

CANADA / JUDGMENT

Concrete Cashmere Ltd. v. Lo

2023 BCSC 1502

COURT

Supreme Court of British Columbia

DECIDED

6 July 2023

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2023 BCSC 1502 Concrete Cashmere Ltd. v. Lo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Concrete Cashmere Ltd. v. Lo,

2023 BCSC 1502

Date: 20230706

Docket: S234607

Registry: Vancouver

Between:

Concrete Cashmere Ltd.

Plaintiff

And

Si Ling (Salina) Lo, Jasper Hon Wai Lee, Daniel Emerson,

1399614 B.C. Ltd., RDB Group Ltd., Odyssey Tile Company Ltd.

O/A Odyssey Construction Division and A.M.J. & Sons

Holding and Construction Ltd.

Defendants

Before: The Honourable Justice Stephens

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

E. Ito

J. Ghatak

Counsel for the Defendants, 1399614 B.C. Ltd. and Daniel Emerson:

J. Sebastiampillai

Counsel for the Defendant, Si Lo:

C.J. Overholt, K.C.

F. Wong

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

July 6, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 6, 2023

- [1] THE COURT: This is an application brought by the plaintiff in this action filed June 28, 2023, against various application respondents, including the defendants in this action. The relief sought is in the nature of injunctive relief and related relief in paras. 1 to 6, and I will not read that into the record, but suffice to say that para. 1 seeks a form of injunctive relief against the application respondents with respect to, among other things, allegations of breach of confidence. Paragraphs 2 and 3 seek what I would call related relief: para. 2 being a form of delivery up, the order in para. 3 being an order sought for the application respondents to provide an affidavit. A sealing order is also sought in para. 4.
- [2] This matter, the plaintiff contends, has a measure of urgency to it. Short leave was granted by this Court for the hearing of this application today, and I do accept that the plaintiff has a reasonable basis for contending that this is an urgent application. The Court was advised at the hearing of this application today that all application respondents, other than the defendant Si Ling (Salina) Lo--who I will refer to as Ms. Lo--either consent to the relief sought other than costs, or have not filed an application response. As a result, the opposition to this application, which has been brought by the plaintiff, has been the defendant, an application respondent, Ms. Lo. The Court has heard arguments today by her counsel in opposition to the relief sought.

- [3] The Court notes that this action is at an early stage. The notice of civil claim was filed on June 27, 2023. The Court has been advised there has been no documentary or other discovery to date. Having heard the submissions of counsel and considering the evidence that I have been taken to, I do find for the purposes of this application that the risk of harm, which is apprehended by the plaintiff, is a reasonable one in the circumstance. I am not satisfied that the risk of apprehended harm to the plaintiff is all in the past, as was argued by Ms. Lo, and that there is no reasonable apprehended harm in the future to the plaintiff.
- [4] I note at the outset that the plaintiff has provided an undertaking as to damages in support of the injunctive relief sought.
- [5] The law in respect of injunctions is set out in a variety of cases, the leading one being *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117. An applicant seeking an interim injunction must demonstrate:
- 1) There is a serious question to be tried;
 - 2) The applicant will suffer irreparable harm if the injunction is not granted; and
 - 3) The balance of convenience favours the injunction.
- [6] The defendant Ms. Lo's submission before me was that this test is not satisfied, and the injunction should not be granted. Ms. Lo submitted that her practice of referring jobs out while she was employed with the plaintiff was not actionable, and she contends that she has no confidential information of the plaintiff.

