

CITATION: Marsh, Christopher and Blockchain Markets Inc. v. Electronica AI Inc. and Aristotle Andrulakis, 2024 ONSC 5869
COURT FILE NO.: CV-20-00636588-00CL
DATE: 20241021

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: Marsh, Christopher and Blockchain Markets Inc., Plaintiffs

AND:

Electronica AI Inc. and Aristotle Andrulakis, Defendants/Moving Parties

BEFORE: Peter J. Osborne J.

COUNSEL: *Jordan Goldblatt*, for the Plaintiffs

Vahid Yeganeh, for the Defendants/Moving Parties

HEARD: October 21, 2024

ENDORSEMENT

The Motion

[1] The defendants/moving parties, Electronica AI Inc. (“Electronica”) and Aristotle Andrulakis (“Andrulakis”), seek leave to amend their Statement of Defence to add additional allegations, and to commence a counterclaim against the plaintiffs, Christopher Marsh and Blockchain Markets Inc. (“BMI”) and add two new parties, Bitbuy Holdings Inc. and Bitbuy Technologies Inc., as defendants by counterclaim.

[2] I pause to observe that the Notice of Motion seeks relief in the form of an order adding the two new Bitbuy parties as defendants to the action. Counsel confirmed in argument that what was intended to be sought was an order adding them as defendants by counterclaim. The motion proceeded on that basis.

[3] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

[4] The principal issue is whether the proposed counterclaim is statute barred as a result of the expiry of the applicable limitation period(s).

[5] The plaintiffs oppose the relief sought on the basis that the defendants ought to have known and in fact did know all of the facts necessary to advance a claim in 2019, or at the latest certainly by early 2022, with the result that the two-year limitation period provided by the *Limitations Act* has expired.

[6] The defendants take the position that the necessary elements of their proposed counterclaim could not have been and in fact were not discovered until they received production of a share exchange agreement and a related letter of intent from the plaintiffs by way of responses to undertakings and refusals earlier this year (in 2024).

[7] In the alternative, they submit that while several causes of action are sought to be asserted, all of their claims are derivative to and dependent on the principal claim of a breach of the *Copyright Act*, with the result that the relevant limitation period is three years as provided in that statute (rather than the two-year limitation period provided for in the Ontario *Limitations Act*), and that has not yet expired, even if the Court were to find that they knew of all relevant facts by 2022.

[8] For the reasons that follow, the motion is dismissed.

The Law

[9] The relevant law is clear. Rule 26.01 provides that on motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[10] In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42 (“*1588444 Ontario*”) at para. 25, the Court of Appeal for Ontario summarized the general principles as follows:

[25] The law regarding leave to amend motions is well developed and the general principles may be summarized as follows:

The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: *Iroquois Falls Power Corp. v. Jacob Canada Inc.*, [2009] O.J. No. 2642, 2009 ONCA 517, 75 C.C.L.I. (4th) 1, at paras. 15-16, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 367, 2010 CarswellOnt 425; and *Andersen Consulting Ltd. v. Canada (Attorney General)*, 2001 CanLII 8587 (ON CA), [2001] O.J. No. 3576, 150 O.A.C. 177 (C.A.), at para. 37.

The amendment may be permitted at any stage of the action: *Whiten v. Pilot Insurance Co.*, (1996), 1996 CanLII 8109 (ON SC), 27 O.R. (3d) 479, [1996] O.J. No. 227 (Gen. Div.), var'd (1999), 1999 CanLII 3051 (ON CA), 42 O.R. (3d) 641, [1999] O.J. No. 237 (C.A.), rev'd [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18.

There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21; and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CanLII 8620 (ON CA), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.), at para. 65.

The non-compensable prejudice may be actual prejudice, i.e., evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 1994 CanLII 416 (ON CA), 17 O.R. (3d) 841, [1994] O.J. No. 633 (C.A.), at paras. 5-7; and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 1995 CanLII 7105 (ON SC), 25 O.R. (3d) 106, [1995] O.J. No. 2220 (Gen. Div.), at para. 9.

Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky*, 1996 CanLII 1762 (ON CA), [1996] O.J. No. 4049, 95 O.A.C. 297 (C.A.), at para. 2; and *Andersen Consulting*, at paras. 36-37.

At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, [2006] O.J. No. 669, 2006 CanLII 5135 (C.A.), at para. 6.

The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 1996 CanLII 36 (ON CA), 27 O.R. (3d) 576, [1996] O.J. No. 231 (C.A.), at paras. 3-4; and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 2003 CanLII 64295 (ON SC), 66 O.R. (3d) 74, [2003] O.J. No. 3034 (Master), at para. 21.

The onus to rebut presumed prejudice lies with the moving party: *Family Delicatessen*, at para. 6.

[11] The Court of Appeal for Ontario has also been clear that Rule 26.01 does not require that amendments must be allowed in all circumstances. There is no absolute right to amend pleadings,

and the residual discretion contemplated directly in the language of Rule 26.01 can be exercised if the responding party would suffer non-compensable prejudice, or if the amendments are untenable: *Avedian v. Enbridge Gas Distribution Inc.*, 2023 ONCA 289 (“*Avedian*”) at para. 6 (where the Court of Appeal quoted with approval from *1588444 Ontario*); *Marks v. Ottawa (City)*, 2011 ONCA 248 (“*Marks*”) at para. 19.

[12] An amendment is untenable if it is not *prima facie* meritorious, or if it is not sufficiently particularized: *Marks*, at para. 19.

[13] The passing of a limitation period automatically gives rise to the presumption of prejudice for the purpose of Rule 26.01: *Jolicoeur v. 1154479 Ontario Inc.*, 2019 ONSC 1635 at para. 3, citing with approval *Frohlick v. Pinkerton Canada Limited*, 2008 ONCA 3 (“*Frohlick*”) at paras. 17 and 18.

[14] Generally, if a limitation period has expired, an amendment is not permitted, and the moving party must show the existence of special circumstances that, in the context of the existing claim, rebut the presumption that the responding party will suffer prejudice from the loss of a limitation defence. This presumption of prejudice cannot be compensated for by costs or an adjournment will be determinative unless the party seeking the amendment can show the existence of special circumstances that rebut the presumption: *Frohlick*, at paras. 17, 18 and 22.

[15] Rule 26.01 does not contemplate the addition of unrelated statute barred claims by way of an amendment to an existing statement of claim. Conceptually, they should be treated no differently than the issuance of a new and separate statement of claim that advances a statute barred claim: *Frohlick* at para. 24.

[16] Rule 5.04(2) provides that at any stage of a proceeding, the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[17] A proposed amendment that would add a party pursuant to Rule 5.04(2) must, among other things, meet all of the tests under Rule 26.01: *Plante v. Industrial Alliance Life Insurance Co.*, (2003), 66 O.R. (3d) 74, 2003 CanLII 64295 (ONSC) at para. 27. Accordingly, the two analyses involve a consideration of the same factors, among others.

[18] A claim commenced after the second anniversary of the day on which the claim was discovered is statute barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s.4. Section 5 codifies the discoverability principle:

- 5 (1) A claim is discovered on the earlier of,
- (a) the day on which the person with the claim first knew,
- (i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[19] Section 5(1)(b) set out above makes discoverability objective and not just subjective as it is in subsection (a) (i.e., actual knowledge).

[20] The *Copyright Act*, R.S.C. 1985, c. C-42 provides in section 43.1 that:

Limitation or prescription period for civil remedies

43.1 (1) Subject to subsection (2), a court may award a remedy for any act or omission that has been done contrary to this Act only if

(a) the proceedings for the act or omission giving rise to a remedy are commenced within three years after it occurred, in the case where the plaintiff knew, or could reasonably have been expected to know, of the act or omission at the time it occurred; or

(b) the proceedings for the act or omission giving rise to a remedy are commenced within three years after the time when the plaintiff first knew of it, or could reasonably have been expected to know of it, in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the act or omission at the time it occurred.

