

CANADA / JUDGMENT

1064392 B.C. Ltd. v. 1062195 B.C. Ltd.

2020 BCSC 1401

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1401 1064392 B.C. Ltd. v. 1062195 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1064392 B.C. Ltd. v. 1062195 B.C. Ltd.,

2020 BCSC 1401

Date: 20200918

Docket: S177238

Registry: Vancouver

Between:

1064392 B.C. Ltd.

Plaintiff

And

1062195 B.C. Ltd., Rising Sun Investments Ltd.

and De Min Li

Defendants

And

Ivy Feng (also known as Ivy Prevost) and

Ivy Feng Personal Real Estate Corporation

Third Parties

Before: Master Elwood

Reasons for Judgment

Counsel for the Plaintiffs and Third Parties:

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O. Mohamed

Counsel for the Defendants:

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E.L. Hansen

Place and Date of Hearing:

Vancouver, B.C.

July 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2020

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I. INTRODUCTION

[1] The plaintiff and third parties apply to examine Raymond Chan, who is not a party to this action, either by way of a second examination for discovery of the one of the corporate defendants or as a non-party witness.

[2] The defendants oppose a second examination for discovery. They argue that the applicants elected to examine a representative of their choosing and have not shown grounds for a second examination. The defendants take no position on the application to examine Mr. Chan as a non-party witness. Mr. Chan is separately represented by counsel who did not appear on this application.

- [3] For the reasons which follow, I have concluded that the application to examine Mr. Chan for discovery as a second representative of the corporate defendants should be dismissed.

II. BACKGROUND

- [4] This action arises out a dispute over the profit from a sale of two development properties in Burnaby. To fully understand the arguments of the parties, it is necessary to first briefly set out a cast of characters and some background to the dispute.
- [5] Ivy Feng controls the plaintiff 1064392 B.C. Ltd. ("392").
- [6] De Min Li controls the defendant 1062195 B.C. Ltd. ("195"). Ms. Li is also the sole director of the defendant Rising Sun Investments Ltd. Rising Sun is owned by Ms. Li's children.
- [7] Raymond Chan controls Canada Willingdon Holdings Ltd. ("Willingdon").
- [8] Shinna Hsu is a real estate agent.
- [9] Jade Holdings Ltd. ("Jade") is a corporation formed by Ms. Feng, Mr. Chan and Ms. Hsu, originally to pursue a development opportunity in Vancouver.
- [10] In October 2015, Willingdon tied up the Burnaby properties under a conditional purchase and sale agreement. Ms. Feng brokered a loan to Willingdon to cover the deposit.
- [11] In December 2015, Willingdon lifted the conditions and assigned its rights under the contract to a company controlled by Frank Wu. The assignment agreement required Mr. Wu to pay the deposit and an assignment fee to Willingdon. Mr. Wu syndicated one third of his interest to Jade.
- [12] Mr. Wu's company was unable to meet its obligation under the agreement with Willingdon. He and Jade lost their interests in the Burnaby properties.
- [13] In January 2016, Willingdon assigned the contract for the Burnaby properties to Rising Sun. The assignment agreement did not require Rising Sun to pay the deposit or an assignment fee to Willingdon. Mr. Chan and Ms. Li agreed they would equally share the profits arising from the venture through their companies, Willingdon and Rising Sun.
- [14] Rising Sun needed to come up with approximately \$25 million to purchase the Burnaby properties. Mr. Chan helped Ms. Li to obtain a loan of \$19.5 million from Trez Capital. Ms. Li put up another \$1.5 million through Rising Sun. That left a shortfall of approximately \$4 million.
- [15] Ms. Feng introduced Ms. Hsu, who was acting for Rising Sun, to a company called Aklaimed Investments Ltd., which was prepared to loan the necessary funds to acquire the Burnaby properties (the "Second Lender"). Ms. Feng received a \$300,000 finder's fee for this introduction.

