

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Insurance Corp. of British Columbia v. Lo,***
2005 BCCA 433

Date: 20050826

Docket: CA033177

Between:

Insurance Corporation of British Columbia

Appellant
(Plaintiff)

And

Fung Kwan (Tammy) Lo

Respondent
(Defendant)

Before: The Honourable Madam Justice Rowles
(In Chambers)

F.G. Potts and
B. Martyniuk

Counsel for the Appellant

W. Ryan

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
22 August 2005

Place and Date of Judgment:

Vancouver, British Columbia
26 August 2005

Reasons for Judgment of the Honourable Madam Justice Rowles:

[1] The appellant Insurance Corporation of British Columbia ("ICBC") has applied for an order staying the dismissal of its action against the respondent, Fung Kwan (Tammy) Lo ("Lo"), and for an order, subject to some conditions, prohibiting the respondent from disposing of certain property owned by her pending the determination of the appeal. At the conclusion of the hearing of the application, I allowed the application with reasons to follow. These are the reasons.

[2] By way of background, the appellant commenced proceedings against 18 defendants on 8 March 2004. The principal defendants were Foon-Wai (David) Chiu ("Chiu"), a driving school company of which Chiu is the principal called Dragon Driving School Canada Ltd. ("Dragon"), and Crispina Argana Diaz ("Diaz"), a driver's licence examiner who was then an employee of the appellant.

[3] In its pleadings the appellant alleged that Chiu, Dragon and Diaz conspired together to defraud the appellant by soliciting other persons to pay them a fee in return for which those defendants would arrange for the issuance of a British Columbia driver's licence regardless of whether the person had passed the requisite written examination (the "knowledge test") or the requisite practical examination (the "road test"). The appellant further

alleged that to the extent such fees were paid, they were bribes, that Chiu, Dragon and Diaz were part of a joint enterprise, and that each was jointly and severally liable to the appellant for the total amount of such bribes. Alternate remedies in trust were also sought against those defendants.

[4] The initial statement of claim included particulars of 70 occasions in which it was alleged that licences had been issued where a knowledge test had not been taken and 12 occasions where licences had been issued where a road test was not taken. The statement of claim was subsequently amended on two occasions to increase the number of occasions on which it was alleged that the two tests had not been taken. The total number was said to be unknown but that it occurred on at least 96 occasions in the case of the knowledge test and 62 occasions in the case of the road test.

[5] On 28 January 2005, Groberman J. granted an application brought by the appellant to add Lo, amongst others, as a defendant and on 23 June 2005, the appellant filed a further amended statement of claim adding Lo as a defendant.

[6] In its pleadings, ICBC alleged that the defendants Chiu, Dragon and Diaz had obtained monies and assets from the alleged fraud and conspiracy and that:

- a) to the extent Chiu, Dragon and Diaz received bribe monies, such monies were the property of ICBC, and an accounting was sought;
- b) to the extent Chiu, Dragon and Diaz possessed assets for which they could not account, such assets were obtained by the fraud and conspiracy, and that the said defendants had been unjustly enriched thereby;
- c) Chiu or Dragon or both had provided bribe monies and monies or assets obtained by reason of the fraud and conspiracy to Lo; that Lo knew, or ought to have known, or was wilfully blind to the fact that such assets were bribes or trust monies or both, and that Lo was liable to account for such monies;
- d) alternatively, to the extent Lo received bribe or trust monies, she had been unjustly enriched;
- e) in respect of the defendants, Chiu, Dragon, Diaz and Lo the appellant was entitled to an accounting and to trace assets;
- f) alternatively, to the extent bribes or trust monies were utilized by Chiu, Dragon, Diaz and Lo to purchase real property, or other assets, such properties were held in trust for the appellant and specifically, that the interests of Chiu and Lo in the property located at 5011 Woodward's Road in Richmond (the "Residence") were held in trust for the appellant.

