

CANADA / JUDGMENT

Pixhug Media Inc. v. Steeves

2017 BCSC 1698

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Supreme Court of British Columbia

DECIDED

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2017 BCSC 1698 Pixhug Media Inc. v. Steeves

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pixhug Media Inc. v. Steeves,

2017 BCSC 1698

Date: 20170922

Docket: S164955

Registry: Vancouver

Between:

Pixhug Media Inc.

Plaintiff

And

Adam Steeves also known as Adam Joshua Noel Steeves also known as

Adam Joshua Brenden Noel Steeves also known as Adam Joshua

Noel Alexander Steeves also known as Adam-Joshua Noel-Steeves

also known as Adam-Joshua Brenden Noel-Steeves also known as

Adam-Joshua Brenden Alexander Noel-Steeves, Janice Birtha King,

Steeves Investments Corporation, Scrumsoft Inc., Bit Creative Inc.,

Darshan Khatri, John Doe as the Trustee of the Steeves Family Trust,

and Jane Doe

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment on Costs

Counsel for the Plaintiff/Respondent:

R. Bennett

Counsel for Defendants/Applicants:

R. Robertson

Place and Date of Hearing:

Vancouver, B.C.

March 14, 2017

Place and Date of Judgment:

Vancouver, B.C.

September 22, 2017

introduction

- [1] The defendants, Adam Steeves, Janice BIRTHA King, Steeves Investments Corporation ("SIC"), Scrumsoft Inc., Bit Creative Inc. and Darshan Khatri (collectively "the defendants") apply for various orders respecting the costs of applications heard in these proceedings on four consecutive days between August 22 and 25, 2016.
- [2] By their application filed August 17, 2016, the defendants applied to set aside the ex parte Mareva injunction this Court granted to the plaintiff on June 3, 2016 and subsequently modified on June 23 and July 22, 2016. The defendants also applied for other relief, including orders for security for costs and security for damages sustained as a result of the Mareva injunction.
- [3] The defendants' applications, together with the plaintiff's application to extend an ex parte interim injunction granted by the Honourable Mr. Justice Sewell against the defendants Steeves and SIC in Vancouver Registry action number S167395, were all heard between August 22 and August 25, 2016.
- [4] On September 2, 2016, I made an order setting aside the Mareva injunction with reasons to follow. Those reasons were delivered on September 19, 2016, and are indexed as Pixhug Media Inc. v. Steeves, 2016 BCSC 1714.

- [5] On the hearing of August 22 to 25, 2016, the matter which was most important to the parties, and which consumed most of the time, was the question of whether the Mareva injunction should be set aside.
- [6] On September 2, 2016, I also made orders:
- that the application by the defendants that the plaintiff pay damages resulting from the Mareva injunction be adjourned to be decided by the trial judge;
 - dismissing the defendants' application that the plaintiff post security for potential damages arising from the Mareva injunction;
 - dismissing the defendants' application for a declaration that the plaintiff improperly disclosed mediation documents and for orders that the plaintiff pay damages to the defendants for this disclosure, and inform the British Columbia Commercial Arbitration Centre of the disclosure.
- [7] On September 19, 2016 in addition to providing written reasons for the order setting aside the Mareva injunction, this Court ordered the plaintiff to post security for costs in the amount of \$10,000 within 14 days, failing which the action would be stayed pending the posting of security.
- [8] Pixhug commenced an appeal from the order setting aside the Mareva injunction and applied for a stay pending determination of the appeal.
- [9] On November 3, 2016 D. Smith J.A. issued reasons for judgment indexed as Pixhug Media Inc. v. Steeves, 2016 BCCA 433, dismissing the plaintiff's stay application. Since then, aside from the plaintiff delivering an incomplete list of documents on the eve of the costs hearing, neither party has taken any step in this court or the Court of Appeal.

