
CANADA / JUDGMENT

Huang v. Dai

2016 BCSC 1205

COURT

Supreme Court of British Columbia

DECIDED

9 February 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 1205 Huang v. Dai

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Huang v. Dai,

2016 BCSC 1205

Date: 20160209

Docket: S140616

Registry: Vancouver

Between:

Guiyin Huang

Plaintiff

And

Ruoyu Dai (also known as "David Dai")

Defendant

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M.C. Hamata

Appearing on his own behalf:

R. Dai

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 9, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 9, 2016

- [1] THE COURT: This is an application brought by the plaintiff and date-stamped January 27, 2016. The application is for civil contempt pursuant to the Supreme Court Civil Rules [Rules], R. 22-8(4), and the inherent jurisdiction of this Court. The plaintiff says that the defendant, Mr. Dai, has breached the January 6, 2016, order of Master Scarth. That order required him to comply with outstanding requests made during an examination for discovery and to provide the documents in response to those requests no later than January 20, 2016.
- [2] Mr. Huang also seeks an order striking Mr. Dai's response to civil claim and pronouncing judgment pursuant to Rules 22-7(5)(c) and (d), or pursuant to R. 22-7(5)(g), which require Mr. Dai's compliance with the process for discovery and production of documents set out in the Rules. In support, Mr. Huang relies on Mr. Dai's alleged total failure to comply with the Rules since the first trial management conference on June 12, 2015 (the "first TMC").
- [3] Mr. Huang says that Mr. Dai has abandoned his defence of this action because he has taken no steps since the first TMC and the adjournment of the first trial. The first trial was adjourned specifically in order to allow Mr. Dai to produce the outstanding discovery request.
- [4] Mr. Huang says that, at a minimum, after today, Mr. Dai's actions will have resulted in trial dates being adjourned twice, with Mr. Huang suffering all of the resultant expense and delay. Mr. Huang says, and I agree, that this result is especially egregious considering this matter is within the ambit of R. 15-1, the fast track rule. It is a simple matter with a relatively small amount of money at stake.
- [5] The orders that Mr. Huang seeks are that Mr. Dai be found guilty of contempt of court and be imprisoned or fined, and that the response to civil claim be struck and judgment be granted in favour of Mr. Huang. Finally, Mr. Huang also seeks special costs of this application in any event of the cause.
- [6] Mr. Dai has applied for an adjournment of the trial which was scheduled to commence this morning. Mr. Huang says that the trial cannot proceed without Mr. Dai's compliance with Master Scarth's order and Mr. Huang does not oppose the application for the adjournment.

[7] With regard to the facts of the underlying action, I will quote from the written submissions of Mr. Huang from this morning:

This is an action in breach of contract, unjust enrichment, and restitution, for the return of the Canadian dollar equivalent of 540,000 Chinese yuan, that Mr. Huang paid to Mr. Dai for the purchase in Canada of a [Mercedes] Benz GL550 (the "Vehicle"), and for the export and import of that vehicle into Hong Kong, and ultimately for delivery to Mr. Huang [in Hong Kong].

[8] Mr. Huang paid that amount of money, 540,000 yuan, to Mr. Dai. Mr. Dai purchased the vehicle and he caused it to be shipped to Hong Kong. The vehicle arrived in Hong Kong and then went missing. Mr. Dai originally informed Mr. Huang that the vehicle had been detained by customs in Hong Kong. Mr. Dai later admitted that the vehicle had been resold to a third party without Mr. Huang's knowledge or consent. Mr. Huang never received the vehicle or other consideration in exchange for the payment he made to Mr. Dai.

[9] Mr. Huang says he is entitled to return of the 540,000 yuan from Mr. Dai, either as damages for breach of contract, or as a remedy in unjust enrichment or restitution. That amount is now the equivalent of \$115,000 Canadian.

[10] The list of the failures of the defendant to comply with the Rules was provided by the plaintiff and is not disputed by the defendant:

Since Mr. Dai filed his Notice of Intention to Act in Person on December 2, 2014, he has:

... Failed to respond to the multiple requests for the Outstanding Discovery Requests, first made by Mr. Huang's former counsel during examination for discovery on October 7, 2014. Mr. Dai's initial failure to comply with those requests resulted in an adjournment of the first trial set down for June 29, 2015.

