
CANADA / JUDGMENT

Rossing v. Ocion Water Sciences Group Ltd.

2014 BCSC 1638

COURT

Supreme Court of British Columbia

DECIDED

11 August 2014

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2014 BCSC 1638 Rossing v. Ocion Water Sciences Group Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rossing v. Ocion Water Sciences Group Ltd.,

2014 BCSC 1638

Date: 20140811

Docket: S145661

Registry: Vancouver

Between:

Peter Rossing

Plaintiff

And

Ocion Water Sciences Group Ltd.

Defendant

Before: Registrar Cameron

Oral Reasons for Decision

Counsel for the Plaintiff:

M.D. Shirreff

Counsel for the Defendant:

C. Dafoe

Place and Date of Hearing:

Vancouver, B.C.

August 8, 2014

Place and Date of Decision:

Vancouver, B.C.

August 11, 2014

Introduction

[1] The Defendant, Ocion Water Sciences Group Ltd. (hereinafter "Ocion"), applies to set aside a garnishing order before judgment obtained by the Plaintiff, Peter Rossing (hereinafter "Mr. Rossing"), and to have any funds that have been paid into court pursuant to the garnishing order paid out of court to Ocion.

[2] The total amount attached by the garnishing order issued on July 23, 2014, was \$53,393.99, claimed to be due to Mr. Rossing from Ocion pursuant to a promissory note dated May 14, 2013, that evidenced loans made by Mr. Rossing to Ocion in the sum of \$50,000. The note provided for interest to accrue on the principal amount of \$50,000 at a rate of 12 percent per annum, payable monthly.

[3] Paragraph 8 of Affidavit #1 of Mr. Rossing sworn in support of the garnishing order on July 22, 2014, reads:

Despite my various demands for repayment of the Debt, Ocion has failed to repay me the Debt. After making all just discounts, the sum of \$52,827.49 is justly due and owing to me as of July 22, 2014.

[4] The cost of the proceedings claimed in the order amounted to \$566.50, for a total of \$53,393.99.

[5] Ocion applies to set aside the order on the following grounds:

(i) that the order itself does not meet the requirement of "meticulous observance" of the provisions of the Court Order Enforcement Act required by this court in *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560;

(ii) that the affidavit in support of a garnishing order before judgment does not meet the standard of meticulous observance called for by *Knowles*, nor does it contain the full and frank disclosure required by ex parte applications generally; and

(iii) it would be "just in all the circumstances" to set aside the order for a variety of reasons, including undue hardship to Ocion.

- [6] At the outset of this hearing, the parties agreed that the question of undue hardship as a ground to set aside the order would be left to be addressed at a later date, should that become necessary.
- [7] Counsel for Mr. Rossing framed the issue simply to be whether there has been compliance with the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 (hereinafter "the Act").

Facts

- [8] Mr. Rossing is a former employee of Ocion. In a cost saving measure, he was laid off on February 28, 2014, and was paid severance. In better times, Mr. Rossing had made an equity investment in Ocion, and in May 2013 that investment was converted to debt and, combined with a further loan, resulted in Ocion owing Mr. Rossing \$50,000. To evidence that debt Ocion issued a convertible promissory note in favour of Mr. Rossing dated May 14, 2013. The note had a principal balance of \$50,000 and contained the following additional terms:
- (i) the debt was due and payable on or before May 31, 2014, on demand of the lender; and
 - (ii) interest was to accrue on the debt at a simple rate of 12 percent per annum with interest payable monthly.
- [9] The note also provided for payment of shares as a finance fee and for the parties to mutually agree to convert the debt into shares of Ocion. These latter terms have no bearing on this application.
- [10] On January 30, 2014, Mr. Rossing sent Ocion an email demanding payment of accrued interest and on February 21, 2014, Ocion paid the sum of \$4,290.32, being the interest due to that date.
- [11] On March 12, 2014, Mr. Rossing sent a further email to Ocion to inquire about payment of further accrued interest on the note and said:

OCION is off course welcome to repay me my loan of \$50,000 if that is a preferable option.