Fair Issue to be Tried

- [7] Turning initially to the fair issue to be tried: I note the test in this regard is subsumed within the comments of this Court in *6180 Fraser Holdings Inc. v. Ali*, 2012 BCSC 247 at para. 31 [Fraser], which I adopt for the purposes of my reasons. I note, among other things, that the threshold is a low one in this branch of the test. The judge on the application must make a preliminary assessment of the merits of the case. A prolonged examination of the merits is generally neither necessary nor desirable at this branch.
- [8] I also have regard to the law as it relates to allegations of breach of confidence, which is one of the causes of action advanced by the plaintiffs. I refer to *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 1989 CanLII 34, which is a leading case in that regard. I also refer to the decision in *EnWave Corporation v. Dehydration Research, LLC*, 2022 BCSC 637 at para. 80, among other things, which describes characteristics of confidential information for the purposes of this doctrine. I find in all the circumstances, having reviewed the evidence provided to me, that the plaintiff has established there is a fair issue to be tried and has met the low standard applicable on the injunction test.

- [9] This is an urgent application. I am going to give reasons concisely, but for the purposes of this aspect, I will refer to the evidence I have been referred to in Exhibit G of Jennifer Zhang's affidavit that refers to the transmission of a Google Docs document by the defendant Ms. Lo, and I further refer to Exhibit P, which on my assessment is supportive of the plaintiff's submission that it appears that information of the plaintiff was used by a competitor in or around December 2022.
- [10] On the whole of the evidence, I find that the plaintiff has met the low standard applicable to establish a fair issue to be tried as to an alleged breach of confidence or breach of the applicable employment agreement. That some of the alleged confidential information may have been known by the plaintiff's clients, does not mean that there is no fair issue to be tried in respect of a breach of confidence allegation and cause of action.

Irreparable Harm

- [11] Turning to the matter of irreparable harm: the plaintiff described its position that the alleged use of confidential information could result in a variety of alleged harms, set out more fully at para. 84 of its written submission. I find that there is a sound basis on this application for the apprehension of such harm. The plaintiff argued and I accept that some of the information that was alleged to be confidential and distributed could be regarded as a starting kit for a competitor of the plaintiff. I refer to *Phoenix Restorations Ltd. v. Drisdelle*, 2014 BCSC 1497 at para. 30 [Phoenix], where Justice Macintosh stated, among other things:
- [30] In addressing irreparable harm, it is, in my view, nearly always impossible for a plaintiff to prove in a way measurable by damages the harm suffered from confidential information getting out. What use might be made of what customer list, or sub-trade list, or any of the other documents taken in this case? No one can readily have a quantifiable answer to that question. There are a thousand reasons to suggest why a company does better or worse in its performance over time. The extent to which any document becoming public can alter a company's fortunes can never be measured realistically. Confidential documents being released presents an almost classic case for a finding of irreparable harm, in my view.
- [12] Ms. Lo argued that documents have been returned to the plaintiff, and therefore there is no basis for the injunctive relief sought. Here, I refer to and adopt the comments of Macintosh J. in *Phoenix* at para. 31. In short, I find that the plaintiff has established a risk of irreparable harm to it if an injunction is not granted.

Balance of Convenience

- [13] Turning to the balance of convenience: the defendant Ms. Lo argued that, among other things, she will be prejudiced, if an injunction were granted, to her livelihood. However, there is no strong evidence before me on this application which would suggest that injunctive relief in the form sought in para. 1 would interfere with her current employment or business endeavours. However, the Court is cognizant of the plaintiff's submissions that this proceeding is an action that is at an early stage procedurally.
- [14] I note as well, however, that the plaintiff has provided an undertaking as to damages in support of the injunction. In my view, for reasons I will describe shortly, I find that the balance of convenience weighs in favour of the injunction and the plaintiff, but I will order an injunction of a shorter duration than the terms sought by the plaintiff and on an interim basis.
- [15] Finally, I disagree with the submission of Ms. Lo that the plaintiff lacks clean hands for the purposes of this injunction application or that the injunction application was sought for an improper purpose, and I am not persuaded on the evidence before me that Ms. Lo's arguments were sound.
- [16] In summary, I find that the injunction test has been met by the plaintiff. However, the plaintiff sought an injunction, as I understood it, of in effect an interlocutory nature with no time limit, and I decline to grant an injunction with that term. Instead, I find a time-limited injunction of an interim nature is just and appropriate. This application has come on quickly. The notice of civil claim has been filed very recently. There has been no discovery and no document production. In my view, a five-month duration of interim injunction is just and appropriate, and I shall grant an interim injunction until 4:00 p.m. on December 6, 2023, or of further duration as ordered by the Court.
- [17] I find that balancing the interests of justice of the prejudice to the parties, a five-month duration is appropriate. This five-month duration will allow time for there to be some document production or potentially examinations for discovery. To be clear, if the plaintiff does not apply for and obtain a further injunction after the five-month period, this injunction will expire at 4:00 p.m. on December 6, 2023. I reiterate that I make the findings on this application on the evidence before me and for the purposes of this application only which is before me.
- [18] Further, I find that the terms of the injunction sought in the main by the plaintiff are sufficiently clear. I will have some comments on aspects of the wording of the injunction, including at para. 1(j) in a moment. I note, in regard to the defendant Ms. Lo's argument that the injunction should not be granted over confidential information, that this Court in Fraser, previously referred to at para. 6, granted an injunction in terms that specified or referred to an injunction of disclosure of confidential information.

