

CANADA / JUDGMENT

Equustek Solutions Inc. v. Jack

2021 BCSC 568

COURT

Supreme Court of British Columbia

DECIDED

30 March 2021

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2021 BCSC 568 Equustek Solutions Inc. v. Jack IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Equustek Solutions Inc. v. Jack, 2021 BCSC 568 Date: 20210330 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 Before: The Honourable Madam Justice

Duncan Reasons for Judgment re Colin Marsh's Application for Double Costs Counsel for the

Plaintiffs/Respondents: R. Fleming J. Zeljkovich Counsel for the Defendant/Applicant, Colin

Marsh: M. Funt Written submissions of Colin Marsh: October 16, 2020 Written submissions of the

Plaintiffs: October 30, 2020 Written Reply submissions of Colin Marsh: November 6, 2020 Place

and Date of Judgment: Vancouver, B.C. March 30, 2021

Introduction

- [1] Colin Marsh was one of a number of defendants in an action brought by Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. In reasons for judgment indexed as Equustek Solutions Inc. v. Jack, 2020 BCSC 793, I dismissed all claims against Mr. Marsh, with costs at Scale B unless there were matters affecting the issue of costs. Mr. Marsh applies for double costs on the basis of a formal offer to settle made on March 26, 2018.

Background

- [2] The plaintiffs' allegations, in summary, were:
- [5] that the defendants conspired to steal confidential material, including DH+ source code, from the plaintiffs' protocol converter and associated technical documents and used what they stole to create their own DH+ protocol converter, the GW1000, and associated technical documents.

- [6] The plaintiffs also allege that the defendants advertised the plaintiffs' products on their internet websites to draw customers in, then shipped the GW1000 instead and gave customers the impression that the plaintiffs' products were no longer available, causing substantial financial damage to the plaintiffs. The wrongful acts underpinning the conspiracy include breach of confidence, passing off, breach of contract, unjust enrichment and breaches of the Copyright Act, R.S.C. 1985, c. C-42, and the Trade-Marks Act, R.S.C. 1985, T-13.
- [7] As an alternative to conspiracy, the claim is framed in joint and several liability for discrete torts.
- [3] Mr. Marsh was qualified as an engineer in the U.K. and Canada. He had an oral distribution agreement with the personal plaintiff, Robert Angus, to sell protocol converters manufactured by Angus's company Equus. Equus was the predecessor to the corporate plaintiff Equustek.
- [4] Mr. Marsh sold Equus protocol converters in the United States. He was sued in that jurisdiction by Allen-Bradley, a company that manufactured protocol converters, over allegations of patent infringement by Equus. Mr. Marsh settled that litigation. Equus itself was not a party to that litigation due to jurisdictional issues.
- [5] Mr. Marsh and Mr. Angus also engaged in litigation in British Columbia over an alleged personal guarantee over accounts receivable. Mr. Marsh was the successful party: *Equus v. Sage*, 2003 BCSC 315.
- [6] Mr. Marsh's response to this round of litigation was that he was only tangentially involved in communications with Mr. Jack and the Cheifots (the personal defendants who abandoned the litigation). He asserts that he was afraid of Mr. Angus, due to the earlier litigation, and wanted to avoid him. Mr. Marsh said his involvement was limited to advising Mr. Jack how to avoid conflict with Mr. Angus. Mr. Marsh had no contact with the defendant Ingraham between 1996 and the start of the trial; no contact with the defendant Crawford after 2003 until the start of the trial commenced; and he has never met the defendant Bunker. The offer
- [7] Mr. Funt, counsel for Mr. Marsh, sent the plaintiffs a formal offer to settle on March 26, 2018. The offer was for Mr. Marsh to waive his costs in exchange for the plaintiffs executing a release and a consent dismissal order. The plaintiffs accepted an identical offer with respect to Kathleen Marsh.
- [8] Mr. Fleming, counsel for the plaintiffs, says the offer to settle was not capable of acceptance because the legal result of accepting the offer would have meant the release of all the remaining defendants, because the pleadings named them as joint tortfeasors.

