

CANADA / JUDGMENT

GEA Refrigeration Canada Inc. v. Chang

2015 BCSC 1593

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1593 GEA Refrigeration Canada Inc. v. Chang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

GEA Refrigeration Canada Inc. v. Chang,

2015 BCSC 1593

Date: 20150904

Docket: S125293

Registry: Vancouver

Between:

GEA Refrigeration Canada Inc.

Plaintiff

And:

Kin Hung (Jeffrey) Chang, Aihua (Alex) Chen, Chen Yoiet, (Andrew) Chu, Justin Lai, Josephine Leung, Xiao Fan Qu, Cam Man Wong, Xia (Mary) Hua Wu, Guang Hao (Frank) Xu, 16289 Holding Limited, Dr. Ken Lai Inc., Ken Lai, Chih Liang Huang, Yu-Wen Lin, Hsaio Tao Yu, Bei Xi Ma, Hi Ming Chan and FPS Food Process Solutions Corporation

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

In Chambers

Counsel for the Plaintiff/Respondent:

M. C. Stacey

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T. A. Kowalchuk

V. Ing

Place and Date of Hearing:

Vancouver, B.C.

September 1 and 2, 2015

Place and Date of Judgment:

Vancouver, B.C.

September 4, 2015

INTRODUCTION

- [1] Eight of the defendants (the "applicants") apply for judgment dismissing the claim against them by way of summary trial. That claim alleges that they were part of a conspiracy with the remaining defendants (the "original defendants") by which they all conspired to carry out certain acts, essentially related to the establishment, financing and conduct of a business that competes with the plaintiff, with the predominant purpose of injuring the plaintiff.
- [2] The applicants say that there is not an iota of evidence that they either conspired together at all, or acted with the predominant purpose of injuring the plaintiff, and the claim should therefore be dismissed.
- [3] The plaintiff says that the existence of a conspiracy of the sort alleged will be a matter for inference and should be left to the trial judge to be determined in the context of the case as a whole. In the particular circumstances of this matter, the plaintiff submits, it would be unfair and unsafe to dismiss the claim on a summary trial.

BACKGROUND AND PROCEDURAL HISTORY

- [4] The plaintiff is in the business of industrial refrigeration. At the material time (2009-2010), the individual original defendants were employed by the plaintiff in various capacities, and, it is alleged, were subject to duties of confidentiality, fiduciary duties and contractual duties, including non-competition clauses.

- [5] The plaintiff claims that, in breach of their common law and fiduciary duties and contractual obligations, the individual original defendants set up a competing business via the corporate original defendant, FPS Food Processing Services Inc. ("FPS"), which, among other things, made use of proprietary information, employed trade secrets and poached customers of the plaintiff. FPS was incorporated on April 12, 2010.
- [6] Accordingly, the plaintiff commenced action against the original defendants on July 27, 2012, claiming, among other things, liquidated damages, damages for breach of fiduciary, contractual and implied duties, an accounting of profits earned by FPS, and injunctive relief, as well as punitive damages.
- [7] The Chief Justice assigned this action to Madam Justice Fenlon for case management. I will not review all of the procedural history, but it is pertinent to note that: the plaintiff was obliged to apply more than once for the production of documents; the trial has twice been adjourned; and an application by the plaintiff to amend its Notice of Civil Claim to add a claim for civil conspiracy was dismissed on February 20, 2014, subject to the pleading being revised to allege a predominant purpose to injure.
- [8] The trial is presently scheduled for six weeks commencing September 28, 2015.
- [9] By order pronounced June 6, 2014, Fenlon J. granted the plaintiff leave to amend its notice of civil claim and to add the applicants as defendants and plead predominant purpose conspiracy. The individual applicants are all relatives of original defendants, but were never employees of the plaintiff. The applicant Dr. Ken Lai is the father of the original defendant Justin Lai. The applicant Chih Liang Huang, now deceased, was the uncle of Justin Lai. The applicant Yu-Wen Lin is the wife of the original defendant Jeffrey Chang. The applicant Hsiao Tao Yu is the wife of the original defendant Cam Man Wong. The applicant Bei Xi Ma is the wife of the original defendant Frank Xu. The applicant Hi Ming Chan is the wife of the original defendant Alex Chen.
- [10] All of the applicants were involved in one way or another with the structure (as directors or shareholders) and/or financing of FPS and/or the applicant 16289 Holdings Limited ("16289"), a holding company that purchased and owns property in Richmond, BC, where FPS located its business. The Amended Notice of Civil Claim, filed August 15, 2014, alleges that the original defendants and the applicants, whom it calls, together, the "Co-Conspirators":
- [78] agreed to work together in carrying out various legal and illegal acts intended to, in part, obfuscate and/or conceal the involvement of Lai, Chang, Chan, Wong, Young, Chen, Wu, Xu and Chu in the formation, financing and running of FPS. The Co-Conspirators agreement to work together was for the sole or predominant purpose of causing harm to [the plaintiff].
- [79] In particular, the sole or predominant purpose of the Co-Conspirators lawful and unlawful actions was to cause damage to, or to destroy, the business of [the plaintiff]. These actions include but are not limited to: incorporating the defendant FPS; acquiring property on