Restriction

(2) The court shall apply the limitation or prescription period set out in paragraph (1)(a) or (b) only in respect of a party who pleads a limitation period.

Analysis

[21] Electronica maintains offices in Ontario. Andrulakis is an officer and director.

[22] BCM is an Ontario company founded by Christopher Marsh (“Marsh”) in 2016 with the stated purpose of creating an exchange platform for crypto currencies: a system to transact and trade bitcoin, Ethereum and others.

[23] The dispute arises out of a contractual relationship that began seven years ago. In October, 2017, Electronica entered into a Service Agreement with BCM to develop the crypto currency trading platform. It was later amended to incorporate additional terms as agreed by the parties.

[24] Electronica agreed to provide research and development services including the creation and refining of equity trading models for BCM’s crypto currency trading exchange for bitcoin and other crypto currencies for which Electronica would provide a “bitcoin inventory” for Electronica to provide “liquidity facilitation for the [BCM] Exchange”.

[25] Pursuant to the terms of the Service Agreement, Electronica could obtain equity in BCM, together with other benefits, on completion of the Service Agreement. Also pursuant to the Service Agreement, Electronica was loaned 50 Bitcoins from BCM. Electronica was to trade the Bitcoins with profits generated from that trading divided equally.

[26] Approximately 13 months after the Service Agreement was entered into, in November 2018, First Ledger Corp. (“First Ledger”) acquired BCM pursuant to a Share Purchase Agreement (the “SPA”). The Service Agreement between Electronica and BCM was still in effect.

[27] Around the same time, the relationship between Electronica and BCM broke down. Marsh demanded that Electronica return the 50 Bitcoins. Electronica refused.

[28] Marsh then commenced this proceeding in August, 2019, initially by way of Application, for an order compelling the return of the 50 Bitcoins and for other relief.¹

[29] The Defendants assert on this motion however that they were unaware of the full extent of the terms of that SPA until the plaintiffs produced the SPA itself in January, 2024 by way of response to undertaking, having previously refused to produce the document when it was requested on examinations for discovery. In particular, the defendants assert that:

- a. the November 2018 acquisition of BCM by First Ledger was a breach of the Service Agreement; and
- b. BCM unlawfully transferred its (Electronica’s) intellectual property to other third parties (i.e., First Ledger).

¹ Notice of Application issued August 29, 2019.

[30] I am unable to conclude on the evidence in the record, however, that the counterclaim now sought to be advanced was not discoverable until the SPA itself was produced this year. Nor am I able to conclude on the evidence that it was in fact not discovered.

[31] On the contrary, the evidence is clear and to the opposite effect. The defendants/plaintiffs by counterclaim, were well aware of the First Ledger Transaction and of the requisite elements to establish discoverability in accordance with s. 5 of the *Limitations Act* at least by the fall of 2019, if not earlier. I reach this conclusion for a number of reasons.

[32] First, the affidavit of Marsh affirmed October 28, 2019 filed in support of the Application expressly pled the acquisition of BCM by First Ledger. Marsh affirmed at para. 3 that:

I was the sole director, officer, and shareholder of BCM **until November, 2018 when BCM's shares were exchanged for shares in First Ledger Corporation, which operates a similar platform to transact in digital currencies.** I remain a minority shareholder of BCM. ... **Executives from First Ledger** [certain named individuals] **are now the directors and officers of BCM, and they collectively have a large shareholding in the company.** [Emphasis added].

[33] Second, on September 26, 2019, the principal of Electronica, Andrulakis, advised BCM (through Marsh) in a written electronic mail exchange and particularly in the context of an exchange about equity that he was well aware of the facts necessary to make the counterclaim now proposed discoverable. Andrulakis stated expressly that he had only developed software for BCM without being paid because of the promise of future equity (“we were minority owners in your business with significant upside equity”), and that:

I then found out from you in September 2018 that you sold the business in the most abrupt fashion.”² [emphasis added].

