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CANADA / JUDGMENT

## Iwasaki v. Redford

2016 BCSC 504

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COURT

Supreme Court of British Columbia

DECIDED

1 March 2016

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2016 BCSC 504 Iwasaki v. Redford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Iwasaki v. Redford,

2016 BCSC 504

Date: 20160301

Docket: S144538

Registry: Vancouver

Between:

Junichi Iwasaki

Plaintiff

And

Leslie Redford also known as Leslie Diane Redford,

Stephanie Longpre, Stephen Redford and 36789 Yukon Inc.

Defendants

Corrected Judgment: The text of this Oral Judgment was corrected  
on the front page on March 23, 2016

Before: The Honourable Madam Justice Warren

Oral Reasons for Judgment

on Security for Costs Application

Counsel for the Plaintiff:

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H. Rod Anderson

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Counsel for the Defendant, Stephen Longpre

John S. Forstrom

Place and Dates of Hearing:

Vancouver, B.C.

February 25-26, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2016

## Introduction

- [1] The defendants, Leslie Redford and 36789 Yukon Inc., apply for orders that the plaintiff, Junichi Iwasaki, post security for costs in the amount of \$170,000 within 30 days and that the action be stayed until such time as the security is posted, with leave to the defendants to apply for further relief including dismissal of the action if Mr. Iwasaki fails to post the security as ordered. The defendant, Stephen Redford, applies for the same orders but in the amount of \$50,000.
- [2] The plaintiff opposes the applications and, in the alternative, submits that the quantum of security sought is excessive and not supported by the evidence.

## Background Facts

- [3] Mr. Iwasaki is a resident of Japan. In the 1980s and into the 1990s, he was very wealthy. His net worth was in the tens or hundreds of millions of dollars. He became insolvent and, in 2002, was declared bankrupt.
- [4] Ms. Redford is a resident of British Columbia. She grew up in Richmond. From about 1980 to 1985 she worked as a realtor in British Columbia. From about 1978 to 1979 and then again from about 1985 to 1988 she worked in Japan as a fashion model and hostess.

- [5] Mr. Redford is a resident of British Columbia. He is Ms. Redford's brother.
- [6] 36789 Yukon Inc. ("Yukon") is alleged to be Ms. Redford's corporate alter ego. Ms. Redford denies having any interest in Yukon. She says that she is not an officer or director of Yukon and she denies that she is Yukon's controlling mind.
- [7] Ms. Redford met Mr. Iwasaki in about 1986 when she was working in Japan. She and Mr. Iwasaki were romantically involved from about 1987 until sometime between 1990 and 1992. The parties disagree as to when, specifically, their romantic relationship ended, but there is no dispute that after it ended they remained friends.
- [8] Ms. Redford returned to British Columbia in the late 1980s but her relationship with Mr. Iwasaki continued, and he would visit her in British Columbia from time to time.
- [9] Mr. Iwasaki alleges that when Ms. Redford returned to British Columbia, they entered into an oral agreement pursuant to which Ms. Redford would act as his business manager and advisor, managing his British Columbia and overseas assets. This oral agreement is referred to in the Notice of Civil Claim as the "Advisory Agreement". It is alleged in the Notice of Civil Claim that Mr. Iwasaki provided Ms. Redford with his power of attorney to facilitate her obligations under the Advisory Agreement.
- [10] Mr. Iwasaki alleges that at various times after 1987 he transferred cash and other property to Ms. Redford, or into her care, which she was to manage on his behalf pursuant to the Advisory Agreement. He claims it was a term of the Advisory Agreement that upon his request she would account to him for any property, profits, interest, monies, rents, dividends and income related to the investments she made on his behalf.
- [11] Mr. Iwasaki was petitioned into bankruptcy in Japan in 2002. The Japanese bankruptcy proceedings completed in April 2009, but Mr. Iwasaki's application for a discharge was subsequently denied by the Japanese bankruptcy court.
- [12] Mr. Iwasaki alleges that in about early 2010, he began inquiring with Ms. Redford regarding the status of his investments and the whereabouts of the funds under her care. He claims that Ms. Redford has refused to account to him as required under the Advisory Agreement and has converted his property to her use. He alleges that she owed him fiduciary and other trust duties which she has breached. He further alleges that Mr. Redford and Yukon knowingly assisted Ms. Redford in her breaches of trust and other duties and received monies, properties and other benefits from her with actual or constructive knowledge that those monies, properties and other benefits were imbued with a trust in his favour.
- [13] Ms. Redford denies that she ever acted as a fiduciary, agent or trustee for Mr. Iwasaki. She says she did not act as his business advisor or manager and that she never had the authorization or the ability to act unilaterally on his behalf and never did so. She denies that she ever received or agreed to accept a power of attorney from him.

