IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Cash Express Corp. v. Connect Cash Service Inc.,* 2011 BCSC 219

Date: 20110317
Docket: S096626
Registry: Vancouver

Between:

Canadian Cash Express Corp.

Plaintiff

And

Connect Cash Service Inc.

Defendant

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

(In Chambers)

Corrected Judgment: The text of the judgment was corrected at paragraphs [12], [17], [18], [20], [26], [42], [44], [47], new paragraphs added as [48], [49], title before new paragraph [50], old paragraph [48] has now been changed to paragraph [50] old paragraph [49] has now been changed to new paragraph [51]. These changes have been added on March 23, 2011.

Counsel for the Plaintiff:	F.G. Potts T. Goepel
Counsel for the Defendant:	J.A. Henshall
Place and Date of Hearing:	Vancouver, B.C. December 3 and 6, 2010
Place and Date of Judgment:	Vancouver, B.C. March 17, 2011

APPLICATION

[1] This is an application by the plaintiff to vary my previous order of September 11, 2009, (the "Previous Order") as follows:

a) to set aside the injunction granted in the Previous Order,

b) to deal with Mr. Pak,

c) to remove from paragraph 3 of the Previous Order the phrase "except to the extent that the Defendant is entitled to withhold payment of profits to the plaintiff as provided for in paragraph 4 of this Order",

d) to delete entirely paragraph 4 of the Previous Order,

e) to provide that the funds held in trust by Church & Company pursuant to the Previous Order be paid to Lindsay Kenney LLP in trust for the plaintiff, and further that any fees charged by Mr. Pak to the joint venture be paid back to the Joint Venture, and that Mr. Pak be declared to have no right to any fees for work done pursuant to the Previous Order.

[2] The plaintiff also seeks an order that the defendant provide copies of certain documents in the defendant's possession, control or power, particularly:

(a) documents relating to the rent charged to the joint venture, including a copy of the lease agreement, invoices, proof of payment, and correspondence with the landlord;

(b) documents relating to Mr. Pak, including all correspondence between the defendant and Mr. Pak;

(c) documents relating to G4S, including all contracts, correspondence, and invoices, as they relate to the setting up of new ATMs at the Edgewater Casino in Vancouver, B.C. (the "Casino"), and the continuing operations at the Casino;

(d) documents relating to the defendant's Line of Credit with Scotiabank, including all contracts, correspondence, and account documents, as they relate to the arrangements for supply of cash for new ATMs, and the continued operations at the Casino;

(e) all documents, including correspondence, letters, e-mails, and notes, relating to any purported termination of the rental agreement between the defendant and Canadian Metropolitan Properties Ltd., effective October 12, 2010, and any documentation relating to the transition period following the end of the rental agreement.

[3] The plaintiff seeks further an order that the defendant provide the solicitors for the plaintiff with a first supplementary list of documents.

BACKGROUND

[4] Both parties are British Columbia companies and both are involved in the business of providing and operating automatic banking machines ("ATMs"). On August 15, 2005, they entered into a joint venture agreement (the "Joint Venture Agreement") whereby the defendant would secure rental space for nine ATMs at the Casino and the plaintiff would install, operate and maintain the ATMs, and the parties would share equally the net revenue from the operation of the ATMs after deduction of operating costs including rent.

[5] The defendant's right to occupy and to authorize the plaintiff to install and operate the ATMs at the Casino was based upon an agreement between the defendant and the landlord of the Casino dated May 28, 2002.

[6] The plaintiff's obligation to maintain the ATMs at the Casino included ensuring adequate supply of

cash for deposit in the ATMs. For that purpose the plaintiff contracted with Visa Canada for credit services and with Churchill Armoured Car Service Inc. ("Churchill") for secured transportation and loading of cash into the ATMs. The defendant also engaged another company, Calypso Canada, to provide for electronic funds transfers and data processing

[7] The Joint Venture Agreement provided also that the parties would open and maintain a bank account for the joint venture where all revenues were to be deposited and out of which all costs were to be paid with the exception of rent, which the defendant would pay directly to the landlord but receive credit for as an expense paid on behalf of the Joint Venture. Instead of opening a new bank account, The parties opted to use the existing deposit and credit facilities offered by the plaintiff's bank, Scotiabank

[8] The Joint Venture Agreement also called for the appointment of a bookkeeper and accountant (the "Joint Venture Accountant") to manage the joint venture's bookkeeping, and on September 30, 2005, they appointed Thomas Pak to the position subject to his stipulation that his duties would be confined to bookkeeping, and would exclude audits and investigations of claims as between the parties.

