
CANADA / JUDGMENT

VS Visual Statement Inc. v. ICBC

2003 BCSC 1610

COURT

Supreme Court of British Columbia

DECIDED

23 October 2003

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2003BCSC1610

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

VS Visual Statement Inc. v. ICBC,

2003 BCSC 1610

Date: 20031023

Docket: S000095

Registry: Vancouver

Between:

VS Visual Statement Inc.

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

On Costs

Counsel for the Plaintiff

D. Lunny

J. Dawson

Counsel for the Defendant

D. Wotherspoon

A.Cameron

Date and Place of Hearing:

September 25, 2002

Vancouver, B.C.

- [1] The plaintiff seeks costs at Scale 5 on what may be described as a complex commercial case. The defendant responds by seeking costs of part of the proceedings and an off-set for same, and in any case, says Scale 3 is appropriate.
- [2] Trial ran some 16 days in September and October, 2002. The plaintiff claimed damages against the defendant alleging breach of duty of care, breach of copyright, breach of confidence and bad faith. In argument at trial the plaintiff sought in excess of \$2.9 million in damages. The defendant averred there was no claim and no damage to the plaintiff. I awarded general damages of \$250,000 for negligent mis-statement.
- [3] The plaintiff's witnesses occupied the first eight days of trial, while the defendant called eight witnesses over the following six days of trial. It was interesting to see the defendant pare its witness list as the plaintiff's case unfolded. Of the witnesses called only Mr. Humphreys, who occupied a position with the Calgary Taxi Authority and was called to give evidence about a possible sale of the disputed software, proved of little assistance. Otherwise, all the witnesses brought something relevant to the issues before me.
- [4] The case of the plaintiff was driven in part by the history of the events as perceived by the plaintiff, and in part as driven by the defendant's various departments not being in adequate communication with each other and leading eventually, in my view, to a rather regrettable administrative decision on how to deal with the matter, the software evaluation causing the proffering of opinion evidence on both sides as to the possible integration of the VS software into I.C.B.C.'s computer systems, and opinion evidence as to the possible losses sustained by the plaintiff.
- [5] Counsel have provided me with a number of case references. The plaintiff's cases follow the general rule that costs follow the event, while the cases that the defendant relies on are those where the Court has, in its discretion, apportioned costs according to issues won and lost before the Court. I have carefully considered those decisions, particularly the defendant directed me to *British Columbia v. Worthington (Canada) Inc.* (1988), 29 B.C.L.R. (2d) 145 (C.A.); *Rooney v. Chan* (1992), 76 B.C.L.R. (2d) 186 (S.C.); *Boerner v. Soohochoff*, [1987] B.C.J. No. 1751 (S.C. [In Chambers]), and *Compas (Guardian ad litem of) v. Lightbrown*, [1996] B.C.J. No. 909 (S.C.).

- [6] The defendant argued the plaintiff had lost on the majority of the issues before me. However, the plaintiff did succeed on its argument as to negligent mis-representation. With respect to the alleged breach of confidence, it was only the element of damages that prevented the plaintiff from success. On further consideration it may be that this is the one case where the defendant has perceived a breach of confidence claim at a sufficiently early stage to abandon a project. Whether further analysis might have yielded a claim based on detriment to the plaintiff rather than benefit to the defendant, must wait another day. The plaintiff did not pursue the copyright issue with any vigour and I am satisfied that defence counsel were aware of that stance early in the trial.
- [7] As to allegations of bad faith, the allegations reflected Mr. Kennedy's predictable response to the defendant's treatment of his pilot project software, the lack of appropriate response by I.C.B.C. once the executive decision had been made not to proceed with the VS software, Mr. Kennedy's suspicions as to I.C.B.C.'s use of the confidential aspects of the VS software, and possibly disappointment at the deflection of his company's path to possible software wealth. Save for the evidence led from Mr. Humphreys, I consider all other evidence was relevant to the issues as framed.
- [8] As to damages, the award reflected (1) the defendant's assurances that no like software was in internal production; (2) the plaintiff had no valid basis for contract expectations with the defendant; (3) the defendant did stop production of its software when it realized it had adapted aspects of VS Visual's software; and (4) that consequently damages should, in a large part, reimburse the plaintiff for its efforts in the pilot project. While the amount may be small in relation to the overall claim of the plaintiff, it is no different from the many other cases where plaintiffs have sought large numbers and not succeed to the extent they hoped. I do not consider the case to have been made more difficult or protracted in the consideration of damages,.
- [9] The defendant submits, in terms of overall success, in terms of general costs, and with respect to disbursements that they enjoyed 75% success at trial. Similarly, with its disbursements, I.C.B.C. says that Dr. Dexter's expenses should be reimbursed but not those of the plaintiff for the reports for Mr. Shand and Mr. Oatway. In particular the defendant says the argument as to the evaluation of the VS software by I.C.B.C. was put as an aspect of bad faith of the defendant. Both sides argued that issue. In my view, it was not so much a matter of bad faith as it was an obvious ground for the "evaluation" to predictably find VS Visual's software not suitable for integration with I.C.B.C.'s mainframe capabilities. But that was not to say, as Mr. Oatway did, that with a modicum of work the VS software could have been integrated. Certainly it was the view of the software writers themselves, including Dr. Paweska, that the software could have been relatively easily introduced into I.C.B.C.'s computer system. I cannot say that the plaintiff did not properly tend to the evidence on the integration issue. Indeed, on its view of the situation, it was obliged to give its own assessment of the capabilities of the VS software. To some degree the opinions were moot, i.e., without the work actually having been done all the experts could say to the Court on the