- [16] Shortly before the closing on the Burnaby properties, Ms. Feng informed Ms. Hsu that the "other investor" required a profit-sharing agreement between the purchaser, a numbered company (which turned out to be 392) and Jade. Ms. Hsu told Mr. Chan that Ms. Feng had informed her that the Second Lender required the profit-sharing agreement. Mr. Chan communicated this information to Ms. Li.
- [17] On February 12, 2016, Ms. Li caused 195 to enter into an agreement to pay 392 and Jade each 20% of the net profit following a sale of the land or the sale of the last unit of any development on the Burnaby properties. That profit-sharing agreement is the subject matter of this action (the "Agreement").
- [18] The recitals to the Agreement state that 392 and Jade had provided consulting services and facilitated essential financing for the acquisition of the Burnaby properties. The Agreement states that it was prepared by the solicitor for 195.
- [19] 195 subsequently acquired the Burnaby properties and held them in trust for Rising Sun. 195 or Rising Sun retained Mr. Chan and Willingdon to manage the properties.
- [20] On March 28, 2017, Mr. Chan and Jade entered into an agreement with 195 pursuant to which Jade quit its claim under the Agreement. The recitals to the quit claim state that Mr. Chan entered into the Agreement on behalf of Jade and did not consider the document legal or enforceable.
- [21] In July 2017, 195 and Rising Sun sold the Burnaby properties at a profit. They did not pay 392 a share of the profit.
- [22] 392 brings this action against Ms. Li, 195 and Rising Sun to enforce the Agreement. The defendants allege that the Agreement is unenforceable because Ms. Feng misled them into thinking that the Second Lender required a profit-sharing agreement with 392 as a condition of the loan, whereas 392 was in reality a vehicle for Ms. Feng to benefit from the transaction.
- [23] The defendants allege that Ms. Feng forged her sister's signature on the Agreement as an authorized signatory of 392, and later removed herself as a director of 392 prior to making demand under the Agreement, all to create the false impression that Ms. Feng was at arms' length from 392.
- [24] 195 has named Ms. Feng and her personal real estate corporation as third parties in the action.

III. ANALYSIS

- [25] The plaintiffs and third parties (who I will refer to collectively as Ms. Feng) apply for an order that they be entitled to examine Mr. Chan as a second representative of 195.

- [26] In accordance with Rule 7-2(5)(a), unless the court orders otherwise, a plaintiff is entitled to examine one representative of a corporate defendant. Rule 7-2(5)(b) requires the defendant to nominate a knowledgeable person for this purpose. Rule 7-2(5)(c) allows that the plaintiff may examine the nominated representative or another person who is or has been a director, officer, employee, agent or external auditor of the company.
- [27] In this case, Ms. Feng did not ask the corporate defendants to nominate a representative or representatives. Instead, Ms. Feng asked to examine Ms. Li both in Ms. Li's personal capacity and as a representative of 195 and Rising Sun.
- [28] Ms. Feng seems to accept there should only be one set of discoveries of the three defendants. This is fair and reasonable. Although Rule 7-2 requires that each party of record make himself or herself available for an examination by each party adverse in interest, this general rule does not mean that every named plaintiff is entitled to examine every named defendant. Where there is a commonality of interests between parties, particularly where the individuals involved used corporate vehicles to achieve their business purposes, common sense and fairness will limit multiple discoveries: *Blue Line Hockey Association Co. v. Orca Bay Hockey Ltd. Partnership*, 2007 BCSC 433, at paras. 37-40.
- [29] The principles to be applied on an application to examine a second representative of a corporate defendant were summarized by Madam Justice Sinclair Prowse in *Murao v. Blackcomb Skiing Enterprises Limited Partnership, et al*, 2003 BCSC 558, at paras. 66-71:

Before that discretion will be exercised, the party applying to examine a second representative must establish that the first representative cannot satisfactorily inform him/herself about the subject of the examination for discovery. See: *Lord v. Royal Columbian Hospital et al* (1981), 43 B.C.L.R. 147 (C.A.).

This is an objective test and is not determined by the view of the examiner. See: *Westcoast Transmission Company Limited v. Interprovincial Steel and Pipe Corporation Ltd. et al* (1984), 59 B.C.L.R. 43 (S.C.)

In making the determination as to whether the first representative can satisfactorily inform his/herself, the Court should consider such factors as the circumstances of the case; the responsiveness of the witness under examination and the degree to which he has taken pains to inform himself; the nature and materiality of the particular evidence sought to be canvassed with the second representative; and what appears to be the most practical, convenient and expeditious alternative see: *Rogers v. Bank of Montreal* (1986), 1 B.C.L.R. (2d) 132 (S.C.).

Practicality is a significant factor. In *Vancouver Wharves v. Continental Insurance* (1999) 15 C.C.L.I. (3d) 52 (B.C.S.C.), the Court granted this application after concluding that the first representative was a second hand source and consequently although he could inform himself of the initial question he would not be in a position to answer the follow-up questions, "the shape and direction of which would be influenced by the answers as they were given."

