

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ace Excavating Ltd. v. Bersenev*,
2024 BCSC 342

Date: 20240228
Docket: S224376
Registry: Vancouver

Between:

Ace Excavating Ltd.

Plaintiff

And

**Nikita Bersenev, Christopher Legault and
Cancon Construction Ltd.**

Defendants

Before: Associate Judge Muir

Reasons for Judgment

Counsel for the Plaintiff:

D. Preston

Counsel for the Defendants:

W. Sweeney

Place and Date of Hearing:

Vancouver, B.C.
February 7, 2024

Place and Date of Judgment:

Vancouver, B.C.
February 28, 2024

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The Application

[1] This was an application by the plaintiff, Ace Excavating Ltd. (“Ace”), for document production from the defendants.

[2] Ace sought the following:

1. An order, pursuant to Rule 7-1(13), that Nikita Bersenev, Christopher Legault and Cancon Construction Ltd. produce and deliver to counsel for Ace Excavating Ltd. copies of the following list of documents in their possession and control:
 - a) All correspondence with Domus Homes regarding the Laurel project;
 - b) All copies of any correspondence between Mr. Bersenev and or Cancon and Ledcor Construction regarding the Tall Timbers project at BCIT;
 - c) Copies of all Cancon takeoff documents related to the Laurel project with Domus Homes, Tall Timbers with BCIT, the Alliance project with Haebler Construction, and the Sunshine project with TL Housing;
 - d) [Adjourned generally];
 - e) Any emails or text messages between Mr. Legault and Mr. van Empel between April 2021 to November 2021;
 - f) Copies of financial statements of Cancon since the incorporation of 1336238 BC Ltd. up to the date of trial;
 - g) Copies of tax filings for Cancon;
 - h) Copies of text messages sent or received between Mr. Legault and any clients or customers of Ace between September 1, 2021, and Mr. Legault’s date of resignation from Ace;
 - i) Copies of the 250 estimates that Cancon has produced for its clients or potential clients since its inception;
 - j) Copies of any emails between Cancon and the principals of Domus Homes regarding the Laurel project from September 2021 until the project commenced;
 - k) Copies of all bidding documentation from Cancon for the BCIT Tall Timbers project;
 - l) Documentation indicating when the Delbrook work was obtained by Cancon and when the work on that project commenced;

- m) Any text messages in Mr. Legault’s possession from September 2021 up to his date of resignation from Ace regarding any clients or customers of Ace;
- 2. An order that the Defendants deliver an amended list of documents reflecting this additional production within 30 days of the date of the order;
- 3. An order, pursuant to Rule 7-2(23), that Christopher Legault must inform himself and provide a written response to the following requests left during his examination for discovery on June 27, 2023:
 - a) [Adjourned generally];
 - b) [Adjourned generally];
 - c) [Adjourned generally];
 - d) [Adjourned generally];
 - e) [Adjourned generally];
 - f) [Adjourned generally];
 - g) [Adjourned generally];
 - h) Advise as to whether or not the Cancon employee agreement contains any confidentiality provisions;
 - i) [Adjourned generally];
 - j) Advise as to whether or not Defendant Legault gave written notice of his resignation from the Plaintiff;
 - k) [Adjourned generally];

[3] Ace also sought costs in any event of the cause, or alternatively costs.

Background

[4] Ace is an excavation and civil contracting company.

[5] The defendant, Christopher Legault (“Legault”), was employed by Ace, ultimately as a site superintendent from approximately July 10, 2015 to November 21, 2021.

[6] The defendant, Nikita Bersenev (“Bersenev”), was employed by Ace, ultimately as its senior estimator and project manager from approximately November 13, 2017 to November 12, 2021. As a term of his employment, Bersenev signed an employment agreement that included the following:

Confidentiality

The Employee understands and agrees that all confidential information of Ace Excavating and any other information from which Ace Excavating derives value or the disclosure of which would cause harm to Ace Excavating, is the exclusive property of Ace Excavating. The Employee agrees that the Employee will not use or disclose confidential information while employed by Ace Excavating or after the Employee’s employment with Ace Excavating ends for any reason whatsoever except as it necessary to properly carry out the Employee’s duties and responsibilities on behalf of Ace Excavating. The Employee further agrees that the Employee will use the Employee’s best efforts to protect and safeguard confidential information from all disclosure, loss, theft or destruction.