[9] The Joint Venture Agreement authorized both parties to submit claims for reimbursement of expenditures for Operating Costs with the requirement to submit detailed invoices for approval by the Joint Venture Accountant, and upon approval, to be paid by way of cheques signed by both parties.

[10] In about September 2005, pursuant to the Joint Venture Agreement, the plaintiff installed and commenced to operate nine ATMs at the Casino.

[11] On or about May 24, 2007, by an extension agreement, the parties agreed to extend the term of the Joint Venture for a further five years commencing May 28, 2007.

[12] It does not seem that any significant complaint was raised by either party until early 2009. At that time, the defendant complained that the plaintiff was overcharging the Joint Venture for its expenses, and in particular, for interest costs and for monies borrowed by the plaintiff for other purposes, notably 200 other ATMs that the plaintiff owned and operated separately, **from** the Joint Venture.

[13] The plaintiff concedes that the Scotiabank credit was available for use by its other ATM businesses, but the plaintiff insists that none of those other ATM operations required the use of a line of credit, and that all interest and other costs charged to the Joint Venture were solely for expenses of the Joint Venture.

[14] Mr. Pak did not accept that explanation because it was not, according to him, supported by documentary evidence, which Mr. Pak alleged that the plaintiffs were refusing to provide. He disclosed this to the principal of the defendant, Mr. Walji, and on February 24, 2009, after consulting with Mr. Walji, Mr. Pak issued a report (the "First Report"). In it he reported that the plaintiff had overcharged the Joint Venture for costs totalling $349,000, including interest costs in the sum of $235,000.

[15] The overcharges allegedly included also bank fees charged at $663.00 per month, totalling $41,669 by the time of the First Report, and also cash bundling fees totalling $2,300, and administration fees of $400

and $500. The defendant correctly asserted that while those fees were chargeable by the bank, the bank had not yet actually charged those amounts, and there was no evidence that it intended to charge those amounts.

[16] The plaintiff conceded that it had submitted claims for reimbursement in respect of the bank charges that had not actually been levied. However, the plaintiff maintained that since it and not the defendant was directly liable to the bank for those charges, and as those charges could be levied at any time, it was not improper to seek payment for them in advance.

[17] The plaintiff also submitted invoices for $44,851 for machine lease costs, and $66,715 for repair costs, neither of which, according to the defendant, was **a** proper **charge** to the Joint Venture. The plaintiff disagreed.

[18] The plaintiff maintained that all of the charges for which it was reimbursed by the Joint Venture had been disclosed to and approved by Mr. Pak and the defendant many months earlier. There was no concealment or misrepresentation about any of its charges nor any dispute at the time that they were submitted, and neither was there any doubt that if the charges were not eventually levied by the Bank, an adjustment would be due to the defendant.

[19] There are several other points of dispute which I need not dwell on for the purpose of this application.

[20] On May 25, 2009, the parties agreed to engage PricewaterhouseCoopers International Ltd. ("Pricewaterhouse") to review the First Report and subsequent reports by Mr. Pak. Subsequently, however, the defendant withdrew from that engagement leaving the plaintiff to deal with it and to pay for it **on** its own. Pricewaterhouse advised the plaintiff that there were errors in those reports of Mr. Pak.

[21] On about September 9, 2009, the defendant convinced that the plaintiff would not admit to the alleged overcharges and repay them, caused the plaintiff's nine ATMs at the Casino to be removed and replaced by ATMs owned by the defendant. Further, the defendant replaced Churchill with another armoured car carrier. On that same date, after these steps were taken, the defendant so notified the plaintiff

[22] In response, the plaintiff commenced this action on that or the next day, and applied on short leave for an order that its nine ATMs be returned to the Casino and that the defendant's ATMs be removed.

PREVIOUS HEARING

[23] The main motion before the Court at the Previous Hearing was resolved at the outset in that the defendant consented to the return of the plaintiff's ATMs to the Casino, and removal of its own ATMs.

[24] Mr. Church for the defendant also confirmed that it was treating the Joint Venture as continuing in effect and not terminated for fundamental breach or any other reason. He submitted that the defendant intended to counterclaim that the plaintiff had sought and accepted the reimbursements misrepresented as Operating Costs, and was therefore liable to the Joint Venture for the total of those amounts on grounds of breach of contract and misrepresentation, and misappropriation.