- [14] Ms. Redford acknowledges that in 1987 a company named Clio Investments (Canada) Inc. was incorporated for the purpose of acquiring and developing investments in Canada for Mr. Iwasaki, including a polo and equestrian park in Surrey. Until 1999, Mr. Iwasaki held two of the three shares of Clio Canada and Ms. Redford held the third share. She says she worked for Clio Canada and in consideration for that work she received one share of the company, representing one-third of its issued and outstanding shares, and, from approximately 1991 to 1999, a salary of \$2,500 per month.
- [15] Mr. Redford and Ms. Redford both served as directors of Clio Canada. Mr. Redford acknowledges that he was also employed by Clio Canada from September 1991 to April 1997. He says his duties related primarily to managing properties acquired by Clio Canada, developing the polo facility, and entertaining Mr. Iwasaki's friends and business associates. He acknowledges receiving a salary of \$2,500 per month for his services as well as gratuitous payments from the Mr. Iwasaki from time to time. He denies having any knowledge of the alleged Advisory Agreement or any other trust relationship between Mr. Iwasaki and Ms. Redford. He says he never knowingly did anything to assist in any breach of trust or fiduciary duty and that he never received any property from Ms. Redford.
- [16] Ms. Redford acknowledges that she personally received funds and one property from Mr. Iwasaki. She says that some of those funds were gifts and some were loans which she subsequently repaid. She says the one property Mr. Iwasaki transferred to her was a gift.
- [17] Mr. Iwasaki claims that in late 1987 he provided Ms. Redford with cash in the amount of almost \$600,000 to purchase a property in West Vancouver, in her name, but on his behalf. This was referred to by the parties as the Pilot House Road Property. He says that he then spent more than \$1.2 million building a residence on the Pilot House Road Property, which Ms. Redford moved into after completion. He claims that unbeknownst to him, Ms. Redford sold the Pilot House Road Property in 1994 for \$1.8 million and converted those funds to her own use or transferred or conveyed them to the other defendants.
- [18] Ms. Redford acknowledges that between 1987 and 1991 she received cash of approximately \$1.4 million from Mr. Iwasaki, which she used in part to purchase and construct the Pilot House Road Property. However, she says this was a gift to her. She has produced a document referred to as the October 1992 Agreement which provides that Mr. Iwasaki gifted Ms. Redford a total of \$1.4 million between 1987 and 1991, \$1 million of which was used by her to acquire and construct the home on the Pilot House Road Property. The October 1992 Agreement appears on its face to have been signed by Mr. Iwasaki in Japan.
- [19] Mr. Iwasaki does not deny signing the October 1992 Agreement but he says he does not recall the circumstances under which he did so. He claims that he did not understand that in signing the document he was confirming that the funds used to acquire the Pilot House Road Property and build the new house were gifts to Ms. Redford. He says that he would have signed the document because Ms. Redford asked him to do so and because he trusted her.

- [20] Mr. Iwasaki claims that in 1988 Ms. Redford assisted him purchase a large property on 8th Avenue in Surrey for \$1.245 million. The parties referred to this property as the Park Lane Ranch Property. He claims that although title to the property was initially registered in his name, sometime in 1991 Ms. Redford transferred the title to herself.
- [21] Ms. Redford says that Mr. Iwasaki gifted the Park Lane Ranch property to her in 1991. She has produced two letters from a lawyer named Lawrence McLellan addressed to Mr. Iwasaki which characterize this transfer is a gift. She has also produced a copy of the Form A Transfer, which appears on its face to have been signed by Mr. Iwasaki.
- [22] Mr. Iwasaki does not deny signing the Form A Transfer. However he says he did not instruct Mr. McLellan or his firm in connection with it. He says he did not receive Mr. McLellan's first letter and does not recall if he saw the second letter. He says that although the letters refer to the transaction as a gift, it was not his intention to give the property to Ms. Redford. He says he would have signed the Form A Transfer based on whatever explanation she provided and his trust in her.
- [23] Mr. Iwasaki claims that Ms. Redford acquired various other properties in British Columbia using his funds, without his knowledge, acquiescence or consent. These include properties referred to as the 132A Street property, the 194th Street property, the Cariboo properties, the Surrey townhouse, the 96-acre property, and a property referred to as the SK Valley Ranch.
- [24] Ms. Redford claims that she purchased the 132A Street property, the Cariboo properties, the Surrey townhouse, and the SK Valley Ranch for her sole benefit. She acknowledges that some of the funds she used to purchase the 194th Street property were borrowed from Mr. Iwasaki. She says she borrowed \$1 million from him, as evidenced by an April 1991 promissory note, some of which was used to purchase this property, and that she repaid the \$1 million loan between October 1998 and May 1999. She produced the promissory note and a document titled "letter of agreement", which was signed by Mr. Iwasaki and confirmed the repayment. Mr. Iwasaki says that he does not recall the details of the \$1 million loan and he claims that there was no mention of funds being used by Ms. Redford to purchase any property other than the Pilot House Road property. He does not deny signing the letter of agreement acknowledging repayment of the loan but claims that it would have been prepared by Ms. Redford.
- [25] Ms. Redford says that neither she nor Mr. Iwasaki owned the 96-acre property. She says that it was owned by Clio Canada. She says in November 1999 Mr. Iwasaki resigned as a director of Clio Canada and sold his two shares in Clio Canada, and that the 96-acre property was subsequently purchased by Yukon.
- [26] The Notice of Civil Claim also alleges that in the early 1980s Mr. Iwasaki purchased three properties in San Francisco, the legal titles to which were lodged in his name. He claims that in the late 1990s, Ms. Redford caused those properties to be sold, without his knowledge or consent, and that she has failed to account to him for the sale proceeds. Specifically, it is alleged that these properties were sold in October 1997, December 1997 and December 1999.

Ms. Redford denies causing these properties to be sold and she denies receiving any sale proceeds.

