

CANADA / JUDGMENT

Pro-Sys Consultants Ltd. v. Microsoft Corporation

2016 BCSC 2212

COURT

Supreme Court of British Columbia

DECIDED

24 November 2016

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2016 BCSC 2212 Pro-Sys Consultants Ltd. v. Microsoft Corporation IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2016 BCSC 2212 Date: 20161124 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 on the cover page on December 1, 2016. Reasons for Judgment: U.S. Depositions #3 Counsel for the Plaintiffs: Reidar Mogerman Naomi J. Kovak Counsel for the Defendants: James M. Sullivan Robin L. Reinertson Alexandra Mitretodis Rebecca Spigelman Place and Dates of Hearing: Vancouver, B.C. October 27 and 28, 2016 Place and Date of Judgment: Vancouver, B.C. November 24, 2016

- [1] This is the third motion before me concerning applications made in two U.S. District Courts by the plaintiffs under 28 U.S.C. § 1782 to examine former Microsoft personnel. The evidence sought is for use in this class proceeding. I will not repeat most of what I have said in those prior decisions and therefore this judgment should be read in conjunction with the prior rulings.
- [2] My first ruling was made in the context of planned depositions of Mr. Balmer and Mr. Ozzie. The decision is indexed as 2016 BCSC 378. My second decision concerned depositions of C. Wilson, J. Doerr, J. Gassée and S. Sakoman and is indexed as 2016 BCSC 1713. Both those decisions were made against the backdrop of Microsoft or the proposed deponents applying in the U.S. courts to set aside the 28 U.S.C. § 1782 ex parte subpoenas.
- [3] The plaintiffs now apply for leave of the Court to request the appropriate U.S. courts to order s. 1782 depositions of Messrs. Wilson, Doerr, Gassée and Sakoman "for the purposes of having the evidence admitted as evidence at trial; with the ultimate admissibility to be determined by the trial judge after further submissions of the parties."

- [4] Mr. Doerr is a former board member of Netscape. Mr. Sakoman and Mr. Gassée are the co-founders of Be Inc. Netscape and Be Inc. were former competitors of Microsoft. The plaintiff alleges that Microsoft's anti-competitive conduct put these companies out of business, or had significant detrimental impact on them. The result is less competition in the marketplace and therefore the class members paid higher prices for Microsoft products.
- [5] Mr. Wilson is a former Microsoft employee who was involved in the development of Windows Explorer (the competitor to Netscape). His documents - which would most likely have been producible - were inadvertently destroyed. This was, in part, the subject of a ruling I made with respect to the plaintiffs' application to have Microsoft swear an affidavit of documents: 2016 BCSC 1870.
- [6] The plaintiffs ask that the requested order be made under s. 3 of the Trial Management Order ("TMO") governing this litigation. It provides: Either Party may request a trial management conference at any time. The Court may make such additional or new directions as are required for the efficient and fair adjudication of the proceedings.
- [7] As part of their argument, the plaintiffs submitted that if the depositions proceed, the evidence would be admissible under s. 26 of the Evidence Act, R.S.B.C. 1996 c. 124. That, however, is not the principle issue for this application. Nor is the relevance of the evidence. Rather, the issue is whether the plaintiffs should be able to submit new evidence given the terms of the TMO and the stage this litigation is at.
- [8] In my prior decisions I summarised the various provisions of the TMO governing this litigation. I will not repeat that here, but I emphasize that the order contemplated each side's case being submitted in writing. The plaintiffs' case has now been filed and the trial is deemed to have commenced.
- [9] The TMO - signed in March 2015 - provided that the plaintiffs' case would be filed by January 18, 2016 and the trial would be deemed to have commenced. On May 12, 2016 the parties agreed to extend this to May 30, 2016. Further adjustments to the TMO were:
- (a) the trial of this matter would formally commence;
 - (b) pre-trial discovery in this matter shall cease, subject only to any exceptions agreed to by the parties or with leave of the court;
 - (c) the plaintiffs would deliver a list of the expert witnesses and affiants on whom they will rely in their memorial of fact and law; and,
 - (d) the plaintiffs would make reasonable efforts to deliver particulars of any foreign law and the ongoing conduct allegations.
- [10] The § 1782 applications that the present motion concerns were made to the U.S. courts without notice to Microsoft on May 23 and May 27, 2016.

- [11] What, then, is the plaintiffs' rationale for asking to have the evidence admitted at this stage? With respect to Mr. Doerr, there is no rationale. The plaintiffs' wish to examine him on an email that was disclosed in the eligible U.S. proceedings, which the TMO makes admissible in this case. However, it is not said that the email was not discovered before the memorial was filed.
- [12] The rationale for Messrs. Gassée and Sakoman is substantially the same, except for this: the plaintiffs have discovered in the U.S. materials written statements made by them. Mr. Mogerman for the plaintiffs acknowledged that the plaintiffs' legal team (which includes lawyers in the United States) were probably aware of the statements but that "the penny didn't drop" until May.
- [13] I am unable to find that a sufficiently compelling rationale given the balance the TMO sought to achieve. To, in effect, allow the plaintiffs to re-open their case with third-party witnesses unfairly shortens Microsoft's timeline to fully answer the case within the current timelines, or in the alternative puts those timelines at risk.
- [14] The rationale for the deposition of Mr. Wilson is different. This is based on the destruction of his documents, even though they were the subject of a hold for the purposes of this litigation.
- [15] While Microsoft says that many or even most of Mr. Wilson's documents were produced from other custodians at Microsoft, that is not an ideal substitute for either the documents or the ability to examine Mr. Wilson. Microsoft points to the fact that the plaintiffs were informed of the document destruction by January 2016, and did not bring this application until some six months later. While that is a significant delay it is not inordinate within the timeframes of this litigation.
- [16] Unlike the situation regarding the other witnesses, I do not think the deposition of Mr. Wilson will result in a delay of the trial. He was a Microsoft employee and the subject he will be examined on will be Microsoft's dealings. It is unlikely that anything arising from his deposition will come as a surprise to Microsoft.
- [17] I conclude that the fair and efficient adjudication of this case merits the order sought by the plaintiffs.
- [18] I therefore grant the requested order with respect to Mr. Wilson. The order is denied regarding the other witnesses. "E.M. MYERS, J."

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