one hand was that use of the VS software might take a lot of work, while on the other hand it might take very little work.

- [10] There were virtually no pre-trial applications. There was one day of plaintiff discovery and three days by defendant, which in my view was rather modest, particularly on the part of the plaintiff.
- [11] The plaintiff produced a list of documents and four supplemental lists of documents. The defendants produced a list of documents and eight supplemental lists of documents. Copies of all of the documents filled 15 x 3-inch binders.
- [12] The defendant put some focus on the lack of production of four forwarding emails which related to internal I.C.B.C. documents that had been forwarded to the plaintiff by Mr. Gliege. It was apparent that Mr. Kennedy tried to deflect that inquiry. But that only went to the issue of how the plaintiff obtained the documents, not the obligation of the defendant providing such relevant documentation. And eight supplemental lists does not indicate forthright and prompt disclosure by the defendant.
- [13] This is not, in my view, a case as *Toy, J. put it in Kerleman Holdings Ltd. v. District of Matsqui and the District of Abbotsford* (1989), 40 B.C.L.R. (2d) 230 (B.C.S.C.), where there were many battles where apportionment would be appropriate, but rather more like a 12-round prize fight where on overall points one contestant was declared the winner.
- [14] As well, Madam Justice Satanove in *REC Holdings Co. Ltd. v. Peat Marwick Thorne*, Vancouver Registry No. C925437, a decision February 4, 1998 stated:
10. I believe that trial judges should resist the temptation, particularly in large commercial cases, to second guess the strategy, or tactics, or manner in which counsel conducted their case. With the wisdom of hindsight issues may seem to have been raised unnecessarily, or too much time to have been spent on peripherally relevant matters, but the trial process is a spontaneous and dynamic one and the outcome is often difficult to predict.
- [15] Here the plaintiff seeks costs at a higher scale than Scale 3. The criteria for such claims is set out in *Bradshaw Construction Ltd. v. Bank of Nova Scotia*, [1991] 54 B.C.L.R. (2d) 309. In my view, the case fits Scale 4, i.e., it was of more than ordinary difficulty given its subject matter. The plaintiff is entitled to its Scale 4 costs, save for the two days of trial attributable to Mr. Humphreys, and one-half of Mr. Shand's account for his opinion. While his opinion was appropriate on the general issue of software development and the time to develop software, it was badly framed and predictably contested by the defendant. As well it reflected a poor choice of the appropriate expert for a case of this nature (at least in my view) where the real answers to the plaintiff's questions lay within the offices of the corporate defendant.
- [16] In sum then, I allow the plaintiff Scale 4 costs for 14 days of trial and his taxable disbursements, save and except Mr. Shand's account which I would allow at 50%. The plaintiff is entitled to the costs of this application at Scale 3.

"R. Crawford, J."

The Honourable Mr. Justice R. Crawford

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