

Federal Court



Cour fédérale

**Date: 20240611**

**Docket: T-723-22**

**Citation: 2024 FC 889**

**Ottawa, Ontario, June 11, 2024**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**ANYSIS, INC. AND ANSYS CANADA LTD.**

**Plaintiffs**

**and**

**EVERFORCE ENERGY LTD. AND  
RAAD WILLIAM BARNET**

**Defendants**

**ORDER AND REASONS**

**I. Introduction**

[1] Ansys, Inc and Ansys Canada Ltd commenced the underlying action against Everforce Energy Ltd and its president, Raad William Barnet, in April 2022. The statement of claim alleges that the defendants have used and reproduced copyright-protected engineering simulation software and associated documentation without authorization. The defendants filed a statement of defence in July 2022 and the plaintiffs filed a reply.

[2] The plaintiffs served an affidavit of documents but the defendants did not. In November 2022, the plaintiffs brought a motion to compel the defendants to serve their affidavit of documents. By order dated January 25, 2023 (January 2023 Order), the Court required the defendants to serve an affidavit of documents within 7 days and pay \$1,000 in costs forthwith. The January 2023 Order provided that the statement of defence would be struck in its entirety if the defendants failed to serve an affidavit of documents.

[3] To date, the defendants have not complied with the January 2023 Order. By way of this motion, the plaintiffs ask the Court to strike the statement of defence without leave to amend.

## II. Arguments

[4] The plaintiffs submit the defendants' conduct amounts to an abuse of process that warrants striking out the statement of defence without leave to amend. The plaintiffs state that, despite numerous reminders and ample time, the defendants have made no effort to comply with the January 2023 Order. The defendants provide no satisfactory explanation for their failure to comply, no excuse that accounts for the full period of non-compliance, and no indication that they intend to comply with orders of this Court.

[5] The defendants submit it is apparent from the circumstances of this case that their previous counsel failed to fulfill their professional obligations. The defendants acknowledge that they should have produced an affidavit of documents and paid the outstanding cost award some time ago, but they contend Mr. Barnet did not fully understand his obligations and the failure to comply can be addressed in short order. The defendants submit there is no abuse of process, the

sanction of striking out the defence is a disproportionate remedy, and a cost award against the defendants would be a sufficient sanction in the circumstances of this case.

### III. Analysis

#### A. *History of the proceeding*

[6] The following provides a brief summary of what has happened since the January 2023

Order issued:

- In response to a letter from the plaintiffs' counsel asking for confirmation that the defendants would comply with the January 2023 Order, defendants' first counsel stated they were not in communication with the defendants and were no longer retained in this matter. Plaintiffs' counsel replied that there had been no notice of a change to the solicitors of record.
- By an order issued in March 2023, the action was continued as a specially managed proceeding. The order noted that the defendants had not complied with the terms of the January 2023 Order.
- The defendants' first counsel then served a "Notice to Cease Limited-Scope Representation". Plaintiffs' counsel responded that the form did not comply with the *Federal Courts Rules*, SOR/98-106 [*FCR*] and a formal motion was necessary.
- In May 2023, the defendants' first counsel brought a motion to be removed as solicitor of record. The motion was heard in June 2023, with Mr. Barnet in attendance, and granted on terms that required the defendants to appoint new

counsel by July 14, 2023. The defendants filed a Notice of Change of Solicitor on July 14, 2023.

- On July 24, 2023, the defendants served an “Amended Statement of Defence of Raad William Barnett”. The plaintiffs responded that they did not consent and the amendment would require leave of the Court. The plaintiffs reminded the defendants that they had not served an affidavit of documents or paid the outstanding cost award as required by the January 2023 Order. The defendants did not respond.
- In November 2023, the plaintiffs brought this motion for an order striking the statement of defence pursuant to Rules 221 and 227. The defendants’ responding motion record, which did not comply with the *FCR*, was accepted for filing under reserve of objection. The motion, set down for hearing in December 2023, was adjourned to March 6, 2024 on consent of the parties.
- At the outset of the hearing on March 6, 2024, counsel at the firm representing the defendants (but not the lawyer with carriage of the matter) requested an adjournment. The plaintiffs opposed an adjournment. After hearing the parties’ submissions, the Court ordered that the matter would be adjourned to April 16, 2024 based on the defendants’ counsel’s representations that: (i) the lawyer at his firm with carriage of the matter was forced to retire suddenly for medical reasons; (ii) the defendants were in the process of retaining new counsel at a different firm; (iii) letters were sent to the Court and/or opposing counsel about the adjournment in advance of the hearing (although the letters were never received by the Court or

opposing counsel); and (iv) new counsel, who was out of the country and unavailable to attend the March 6, 2024 hearing, would be available to attend a hearing on April 16, 2024. The Court's order allowed the parties to file supplemental motion materials relating to any objections in respect of the irregular responding motion record and any costs of the adjournment. The plaintiffs filed supplemental materials. The defendants did not.