... Failed to file a trial brief in the First Trial Management Conference held on June 12, 2015;

... Failed to file a trial brief in the Second Trial Management Conference, held on December 17, 2015;

... Failed to attend the Second Trial Management Conference, or to be available by telephone [or] have someone attend on his behalf;

... Failed to respond to the plaintiff's application for production of the Outstanding Discovery Requests;

... Failed to attend the plaintiff's application for production of the Outstanding Discovery Requests, held on January 6, 2016;

... Failed to comply with the January 6, [2016], order of Master Scarth, which required compliance no later than January 20, 2016;

... Failed to file a trial certificate or witness list; and,

. . . Failed to file any response to this application, all of which necessarily results in a second adjournment of the trial of this matter, which was scheduled to commence today.

- [11] The procedural history is briefly as follows. The notice of civil claim was filed by previous counsel for Mr. Huang on January 28, 2014. Previous counsel for Mr. Dai filed a response to civil claim on February 26, 2014. Previous counsel for Mr. Huang filed a reply on March 6, 2014. The examination for discovery of Mr. Dai was on October 7, 2014. There were 15 requests made on the record demanding that Mr. Dai provide various information and documents. Two of those have since been acquired. There are now 13 outstanding requests, none of which have been provided.
- [12] Some 14 months ago, on December 2, 2014, Mr. Dai filed a notice of intention to act in person. In that notice, he provided the email address []@gmail.com as his email address for service. He has been served at that address since that time. I note here that there is an outstanding issue about his residential address and I will come back to that.
- [13] More than a year ago, on December 24, 2014, Mr. Huang's previous counsel set down a four-day trial commencing June 29, 2015. Mr. Huang's previous counsel successfully applied to be removed from the record on April 30, 2015, and present counsel have been retained for Mr. Huang since May 25, 2015.
- [14] The first TMC was June 12, 2015. There had been, up to that date, multiple attempts to adjourn that trial date because Mr. Dai had not yet produced the outstanding discovery requests, but Mr. Dai did not respond to the requests to consent to adjourn the trial date.
- [15] In the result, on or about June 11, 2015, counsel for Mr. Huang filed and served a trial brief seeking an adjournment of the trial, in part to allow Mr. Dai time to produce the outstanding document requests. Mr. Dai attended the first TMC to the surprise of plaintiff's counsel, but he failed to file or serve a trial brief. That was a breach of R. 12-2(3). At that first TMC, the judge ordered that the trial then set to commence on June 29 be adjourned, in part to allow Mr. Dai time to produce the outstanding discovery requests. That was about seven-and-a-half months ago. Mr. Dai at that time, with regard to his address for service, confirmed his Gmail email address and also confirmed his home address.
- [16] This trial was reset on or about July 9, 2015 for four days to commence today, February 9, 2016. Subsequent to that date in July, Mr. Dai has continued to fail to produce the outstanding document requests, including the failure to respond to a letter dated August 24, 2015, when counsel for Mr. Huang wrote to Mr. Dai demanding responses to those outstanding requests no later than September 30, 2015. There was no response at all to that demand from counsel, and that is a breach of Rules 7-2(16), (22), and (23).
- [17] Again, on October 6, 2015, counsel for Mr. Huang wrote to Mr. Dai requesting available dates for an application for production of the outstanding discovery requests and requested that Mr. Dai provide those dates no later than October 9, 2015. Again, Mr. Dai did not respond to that request. On or about December 10, 2015, counsel for Mr. Huang set down the second

trial management conference for December 17, 2015 (the "second TMC"), and served Mr. Dai with a filed trial brief. Also, Mr. Dai was served with a notice of application and supporting affidavit for production of the outstanding discovery requests. The date for hearing of that application was January 6, 2016.