[7] The appellant obtained interlocutory judgment as against each of Chiu, Dragon, Diaz and Lo in the proceedings because, in the case of Chiu, Dragon and Diaz, their defences were struck by court order with leave to the appellant to proceed as if no Appearance had been filed and, in the case of Lo, because she failed to file an Appearance. Under Rule 19(19) of the **Rules of Court**, those defendants were deemed to have admitted the allegations of fact in the statement of claim. For the purposes of trial, the material facts deemed to be admitted were reduced to writing and provided to the court. In particular, Chiu and Diaz were deemed to have admitted that they had participated in the fraudulent scheme, that Chiu had been paid between \$2,000.00 and \$8,000.00 per transaction, that there were at least 158 such transactions, and that Diaz had been paid at least \$500.00 per transaction by Chiu.

[8] The trial commenced on 27 June 2005 before a judge and jury. At that time, the trial judge permitted Lo to attend and defend the action against her as to the amounts held by her in trust for the appellant, and further ruled that she was entitled to argue issues of law which related to the appellant's claim against her. Lo was represented at trial by counsel from 27 June 2005 to 4 July 2005, inclusive, at which point her counsel withdrew.

[9] Diaz testified that the fraudulent scheme had been used "a minimum of 250" times. Chiu testified that those persons purchasing this "service" were aware that he had a "connection" at ICBC, and were told to attend at a certain licensing office, to deal only with Diaz (a picture of Diaz was provided for the purpose), and to watch for a "wave off" hand signal. Chiu testified that substantial sums were paid by these persons for driving lessons they did not receive.

[10] Chiu also testified that all the monies for the down payment for the purchase of the property owned by himself and Lo came from him.

[11] Lo was not called as a witness by Chiu or Dragon and she elected not to call evidence on her own behalf.

[12] After the close of evidence but before final submissions and the jury charge, Groberman J. ruled that, as a matter of law, neither a trust remedy nor a claim for unjust enrichment was available to the appellant as against Lo and dismissed the claim against her. As well, the trial judge dissolved the injunction granted on 17 June 2005.

[13] After the action against Lo had been dismissed, final arguments were made to the jury and the jury charge was given. The jury was instructed that the matter of how much money had been made by reason of Chiu and Lo's fraud was to be considered in assessing punitive damages. The jury were further instructed that insofar as the appellant was required to elect whether to take judgment for the amount of the bribes or the actual damages, it ought to assume that the appellant would elect the higher amount. Jury deliberations began late in the day on July 14.

[14] On 18 July 2005, the appellant brought an application before the trial judge seeking to have the order of 14 July 2005 dismissing the action against Lo stayed pending an appeal. The trial judge held that there was a reasonable prospect of a successful appeal and that a case was made out for a stay. He granted a stay in respect of the order for a period of seven days and varied the injunction order so as to provide that in the event of the sale of the Residence, the net proceeds of Lo's interest in the Residence, less the sum of \$5,000.00 would be paid into court to the credit of the action. The appellant promptly filed its appeal of the dismissal of the action against Lo.

[15] On the evening of 18 July 2005, the trial against the remaining defendants concluded with the jury's verdict, which included an award of ordinary damages as against Chiu, Dragon and Diaz in the sum of \$510,628.89 and punitive damages as against Chiu in the sum of \$950,000.00; as against Dragon, \$500,000.00; and as against Diaz, \$350,000.00. The jury also found that Chiu and Dragon had paid Diaz \$175,000.00 in bribes.

[16] On 25 July 2005, the appellant brought their application for a stay of the order dismissing the action against Lo and for an order continuing the injunctive relief granted by the trial judge on 18 July 2005 in this Court. On 25 July 2005, the order of Groberman J. was made an order of this Court, effective to 22 August 2005.

[17] On 25 July 2005, Ms. Lo appeared on her own behalf along with a translator. On that date I adjourned the appellant's motion so that Ms. Lo would have the opportunity to consult with counsel about the issue, among others, of whether the appellant could pursue her after apparently electing their remedy in damages against Mr. Chiu in the trial court. When the matter came on before me on 22 August, Ms. Lo was represented by counsel.