Similarly, in *Atwood Air Ltd. v. Standard Aero Ltd.* [1998] B.C.J. No. 2373 (S.C.), it was practicalities that determined the outcome. In particular, the trial date in that case was fast approaching and the person with the knowledge was residing in Quebec. It was foreseeable that because of his lack of knowledge that the first representative would have to adjourn the discovery from time to time to call the person in Quebec to obtain the information required. This would result in a protracted process that would be frustrating for everyone.

Generally the questions have to be asked to the first representative before a decision can be made as to whether he/she could properly inform him/herself See: *Lord v. Royal Columbian Hospital et al* (1981), 43 B.C.L.R. 147 (C.A.), however there may be exceptions to that general rule *W.R. Grace & Co. of Canada v. Privest Properties Ltd.* (1992), 67 B.C.L.R. (2d) 345 (C.A.).

[30] In this case, Ms. Feng bases her application to examine Mr. Chan as a second representative of 195 on two broad grounds: (a) Mr. Chan is the true directing mind of 195; and (b) Ms. Li lacks knowledge of the material facts and cannot properly inform herself.

A. Is Mr. Chan the Directing Mind of 195?

[31] Ms. Feng's first argument can be disposed of quickly. In my view, there is no evidence on this application that Mr. Chan is the directing mind of 195.

[32] Mr. Chan's involvement in the acquisition of the Burnaby properties appears to have originated from his ownership of Willingdon and the agreement between Willingdon and Rising Sun pursuant to Willingdon assigned the contract of purchase and sale of the properties to Rising Sun.

[33] Ms. Feng argues that Ms. Li admitted during her examination for discovery that Mr. Chan is a partner with her in 195:

Q Okay. Is there anyone else other than yourself that makes decisions on behalf of these companies or are you the sole decision maker?

A 195, I have partners, yeah, partners who work with me.

Q Okay. What are their names?

A Ray Chan (Q. 8-9).

[34] Later in her discovery, however, Ms. Li testified that she described Mr. Chan as her partner because he invested time, energy and money in the effort to acquire the Burnaby properties. She testified that she understood Mr. Chan would be compensated for his investment by receiving a share of the profits from the project down the road.

[35] At most, in my view, Ms. Li acknowledged that Mr. Chan was a joint venture partner in the acquisition and development of the Burnaby properties, not that he is an owner or director of 195.

[36] In any event, even assuming some evidence Mr. Chan is a directing mind of 195, his role in the decision-making on behalf of 195 would not in-and-of-itself establish grounds for a second examination. Ms. Feng may have asked to examine Ms. Li believing she was the sole decision maker; but a mistaken belief in the role or knowledge of the representative she selected would not entitle Ms. Feng to a second examination. Ms. Feng must still establish that Ms. Li cannot satisfactorily inform herself about the subject of the discovery.

B. Can Ms. Li Inform Herself Satisfactorily About the Subject of the Discovery?

[37] Ms. Feng argues that Ms. Li cannot provide meaningful discovery because she lacks personal knowledge of the matters in issue.

[38] On her examination for discovery, Ms. Li testified that she never spoke to Ms. Feng about the Burnaby properties or the Agreement; in fact, Ms. Li testified, she did not even know who Ms. Feng was until some time following the closing.

[39] Ms. Li did not read any of the documents. She does not understand English, and no one prepared translations for her to review. She first saw the Agreement immediately before she signed it in the lawyer's office. She did not instruct the lawyer on drafting the Agreement. Her understanding of why a profit-sharing agreement was required was based entirely on what Mr. Chan told her.

[40] Accordingly, Ms. Feng submits, an examination of Mr. Chan is necessary to provide Ms. Feng with meaningful discovery of 195, particularly on the facts on which the defence of misrepresentation is based.

[41] Notably in my view, Ms. Feng's counsel concluded the examination of Ms. Li subject only to an agreement that Ms. Feng could return to examine Ms. Li on accounting issues. Ms. Feng's counsel left just eight requests on the record for Ms. Li to inform herself. None of those requests asked Ms. Li to inform herself by asking Mr. Chan for information.

[42] Ms. Feng argues that asking Ms. Li to inform herself would have been impractical and artificial. The result, she argues, would have been a lengthy and disjointed discovery, or, effectively, discovery in writing.

