IN THE SUPREME COURT OF BRITISH COLUMBIA

COPY

Date: 20120620
Docket: S112421
Registry: Vancouver

Between:

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

Plaintiffs

And:

Morgan Jack, Andrew Crawford, Datalink Technologies Gateways Inc., Datalink 5, Datalink 6, and John Doe

Defendants

Before: The Honourable Madam Justice Dickson

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiffs	R. Fleming
Counsel for Defendants	None Appearing
Place and Date of Hearing:	Vancouver, B.C. June 20, 2012
Place and Date of Judgment:	Vancouver, B.C. June 20, 2012

[1] **THE COURT**: The plaintiffs Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. seek an order striking the Responses to Civil Claim of two of the defendants in this proceeding, Morgan Jack and Datalink (the "Datalink Defendants") and entering judgment against them.

[2] The claim is complex and concerns, amongst other things, allegations of conspiracy, breach of confidence and passing off. The relief sought in the Notice of Civil Claim includes a declaration as to ownership of certain trademarks, temporary and permanent injunctions, damages and an accounting.

[3] The plaintiffs' application is brought pursuant to Rule 22-7 of the *Supreme Court Civil Rules* based on the Datalink Defendants' alleged ongoing non-compliance with three orders previously made in the proceeding. The orders in question were made by Madam Justice Gropper on August 3, 2011; by Mr. Justice Leask on September 23, 2011; and by Madam Justice Fenlon on March 21, 2012.

[4] In summary, the plaintiffs say that the Datalink Defendants have engaged in a course of deliberate and continuous misconduct by violating the previous court orders despite having been warned clearly and unambiguously of their obligation to comply. In these circumstances the plaintiffs submit that the time has come for the Response to Civil Claim to be struck.

[5] The Datalink Defendants are presently self-represented, although they were previously represented by counsel. They were served with the application materials at the address for service listed on their Notices of Intention to Act in person in accordance with the *Rules*.

[6] The Datalink Defendants have not responded to the plaintiffs' application in any manner. They did not appear at the hearing on May 29, 2012.

[7] The issue for determination is whether the Responses to Civil Claim filed by the Datalink Defendants should be struck and, if so, on what terms.

[8] Much of the factual background to the application is summarized in the oral reasons for judgment of Madam Justice Fenlon delivered on March 21, 2012. I will not repeat that background here, except to quote from paragraph 4 of the reasons in which Madam Justice Fenlon described the key terms of the orders of Justices Gropper and Leask. She stated:

> [4] The orders in issue are: first, the order of Madam Justice Gropper made August 3, 2011, which requires these defendants to delete all references to the plaintiffs' products on their websites; and second, the order of Mr. Justice Leask made September 23, 2011, which continued Madam Justice Gropper's order and also obliged the defendants to do two things:
>
> - disclose to the plaintiffs the names and contact details of all customers who have ordered one of the plaintiffs' products from the defendants since January 1, 2007; and
> - prominently post on each of their websites a statement identifying the plaintiffs as the manufacturer of the plaintiffs' products and directing customers of those products to the plaintiffs.

[9] Madam Justice Fenlon went on to order the Datalink Defendants to comply in full with the Leask Order. She also ordered that they produce a new customer list as required in paragraph 6 of the Leask Order; deliver an affidavit confirming that the new customer list was accurate and complete; deliver copies of the purchase order or credit card invoice associated with each request to purchase the plaintiffs' products from each of the customers on the list, except Morgan Jack and Datalink were permitted to redact the first 9 digits of the 12 digits in each credit card number referenced; amend the notice posted on their websites as required by paragraph 5 of the Leask Order to delete the opening phrase; delete the Datalink phone number above the notice; display the Equustek phone number in the same font and in bold as the Datalink phone number formerly above the notice; and use an image to post the notice so that it is not searchable by internet search engines, all by April 30, 2012 (the "Fenlon Order").

[10] Madam Justice Fenlon also made an order for special costs of the application in favour of the plaintiffs. The special costs were to be paid forthwith and in event of the cause.

[11] On April 24, 2012, the plaintiffs wrote to then-counsel for the Datalink Defendants reminding them that the deadline for full compliance with the Fenlon Order was April 30, 2012.

[12] On April 29 and 30, 2012, the Datalink Defendants made some changes to their website. I am satisfied on the basis of the affidavits presented on this application, however, that their compliance was incomplete. In particular, it is apparent that none of the websites post the notice in an image so that it is not searchable by internet search engines, as required by the Fenlon Order. In addition, some websites have not changed the notice at all; others have only modified the opening phrase and not deleted it as required by the Fenlon Order; some websites still had the notice with the offending "contact us" buttons for the defendants; others do not display the Equustek phone number prominently as required by the Leask and Fenlon Orders; and others do not fully set out the notice required. Further, no new customer list, affidavit or supporting documents have been produced. Finally, the special costs that were ordered by Madam Justice Fenlon have not been paid.