- [27] The Notice of Civil Claim also alleges that in 1980 Mr. Iwasaki inherited shares in Coca-Cola West Ltd. with an approximate value of US \$22 million. He claims that in the early 1990s Ms. Redford caused the shares to be sold and converted the sale proceeds to her own use. This is denied by Ms. Redford.
- [28] Mr. Iwasaki claims that in the early 1990s, he, Ms. Redford, and Mr. Redford travelled to Switzerland together where they deposited approximately ¥300 million, or roughly \$3.3 million Canadian, in a Swiss bank account. He claims that Ms. Redford subsequently removed those funds from the Swiss bank account and failed to account to Mr. Iwasaki for them. Mr. Iwasaki also claims that he provided Ms. Redford with about \$110,000 Canadian in or about 1998 which he withdrew in cash from a safe deposit box in California. He claims that Ms. Redford appropriated those funds to her own use. Ms. Redford denied appropriating any of these funds. She acknowledges that she did travel with Mr. Redford to Switzerland where they met Mr. Iwasaki and that she saw Mr. Iwasaki deposit cash into a Swiss bank account during the trip.
- [29] As already noted, Mr. Redford denies any personal involvement in the subject matter of the claim. However, he admits that in about 1990 he traveled to Switzerland and, at Mr. Iwasaki's request, carried with him a suitcase containing a large quantity of Japanese currency. He said he handed the suitcase of cash to Mr. Iwasaki at an office in Switzerland.
- [30] As already noted, Mr. Iwasaki asserts, in his Notice of Civil Claim, that he became insolvent after borrowing a great deal of money from the Fuji Bank in Japan in 2001. It is apparent from the filings in the Japanese bankruptcy court that he was petitioned into bankruptcy on January 31, 2002, and a trustee in bankruptcy was appointed at that time.
- [31] The trustee in bankruptcy interviewed Mr. Iwasaki on February 14, 2002 and filed a report with the Japanese court setting out the answers provided by Mr. Iwasaki during the interview. According to the report, Mr. Iwasaki claimed to have a condominium in Hawaii but no other foreign assets were mentioned. He also claimed that he sold a penthouse in New York in June 2000, a house in San Francisco in December 1999, and an apartment in San Francisco in October 1997. There is no mention of Ms. Redford being involved in these sales and no mention of Mr. Iwasaki having any claim against Ms. Redford or Mr. Redford. There is no mention of the Pilot House Road property or the Park Lane Ranch property which, according to the Notice of Civil Claim, he says he had at least a beneficial interest in at the time. There is no mention of the Swiss bank account or any cash that he thought Ms. Redford was holding or managing for him.
- [32] In March 2005 the bankruptcy trustee filed a report with the Japanese court attaching additional information provided by Mr. Iwasaki. Among other things, the trustee asked whether Mr. Iwasaki had ever privately owned any real estate in Canada in the past and if he had done so to provide details. Mr. Iwasaki's answer was that he had owned real estate in the

past, but that he sold it around 1980 and he did not currently own anything. In addition, he confirmed that he had no foreign assets around the time of the commencement of the bankruptcy in 2002. He also advised that he sold his shares in Clio Canada and its land (which Ms. Redford says is the 96-acre property referred to in the Notice of Civil Claim) around 1999. Finally, he advised that he sold 250,000 Coca-Cola West shares around 1998 or 1999 and after paying taxes, a commission, and some hospital bills, he invested the rest in Argentina.

- [33] During a court hearing in the bankruptcy proceeding held on July 15, 2005, Mr. Iwasaki was asked about the establishment of a company referred to as Cornerstone Capital. He testified that he established that company in March 1998 in the Bahamas. He said he thinks that the money he invested in Cornerstone was in turn invested in Argentina and subsequently lost. He testified that the source of this investment was the proceeds from the sale of a building in New York, perhaps among other things. He was asked specifically about Ms. Redford and her role in the establishment and operation of Cornerstone. He advised the court that Ms. Redford was not involved with Cornerstone. Later in the bankruptcy proceeding, Mr. Iwasaki was asked again about Ms. Redford and the answer he gave was, "Leslie and I have a certain relationship. We are old friends." Thus, despite the fact that he was expressly asked about Ms. Redford he made no mention of the allegation he now makes against her; namely, that she was his advisor in respect of investments in Canada and elsewhere and that she held millions of dollars' worth of assets on his behalf.
- [34] Also during the Japanese court hearing on July 15, 2005, Mr. Iwasaki testified that he sold his shares in Coca-Cola West around 1997 and 1998 through the Securities Department of HSBC. He said that he thought the sale generated proceeds of about 900 million or 1 billion Japanese yen. He said he used the proceeds for investments in Argentina and, again, all of those investments were subsequently lost. He also testified that he had no assets in overseas countries at the time of the adjudication of the bankruptcy
- [35] In July 2007, the bankruptcy trustee submitted an application to the Japanese court for permission to abandon foreign assets. This was an application for permission to abandon efforts to realize on foreign assets, except for the condominium in Hawaii. The application indicates that the trustee had concluded that although Mr. Iwasaki was engaged in economic activities in several overseas countries before the adjudication of the bankruptcy, his investigation indicated that those activities were discontinued without producing favourable results and that even if some foreign assets continued to exist, the investigation had proved to be difficult because Mr. Iwasaki was denying that any continued to exist. On July 11, 2007, the Japanese court granted the trustee permission to abandon the foreign assets other than the Hawaii condominium.

- [36] In April 2009, the bankruptcy proceedings were ordered closed. Apparently, under Japanese law, this means the trustee's work to gather and realize on assets and distribute the proceeds to the creditors was determined to have been completed. However, it did not have the effect of discharging Mr. Iwasaki and releasing him from his debts.
- [37] The following month, the trustee submitted a report to the Japanese court in respect of Mr. Iwasaki's potential discharge. The report raised a number of concerns including the concealment of assets by Mr. Iwasaki, the sale of an asset contrary to a court order, and the disposition of the proceeds, among other things. Nevertheless, the trustee expressed the view that a discharge would be appropriate.
- [38] Notwithstanding the trustee's recommendation, the Japanese court denied Mr. Iwasaki's discharge. In its reasons for judgment dated September 2, 2009, the court made several adverse findings against Mr. Iwasaki. In general terms, the court found that he had concealed assets from his creditors and intentionally disposed of assets after becoming insolvent in order to defraud his creditors. The court's specific findings include but are not limited to the following:
- (a) Mr. Iwasaki presided over and had effective control over what was referred to as the Clio group of companies. The Clio group had borrowed very significantly from financial institutions including the Mizuho Bank. According to the reasons for judgment, the Clio group was already behind in the repayment of its debt obligations by 1992 (that is, very shortly after Mr. Iwasaki was allegedly transferring the assets in issue in this case to Ms. Redford). This eventually led to negotiations between the Mizuho Bank and the Clio group to resolve the issue. During these negotiations, in the late 1990s, the prospect of selling properties owned by the Clio group and using the proceeds to repay the debts was discussed. Meanwhile, in February and December 1998, Mr. Iwasaki sold buildings located in New York City without consulting the bank or other creditors and did not use the proceeds (of roughly \$32 million US) to repay the debt but instead diverted them to Cornerstone's bank account in the Bahamas.
  - (b) Approximately three years after the bankruptcy proceedings commenced, the trustee discovered the existence of Cornerstone and the fact that the proceeds from the sale of the New York buildings had been deposited into the Bahamas bank account. The court found that Mr. Iwasaki had intentionally failed to disclose the existence of Cornerstone to the trustee and in doing so had breached his disclosure obligations.
  - (c) The Japanese court concluded that Mr. Iwasaki sold real estate in San Francisco, the buildings in New York, and the shares he held in Coca-Cola West between 1997 and 2000. He was found to have been effectively insolvent by 1999 and therefore some of these assets were sold after he became insolvent. He did not use the proceeds from the sale of these assets to repay creditors but, rather, spent them or invested them elsewhere.