behalf of 16289; concealing the ownership structures of both FPS and 16289; falsifying FPS' employment records; acquiring, without right, the Confidential Information; inducing the customers of [the plaintiff] to become customers of FPS; and/or causing the employees of [the plaintiff] to become employees of FPS.

- [83] The plaintiff states and the fact is that the sole and predominant intention of the Co-Conspirators in entering into the Conspiracy was too, through both lawful and unlawful means, injure [the plaintiff]. The Co-Conspirators were motivated by their desire to damage or destroy the business of [the plaintiff].
- [11] The applicants say that their involvement in these matters was simply intended to assist their respective spouses or relatives in a business venture, that they had no idea what anyone else was doing or why they were doing it, and had no motivation other than advancing their families' self-interest. They specifically deny having had any intention to injure the plaintiff. They point to an absence of any evidence to the contrary.
- [12] The plaintiff acknowledges that there is no direct evidence of a predominant intention to injure the plaintiff on the part of the applicants, but relies on inference. It alleges that the manner in which the companies were set up and financed was designed to hide the fact that the original defendants, being former employees of the plaintiff, were behind FPS, and that this was done so that those former employees could start competing with the plaintiff before it was lawful for them to do so. The applicants, they say, were part of this. Thus, for instance, shares were put in the name of the wife, not her employee husband. From this, the plaintiff submits, it should be inferred that their intention was to harm the plaintiff. Otherwise they would and should have waited until they could compete fairly, lawfully and openly.
- [13] The plaintiff points to the late production of documents, and the very recent production of a large number of documents, in submitting that it ought not to be foreclosed from pursuing this claim at this time. It is therefore necessary to review the more recent procedural history in some detail.
- [14] The amendments led to further rounds of requests for documents, document disagreements, and examinations for discovery. The applicants filed this application on June 11, 2015, with a hearing date of July 3, 2015. Madam Justice Fenlon ordered that an application for the production of documents brought by the plaintiff should be heard first, and directed that she would hear this summary trial application on August 27 and 28, 2015. As I understand it, Fenlon J. made this direction specifically without prejudice to the right of the plaintiff to rely on Rule 9-7(3), which requires a summary trial application to be heard at least 42 days before the scheduled trial date.

- [15] Madam Justice Fenlon was thereafter translated to the Court of Appeal. On July 6, 2015, Master Tokarek heard and allowed an application by the plaintiff for an order that the defendants produce a complete list of documents, including various classes of documents outlined in the notice of application, or in the alternative swear affidavits confirming that documents of the enumerated classes had been produced.
- [16] In response, affidavits from all of the individual defendants other than Jeffrey Chang, Justin Lai and Andrew Chu (who were all out of the country) were delivered on July 17, 2015. Affidavits from Jeffrey Chang and Justin Lai were delivered on July 21, while the affidavit of Andrew Chu came somewhat later. In the meantime, the plaintiff proceeded to conduct further discoveries of Mr. Lai, Mr. Chang, Dr. Lai, and Mr. Wong.
- [17] Then, on or about August 17, 2015, the defendants delivered a further list of documents some 3,200 pages long (searchable) listing some 36,000 documents, consisting of emails and attachments from and to Justin Lai. These emails were, apparently, only recently recovered.
- [18] In the meantime, Madam Justice Ballance was assigned to take over the management of the case, and a case management conference is scheduled for September 8, 2015. Ballance J. indicated that she was not in a position to hear this application, and that it could be heard in regular chambers.
- [19] Counsel for the plaintiff advises that he has instructions to apply at that case management conference for an adjournment of the trial scheduled to begin September 28.

