

CANADA / JUDGMENT

Pro-Sys Consultants Ltd. v. Microsoft Corporation

2016 BCSC 1713

COURT

Supreme Court of British Columbia

DECIDED

19 September 2016

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2016 BCSC 1713 Pro-Sys Consultants Ltd. v. Microsoft Corporation IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2016 BCSC 1713 Date: 20160919 Docket: L043175 Registry: Vancouver Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50 Between: Pro-Sys Consultants Ltd. Neil Godfrey Plaintiffs And Microsoft Corporation Microsoft Canada Co./Microsoft Canada Cie Defendants Before: The Honourable Mr. Justice Myers Corrected Reasons: These reasons were corrected at paras. 3, 6 and 10 on September 21, 2016. Reasons for Judgment: U.S. Depositions #2 Counsel for the Plaintiffs: Reidar Mogerman Counsel for the Defendants: D. Geoffrey Cowper, Q.C., Rebecca Spigelman Place and Date of Hearing: Vancouver, B.C. September 7, 2016 Place and Date of Judgment: Vancouver, B.C. September 19, 2016 I. The Applications

- [1] This is the second motion before me concerning applications made in two U.S. District Courts by the plaintiffs to examine former Microsoft personnel. The applications were brought ex parte under 28 U.S.C. § 1782. The evidence sought is for use in this class proceeding.
- [2] My prior ruling was made in the context of planned depositions of Mr. Balmer and Mr. Ozzie, although wide declarations were sought that would have affected depositions of any possible witnesses. The decision is indexed as 2016 BCSC 378. My decision in the current application should be read in conjunction with my prior ruling.
- [3] Subsequent to that ruling, the plaintiffs successfully applied ex parte for subpoenas for § 1782 depositions of additional witnesses, C. Wilson, J. Doerr, J. Gassée and S. Sakoman. Microsoft intends to apply to set these aside and in anticipation of that, asks this Court for:
1. An order that since the commencement of the trial of this proceeding on May 30, 2016, leave of this Court is required by any party seeking to conduct a § 1782 Deposition, other than those which were the subject of this Court's Order pursuant to reasons pronounced March 3, 2016 (the "March 3, 2016 § 1782 Depositions").

2. A direction that the Plaintiffs not refer to or rely upon any testimony from a March 3, 2016 § 1782 Deposition or any other § 1782 Deposition for which leave has been granted in their principal memorial of fact and law or their reply memorial of fact and law without a prior ruling from this Court admitting the testimony into evidence in this proceeding.
- [4] In her August 5, 2016 decision refusing to set aside the Ozzie subpoena, Saris C.J. of the United States District Court, District of Massachusetts set out the criteria to be applied in considering applications for § 1782 depositions: Federal law authorizes district courts to order discovery "for use in a proceeding in a foreign international tribunal." 28 U.S.C. § 1782. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), the Supreme Court set forth discretionary factors a court should consider in ruling on an application for § 1782 discovery: (1) whether the "person from whom discovery is sought is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) whether the discovery request is an "attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the discovery requested is "unduly intrusive or burdensome" and should be "rejected or trimmed." The unstated purpose of the application before me - as it was for the prior application - is for my judgment to be shown to the U.S. courts to inform their analysis with respect to items 2 and 3.
- [5] On behalf of the plaintiffs, Mr. Mogerman said that the purpose of this "second wave" of § 1782 depositions is to obtain evidence to be admitted as part of their case at trial, or to obtain information for use in cross-examining Microsoft witnesses, or both. As I will explain, given the current state of the litigation, I think there is a meaningful difference between the two.
- [6] I will not repeat what I said in my earlier ruling with respect to the trial management order made in this action. There is one additional provision of the order to which I did not refer that is important to the current application: s. 38 provides that "the trial will commence on the filing of the plaintiffs' memorial". That has recently been filed. Consequently, the current application, unlike the previous one, is made in mid-trial and any § 1782 depositions of Messrs. Wilson, Doerr, Gassée and Sakoman will be conducted mid-trial.
- [7] The other obvious consequence of the plaintiffs having filed their memorial is that their evidence in chief has now been submitted. The trial management order does not contain the ability to supplement that evidence by way of deposition or other means, other than possibly para. 3, which provides that, "The Court may make such additional or new directions as are required for the efficient and fair adjudication of the proceedings".
- [8] The plaintiffs rely on *Penty v. The Law Society of British Columbia*, 1999 BCCA 630. In that case, at para. 26, the Court of Appeal quoted with approval the following passage from the House of Lords' judgment in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, [1987] 1 App. Cas. 24: I consider, first, the ground that the re-re-

insurers' conduct was an interference with the court's control of its own process. It is not clear to me why this should be so. Under the civil procedure of the High Court the court does not, in general, exercise any control over the manner in which a party obtains the evidence which he needs to support his case. The court may give him help certainly; Subject, however, to the help of the court in these various ways, the basic principle underlying the preparation and presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used. ... I cannot see why, since the Federal law of the United States authorises an application of the kind made by the re-re-insurers in this case, the making of such application, which may or may not succeed in whole or in part, should be regarded as such an interference either. I cannot, therefore, agree with the first ground of decision relied on by the Court of Appeal. Neither Penty nor South Carolina Insurance Co. involved a trial management order such as we have in this case, nor were the applications made mid-trial. Therefore, they are only partially applicable to this case.

- [9] In my earlier ruling, in refusing to grant one of the declarations sought by Microsoft, I noted that I was not prepared to say that the admissibility of the depositions into evidence was an impossibility. However, I did make the declaration that the depositions of the former Microsoft personnel are presumed to be inadmissible. Now that the trial has commenced and the plaintiffs' case is filed it is necessary for me to go one step further in order to preserve the trial process contemplated by the trial management order.
- [10] As I noted in my prior reasons, the plaintiffs said they had arguments in support of the admissibility of the depositions but did not make them at that time. Nor did they now. With respect to Wilson, Doerr, Gassée and Sakoman, the time has come for them to be specific as to the purpose of the § 1782 depositions and if that includes admitting the depositions into evidence, for them to make their arguments for admissibility. Therefore, if the plaintiffs intend on doing the § 1782 depositions of Wilson, Doerr and Gassée for the purpose of their introduction as evidence at trial, they ought to apply to me in advance of conducting the depositions, otherwise the evidence is not admissible. To be direct, the U.S. courts should not be under the impression that I would be receptive to the evidence being introduced at the trial.
- [11] To the extent the plaintiffs wish to and are entitled by the U.S. courts to conduct the § 1782 depositions as a rough equivalent of interviewing a witness under compulsion in order to obtain information to assist in cross-examination of other witnesses or case preparation in general, I have no comment other than to say that I am not prepared to require them to obtain this Court's authorisation.

- [12] In my view, this balances the considerations noted by the Court of Appeal in *Penty* and the trial management order, and reflects this litigation's state of play. It is, of course, not for me to say whether the depositions fall within what is permitted by § 1782 and I have addressed the matter purely from the point of view of British Columbia law.
- [13] The order I make is therefore a modification of the first order sought by Microsoft, quoted above. I have underlined the changes: Since the commencement of the trial of this proceeding on May 30, 2016, leave of this Court is required by any party seeking to conduct a § 1782 Deposition for the purposes of having the evidence admitted as evidence at the trial, other than those which were the subject of this Court's Order pursuant to reasons pronounced March 3, 2016 (the "March 3, 2016 § 1782 Depositions"). If such leave is not obtained the evidence is not admissible.
- [14] I agree with Microsoft that the second order ought to be made. "E.M. MYERS, J."

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