- (d) The Japanese court concluded that there were inconsistencies in Mr. Iwasaki's testimony concerning the use of the proceeds from the sale of certain properties and that there was no reasonable justification for the inconsistencies. Mr. Iwasaki was found to have misrepresented what had happened with respect to these proceeds.
- (e) The Japanese court concluded that Mr. Iwasaki had borrowed significant amounts of money contrary to the terms of an order that prohibited such borrowing.
- [39] These are just some of the adverse findings the Japanese court made against Mr. Iwasaki. In general terms, he was found to have been uncooperative and evasive, which resulted in the trustee acquiring little understanding of the status of his assets, particularly assets outside of Japan. The court referred to "an indication of profound insincerity" on his part. Finally, he was found to have been in contempt of the bankruptcy proceeding for having borrowed in violation of a court order.

### The Evidence on this Application

- [40] In setting out the background facts I have relied on some of the evidence that was filed on the applications. I do not intend to review the evidence comprehensively but I will summarize, in very general terms, the record before me.
- [41] Ms. Redford swore two affidavits in which she deposes, in general terms, as follows:
- there was never any agreement between her and Mr. Iwasaki pursuant to which he was to deposit to her care any property so that she could make investments on his behalf;
  - Mr. Iwasaki did not ever deposit to her care and for his benefit, any property, cash or stocks so that she could make investments on his behalf;
  - the alleged Advisory Agreement does not exist and was never even discussed;
  - Mr. Iwasaki did not ever provide her with a power of attorney and no such power of attorney exists.
- [42] As already indicated, Ms. Redford attached to her affidavit various documents that appear to support her position. However, some aspects of her affidavit were vague. For example, although she attached the October 1992 agreement in which Mr. Iwasaki appears to acknowledge providing her with gifts of \$1.4 million between 1997 and 1991, she does not provide any explanation of the circumstances that led to the creation of the document, after the fact, in 1992. Similarly, she provides no details as to the circumstances that led to Mr. Iwasaki deciding to give her the Park Lane Ranch property in 1991 which, on her evidence, is after their romantic relationship ended.
- [43] In addition to her own affidavits, Ms. Redford and Yukon relied on affidavits of legal assistants employed at their counsel's law firm which attached the following documents, among others, as exhibits:

- a draft bill of costs reflecting an estimate of the costs at Scale B and disbursements likely to be awarded to them in the event the claim is dismissed. The total amount of that draft bill of costs, including tax, is \$177,057.08;
- copies of various documents obtained from the court file in the Japanese bankruptcy proceedings, each of which was accompanied by a certified translation;
- a report authored by Prof. Hiromasa Nakajima, an expert in Japanese bankruptcy law, together with a certified translation. The report is primarily focused on whether Mr. Iwasaki would have standing under Japanese law to advance the claims in this action or whether the claims would remain vested in the bankruptcy trustee;
- copies of invoices and internal disbursement summaries from the counsel's law firm reflecting disbursements already incurred on the file, including for translation services and the fees paid to Prof. Nakajima. The affidavit to which these documents are attached was delivered as a reply affidavit. Mr. Iwasaki's counsel objects to it on the basis that it is not proper reply but rather amounts to the splitting of Ms. Redford's case.

[44] Mr. Redford swore an affidavit in which he denies having any knowledge of any trust agreement or relationship between Ms. Redford and Mr. Iwasaki. He also denies receiving any property from Ms. Redford. He acknowledges working for Clio Canada between 1991 and 1997. He also acknowledges carrying the suitcase of cash to Switzerland on Mr. Iwasaki's behalf in about 1990.

[45] In addition, Mr. Redford relied on an affidavit of a legal assistant employed at his counsel's law firm that attached, among other things, a draft bill of costs reflecting an estimate of the costs at scale B and disbursements likely to be awarded to him in the event the claim is dismissed. The total amount of that draft bill of costs, including tax, is \$53,110.40.

[46] Mr. Iwasaki swore an affidavit in which he deposes, in general terms as follows:

- His wealth led him to be generous, overly trusting and inattentive to his assets and affairs. He says he relied on Ms. Redford to manage his BC and other overseas assets.
- He is not comfortable reading and writing complicated business or legal documents in English and he did not always read legal documents particularly if they were in English.
- He and Ms. Redford entered into the oral Advisory Agreement pursuant to which he entrusted her with property, cash and other assets to invest and manage on his behalf.
- He provided the funds for the Pilot House Road property and did not concern himself with whose name was on title. He believed that since he had paid for the property it was his. As already noted he did not deny signing the October 1992 agreement that confirmed he had given these funds to Ms. Redford as gifts. He claimed he did not recall the circumstances of signing the document but he would have done so because he trusted Ms. Redford.

