COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Equustek Solutions v. Jack,*
2016 BCCA 190

Date: 20160428
Docket: CA43610

Between:

Equustek Solutions Inc., Robert Angus, and Clarma Enterprises Ltd.

Appellants
(Plaintiffs)

And

Morgan Jack aka Matt Garcia aka Matt Garci aka Ian Taylor, Andrew Crawford aka Derek Smythe, Datalink Technology Gateways Inc., Datalink 5, Datalink 6, John Doe, Datalink Technologies Gateways LLC, Lee Ingraham aka Darren Langdon, Mike Bunker, Igor Cheifot aka Jolio Fernandez, Alexander Cheifot aka Randy Schtolz, Frank Geiger aka Felix Fernandez, and Alfonso Doe

(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated April 15, 2016 (*Equustek Solutions Inc. v. Jack*, Vancouver Docket No. S112421)

Oral Reasons for Judgment

Counsel for the Appellant: R.S. Fleming
J. Zeljkovich

Appeal Brought without notice to Defendants

Place and Date of Hearing: Vancouver, British Columbia
April 25, 2016

Place and Date of Judgment: Vancouver, British Columbia
April 28, 2016

Summary:

The appellant applied for orders freezing the assets of two defendants ("worldwide Mareva injunctions"). The chambers judge refused the orders, finding that there was not a strong prima facie case against one defendant, and that the balance of convenience did not favour the granting of the orders. Of her own motion, the judge ordered the appellants to bring portions of her reasons for judgement to the attention of a court in France. The appellant applied for leave to appeal. Held: Leave granted and appeal allowed in respect of the order requiring the appellant to bring the chambers judge's reasons to the attention of the French court. The order should not have been made without giving the appellant an opportunity to address the issue. In light of fresh evidence tendered in this court, it is evident that the order constituted undue interference in the conduct of a foreign legal proceeding. Leave to appeal denied with respect to the dismissal of the applications for injunctions. The orders sought were discretionary and the proposed appeal is not meritorious.

[1] **GROBERMAN J.A.**: The appellants design, manufacture and sell industrial network interface hardware. They allege that the defendants have conspired together to design and manufacture competing products using trade secrets stolen from them. A fuller discussion of the nature of the underlying litigation is available in this Court's decision in *Equustek Solutions Inc. v. Google Inc.,* 2015 BCCA 265.

[2] In March 2015, a Supreme Court judge issued an order for seizure and safekeeping of evidence (often referred to as an "*Anton Piller*" order) against two defendants. As a result of information obtained from the seizure, the appellants proposed the addition of two new defendants in this action, and applied for orders freezing and preserving their worldwide assets (such orders are often referred to as "worldwide *Mareva* injunctions").

[3] At the outset of the application in Supreme Court, the appellants explained that they intended to make applications in France for domestic orders freezing the proposed defendants' assets in that country. To facilitate those applications, they sought and obtained the chambers judge's permission to use seized evidence in the proceedings in France.

[4] The Supreme Court judge ultimately refused to grant the orders freezing the proposed defendants' worldwide assets. She found that there was a strong *prima facie* case against only one of the two proposed defendants, and that the balance of

convenience did not favour the granting of an injunction in respect of either of them. Of her own motion, and without hearing submissions on the issue, the judge also directed the appellants to bring the substance of her reasons to the attention of any judge in France before whom the appellants seek asset-freezing orders against the proposed defendants.

[5] The appellants seek leave to appeal from the denial of the asset-preservation orders, and from the order requiring them to bring the judge's reasons to the attention of courts in France.

Procedural Issues

[6] The applications in the court below were brought without notice to the proposed defendants. Such a manner of proceeding is often used in proceedings seeking to freeze liquid assets, for fear that providing notice of the application might encourage the respondents to dissipate or secret their assets before the court has ruled.

[7] In keeping with this rationale, the appellants did not give the proposed defendants notice of their application for leave to appeal. Further, because of the exigent circumstances, the appellants sought an early date for the hearing of their appeal. We agreed to hear the leave application on April 25, along with arguments on the merits of the proposed appeal. Further, we agreed to hear submissions notwithstanding that no notice of the appeal had been given to the proposed defendants.

