

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Insurance Corp. of British Columbia v. Lo,***
2005 BCCA 490

Date: 20050725

Docket: CA033177

Between:

Insurance Corporation of British Columbia

Appellant
(Plaintiff)

And

Fung Kwan (Tammy) Lo

Respondent
(Defendent)

Before: The Honourable Madam Justice Rowles
(In Chambers)

Oral Reasons for Judgment

F.G. Potts and
B. Martyniuk
F.K. Lo

Counsel for the Appellant

Appearing in Person

Place and Date:

Vancouver, British Columbia
July 25, 2005

(Stay Application)

[1] **ROWLES J.A.:** On July 14, 2005, during the course of a jury trial, Mr. Justice Groberman dismissed an action as against one of the defendants in an action brought by the plaintiff, ICBC. The defendant is Fung Kwan (Tammy) Lo who is the common-law wife of one of the other defendants in the action, Foon-Wai (David) Chiu. On July 18, 2005, ICBC filed an appeal from the dismissal of the action against Ms. Lo and on the same day, obtained an order from the trial judge which was apparently intended to have the effect of reinstating for a limited period a prior injunction the trial judge had granted to prevent the proceeds of the sale of some real property in which Ms. Lo has a one-half interest from being dissipated pending an order being made in this Court.

[2] ICBC now seeks an order in this Court on similar terms to the order made by Mr. Justice Groberman, pending the determination of the appeal, pursuant to s. 10(2) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77. Section 10(2) provides, in part:

10(2) In an appeal or other matter before the court, a justice may do one or more of the following:

(a) make an order incidental to the appeal or matter not involving a decision of the appeal on the merits;

(b) make an interim order to prevent prejudice to any person;

* * *

(f) when making an order, impose terms and conditions and give any directions as the justice thinks just.

[3] In order to explain the order that I am going to make, it is necessary to set out the background to this matter.

[4] In its action, ICBC claimed damages arising out of a fraudulent scheme for the issuance of British Columbia driver's licences as against a number of defendants. When the action was commenced, Ms. Lo was not a defendant but her common-law husband, Mr. Chiu, was a defendant.

[5] Mr. Chiu was the principal of Dragon Driving School Canada Ltd. ("Dragon") and Dragon was also a defendant in the action. Another defendant, Crispine Argana Diaz, was a driving examiner and an employee of the plaintiff ICBC. In exchange for payments from Mr. Chiu, Ms. Diaz fraudulently recorded that Dragon's clients had passed knowledge and road tests, and she issued driver's licences to them fraudulently.

[6] Ms. Lo is the co-owner with Mr. Chiu of some real property. About eight months before the trial proceeded, ICBC was successful in its application to have Ms. Lo joined as a defendant in the action. However, she did not file an appearance or defence to the claim.

[7] The action was to proceed and did proceed before a judge and jury. Before the jury was to be charged, Mr. Justice Groberman made some rulings on what claims could be advanced and on what basis. In his ruling given on July 14, 2005 [2005 BCSC 1093], the learned trial judge described the nature of the plaintiff's claims this way:

[3] The plaintiff is a public corporation offering automobile insurance in British Columbia, and it is also the public agency charged with licensing drivers under s. 25 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. It claims that it has suffered damages as a result of the fraudulent scheme operated by Dragon Driving School, Mr. Chiu and Ms. Diaz. In particular, it says that some drivers who obtained their driver's licences fraudulently subsequently caused accidents and that the plaintiff made payments in respect of those accidents. It says that it would not have made the payments had it been aware that the drivers were not properly licensed. It also seeks to recover the considerable sums that it says it expended to investigate the bribery scheme and to establish which licensees had not properly been examined.

[4] The plaintiff, however, claims that it is entitled to elect to receive damages on an alternative basis, as well. It says that it is entitled to recover from Mr. Chiu and Ms. Diaz all the money that each of them received as a result of the bribery scheme. Further, it argues that those funds are impressed with a trust and that it is entitled to tracing remedies allowing it to recover from Ms. Lo (Mr. Chiu's common-law wife) any of the funds that found their way into her assets.

[Underlining added.]

[8] The trial judge, in relation to the claim for recovery of the amount paid in bribes, said this:

[15] I accept, then, that it is well-established that where one person bribes another to violate his or her duty, both the briber and bribee will be liable in the amount of the bribe to the person to whom the bribee owes duties of good faith, a person often referred to as the "victim" of the bribe.

[16] In the case at bar, therefore, the plaintiff is entitled to claim as an alternative to the claim for

compensatory damages the amounts of the bribes received by Ms. Diaz. The remedy is available as a joint and several remedy against Dragon Driving School, Mr. Chiu and Ms. Diaz.

