IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Equustek Solutions Inc. v. Jack,*
2023 BCSC 506

Date: 20230331
Docket: S112421
Registry: Vancouver

Between:

Equustek Solutions Inc., Robert Angus, and Clarma Enterprises Ltd.
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, Alfonso Doe, and Colin Marsh and Kathleen Marsh
Defendants

Before: The Honourable Justice Duncan

Reasons for Judgment
Re: Application for Access to Court Record

Counsel for the Plaintiffs:	R. Fleming
Counsel for the Applicant, Google LLC:	T. Cohen, K.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. February 27, 2023
Place and Date of Judgment:	Vancouver, B.C. March 31, 2023

[1] This is an application by Google LLC (“Google”), who is not a party to the proceedings captioned in the style of cause, for access to the trial file and exhibits in these proceedings. The registry will not permit access to the trial file, as a sealing order was made in or about 2015 by Madam Justice Dillon.

[2] The application is opposed by the plaintiffs, Equustek Solutions Inc., Robert Angus and Clarma Enterprises Ltd.

[3] The plaintiffs were successful at trial against the defendants Morgan Jack, Andrew Crawford and a group of companies with the root name “Datalink”. In the briefest of summaries, I found that those defendants had stolen trade secrets from the plaintiffs to make their own devices, which they then marketed on the internet.

[4] One of the ways that the defendants’ products were marketed was through indexing on Google. As noted, Google is not a party to these proceedings. Nevertheless, the plaintiffs applied for an interim injunction to enjoin Google from indexing or referencing Datalink websites in its worldwide internet search engines.

[5] Madam Justice Fenlon, then of this Court, granted the injunction: 2014 BCSC 1063. Google appealed, but was ultimately unsuccessful: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.

[6] Google applied to amend the injunction prior to the commencement of trial. Mr. Justice Smith dismissed the application: 2018 BCSC 610.

[7] My main reasons for judgment are indexed as 2020 BCSC 793. The issue of whether the plaintiffs were entitled to damages as well as injunctive relief was deferred to a later hearing, at which I determined it would be unfair to the plaintiffs to award damages without an injunction: 2021 BCSC 2126. The Datalink defendants were then permanently enjoined from marketing their product. There is a form of “escape hatch” for them in the order if they agree to provide certain information to the plaintiffs; however, since neither the Datalink defendants nor Morgan Jack appeared at trial, it is unlikely they will avail themselves of the relief set out in the order.

[8] The plaintiffs filed a notice of application on January 27, 2021, with notice to Google, that they would seek to have the "Notice and Take Down" regime against Google, as set out in the orders of Fenlon J. on June 14 and November 27, 2014, be made the subject of a permanent order. Specifically, the plaintiffs sought an order that Google continue to cease indexing or referencing in its worldwide internet search engines a list of websites.

[9] The notice of application was filed at my direction, essentially to frame the issue for Google. Since Google is not a party and did not participate in trial, the process to bring the plaintiffs' application for a permanent injunction is not prescribed in the *Supreme Court Civil Rules* and is at the root of significant disagreement as between counsel. The process may dictate what if any rights of disclosure exist and what form the ultimate hearing will take, but that issue is not before me today.

[10] Google did not file an application response until October 6, 2022. At that point, it resisted a permanent injunction, queried the jurisdiction to bring an application against a non-party after the conclusion of trial, and sought access to the evidence from trial before responding any further to the plaintiffs' application.

[11] The plaintiffs in turn required Google to file an application for access to the court file. Google did so on February 13, 2023. The plaintiffs filed a response on February 14, 2023, opposing the application for access.

[12] I heard Google's application on February 27.

[13] Ms. Cohen, K.C., counsel for Google, took me through a preview of some of the issues that may be raised at the hearing for the permanent injunction. I will not repeat them here. Suffice it to say that the overriding concerns expressed by Ms. Cohen are: first, that Google should be given access to the trial file and exhibits to respect due process, in light of the fact that the plaintiffs seek a final order against that corporate entity which did not participate at trial and does not know what the evidence was; and second, this Court does not make orders that are overly broad or unnecessary unless they are justified.