[34] In the same electronic mail communication of September 26, 2019, Andrulakis continued, following the above-noted acknowledgement that he was aware that BCM had sold the business, and stated:

I asked you for details of the sale of BCM to the acquirer; you said you would provide it later, but never did.” [Emphasis added].

² I agree with the submission of the plaintiffs that while the reference to September is likely an error, the specific date referred to in Andrulakis' email as between September 2018 and November 2018 (the date referred to in his affidavit) is not material for the purposes of this motion.

[35] He then continued further, specifically about the sale of BCM, to state that he had sought legal advice with respect to the transaction with First Ledger and the very issues now sought to be asserted in the counterclaim:

After some more conversations again in November without any details of the sale along with BCM's breach and paying Electronica's invoice from October, **I spoke with my lawyer. I then asked you for proof of ownership of the remaining coins. I remained sceptical of your claim to the property** despite your attestations **due to BCM's share sale.** [Emphasis added].

[36] Accordingly, and at least as of September 26, 2019, Andrulakis was acknowledging repeatedly that:

- a. he was aware of the First Ledger Transaction;
- b. he was aware that it was a share sale;
- c. as a result of the share sale, he was concerned about the equity of Electronica in BCM;
- d. further, as a result of the share sale, he was concerned about the intellectual property that he was aware was part of the First Ledger Transaction, and he was taking the position that in entering into the First Ledger Transaction, BCM had "disposed of" Electronica's intellectual property; and
- e. he was seeking legal advice with respect to these issues.

[37] I pause to observe that these are the facts of which the defendants/moving parties, now seek to complain in the proposed counterclaim. In their factum submitted on this motion, they submit that the new evidence on which they now seek to rely, and which was disclosed only in January, 2024: "revealed that EAI's intellectual property, developed under the Service Agreement with BCM, was unlawfully transferred during BCM's acquisition by First Ledger Corp. This intellectual property was later used by [sic] related company, Bitbuy Technology Inc. to develop and launch Bitbuy Pro, a continuation of the BCM Exchange platform" (para. 3). Those parties knew all of this in 2019.

[38] Third, and after this proceeding was converted from an Application to an Action, Electronica delivered its statement of defence dated July 16, 2021 in which it pled that:

- a. BCM had "been sold to third parties in November 2018" (paras. 4 and 16);

- b. Electronica’s work had created wealth and value for BCM and Chris [Marsh] (para. 16);
- c. “in breach of BCM’s obligations, Chris [Marsh] sold BCM in 2018 for an unknown but significant profit. This sale by BCM had a negative effect on [Electronica] which was then unable to take advantage of the various benefits, rights and options under the Services Agreement” (para. 16);
- d. BCM was “liable for any claims against [Electronica] which result from its own non-compliance (para. 16); and
- e. [Electronica] relied on the doctrines of legal and equitable setoff given “the plaintiffs’ breaches and outstanding amounts owing under the Services Agreement” (para. 23).

[39] However, and notwithstanding the knowledge of the First Ledger Transaction and of its claims as was clear from the September 26, 2019 electronic mail communication and pleadings of the moving parties in their statement of defence, Electronica failed to commence any claim (i.e., the counterclaim now proposed).

[40] I pause to observe that the statement of defence further specifically pleads the expiry of the limitation period in the *Limitations Act* but does not plead or make any reference whatsoever to the *Copyright Act*, let alone the expiry of any limitation period provided thereunder.

[41] Fourth, on his examination for discovery on February 24, 2022, Andrulakis gave evidence that:

- a. he was owed money by BCM;
- b. Electronica took “big discounts” to complete “key technical components” in “consideration of equity ownership of BCM”;
- c. Electronica had “produced a lot of technology that forms the basis of BCM’s exchange”; and
- d. BCM had launched an exchange on the basis of Electronica’s intellectual property that met the required minimum trading volume.³

[42] The next day following that examination, on February 25, 2022, the representative of BCM was examined by counsel for the defendants/plaintiffs by counterclaim. In the course of that

³ See Q. 224, 239, 262, 285 and 290.

examination, examining counsel for Electronica and Andrulakis (the moving parties) stated on the record that:

“my client takes the position that there are outstanding payments, and **there is some dispute as to transfer of intellectual property ownership**”, and that “there is intellectual property of BCM belongs to EAI [Electronica]”. [Emphasis added].