- [12] On May 9, 2014, Mr. Rossing sent an email requesting payment of interest still overdue and said:

Please also note that the due date for the \$50,000 loan itself is due on May 31, 2014.

- [13] On May 16, 2014, Mr. Rossing sent a letter to Ocion by registered mail and he said, inter alia:

I. . . formally request the return of all my investment monies and all applicable interests [which should be "interest"] due and owed.

- [14] On May 31, 2014, Ocion sent an email to Mr. Rossing that said, inter alia:

As you are aware, the 2 Notes (Total \$50,000) that you entered into last year with Ocion was repayable May 31, 2104 [should be "2014"]. At this time, the Company is unable to repay the Note and any interest due to you.

The Company asks that you please extend the Note until May 31, 2016, without future interest payments.

[15] In an email dated June 2, 2014, Mr. Rossing declined to discuss terms for an extension of the note and said:

You give me no option but to seek legal advice.

[16] This action was commenced on July 22, 2014, and the impugned garnishing order was issued on July 23, 2014.

The Position of the Parties

[17] Counsel for Ocion submitted that Affidavit #1 of Mr. Rossing contained misleading or false evidence as follows:

- (i) that "the Debt was repayable on or before May 31, 2013 or on demand from me, the Lender";
- (ii) that Ocion has failed to pay a finance fee of 200,000 shares. In respect of the shares during the course of the argument, counsel for Ocion did not press this point, noting there was a reasonable misunderstanding between Mr. Rossing and Ocion as to the issuance of the shares;
- (iii) that "on January 30, 2014, I demanded repayment of the Debt"; and
- (iv) that "despite my various demands for repayment of the Debt, Ocion has failed to repay me the Debt".

[18] In respect of the garnishing order itself, counsel for Ocion submitted that the claimed cost of attachment proceedings included amounts that were not properly so claimed. Relying upon *Knowles v. Peter*, counsel submitted that there has not been a meticulous observance of the Act and the garnishing order must be set aside as a result.

[19] Counsel for Mr. Rossing submitted that Mr. Rossing met all the requirements of the Act by swearing to the fact an action is pending; the time of its commencement; the nature of the cause of action; the amount of the debt; and the debt is justly due and owing after making all just discounts.

[20] Counsel submitted that, on the evidence, Mr. Rossing had made a demand for repayment of the debt. As to the error in the affidavit that the amount owing was payable on or before May 31, 2013, (rather than what the note provided, which was a due date on or before May 31, 2014), counsel submitted that this error could not reasonably have misled anyone reviewing the sought after garnishing order, given that the promissory note was attached to the affidavit of Mr. Rossing in support of the order as an exhibit. He submitted that there would have been no confusion as to when the debt was due.

- [21] In answer to the attack on the garnishing order based upon claims for attachment costs not being due and owing, counsel relied on two authorities that I will review in support of the proposition that overstating the allowable costs of attachment is not fatal to the garnishing order, but rather only requires an adjustment to the amount being garnished.

Analysis

The affidavit in support of the garnishing order (Rossing Affidavit #1)

- [22] Mr. Rossing communicated with Ocion on May 16, 2014, requesting the return of his investments monies, being the debt. On May 31, 2014, Ocion replied that it was unable to pay the debt and an extension was sought. On June 2, 2014, Mr. Rossing declined to extend the note.
- [23] In my view, these communications are clear. Mr. Rossing sought repayment of the debt on its due date of May 31, 2014 and Ocion refused to pay. However one might interpret some of the earlier communications, I do not find Mr. Rossing's evidence as to those communications as set out in his affidavit misleading either to Ocion or the court.
- [24] It follows that I find no merit in the assertion that Mr. Rossing should be found to have been misleading in his evidence that the amount claimed was justly due and owing.
- [25] It was common ground that the affidavit did contain a typographical error in paragraph 4 that asserted the debt was repayable on or before May 31, 2013. Is that error fatal?
- [26] In *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263, Mr. Justice Chiasson said:
- [2] The parties entered into two agreements whereby the appellant, Golder Associates Ltd., agreed to provide environmental consulting services to the respondent, North Coast Wind Energy Corp. Golder alleges it provided the services and is entitled to be paid \$843,447.16 and \$5,019.61 plus interest for services rendered to the respondent.
- [3] On May 4, 2009 Golder sued claiming these amounts and on May 7, 2009, it obtained a garnishing order before judgment. Pursuant to the garnishing order \$103,257.01 was paid into court.
- [4] The garnishing order recited it was made "[o]n reading the affidavit of Gali Gelbart sworn May 4, 2009". The affidavit that accompanied the garnishing order when it was served was sworn May 7, 2009.
- [5] The respondent applied to set aside the garnishing order alleging defects in the content of the affidavit and taking the position the order was defective because it referred to an affidavit that had not been used to support the order.
- [6] The chambers judge set aside the garnishing order.