[8] At the hearing of the leave application, the appellants filed an application to adduce fresh evidence, in the form of an affidavit of a French lawyer. The lawyer deposed that the French law on asset-freezing orders is quite different from Canadian law. He also stated that the common law concepts of "strong *prima facie* case" and "balance of convenience" are not relevant to the granting of pre-trial asset-freezing orders in France. A motion for such an order would normally be submitted in writing, and determined without an oral hearing. The lawyer was of the

opinion that the information the chambers judge ordered the appellants to provide to the French court would be irrelevant, and potentially confusing, in the French proceedings.

[9] We were of the view that the fresh evidence should be received. It was highly relevant to the appeal. Further, the appellants did not have any opportunity to tender the evidence in the court below, as they had no notice that the judge was considering the order that she made.

The Disclosure Order

[10] During the hearing on April 25, we advised the appellants that we were granting leave to appeal from the order requiring them to disclose the judge's reasons to French courts, and were allowing the appeal in respect of that matter.

[11] In our view, the judge erred in making the order without giving the appellants any opportunity to address the issue. Ideally, the appellants could have asked the judge to reconsider the matter before the order was entered. Given that there was some urgency in pursuing the appeal from the denial of the freeze orders, however, it is understandable that the order was entered quickly.

[12] We considered the evidence provided by the appellants' French lawyer, and concluded that the appropriate disposition was to vacate the order requiring the appellants to disclose information to the French court. In light of the lawyer's description of French law and procedure in the area, the effect of the chambers judge's order may have been to compel the appellants to tender irrelevant or inadmissible evidence in French legal proceedings. If so, the order would unduly interfere with the French legal process. The appellants have engaged professional counsel in France, and have advised him of the substance of the chamber's judge's reasons for dismissing the application for injunctions. That having been done, it is appropriate to rely on counsel's legal knowledge and ethical training to decide what information is properly provided to the French court.

The Asset Preservation Orders

[13] Considerable deference is afforded to a judge's decision to grant or refuse a pre-trial asset-preservation order. In *ICBC v. Patko*, 2008 BCCA 65, Finch C.J., speaking for a unanimous Court, said:

> [22] The granting or refusal of a *Mareva* injunction is a discretionary order. The onus on a party seeking to appeal a decision based on the exercise of judicial discretion is a substantial one: *A.B. v. British Columbia (Securities Commission)*, 2004 BCCA 249 at para. 11. The order will not be interfered with unless the judge erred in principle, clearly and demonstrably misconceived the evidence, or made an order which has resulted in a clear injustice: *Canadian Broadcasting Corporation v. C.K.P.G. Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.), cited in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog,* (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196, [1998] B.C.J. No. 2298 (QL) (C.A.) at para. 11.

[14] The chambers judge in the case before us was well-aware of the legal principles applicable to the granting of pre-trial asset-preservation orders. In making her decision, she cited the tests from the leading British Columbia cases, including *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (SC); *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998); 168 D.L.R.(4th) 309 (BC CA); and *Tracy v. Instaloans*, 2007 BCCA 481. She also mentioned her own, relatively recent, decision in *Hans v. Volvo Trucks North America Inc.*, 2014 BCSC 1123, a judgment that refers to other important Canadian and English cases dealing with *Mareva* injunctions. It is apparent that the judge was familiar with the tests to be applied, and that she followed them. It cannot be said that she made any error of principle.

[15] The appellants have also failed to point to any instance in which the judge can be said to have misapprehended the evidence that was before her.

[16] The appellants do say that the denial of the asset-preservation orders amounts to a clear injustice. They point out that such orders have been made against the other defendants in this action, and note that in *Equustek v. Google*, this Court upheld an extraordinary worldwide order against a non-party based, in part, on the strength of the appellants' case against the defendants and on the defendants' refusal to abide by court orders.

[17] I note, however, that the evidence against the proposed defendants had to be assessed independently of any previous court's assessment of the situations of other defendants. The judge did so. Her conclusions were that there was a strong *prima facie* case against one proposed defendant, a former employee of Equustek and its predecessor. On the other hand, she found that the case against the other proposed defendant – the wife of the former employee – was not strong.