ORDERS SOUGHT BY DEFENDANTS

- [10] The defendants apply for orders for the costs of the hearing of August 22-25, 2016 (the "Set Aside hearing") to be assessed as special costs, or alternatively as increased costs at Scale C payable by the plaintiff forthwith and in any event of the cause.
- [11] The defendants also seek an order that their costs shall include costs of court appearances on July 22, 27 and 28, 2016 related to their application to set aside the Mareva injunction, and the costs of the defendants' cross-examination of the plaintiff's expert, Mr. Ong, on August 5, 2016. In addition, the defendants seek orders that their allowable disbursements include the reasonable costs of the report of their expert, Mr. Mike Pellegrino, dated August 18, 2016, and reasonable fees for ordering the transcripts of the various hearings, cross-examination and oral ruling of September 2, 2016.
- [12] The defendants seek an order that the \$10,000 paid into court by the plaintiff as security for costs pursuant to my order of September 19, 2016 be paid out, together with interest accrued, as a partial advance payment of the defendants' costs. They also seek an order that the \$10,000 paid into court by Pixhug pursuant to my order of September 23, 2016 as security

for any damages suffered by the defendants as a result of that order also be paid out, together with interest accrued as a partial advance payment of the defendants' costs, or alternatively, be paid out upon the assessment of any costs awarded to the defendants.

background

- [13] Pixhug is a British Columbia technology company formed to create a software platform linking donor corporations to charitable organizations through social media. The defendant, Adam Steeves, is the former chief technology officer of the plaintiff and the principal of SIC, a New Brunswick corporation that provided software development services to the plaintiff. The defendant, Janice Birtha King, is also a director of SIC.
- [14] The defendants, Bit Creative Inc. and Scrumsoft Inc. are, respectively, graphic design and software development companies that performed work for the plaintiff's project as subcontractors to SIC. Darshan Khatri was the chief software developer at Scrumsoft.
- [15] In the underlying action, Pixhug claims that the defendants fraudulently represented that they were developing a fully functioning software program for Pixhug when in fact they produced no computer code and did little more than produce graphic mock-ups and demonstration animations. The plaintiff contends that in reliance upon the defendants' misrepresentations, it paid for work the defendants never performed.
- [16] The Mareva injunction granted by the Court on June 3, 2016 restrained the defendants from disposing of or dealing with their assets worldwide.
- [17] In granting the Mareva injunction, this Court gave significant weight to the evidence of Mr. Jack Ong, the expert retained by Pixhug to conduct an assessment of an audit delivered by Bit Creative Inc. to the plaintiff listing all the activities performed by that defendant for the software development project.
- [18] Based on Mr. Ong's evidence, I found the plaintiff had established a strong prima facie case that the defendants had deliberately misrepresented the work performed. I also found that Pixhug, relying on the misrepresentations, had made expenditures that had substantially exceeded the value of the actual work performed by the defendants. I concluded that the plaintiff would suffer irreparable harm if the Mareva injunction was not granted, and that the balance of convenience weighed in favour of granting the Mareva injunction.
- [19] In my reasons for judgment on the Set Aside hearing, my findings included the following:
- [43] In cross-examination on his affidavit, Mr. Ong admitted:
- (a) that he had no formal education in graphic design;
 - (b) that he does not presently consider himself a computer programmer and has not done so for the last 15 to 17 years;
 - (c) he does not claim any expertise in graphic design;

