

CANADA / JUDGMENT

Cheung v. Raegon Properties and Investments Ltd.

2020 BCSC 1271

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1271 Cheung v. Raegon Properties and Investments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cheung v. Raegon Properties and Investments Ltd.,

2020 BCSC 1271

Date: 20200806

Docket: S206803

Registry: Vancouver

Between:

Samuel Cheung and 0908034 BC Ltd.

Plaintiffs

And

Raegon Properties and Investments Ltd., Morrison Homes Bridge Street Ltd., Morris Chen,
Jingon Development International Group LLP, and Jingon Development Group (West Road) LLP

Defendants

Before: The Honourable Mr. Justice Brundrett

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs appearing by teleconference:

R.W. Cooper, Q.C.

Counsel for the Defendants Raegon Properties and Investments Ltd., Morrison Homes Bridge Street Ltd., and Morris Chen appearing by teleconference:

G. Allen

L.Y. Babbitt

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 5, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 6, 2020

[1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for publication.

Introduction

[2] This matter concerns a dispute over partnership interests in a valuable land assembly in the northwest part of Richmond, B.C. The main property in issue is held by the Jingon International Development Partnership LLP ("Jingon").

[3] The defendant Mr. Chen and his corporate entities Raegon Properties and Investments Ltd. ("Raegon Properties") and Morrison Homes Bridge Street Ltd. ("Morrison Homes") control 98% of the Jingon partnership and another partnership called the West Road partnership. These Chen-related defendants, whom I will refer to simply as the defendants, have sought to rely on a buy-sell provision in a limited liability partnership agreement they signed with the plaintiffs to force a sale of the plaintiffs' 2% interest in the partnerships.

[4] The plaintiffs, Mr. Cheung and his numbered company 0908034 BC Ltd. ("8034 Ltd."), are seeking an interim injunction until September 17, 2020, in their underlying action against the defendants. Specifically, the plaintiffs seek interim orders until September 17, 2020:

1. declaring that the buy-sell provision in the partnership agreement has not been engaged;
2. enjoining the defendants from transferring their partnership units pending judgment in this matter; and
3. enjoining the defendants from causing further encumbrances on the properties owned by the Jingon partnership or West Road partnership.

- [5] The defendants oppose the orders sought and submit that an offer for the plaintiffs' shares earlier this year triggered the buy-sell provision of the partnership agreement. The plaintiffs say the buy-sell provision was not triggered by the offer, and that an impending sale by the defendants to a third party threatens their interests in the development.
- [6] The issue for my determination is whether a basis for an interim injunction and declaration has been made out.
- [7] The defendants have raised a preliminary issue as to whether the plaintiffs' application is properly before the court. They point out that until the morning of the application, they understood that the plaintiffs were bringing their full application on short notice. The plaintiffs' application was revised to seek interim relief until the full application can be heard on September 17, 2020. While the unfolding of the application has no doubt been less than ideal due to the plaintiff's desire to urgently have an application heard before August 7, 2020 when the defendants' deal with a prospective purchaser is to close, in my view it was open to the plaintiff to seek more limited relief than what they originally sought. I cannot find that the plaintiffs' application is not properly before the court.

Background

- [8] As noted, Samuel Cheung and his numbered company 8034 BC Ltd. own 2% of the issued units in the Jingon partnership and the West Road partnership. Mr. Cheung is a realtor and a smaller investor in comparison to the defendants. He has some experience developing real estate projects, principally in China.
- [9] The defendants Raegon Properties and Morrison Homes own the remaining 98% of the units in Jingon. Mr. Chen is a large-scale property developer and the principal of both companies.
- [10] Mr. Cheung and Mr. Chen previously had business dealings as far back as 2006. In late 2010, Mr. Cheung approached Mr. Chen about a potential real estate development project involving the three Richmond properties collectively referred to as the Duck Island properties and additional properties on West Road in Richmond known as the West Road properties. Mr. Cheung and Mr. Chen agreed that Mr. Cheung would be compensated both by commission and a 2% minority stake in any partnership formed to develop the properties.
- [11] Mr. Cheung was successful in finding Mr. Chen an investor to help finance the development of the properties. Following negotiations, Mr. Cheung, Mr. Chen, and Gui Fang Zhu entered the partnership agreement on April 8, 2011, under the Jingon name, in which Ms. Zhu agreed to provide \$40 million in capital for a 49% interest in the partnership. The Duck Island properties were assigned to the Jingon partnership, and the West Road properties were the subject of a separate but similar partnership agreement.