[...]

No Conflict of Interest

The Employee agrees that the Employee will not hold any office, acquire any property, or enter into any contract, arrangement, understanding, or transaction with any other person or entity that would in any way conflict or interfere with the Employee’s duties, responsibilities, or obligations under this Agreement.

[7] Legault and Bersenev (together, the “former employees”) formed and operated the corporate defendant, Cancon Construction Ltd. (“Cancon”) (collectively, the “defendants”).

[8] It is alleged that Cancon is a direct competitor of Ace.

Positions of the Parties

The Plaintiff

[9] It is alleged in the notice of civil claim filed May 30, 2022 (the “NOCC”) that the former employees breached their contracts, were engaged in a civil conspiracy, and that Bersenev breached his fiduciary duty to Ace, all by disclosing, obtaining, or stealing and using confidential and proprietary information from Ace to their benefit and the benefit of Cancon.

[10] It is said that the former employees were planning on forming Cancon in the summer of 2021 and upon the examination for discovery of Bersenev, Ace learned that Bersenev had arranged financing from a Mr. van Empel in October 2021 for the start up of Cancon.

[11] Jairus Korpa (“Korpa”), the Assistant Project Manager and Lead IT with Ace, provided an affidavit #2 sworn December 18, 2023 in these proceedings, detailing an audit that he undertook of the Ace computer system.

[12] Korpa was notified by an alert on the Ace computer system of an unusual increase in file activity beginning October 2, 2021. His evidence is that he soon learned that these notifications had been triggered by Bersenev’s activities.

[13] As a result, in November 2021, Korpa conducted an audit of the Ace computer system. His evidence is that he discovered that Bersenev had downloaded, uploaded, or deleted over 9,000 Ace documents between July 8, 2021 and November 10, 2021. These included approximately 266 Ace estimating documents, as well as project-related records, quotes, safety documents, forms, and allegedly proprietary data. It is said that this is orders of magnitude larger than what would be required for the purposes of Bersenev’s employment with Ace.

[14] It is alleged that a majority of these documents were downloaded, uploaded, deleted or moved by Bersenev on November 2, 2021, which was one day after he submitted his resignation to Ace.

[15] It is also said that there were a vast number of daily job site tracking reports downloaded that were not directly related to any of the projects Bersenev was working on.

[16] The evidence allegedly indicates that Bersenev downloaded numerous files to external storage devices and then attempted to delete the record of his accessing the files.

[17] Korpa also reviewed the records from Ace’s PlanSwift software, a program used to compile takeoffs for projects. His evidence is that he found that Bersenev had accessed files related to two of his projects, the BCIT Tall Timbers project and the Domus Homes Laurel project, as well as certain projects that Ace had no knowledge of. Korpa’s evidence is that his review indicated that various takeoff and

bid data files were saved onto external storage devices and then deleted from Bersenev's laptop.

[18] In addition, Korpa's evidence is that his audit revealed that Bersenev also made copies of Ace's 2021 Force Account rates. It is alleged that these rates are confidential and proprietary information.

[19] Further, on his examination for discovery, it is alleged that Bersenev admitted to using confidential Ace information to create the Cancon business plan, in particular, an estimate of Ace's annual profit. It is alleged that this information was shared with Legault and Mr. van Empel prior to his agreeing to finance Cancon.

[20] Further, Ace alleges that due to unlawful use of Ace's confidential information, Ace lost certain projects, including the Domus Homes Laurel project, the BCIT Tall Timbers project, the Haebler Construction Alliance project, and the TL Housing Sunshine project.

