealed the Cheifots' involvement in the project and withheld documents related to them. Mr. Ingraham furthered the enterprise of the unsuccessful defendants and assisted them in re-locating operations out of jurisdiction in the face of litigation.
- [20] Mr. Ingraham submits that the above actions did not make it necessary to add him as a defendant as the plaintiffs could have sought the same material from him as a non-party under the Supreme Court Civil Rules, B.C. Reg. 168/2009. Mr. Ingraham says the unsuccessful defendants did nothing to cause him to be added as a defendant. Like Mr. Marsh, he also points to the unfounded conspiracy claims as being insufficient to support a Sanderson order and flags the consequences on the successful defendants on trying to collect costs from insolvent/departed unsuccessful defendants.

Conclusion

- [21] I am not satisfied that I should exercise my discretion to order that the successful defendants collect their costs against the unsuccessful defendants. Mr. Crawford, the only participating unsuccessful defendant, did many things to thwart the plaintiffs' search for documents and involvement, but I am satisfied he was motivated by wanting to keep his friends out of the litigation rather than by acceding to their requests to keep them out of things. The plaintiffs argued at trial that Mr. Crawford was left as the rear guard to fight the litigation as part of a plan, but I rejected that argument.
- [22] The successful defendants did not point the fingers at each other. They were all cooperative in the pre-litigation process, although Mr. Marsh admitted to destroying documents before he was added as a party.
- [23] This was a complex piece of litigation, made more complex by the plaintiffs' conspiracy theories which were ultimately not proven against the successful defendants.
- [24] The plaintiffs' application for Sanderson and Bullock orders is dismissed. The plaintiffs will have their costs as against Mr. Crawford and the non-participating defendants.
- [25] The successful defendants will have their costs from the plaintiffs, in line with the usual practice of costs following success, and they are also entitled to their costs of this application from the plaintiffs.

"Duncan J."

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