[25] Based on the reports of Mr. Pak, Mr. Church submitted further that the defendant had a strong case for the return of those funds, that there was a serious risk of dissipation of those funds, and of the assets of the plaintiff generally, such that the Court should make an interlocutory order freezing all further distributions of net revenue to the plaintiff up to one-half of those challenged reimbursements, that is, one-half the total of $349,000, or $174,500.

[26] Mr. Douvelos **for the plaintiff** submitted that the Pricewaterhouse Report had revealed a number of incorrect assumptions and calculations by Mr. Pak. He suggested that there was more to be revealed, that the plaintiff had not yet had the opportunity to review Mr. Pak's files and other documents. He did not at that time, however, object in principal to the imposition of a freeze on subsequent distributions of net revenue of the Joint Venture. He only complained that the amount to be frozen should include all of the net revenue, and not only the plaintiff's share. Neither did he raise any question with respect to Mr. Pak's impartiality. In fact, at that stage, the plaintiff had not pleaded any breach of duty by Mr. Pak.

[27] My view of the freeze order application was that the grounds were thin. The only evidence of potential dissipation was disclosed in an affidavit of June 3, 2009, Mr. Walji who deposed that he was concerned that the assets in the hands of the plaintiff could be dissipated. There was no reason expressed or evidence to justify the reason for Mr. Walji's concern. The evidence, as a whole, was mainly opinion and hearsay and could have been disallowed for those reasons.

[28] Both counsel conceded that they had not been able to review all documents relevant to Mr Church's counter application for an injunction, but neither wished to delay the hearing of it, and neither asked for an adjournment. On the other hand, counsel agreed that the Order should include the words "liberty to apply" to signal that with the production and inspection of further documents and other inquiries, it would be possible to apply to vary the Order in due course.

NATURE OF RELIEF

[29] The essence of the Previous Order was to provide prejudgment security for the defendant's claim. It was thus in the nature of a Mareva Injunction, which is a species interlocutory injunction intended to freeze the exigible assets of the opposing party to check against the risk of dissipation of assets or their removal from the jurisdiction and outside of the Court's reach pending determination of the issues. (*Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at para. 26 [*Aetna*]); (*Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 45 [*Tracy*]).

[30] The test was recently affirmed by the British Columbia Court of Appeal in *ICBC v. Patko*, 2008 BCCA 65 at paras. 25-26:

> Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interests of the two parties must be balanced, having regard to all the relevant factors, to reach a just and convenient result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: *Mooney No. 2* at

para. 44.

> The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: *Tracy* at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted": *Silver Standard* at para. 21. Thus, though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a *Mareva* injunction in British Columbia.

[31] I was mindful of the caution with respect to *Mareva* Injunctions expressed in *Tracy*, where the BC Court of Appeal at paragraph 37 cited the following passage from Estey J.A. of the Supreme Court of Canada in *Aetna*:

> There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial. ...

EVIDENCE OF BIAS

[32] The plaintiff now complains that Mr. Pak's conclusions were drawn largely on hypotheses rather than facts, and that by applying himself in that manner, he acted with partiality and bias in favour of the defendant. The following are examples cited by the plaintiff:

> a) Mr. Pak submitted his First Report at the behest of Mr. Walji without advising the plaintiff and he failed to mention to the plaintiff the high degree of collaboration he carried on with the defendant.
>
> b) Mr. Pak failed to mention the large amount of speculation and assumptions he made in his determinations.
>
> c) Mr. Pak's calculations for overcharges in the First Report changed in subsequent reports. On October 23, 2009, he provided a potential overcharge amount of $164,300; on November 30, 2009, a further revision to only $89,066; and then on May 23, 2010, a further revision to $194,517. In this regard he consulted with Mr. Walji, but not with the plaintiff.
>
> d) On May 19, 2010, after initial reluctance, Mr. Pak produced a copy of his file for inspection by the plaintiff. He enclosed a covering letter stating "In connection to your request, I have asked David Church to see if any of my communications with him regarding Farhad (Mr. Walji) [are] privileged?"
>
> e) Along with his file, Mr. Pak produced various emails between himself and Mr. Walji which satisfy me that very clearly Mr. Pak saw his primary duty as being to Mr. Walji as opposed to the defendant and the plaintiff as joint venturers.
>
> f) In one email to Mr. Walji on October 7, 2009, Mr. Pak states:
>
> > "As I have said before, my report is heavily based on hypotheses. If three experts look at the situation, there will be three different results. All PwC is to [*sic*] criticize some

> aspects of it, and throw it to the ditch. If your action is solely based on my report, you will have the onus to prove it with another expert to say that “yeah it is right”.

g) In an email dated November 5, 2009, from Mr. Pak to Mr. Walji, Mr. Pak states:

> “My concern is that if the security service cost is doubled from Churchill in order to reduce the overall interest cost… the combined cost of interest and security would somehow revert back to what Canadian has charged. It does not look very convincing.”

