

CANADA / JUDGMENT

Jiang v. Wang

2023 BCCA 93

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 93 Jiang v. Wang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jiang v. Wang,

2023 BCCA 93

Date: 20230224

Docket: CA46734

Between:

Xiao Ling Jiang, Tian Qi Jiang, Wingsum International Trading Inc.,

Wingsum Food Inc., W & W Food Ltd., Win Sum Produce Corp.,

and Jun Shan Jiang aka Grace Jiang

Appellants

(Respondents)

And

Yi Meng Wang aka Sharon Wang

Respondent

(Claimant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Griffin

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated
February 7, 2020 (Wang v. Jiang, 2020 BCSC 145, Vancouver Docket E152456).

Counsel for the Appellants:

G.A. Hooper

Counsel for the Respondent:

L.N. MacLean, K.C.

S.K. Chen

Place and Date of Hearing:

Vancouver, British Columbia

January 5, 2023

Place and Date of Judgment:

Vancouver, British Columbia

February 24, 2023

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Justice Griffin

The Honourable Madam Justice Horsman

Summary:

This appeal arises from a lengthy dispute between two families related by marriage, following the separation of the respondent and her former spouse. The appellant Tian Qi Jiang challenges an order declaring two commercial properties to be family property. Held: Appeal allowed. There was no evidence before the judge to support his conclusion that the two properties at issue were family property. The respondent's claim to an interest in the properties was described in the pleadings as one arising as an express, implied or resulting trust, or by virtue of a fraudulent conveyance. At trial, the respondent did not pursue the fraudulent conveyance claim, nor did she establish a claim arising out of a trust. The judge erred in drawing an inference adverse to the appellant with respect to the properties. The evidence was that a review of the financial records produced by the appellant caused the respondent to abandon the allegation that her former spouse was an owner or had a beneficial interest in them.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] A lengthy trial involving disputes between two families related by the marriage of Jun Cheng Jiang ("John") and Yi Meng Wang ("Sharon"), the Jiang and Wang families, resulted in multiple orders made for reasons indexed at 2020 BCSC 145.
- [2] This appeal is from one of the orders, declaring two commercial properties registered in the name of the appellant Tian Qi Jiang (John's father whom I shall refer to as the appellant), located at 3110 and 3120-21331 Gordon Way, Richmond, British Columbia (the "Gordon Way Properties") to be the family property of John and Sharon.
- [3] Sharon and John were married October 12, 2012. In August 2015, they separated and, on September 2, 2015, Sharon commenced these family proceedings. She sought a divorce and orders with respect to the guardianship and support of the child of the marriage; spousal support; and division of family property.
- [4] The property claim included a claim to an interest in three commercial properties on Gordon Way in Richmond, used by John's business. In addition to the two properties I have described as the Gordon Way Properties, she claimed an interest in an adjacent property at 3125-21331 Gordon Way, owned by Wingsum Food Inc. ("WFI"), one of John's companies (although, nominally, 90% of the WFI shares were owned by his mother).
- [5] The proceedings were complicated by the fact that John owned a large and successful business, but had structured it in a manner that concealed his income and interests; and the fact he had not made full and honest disclosure of his income and assets. The trial judge, relying on an independent audit, concluded the evidence was overwhelming that John had created companies as "end-run companies to divert profit" from Wingsum International Trading Inc. ("WIT") a company he wholly owned and acknowledged to be family property, and had set up those companies "as a means of hiding income". The judge concluded there was "a great deal of undisclosed cash going through the companies" (at paras. 355-6). Most critically, he found:
 - [428] I accept Sharon's submission that John is clearly lying regarding every significant issue in this case, in a concerted effort to defraud Sharon of her claims to property division, and child support and spousal support
- [6] The judge concluded that all of John's companies were engaged in one business; the business owned multiple properties; the whole enterprise was wholly owned by John, despite the fact that shares in some of the companies were nominally owned by other family members; and it was family property.