...

- [9] The judge referred to a number of decisions of the British Columbia Supreme Court establishing "that the requirement for meticulous compliance with the [Court Order Enforcement Act] does not extend into the realm of the ridiculous" and that the issue is whether a recipient of the garnishing order would be uncertain or confused (*Nesbitt Consolidated Farms Ltd. (Trustee of) v. Nesbitt . . . Cooper Yacht Charters Ltd. v. Sea to Sky Leisure . . . [and] Winroc Gypsum Supplies (B.C.) Ltd. v. Delta Drywall Ltd. (1984) . . .*

...

- [11] The judge expressed his conclusion in paras. 19 - 21 as follows:

- [19] In summary, in my opinion the pre-judgment garnishing order that was obtained in these proceedings on 7 May 2009 is fatally flawed. There is a serious defect on its face that would improperly lead someone reading it to think it was granted on account of an affidavit sworn on 4 May 2009. This is not a question of grammar or syntax like *Saunders J. found in Coopers*, nor is it a situation of failing to name all the garnishees on the face of the order, as *McKenzie J. addressed in Winroc*.

- [20] I have no evidence before me to indicate that an affidavit dated 4 May 2009 does not exist and thus no evidence that the error was simply a typographical one. Consequently, one is still left to guess if there is a missing affidavit. As the jurisprudence clearly indicates in cases of pre-judgment garnishing orders, readers should not be left in limbo trying to guess the nature and extent of the order.

- [21] I find the order is incurably defective. Therefore, I am ordering that it be set aside and the funds paid into court pursuant to its terms be paid out to the defendant.

...

- [21] Golder's position was that there was no confusion because the garnishing order, the affidavit that supported it, the writ and the statement of claim all were served together.

...

- [24] I recognize that a garnishing order before judgment, which is not allowed in all Canadian jurisdictions, is an extraordinary remedy, but the Supreme Court, quite correctly in my view, has approached defects in the material to obtain the remedy in a practical, sensible way. Strict compliance is required, but not perfect compliance. The objective is to ensure that those who are subjected to garnishing orders before judgment must not be confused or uncertain about the basis on which the order was granted. As *McKenzie J. stated in Winroc* at p. 290, "the main thing is to assure that no one is misled even though he or she might be momentarily puzzled. One is not 'left to guess what is meant'".

[25] In my view, the concern is to ensure that the recipient of the garnishing order understands the substantive basis on which it was made. Although form sometimes can sufficiently mask substance so as to cause confusion, I would be reluctant to conclude that occurred in the circumstances of this case.

...

[40] The important issue in this case was whether the garnishing order was based on the May 7, 2009, affidavit. Whether there was a May 4, 2009, affidavit was not the question. The judge was told the garnishing order was based on the May 7, 2009, affidavit. Counsel for the respondent previously had been advised of this fact both orally and in the written material delivered in response to the respondent's motion. The affidavit was entitled as an affidavit in support of a garnishing order and bore the Court Registry stamp of May 7, 2009, the date it was sworn. It was delivered with the garnishing order. The respondent attacked the garnishing order on the basis of the content of the May 7, 2009, affidavit. I am satisfied that the date error did not mislead or confuse the respondent more than momentarily. In my view, the judge erred in setting aside the garnishing order before judgment on the basis it referred incorrectly to the date of the affidavit filed to support the order.

...