- (d) 90% or more of the work performed by Gossamer Threads does not involve building apps;
 - (e) Mr. Ong has worked on only two projects that involved building an app;
 - (f) he was not aware of the number of persons employed by Bit Creative or that the Bit Creative complement of employees and contractors for the Pixhug project fluctuated between five and nine;
 - (g) when pressed by counsel he agreed that it could have helped to view a presentation of the software actually working but expressed concern that a "guided tour" presentation could be built on static images rather than functional code;
 - (h) he was asked to provide an opinion on the Audit Report and assumed it represented all of the work for the Pixhug project;
 - (i) Mr. Ong confined his evaluation of the defendants' work to the "four corners of the [Audit Report]"; he made no inquiries and did no research concerning the type of work Bit Creative did;
 - (j) he did not know how the scope of work might have changed over time;
 - (k) one of the factors which Mr. Ong took into account in concluding that Pixhug's project was beyond the expertise of the defendants was the absence of a detailed specifications document. When Mr. Ong offered that opinion, he was unaware that Pixhug and SIC had entered into a contract regarding the services to be rendered by SIC and that Pixhug had declined a user-requirement service document setting out detailed specifications;
 - (l) after viewing a March 15, 2016 video provided by the defendants, Mr. Ong agreed there was definitely coding work performed. Mr. Ong also agreed that after viewing the demonstration video he was in a better position to assess the amount of work than when he was limited to reviewing the static images contained in the Audit Report. Mr. Ong also agreed some of the content of the March 15, 2016 video was back-end administration that he had not seen before; and
 - (m) he was not aware that contractors other than Bit Creative were hired to create the back-end portions of the Pixhug app.
- [44] In re-examination, Mr. Ong said that his estimate of 300 to 400 hours for the work documented in the Audit Report was not influenced by the first question he was asked to answer, i.e., whether the Audit Report reflected the work of 35 professionals.
- [45] In finding the plaintiff had established a strong prima facie case that the defendants had made false representations regarding the progress and extent of their work, the Court relied on Mr. Ong's opinion, including his conclusion that he had found "scant evidence" of the defendants having provided the coding required to support the back-end administrative functions of the software platform.

- [46] As I have noted, when cross-examined after he viewed the March 15, 2016 video, Mr. Ong acknowledged that "there was definitely coding done"; that "the nature of that code was not detailed in the [Audit Report]"; and that the video included some back-end administration.
- [47] When it retained Mr. Ong, the plaintiff had in its possession a video of Mr. Steeves' November 23, 2015 presentation to Pixhug. That video included a demonstration of the front-end features of the software platform, as well as some back-end administrative functions, and a variety of other features, including work performed for the mobile app, a custom Facebook interface and a demonstration of the Pixhug Dashboard system which permitted users to track the progress of development of the software platform. Pixhug did not provide that video to Mr. Ong to assist him in preparing his report. Mr. Ong only viewed the November 23, 2015 video shortly before his cross-examination. He agreed that video also contained evidence of software code.
- [48] Although Bit Creative provided the Audit Report to Pixhug in an electronic format containing links to additional content including videos, images and animations, the plaintiff provided Mr. Ong with a Dropbox link to a PDF copy of the Audit Report. Mr. Ong acknowledged in cross-examination that he was not able to view the animations, video or presentations, and was not able to estimate the time that went into their creation. The PDF format of the Audit Report was essentially static. He attempted to follow a few links; however, they lead to dead ends at login pages to which Mr. Ong had no access.
- [49] The plaintiff's instructions confined Mr. Ong to an assessment of only part of the work performed by the defendants. The focus of the Audit Report was the graphic and design work performed by Bit Creative. The Audit Report was not an assessment of the software development work performed by Scrumsoft. Further, the defendants' cross-examination of Mr. Ong has revealed his very limited qualifications to assess graphic and design work. More significantly, that cross-examination substantially undermined Mr. Ong's opinions regarding the scope and extent of the work performed by the defendants, including his opinion that the defendants provided little or no coding to support the back-end administrative functions of the software platform.
- [50] While there remains a live dispute between the parties concerning the scope of the work performed and the value of the services provided by the defendants, Mr. Ong's report was so diminished on cross-examination that it no longer provides the underpinnings for a strong prima facie case of fraud.
- [20] This Court also found at paras 52 and 53 that the November 23, 2015 video presentation ought to have been disclosed on the Mareva injunction application.
- [21] At paras. 69 through 78, I found the plaintiff had failed to disclose the following material facts concerning its own financial circumstances:
- the extent of its indebtedness to creditors;

- the fact that all of its funds on deposit were subject to a security interest in favour of the Royal Bank of Canada;
- that following Mr. Steeves' software demonstration of November 23, 2015, the plaintiff resorted to borrowing \$187,000 USD from its chief executive officer, Mr. James Scott, in order to partially pay SIC's outstanding accounts, and that Mr. Scott claims the plaintiff still owes him \$123,176;
- the fact that Pixhug's previous software developer PyCo had a substantial claim against the plaintiff for unpaid invoices.