- [12] After the proposed development plans ran into difficulty, and litigation occurred between 2015 and 2019, Mr. Chen later bought out Ms. Zhu's share for \$80 million, leaving him with effective 98% control over the Jingon and West Road partnerships through his corporate entities. The other 2% is held by the plaintiff and his numbered company.
- [13] In order to finance the settlement with Ms. Zhu, Mr. Chen caused other companies he controls to enter into two mortgages secured by individual parcels of land that make up the Duck Island properties. One mortgage dated December 16, 2019, is for \$22 million. The other mortgage, also dated December 16, 2019, encumbers the properties for an additional \$60 million. Mr. Chen did not discuss the mortgages with Mr. Cheung before taking them out.
- [14] I am told that the current assessed value of the Duck Island properties is more than \$150 million, and it is common ground that their value would be many times that amount if successfully rezoned and developed. The assessed value of the West Road properties is in the range of \$20 million.
- [15] By letter from counsel for the defendants to counsel for the plaintiffs dated March 19, 2020, the defendants offered \$800,000 for the purchase of the plaintiffs' shares in the partnerships. The offer was not accepted, and no counter-offer was made. This is important because the buy-sell provision in the partnership agreement is a form of "shotgun clause" that deems the lack of a counter-offer after seven days to constitute acceptance:

10.10 Buy-Sell

a)

- (i) Subject to sections 10.10(b) and 10.10(c) hereof a Partner (the "Offeror") desiring to purchase all of the Units of another Partner shall make an all cash offer in writing (the "Offer") to the Partner whose Units it desires to purchase specifying the price per Unit in lawful money of Canada and the terms of payment. The Offer shall constitute an offer by the Offeror to purchase the Units from the other Partner on the date being thirty (30) days after acceptance and shall not be revocable.
- (ii) Upon receipt of the Offer, the other Partner shall have a period of seven (7) days to elect either:
- a) to accept the Offer by written notice to the Offeror; or
- b) make a counter-offer (the "Counter-Offer") offering to purchase all of the Units of the Offeror the price per Unit in lawful money of Canada for the Units, which price must exceed the price contained in the Offer. The Counter-Offer shall constitute an offer by the Partner to purchase the Units from the other Partner on the date being thirty (30) days after acceptance and shall not be revocable.
- (iii) A Partner who receives a Counter-Offer shall have a period of seven (7) days to elect either:

- a) to accept the Counter-Offer by written notice to the other Partner; or
- b) make a further Counter-Offer at a price in excess of the prior Counter-Offer.

(iv) The aforesaid provisions with respect to the Offer and Counter-Offers shall continue with each Counter-Offer increasing the price until such time as a Partner agrees to accept the Offer or Counter-Offer of the other Partner; Provided However if at anytime a Partner in receipt of the Offer or a Counter-Offer fails to elect either to accept the Offer or Counter-Offer by written notice or make a Counter-Offer within a period of seven (7) days, then and in such event, such Partner shall be deemed to have elected to accept the Offer or Counter-Offer.