Orders Granted

Injunctive Relief

- [19] I therefore order that para. 1 of the notice of application is granted. However, it shall be granted until 4:00 p.m. on December 6, 2023, or such further other duration as may be ordered by this Court. I further modify the relief sought in para. 1 of the notice of application to remove the words in the first paragraph "of or in collaboration with any of them in any capacity," which I find broad and vague. Further, I agree with what I appreciated to be the submission of counsel for Ms. Lo that para. 1(j), which deals with "proprietary information" is vaguely worded, and I remove that paragraph from the order that I have just granted. I further direct that the plaintiff's undertaking as to damages be referred to in the preamble of this order.
- [20] As it relates to para. 2 of the relief sought, I am not persuaded that is an order that I should make on this application as it relates to Ms. Lo. Ms. Lo opposed this order sought, and I agree with Ms. Lo's counsel that there is not a sufficient basis for the making of such an order on this application, which is an interlocutory application.
- [21] Similarly, with respect to para. 3 of the notice of application, I am not persuaded that there is a sufficient basis to order para. 3. I agree with the submissions of Ms. Lo that through the discovery process, the plaintiff is afforded an opportunity to obtain information that may be relevant to this proceeding in the subject matters covered in para. 3.
- [22] In short, I grant para. 1 of the orders sought subject to the modifications that I have stated and for a term of five months or further term ordered by the Court. I dismiss para. 2 of the notice of application, and I dismiss para. 3 of the notice of application. I should be clear; I dismiss paras. 2 and 3 as they relate to relief sought against Ms. Lo. As it relates to the other application respondents, I will adjourn paras. 2 and 3 generally. I note that others of the application respondents may be prepared to consent to that relief, and I am not deciding that now.

Sealing Order

- [23] The plaintiff also sought a sealing order over portions of materials and the affidavit in support of this application, the affidavit No. 1 of Ms. Zhang. Through further submissions and exchanges with counsel for the plaintiff, this request for a sealing order was narrowed to only certain exhibits of Ms. Zhang's affidavit: H, J, K, L, M, and Q.
- [24] I have had regard to the applicable law as it relates to applications for sealing orders. I have had regard to the applicable paragraphs of *N.E.T. v. British Columbia*, 2018 BCCA 22 at paras. 40-44, among others; and also to the leading case of *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. A sealing order or confidentiality order should only be granted where such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and two, the salutary effects of the confidentiality order, including the effect of the rights of civil litigants to a fair trial, outweigh its deleterious

effects, including the effects on the right to free expression, which in this context includes public interest in open and accessible proceedings.

[25] I also refer to *Sherman Estate v. Donovan*, 2021 SCC 25, and the applicable paragraph of that. I am mindful that court openness has a serious connection to an important public interest, and in order to obtain a sealing order, a plaintiff must satisfy or must establish that:

- a) Court openness poses a serious risk to an important public interest.
- b) The order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent the risk; and
- c) As a matter of proportionality, the benefits of the order outweigh its negative effects.

