
CANADA / JUDGMENT

Pro-Sys Consultants Ltd. v. Microsoft Corporation

2016 BCSC 378

COURT

Supreme Court of British Columbia

DECIDED

3 March 2016

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2016 BCSC 378 Pro-Sys Consultants Ltd. v. Microsoft Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pro-Sys Consultants Ltd. v. Microsoft Corporation,

2016 BCSC 378

Date: 20160303

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

Reasons for Judgment:

U.S. Depositions**Counsel for the Plaintiffs:**

Reidar Mogerman

Julie R. Facchin

Naomi J. Kovak

Counsel for the Defendants:

D. Geoffrey Cowper, Q.C.,

James M. Sullivan

Andrew Borrell

Robin L. Reinertson

Rebecca Spigelman

Place and Dates of Hearing:

Vancouver, B.C.

February 9-10, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2016

I. The Applications

- [1] Both sides apply for declarations that concern rulings made by two United States District Courts on applications by the plaintiffs to examine former Microsoft personnel. The applications were brought ex parte under U.S.C. Rule 1782. The evidence sought is for use in this class proceeding.
- [2] The parties agreed to an extensive trial management order ("TMO") to govern the procedure in this case. Describing it at the most general level, it provides for each side to submit its case in a written "memorial", which can draw extensively on evidence from specified earlier cases in the United States, defined in the TMO as "Eligible US Proceedings". The Eligible US Proceedings are listed in a schedule to the TMO. The TMO excludes the operation of numerous court rules, unless the court determines otherwise.
- [3] The Rule 1782 application brought in the District of Massachusetts sought a deposition of Mr. Raymond Ozzie. Judge Talwani declined to grant the application, on a without prejudice basis. Her order stated:

The Trial Management Order in the Canadian Litigation ... indicates that the primary forms of discovery in the Canadian Litigation are material from depositions in prior cases and the production of a witness identified by the defense, and that the parties are required to apply for leave to take discovery from a different witness. Applicants have not shown that they have been granted leave from the Supreme Court of British Columbia or that they are not required to make such an application. Accordingly, Applicants have not demonstrated that the Supreme Court of British Columbia would be receptive to this court's assistance here.

- [4] The plaintiffs applied to the United States District Court for the Western District of Washington to depose four other former senior officers of Microsoft. The applications were granted.
- [5] In the application before me, Microsoft asks for the following four declarations:
1. A declaration that any deposition sought or conducted by the Plaintiffs pursuant to 28 U.S.C. § 1782 does not constitute discovery pursuant to paragraphs 6 to 10 of the Order of Mr. Justice Myers made on May 29, 2015 relating to trial management of this action (the "Trial Management Order").
 2. A declaration that any proceeding commenced in the United States by the Plaintiffs pursuant to 28 U.S.C. § 1782 is not an Eligible US Proceeding pursuant to the Trial Management Order.
 3. A declaration that the transcript of any deposition conducted by the Plaintiffs pursuant to 28 U.S.C. § 1782 does not constitute a "deposition transcript" pursuant to paragraphs 24 to 30 of the Trial Management Order, and that paragraphs 24 to 30 of the Trial Management Order do not apply to any deposition sought or conducted by the Plaintiffs pursuant to 28 U.S.C. § 1782.
 4. A declaration that the Plaintiffs cannot designate and place in evidence at trial (either in their memorials or at the oral hearing), excerpts of foreign deposition transcripts that are not from any of the Eligible US Proceedings identified in Schedule D to the Trial Management Order, without complying with Rule 7-8 of the Supreme Court Civil Rules.
- [6] The plaintiffs apply for a declaration that they are not required to seek leave from this Court to conduct the Ozzie deposition or in the alternative that they be given leave to conduct it. At the hearing, the plaintiffs dropped their application for a declaration that "this court is receptive to evidence from the Ozzie 1782 deposition, subject to its admissibility which will be determined at trial." With respect to Microsoft's motion, the plaintiffs take no issue with the declarations sought in items (1) and (2) of the Notice of Application.

- [7] The parties are seeking the declarations because they wish to use them for further applications in the United States: the plaintiffs want to renew their application in front of Judge Talwani and Microsoft intends on applying to set aside the orders of the Western District of Washington Court, as they are entitled to do. Because of this context, the order I am prepared to make with respect to Microsoft's fourth requested declaration is somewhat unusual.

II. Discussion

- [8] As the plaintiffs pointed out, I previously declined to make declarations dealing with the plaintiffs' ability to obtain foreign third-party discovery: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 1516. However, the declarations sought then were far broader; the application was, in essence, a request by the plaintiffs for a legal opinion. Further, it did not involve discovery from Microsoft or its former personnel, and the admissibility of obtained evidence was not argued by the parties. In other words, a true issue between the parties had not crystallised as it has here and these applications therefore stand in a different light.

A. The first three declarations sought by Microsoft

- [9] Given the plaintiffs' non-opposition to the first two declarations, it is difficult to understand their opposition to the third. The paragraphs in the TMO to which the third declaration refers are all with reference to depositions from Eligible US Proceedings. In the few instances where the phrase "deposition transcripts" is used without being conjoined with "Eligible US Proceedings" it is clear from the context that the depositions referred to are from Eligible US Proceedings.

- [10] The first three declarations sought by Microsoft are therefore granted.

B. The fourth declaration sought by Microsoft

- [11] I now turn to the fourth declaration sought by Microsoft. The issue raised is the admissibility of the Rule 1782 deposition evidence when this matter comes to trial.