- (v) If in accordance with the aforesaid sections a Partner accepts the price being offered by the other Partner, the Partner accepting shall be bound to transfer its' Units and if it fails to do so, the Management Committee shall cause the Registrar to enter the name of the purchasing Partner in the Register as the holder of those Units and shall cancel the Unit Certificates previously issued to the selling Partner representing those Units whether they have been produced to the Registrar or not. Payment of the purchase price to the Registrar and the deposit of such funds in an account established by the Registrar shall be sufficient payment by the purchasing Partner and entry of the transfer in the Register shall be conclusive evidence of the validity of the transfer. Upon completion of the transfer, the Registrar shall pay the purchase price received from the purchasing Partner to the selling Partner.
- b) Except arising from a dispute over a Major Decision as set out in section 13.15, no Partner may invoke the procedure set out in this section 10.10 prior to the first anniversary of the date in which the Partnership acquired the Lands.
- c) If any Partner exercises its right to invoke the procedure set out in this section 10.10 within eighteen (18) months of the Required Rezoning being obtained then the Partnership shall immediately pay to XuCo the sum of \$10,000,000.

[16] The partnership agreement also contains a right of first refusal on the sale of partnership interests. Under Clause 10.9, other partners have a 30-day right of first refusal to purchase a partner's interest if a partner is contemplating the sale of his or her units.

[17] The March 19, 2020 letter did not refer to the buy-sell provision of the partnership agreement. However, by further letter dated April 1, 2020, the defendants sought to cloak the March 19, 2020 buyout offer as having invoked the buy-sell clause of the partnership agreement. Mr. Cheung maintains that he was unaware that the buy-sell provision was being relied upon at the time in March, and that the April 1, 2020 position of the defendants is an unfair attempt to retroactively invoke the buy-sell provision of the partnership agreement.

[18] In their notice of claim filed July 8, 2020, the plaintiffs seek a declaration that the defendants breached their partnership agreements with the plaintiffs, breached their fiduciary duties, and breached a common law duty of good faith and honest performance. In the underlying action, they seek an order dissolving the partnership agreements, damages, and costs. A

standstill agreement has been in place by consent, but Mr. Chen recently gave notice that he wanted to close on a proposed sale of his interests, which is due to close tomorrow, Friday, August 7, 2020.

- [19] As a result, Mr. Cheung has applied for an interim injunction to preserve the status quo and protect his interests from what he says is unfair and oppressive conduct by the defendants during the interim until his application can be fully heard on September 17, 2020.

Legal Framework

- [20] The parties agree as to the test to be applied for an interim injunction under R.J.R.-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311. That test is phrased as follows at p. 334 of R.J.R.:

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. . . .

- [21] The Supreme Court of Canada more recently summarized the test as follows in R. v. Canadian Broadcasting Corporation, 2018 SCC 5 at para. 12:
- [12] In Manitoba (Attorney General) v. Metropolitan Stores Ltd. and then again in RJR -- MacDonald, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in American Cyanamid Co. v. Ethicon Ltd. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
- [22] Although a modified test of a strong prima facie case that the plaintiffs will succeed at trial attaches to a mandatory injunction, here the plaintiffs' prayer for relief is mostly prohibitive in the sense that it, in substance, requires the defendant to refrain from transferring their interests or causing further encumbrances to the properties in issue: Canadian Broadcasting at paras. 16 to 18.

Application of the Law to the Facts

Issue of Declaratory Relief

- [23] In paragraph 1 of their notice, the plaintiffs seek an order declaring that the buy-sell provision in the partnership agreement has not been engaged.
- [24] At this stage, I would not make the declaration as sought by the plaintiffs. I agree with the defendants that this Court lacks the jurisdiction to make such an order on an interim basis: *Millership v. City of Kamloops et al*, 2001 BCSC 1692 at paras. 13-14; *Monimos Equities & Developments Inc. v. Esquimalt Dockyard Branch 172 of the Canadian Legion*, 2016 BCSC 2057 at para. 15.
- [25] Therefore, this aspect of the plaintiffs' application is adjourned to the full hearing.