This indication of Mr. Pak’s attitude was not passed on to the plaintiff, according to the plaintiff.

[33] In my opinion the plaintiff had and has a reasonable case on the facts alleged for a finding of bias by Mr. Pak, which, if they had been raised at the Previous Hearing, it would have likely persuaded me not to grant the Previous Order.

VARIATION OF PREVIOUS ORDER

[34] Generally speaking, once an order has been entered, whether final or interlocutory, the court is *functus officio.*

[35] As the authorities provide, the Court may not hear what is essentially an appeal of the same issue. *Newport Sales Co. v. Jason Ventures Ltd.* (1984), 50 B.C.L.R. 152 (S.C.); *Payne v. Newberry* (1890) 13 P.R. 392. Further, Rule 13-1(17) of the *SCC purports to restrict the C*ourt’s jurisdiction to vary an Order to correction of clerical mistakes, slips or omissions.

[36] That said, the Court has wide discretion to vary an interlocutory order where there has been a change of circumstances. The expression “liberty to apply” is utilized to clarify the right to seek variation but one must not interpret those words to permit applications to vary unconditionally. The phrase does not dilute the requirement to show a change of circumstance.

[37] The Court may also amend an interlocutory order that contains a serious defect. An example is found in *First Western Capital Ltd. v. Taylor* (1980), 20 B.C.L.R. 149 (S.C.) [*First Western*], where an order approving a sale of a mortgaged property was set aside owing to the fact that one of the purchasers was in a conflict of interest and the interim agreement that was entered into by the court’s order included certain property that was not authorized to be sold (despite the fact that the mortgagor’s counsel could have seen this before the previous order was entered).

[38] In *Canada Trust Co. v. Sundist Holdings Ltd.* (1981), 29 B.C.L.R. 1 (S.C.), counsel for the respondent applied to have an entered order approving the sale of a property in a foreclosure set aside on the basis that the property was undervalued pursuant to a second appraisal. McEachern C.J.S.C. explained that a judge may not alter or amend an entered order except in limited circumstances:

> **14** There are many cases on the jurisdiction of a Judge at first instance to deal with matters after his order has been entered. Certainly he cannot make a fresh order merely because he has been persuaded to change his mind if the entered order correctly expresses the judgment or order which has been pronounced and if it expresses the manifest intention of the Judge: Payne v. Booze (1979), 10 B.C.L.R. P-9. Orders are often set aside where there has been an accidental omission or a slip (R. 41(23)). There is also a "jurisdiction to make a supplemental order upon new facts, to work out

> the terms of an order, although there is no jurisdiction to alter an order once it has been drawn up and entered;" Scow by v. Scow by, [1897] 1 Ch. 741 at 754, per A.L.R. Smith L.I., quoted by Collins J. in Buxton v. Caress (No. 2) (1959), 27 W.W.R. 459.
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> **15** I understand, therefore, that the law is that an entered order is final and cannot be changed because of new arguments or because the Judge pronouncing the order may have second thoughts about what he has ordered, or where the parties merely advance fresh details of matters which are already before the Court. I certainly wish I had a chance to hear this application de novo but that is not the law.
>
> **16** It is always disturbing to a Judge - particularly in Chambers practice - to find that the facts are not entirely as he thought them to be. In this case I made the order sought to be set aside on the belief that the respondents were not opposing the order, and that the proposal was a reasonable one. If all the matters now disclosed had been before me I would either have made the order I did in fact make (that was all that was before me), or I would have adjourned the application. I was not asked to adjourn the application, and I am now being asked only to reconsider the question of the price.
>
> **17** I do not think the facts of this application permit me to depart from the usual Rule that a Judge cannot alter or amend an order after it has been entered except in the limited circumstances mentioned above. Examples of recent cases where there has been a departure from the usual Rule includes First Western Capital Ltd. v. Taylor, 20 B.C.L.R. 149; Odds son v. Creative Projects Ltd., B.C.C.A., October 10, 1980 (unreported); and Gloucestershire Properties v. R. B.C.S.C., March 31, 1981 (unreported).
>
> **18** In those cases, however, there was a serious defect in the order or in the proceedings. Here the respondents only seek a second opportunity to persuade me not to make the specific order I intended to make, and they chose not to acquaint me with the complexion they now wish to place upon the facts which were before me.