[21] The plaintiff has demanded production of the documents sought in accordance with the rules and provided a rationale for their relevance. The documents are sought both under Rule 7-1(1) of the *Supreme Court Civil Rules*, as capable of proving or disproving a material fact, and under Rule 7-1(11) as containing information which might enable the plaintiff to advance its case or damage the defendants' case, or might lead to a train of inquiry in that regard: *Global Pacific Concepts Inc. v Owners of Strata Plan NW141*, 2011 BCSC 1752.

The Defendants

[22] The defendants have many innocent explanations for all of the various activities alleged to constitute, *inter alia*, the taking and use of confidential information.

[23] The defendants dispute many of the facts and conclusions reached from Korpa's audit. Further, they say that the plaintiff has failed to show that any of the documents allegedly taken were confidential or used by the defendants in any way.

[24] They point to the explanations advanced by Bersenev on his examination for discovery and a very short affidavit from Bersenev (affidavit #2 sworn January 5, 2024) in response to this application. He responds in his affidavit to deny the allegations that he wrongly used Ace's force account rates and that he used Ace information to draft Cancon's employee agreement templates. Bersenev does not deal with the other issues, with counsel relying on evidence from his examination for discovery on those points.

[25] On his examination for discovery, Bersenev asserted that he was looking in the Ace records, amongst other things, to simply verify the accuracy of his bidding assumptions over the years. He denies taking or misusing anything confidential.

[26] The defendants assert that they were free to compete with Ace and that they did so without any unlawful use of information.

[27] The defendants also say that the plaintiff's application has not sufficient foundation in the pleadings. They point out that there is no mention of clients in the NOCC, nor is it pleaded that the former employees were working on advancing Cancon while they remained employed with Ace.

[28] The defendants argue that it is not sufficient to rely on a plea of breach of fiduciary duty to broadly seek documents, e.g., dated while the former employees were still working at Ace, as there is no plea that they breached any fiduciary duty during that time.

[29] The defendants rely on *Red Avocado Sales Inc. v. Yao*, 2019 BCSC 996, where Madam Justice Baker noted at para. 30:

[30] While counsel are required to explain how documents are relevant, and such explanations often involve more detail [than] the pleadings themselves, the court must always be able to link the explanations to the pleaded allegations. It is not correct for a court to accept submissions of counsel which effectively create whole new unpleaded allegations.

[30] The defendants assert that the documents sought relate to many projects, none of which are named in the NOCC and many of which are unidentified.

[31] The defendants also complain that many of the documents sought could only go to remedy and that production of those documents is premature. They argue the documents contain confidential information to Cancon and that Ace could unduly benefit from their production in advance of a determination of liability.

[32] In addition, the defendants argue that the breadth of documents sought are disproportionate to the issues and refer to *Red Avocado Sales Inc.* at para. 20 in support of their position that proportionality is a relevant consideration on document production applications.

Analysis and Dispositions

Entitlement Generally

[33] The first issue is the breadth of the pleadings and their ability to support an order for production of the documents sought.

[34] In the NOCC, Part 1, Statement of Facts, the plaintiff pleads the following (in part):

BREACH OF CONTRACT

12. Defendant Bersenev and Defendant Legault were contractually bound to not disclose Ace's confidential information while employed by Ace, or after their employment with Ace was terminated for any reason, except as necessary to carry out their employee duties and responsibilities on behalf of Ace.

13. At times and in ways presently unknown to Ace but known to the Defendants, Defendant Bersenev and Defendant Legault used, disclosed and/or retained confidential information of Ace for reasons beyond what was necessary to properly carry out their employee duties and responsibilities on behalf of Ace, to the detriment of Ace.

CIVIL CONSPIRACY

14. At a time presently unknown to Ace but known to the Defendants, Defendant Bersenev and Defendant Legault started Cancon, a direct competitor of Ace.