- He provided the funds to purchase the Park Lane Ranch property and he did not instruct Mr. McLellan to transfer the property to Ms. Redford. He did not deny signing the Form A Transfer but, again, said he could not recall the specific circumstances under which it was signed other than to say he would have signed it based on whatever explanation Ms. Redford provided.
- He denied any recollection of the \$1 million loan evidenced by the promissory note attached to Ms. Redford's affidavit. He said the letter of agreement, which he did not deny signing and which acknowledged repayment of the loan, would have been prepared by Ms. Redford.
- He also stated his belief with respect to Mr. Redford's involvement in the matters in issue. He said that he believes Mr. Redford and Ms. Redford's relationship is a close one, that Mr. Redford knew that he had paid for the Pilot House Road property and that Mr. Redford also knew that Ms. Redford was managing assets on his behalf. He attached a memorandum from Mr. Redford to him dated December 3, 1990, which refers to a number of subjects including discussions concerning the possible purchase of two CP hotel properties, suggesting that Mr. Redford had minimized the scope of his work for Mr. Iwasaki in his own affidavit. Finally, he stated that he believes Mr. Redford knew that Ms. Redford was dealing with his properties and assets contrary to the Advisory Agreement and the trust obligations she owed and that Mr. Redford assisted Ms. Redford in this regard and/or received some of the proceeds. He does not explain the basis for his claim to know that Mr. Redford knew what Ms. Redford was doing.

[47] Mr. Iwasaki's affidavit is silent with respect to the existence of the power of attorney. He does not mention the San Francisco properties or the Coca-Cola West shares referred to in the Notice of Civil Claim. He did not take issue with the contents of any aspect of the bankruptcy file and in particular did not provide any explanation or clarification with respect to his apparent failure to advise the bankruptcy trustee of the claims that he is advancing in this proceeding. Finally, he provided no evidence as to his current financial circumstances, did not claim to have assets in British Columbia, and did not say that he is unable to post security in the amount requested or that a security for costs order would serve as an impediment to him advancing this claim.

[48] In addition to his own affidavit, Mr. Iwasaki relied upon an expert report prepared by a Japanese lawyer named Mr. Ohno, who is also an expert in Japanese bankruptcy law. This report is also focused on whether Mr. Iwasaki would have standing under Japanese law to advance the claims in this action or whether those claims would remain vested in the bankruptcy trustee.

## Positions of the Parties

[49] The defendants say they have established that they will be unable to enforce an award of costs in the event the claim is dismissed. This is because Mr. Iwasaki is a resident of Japan, which is a non-reciprocating jurisdiction for the purpose of enforcement of court orders, has no assets in British Columbia, has a history of attempting to avoid the claims of legitimate creditors, gave evidence in the Japanese bankruptcy proceedings that is

inconsistent with the claims he advances in this action, and remains an undischarged bankrupt in Japan.

- [50] In addition, the defendants submit that an order for security for costs in this case will not stifle a legitimate claim. They emphasize that Mr. Iwasaki has provided no evidence of his inability to post the security sought. Further, the defendants say that the claim against them has no air of reality, is exceedingly weak and, in Stephen Redford's case, is non-existent.
- [51] Mr. Iwasaki submits that the court will only exercise its discretion to grant security for costs against a natural person in exceptional cases, where there are special circumstances amounting to an abuse of the court's process. He acknowledges that it would be an abuse of process for him to pursue this action if the right to do so remains vested in the Japanese trustee in bankruptcy. However, there is no dispute that this issue is governed by Japanese law and there are differences in the opinions of the experts that cannot be resolved on this application. Further, he emphasizes that the bankruptcy trustee expressed the view that his failure to accurately report during the course of the bankruptcy was a "reflection of the way he conducted his business haphazardly rather than trying to hide something intentionally". In any event, he submits that his conduct in the Japanese bankruptcy does not equate to an abuse of process of this court that would justify the granting of an extraordinary order for security for costs against an individual.
- [52] In addition, Mr. Iwasaki submits that this is not a case where the court can conclude - in Chambers and on a preliminary review of the evidence - that his claim is without merit. He emphasizes that the claim depends in large part on an alleged oral agreement. Further, Ms. Redford admits receiving \$3.65 million in cash and properties from him between 1987 and 1991, and it is not disputed that Mr. Redford and Ms. Redford served as directors of Clio Canada, a company Ms. Redford admits was formed to hold the plaintiff's investments in Canada. In these circumstances, he says his case is going to depend heavily on an assessment of credibility and, on the affidavits before me, there are sharp conflicts in the testimony.
- [53] In the alternative, Mr. Iwasaki submits that if an order is granted requiring him to post security, it should be in an amount and on terms that are consistent with the authorities and which "sufficiently secure the defendants' positions without unduly burdening the plaintiff". He submits that the quantum of security sought by the defendants is excessive and not supported by evidence. Finally, he submits that any security should be ordered to be posted in installments.

## Legal Principles

[54] The parties provided me with many authorities on the question of when security for costs ought to be ordered. Having reviewed those authorities, I disagree with Mr. Iwasaki's submission that the court will only exercise its discretion to grant security for costs against a natural person where there are circumstances amounting to an abuse of the court's process. That language comes from *Fraser v. Houston* (1997), 36 B.C.L.R. (3d) 118, where Shaw J. said at para. 11:

[the court] should make an order which would preclude the right of access except in egregious circumstances amounting to a likely abuse of the court's jurisdiction.

In other words, where an order for security for costs would stifle a claim, the order might still be made in circumstances amounting to an abuse of process. Having reviewed the authorities, it is my view that while the order sought is an exceptional one, it is not always necessary for an applicant to establish conduct amounting to an abuse of process.