- [9] As I observed in my rulings in respect of applications for double costs by two other defendants, Mike Bunker and Lee Ingraham, the wording of the release order was not fatal to settling the matter. The plaintiffs settled with Kathleen Marsh and Frank Geiger, two other alleged tortfeasors, and an order could have been crafted to release Mr. Marsh as well. The Law
- [10] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, the Court of Appeal said:
- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:
- [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court: · "[D]etering frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, · "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.); · "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33; · "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.
- [26] Rule 37B(6) of the Rules of Court (which is now R. 9-1(6) of the Supreme Court Civil Rules and remains the same as its predecessor) lists the following factors to be considered in making an award for double costs under R. 37B(5)(b):
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- (a) Whether or not the offer ought reasonably to have been accepted

[11] Hartshorne provides the following considerations (at para. 27):

1. timing of the offer
2. whether it had some relationship to the claim
3. whether it could be easily evaluated and
4. whether some rationale for the offer was provided.

[12] The offer was made the week before trial. By that time, the plaintiffs had examined Mr. Marsh for discovery and obtained from him the documents he still possessed. The offer was related to the claim in that it was based on Mr. Funt's assessment that the plaintiffs' case against his client was bound to fail, an assessment which the plaintiffs obviously disagreed with.

[13] Mr. Fleming points to the evidence against Mr. Marsh to demonstrate why it was not unreasonable for the plaintiffs to ignore Mr. Marsh's offer to settle. Mr. Marsh acknowledged that he used an alias, intentionally destroyed emails and asked other defendants to destroy their emails with him. He gave advice to Mr. Jack about how to respond to the litigation and was aware of the content of pre-trial applications that pre-dated his participation as a defendant. Overall, Mr. Marsh participated in maintaining a curtain of secrecy over things, thwarting the plaintiffs' efforts at discovery in the process.

(b) the relationship between the offer and the final judgment

[14] The judgment paralleled the offer.

(c) the relative financial circumstances of the parties

[15] Mr. Marsh deposes that he is in dire financial straits, particularly in light of the fact that the plaintiffs put a lien on his home in France, precluding him from making repairs. The plaintiffs, on the other hand, are well funded, as is apparent from my reasons for judgment refusing an application for security for costs: 2017 BCSC 2356.

[16] As Mr. Fleming points out, however, there is no evidence that the plaintiffs took any improper steps against Mr. Marsh in the proceedings. The plaintiffs were stonewalled by the defendant Crawford and had to bring on various applications to break the stalemate. Mr. Marsh was part of the stonewalling effort.

[17] Mr. Fleming also relies on a comment by Cullen J. in *Burnett v. Moir*, 2012 BCSC 1286:

[53] The line between the dogged pursuit of a very dubious claim and the determined exploration of a legitimate but ultimately unsuccessful theory of liability is not always clear-cut. The Court, however, must be careful not to too readily assume the former in making costs awards which would deter the latter. In this case, while clearly the plaintiff faced the prospect of failure, I am not prepared to conclude that the merit of his claim was such that it should factor into a consideration of double costs.

(d) any other factor the court considers appropriate

- [18] Mr. Funt points to the plaintiffs' pleadings which alleged fraud and dishonesty along with conspiracy, allegations that he maintains were reprehensible and relevant to an award for special costs, and by association for double costs as well. Mr. Funt suggests that the litigation history between Mr. Marsh and Mr. Angus indicates that Mr. Angus uses litigation as a weapon and has failed to pay costs orders against his corporate alter ego in the past.
- [19] Mr. Fleming submits that the previous litigation between Mr. Angus and Mr. Marsh and their corporate entities is irrelevant. In any event, Mr. Fleming notes that Mr. Marsh did not pay the judgment that Equus secured against his company, Sage.

Conclusion

- [20] Despite a long and somewhat bitter history with Mr. Angus, Mr. Marsh involved himself with providing comments and support to his old friend Mr. Jack. Mr. Marsh used aliases, encouraged people to delete emails with him and admitted that he deleted his own documents in an attempt to erase his involvement. While he was ultimately successful in defending the allegations against him, the plaintiffs were not unreasonable in refusing to settle with him in light of the evidence that he was, at the very least, nibbling at the edges of the subject matter of the litigation.
- [21] The plaintiffs are entitled to their costs of this application at Scale B. Mr. Marsh is entitled to his costs of trial at Scale B. "Duncan J."

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