[9] As to a similar claim with respect to the monies paid to Mr. Chiu and Dragon by their clients, the trial judge said this:

[17] The plaintiff argues that it should be entitled to a similar remedy with respect to amounts received by Mr. Chiu from his clients in exchange for him arranging for Ms. Diaz to issue driver's licences.

[18] It argues that this result can be achieved by characterizing Mr. Chiu as having received all money from his clients as an agent for Ms. Diaz. With such a characterization, the money in issue would belong, in law to Ms. Diaz and in equity to the plaintiff. In my respectful view, on the evidence in this case, there is no air of reality to that characterization, such that it could be put before the jury. While the evidence does indicate that Mr. Chiu and Ms. Diaz acted in concert, it is also apparent that the relationship was not one of principal and agent.

[19] The plaintiff argues, in the alternative, that as Mr. Chiu and Ms. Diaz were acting in concert, equity should provide the same remedy in respect of money he received as it provides in respect of money that she received.

[20] There is no doubt that Mr. Chiu and Ms. Diaz acted, to a degree, in concert. Nonetheless, I can find no doctrinal basis for the application of the equitable principles that apply to Ms. Diaz's position to that of Mr. Chiu. Unlike Ms. Diaz, Mr. Chiu did not owe duties of utmost good faith to the plaintiff. The theory upon which money paid as bribes to Ms. Diaz would be held in a constructive trust is simply not applicable to Mr. Chiu.

[21] No authority has been cited to me in which a court has imposed a trust obligation in a bribery case on a person who is not in a relationship of good faith with the victim. Indeed, both *Warman International v. Dwyer* [(1995), 182 C.L.R. 544 (HC Aust)], and *Fyffes Group v. Templeman*, [2000] 2 Lloyd's Rep 643 (Eng. Comm. Ct.), which break new ground in terms of fixing bribers with a duty to account for their profits, fall short of recognizing any proprietary or trust remedy against them. The existence of such a remedy is expressly rejected in the *Fyffes* case.

[22] I note that there has not been, in this case, any claim of a fraudulent preference or fraudulent conveyance. I do not make any comment as to whether such claims could succeed or whether they remain available to the plaintiff. It may also be that arguments could be made that certain assets held in law by Ms. Lo are in equity the property of Mr. Chiu. Such arguments are not within the pleadings of this matter, and I make no comment as to their viability. My decision today is confined to the issue of whether the money paid to Mr. Chiu is, because he was involved in a bribery scheme, impressed automatically with a trust in favour of the plaintiff. I find that it is not.

[23] In the result, I find there is no basis upon which equity can grant the plaintiff a proprietary or trust remedy that would capture Mr. Chiu's profits. Without such a remedy, the plaintiff's claims to trace funds into the hands of Ms. Lo must fail.

[Underlining added.]

[10] In the concluding paragraph of his reasons, the trial judge said this in relation to any claim for costs against Ms. Lo:

[38] Ms. Lo's participation in this case has been minimal. She has not filed an appearance or Statement of Defence and she has not, except for a brief period, been represented by counsel in this matter. She has not presented legal argument. While I recognize that parties who represent themselves are not disqualified from being awarded costs (*Skidmore v. Blackmore* (1995) 2 B.C.L.R.

(3d) 201, 122 D.L.R. (4th) 330 (CA)), the discretion to award costs to a self-represented litigant should not be exercised where litigant does not take an active role in litigation and does not provide the assistance to the court that is to be expected. I accept that Ms. Lo's capabilities of assisting the court may not have been great and that there may be various reasons why she has failed to comply with the rules in bringing her defence. All that said, this is not a case where I would award costs to an self-represented litigant.

[11] According to the jury verdict sheet, the jury found that the amount paid to Ms. Diaz by Mr. Chiu and Dragon as bribes was \$175,000. The jury awarded, in joint and several, ordinary damages against Dragon, Chiu and Diaz, the sum of \$510,628.89. As against Dragon, punitive damages of \$500,000 were awarded. As against Chiu, \$950,000 in punitive damages were awarded.

[12] I understand from counsel for ICBC that the order has been submitted to the judge for signature, the jury's verdict having been confirmed. I further understand from ICBC's counsel that no appeal has been brought against the order that resulted from the jury verdict.

[13] In granting the order he did on July 18, 2005, Mr. Justice Groberman said this:

[1] **THE COURT:** I am satisfied that there is a reasonable prospect of a successful appeal, and a case has been made out for a stay of my order of July 14, which dismissed the claim as against Ms. Lo and dissolved the injunction that restricted her use of assets.