[55] The court has the inherent jurisdiction to order security for costs against natural persons. The jurisdiction is discretionary and it is apparent that there is no firmly prescribed framework to be employed in analyzing whether it ought to be exercised in a particular case. In my view, this reflects the court's reluctance to be the prisoner of a formula that might fetter the court's discretion to balance the interests of the parties in all the circumstances of the case. Having said that, there are several clearly identified principles that the court must apply in exercising the discretion.

[56] In *Han v. Cho*, 2008 BCSC 1229, Madam Justice Dillon comprehensively reviewed the authorities and summarized the law. Her summary was endorsed by the Court of Appeal in *Meade v. Armstrong (City)*, 2011 BCCA 63 at para. 12 and *Ocean Pastures Corp. v. Old Masset Economic Development Corporation.*, 2016 BCCA 12 at para. 20. The following principles emerge from it:

- In exercising the discretion to order security for costs, a distinction is drawn between individual plaintiffs and corporate plaintiffs.
- In the case of a corporate plaintiff, once the defendant has demonstrated that the plaintiff would be unable or unlikely to pay costs, security for costs is generally ordered unless the plaintiff shows that there is no arguable defence. This reflects a concern to prevent the principals of a corporate plaintiff from hiding behind the corporate veil to avoid personal exposure for costs. Accordingly, the possibility that a company might be deterred from pursuing its claim is not a sufficient reason, on its own, for not ordering security for costs against a corporate plaintiff.

- In the case of an individual plaintiff, the court must balance the risk that a successful defendant will be unable to recover costs against the possibility of stifling a legitimate claim. Because of the longstanding principle that poverty is not a bar to access to the courts, a concern that a legitimate claim could be stifled by an order for security for costs will almost always override a concern that a successful defendant will be unable to recover costs if security is not ordered.
  - "The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances": Han at para 27.
  - In the case of an individual plaintiff, it is not enough for the applicant to establish that the plaintiff resides out of the jurisdiction and has no assets in it. Further, the fact that the plaintiff's jurisdiction of residence is a non-reciprocating jurisdiction for the purpose of enforcement of court orders "is of little import": Bronson v. Hewitt, 2007 BCSC 1751 at para. 44.
  - The authorities do not establish an exhaustive list of the circumstances that would be special enough or egregious enough to justify an order for security for costs. As Madam Justice Dillon noted in Han, if the plaintiff is impecunious, the fact that the plaintiff's claim is weak or that the plaintiff has failed to pay a costs award in the past, might tip the balance in favour of granting the order.
  - Again, as Mr. Justice Shaw put it in Fraser, at para. 11, where an order for security for costs would preclude an individual plaintiff's right of access to the courts, it will not be made "except in egregious circumstances amounting to a likely abuse of the court's jurisdiction".
- [57] In summary, if a defendant establishes a real likelihood that he or she will be unable to enforce a costs award, then it is necessary to assess the risk of a legitimate claim being stifled. This requires a consideration of all the relevant factors present in the case in question. The ability of the plaintiff to post the security sought and the merits of the plaintiff's claim are obvious factors to consider. While the court cannot delve deeply into the merits on an application of this sort, if it is plain and obvious that the claim lacks merit then the concern not to frustrate legitimate claims is engaged with less force. If the plaintiff's claim is arguable but there is no reason to believe that the plaintiff will not be able to prosecute the claim if ordered to post security, then the concern not to frustrate legitimate claims does not arise. In my view, if the defendant establishes a real likelihood that it will be unable to enforce a costs award in circumstances where there is no risk of a legitimate claim being stifled, that amounts to special circumstances justifying an order for security for costs. In contrast, where it appears that an order for security for costs is likely to preclude an individual plaintiff's right of access to the courts, security should not be ordered, even where the defendant establishes that it will be unable to enforce a costs award, except in egregious circumstances.

## Analysis

Is there a likelihood that the defendants will be unable to enforce an order for costs in the event the claim is dismissed?

- [58] In my view, there is a substantial likelihood that the defendants will be unable to enforce an order for costs in the event the claim is dismissed. As already noted, Mr. Iwasaki is a resident of Japan. He has no assets in British Columbia and Japan is a non-reciprocating jurisdiction for the purpose of enforcement of court orders. As already noted, those factors, while troubling, are not enough. However, in this case, the material from the Japanese bankruptcy proceedings, the accuracy of which was not put in issue by Mr. Iwasaki, gives rise to very significant additional concerns. That material establishes that Mr. Iwasaki has demonstrated an inclination to attempt to avoid the legitimate claims of creditors that extends so far as to intentionally concealing assets in the bankruptcy proceeding and breaching an order of the Japanese court. I recognize that the trustee in bankruptcy considered Mr. Iwasaki's conduct to be more reflective of haphazard business practices than an intention to frustrate or deceive, but I place more weight on the findings of the Japanese court which were clearly to the contrary.
- [59] Further, it is apparent that Mr. Iwasaki gave evidence in the bankruptcy proceedings that is inconsistent with this claim. He denied having foreign assets at the time the bankruptcy proceedings commenced in 2002, but for the Hawaii condominium. In particular, he testified in the bankruptcy proceedings that he sold San Francisco properties and Coca-Cola West shares and subsequently spent or lost the proceeds. Those appear to be the same San Francisco properties and Coca-Cola West shares that, in this action, he claims that Ms. Redford sold without his knowledge or consent. Certainly, he did not provide evidence on this application that the San Francisco properties and Coca-Cola West shares referred to in the Notice of Civil Claim are some other properties. In fact, he did not mention the San Francisco properties or the Coca-Cola West shares in his affidavit at all, which indicates to me that he appreciates the inconsistency on this point.
- [60] In summary, I am satisfied that Mr. Iwasaki took steps in the past to avoid the legitimate claims of creditors. I am also satisfied that at least some of the claims he seeks to advance in this action are inconsistent with evidence he gave in the Japanese bankruptcy proceedings. Those factors, combined with the fact that he is a resident of Japan, which is a non-reciprocating jurisdiction for the purposes of enforcement of court orders, and has no assets in British Columbia, satisfy me that a costs award in favor the defendants is likely to be unenforceable.