[13] An order to strike a party's pleadings for non-compliance with a court order is a draconian remedy to be invoked in only the most egregious of cases. In *Schwarzinger v. Bramwell*, 2011 BCSC 304, Madam Justice Fitzpatrick conducted a thorough review of the factors for consideration on an application to strike. In so doing, she stated:

> [105] Rule 22-7 provides that the Court may strike out a response to civil claim (formerly a statement of defence) and pronounce judgment if the defendant refuses or neglects to comply with a direction of the Court or to produce documents, and may order the proceeding to continue as if no response had been filed.
>
> [106] Counsel for the parties are in agreement that the applicable authorities are found in seven decisions of our Court of Appeal: *Neeld v. Pezamerica Resources Corp.*; *Muscroft v. Eurocopter S.A.*; *MacGougan v. Barraclough*; *House of Sga'nisim v. Canada (Attorney General)*; *McIsaac v. Healthy Body Services Inc.*; *Dhillon v. Pannu* and *612797 BC Ltd. v. Ferguson* [citations omitted].
>
> [107] There is no doubt that the relief sought in this case involves an exercise of discretion. Nevertheless, that discretion must be exercised in a principled manner. The overarching principle requires that the Court consider whether, in all of the circumstances, justice requires that the defence be

> struck. The authorities referenced above discuss factors that are to be considered by the Court in the exercise of its discretion.
>
> [108] From these authorities, I take the relevant factors to be as follows.
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> ***(1) Draconian measure***
>
> [109] The Court must start from the proposition that it will only be in extreme cases that such relief is granted...
>
> ***(2) Second Chance***
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> [113] Our courts have generally recognized that parties are entitled to a "second chance" before such relief is granted...
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> [114] The usual practice, adopted in *Neeld*, is that a party is first put on notice by the court that an order to strike will likely follow unless there is compliance. Notice is effectively given by dismissing a first application to strike, making certain orders for compliance and, then, if there is still lack of compliance, possibly granting the second application to strike...
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> ***(3) Proportionality***
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> [118] The punishment must fit the crime. This notion was addressed in *Chief Mountain* where the chambers judge struck the claim when the plaintiffs failed to abide by two orders that they deliver particulars to their claim by a certain date. Partial particulars were provided and the plaintiff sought further time without success. Madam Justice Saunders found that the striking of the claim was not justified in the circumstances...
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> ***(4) Alternate Remedy***
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> [123] A consideration of proportionality inevitably leads to the question of whether a lesser remedy would cure the default and inspire confidence that the Court's orders will be respected in the future.
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> [124] In *Ferguson*, the Court of Appeal considered and rejected the argument that an alternate remedy was appropriate in these circumstances...
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> ***(5) Explanations for Default***
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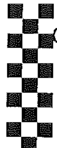
> [135] The Court must also consider the submissions of the offending party in terms of the explanation offered for the non-compliance. Some reasonable explanation must be provided...
>
> [137] Further, a party who comes to the Court apologizing and providing reasons for their transgressions is more likely to be given another chance by the Court. To use a religious metaphor, confession must necessarily precede penance. A party who continues to deny their transgressions must necessarily raise in the Court's mind the question as to whether that party is truly reformed. If the breaches will only continue, effectively the Court has only delayed the inevitable further application to strike...

[14] The relevant factors for consideration on an application to strike were also recently addressed by the Court of Appeal in *Besic v. Kerenyi*, 2012 BCCA 187. At paragraph 17 Madam Justice MacKenzie stated:

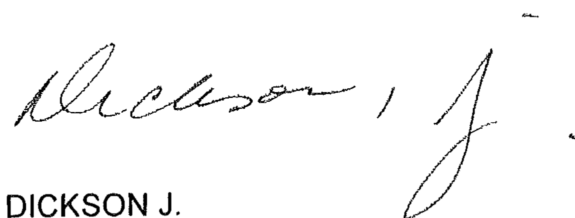


> Considerations relevant to the exercise of the court's discretion to strike out pleadings include: (i) whether non-compliance with the court order was wilful or intentional, or whether the offending party had an explanation for his or her non-compliance (*TG Industries Inc. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35 at para. 17, and *Eisele v. B.A. Blacktop Ltd. et al*, 2004 BCSC 521, 15 C.P.C. (6th) 235 at paras. 18-23); (ii) whether the scope of the remedy is disproportionate or excessive to the "delict" (*House of Sga'nisim* at para. 26); and (iii) whether a second chance should be provided to remedy the breach (*Neeld v. Pezamerica Resources Corp.*, [1985] B.C.J. No. 2356 (C.A.) at paras. 28-29). This is not an exhaustive list; there may well be other relevant factors to consider. Ultimately, the question is whether a lesser remedy would suffice.

[15] In this case I am satisfied that the Datalink Defendants' non-compliance with the previous court orders is willful and unexplained. In addition, the remedy sought by the plaintiffs is proportionate to the Datalink Defendants' repeated and ongoing misconduct and the Fenlon Order provided them with sufficient warning that their Response to Civil Claim would likely be struck should they continue to fail to comply. The Datalink Defendants have nevertheless continued flagrantly to disregard their litigation obligations, to the considerable detriment of the plaintiffs. There is no basis in the evidence to support the conclusion that a lesser remedy would suffice.

[16] Taking into account the foregoing, I exercise my discretion in favour of granting that aspect of the application that seeks an order to strike the Response to Civil Claim. I also make an order for special costs of the application for the same reasons as those of Madam Justice Fenlon.

[17] As noted, the relief sought in the Notice of Civil Claim is complex in nature. Given that complexity and, in particular, the possible implications for the other defendants I decline to order judgment with damages to be assessed. Rather, I grant leave to the plaintiffs to proceed as if the Response to Civil Claim was never filed.



DICKSON J.