[46] A garnishing order before judgment is an extraordinary remedy, but it is a remedy the Legislature has seen fit to make available to litigants. Although strict compliance with the requirements for the remedy is appropriate, this must not defeat the objective of the legislation and the Rules of Court. Like *Hutchison J. in Sutton Group - Resource Realty*, I find some comfort in Rule 1(5), which mandates the effective determination of disputes on their merits.

[47] Where a defect in material supporting a garnishing order before judgment is *prima facie* misleading or confusing, prejudice is presumed and the order likely will be set aside.

[48] Where the defect is technical or procedural only, the party affected by the order must show some prejudice in order to have the order set aside.

[49] In this case, I consider the incorrect date reference in the garnishing order to be a technical defect and the respondent has shown no prejudice.

...

[52] I would allow this appeal and quash the order setting aside the garnishing order before judgment.

[27] In *Flintstone Concrete v. Peace River Contracting Ltd.*, 2003 BCSC 1137, Master Groves, as he then was, provided a very helpful summary of the law as follows:

[89] Pre-judgment garnishing orders are an extraordinary remedy granted by the court. A pre-judgment garnishing order allows a plaintiff in an action to force the defendant to pay into court all or a portion of the debt being sought in an action prior to any determination in the action being made. The rationale behind these orders is to prevent the defendant from disposing of, absconding with, or in any other manner disavowing themselves of funds available to satisfy the debt. It is a remedy granted only where particular circumstances are alleged to exist and where it is relatively clear that there is a definitive debt owing to the plaintiff.

[90] In order for an individual to obtain a pre-judgment garnishing order against another party, certain specific requirements found under the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 must be fulfilled. These requirements are found under section 3(2)(d), (formerly section 4), and must be set out in the affidavit filed in support of the order. These details must include the following information:

1. That an action is pending;
2. The time of its commencement;
3. The nature of the cause of action;
4. The actual amount of the debt, claim or demand;
5. That the debt is justly owing after making all just discounts;
6. That the garnishee is indebted or liable to the defendant, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court.
7. With reasonable certainty, the place of residence of the garnishee.

[91] Pre-judgment garnishing orders have been attacked on nearly all of these grounds in the British Columbia courts.

[92] Recognizing perhaps that the remedy of pre-judgment garnishing orders is an extraordinary one, there has been much litigation around them. Having reviewed the many authorities noted in this decision, it is clear that there are three main areas of attack; those being general considerations, deficiencies in affidavits, and the requirements of justice. A quick summary of these is as follows:

(A) General Considerations: Meticulous observation of the requirements of the Act including the nature of the cause of action, is required (Knowles); there is a difference between meticulous compliance and ridiculous compliance (Cooper Yacht Charters Ltd.); obvious errors in a statement of claim related to date and in reference to the garnishee only by name, are not sufficient to set aside the order (Mutual of Omaha); however, a multiplicity of errors otherwise potentially minor in nature, can contribute to the ultimate demise of an order (Dutra). Inconsistency between a statement of claim and affidavit in support as it relates to the description of the debt claimed can be a fatal error (Ultimate Forest Products). An estoppel

argument can be successful when a second application is brought to set aside a garnishing order, raising different issues (Mandel Pinder).

(B) Affidavits

- (i) Generally - Literal adherence not required, as long as one is not left to guess what is meant (Winroc Gypsum). . . .

[93] It would appear as though the court is willing to overlook minor errors of a technical nature that are made in the materials filed in support of orders, however, even this move away from "technical perfection" is dependent upon the surrounding circumstances. The more errors exist in an order, the less likely the court is to let it stand. There is a sliding scale of errors, where the technical can turn into the substantive. The closer the error is towards the substantive end of the scale, the less likely the court is to forgive the error. The court can never be faulted for adhering to the "meticulous" requirement in these orders.

[94] In determining whether an order should be set aside, the court has the duty to consider all relevant material filed in support of the order and by the parties and from that consider the arguments of the parties in support or defence of the order. The court at this juncture is not to decide the overall issues in the case, but merely weigh the strengths and weaknesses of the case as is necessary in respect of the arguments made. What is important, however, is whether the plaintiff properly adhered to the requirements set out in the Act and whether the defendant provided any just reason why the order should not stand. The court employs its highest standards of scrutiny where an innocent third party is affected by the order.