[43] When counsel for BCM objected to the line of questioning on the basis that there was no pleading of an intellectual property claim and refused certain questions, counsel for Electronica took the position that if Electronica had not pled a claim in respect of intellectual property issues, **“we can always amend it [the claim] and come right back.”** [Emphasis added].

[44] Counsel for Electronica continued on the same examination to take the position that:

- a. “work product ... that was created by BCM or for BCM by its ... service providers all came within the control of [First Ledger Corp.];
- b. **“we believe intellectual property have [sic] been transferred from BCM to Bitbuy”**; and
- c. EAI had “learned about that from the public domain about what Bitbuy has been doing, etc.”. [Emphasis added].⁴

[45] The moving party defendants still, even following those examinations for discovery in 2022, never advanced the counterclaim until they delivered the proposed amended claim on July 31, 2024, which was:

- a. over two years following the examinations for discovery in February, 2022;
- b. over three years following delivery of their statement of defence on July 16, 2021; and
- c. almost four years following their own September 2019 electronic mail communications specifically referencing the requisite elements of the counterclaim now sought to be advanced.

[46] They had all the elements of discoverability of their claim: a) knowledge of injury, loss or damage; b) knowledge that the injury, loss or damage was caused or contributed to by an act or omission; c) knowledge that the act or omission was that of the person against whom the claim is

⁴ Q. 362, 364, p. 113 Q 150 and p. 116.

now sought to be made; and d) knowledge that a proceeding would be the appropriate means to seek to remedy the alleged harm.

[47] The only evidence upon which the defendants/moving parties, rely in this motion that is relevant to these issues is found in two paragraphs of the affidavit from Andrulakis where he describes the “new information”: paras. 16 and 17. Andrulakis states that EAI was “unaware of the details of the transaction” between BCM and First Ledger” and that “a significant portion of EAI’s intellectual property, developed under the [Service Agreement] was unlawfully transferred by BCM to First Ledger Corp., and subsequently to Bitbuy Technologies Inc.”

[48] As stated above, Andrulakis was clearly aware of these facts years ago, and therefore the claim was in fact discovered. Moreover, and even if I were in error in that regard, in my view the claim was clearly discoverable given the facts that were known. There can be no successful argument to the effect that the first time that EAI learned that it had suffered a loss, or that the loss was caused by an act carried out by the proposed defendants to counterclaim, was January 2024 when it received what it now says was “new information”.

[49] I accept the submission of the plaintiffs that, at its highest, what the defendants received in January of this year amounted to evidence that supports the claim of which it was clearly already aware, and which its counsel had stated on the examination for discovery in 2022 that it would bring if necessary. A prospective litigant need not know the exact extent or type of harm suffered or the precise cause of injury: *Rumsam v. Pakes*, 2019 ONCA 748 at paras. 23-24.

[50] Further, and as expressed by this Court, “[T]he claimant need only know enough material facts on which to base a legal allegation. Once the plaintiff knows that some damage has occurred and has identified the alleged wrongdoer, “the cause of action has accrued”. Neither the extent nor the type of damage need be known. The claimant also need not know the details of the wrongdoer’s conduct, or how the wrongdoer caused a loss. The question of “how it happened” will be revealed through the legal proceeding.”: *Beaton v. Scotia iTrade and Scotia Capital*, 2012 ONSC 7063, at para. 13, aff’d 2013 ONCA 554.