[2] I am granting a stay, which will expire at four o'clock one week from today, that will be the 25th of July, 2005. I am mindful of concerns that have been expressed by Mr. Chiu and Ms. Lo about their ability to find money for living expenses, and I am relaxing the injunction against Ms. Lo to this extent. She will be entitled to place a charge against any of her assets, including her share of the house, for an amount up to \$5,000 to cover reasonable living and legal expenses over the next week. Anything beyond that will be a matter for the Court of Appeal.

* * *

{SUBMISSION BY MR. POTTS}

[4] **THE COURT:** Yes, if there is a sale of the home that closes before the stay expires, then the net proceeds, other than \$5,000, will be paid into court to the credit of this action. Also, of course, there will be an undertaking as to damages.

[14] The application before me is urgent as there is a pending sale of a property of which Ms. Lo is the co-owner with Mr. Chiu. I understand from submissions made during the hearing of the application that Ms. Lo would receive net about \$100,000 as her share of the proceeds.

[15] I am prepared to grant an interim order under s. 10(2) of the **Court of Appeal Act** which is to be effective until 4:00 p.m. on August 22, 2005. That order will allow the sale to complete but it will prevent Ms. Lo's share of the net proceeds of the sale of the property being dissipated until such time as this matter can be more fully

argued, hopefully, with counsel appearing on behalf of Ms. Lo. As I stated to Ms. Lo during submissions, this is a matter of some legal complexity and the assistance of legal counsel to give her advice is badly needed. I would hope that she obtains such advice.

[16] The funds representing Ms. Lo's one-half interest are to be paid into Court upon the completion of the sale, less the sum of \$5,000. The funds paid into Court are to be held until further Court order or August 22 at 4:00 p.m., whichever is first.

[17] I should say that one of the matters on which argument is required is whether the appellant is deemed to have elected its remedy in damages against Mr. Chiu and therefore could not proceed on its claim against Ms. Lo on the basis of trust, even if it were successful in the argument that ICBC wishes to advance which is that the trial judge was in error in concluding that there could not be an equitable remedy.

[18] I wish to note that Mr. Potts, who has appeared today on behalf of ICBC, has been fair in every respect in advancing both the application and making suggestions as to how this matter might be dealt with in the face of Ms. Lo's not being represented. An interpreter was obtained, as I understand it, at the request of ICBC so that Ms. Lo would understand the nature of the argument being made today. I simply reiterate that it is essential, in my view, that Ms. Lo obtain legal advice in regard to this matter so that it may be properly argued.

[19] I am going to be in chambers during the week of August 22 and will be able to hear any further applications if it is set at that time.

[20] What I direct is that any further argument that Mr. Potts wishes to make on the particular issue I posed be provided to the Court and to Ms. Lo at least 15 calendar days before August 22.

(discussion with counsel)

[21] **ROWLES J.A.:** If the sale completes before August 22, and I am going to assume that it will, the funds are to be paid into Court less the \$5,000. The funds are not to be paid out of Court until further Court order or August 22, whichever is earlier.

(discussion with counsel and respondent)

[22] **ROWLES J.A.:** I can only say, or repeat, that this matter appears to me to be legally complex and considering the amount of money that is involved, it would be to your advantage to understand and get advice on whether the order should stand and as well you might well wish to have counsel look at the appeal that is being filed against the order. But I cannot do anything in respect to your funds or lack of funds to get a lawyer. I just repeat that is up to you.

[23] There are some resources, for example, there is a service run by the Bar Association in which legal advice can be obtained for a relatively small amount, but it is just, I believe, for a one half-hour consultation. But it may be that if you see a lawyer through the Lawyers Referral Service that that lawyer would be able to make suggestions as to whether anyone would be prepared to take the case without your having to put up a retainer.

(discussion with counsel)

[24] **ROWLES J.A.:** You might also explain that there is a Court of Appeal pro bono program and Mr. Potts can provide you with the numbers for both of those. I believe that the Court of Appeal Registry has a pamphlet on the pro bono program and you can obtain the pamphlet from the Court of Appeal Registry.

(discussion with respondent)

[25] **ROWLES J.A.:** The matter will come back before the Court and it will come back on August 22 at 9:30 in the morning. I will then hear any further argument as to whether the order holding the funds pending the appeal ought to be continued. Mr. Potts will send you any further submissions that he wishes to make well before August 22, I said 15 calendar days before that. I am also going to direct, Madam Registrar, that a copy of my reasons be transcribed and provided to Ms. Lo. If she does seek the advice of counsel, she will be able to take those reasons to the lawyer.

[26] Now, Mr. Potts has asked me if he prepares the order today, whether I would sign the order without your formal approval as to the form of the order. I am going to make that order.

“The Honourable Madam Justice Rowles”