[18] With that background, I turn now to the application. Section 10(2) of the **Court of Appeal Act**, R.S.B.C. 1996, c. 77 (the "**Act**") provides:

- 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;
 - (c) with the consent of all parties to the appeal, make any order;

* * *

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

[19] Section 18(1) of the **Act** provides:

18(1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

[20] In **R.J.R. – MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311 at 334, the Supreme Court of Canada said this concerning the principles to be applied when the remedy of a stay is sought:

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores [Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110], at p. 127, Beetz J. expressed the position in these words:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

* * *

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[21] In this case, counsel for the respondent submitted that an appeal of the order dismissing the action against Lo lacked merit. With respect, I disagree. In his reasons dismissing the action as against Lo, the trial judge found that Chiu did not owe any duties of utmost good faith to the appellant, there being no doctrinal basis for the application of the equitable principles that applied to Diaz being applied to Chiu. The trial judge noted that there was no Canadian authority that had imposed a trust obligation in a bribery case on a person who was not in a relationship of good faith and declined to follow English and Australian authority to the contrary. The appellant submits that there is Canadian authority for the proposition that an accessory or dishonest assistant to a corrupt fiduciary will be treated, in law, as if he were also a fiduciary and referred to **MacMillan Bloedel Ltd. v. Binstead** (1983), 22 B.L.R. 255 (B.C.S.C.). The further alternative argument of the appellant is that the monies received by Chiu were subject to a remedial constructive trust in favour of the appellant. To support the alternative argument, appellant's counsel referred to **Soulos v. Korkontzilas**, [1997] 2 S.C.R. 217 at para. 43. In my opinion, the points the appellant has raised are, at the very least, arguable.

[22] The second matter to consider is whether the appellant would suffer irreparable harm if the application were refused. In this case, the appellant is concerned that if the order dismissing the action against Lo is not stayed and the house owned by Chiu and Lo is sold without injunctive relief being in place, the appeal as it relates to Lo could well become nugatory. In light of the evidence at trial concerning the origin of the funds to purchase the Residence as well as Lo's statement concerning the disposition of the proceeds of a sale of a Mercedes automobile, I am satisfied that the appellant is likely to suffer irreparable harm if there is no restraint on what Lo may do with her portion of the funds from the sale of the Residence, assuming that a sale is consummated.

[23] The third factor requires an assessment to be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. On the appellant's side of the balance, I agree with Mr. Potts that if an order restraining disposition of the proceeds is not granted, it would be for all practical purposes futile to pursue the appeal. The cost of proceeding with the appeal without some chance of recovery makes no economic sense. From the respondent's perspective, however, such an order has the potential to deprive her of her basic living expenses. For example, respondent's counsel submitted that if Ms. Lo does not have access to the funds from the sale of the property, she will not have any ability to purchase a more modest dwelling for herself and her children and will lack funds to provide for necessities.

[24] The concerns of the respondent can be met by imposing some terms. One of the provisions in the order made by Groberman J. was that in the event of the sale of the property, \$5,000 was to be paid to Ms. Lo so that there were funds available for her living expenses. That provision is to be carried forward to the order made in this Court.

[25] Counsel for the appellant stated that if Ms. Lo wishes to purchase another property with the proceeds of sale of the Residence, the appellant would have no objection to the release of funds for that purpose, provided the appellant is able to obtain security against any newly acquired property. In the event that funds are required to purchase new accommodation, it would be open to the respondent to make an application to this Court for release of the funds.

[26] Respondent's counsel raised some further matters, such as the need to have funds available for payment of legal fees. Again, those concerns may be met by future applications to the Court for release of specified amounts.

[27] Appellant's counsel made plain that the appellant is prepared to give an undertaking as to damages if the order is made. I also note that appellant's counsel urged that a direction be given that the appeal be expedited and that direction was given.

[28] In light of the foregoing, I am satisfied that, overall, the balance of convenience favours the appellant and that the orders sought by the appellant should go. An undertaking as to damages is to be provided in respect of the injunctive relief.

[29] Orders accordingly.

“The Honourable Madam Justice Rowles”