- [18] Mr. Dai failed to file or serve a trial brief at the second TMC. That was a breach of R. 12-2(3). Mr. Dai failed to attend the second TMC, to have anyone attend for him, or to make himself available by telephone. Those are collectively a breach of Rules 12-2(4) and (5).
- [19] Mr. Dai failed to file or serve an application response to Mr. Huang's application for production of the outstanding discovery requests and Mr. Dai failed to attend the application on January 6, 2016, and did not provide any notice of his position with regard to Mr. Huang's application. It was on January 6, 2016, that Master Scarth ordered Mr. Dai comply with the 13 out of 15 remaining outstanding discovery requests within 14 days, which is January 20, 2016. That order of Master Scarth was served on Mr. Dai on January 7, 2016. The covering letter included a warning which states in part:
- . . . or else we will proceed with a contempt application against you. We will also apply for summary judgment against you in this matter.
- [20] On January 19, 2016, counsel for Mr. Huang filed and served a trial certificate that provided in part:
- . . . provided that Mr. Dai complies with the order of Master Scarth, made on January 6, 2016.
- [21] Mr. Huang filed and served his witness list and trial record on the same date.
- [22] January 20, 2016, came and went. Mr. Dai failed to comply with Master Scarth's order. He did not provide any documents or information in response to that order. Mr. Dai has still provided no documents in response to Master Scarth's order. Mr. Huang says that Mr. Dai's breach of that order amounts to contempt of court. Mr. Dai has also failed to file or serve a trial certificate or witness list, in breach of Rules 12-4(1) and (2) and R. 7-4.
- [23] Mr. Dai did retain counsel on a limited basis. On January 21, 2016, counsel for Mr. Huang received a letter from the law firm of Henderson & Lee which stated, and I paraphrase, that that law firm was recently retained by the defendant only to assist to settle the matter and to obtain consent of plaintiff's counsel to adjourn the trial. The letter from Henderson & Lee requested a response from plaintiff's counsel by January 28, 2016. That adjournment request was refused by the plaintiff and settlement negotiations were not successful.
- [24] On or about January 27, 2016, Mr. Dai was served with this application and supporting affidavits. Henderson & Lee were also served with copies of the application material. Neither Mr. Dai nor Henderson & Lee provided a substantive response.

- [25] On February 1, 2016, plaintiff's counsel emailed Mr. Dai to request his position on having this application heard by the trial judge rather than in chambers. Mr. Dai did respond to that email, the first response in many, many months, on or about February 2, 2016, indicating that he wanted this application heard by a master.
- [26] The email response sent by Mr. Dai was sent from the same Gmail account which is Mr. Dai's email address for service. That was the first communication received directly by plaintiff's counsel from Mr. Dai. It does indicate that Mr. Dai was using that email address and I infer that he was at all material times. Counsel for Mr. Huang again asked Mr. Dai by email to clarify his position with regard to an adjournment. Mr. Dai did not respond to that request.
- [27] Mr. Dai did attend court today on his own without a lawyer. Mr. Dai today does not take issue with having received the documents, demands, and orders which were sent, delivered, and served by plaintiff's counsel's office. Mr. Dai says that he needed the assistance of a lawyer to understand what he received from plaintiff's counsel. He says that he could not find a lawyer. The lawyer that Mr. Dai retained in January 2016 for the limited purpose of the adjournment and settlement is not able, he says, to represent him further than that limited retainer.
- [28] With regard to the issue of contempt of court, firstly, I am mindful of the standard of proof on contempt proceedings. I find as a fact that Mr. Dai failed to comply with the January 6, 2016, order of Master Scarth. As a result of that failure and in the context of the repeated failures of Mr. Dai to comply with the Rules, I do find that he is in contempt of court.
- [29] With regard to the law, the requirements for establishing civil contempt are well established: firstly, the alleged contemnor must have had notice of the order; second, he must not have complied; and thirdly, the alleged contemnor's non-compliance must have been wilful, that is deliberate, not accidental or unintentional; and fourth, the alleged contemnor must have been capable of complying with the order.
- [30] I agree with counsel for Mr. Huang that those requirements are met in this case. There is no issue that Mr. Dai was served with Master Scarth's order on January 7, 2016. The covering letter, as I quoted earlier, indicates the intention of plaintiff's counsel to proceed with a contempt application if that order was not complied with. That deals with the first requirement with regard to notice.
- [31] Secondly, that Mr. Dai has not complied is established on a criminal standard, beyond a reasonable doubt, on the record filed by plaintiff's counsel. Indeed there is no evidence, notwithstanding Mr. Dai's attendance in court today, to the contrary.
- [32] Thirdly, I find that his non-compliance was not accidental or unintentional, but wilful with the excuse that he could not, without a lawyer, comply. While I appreciate that a lawyer's assistance is helpful, Mr. Dai has not complied in any way with the order of Master Scarth. Again, I take this in the context of his continued non-compliance with requests, demands, and orders over the last seven-and-a-half months or so.

