

CANADA / JUDGMENT

JCB Contracting Ltd. v. Marschall

2023 BCSC 1561

COURT

Supreme Court of British Columbia

DECIDED

13 July 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1561 JCB Contracting Ltd. v. Marschall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

JCB Contracting Ltd. v. Marschall,

2023 BCSC 1561

Date: 20230713

Docket: S56881

Registry: Vernon

Between:

JCB Contracting Ltd. and Jason Barnett

Plaintiffs

And:

Peter Marschall and Kimberly Marschall

Defendants

Before: The Honourable Justice G.P. Weatherill

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

C.T. Hart

Counsel for the Defendants:

D.R. Whittaker

Place and Date of Hearing:

Vernon, B.C.

July 12, 2023

Place and Date of Judgment:

Vernon, B.C.

July 13, 2023

[1] THE COURT: These are my reasons for judgment.

Introduction

[2] The defendant Kimberly Marschall seeks the dismissal of the plaintiff's claim against her for defamation pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019 c. 3 (PPPA). She also seeks costs and damages pursuant to ss. 7 and 8 of the PPPA on the basis that the plaintiff's claim was brought in bad faith and for an improper purpose.

Background

- [3] The dispute between the parties arises out of a residential fixed-price construction contract dated December 30, 2018 ("Contract"), that went sideways. The Contract was between the plaintiff, JCB Contracting Ltd. ("JCB") as contractor and the defendant spouses as owners. The plaintiff Jason Barnett is JCB's principal.
- [4] The defendants own property in a strata complex known as La Casa Resort on Terazona Drive in Kelowna, BC ("Property"). The defendants purchased the Property prior to meeting the plaintiffs and wanted to build a home on it ("Home"). Many residents of La Casa Resort belong to a private Facebook group known as the La Casa Resort Owners Facebook Group ("Facebook Group"), which has some 329 members, including the two defendants. Neither plaintiff belongs to the Facebook Group.
- [5] The Contract quotes a fixed price of \$306,138.71, plus applicable taxes for the construction of the Home. The Contract provides that upon signing, the defendants would pay JCB a non-refundable "contract signing fee" of \$31,000 plus GST, representing 10 percent of the contract price.
- [6] The defendants paid that sum shortly before the parties signed the Contract in December 2018. By then, the defendants had already paid JCB a deposit of \$10,000 plus GST in October 2018 for costs associated with obtaining plans and surveys and other preliminary matters. JCB commenced construction of the Home shortly after the Contract was signed, excavating the Property and installing footings.

- [7] As it happens, BC Hydro had registered a statutory right-of-way against the Property ("SRW"), and there was a covenant restricting the height of the residence to 16.5 feet ("Restrictive Covenant"). In March 2019, JCB was issued a stop-work order due to the Home's plans exceeding the Restrictive Covenant's height restriction and due to an issue with the SRW requiring permission from BC Hydro to resolve.
- [8] In May 2019, the defendants decided they no longer wanted JCB to continue with the Contract. JCB took the position that the defendants repudiated the Contract, accepted the repudiation, and was content to retain the moneys the defendants had paid to it to date as compensation. The defendants took the position that the Contract's termination was by way of mutual agreement.
- [9] Shortly after the Contract's termination, Ms. Marschall requested that JCB fill in the excavation and provide a breakdown of JCB's costs to date. JCB arranged for a subcontractor, Devco Excavating Ltd. ("Devco") to fill the excavation to the extent possible using the material that had been excavated and available on site. That work was completed on May 23, 2019. Although most of the excavation was refilled, it was not filled to the original grade level. The parties dispute the level to which the excavation was filled.
- [10] On June 6, 2019, JCB complied with Ms. Marschall's request for a breakdown of its costs and services by providing a reconciliation complete with invoices. That reconciliation included Devco's invoice of \$720 plus GST for filling in the excavation. The reconciliation noted that cost as "excavation for refill of hole" and JCB added a 15 percent "management fee" for a total cost of \$828. The total amount noted on the reconciliation for the work prior to the Contract's termination, including the cost of refilling the excavation, was \$37,456.88. In total, the only moneys the defendants paid to JCB were the original \$10,000 paid in October 2018 and the \$31,000 paid in December 2018 plus GST. Inclusive of GST, the amount paid was \$43,050.
- [11] Relying on the Contract, JCB took the position that no moneys were repayable to the defendants and sought no further payments from the defendants. JCB and the defendants then parted company.
- [12] In September 2020, some 15 months later, the defendants posted various unflattering comments about both plaintiffs on the Facebook Group. Peter Marschall published the first post, which stated:

If anyone has been ripped off by JBC [sic] Construction owner Jason, please contact me. He has \$70,000 cash that he started digging a hole on my lot and just walked away and put the cash in his pocket. And, yes, I have all the paperwork.

- [13] Several third-party members of the Facebook Group posted responses that were complementary of JCB and Mr. Barnett. One member, Robert Parker, wrote:

Jason is a standup guy. We are in the same field, and Jason does great work. There are always two sides to a story. My buddy just started his build, and I highly recommend Jason.