- [7] In particular, the trial judge (at paras. 550-555) concluded 3125 Gordon Way was family property. John had admitted to signing every document for the purchase of that property, and the judge accepted Sharon's position that WFI and 3125 Gordon Way were owned by John and WIT. The value of WIT was therefore adjusted to include 3125 Gordon Way.
- [8] The evidence with respect to the two other commercial properties, the Gordon Way Properties, was less clear. The claimant testified that the warehouses were rented and renovated by WIT in 2011 and that she learned during the course of the trial that they had been purchased by the appellant in 2016, after the parties separated. The trial judge noted (at para. 398) that the respondent was aware that WIT had rented these units as warehouses and had considered the rent to be "very high".
- [9] The judge described the claim advanced with respect to these properties at trial as one arising from what Sharon referred to as an "inflated rent scheme" that amounted to breach of an order precluding John from disposing of family assets:
- [540] Sharon says a compensation payment is due from John's father to John to correct for what she terms the "inflated rent scheme". She sets it out as follows:

A. Rent - Diversion of Family Property, FCA breach of restraining order

Doug Ryder's Report - Exhibit 10, Tab 49 page 367 Table 6.1

W&W pays \$8.75 per sq ft for identical unit = fair market rent

To defeat, hinder or delay within the meaning of FCA WIT aka John pays:

- (a) \$17.14 per sq ft to WFI
- (b) \$12.45 per sq ft to his father Tian Qi Jiang

The result is not in the ordinary course of business and is a breach of the section 91 restraining order pronounced by Madam Justice Baker on September 29, 2015 (Exhibit 11, Book 2, Tab 8, para 1)

The division of profit from August 2016 to August 2018 is substantial and can be calculated as follows:

- WIT pays Tian Qi Jiang rent of \$8,000 per month
- $\$8,000 \times 8.75/12.45 = \$5,622.49$
- $\$8,000 - \$5,622.49 = \$2,377.51$ overpayment
- $\$2,377.51 \times 24 \text{ months} = \$57,060.24$ total overpayment from August 2016 to August 2018

- [10] Later in his reasons for judgment, the trial judge returned to the question of ownership of the Gordon Way Properties. He accepted (at para. 674) that "certain adverse inference should be drawn from the failure of the Defendants to call certain witnesses". He noted (at para. 682) the appellant might have testified with respect to whether the Gordon Way Properties were "family assets", and whether the rent paid by WIT was over market value and diverted profits from WIT and from John's income.
- [11] He noted the appellant's counsel had not cross-examined the expert witness, Mr. Ryder, on his evidence that rents were inflated. For that reason, the judge accepted that higher than market rent had been paid to Mr. Jiang.
- [12] Further (at para. 686), he found salary payments John made to Mr. Jiang amounted to "fraudulent conveyances". In coming to that conclusion, he appears to have accepted that the onus of proof had shifted to Mr. Jiang to establish that the salary paid to him was earned.
- [13] The judge then turned to the issue of the ownership of the Gordon Way Properties, which he dealt with only briefly and, respectfully, somewhat cryptically, as follows:
- [687] I agree that the circumstances in this case justify a shift of the burden of proof to Mr. Tian Qi Jiang to prove these transfers are not fraudulent. However, he chose not to testify and I accept that Sharon has proven her claim. The Gordon Way property is a family asset divisible in the terms of this Judgment.
- [14] I say the judge dealt with this cryptically, because there was no evidence of a transfer of the Gordon Way Properties from John to the appellant and it is unclear which transfer he is referring to.
- [15] Ultimately, the trial judge did not make an order for the transfer of title to the Gordon Way Properties. He took the value of the properties into account in the compensation order, and he made an order declaring the properties to be family property. John has not appealed the compensation order. However, the appellant seeks to set aside the declaratory order so as to protect the properties registered in his name from execution in the event the judgment against John is not satisfied; we were assured the appeal is not moot.

Grounds of Appeal

- [16] The appellant says there was no evidence in support of the respondent's claim to a trust (or any) interest in the Gordon Way Properties. He says the respondent abandoned a claim that the properties had been fraudulently conveyed. He says no adverse inference was sought or could reasonably have been drawn with respect to the ownership of the Gordon Way Properties. Finally, he says the declaratory order was inconsistent with both the expert evidence and the conclusion that John had diverted income from WIT by paying over-market rent on the properties.