[43] The premise of Ms. Feng's position is that Mr. Chan possesses material information about 195's case that cannot be discovered on effectively and efficiently without the benefit of cross-examination of Mr. Chan himself and follow-up questions.

[44] The defendants challenge this premise. They say admissions from Ms. Li are more important for the purposes of discovery than questioning Mr. Chan directly.

[45] Mr. Chan's evidence would relate primarily, as I understand it, to the defendants' allegation that Ms. Feng misrepresented the reason for the profit-sharing agreement.

- [46] As I understand the known facts, Ms. Feng communicated the reason for a profit-sharing agreement to Ms. Hsu, who communicated it to Mr. Chan, who explained the reason to Ms. Li, who caused 195 to enter into the Agreement.
- [47] The facts forming the foundation of the defence of misrepresentation are what Ms. Feng said and what Ms. Li relied on. Ms. Hsu and Mr. Chan are important witnesses in the chain of communication, but the defendants cannot make out their claim of misrepresentation without the evidence of Ms. Li on reliance.
- [48] Ms. Li was able to provide discovery of the reasons why she caused 195 to enter into the Agreement. In general terms, Ms. Li testified that she understood the Second Lender required her to sign the document or else they were not going to advance the \$4 million Rising Sun required to close the deal.
- [49] That Mr. Chan was the source of Ms. Li's understanding of these matters does not mean Ms. Feng requires an examination of Mr. Chan to obtain meaningful discovery. Ms. Li's evidence is the critical evidence on the question of reliance. Although she may not have been versed in the details or involved directly in any communication with Ms. Feng, Ms. Li provided meaningful discovery on that critical question.
- [50] Some matters remain unclear from Ms. Li's evidence. For example: Who instructed the lawyer acting for 195 on the terms of the Agreement? What did Ms. Hsu and Mr. Chan know about 392 prior to the Agreement? Why does the Agreement acknowledge that 392 provided consulting services on the transaction?
- [51] These unanswered questions, although potentially relevant to the defence of misrepresentation, do not justify an examination of Mr. Chan as a representative of 195. I agree with the defendants that Ms. Feng could have asked Ms. Li to inform herself on the matters outside her knowledge.
- [52] The purpose of Rule 7-2, in combination with Rule 1-3(2) and the concept of proportionality, is to strike a balance that promotes efficient and effective use of discovery time, but also establishes reasonable limits and finality for the party being discovered. The questions on which Ms. Feng would prefer to examine Mr. Chan directly in this case are not so central to the case that answers from Ms. Li on information from others would be unfair to Ms. Feng or unduly inefficient.
- [53] Ms. Feng argues that Ms. Li's evidence about her business relationship with Mr. Chan was misleading and non-responsive. Ms. Li testified there was no agreement with Mr. Chan to share the profits from the venture. Her evidence on this point appears to be at odds with the assignment agreement between Willingdon and Rising Sun pursuant to which Mr. Chan stood to receive a share of the profits. However, I do not think Ms. Li's evidence as a whole was evasive or misleading so as to require the defendants to produce a different representative for discovery.

- [54] Ms. Feng also seems to allege bad faith against Mr. Chan. She suggests Mr. Chan stood to benefit if Ms. Li refused to honour the Agreement with 392. Some unanswered questions do arise out of Mr. Chan's involvement in the transaction. For example, why did Mr. Chan enter into the Agreement if he thought it was unenforceable and he had no intention of enforcing it?
- [55] However, in my view, Ms. Feng's potential allegations against Mr. Chan are not grounds for a further examination of 195. To the extent Ms. Feng alleges bad faith by 195 in co-ordination with Mr. Chan, she could have asked Ms. Li about those suspicions.
- [56] I also agree with the defendants that no meaningful benefit could be gained by examining Mr. Chan on the outstanding accounting issues. The accounting work was done by an outside accountant. Mr. Chan would need to inform himself on the accounting issues just as much as Ms. Li would need to inform herself.

IV. CONCLUSION

- [57] The application to examine Mr. Chan for discovery as a second representative of 195 is dismissed with costs in the cause.
- [58] The defendants took no position on the application to examine Mr. Chan as a non-party witness. Mr. Chan clearly has material information relating to matters in question in the action. Mr. Chan did not oppose the application.
- [59] There will be an order without costs that Mr. Chan attend to be examined under oath at a time, place and date to be agreed on, to answer questions relating to matters in question in this proceeding.

"Master Elwood"

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