[22] On the other side of the ledger, I also addressed Mr. Steeves' delivery to the plaintiff of a portable hard drive which he claimed contained the software code written by the defendants. The portion of the hard drive containing the code was encrypted. Mr. Steeves refused to provide the password for access to the encrypted material until the defendants' outstanding accounts were fully paid, despite repeated requests from the plaintiff.

[23] At paras. 64 and 65 of my reasons, I made the following observations:

[64] Mr. Steeves swore an affidavit on this application in which he deposes that during the mediation proceedings, when he had access to the hard drive, he surreptitiously destroyed the copy of the coding on the hard drive. He explained that he did so because at the time he feared that the plaintiff was attempting to "hack" into the hard drive. Mr. Steeves has also deposed that the defendants retain a copy of the code, which they will provide to the plaintiff upon payment of their accounts.

[65] The defendants' apparent reluctance to cooperate with the plaintiff in a forensic examination of the hard drive that might well assist the defendants' case is, to say the least, troubling. If Mr. Ong's opinions on the scope and nature of the work performed by the defendants had withstood cross-examination, I would have been inclined to accept the plaintiff's submission that its case had strengthened since the grant of the Mareva injunction. However, as I have explained earlier in these reasons, the defects in Mr. Ong's report have led me to conclude that the plaintiff does not have the strong prima facie case of fraud required to sustain the Mareva injunction.

[24] I also found, at para. 67, that apart from the failure to disclose the November 23, 2015 demonstration video, and the failure to provide Mr. Ong with the March 15, 2016 video, the plaintiff had disclosed the material in its possession relating to the work the defendants claimed to have performed on the Pixhug project. I concluded at para. 85:

[85] I find that the plaintiff failed to disclose facts relating to its lack of exigible assets, the security held by the Royal Bank of Canada and its indebtedness to creditors. Those facts were relevant and material to the Court's exercise of its discretion on the Mareva injunction application. They have a direct bearing on the adequacy of the plaintiff's undertaking as to damages, the Court's assessment of the balance of convenience, and the extent to which damages would provide a remedy to the defendants in the event that the injunction was granted and the plaintiff's claim ultimately failed. Had the plaintiff fully disclosed its

financial position, I would have been left in serious doubt concerning the adequacy of the plaintiff's undertaking as to damages. The plaintiff's failure to fully disclose its financial circumstances, combined with the undermining of Mr. Ong's report lead me to conclude that the Mareva injunction should be set aside.

- [25] Although the Court made the order setting aside the Mareva injunction on September 2, 2016, as a result of stay orders obtained by Pixhug pending its intended appeal, the Mareva injunction remained in effect for more than five months after it was first granted.
- [26] In support of their application for an order fixing the special costs of the Set Aside hearing, the defendants have provided copies of invoices from their solicitors, and from their expert, Mr. Pellegrino, totalling \$61,132.66. The solicitors' invoices contain brief descriptions of the work performed, the hours expended, hourly rates charged and the amounts billed. The defendants have not produced their solicitors' files, for which they claim privilege.
- [27] The defendants have also provided a bill of costs at Scale C in the amount of \$38,991, which includes the disbursement for Mr. Pellegrino's report in the amount of \$14,051.53.