[26] I am mindful that this is an order that the parties cannot consent to, and I do note that the defendant Ms. Lo did oppose a sealing order as initially sought over the entirety of Ms. Zhang's affidavit.

[27] In my view, given the context of this case, which involves allegations of breach of confidence, and that the particular exhibits referred to by the plaintiff constitute those documents, which it says are the selfsame documents that have resulted in an alleged breach of confidence in this case, and noting that an important interest for the purposes of a sealing order can include a commercial interest, I find that the plaintiff has met the onus to show a sealing order is appropriate and that in the context of this case involving allegations of breach of confidence, court openness would pose a serious risk to an important public interest, but the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent the risk. And, as a matter of proportionality, the benefits of the order outweigh its negative effects.

[28] I will not grant a sealing order over the entirety of Ms. Zhang's affidavit. In my view, that would overshoot the mark, and because reasonably alternative measures exist. That is, I am ordering that Ms. Zhang's affidavit be sealed but a redacted form of the affidavit be publicly accessible.

[29] In summary, I therefore do grant a sealing order until further order of this Court, I understand to be on the terms sought, of the affidavit No. 1 of Ms. Zhang, but I further order that a redacted version of that affidavit of Ms. Zhang, which redacts the contents of Exhibits H, J, K, L, M, and Q, be filed not under seal.

[30] Are there any submissions on costs?

(SUBMISSIONS ON COSTS)

[31] THE COURT: All right. I have listened to counsel's submissions and considered it, and I regard it appropriate given that not all the relief was granted that was originally sought, that costs of this application be in the cause.

- [32] CNSL C. OVERHOLT: Justice, one point for clarification.
- [33] THE COURT: Yes.
- [34] CNSL C. OVERHOLT: Is it -- may we file the affidavit of Ms. Lo in the court file? It does reference some of the exhibits, or does that need to be redacted? My friend has --
- [35] THE COURT: Mr. Overholt, I will just say I have not considered that. That is not an application that was before me. I would -- Mr. Ito is going to rise. I would -- I would suggest you discuss that amongst yourselves.
- [36] CNSL C. OVERHOLT: Okay. Thank you.
- [37] THE COURT: And, Mr. Ito, were you going to echo that?
- [38] CNSL E. ITO: That was my very suggestion, Justice, thank you.
- [39] THE COURT: And I -- and I wish to make clear that in not making any order about that affidavit, I am not passing any judgment on whether that is meritorious or not. I simply have not considered it, and I am not in a position to give a decision on that at the moment.
- [40] Are there any questions about the terms of the order before we adjourn, or is that all?
- [41] CNSL E. ITO: Just for clarity, Justice, so as I understand it, there will be an order that Ms. Lo's -- or sorry, Ms. Zhang's first affidavit be filed under seal and a separate affidavit -- and a redacted version be filed as well not under seal? Just to be clear.
- [42] THE COURT: That's correct. There would be a public version of her affidavit redacted to remove the content of the exhibits that I referenced.
- [43] CNSL E. ITO: Understood.
- [44] THE COURT: Which I understood -- well, that is what I have ordered. That is what the list that you provided -- I believe, and the court clerk may know or the registry, that will result in two orders. There will be a sealing order, and then I believe there will be a separate form of order that -- the court clerk is nodding yes. There will be a separate order that directs that a redacted version be filed not under seal.
- [45] And I should add, and counsel will likely be aware of this, there is a practice directive on sealing orders.
- [46] CNSL E. ITO: Yes.
- [47] THE COURT: Ms. Overholt is -- I believe it is practice directive 58. And you should consult that and comply with it. And I will not purport to summarize it at that time, but I ask, and I expect that you will do that; all right? I do not believe there is anything further. We are adjourned.

"Stephens, J."

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