Serious Question to Be Tried

- [26] Turning to the injunctive relief sought by the plaintiffs, our Court of Appeal has held that the "serious question to be tried" threshold is a low one: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 22 (Frankel J.A. in Chambers), quoting *RJR-MacDonald* at 337-338; *Vesuna v. Ashworth*, 2020 BCCA 154 at para. 34 (per Griffin J.A. in Chambers).
- [27] I find that the applicant has met that threshold here. The silence in the March 19, 2020 letter and the after-the-fact invocation of the buy-sell clause in the April 1, 2020 letter raises a serious issue as to whether the buy-sell agreement was properly invoked.
- [28] Moreover, the plaintiffs have pointed to the potential technical deficiencies if the March 19, 2020 letter was indeed to be treated as a formal offer to buy the plaintiff's interests for the purposes of the partnership agreement. The defendants have disputed all of these, but the law provides that buy-sell clauses which result in one party being expelled are a severe remedy that must be strictly complied with: *Western Larch Limited v. Di Poce Management Limited*, 2013 ONCA 722 at para. 42 [*Western Larch*].
- [29] I am not tasked with deciding the issue at this stage, but the plaintiffs' claim appears to me to have some merit and is certainly not frivolous or vexatious.
- [30] I find, therefore, that the plaintiffs have raised a serious question as to whether or not the buy-sell clause in the parties' partnership agreement was properly invoked.

Irreparable Harm and the Balance of Convenience

- [31] I will consider these two factors together because they interrelate, and a balancing of interests is called for since both parties submit that an adverse ruling will cause harm to them.

[32] In considering whether a party will suffer irreparable harm, it is the type of harm rather than the magnitude of harm that must be considered. However, in assessing the balance of convenience, the magnitude of harm to both parties is of great importance: *Prophet River First Nation v. British Columbia (Forest, Lands and Natural Resource Operations)*, 2015 BCSC 2662 at para. 18.

[33] In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.), the Court commented on the balance of convenience analysis as follows:

I would also adopt and follow the approach of Madam Justice McLachlin to the second prong of the test, namely the assessment of balance of convenience. I would summarize that approach in this way: in assessing the balance of convenience a judge should consider these points: - the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

[Emphasis added]

[34] The plaintiffs submit that the balance of convenience favours the status quo. They submit that in the absence of an injunction, Mr. Cheung and 8034 Ltd. will suffer irreparable harm in the form of the involuntary loss of their partnership interest. They say that in the absence of an injunction, it is possible, and even likely, that the defendants will continue to force the plaintiffs to relinquish their partnership interest at a deeply discounted price by exercising the buy-sell clause. The plaintiffs say that they bargained for an equity interest in the partnership so as to allow them to profit from the successful development of the properties, and that the loss of this interest (which involves a calculation of the prospective success of the project, the anticipated costs, and the potential timeline) cannot be easily fixed or ascertained on a conventional damages analysis.

[35] The plaintiffs further submit that there is no evidence put forward by the defendants as to why they must make the transfer of their interests now, thereby upsetting the status quo. They also point to the defendants' actions in encumbering the properties with mortgages to buy out Ms. Zhu's interests, without the involvement of the plaintiffs, as leading to the troubling prospect that the properties could be put into foreclosure.

[36] Overall, the plaintiffs argue that failing to grant the injunction will be tantamount to a pretrial judgment in favour of the defendants.