- [12] The first paragraph of the TMO notes that the order is meant to be comprehensive:

The following matters have been agreed to by the Parties and endorsed by the Court. This order is made pursuant to Rule 12-2 of the Supreme Court Civil Rules and shall govern the pre-trial and trial proceedings (for the purposes of this order referred to as the pre-hearing and oral hearing proceedings) to be followed in this action, subject to any amendments as may be agreed upon between the Parties or ordered by the Court. It is intended that the provisions of this order shall be comprehensive except where necessary to address matters that are not anticipated by this order or are not inconsistent with the provisions of this order. [Emphasis added.]

- [13] Each side's case is to be presented in a "memorial" described as:

a principal memorial of fact and law together with all authorities and all evidence in support including deposition transcript excerpts and previous trial testimony from the Eligible US Proceedings, affidavits, expert reports and all documentary evidence upon which they rely.

[14] The TMO provides for the direct evidence of a witness to be provided only by way of affidavit (para. 32) or by prior testimony from an Eligible US Proceeding (para. 25). That is reinforced by para. 42, which provides:

The hearing of viva voce evidence and submissions will take place as follows:

- (a) Each Party shall have the right to cross-examine the affiants or experts for whom notice was provided under paragraph 35 above.
- (b) In the event the affiant or expert is unavailable or unwilling to attend in person, the Party that seeks to introduce the evidence may apply to the court for letters of request to obtain that person's evidence by commission.
- (c) The failure to obtain a witness's evidence on cross-examination shall not by itself be grounds for exclusion of that evidence but shall be taken into account when considering its weight and relevance to the proceeding.

[15] With respect to examinations for discovery of the parties (and I am here referring to oral examination for discovery and not discovery of documents), the TMO provides that "the primary discovery of Parties and witnesses shall be considered as having been accomplished by the conduct of depositions in the Eligible US Proceedings and the disclosure of the written evidence in the EC" (para. 6). The TMO requires Microsoft to provide for an appropriate witness to be examined for discovery in relation to issues concerning events after January 1, 2006 or Microsoft's activities in Canada for any time relevant to the action. The TMO provides that the plaintiffs may apply for additional discovery of witnesses.

[16] The TMO does not exclude Rule 12-5(46), which concerns the admissibility at trial of examination for discovery evidence, so under that rule the plaintiffs have the opportunity to adduce answers obtained in the examinations for discovery of the personnel Microsoft produces for discovery.

[17] Under the Rules, where a party knows in advance of the trial that a witness will be unavailable to attend the trial, or will be outside the jurisdiction of the court and therefore unable to be subpoenaed, the process to obtain his or her evidence is by application under Rule 7-8, which, as I have said above, is not one of the rules excluded from the TMO. The plaintiffs have not made that application.

[18] The TMO excludes Rule 12-5(54), which allows for the use of a transcript from other proceedings at trial if the witness "is dead, or is unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction".

- [19] The plaintiffs said they had arguments in support of the admissibility of the depositions, but they did not make them, appearing to reserve them for a later date.
- [20] As I noted above, the TMO is meant to be comprehensive and deals with Microsoft personnel to be produced for examinations for discovery. In the context of this litigation, the Rule 1782 depositions of the Microsoft former personnel when characterised according to our civil procedure and Court Rules would seem to be examination for discovery in another guise and something not contemplated by the TMO. Rather, the procedure contemplated in the TMO is the plaintiffs applying for an order to discover further Microsoft personnel.
- [21] Interpreting the relevant provisions of the TMO and the Court Rules together, it appears to me that in order to have the prospective U.S. depositions admitted into evidence, the plaintiffs will have to rely on para. 3 of the TMO, which provides: "The Court may make such additional or new directions as are required for the efficient and fair adjudication of the proceedings".
- [22] Assuming the depositions proceed, at this time I am not prepared to say that their admissibility into evidence is an impossibility. That would require an interpretation of the law concerning Rule 7-8, the TMO and the anticipation of every possible eventuality concerning those issues as the matter moves toward trial. I observe that the plaintiffs, having chosen the course they have, will face some hurdles. Whether they are insurmountable remains to be seen.
- [23] Moreover, the declaration sought by Microsoft is too broad. It is not limited to the Rule 1782 depositions of former Microsoft personnel; in fact, it is not limited to Rule 1782 depositions at all.
- [24] I am therefore not prepared to grant Microsoft's fourth-sought declaration in the terms it seeks. Rather, I make the declaration that the depositions of the Microsoft former personnel with which this application is concerned are presumed to be inadmissible. This is without prejudice to the plaintiffs attempting to establish their admissibility at a later time, should the depositions proceed.

C. The declarations sought by the plaintiffs

- [25] This leaves the orders sought by the plaintiffs. The first is for a declaration that leave of this Court is not necessary for the deposition of Mr. Ozzie.
- [26] There is nothing in our Rules or the TMO requiring leave of this Court for the plaintiffs to apply for the U.S.C. Rule 1782 deposition. As I have said, the real issue for this Court will be the admissibility of the depositions.

[27] I will therefore make the declaration that the plaintiffs are not required to obtain the leave of this Court to seek or conduct the Rule 1782 depositions. The declaration is to be contained in the same order as those granted in Microsoft's application, so that the U.S. courts will also have the declaration regarding the admissibility of the evidence when this matter comes back before them.

[28] It follows that the alternative declaration sought by the plaintiffs is not granted.

[29] I wish to make it clear that it is, of course, up the U.S. Courts to determine the plaintiffs' ability to conduct the Rule 1782 depositions. I have not been asked to grant the equivalent of an anti-suit injunction. It is not my role to interpret

Rule 1782. As I have said, the issue for this Court will be the admissibility of the evidence obtained in the depositions if they are allowed to proceed.

"E.M. MYERS, J."

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