DISCUSSION

- [20] As a preliminary point, the plaintiff initially took the position that I had no discretion to hear this application in view of Rule 9-7(3), as we are less than 42 days before the scheduled trial date. After due consideration, the plaintiff revised its position and conceded that pursuant to Rule 22-4(2), the Court does have the discretion to abridge the time limited by Rule 9-7(3). That seems to me to be correct. Rule 22-4(2) allows the court to extend or shorten any period of time provided for in the Supreme Court Civil Rules even though the application for the extension is made after the period of time has expired. The plaintiff maintains, however, that I should not exercise that discretion in this case in view of the late document disclosure, as it would be unfair to do so.
- [21] The plaintiff also warns against the well-known risks of "litigating in slices", and of rendering judgment on a summary trial application where issues of credibility arise. See, for instance, the discussion in *Greater Vancouver Water District v Bilfinger Berger AG*, 2015 BCSC 485 at paras 92-110. Those risks do not concern me in this case. The situation here is more akin to excising a tumor then litigating in slices. The question is whether it may be removed without unduly harming the host. Given the nature of the allegations, I am satisfied that it may be safely dissected. And, as I discuss below, there is no issue of credibility that would prevent me from finding the facts necessary to render judgment.

- [22] The plaintiff has taken me extensively through discovery and documentary evidence and has pointed out a number of reasons why the credibility of the original defendants as to the nature and timing of their decisions concerning FPS in relation to their employment with the plaintiff may be legitimately questioned. The plaintiff has failed, however, to direct me to any evidence that puts the credibility of the applicants in doubt in relation to the purpose of their participation. Discrepancies and inconsistencies urged by the plaintiff disappear upon close examination. By way of example, I turn to the evidence of the applicant Hi Ming Chan, wife of the original defendant Andrew Chu.
- [23] Ms. Chan is listed as a shareholder in both FPS and 16289. She explained on discovery that she was made a shareholder because she invested \$300,000 in the enterprise, and did so at her husband's request. She gave the cheque to Jeffrey Chang when he met with her husband. She could not recall what, if any, discussion took place between her husband and Mr. Chang in her presence.
- [24] In her affidavit, Ms. Chan deposed that her husband asked her to make the investment, and she agreed to do so by borrowing money secured by a mortgage on her parents' house. The reason she gave the money to Mr. Chang was that her husband asked her to do so as an investment. This was entirely consistent with her discovery evidence. She then deposed that "[d]amaging or destroying the plaintiff's business or injuring or harming the plaintiff was never a reason for my involvement with 16289 or FPS nor was it part of any explanation given to me by my husband, or anyone else, for my involvement with 16289 or FPS".
- [25] The plaintiff submits that Ms. Chan's inability on discovery to recall any details of her discussion with her husband regarding the investment was "contrary to her Affidavit in which she swears that she not only recalls these discussions but further specifically recalls the explanations provided to her". With respect, that is not even close to an accurate characterization of what Ms. Chan said in her affidavit. The alleged inconsistency is, in my view, illusory.
- [26] That is also true in relation to the evidence of the other applicants. Another example is the applicant Dr. Ken Lai. He provided money to the enterprise, testifying that he gave the money to his son, Justin, to support him in his new venture. He was questioned at some length about whether he gave money to FPS or 16289, and it was suggested that he gave false evidence in this regard. But what is clear to me on a fair reading of his evidence is that he did not pay much attention to which entity the cheque was addressed; from his perspective, he was giving money to his son, directing it as his son requested. In my view, the transcript put before me does not support the description of his evidence as "false".
- [27] Given that there is no evidence at all from the plaintiff, whether in the form of admissions on discovery, affidavits or documents, to suggest that Ms. Chan, Dr. Lai, or any other applicant, was a party to discussions that would support the plaintiff's claim of predominant purpose conspiracy, I can find no credibility issue that would render it unfair to grant to the applicants the judgment they seek. Indeed, as far as I can tell, the applicants were not even