- [37] The defendants, on the other hand, argue that the plaintiffs do not face irreparable harm if the relief is not granted. They point out that the plaintiffs' underlying action is essentially a claim for damages, and suggest that the plaintiffs are simply seeking to avoid their obligations under the buy-sell provision.
- [38] Moreover, the defendants point out that Mr. Cheung admits that it is simply not possible for his numbered company to ever make a counter-offer under the buy-sell provision. As well, the plaintiffs no longer control a position on the management committee of Jingon, which has wide powers to manage the partnership and to borrow money. Given the inequity in bargaining power, unless the plaintiff's numbered company were to challenge the validity or enforceability of the buy-sell provision itself (which it has not), it could be again presented with an offer that it is doomed to accept under the shotgun-style buy-or-get-out provision.
- [39] On the questions of irreparable harm and balance of convenience, I substantially agree with the defendants.
- [40] The plaintiffs' argument that its interest in Jingon cannot be fixed by a conventional damages analysis is flawed. The plaintiffs' position seeks to preserve the status of their minority partner status well into the future including, presumably, up to the point at which the holdings are developed into more valuable assets. However, a party subject to such a buy-sell provision has no entitlement to the market value of its interest, unless it can establish that the operation of the buy-sell provision would have resulted in a market value purchase: *Western Larch* at paras. 75-75. That is not the case here because the plaintiffs, in their minority situation and being subject to the buy-sell shotgun clause, are simply not in a position to engage in an escalating exchange of offers that could lead to retention of their interest and their obtaining a market rate for the sale of their shares. In other words, the buy-sell provision restricts the transfer of partnership interests and inhibits the plaintiffs' ability to receive a market price for their interest.
- [41] As the defendants point out, the plaintiffs' interest was always at risk of another partner invoking the buy-sell clause. If another partner purchased the plaintiffs' interests, they would have no entitlement to any future profits earned through the development process. Here, due to their asymmetrical economic positions, the plaintiffs are not in a position to counter a valid offer made by the defendants to defeat the operation of the buy-sell clause.
- [42] The plaintiffs says that if the purchase goes through, they will lose their rights as a partner and lose the right to participate in the development of the holdings and benefit from the future increases in the value of the properties. However, this argument ignores the fact that even if the March buy-sell invocation was invalid, the majority partner could again invoke the buy-sell provision at any time and force a sale of the plaintiffs' interest at a non-market price. As well, the fact that the plaintiffs no longer have a place on the management committee, which is now controlled by the defendants, means that the plaintiffs are unlikely to have significant input on future development decisions.

- [43] If the defendants' sale goes through tomorrow, on August 7, 2020, the plaintiffs will still be able to maintain their claim that the buy-sell clause was unfairly or improperly invoked. The plaintiffs will still have their claim for damages, and I do not accept that the difficulty quantifying the plaintiffs' potential loss amounts to irreparable harm.
- [44] As for the argument that the plaintiffs are at risk of losing their interest due to over-mortgaging, the fact that the defendants encumbered the properties in issue with mortgages does not lead to a reasonable inference that the plaintiffs' interests are at risk. The properties have apparently accumulated significantly in value, and the defendants have other substantial holdings. I cannot find that, in these circumstances, the plaintiffs are at material risk of non-recovery. There is no indication that the defendants are soon planning on funding further development through additional mortgage financing. The risk of foreclosure is not well-established, and I cannot foresee a reasonable risk that the plaintiffs will wind up with a dry judgment at the end of the day.
- [45] As noted, the plaintiffs' claim for damages will survive the impending sale, if it goes through, by the defendants of their interests. If the plaintiff is successful in its underlying action, the plaintiffs will likely end up with an award of damages commensurate with the nature of their interest in the partnership. However, the plaintiffs have not established a risk of irreparable harm to their interests if the injunction is not granted.
- [46] Overall, weighing the potential harm to the parties, I find that the balance of convenience does not favour restricting the defendants from exploring commercially viable options by imposing restrictions on the transfer of their interests, or imposing restrictions on their ability to further financially encumber the properties.

Conclusion

- [47] For the reasons above, I have decided that the application for injunctive relief must be dismissed.
- [48] That is the end of my reasons. Do counsel have anything else to add?
- [49] MR. ALLEN: My Lord, this is Mr. Allen. Just with respect to costs, it's my submission that costs should be awarded in favour of my clients in any event of the cause.
- [50] MR. COOPER: And Robert Cooper. I would say that costs on an interim application like this should be in the cause.
- [51] THE COURT: All right, Mr. Cooper, I agree with you. I am going to award costs in the cause.
- "Brundrett J."

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