ANALYSIS

[39] Although not expressly stipulated in the Joint Venture Agreement, there is no question that the parties understood Mr. Pak to be an impartial agent for them, and neither party contemplated that he would favour the other party.

[40] With neither counsel raising the issue of bias by Mr. Pak at the Previous Hearing, the suggestion did not leap from the pages of the materials before me on that occasion. There was no reason that I could find to deny the Order sought on grounds of bias.

[41] The defendant now argues that there has been no change of circumstance, and that all of the information now submitted by the plaintiff was within the plaintiff's knowledge, or was ascertainable before the Previous Hearing. That is not quite so. As I have described earlier, a number of documents bearing upon the allegation of bias were not made available, and some were not even published until after the date of the First Hearing. I have in mind particularly two reports issued by Mr. Pak and his file on the matter, none of which were made available until after the Previous Hearing.

[42] The passage of more than a year since the **First Hearing** constitutes a change of circumstance in my view. No longer is there the urgency, and no longer am I prepared to accept Mr. Walji's affidavit **as** the best evidence available to support the previous order. Rather, **with no better evidence to bolster the evidence of Mr. Walji** it raises the inference that the necessary evidence does not exist.

[43] The Previous Order was also predicated on the impartiality and absence of bias of Mr. Pak. The evidence of bias submitted by the plaintiff on this application, and not refuted by the defendant, undermines the defendant's evidence of a strong arguable case for the freeze order, and in my opinion raises a serious defect in the Previous Order.

CONCLUSION

[44] I conclude that the changes of circumstance that I have mentioned make this application to vary the Previous Order appropriate. I find that the evidence to support the freeze order is insufficient, and therefore the **Previous Order** cannot stand and must be varied to cancel the freeze order.

[45] I also find that the evidence of bias and partiality indicates a serious defect in the freeze order, and for that reason also, the Previous Order must be varied to cancel the freeze order.

[46] I hereby exercise my discretion to vary the Previous Order to set aside the injunction to freeze the plaintiff's share of the Joint Venture net profits, and I direct Church and Company to pay all sums held by them pursuant to paragraph 4 of the of the Previous Order to Lindsay Kenney LLP, counsel for the plaintiff, in trust for the plaintiff pursuant to paragraph 4 of the Previous Order.

VARIANCE

[47] I order that my Previous Order be varied as follows:

(a) in paragraph 2 remove the words in the third line "be at liberty to" and remove all of the words in that paragraph from and including the words "Thomas Pak" in the sixth line, and substitute with, "an accountant appointed by consent of the parties, and failing consent, by further order of this Court";

(b) in paragraph 3 remove the phrase "except to the extent that the defendant is entitled to withhold payment of profits to the plaintiff as provided for in paragraph 4 of this Order";

(c) paragraph 4 is deleted in its entirety; and

(d) in paragraph 5 remove the word "defendant" and substitute the word "parties", and further in paragraph 5, after the words "Joint Venture accountant" include the word "succeeding" immediately before the words "Thomas Pak".

MR. PAK

[48] There is no reason on the evidence that I can see for questioning Mr. Pak's honesty or ability in any way. It is simply the case of misunderstanding between the parties as to what Mr. Pak's duties would be, what was the limitation, and how he would report to the Joint Venture. That being so, Mr. Pak's dealings directly with Mr. Walji and lack of communication with the plaintiff affected the impartiality he was bound to employ and created the impression of bias.

[49] With respect to Mr. Pak, the parties have reached an agreement and I so order that by consent:

(a) Mr. Pak will resign as Joint Venture Accountant effective December 15, 2010, and that he will submit a final report as of that date with respect to transactions of the Joint Venture;

(b) Mr. Pak will be entitled to keep for himself as fees the sum of approximately $8,000 that he has received for remuneration subject to taxation;

(c) the Joint Venture will be responsible for that expense, but as to which of either or both of the Joint Venturers will be responsible for payment, that is to be determined later by agreement between the parties and failing agreement by the Court.

DOCUMENTS

[50] I further order that the defendant provide to the plaintiff those documents stated in the plaintiff's notice of application and I order the defendant to provide the plaintiff with its first supplementary list of documents.

[51] **Costs** to the right of counsel to apply within ten days of this Order, costs will be costs in the cause.

"The Honourable Mr. Justice Rice"