[18] Counsel for the appellants has referred us to the evidence against the wife. I can see no basis on which to find that the judge made any palpable or overriding error in concluding that the case against the wife was not, at this stage, a strong one. The assessment of that evidence was a task for the chambers judge, and I am unable to see any basis on which this Court could interfere with her conclusion.

[19] In respect of the former employee, the judge was not convinced that the balance of convenience favoured the granting of the injunction. Despite acknowledging that there was a strong *prima facie* case that the proposed defendant was implicated, in the past, in the alleged conspiracy, she was unconvinced that the risk that he would place assets beyond the reach of the plaintiffs was sufficiently great to outweigh the *prima facie* right of the proposed defendant to have full control over his assets (*First Majestic Silver v. Santos*, 2009 BCCA 71 at para. 23).

[20] I am unable to conclude, in this case, that the chambers judge failed to take into account all of the evidence, or that her conclusion was unavailable to her on the evidence. While her assessment of the balance of convenience may not have been the only one open to her, the assessment was hers to make. I cannot see any basis for holding that the denial of the injunction constituted a "clear injustice".

[21] It is my view that the proposed appeal is not meritorious. In essence, it invites the Court to re-weigh the evidence and come to a fresh conclusion as to where the balance of convenience lies. That is not the function of this court in exercising its appellate review powers.

[22] Of course, the question of whether the appeal is meritorious is not the only factor to be considered on a leave application. Typically, the court will also consider the importance of the proposed appeal to the practice, its importance to the parties, the question of whether it may delay proceedings, and the overall interests of justice.

[23] In my view, the proposed appeal is not of importance to the practice. The general law governing the granting of pre-trial asset preservation orders is now well-established, and it is not suggested that any novel issues of law arise in this case. Further, I note that the appeal would be taken without notice to the proposed defendants, making this case a rather inadequate platform for considered development of legal principles.

[24] The importance of the proposed appeal to the parties is unclear. At present, it appears that the proposed defendants reside in France. While there is some evidence suggesting that they may continue to have a bank account of some sort in Canada, the evidence is dated, and the magnitude of the account (if it exists) is unknown. Apart from that account, the proposed defendants are not known to have any assets outside of France. It is not apparent that the freezing of those assets will be affected by the proposed appeal. The information before the Court is that French courts will assume jurisdiction and entertain an application to freeze the assets in that country.

[25] There is no suggestion that an appeal in this matter will delay proceedings – indeed, we have heard the arguments on the merits of the appeal, and there would be no necessary delay at all.

[26] In terms of general issues of justice, I note only that the background facts in this case do not provide any strong reasons for B.C. courts to act at this time. As a matter of comity, the issue of whether assets should be frozen may be better decided under the domestic law of France, where the assets are situated and where the proposed defendants live.

[27] Particularly given the absence of merit in the appeal, I am not persuaded that this is an appropriate case in which to grant leave.

Sealing of the File

[28] The chambers judge made an order that the file in that court be sealed until May 5, 2016, in order to allow the appellants time to bring an application in French courts before the proposed defendants are tipped off that such an application may be coming. In order to allow this court time to hear argument, we exercised our jurisdiction to seal our own file temporarily, and to extend the sealing period to May 15, 2016 both for this court's file and the file of the Supreme Court. We have also directed that these reasons not be published until that date.

Conclusion

[29] At the hearing of this matter, the Court granted leave to appeal from the judge's direction that the appellants disclose particular information to the French Courts, and vacated that order. We also granted a sealing order in respect of this Court's file mirroring the sealing order granted in the Supreme Court, and extended the sealing orders to May 15, 2016. We reserved our decision on the asset-preservation injunctions to today. I would deny the application for leave to appeal the judge's dismissal of the injunction applications.

[30] **GOEPEL J.A.**: I agree.

[31] **DICKSON J.A.**: I agree.

[32] **GROBERMAN J.A.**: The application for leave to appeal the injunction applications is denied.

"The Honourable Mr. Justice Groberman"