[28] In this case, while there is an error in the affidavit that cites the incorrect date for the debt to be repayable, on or before May 31, 2013, rather than May 31, 2014, as the note reads, I have concluded that, given the underlying promissory note was attached as an exhibit to the affidavit, that "one is not left to guess what is meant".

[29] I repeat the words of the Court of Appeal in Golder at paragraphs 24 and 25, which I consider apposite to this situation:

. . . Strict compliance is required, but not perfect compliance. The objective is to ensure that those who are subjected to garnishing orders before judgment must not be confused or uncertain about the basis on which the order was granted. As McKenzie J. stated in Winroc at p. 290, "the main thing is to assure that no one is misled even though he or she might be momentarily puzzled. One is not 'left to guess what is meant'".

In my view, the concern is to ensure that the recipient of the garnishing order understands the substantive basis on which it was made. Although form sometimes can sufficiently mask substance so as to cause confusion, I would be reluctant to conclude that occurred in the circumstances of this case.

[30] I am further supported in reaching this conclusion recognizing that the parties themselves in their course of dealings with one another always knew and treated the debt to be due on May 31, 2014. I would not accede to this ground as justifying the setting aside of the garnishing order.

The cost of attachment proceedings

[31] The garnishing order claims costs as follows:

- (i) attachment costs, Schedule 2, \$150;
- (ii) issue garnishing order, \$80;
- (iii) issue notice of civil claim, \$200;
- (iv) service of garnishee with garnishing order, \$30;
- (v) service on debtor of garnishing order, \$100;
- (vi) GST on service costs, \$6.50;
- (vii) A total of \$566.50.

[32] The Supreme Court Civil Rules, Appendix B, s. 6(3) sets out the costs that are to be allowed as follows:

If a writ of execution or garnishing order, or a process in Form 56, 58, or 59, is issued, the costs must be endorsed on the process and allowed in accordance with Schedule 2, instead of Item 42.

[33] Schedule 2 provides that for Item 1, if the amount involved is \$45,000 or more but less than 55,000, the costs are fixed at \$150 and, in addition, disbursements.

[34] Counsel for Ocion relies upon the decision of *Ocean Floors Ltd. v. Crocan Construction*, 2010 BCSC 409, in support of the argument that the costs claimed of \$566.50 are more than what the law allows and, as such, the garnishing order must be set aside. In *Ocean*, Mr. Justice Burnyeat set aside a garnishing order before judgment on three grounds:

[21] I cannot conclude that the claim advanced in the Garnishing Order is a liquidated amount. *Ocean* has not met the burden of establishing a prima facie case that a liquidated amount is due. Rather, what is claimed is not an amount (already ascertained) as no agreement was ever reached between the parties. Additionally, the amount claimed is not "capable of being ascertained as a mere matter of arithmetic.

[22] As well, I cannot conclude that the amounts claimed under the Garnishing Order are "justly due and owing". Section 3(2)(d)(v) of the Act provides that the affidavit must state that an amount is "justly due and owing". There has been no agreement as to the work to be done, the amount due and owing for the work, or when what is owing is payable. There is no formula for determining the value of the work that was undertaken as the various quotations and correspondence indicate different areas within the Store, different square footage, and

different amounts to be charged for the work that was undertaken. Even Ocean concedes that the square footage may be as low as 1,629 square feet.