- [33] Lastly, I find that Mr. Dai was capable of producing the documents and responding to the requests. The documents and requests are not complex. They are matters which are within Mr. Dai's knowledge. Mr. Dai's counsel made no objection to the requests at the time that they were made during the examination for discovery. Mr. Dai has never indicated to plaintiff's counsel that he is not able to produce any document or respond to any request, and today in court, Mr. Dai indicated that he would prefer to have the assistance of a lawyer, but has not said that he is not able to do this on his own. Further, if his comments can be construed as an inability, then his course of action is clear. He has hired at least two lawyers in the course of these proceedings and is, in my view, able to obtain legal assistance and advice, either through a lawyer or through the legal assistance clinic route.
- [34] The cases cited support the plaintiff's position that failure to obey a court order for production of documents is a clear case of civil contempt. The plaintiff relies on *Sound Contracting Ltd. v. Comox-Strathcona (Regional District)*, 2004 CarswellBC 3452, aff'd 2005 BCCA 167. In that case, the respondent District obtained an order for production of outstanding requests made during examination in aid of execution. That order did not, unlike Master Scarth's order, contain a deadline for compliance. The company did later cure the contempt by producing the documents and the fine was set aside. The special costs award was maintained.
- [35] The Court of Appeal unanimously endorsed the findings of the chambers judge. On appeal, Smith J.A. quoted two paragraphs of *Rogers Cable T.V. Ltd. v. I.B.E.W., Local 213* (1994), 26 C.P.C. (3d) 67 (B.C.S.C.) where Warren J. stated:
8. Contempt of court is conduct which is in deliberate or wilful disobedience of a court order and thus offends the court. Not incidentally, the action also violates a right of another which was protected by the order, but the punishment is for the insult to the court and not to compensate the complaining party. In my view therefore, were I to award special costs, it would be to recognize that as between the parties to the litigation, the conduct of the contemnor was outrageous or scandalous and to provide as close to complete indemnity as possible for the party obliged to bring on the application. In my view, where there is contempt of court, there is nothing offensive in an award of special costs which may both act as a form of chastisement to the contemnor and provide indemnity for the complainant. In my opinion it is precisely for this type of situation that special costs were designed. In *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 (C.A.), in reversing the chambers judge's decision to award solicitor and client costs, Lambert J.A. at p. 311 says:

The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used. [Emphasis added in original.]

9. All three members of the Court of Appeal in *Stiles* make reference to the wide measure of judicial discretion in awarding costs. They caution, however, that the discretion must be exercised judiciously and not arbitrarily or capriciously. Southin J.A. (Toy J.A. concurring) considers the decision of Lambert J.A. in *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230 (C.A.) and at p. 316 states:

Fundamentally, this power [to award costs] like the power to award any of the remedies of law and equity is part of the inherent jurisdiction of the Court. It is a power to be exercised judicially on proper principles in accordance with any applicable enactment whether the enactment be in a statute or in a Rule of Court.

- [36] I agree with plaintiff's counsel that the parallels between the *Sound Contracting* case and this case are strong, and that there is no doubt that Mr. Dai's conduct amounts to contempt of court. It therefore deserves sanction.
- [37] The application also sought that Mr. Dai's response to civil claim be struck pursuant to Rules 22-7(5)(c) and (d), as well as R. 22-7(2)(d). In light of my finding that Mr. Dai is in contempt, this application is adjourned generally. I do so because the remedy for this application is, as the cases have said, draconian. In my view, it is the appropriate procedure to exercise the contempt jurisdiction of this Court first, and if that does not result in the intended result to have the documents produced, then Mr. Huang can have recourse to R. 22-7 as the next step.
- [38] I also have reference to the case of *Chang v. Siew*, 2014 BCSC 253. In similar circumstances there, the court declined to strike the defendant's pleadings and substituted a lesser penalty of contempt and special costs. In that case, the application was suspended for 10 days to allow the defendant to comply with the document production obligations.
- [39] With regard to special costs, as was also set out in the *Sound Contracting* case, here Mr. Huang applies for special costs of this application in any event of the cause. The plaintiff cites the case of *Law Society of B.C. v. Yehia*, 2008 BCSC 1172 at para. 59, in support of its position that where civil contempt is established, special costs are the usual order. It has long been the practice to award special costs to the successful applicant in a contempt proceeding.
- [40] The principal purpose of a special costs order in contempt proceedings is to indemnify a private party for the costs to which he or she has been put: *Telus v. Telecommunications Workers Union*, 2008 BCCA 144 at para. 30.