- On April 9, 2024, the defendants filed a notice of change of solicitor. The defendants were represented by their current counsel at the hearing of this motion on April 16, 2024.

B. *Preliminary issue: defendants' irregular motion record*

[7] As noted above, the defendants' responding motion record does not comply with the *FCR*. It consists of an affidavit sworn by Mr. Barnet with no written representations. Mr. Barnet states the affidavit is for the purpose of: (i) seeking leave to file an amended statement of defence (attached as an exhibit) and affidavits of documents within ten days of the motion; (ii) seeking leave to bring a motion to change the venue of trial; and (iii) "eliminating or reducing the legal costs claimed as they are excessive".

[8] The plaintiffs submit the motion record is not in the proper form and should not be admitted. However, the plaintiffs submit that nothing turns on whether the responding motion record is admitted or not—either way, the relief they seek on this motion should be granted. While Mr. Barnet states in his affidavit that his first counsel did not send him a copy of the January 2023 Order, the affidavit was sworn after the defendants had appointed new counsel in

July 2023 and after the plaintiffs reminded new counsel of the defendants' outstanding obligations. The plaintiffs contend the defendants have not provided evidence that would explain their continued non-compliance or alter the basis for this motion to strike the statement of defence.

[9] The defendants submit the responding motion record should be admitted to provide context. At the hearing, the defendants' current counsel confirmed that the defendants are not asking the Court to entertain any of the relief requested in Mr. Barnet's affidavit.

[10] Having considered the parties' arguments, I have decided to admit the motion record on the basis that some of the statements in Mr. Barnet's affidavit are relevant as a response to the plaintiffs' motion to strike. For example, Mr. Barnet states in his affidavit that his first counsel did not tell him about the January 2023 Order. While much of Mr. Barnet's affidavit is irrelevant to the motion before me, it would serve no purpose to strike parts of the affidavit, as this would make no difference to the result. For this reason, I will admit the defendants' responding motion record in its entirety and treat the affidavit as the defendants' evidence and written submissions in response to the motion.

C. *Preliminary issue: plaintiffs' supplemental materials*

[11] The plaintiffs submitted two sets of supplemental materials.

[12] The first set of supplemental materials was served on the defendants' former counsel and filed by April 3, 2024, the deadline set by the Court. However, the plaintiffs were unaware that

the defendants had retained new counsel because they were not served with a notice of change of solicitor. The plaintiffs re-served the first set of supplemental materials, but by that time the Court's deadline had passed.

[13] On April 11, 2024, the plaintiffs served and submitted a second set of supplemental materials that: (i) explained their efforts to serve the defendants' former counsel with materials related to a Rule 404 request and their reasons for believing the materials came to his attention; and (ii) attached additional materials the plaintiffs had just received from the Law Society of Ontario about disciplinary proceedings against the defendants' former counsel.

[14] The plaintiffs asked that the materials be accepted for filing. At the hearing I informed the parties that I was satisfied with the plaintiffs' explanations and that both sets of supplemental materials would be accepted for filing.

D. *Main issue: Disposition on motion to strike*

[15] The plaintiffs' motion is granted. The statement of defence is struck in its entirety, without leave to amend.

[16] The Court has the power to strike a party's pleading as a consequence for failing to comply with the obligation to disclose documents or for failing to comply with an order of the Court: *Apotex Inc v Sanofi-Aventis*, 2010 FC 77 at para 12; *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 247 at para 5. This Court has found that the remedy of striking a statement of defence is warranted where a defendant breached an order to produce an

accurate affidavit of documents and showed disregard for the process of the Court: *Canadian Private Copying Collective v Red Coast Imports Inc*, 2009 FC 97 at paragraph 34 [*Red Coast Imports*].

[17] In this case, the defendants have yet to comply with the terms of the January 2023 Order. The plaintiffs have sent repeated reminders of the defendants' obligations, and the Court's order issued in March 2023 noted that the defendants had not complied with the January 2023 Order. Despite the time they were given to retain new counsel twice, which delayed the progress of the proceeding, the defendants have not even partly fulfilled their obligations under January 2023 Order.