[51] In addition, I am satisfied that separate and apart from the presumption of prejudice, there is in fact real prejudice that will accrue here if the proposed amendments are allowed. At a minimum, there is no question that the plaintiffs will lose their (now imminent) trial date in an action that is already four years old. That itself may form non-compensable prejudice, particularly where the litigation has already been significantly delayed, as it has here: *Horani v. Manulife Financial Corporation*, 2023 ONCA 51 at para. 35.

[52] This matter is already set for trial, now scheduled to commence in almost exactly three months on January 13, 2025. I accept the submission of the plaintiffs/defendants to counterclaim, that it has been a challenge to advance this litigation in large part due to the conduct of the defendants/plaintiffs by counterclaim, which have included the following:

- a. when the Application was converted to an Action, the defendants opposed the filing of the Statement of Claim by the plaintiffs on the basis that while it had been delivered, the proposed filing was late as a result of the Covid 19 pandemic. A motion was required. Conway, J held that the plaintiffs were entitled to file the Statement of Claim, in order to case management timetable;
- b. the defendants breached the timetable, apparently on the basis that counsel for the defendants could not locate Andrulakis. Counsel considered removing themselves from the record, but after some delay a new timetable is imposed, again by Conway, J;
- c. the plaintiffs scheduled a case conference to fix a trial date in September, 2023, but the process was frustrated because counsel who attended for the defendants was unfamiliar with the file. The Court ordered a further case conference and specifically directed that counsel who will be doing the trial was required to attend;
- d. days before that rescheduled case conference, the defendants changed counsel and the scheduling conference was again adjourn for another month; and
- e. the scheduling conference was ultimately conducted, and a trial date was ultimately scheduled. At the same case conference, refusals from the examinations for discovery were discussed, as a result of which, counsel for the plaintiffs advised that they would answer refusals subject to a reservation of rights other than “with respect to issues of privilege or proprietary information”. When the Endorsement in respect of that case conference was released, the caveat was inadvertently omitted and counsel for the defendants refused to agree, with the result that judicial intervention was again required, following which the Court confirmed that plaintiffs’ counsel was correct. The Court further noted that cooperation among counsel was expected.

[53] While events such as those set out in the above chronology may not always be relevant on a motion such as this, I accept the submission of the plaintiffs that there has already been significant delay and challenges in getting this matter on for trial, which is now scheduled to be effectively imminent, and real prejudice from further delay will result. At its core, this Action (originally an Application) is a claim by the plaintiff, BCM, against Electronica for the return of 50 Bitcoins that it admits it received but which it maintains it has no obligation to return. While of significant importance to the parties, that is a relatively straightforward claim.

[54] The proposed amendments to the pleading would add new allegations but would also add two new parties to the action: Bitbuy Holdings Inc. and Bitbuy Technologies Inc. (together, the “Bitbuy Entities”).

[55] As is clear from the examination for discovery transcript excerpts above, questions specifically about Bitbuy’s use of Electronica’s intellectual property were put to the witness for

BCM on discovery, all consistent with Electronica’s long-held belief and theory of its claim that Bitbuy (specifically named) took the benefit of Electronica’s intellectual property.

[56] The proposed Counterclaim in respect of which leave is now sought would:

- a. advance a new claim in breach of contract, alleging that BCM breached the Services Agreement;
- b. advance a new claim of copyright infringement and breach of the *Copyright Act* against Marsh, BCM and the Bitbuy Entities (as noted above, no breach of the *Copyright Act* was previously pled at all);
- c. advance a new claim of breach of confidence (seemingly together with breach of contract), alleging that Marsh and BCM unlawfully disclosed Electronica’s confidential information and trade secrets;
- d. advance a new claim in negligence against Marsh and BCM in respect of their alleged handling of “contractual obligations and proprietary information”;
- e. advance a new claim of breach of fiduciary duty against Marsh and BCM for failing “to protect Electronica’s intellectual property”;
- f. advance a new claim of unjust enrichment against Marsh, BCM and the proposed new defendants to counterclaim, the Bitbuy Entities, for using “Electronica’s intellectual property without proper compensation;
- g. plead an oppression claim against BCM for unfairly disregarding the interests of Electronica; and
- h. seek declaratory relief in the form of a declaration that Electronica owns intellectual property developed under the Services Agreement, and that it “possesses an equitable interest in the BCM shareholders’ stake in the successor entities Bitbuy Holdings Inc. and Bitbuy Technologies Inc.”, for which it seeks damages and injunctive relief.