[14] Further to the second point, Ms. Cohen queries whether the plaintiffs will continue to manufacture the device that the Datalink defendants effectively stole, in light of some of the evidence noted in my trial judgment about the life of the product. If the plaintiffs will not continue to manufacture their product indefinitely, a permanent order against Google overshoots the mark.

[15] Ms. Cohen referred to *Rogers Media Inc. v. John Doe 1*, 2022 F.C. 775 at para. 113, to illustrate factors a court will consider on an application for a permanent site-blocking order against a party. The factors include whether the order is necessary, whether alternative and less onerous measures are available or have already been granted, and whether there is any ongoing conduct or damage that requires a further remedy.

[16] Ms. Cohen also submits that the issue of whether any final injunction should have a firm end date or sunset clause will be significant at the hearing of this matter, in whatever form the hearing takes. She notes that the reasons restrict future damages to 15 years post-trial, after which it would no longer be profitable for the plaintiffs to market their product.

[17] Mr. Fleming, counsel for the plaintiffs, resists Google's application for access to the court record. He maintains that Google does not need to know everything that happened at trial in order to respond to the plaintiffs' application. His understanding about Google's response to the plaintiffs' application is that:

1. a permanent injunction against the Datalink defendants is not sufficient to justify a permanent order against Google;

2. the plaintiffs did not seek relief at trial against Google, which is a non-party;

3. the court has no jurisdiction to order relief against a non-party, after trial; and

4. there is no factual or legal basis for a permanent order against Google.

[18] Mr. Fleming says these four concerns are “non-starters”. This Court exercised jurisdiction on an interim basis against Google and has now found the Datalink defendants liable in tort. Google has no economic or other legitimate interest in being allowed to facilitate their illegal business by displaying the impugned websites on search results. Access to the trial record has no meaningful purpose except to create further delay. Mr. Fleming says it also raises concerns about *res judicata*, in the event that Google makes a direct or indirect attack on the findings at trial.

[19] In the absence of a proceeding between the parties, my decision on Google’s access to the trial record and exhibits is guided by the British Columbia Supreme Court’s Policy on Access to the Court Record (the “Policy”). It is a public document, available on the Court’s website.

[20] The Policy provides that affidavits, hearing lists, orders, pleadings, transcripts of civil proceedings and reasons for judgment are clearly public and producible: see pages 21 to 23. Transcripts for case planning conferences, settlement conferences and trial management conferences are not accessible to the public unless by Court order (per Rules 5-2(7), 9-2(2) and 12-2(8) of the *Supreme Court Civil Rules*: pages 22–23. In camera proceedings are also not accessible without a Court order: page 20.

[21] Access to an exhibit by someone who was not party to an action requires written authorization of a party to that action, which the plaintiff will not provide in this case, or by an order of the Court: page 31.

[22] Access to a sealed court record is not permitted without an order of the Court: page 22. There is a sealing order in this case; however, it does not relate to the proceedings at trial or the exhibits filed at trial. Rather, the sealing order relates to an Anton Piller order made on March 9, 2015.

[23] I am satisfied, based on the submissions of Ms. Cohen, as well as the unusual nature of Google’s involvement with this matter, that the access sought should be granted. The terms of the access will be governed by an undertaking.

Model undertakings are appended to the Policy at page 44. Counsel are to discuss the appropriate terms of an undertaking and, if they are unable to reach a consensus, they may appear before me to resolve the issue.

[24] Finally, the procedure by which the plaintiffs intend to bring the application for a permanent injunction against Google has not been settled. During submissions on February 27, Mr. Fleming adverted to making an application to me for directions concerning the procedure the plaintiffs should follow in seeking a further injunction against Google.

[25] Upon reflection, it is not appropriate for a judge to advise counsel on the correct path to bring a dispute before the court, and I will decline to hear an application for directions concerning procedure.

"Duncan J."