asked on discovery whether, for instance, they were aware (as alleged) that the original defendants owed contractual duties of confidentiality to the plaintiff - a relevant point if a predominant intent to harm the plaintiff is to be proven.

- [28] It follows that this is not a case where there is a conflict in evidence that goes directly to the foundation of the plaintiff's case and which cannot be resolved without findings of credibility, as discussed in *Jutt v Doehring*, [1993] BCJ No 932 (CA) at paras 12-13. The best the plaintiff can say is that I should not put reliance on any of the evidence of any of the defendants.
- [29] But even if that is correct, and I do not say that it is, it does not get around the inescapable fact that the onus is on the plaintiff to prove its case, and there is simply no evidence capable of supporting, directly or by inference, a finding that the applicants acted with the predominant purpose of injuring the plaintiff, as opposed to pursuing their own economic self-interest. That, of course, is very difficult to prove, and properly so given the anomalous nature of the tort of civil conspiracy: see, for instance, the discussion in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 75, referring to Justice Estey's description of predominant purpose conspiracy as a "commercial anachronism" in *Canada Cement Lafarge Ltd v British Columbia Lightweight Aggregate Ltd*, [1983] 1 SCR 452 at 473.
- [30] As noted by Professor Klar (Lewis Klar QC, *Tort Law* (5th Ed, 2012), Thomson Reuters Canada Ltd, p. 732):

The difficulty in establishing the tort of conspiracy to injure resides in the requirement of proving that the predominant purpose of the defendants was to cause injury to the plaintiff, as opposed to promoting their own interests. Acting in order to improve one's own interests, even if this is accomplished by damaging the plaintiff's, has always been regarded as legitimate. The test is a subjective one. What matters is not what the defendants ought to have realized would occur, nor what would naturally occur, as a result of their actions, but what their purpose or object was in acting.

- [31] Here, the plaintiff has been unable to surmount this difficulty in relation to the applicants. The question then becomes whether fairness nevertheless requires that the plaintiff be accorded a further opportunity to attempt to do so through the process of completing its review of the colossal list of emails to and from Justin Lai that was only recently produced, and through any further discovery that might follow from that.
- [32] In most cases, faced with such circumstances, my answer would be yes. But in this case, I am satisfied that the plaintiff has had a fair opportunity to establish its case through several rounds of examination for discovery and document production. The inherent improbability of the existence of predominant purpose conspiracy involving the applicants (why, one might ask, would Ms. Chan borrow \$300,000 on the security of her parents' house for the predominant purpose of injuring the plaintiffs, as opposed to advancing her family's interests?), together with the state of the evidence after extensive litigation and discovery, convinces me that allowing this aspect of the claim to proceed further would accomplish

nothing but increased expense.

- [33] Accordingly, the applications are allowed. The claim against the defendants 16289 Holdings Limited, Dr. Ken Lai Inc., Ken Lai, Chih Liang Huang, Yu-Wen Lin, Hsiao Tao Yu, Bei Xi Ma and Hi Ming Chan is dismissed.
- [34] In the event of this result, the applicants asked for costs to be assessed as special costs. They point out the unsavoury nature of the claim made against them, the expense to which they have been put, and the aspersions cast their way. But viewing this aspect of the claim in the context of the claim as a whole, I am unable to find that the plaintiff was guilty of misconduct in pursuing them, let alone misconduct that could be described as reprehensible.
- [35] The applicants will therefore have their costs to be assessed as ordinary costs at Scale B.
- [36] Nothing in these reasons should be taken as reflecting in any way on the strength of the plaintiff's claims, in conspiracy and otherwise, against the original defendants.

"GRAUER, J."

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