15. Cancon is in the business of excavating and civil contracting.

16. At times and in ways presently unknown to Ace but known to the Defendants, the Defendants conspired together to obtain confidential and proprietary information belonging to Ace for use by the Defendants with the intent of injuring Ace.

17. In furtherance of this conspiracy between the Defendants, between July 8, 2021 and November 10, 2021, or at an earlier date not known to Ace but known to the Defendants, Defendant Bersenev surreptitiously stole and/or removed confidential and proprietary information from Ace (the “Confidential Information”) without Ace’s consent. [...]

[...]

19. At times presently unknown to Ace and in furtherance of the conspiracy with Defendant Legault and Cancon, Defendant Bersenev delivered to Defendant Legault and Cancon some or all of the Confidential Information.

20. As a result of being in possession of and wrongfully using the Confidential Information, the Defendants have received benefits and profits which they would not otherwise have obtained to the detriment of Ace.

[...]

BREACH OF FIDUCIARY DUTY

27. Defendant Bersenev breached his fiduciary duty and his duty of good faith towards Ace by removing the Confidential Information, and among other things, conspiring to provide the Confidential Information to Defendant Legault and Cancon.

28. Defendant Bersenev and Defendant Legault’s actions resulted in damages, loss, and expense to Ace, including the fact that Cancon, a direct competitor of Ace, has received and used the Confidential Information to its own benefit.

[...]

[35] Contrary to the position advanced by the defendants on this application, it is clear that the pleadings are broad enough in scope to capture taking and use of the confidential information both before and after the former employees ceased working for Ace.

[36] As to the fact that clients are nowhere mentioned in the NOCC, in my view, it is obvious that confidential information can and often does include confidential information about clients.

[37] As to the fact that specific projects are not named in the pleadings, this is hardly surprising. Much of what the defendants allegedly did will be known only to them. That is why, in particular on an application under Rule 7-1(11), some evidence is required to tie the requests to the issues, and many cases note that such evidence may only be obtainable on examination for discovery.

[38] The defendants present evidence that the plaintiff's allegations are unfounded and that they did not misuse confidential information. That, however, is a matter for the trial judge. The test for document disclosure is relevance to the pleadings and, for the second tier, evidence of a connection to the issues. It is not appropriate on a document disclosure application to attempt to weigh the evidence regarding the fundamental allegations in issue.

[39] As to the argument that some of the documents sought only go to remedy, I note that in the NOCC, Part 2, Relief Sought, the plaintiffs seek, amongst other things, the following:

2. Restitution in the form of disgorgement of the monetary value of the benefits and profits accrued by each of the Defendants from use of the Confidential Information.

[40] The defendants cited no authority for the proposition that, absent a severing of damages from liability, material documents that would quantify the benefit received by the defendants from the alleged misuse of confidential information do not have to be disclosed.

[41] I agree that proportionality is a consideration on such applications for document disclosure and I will consider that factor with respect to each of the categories of documents sought.

The Categories of Documents Sought

All correspondence with Domus Homes regarding the Laurel project

[42] The evidence presented satisfies me that there is potentially a connection between the work of Bersenev for Ace on a Domus Homes development and the later work of Cancon on either the same or a similar development.

[43] The request, however, is too broad. It is way out of proportion to the needs of this case, at least at present. What is to be produced for now, is all correspondence between any of the defendants and Domus Homes regarding work to be undertaken by the defendants for Domus Homes, outside of work conducted on behalf of Ace.

That correspondence will, for now, be limited to correspondence up to and including tender acceptance, if any, but not correspondence related to any specific construction undertaken.

[44] Should additional evidence indicate that broader disclosure might be appropriate, there is liberty to apply.

Copies of financial statements of Cancon since the incorporation of 1336238 BC Ltd. up to the date of trial

[45] The financial statements of Cancon are clearly relevant to the claim of restitution and should be produced.