- [41] Mr. Dai has failed to comply with the Rules and with a court order. The trial cannot proceed without Mr. Dai's compliance with the order of Master Scarth. As a result, Mr. Huang has been put to the extra time and expense of bringing contempt proceedings so that the matter can be resolved.
- [42] In these circumstances, I find that an award of special costs is appropriate. By these circumstances, I mean the entirety of the circumstances from the time when the requests for the outstanding discovery request were first made, through the first TMC, through the first trial dates being adjourned, through the second TMC, through the application to and order of Master Scarth, and through the non-compliance with the order of Master Scarth.
- [43] Mr. Dai has made the resolution of the trial issue for Mr. Huang far more difficult than it should have been. This is, on its face, a straightforward case. It should have, if it did not proceed to trial the first time, certainly have been able to proceed to trial on the second four-day trial time that was set to commence today.
- [44] Mr. Dai has repeatedly failed to comply with the Rules, and he did not comply with the order of Master Scarth.
- [45] Finally, the outstanding discovery requests have not been provided since October 7, 2014, and there is, to date, including today, no viable reason provided by Mr. Dai for his failure and for his non-compliance. It simply does not satisfy his obligations to say that it has been difficult to find a lawyer, especially when there have been two lawyers retained by him in the course of this litigation. Mr. Dai is delaying and postponing and, in the course of that, making the course of this litigation for Mr. Huang much more difficult than it should be.
- [46] Although Mr. Dai to date has displayed minimal willingness to comply with his obligations as a party to litigation, he has today indicated that he will find another lawyer and that he will take steps to comply with the outstanding discovery requests.
- [47] I therefore, in finding Mr. Dai in contempt, impose a fine of \$5,000. There will be one month, Mr. Dai, to pay that fine, and during that one-month period, which goes to March 9, 2016, you have time to purge the contempt. I will go through this again for you in a moment.
- [48] If the contempt is not purged within a month, then the fine is payable, and I will go through these steps again in a moment.
- [49] There are special costs awarded to the plaintiff against the defendant for the application today. Those costs are to be assessed by the registrar and they are payable forthwith.
- [50] Before I repeat myself for you, sir, I just want to cover the address for service, and Mr. Dai, if I can just ask you, so that we deal with this issue raised by the plaintiff, is it still your residential address, [Williams Road address]. Is that where you live?
- [51] RUOYU DAI: No, I moved.
- [52] THE COURT: Okay, where did you move to?

- [53] RUOYU DAI: It is [Westminster Highway address].
- [54] THE COURT: [Westminster Highway address]?
- [55] RUOYU DAI: Yeah, right.
- [56] THE COURT: Okay, and when did you move?
- [57] RUOYU DAI: This month.
- [58] THE COURT: When?
- [59] RUOYU DAI: This month.
- [60] THE COURT: Okay, February 1st?
- [61] RUOYU DAI: Yeah.
- [62] THE COURT: So you were still living at [Williams Road address] in January?
- [63] RUOYU DAI: Kind of, yeah, I rent there, I am a tenant there.
- [64] THE COURT: Yes, oh yes, I understand you do not own it, but you were living there, that was your home? That is where you slept?
- [65] RUOYU DAI: Yes, sometime, yeah, yeah, sometime, yeah.
- [66] THE COURT: So you moved on February 1st?
- [67] RUOYU DAI: Yeah, right.
- [68] THE COURT: All right. Sir, if you ever move again, you need to keep Mr. Hamata up to date and you need to change your address with the court too, because you gave [Williams Road address] as your address for service, so you need to keep that updated.
- [69] Now, with regard to the issue of service, I find, as the plaintiff has raised, that there was proper service for the contempt application, since there has been service by email and Mr. Dai confirmed this morning that he received the application and indeed counsel for Mr. Dai, retained on the limited basis, also had the application. So I do find, Mr. Hamata, with regard to the issue raised with regard to service, that there was proper service of Mr. Dai with the contempt application.
- [70] Madam Registrar, I will give you this affidavit of attempted service for the record.
- [71] That completes the orders. To be clear, the plaintiff's application date-stamped January 27, 2016, number 1 is adjourned generally. Number 2 is granted, the defendant, Mr. Dai, is found guilty of contempt of court, he is fined \$5,000. He has one month to pay that fine, and indeed one month to purge the contempt. If the contempt is not purged and there is not compliance with Master Scarth's order within that month, then the fine becomes payable, in any event. Special costs to be assessed by the registrar and payable forthwith are assessed.

- [72] Now, with regard to Number 2 on the application, an order was sought that Mr. Dai comply with the order of Master Scarth. I will make that also the same one month, so that will be March 9th, Wednesday, March 9th, Madam Registrar, for 2(b).
- [73] The defendant has applied for the adjournment of this trial. The plaintiff is not objecting to that adjournment and indeed is not able to proceed without the outstanding discovery requests. The trial of this matter is therefore adjourned generally on the defendant's application without objection by the plaintiff.

"The Honourable Madam Justice Watchuk"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/12/2016BCSC1205.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/huang-v-dai-2016>

Prepared on 28 October 2026 · Esheria