[14] In response to Mr. Parker's post, Mr. Marschall posted this:

Robert Parker, I guess that is too bad for him. If somebody had a problem with me, why you do not come up and take a look at my paperwork. If you cannot do that, I think you know what my next words will be to you.

[15] At this point, Ms. Marschall entered the fray with her first post:

Robert Parker, would love to give you the whole story, but this is not the place, and I would have loved to discuss it with Jason himself, but he refused to meet with me.

[16] Mr. Parker once again responded, confirming that the plaintiffs do good work and suggesting that Ms. Marschall call Mr. Barnett. Ms. Marschall responded with this post:

Robert Parker, I would love that, but she [sic] will not contact me and actually drove away from me when I stopped to talk to him about trying to set up a time. Again, the original post was asking for others to contact us, not to discuss it on this platform. I have been told there are others who had unfavourable interactions. I am not looking to fight or to defend myself from others who doubt my awful experience. I can fully enlighten you if you would like to discuss it further, but please do not post how unfair I am being.

[17] This post from Ms. Marschall was followed by Mr. Marschall's post stating simply "he is a moran [sic]."

[18] Another member of the Facebook Group, Tracey Smith, chimed in posting:

He built my place and was amazing, above and beyond, professional, caring. Pretty slanderous statement to publicly make of a company and person. To me it says way more about you than him.

[19] Mr. Marschall replied to Ms. Smith's post with this:

Tracey Smith, if you would like to replace the money he owes me out of your own pocket, feel free, and then he can be your problem.

[20] At this point, Ms. Marschall made the following post ("Kimberly Post"):

Tracey Smith, also pretty slanderous chargering [sic] to fill the hole and not doing it. Also, pretty unprofessional driving away from someone when you try to talk to them on your street and they won't ever return your phone call, just saying.

- [21] The plaintiffs were made aware of the postings in late September 2020 by members of the Facebook Group and considered them defamatory. They consulted counsel, who issued a letter to the defendants dated October 6, 2020. The letter pointed out that a number of the posts were untrue, disparaging, and had defamatory imputations and requested an apology and retraction. No apology or retraction was received and the plaintiffs commenced this action for damages in defamation on December 7, 2020.
- [22] On December 30, 2020, the defendants filed a response to civil claim denying the alleged defamation. They claimed that if the comments had been published, they were true or substantially true and therefore justified. On the same day, they filed a counterclaim seeking damages for misrepresentation, breach of contract, negligence, and conversion.
- [23] Various steps have been taken in the litigation, including document disclosure and examinations for discovery. On April 4, 2022, Ms. Marschall brought this application seeking dismissal of the action against her pursuant to s. 4 of the PPPA. The post that is the subject of the application is the Kimberly Post.

The PPPA

- [24] The PPPA came into force in March 2019. Its purpose is to protect public participation in matters of public interest. It is designed to screen out actions that have the effect of limiting a defendant's participation in public debate and seeks to balance the rights of individuals to protect their reputations against the benefit to society of protecting free speech and rigorous debate on issues of public interest. The Province's stated intention in enacting the PPPA was to protect public participation in debates of the issues of the day and prevent strategic lawsuits brought by the wealthy and powerful to shut down public criticism. Such lawsuits are known as Strategic Lawsuits Against Public Participation or the acronym "SLAPP": *Hansman v. Neufeld*, 2023 SCC 14, at paragraphs 46 to 49; and *Todsén v. Morse*, 2022 BCSC 1341, at paragraphs 28 to 33.
- [25] The PPPA creates a multistep process for determining whether an action should proceed. It essentially acts as a gatekeeper to prevent defamation lawsuits from continuing where the impugned words arise out of an expression related to matters of public interest. For the purposes of this application, the relevant section of the PPPA is s. 4, which reads:

Application to court

4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
- (b) the expression relates to a matter of public interest.

- (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
- (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding, and
 - (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

Discussion

[26] Both parties provided comprehensive written submissions which they took me to during oral submissions and which I have since had the benefit of reviewing. As mentioned, s. 4 of the PPPA is designed to screen out lawsuits that unduly limit expression related to matters of public interest. It is also designed to ensure that a plaintiff with a legitimate defamation claim is not unduly deprived of the opportunity to pursue it. Section 4 engages a four-step analysis:

- 1) The defendants have the onus of showing that the claim against them arises from an expression that relates to a matter of public interest;
- 2) If the defendants succeed on step 1, then the onus shifts to the plaintiffs, who must show that the claim has substantial merit;
- 3) The defendant has none of the usual defences to defamation claims; and
- 4) The public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression.

[27] The defendants admit that the Kimberly Post was an "expression" within the meaning of s. 4(1)(a) of the PPPA. Ms. Marschall must therefore show that it relates to a matter of public interest.

Did the Kimberly Post relate to a Matter of public interest?

[28] In assessing that question, it is important to consider what was really going on as between the parties. In other words, what was driving Ms. Marschall's decision to make the Kimberly Post? Was it a general comment related to her experience with the plaintiffs in the form of a "customer review" as she suggests, or did she decide to air a private dispute between the parties in a public forum, as the plaintiffs suggest?