All copies of any correspondence between Mr. Bersenev and or Cancon and Ledcor Construction regarding the Tall Timbers project at BCIT

[46] Again, although an evidentiary connection has been established, this request is too broad. The order will go as above, that is for now what is to be produced is all correspondence between Bersenev and Cancon and Ledcor Construction regarding work to be undertaken by the defendants for Ledcor Construction on the Tall Timbers project at BCIT, outside of work conducted on behalf of Ace. That correspondence will, for now, be limited to correspondence up to and including tender acceptance, if any, but not correspondence related to any specific construction undertaken.

[47] Again, should additional evidence indicate that broader disclosure might be appropriate, there is liberty to apply.

Copies of all Cancon takeoff documents related to the Laurel project with Domus Homes, Tall Timbers with BCIT, the Alliance project with Haebler Construction, and the Sunshine project with TL Housing

[48] These projects are all tied to projects undertaken by Ace and there is evidence that Bersenev took takeoff documents of Ace. Thus, the takeoff documents sought could show or lead to a train of inquiry regarding the wrongful use of

confidential information that is pleaded. As a result, the order sought regarding these documents is granted.

Any emails or text messages between Mr. Legault and Mr. van Empel between April 2021 to November 2021

[49] The evidence indicates that Mr. van Empel agreed to finance the development of Cancon in October 2021, before either of the former employees had left the employ of Ace.

[50] April 2021 appears to be a date selected at random. I will grant the order sought, but limited to documents regarding the potential development or financing of a new company by the former employees.

Copies of tax filings for Cancon

[51] I do not agree that Cancon tax filings will, at this juncture, provide any light on the issues pleaded. This application is denied.

Copies of text messages sent or received between Mr. Legault and any clients or customers of Ace between September 1, 2021 and Mr. Legault's date of resignation from Ace

[52] This is simply too broad. It is granted, but must be limited to messages unrelated to Legault's employee duties and responsibilities for Ace.

Copies of the 250 estimates that Cancon has produced for its clients or potential clients since its inception

[53] I agree with the defendants that this is simply a fishing expedition. It is much too broad and totally out of proportion to anything claimed. It is denied.

Copies of any emails between Cancon and the principals of Domus Homes regarding the Laurel project from September 2021 until the project commenced

[54] In my view, this is captured by the orders granted above, and is denied. But to be clear, the orders granted regarding correspondence are to be read as including email correspondence.

Copies of all bidding documentation from Cancon for the BCIT Tall Timbers project

[55] Given the evidentiary connection noted above, these documents are to be produced.

Documentation indicating when the Delbrook work was obtained by Cancon and when the work on that project commenced

[56] Counsel advised that both Ace and Cancon did work for Delbrook. I have not been able to find any other evidence of a connection between the plaintiff and the defendants regarding this project or projects.

[57] Due to the lack of evidence in this regard, the application for these documents is denied. There is, however, liberty to apply if a proper evidentiary basis can be established.

Any text messages in Mr. Legault's possession from September 2021 up to his date of resignation from Ace regarding any clients or customers of Ace

[58] This is too broad. It is allowed, but only for production of any such texts as are not related to Legault's employment with Ace.

Amended List of Documents

[59] The order sought in para. 2 of the notice of application is granted. The defendants will provide an amended list of documents incorporating the documents ordered herein within 30 days.

Requests From the Examination for Discovery of Legault

[60] Paragraph 3 of the notice of application seeks responses to certain questions left on the record at the examination for discovery of Legault.

Advise as to whether or not the Cancon employee agreement contains any confidentiality provisions

[61] The inquiry allowed on an examination for discovery is broader than that allowed under the rules for document disclosure.

[62] Given the allegations of theft of confidential information, this question could have relevance in many unknown ways. The question shall be answered.

Advise as to whether or not Defendant Legault gave written notice of his resignation from the plaintiff

[63] Again, this question could have relevance to the issues of timing of work undertaken for Cancon and is allowed.

[64] I note that the defendants did not advise me of any particular issue they took with responding to these two outstanding questions from the Legault examination for discovery.

Costs

[65] As success has been divided, costs of this application will be in the cause.

“Associate Judge Muir”