Is there a risk that an order for security for costs would stifle a legitimate claim?

- [61] A significant amount of time was spent during the hearing of the application on the merits of the case. If the claim has little merit, the overriding concern about stifling legitimate claims is not engaged with as much force as would otherwise be the case.

- [62] I do not intend to delve deeply into the merits. It is obvious that Mr. Iwasaki will face some significant challenges in advancing the claim. Among other things, there are documents including the October 1992 agreement, the letter agreement acknowledging repayment of the \$1 million loan, and the Form A Transfer concerning the Park Lane Ranch property that appear to support the defendants' position. Further, Mr. Iwasaki has not produced the power of attorney which by implication is the tool with which Ms. Redford is alleged to have dealt with properties in his name without his knowledge. His credibility is going to be central to the claim and it is vulnerable to being undermined by the inconsistent testimony he gave in the Japanese bankruptcy proceedings. In addition, the expert opinions on Japanese bankruptcy law both appear to indicate that his standing to advance the claim is at least questionable. By its nature, his claim against Mr. Redford will be challenging to advance because, as Mr. Iwasaki acknowledges, he has little if any personal knowledge of Mr. Redford's involvement and will have to rely on evidence he obtains from Mr. Redford himself. At the same time, however, the transactions underlying the claim are unusual and not yet fully explained by Ms. Redford. She admits to receiving a very large amount of money from someone who, on her evidence, was little more than a friend with whom she had a casual romantic relationship for a few years. Mr. Redford acknowledges transporting a suitcase of cash to Switzerland on Mr. Iwasaki's behalf. Both his and Ms. Redford's defence will depend to a significant extent on their credibility.
- [63] At this early stage, I will say no more than that the case will be a challenging one for Mr. Iwasaki to advance. However all that is required is an arguable case: *Bronson v. Hewitt* at para. 46. He meets that threshold.
- [64] The bigger problem for Mr. Iwasaki on this application is that there is no evidence that he is impecunious even though he has no exigible assets in this jurisdiction. The findings of the Japanese court suggest that he was able to successfully conceal some assets from the trustee in bankruptcy. There is no evidence before me about Mr. Iwasaki's current financial circumstances and he has not claimed that he cannot post security in the amount requested. He has not even said that an order requiring him to post security would impede his ability to prosecute his claim. On the record before me, there is simply no risk that an order for security will stifle his claim.
- [65] As already noted, the power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances. Special circumstances exist in this case. They include Mr. Iwasaki's demonstrated inclination to attempt to frustrate legitimate claims of creditors, his breach an order of the Japanese bankruptcy court, his evidence given in the bankruptcy proceedings which is inconsistent with at least some of the claims he advances here, and the lack of any evidence that would support a finding that the orders for security for costs sought by the defendants would impede his ability to prosecute the claim. In combination, these are special circumstances that warrant an order for security for costs.

## Quantum and terms

- [66] The action is set for a 15-day trial to commence on January 16, 2017.
- [67] Ms. Redford and Yukon seek an order in the amount of \$170,000 payable within 30 days. That quantum is based on a draft bill of costs that estimates the recoverable costs at scale B and disbursements at \$177,057.08. In addition, they rely on copies of invoices and internal disbursement summaries reflecting disbursements incurred already occurred on the file, but as already indicated, that evidence was objected to. I agree with Mr. Nathanson that this is not proper reply evidence and I do not intend to consider it. I will base my decision on quantum on the draft bill of costs.
- [68] Mr. Redford seeks an order in the amount of \$50,000. That quantum is based on a draft bill of costs that estimates his recoverable costs at scale B and disbursements at \$53,110.40.
- [69] The cumulative order sought, at \$220,000, exceeds the amount of security ordered in any of the cases to which I was referred. However, in my view, the quantum in other cases, on its own, is of little import.
- [70] The factors that should be considered when determining the amount of security to order were recently summarized by Master Taylor in *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCSC 1900. I consider the following to be particularly applicable in this case. The security should be such as the court thinks to be just in the circumstances of the case. The court can order any amount up to the full amount claimed. The amount ordered should sufficiently secure the defendant's position without unduly burdening the plaintiff. The order is usually limited to future costs. It is relatively common for security to be ordered to be posted in installments. Historically, dollar-for-dollar security has not been awarded. This reflects the reality that the quantum of security claimed will always be based on an estimate, usually made at a very early stage in the proceeding, and it may be relevant to discount the estimate for the prospects of settlement.
- [71] The application of these factors satisfies me that this is a case where a significant order is warranted. This is primarily due to the fact that the purpose is to sufficiently secure the position of the defendants without unduly burdening the plaintiff and there is no evidence that the plaintiff will be burdened at all.
- [72] Mr. Iwasaki submits that the quantum sought is not supported by appropriate evidence. I disagree. In my view a draft bill of costs prepared by counsel is appropriate evidence. At this stage, the only real alternative is expert evidence from another lawyer which in my view would serve only to increase costs without adding much if any probative value. Counsel with conduct of the action is in a good position to estimate the recoverable costs and the court is in a good position to assess the reasonableness of such an estimate. Having said that, I agree with Mr. Iwasaki's counsel that in some respects the amounts sought are excessive.

[73] Before turning to the draft bills of costs, I note that Mr. Iwasaki agrees that if security is ordered it should cover costs going back as far as January 2015, which is when the defendants made clear that they would seek a security for costs order.