- [29] I conclude it was the latter. This action has none of the hallmarks of a SLAPP. The plaintiffs are not powerful entities trying to use litigation to stifle expressions or silence critics. The plaintiffs are seeking to protect themselves from reputational harm instigated by what they say are false and malicious statements after they requested an apology and retraction. Only after the defendants' refusal was this action commenced.
- [30] The Kimberly Post cannot be looked at in a vacuum and must be put in context of the preceding posts. It followed earlier posts authored by her husband to which Ms. Marschall hitched her wagon. The purpose of the Kimberly Post was to support her husband's posts suggesting that JCB charged them for work that was never performed, including charging them to "fill a hole" on the Property when JCB had not done so. Mr. Marschall's first post was made seemingly out of the blue in September of 2020, some 15 months after the Contract terminated, and was highly disparaging of the plaintiffs. On the evidence before me, it was also factually incorrect.
- [31] A string of third-party posts in defence of the plaintiffs followed. Mr. Marschall followed those posts with other negative posts, which Ms. Marschall followed up with her own comments:
- a) that they had an "awful experience" with the plaintiffs;
 - b) that there was more to the story;
 - c) the plaintiffs refused to meet with her; and
 - d) that they refused to contact her and drove away when she tried to talk to them.
- [32] She then made a bare assertion that other clients of the plaintiffs had had unfavourable interactions with them also. After other third parties responded, Ms. Marschall concluded with the Kimberly Post. In broad terms, by failing to include details of her relationship with the plaintiffs so that her audience reading the posts could be properly informed, the Kimberly Post suggests that the plaintiffs falsely charged them for filling the excavation on the Property when that work was not performed at all.
- [33] Ms. Marschall now asserts that the Kimberly Post is an expression of public interest because it relates to the conduct of the business practices of the plaintiffs. She argues that the only question is whether the expression pertains to any "matter of public interest", as that term is broadly defined. In support, she refers to 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at paragraphs 26 to 30.
- [34] The plaintiffs maintain that the Kimberly Post is not an expression of public interest because when put into context and properly considered, it pertains to a private dispute between the parties and is merely a defamatory attack on the plaintiffs veiled as a discussion of a matter of public interest. While consumer reviews have long been held to be matters of public interest in defamation cases, I am not persuaded that the Kimberly Post was a consumer review.

- [35] This case is distinguishable from cases upon which Ms. Marschall relies where online reviews were found to be expressions of public interest, such as *Peterson v. Deck*, 2021 BCSC 1670; and *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517, affirmed 2019 ONCA 141.
- [36] In simple terms, the Kimberly Post alleges that the plaintiffs charged them for filling a hole when that service was not performed. It is a specific complaint provided without explanatory context some 15 months afterwards. This expression does not have a general application that would permit a segment of society to receive or extract information on JCB's business practices, and there is no accompanying information that would allow the public to evaluate or debate the matter.
- [37] Without any context or accompanying information, the Kimberly Post is, in my view, a publication in relation to a private dispute and cannot be considered an education presentation of public interest. It is not a consumer review, but rather the airing of a private dispute in a public forum. It is not written in a manner that would assist the general public or allow the public to evaluate and weigh her statements. There is no objective background, and all that can be taken away from it is that the plaintiffs took money from her without performing work and then ran away.
- [38] In sum, Ms. Marschall has failed to satisfy the first branch of the s. 4 test, and her application must accordingly be dismissed. Regardless, even if I were to have found the Kimberly Post was an expression of public interest, her application also fails because the plaintiffs have met the onus of satisfying steps 2, 3, and 4 of the analysis as described above.
- [39] For substantially the reasons set out in Mr. Hart's written submissions, I conclude that this proceeding has substantial merit, that Ms. Marschall cannot rely on such defences as justification or fair comment, and that the harm caused to the plaintiffs by the Kimberly Post was serious enough that society's interest in continuing the proceeding outweighs society's interest in protecting her expression.

Decision

- [40] Although broad in nature, there is a limit to the sorts of communications that trigger the s. 4 PPPA process. The communications must relate to a matter of public interest. I have concluded that the Kimberly Post taken in the proper context of the full interaction between the parties does not reach the level of being an expression of public interest. Therefore, s. 4 of the PPPA is not engaged. Even if it were engaged, I would have dismissed the application on the basis of my conclusions that the plaintiffs have met their s. 4(2) onus of showing that there were grounds to believe that:
- 1) The action has substantial merit;
 - 2) Ms. Marschall has no valid defence such as justification or fair comment; and

3) The harm likely to have been caused by the Kimberly Post is serious enough that the public interest in allowing the claim against her to continue outweighs the public interest in protecting her education presentation.

[41] Accordingly, Ms. Marschall's application for dismissal of the action against her under s. 4 of the PPPA is dismissed.

Costs

[42] Although during submissions the parties requested that costs be spoken to after my ruling, s. 7(2) of the PPPA makes it clear that the plaintiffs are not entitled to costs despite their success. Accordingly, the matter of costs will be reserved to the trial judge.

"G.P. Weatherill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/15/2023BCSC1561.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jcb-contracting-ltd-v-marschall-2023>

Prepared on 29 October 2026 · Esheria