[18] The defendants' assertion that the blame lies with counsel can no longer provide any excuse for their non-compliance. In his affidavit filed in response to this motion, Mr. Barnet specifically referred to the outstanding order and stated that the defendants were in a position to provide affidavits of documents within 30 days. Close to six months have passed since Mr. Barnet swore his affidavit. At the hearing of this motion, the defendants' current counsel stated that an affidavit of documents could be produced in 30 days and the funds to pay costs were in trust. Yet, the defendants have provided no evidence of their progress in gathering documents and preparing their affidavit of documents, and no evidence that they have instructed counsel to pay the cost award they were ordered to pay well over a year ago.

[19] In summary, the defendants have not put forward evidence that provides a satisfactory explanation for their continued non-compliance with the terms of the January 2023 Order. In my view, the defendants have shown disregard for the process of the Court.

[20] In *Red Coast Imports* (at paragraph 35), the Court stated:

I might have been somewhat more sympathetic to the Defendant, if at the last hour, he had complied with the order of [the associate judge] issued six months earlier. The evidence I have is that he is still in default and has yet to comply.

[21] The same applies here. The defendants have made no attempt to comply with the January 2023 Order, even at the last hour.

[22] Striking a statement of defence is a drastic remedy. However, the defendants have not given this Court a reason to expect they will comply with a further order and I am not satisfied that they should be granted further indulgences. I find that an order striking the statement of defence without leave to amend is an appropriate remedy that is warranted in view of the defendants' conduct in this case.

E. *Costs*

[23] The plaintiffs requested a lump sum cost award against the defendants, in the amount of \$10,000. The defendants do not dispute that costs should be awarded against them, but state that an award of \$3,500 would be proportionate.

[24] The plaintiffs also seek an order pursuant to Rule 404 of the *FCR* that would require the defendants' former counsel to personally pay costs of the adjournment. After the March 6, 2024 hearing was adjourned, the plaintiffs learned that the defendants' former counsel had been under investigation by the Law Society of Ontario and that his license to practice law was suspended as of March 7, 2024. The plaintiffs state this information was not brought to the plaintiffs' or the Court's attention, it was only by happenstance that the plaintiffs learned about the disciplinary proceeding, and it is apparent that this was the true reason behind the request to adjourn the March 6, 2024 hearing. Consequently, the plaintiffs argue that the defendants' former counsel should be liable for the costs of the adjournment.

[25] Dealing first with the defendants' liability for costs of this motion, the parties do not dispute that the defendants should be ordered to pay the plaintiffs' costs and they agree that a lump sum award is appropriate. The plaintiffs were entirely successful on the motion and the defendants should be ordered to pay costs. I agree with the parties that a lump sum cost award is appropriate.

[26] I am not satisfied that \$10,000 represents an appropriate cost award for this motion. Considering the nature of the motion and the work involved, and considering that the plaintiffs seek to have the defendants' former counsel pay the costs of the adjournment, I find that an award of \$3,500 is reasonable and appropriate. In my view, the defendants should be jointly and severally liable for paying the cost award.

[27] With respect to the plaintiffs' request for costs of the adjournment against the defendants' former counsel personally, for the reasons given at the hearing I decided that the Rule 404 request should be the subject of a separate hearing. Plaintiffs' counsel wrote to the Court with his availability for a further hearing but those dates have passed. The Court will issue a direction about setting a date for hearing submissions on costs of the adjournment.

**ORDER IN T-723-22**

**THIS COURT ORDERS that:**

1. The defendants' responding motion record is admitted.
2. The plaintiffs' supplemental materials are accepted for filing.
3. The plaintiffs' motion is granted. The statement of defence is struck in its entirety, without leave to amend.
4. The defendants shall pay the plaintiffs' costs of this motion, fixed as a lump sum award of \$3,500. Liability for the cost award is joint and several; it may be paid in full by either defendant or divided as between them.
5. Any order as to costs under Rule 404 is reserved.

"Christine M. Pallotta"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-723-22

**STYLE OF CAUSE:** ANYSIS, INC. AND ANSYS CANADA LTD. v  
EVERFORCE ENERGY LTD. AND RAAD WILLIAM  
BARNET

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** APRIL 16, 2024

**ORDER AND REASONS:** PALLOTTA J.

**DATED:** JUNE 11, 2024

**APPEARANCES:**

R. Nelson Godfrey FOR THE PLAINTIFFS

Paul Gosio FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

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