[57] I pause again to observe that while the proposed Counterclaim would plead a breach of the *Copyright Act* (i.e., the unlawful transfer and unauthorized use of the intellectual property of Electronica by BCM to third parties, and further while the proposed Counterclaim continues to plead the two year limitation period in the *Limitations Act*, it still does not plead the three year limitation period in the *Copyright Act* on which it sought to rely at the hearing of this motion.

[58] In any event, and even if it had done so, in my view, the claims now sought to be advanced are not, as was submitted by the moving parties, entirely derivative of a breach of the *Copyright*

Act. On the contrary, it is clear from a plain and common sense reading of the pleading that the claims flow directly from the alleged breach of contract (the Service Agreement). The core allegation at the root of all of the claims now sought to be advanced (breach of contract, negligence, unjust enrichment, breach of confidence and copyright infringement) has the same factual underpinning: an alleged transfer of intellectual property owned by EAI to a third party through BCM. Accordingly, the two-year limitation period in the *Limitations Act* applies.

[59] Moreover, and in the event that I am in error in this regard, since I have found that the claim was not only discoverable but in fact discovered at least by September 26, 2019, the issue about which statute applies is moot since the proposed Counterclaim was not brought within even the longer three-year limitation period.

[60] It follows that:

- a. the applicable two-year limitation period has expired;
- b. even if the three-year limitation period applied (and I have found that it does not apply on the facts and nor has it been pleaded, even in the proposed amendments), it also has expired;
- c. prejudice within the meaning of Rule 26.01 that cannot be compensated for by costs or an adjournment is presumed as a result;
- d. there are no special circumstances present here, such as would rebut the presumption of prejudice from the expiry of the limitation period (in addition, neither costs or an adjournment is offered or proposed to be adequate here anyway. There is no evidence or submission to this effect, and in the moving parties have neither offered costs nor put forward any evidence that they could rebut the prejudice by, for example, paying costs in any event);
- e. there is actual prejudice separate and apart from the presumption, given the imminent trial date and the delays that have occurred already in getting a relatively straightforward matter to trial; and
- f. for the same reasons, there is prejudice that cannot be compensated for by costs or an adjournment for the purposes of Rule 5.04(2), such that the proposed new parties ought not to be added.

[61] For all of these reasons, leave is denied in respect of the proposed amendments to add the Counterclaim, including the addition of the proposed new parties.

[62] I agree with the submission of the plaintiffs (which the defendants did not contest in argument) that the relatively modest amendments to the Statement of Defence that refer to the

proposed new entities sought to be added to the Counterclaim, the Bitbuy Entities, should stand or fall with the proposed amendments to the Counterclaim, and for the same reasons.

[63] Accordingly, the motion is dismissed.

[64] The successful parties are presumptively entitled to their costs of this motion.

[65] The parties submitted respective Costs Outlines. The defendants sought costs if they were successful, on an “actual costs incurred” scale of \$13,348.12 inclusive of fees and HST. Their Outline also reflected costs, inclusive of fees and HST, of \$11,532.78 on a substantial indemnity scale and \$7688.52 on a partial indemnity scale. The plaintiffs sought costs, inclusive of fees and HST, on a substantial indemnity scale of \$13,050.65 and on a partial indemnity scale of \$8700.44.

[66] Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[67] Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

[68] The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).

[69] Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

[70] In my view, there is no basis upon which to justify an award of costs on any scale other than partial indemnity in the circumstances of this case. Taking into account the Rule 57 factors, an appropriate award of costs here is \$8500, inclusive of fees and HST. That amount is payable by the defendants to the plaintiffs within 30 days.

[71] Order to go in accordance with these reasons.

Osborne J.