[74] I will start with Ms. Redford's draft bill of costs which claims a total of 488 units:

- For those items for which a range of units is available, she claims the maximum number of units. While this case is challenging, it is not the most complicated case. I would deduct one unit from each of items 2, 3, 5, 12 through 18, 31, 32 and 36, for a combined reduction of 13 units.
- She claims for more days of examination for discovery than are permitted, as of right, under the Rules. While this case might warrant additional examinations for discovery, at this stage I am unable to assess the likelihood that this actually will be reasonably required. In my view, it is reasonable to allow for two days of examinations for discovery by the defendants and two days of the defendants. This adjustment would reduce the claim for items 19 and 20 by 28 units.
- There is some double counting and flawed arithmetic. Ten units are claimed for a consent case plan under item 5 and additional units are claimed for the preparation and appearance at a case planning conference under items 31 and 32. I am optimistic that with the counsel engaged by these parties, a consent case plan is realistic. Items 31 and 32 have already reduced by one unit but I would eliminate them which would reduce the claim by a further six units.
- 100 units are claimed for item 34 - trial preparation. However, for a 15-day trial, only 75 units are available. I would reduce the claim for item 34 by 25 units.
- There are additional steps included which may not actually be taken. These include steps to enforce a final order (item 3), serving and answering interrogatories (items 12 and 13), preparing accounts, et cetera (item 16) and for three days of chambers applications (items 21 and 22). At this stage, and on the evidence before me, I am not persuaded that those steps will reasonably be required. Items 3, 12, 13 and 16 have already been reduced by one unit but I would eliminate them, which would result in a further reduction of nine units for item 3, nine units for item 12, nine units for item 13, four units for item 16, and a combined 24 units for items 21 and 22.
- I am persuaded that it is reasonable to include items 45 and 46 - for preparation for and attendance at a mediation.
- In the result, I have concluded that the total units claimed should be reduced from 488 to 361 units. When multiplied by the unit value of \$110 this results in a total of \$39,710.
- Turning then to the disbursements claimed. They are obviously preliminary estimates but at this stage they can be nothing other than that. With one exception, I conclude that they are reasonable preliminary estimates. The one exception concerns a possible trip to Japan for three persons. I am not satisfied that there is a basis to conclude that it will be necessary to travel to Japan to conduct an examination for discovery of Mr. Iwasaki or, if it is necessary to do so, that it would be reasonable for three people to go. The other large expenses relate to expert fees and translation services. Based on the material before me on this application, which already includes

a comprehensive expert report and many pages of translated documents, it is my view that those estimates are entirely reasonable and perhaps even understated. The expenses claimed in relation to the trip to Japan total \$20,619.

- All of these adjustments would reduce the total claimed to approximately \$142,000.

[75] Turning then to Mr. Redford's bill of costs, which claims a total of 374 units:

- His claim includes steps that predate January 2015. This includes five units for item 1 and 15 units for item 10. I would reduce the claim by 20 units as a result.
- His claim also includes 10 units for item 7, which is a catch-all provision that I am not persuaded is reasonable. I would reduce the claim by 10 units as a result.
- He too claims for three days of chambers applications and for the reasons already noted there is an insufficient basis to conclude that this is a reasonable likelihood. I would reduce the claim for items 21 and 22 by 26 units as a result.
- As with Ms. Redford's draft bill, he claims for both a consent case plan under item 5 and preparation and attendance at a case plan conference under items 31 and 32. I would reduce the claim for items 31 and 32 by eight units.
- In the result, in my view, Mr. Redford's bill should be reduced by a total of 64 units from 374 to 310. When multiplied by the unit value of \$110 this results in a total of \$34,100.
- Turning then to the disbursements, again, they are obviously preliminary estimates but in my view they are all reasonable.
- These adjustments would reduce Mr. Redford's total claim to approximately \$45,000.

[76] In the result, I am satisfied that a reasonable estimate of Ms. Redford's and Yukon's recoverable costs is \$142,000 and a reasonable estimate of Mr. Redford's recoverable costs is \$45,000. In my view that is the starting point. As already noted, dollar-for-dollar security is not usually appropriate because the quantum is, by necessity, based on an estimate and does not reflect the prospect of settlement. Given the nature of the allegations, the claim is likely to be hard-fought. The estimates may well be low but settlement is almost always a realistic possibility. In all the circumstances it would be appropriate in my view to reduce the estimates by approximately 20% to reflect the prospect of settlement. This would result in a total quantum of \$114,000 for Ms. Redford and Yukon, and \$36,000 for Mr. Redford.

[77] Finally, I am satisfied that it would be appropriate to order the security to be posted in installments. Otherwise Mr. Iwasaki will be posting security well in advance of the defendants actually incurring the costs and the order would not fairly balance the interests of the parties. I have considered the schedule proposed by Mr. Iwasaki's counsel but, in my view, it does not fairly account for the costs that have already been incurred since January 2015, and those that will be incurred as discovery progresses. In my view the schedule proposed by the defendants is more reasonable.

[78] Accordingly, I order that Mr. Iwasaki post the sum of \$114,000 as security for the costs of Ms. Redford and Yukon as follows: 25% within 30 days; 25% no later than two days before the first day of examinations for discovery; and 50% no later than 60 days before the first day of trial. I order that Mr. Iwasaki post the sum of \$36,000 as security for the costs of Mr. Redford as follows: 25% within 30 days; 25% no later than two days before the first day of examinations for discovery; and 50% no later than 60 days before the first day of trial. Mr. Iwasaki may post the security by paying the requisite amount, on each of the due dates, to his counsel to be held in trust. In the event that an installment is not made on the date it is due, the action shall be stayed until such time as the security is posted, with leave to the defendants to apply for further relief including dismissal of the action if Mr. Iwasaki fails to post the security as ordered.

[SUBMISSIONS RE COSTS]

[79] THE COURT: The costs will be in the cause. I cannot see any reason for ordering otherwise. It will be costs of the application in the cause.

"WARREN J."

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