POSITIONS OF THE PARTIES

Defendants' Position

- [28] The defendants say that as the successful party on the Set Aside hearing, they should have their costs. They submit Pixhug's failure to disclose to Mr. Ong or to the court evidence in the plaintiff's possession showing the defendants had performed more work than the activities listed in the Bit Creative audit, whether deliberate or inadvertent, demonstrated a "callous disregard" for the importance the court would likely place on an expert's report on an ex parte application. The defendants say that, combined with Pixhug's failure to fully disclose its impecuniosity, constitutes reprehensible conduct deserving of the court's rebuke by an order for special costs.
- [29] Alternatively, the defendants argue this matter was of more than ordinary difficulty, and warrants an order for costs at Scale C. The defendants also contend that in light of Pixhug's impecuniosity, and its failure to move this action forward since the Mareva injunction was set aside, it is unlikely this case will ever proceed to trial. In these circumstances, the defendants argue that absent an order for payment of their costs forthwith and in any event of the cause, they will probably never receive any costs compensation for the Set Aside hearing. The defendants also submit that an order for payment out of the monies in court would partially compensate them for the substantial expense they have incurred in order to set aside the Mareva injunction.

Plaintiff's Position

- [30] The plaintiff submits an order for special costs is not warranted. Pixhug says that its failure to make full and frank disclosure was the result, at worst, of bad judgment and was not calculated to deceive the court. In these circumstances, the plaintiff argues that it engaged in no reprehensible conduct worthy of rebuke by an order for special costs.
- [31] Further, relying upon *Gichuru v. Smith*, 2014 BCCA 414, the plaintiff submits that without disclosure of the defendants' solicitors' file, and cross-examination of the defendants' solicitors concerning the scope and nature of the services they provided, the court is not in a position to determine whether the special costs claimed are reasonable, and ought not to exercise its discretion under R. 14-1(15) to fix costs.
- [32] Where, as here, a party claims that its legal accounts are privileged, its choices are to waive privilege, wait until all appeals are exhausted before having its costs assessed or abandon its claim of special costs: *Gichuru* at para. 120. The plaintiff submits that if the defendants intend to pursue special costs of the Set Aside hearing, they must either waive privilege or defer the assessment of costs until the conclusion of the trial and the exhaustion of any appeals.
- [33] Pixhug says there is no basis for departure from the general rule that costs of an interlocutory hearing should be costs in the cause. The plaintiff submits that it intends to proceed to trial, and that with the benefit of discovery it may ultimately prevail in proving fraud on a balance of probabilities. Pixhug argues that if costs of the Set Aside hearing are awarded in any event of the cause, there is a risk it will be penalized for taking a position that is ultimately shown to have been correct. Pixhug submits that the key issue on the Set Aside hearing was whether the plaintiff had made out a *prima facie* case of fraud, and says that issue is not severable from the issue at trial of whether, on a balance of probabilities, the defendants committed fraud.
- [34] Further, Pixhug contends that if costs are ordered in any event of the cause, there will be an unnecessary multiplicity of assessment hearings. The plaintiff also argues that an order for costs payable forthwith risks stifling the litigation by depleting its already strained financial resources.

DISCUSSION AND ANALYSIS

Success

- [35] On the Set Aside hearing, Pixhug successfully resisted some of the relief sought by the defendants and secured an extension of the interim injunction granted by Sewell J. in action S167395.
- [36] However, the defendants prevailed on their application to set aside the Mareva injunction. I estimate that argument on the issue of whether the Mareva injunction should be set aside consumed approximately 80% of the court's time during the four day hearing. Whether the

Mareva injunction should be continued or vacated was the matter of primary importance to both parties. Pixhug contended that the continuation of the injunction was necessary to prevent irreparable harm to its software enterprise. For their part, the defendants had suffered the consequences of the order restraining access to their finances and maintained that their capacity to carry on their businesses would be jeopardized, if not destroyed, unless the Mareva the injunction was vacated. Weighing all of the matters in dispute, and the outcomes of the Set Aside hearing, I find that the defendant achieved "substantial success" as defined in *Fotheringham v. Fotheringham*, 2001 BCSC 1321.

Should the Court exercise its discretion under Rule 14-1(15) to fix costs, or order an assessment of costs before the Registrar?

[37] The court's discretion to fix costs should be exercised sparingly. The registrar, who has particular expertise and extensive experience in assessing legal bills, is usually the court officer best placed to determine if the fees billed by a solicitor are objectively reasonable: *Gichuru* at para. 106.

