

CANADA / JUDGMENT

Equustek Solutions Inc. v. Jack

2021 BCSC 569

COURT

Supreme Court of British Columbia

DECIDED

30 March 2021

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2021 BCSC 569 Equustek Solutions Inc. v. Jack IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Equustek Solutions Inc. v. Jack, 2021 BCSC 569 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 Lee Ingraham's Application for Double Costs Counsel for the

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

Ingraham: C. Veinotte J. Cytrynbaum Written submissions of Lee Ingraham: October 16, 2020

Written submissions of the Plaintiffs: October 30, 2020 Written Reply submissions of Lee

Ingraham: November 6, 2020 Place and Date of Judgment: Vancouver, B.C. March 30, 2021

Introduction

- [1] Lee Ingraham 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. Ingraham, with costs at Scale B unless there were matters affecting the issue of costs.
- [2] Mr. Ingraham seeks an award of double costs against the plaintiffs on a joint and several basis from the time of an offer to settle dated September 22, 2014 (the "2014 offer") or alternatively a second one dated March 27, 2018 (the "2018 offer"). His counsel, Mr. Veinotte, maintains the litigation was fueled by the animus that the personal plaintiff, Mr. Angus, had towards the defendants. Mr. Veinotte submits that Mr. Angus used his considerable resources to exact revenge against his opponents, who he regarded as his business competitors, without regard for the consequences the litigation would hold for Mr. Ingraham.

- [3] Mr. Fleming, counsel for the plaintiffs, opposes the application on two bases: first, there was no acceptable form of release that would not imperil the plaintiffs' case against the remaining defendants and second, Mr. Ingraham's involvement in the development and sale of the defendants' rival product was extensive.

Background

- [4] The litigation was commenced in 2011. Mr. Ingraham was added as a defendant in 2014. 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.
- [5] Mr. Ingraham is an engineer who worked briefly as an engineer in training for the personal plaintiff Robert Angus at his company Equus in 1996. Equus was a predecessor to Equustek. In 2005, Mr. Ingraham was persuaded by the defendant Crawford to work on projects for the defendant Jack on a part-time basis. This turned into full-time work in 2007, when Mr. Ingraham became a contractor supplying services to the defendant Datalink. Mr. Ingraham provided customer support, assembly of protocol converters for shipping and ordered parts. The offers
- [6] The 2014 offer was made on September 22, 2014. It was a formal offer to settle all claims, with Mr. Ingraham paying \$24,500 in exchange for a consent dismissal order dismissing the action as against Mr. Ingraham. The plaintiffs did not respond.
- [7] On March 27, 2018, Mr. Ingraham withdrew the 2014 offer and replaced it with a new formal offer to settle all claims in the action on the basis that the plaintiffs pay Mr. Ingraham's taxable costs and disbursements from April 10, 2013 to the date of settlement at Scale B, plus the entry of a consent dismissal order of all claims against him. The offer was left open for acceptance until May 16, 2019. The plaintiffs did not respond.

- [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 Colin Marsh, 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. Ingraham as well.
- The Law
- [10] Offers to settle are relevant to the assessment of costs: Rule 9-1(4). Double costs may be awarded for some or all of the steps taken in the proceeding after the date of delivery or service of the offer to settle: Rule 9-1(5)(b).
- [11] 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]eter[ri]ng 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

[12] 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.

[13] The first offer was made well in advance of trial. The second was made during the trial and was open until the trial had nearly concluded.

[14] Mr. Veinotte says the 2014 offer was clear and unambiguous: Mr. Ingraham was prepared to settle with the plaintiffs for a clear monetary value of \$24,500. The plaintiffs had examined Mr. Ingraham for discovery by the time the offer was made and he had made comprehensive disclosure of documents. The 2018 offer to settle in exchange for taxable costs and disbursements was a "walk away" offer but one that may trigger double costs where a plaintiff has brought an unmeritorious claim.

[15] Mr. Fleming says both offers were minimal and lacked any explanation or analysis. The plaintiffs were seeking damages in the millions and the case was not bound to fail. Conspiracy claims are nearly always based on inferences, not admissions, and there was nothing certain about the court's assessment of the credibility of witnesses.