- [23] The Garnishing Order also claims that the amounts "due" includes the "cost of attachment proceedings". In this regard, I am satisfied that a number of amounts cannot be brought within the definition set out in s. 3(2)(d)(v) of the Act or within what is described as "Cost of attachment proceedings" as set out in "Form F" under Schedule 1 to the Act. The following cannot be brought within the Act as being "justly due and owing" or as a "cost of attachment proceedings": (a) the cost of issuing the Writ of Summons and Statement of Claim (\$208.00); (b) the cost of serving the Writ of Summons and Statement of Claim (\$100.00); and (c) the cost of serving the Garnishing Order on various garnishees (\$190.00). Regarding the cost of issuing the Writ of Summons and Statement of Claim and serving them, I cannot conclude that these are proper amounts applicable to the "Cost of attachment proceedings". While I recognize that these amounts may well be regularly allowed in garnishing orders made by the Registrar, I am satisfied that this practice is other than in accordance with the provisions of the Act. Clearly, the cost of commencing the action and serving the action are not costs of the attachment proceedings themselves. Rather, they are costs associated with providing a forum for the determination of the issues between the parties whether or not attachment proceedings follow in due course. Regarding the cost of serving the Garnishing Order, it is not clear how the \$190.00 could be incurred prior to the issuance of the Garnishing Order and therefore already "justly due and owing". Anticipated costs such as the anticipated cost of serving a garnishing order cannot be ascertained at the time a garnishing order is issued. The cost of serving a garnishing order cannot be included within the cost of attachment proceedings at the time a garnishing order is issued even though the disbursement may ultimately be chargeable against a defendant. It should also be the case that the calculation of the amount "justly due and owing" should be ascertainable as a "mere matter of arithmetic". Regarding the \$265.00 claimed as part of the "costs of attachment proceedings", there is absolutely no explanation of how a "\$80.00 disbursement" can result in a \$265.00 total.
- [24] I conclude that Ocean has failed to exercise the "meticulous observation" of the requirements of the Act by listing amounts which may well be due and owing to Ocean in due course but not as yet.
- [35] I agree with counsel for Ocion that the attachment costs claimed in the sum of \$566.50 are not all properly claimed. Applying Ocean and Appendix B, s. 6(3) as earlier referred to, the proper amount that should have been claimed by the Plaintiff would have been \$150 for costs and the disbursement of \$80 to issue the garnishing order, for a total of \$230.

[36] Does it follow then that the garnishing order must be set aside following the decision of the court in Ocean? The answer to that question requires a consideration a review of two earlier decisions of this court, *Mutual of Omaha Insurance Company v. Gestion Professionnelle Inc.*, 1990 CanLII 775, and *Cariboo-Chilcotin Helicopters v. Ashlaur Trading Inc.*, 2003 BCSC 2007.

[37] In *Mutual of Omaha*, Madam Justice Sinclair Prowse (as she then was) dealt with an application to set aside a pre-judgment garnishing order and said at paragraph 7 of her reasons:

With respect to the amount for costs being incorrect in the garnishing order this is a matter that should be dealt with by an application to amend the order.

[38] In *Cariboo-Chilcotin Helicopters Ltd.*, Mr. Justice Groberman (as he then was) said at paragraphs 16 and 17:

[16] I should also note that it has been agreed between the parties that the garnishing order overstated the allowable costs of attachment proceedings by \$365.90. That amount should also be deducted from the garnishing order.

[17] It has been argued by the defendant that the failure to allow for these amounts in the original application should result in the setting aside of the order. The plaintiff, however, raises the decision of Boyd J. in *Vozza v. Krief*, No. C883191, Vancouver Registry, September 2, 1988. I agree with Boyd J. that relatively small amounts such as those at stake here are not fatal to the garnishment order but rather require an adjustment of the amount to be garnished.

[39] It appears that neither one of these two earlier decisions on the consequences that should flow from claiming an erroneous amount for costs of garnishment were brought to the attention of Mr. Justice Burnyeat. I also bear in mind that Mr. Justice Burnyeat found other substantive grounds to set aside the garnishing order in the case before him.

[40] In my respectful view, I would properly decide this issue by following the two earlier decided cases and I will remedy the error in the calculation of costs of attachment not by setting aside the garnishing order, but rather amending the order to attach a lesser sum of \$336.50.

[41] In summary, the application to set aside the garnishing order is dismissed, but the amount to be attached is to be reduced by \$336.50 to a total amount of \$53,057.49.

[42] Submissions as to costs, gentlemen?

(Submissions from counsel)

[43] THE COURT: Costs to be addressed at a subsequent application if necessary.

"Registrar Cameron"

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