[38] As the Court stated in *Gichuru* at para. 111:

... Assessing special costs on a summary basis absent sufficient evidence of the objective reasonableness of those fees is an error of principle, contrary to both natural justice and to the Rules.

[39] Without disclosure of the solicitors' files, the invoices provided by the defendants do not permit a full assessment of the nature and scope of the work performed or of the reasonableness of the fees incurred by the defendants. A summary assessment of costs by the court would save that the parties the expense of a further hearing before the registrar. However, here that consideration is trumped by the requirement that Pixhug, as the party facing a costs order, must have a meaningful opportunity to challenge the reasonableness of the fees, costs and disbursements claimed.

[40] I am satisfied it was reasonable for the defendants to retain an expert to provide an opinion relating to the scope of the work they performed on Pixhug's software development project. However, the reasonableness of the amount claimed for this disbursement is a matter best left to the registrar.

[41] I am also satisfied that the defendants' allowable disbursements should include a reasonable fee for the transcripts they ordered for the various hearings, cross-examination and oral ruling made on and prior to September 2, 2016. Again, the reasonableness of those fees is a matter for the registrar.

[42] The defendants' costs, to be assessed by the registrar, will include not only the costs of the Set Aside hearing, but also the costs of the court appearances on July 22, 27 and 28, 2016 and costs related to the cross-examination of Mr. Ong on August 5, 2016.

Special Costs or Costs under the Tariff

- [43] At the conclusion of the costs hearing, counsel for the defendants took the position that if the Court ordered an assessment of costs, the defendants would resile from their application for an order for special costs, rather than waive privilege, and would seek costs at Scale C.
- [44] Since the Court has ordered an assessment of costs, it is unnecessary to determine whether the plaintiff's failure to make full and frank disclosure, or any other conduct on the part of Pixhug during the course of this litigation, was so reprehensible as to justify an order for special costs.
- [45] Under s. 2(2)(c) of Appendix B of the Rules, Scale C is for matters of more than ordinary difficulty.
- [46] In *Mort v. Saanich School Board No. 63*, 2001 BCSC 1473, at para. 6, the Court held that the level of difficulty of a proceeding is determined by considering at least:
- (a) the length of the hearing on the substantive point;
 - (b) the "complexity of the issues involved";
 - (c) the number and complexity of pre-trial or hearing applications;
 - (d) whether the proceeding was "hard fought", with little or nothing having been conceded along the way;
 - (e) the "number and length of examinations for discovery";
 - (f) the "number and complexity of experts' reports"; and
 - (g) the extent of the effort required in fact gathering and proof.
- [47] These considerations, which are not exhaustive, were approved by the Court of Appeal in *Meghji v. Lee*, 2014 BCCA 105 at para. 138.
- [48] For the following reasons, I find that the Set Aside hearing involved matters of more than ordinary difficulty. This was a four day, hard fought application where neither party made concessions on any material point in dispute. The issue of whether the plaintiff had established a strong prima facie case of fraud was complex insofar as it required a close analysis of a large body of evidence relating to Pixhug's software development project and the work performed by the defendants. As I noted at para. 11 of my reasons for judgment, the defendants filed 18 affidavits; some with hundreds of pages of exhibits attached. The materials filed by the plaintiff on the original ex parte application and in response to the defendants' motion to set aside the injunction were equally voluminous.
- [49] Defence counsel were required to marshal and master a large body of evidence in a relatively short period of time obtained from clients and witnesses who in many cases resided in New Brunswick, the United States, or other jurisdictions outside this province. Counsel also had to respond to the plaintiff's allegation of a multi-phased scheme of fraud

perpetrated by Mr. Steeves. They also investigated the plaintiff's financial circumstances in order to determine whether Pixhug had any means of satisfying its undertaking as to damages. The expeditious and effective cross-examination of the plaintiff's expert was pivotal to the outcome of the defendants' application to set aside the Mareva injunction. Here, the extent of the effort required for fact gathering and proof was well beyond the ordinary - particularly where counsel were working under significant time pressures.