[16] Mr. Fleming points to evidence that Mr. Ingraham worked with the other defendants to create a GW1000 which was based on stolen technology. Among other things, Mr. Fleming notes: · Mr. Ingraham did no due diligence about where Mr. Crawford's work came from; · he gave away his design notes after the litigation began but before he was added as a defendant; · he used an alias and could give no credible explanation for his use of aliases before trial; · he attempted to protect the Cheifot defendants by offering no information about them and later contacting Igor Cheifot to let him know his name had come up in examination for discovery; and · he helped Mr. Jack move Datalink to Mexico after the litigation began.

[17] In light of those considerations, the plaintiffs submit it was not unreasonable to refuse Mr. Ingraham's settlement offers.

- (b) Relationship between the offer(s) and final judgment

[18] This factor is the mirror image of the first factor. Mr. Veinotte submits there is a substantial discrepancy between the 2014 offer to settle for \$24,500 or the 2018 offer and the dismissal of the claims against Mr. Ingraham. The final judgment and costs awards is a greater financial liability to the plaintiffs than previously contemplated. The trial lasted 73 days, substantially longer than the 29-day estimate.

(c) Financial circumstances

[19] Mr. Veinotte cites *Coglon v. Ergas*, 2009 BCSC 1664, in support of his contention that courts will not shy away from double costs in "a case about money, prosecuted by someone who knew he could afford to lose and to pay for double costs" (at para. 33). He notes that the plaintiffs have access to significant resources, by reference to my judgment refusing security for costs: *Equustek Solutions Inc. v. Jack*, 2013 BCSC 2135 (at paras. 5-6). In contrast, Mr. Ingraham earned \$72,000 gross per year as a contract engineer and has not worked in that capacity since 2012. He has spent nearly \$1 million in legal fees to date.

[20] Mr. Fleming notes that the parties' relevant financial circumstances are irrelevant unless there is evidence that one party abused its greater economic power. He says Mr. Ingraham has not identified any steps taken in the litigation that were improper, or any applications that the plaintiffs did not succeed on.

[21] In Mr. Fleming's response to the double costs application of another of the successful defendants, Colin Marsh, he cites 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) Other factors

[22] Mr. Veinotte says the plaintiffs made serious allegations of dishonesty tantamount to fraud and conspiracy against Mr. Ingraham, who was a professional engineer. They also sought punitive damages and special costs. Unfounded allegations of conspiracy and dishonest conduct have been a pathway to an award of special costs. Unfounded allegations of conspiracy are considered reprehensible, like allegations of fraud: *Pocuca v. Gutiu*, 2007 BCSC 490 and *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9.

[23] Allegations related to claims seeking punitive damages and special costs is a factor the court has considered to justify an award of double costs: *Level One Construction v. Burnham*, 2019 BCSC 548 at para. 40, appeal allowed on other grounds, 2019 BCCA 407 at para. 31.

[24] Mr. Fleming says all of the plaintiffs' core allegations - theft of trade secrets, conspiracy, passing off and breach of copyright - have been proven. The issue at trial was whether or not Mr. Ingraham was part of the misconduct.

Conclusion

[25] I am satisfied the case against Mr. Ingraham was more akin to a legitimate exploration, but ultimately unsuccessful, theory of liability, rather than a dubious claim fueled by the animus. Mr. Ingraham chose to associate with the other defendants in developing a product that would rival Mr. Angus's protocol converter. He did so knowing litigation was likely inevitable, as he testified about his understanding of Mr. Angus's litigious nature. Mr. Ingraham tried to cover up his involvement with developing the rival product by using an alias. He struggled to explain why he would do so. I am not satisfied the respective financial circumstances of the parties favour double costs in this case. While Mr. Ingraham was successful in defending the plaintiffs' claims, considering the factors listed in these reasons, it was not unreasonable for the plaintiffs to refuse the settlement offers.

[26] The plaintiffs are entitled to their costs of this application. Mr. Ingraham is entitled to his costs for the action at Scale B, jointly and severally against the plaintiffs. The assessment of costs should not be scheduled until I determine the plaintiff's application for a Sanderson order. "Duncan J."

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