[50] Accordingly, the defendants' costs will be assessed at Scale C.

Costs Payable in any Event of the Cause.

[51] Under R. 14-1(13) costs are payable on the conclusion of the proceeding unless the court otherwise orders.

[52] The court has a discretion to order the costs of an application payable forthwith where, for example, the application concerned an issue separate and distinct from the substantive aspects of the case and did not advance the issues between the parties: *Sinclair v. Sutton Resources Ltd.* (1996), 24 B.C.L.R. (3d) 96 (S.C.); or where it is unlikely that the matter will proceed to trial: *Chances Housing Cooperative v. Progressive Homes Ltd.*, 2000 BCSC 596 at para. 19.

[53] In *Martel v. Wallace*, 2008 BCSC 436 at para. 28, the Court summarized the principles applicable when dealing with costs of motions:

...

- (1) Costs in the cause serve generally to maintain the balance that should be preserved between litigants until final judgment is rendered;
- (2) It is preferable to have only a single assessment of costs, at which time all aspects of the litigation may be considered by the assessing officer;
- (3) However, if the circumstances warrant, the court may order that costs be payable forthwith in any event of the cause in order to control its own process. For example, the court may make the order to deter unnecessary or unreasonable conduct in the proceedings;
- (4) Costs may also be payable forthwith if it is unlikely that the matter will proceed to trial, or if the motion deals with a discrete issue that is severable from the remaining claims; and
- (5) In making such an order, the court must remember that the order may prevent or hinder a meritorious claim from proceeding.

- [54] Here, despite Pixhug's stated intention to proceed to trial, the plaintiff has taken no step to advance this litigation since the setting aside of the Mareva injunction and has not pursued its appeal from that order. The evidence adduced concerning the plaintiff's financial circumstances, as described in my reasons for judgment for setting aside the Mareva injunction, demonstrates Pixhug's lack of financial resources. It is unlikely that this matter will proceed to trial.
- [55] The defendants also submit, with some force, that the Mareva injunction and the subsequent Set Aside hearing did not move the litigation forward or resolve any issues. In opposing defendant's application for costs payable in any event of the cause, Pixhug refers to *British Columbia (Attorney General) v. Malik*, 2009 BCCA 510. There, the Court of Appeal had allowed the defendants' appeals and had set aside the Mareva injunction obtained against two of the defendants by the respondent.
- [56] The defendants applied for an order for the costs of their applications in the Supreme Court to set aside the Mareva injunction. The respondent had made allegations of fraud and dishonesty against the defendants. At para. 13, the Court stated that the allegations made by the respondent in obtaining the Mareva injunction were substantially similar to the allegations the respondent would need to prove at trial. In ordering that the costs of the applications in the Supreme Court should be left to the discretion of the trial judge, the Court of Appeal observed that "a relevant consideration in deciding an appropriate award of costs of these applications would be the extent to which the respondent is able to prove the allegations at trial".
- [57] In my view, Malik is distinguishable. The respondent was Her Majesty the Queen in right of the Province of British Columbia. No question arose concerning the respondent's capacity or intention to take the matter to trial.
- [58] The defendants' costs at Scale C will be payable by the plaintiff in any event of the cause and forthwith upon their assessment by the Registrar.
- [59] The Registrar's assessment will be set for hearing within 30 days of the date of these reasons for judgment.
- [60] Forthwith upon the filing of the registrar's certificate of costs, the \$10,000 paid into court pursuant to my order of September 19, 2016 as security for the defendants' costs will be paid out of court to the defendants.
- [61] In the event that the defendants' costs and disbursements, as assessed by the registrar exceed \$10,000, then so much of the \$10,000 paid into court pursuant to this Court's order of September 23, 2016 as is required to pay the remaining balance of the defendants' costs as certified by the registrar will also be paid out of court to the defendants forthwith upon the filing of the registrar's certificate of costs.
- [62] The defendant will have the costs of this costs hearing as assessed by the registrar at Scale B.

"PEARLMAN J."

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