[17] The respondent draws our attention to the fact that the appellant does not dispute his liability to pay her the sum of \$81,829.24, as compensation for the overpayment of rent and salary, but has not paid that judgment. She seeks an order staying the appeal on the grounds that we ought not to hear from an appellant who has not satisfied a judgment.

Argument and Analysis

[18] In my opinion, there was no evidence before the judge to support his conclusion that the Gordon Way Properties were family property.

[19] The respondent's claim to an interest in the Gordon Way Properties was described in the pleadings as one arising as "an express, implied or resulting trust". In the alternative, she sought the following order:

Pursuant to s.1 of the Fraudulent Conveyance Act a declaration that the registration of the [Gordon Way Properties] in Tian Qi Jiang's name was made to delay, hinder or defraud the Claimant from her just and lawful remedies as against the respondent John Jiang, and is thus void and of no effect against the Claimant and further that the [Gordon Way Properties] be nominally registered in the name of the respondent John Jiang, and declared as family assets and be subject to the Claimant's claims in this action, pursuant to the Family Law Act and/or by way of constructive trust.

[20] The fraudulent conveyance claim was not pursued at trial. In her submissions on costs, the respondent sought to avoid liability for costs arising from a fraudulent conveyance claim not established at trial, arguing in her written submissions:

Initially, Sharon sought a declaration of fraudulent conveyance against Tian Qi Jiang given the highly suspicious circumstances surrounding the purchase and use of the Gordon Way warehouses. Prior to trial, Tian Qi Jiang produced documents respecting the source of funds for the purchase, and Sharon did not proceed with the claim of fraudulent conveyance. However, she was successful in her claim against Tian Qi Jiang in regards to the overpayment of salary and rent in the amount of \$81,829.24. For reference, Mr. Justice McEwan's reasons respecting the overpayment of salary and rent are found at paragraphs 540 to 548 and 681 to 687 in the Reasons.

[21] Given the acknowledgement that there was no fraudulent conveyance and that documents had been produced establishing the source of funds used to purchase the Gordon Way Properties, the appellant argues the impugned order was erroneously made. He says the Gordon Way Properties were registered in his name and no case was made out for the order declaring them to be family property. I agree. The order is not supported by the accounting evidence at trial and, as the appellant contends, it is inconsistent with the judge's conclusion that John concealed income by overpaying rent on the Gordon Way Properties.

[22] The accounting evidence was the report and testimony of a court-appointed forensic auditor, Shane Troyer, and a jointly-appointed business valuator, a CPA, Douglas Ryder. In his written report, Mr. Troyer described his review of the financial and accounting and tax records provided to him. He made only the following comments with respect to the Gordon Way Properties:

Other Properties: We also understand that three additional properties exist that are held by related parties or companies. One is held by WFI (3125-21331 Gordon Way, Richmond, BC) and the remaining two (3110 and 3120-21331 Gordon Way, Richmond, BC) are registered in Mr. Jiang's father's name. [These two are the Gordon Way Properties.]

At this time we do not have any evidence to suggest that the purchase of properties registered to Mr. Jiang's father were funded by either Mr. Jiang, WIT, WSP or WW and as such we have not proposed any adjustment in that regard.

[Emphasis added.]

[23] Mr. Troyer was examined in chief and cross-examined, but was not asked any questions about the Gordon Way Properties.

[24] Mr. Ryder's evidence with respect to market rents, summarized at para. 540 of the reasons, reproduced above, was premised upon the assumption that, as owner of the Gordon Way Properties, the appellant was entitled to receive market rent from WIT but no more. Calculation of over-market rent was not a necessary exercise if WIT was, in fact, the owner of the property. If that were the case, all payments to the appellant, not merely the overpayment, would have diverted revenue from WIT, and would have artificially reduced John's income.

[25] The fraudulent conveyance claim advanced by the respondent was described in the closing submissions as follows:

As per *Dexia Credit Local v. Peter Rogan et al.*, 2008 BCSC 1406, page 9-10, para 23 and 24 identify the "badges of fraud", and more particularly at para 26, there is a suspicion that when a transaction is made between near relatives, the transaction was not made in good faith. The burden of establishing the bona fides of the transaction "shifts from a plaintiff to the parties to the transaction".

This applies to the salary paid to Tian Qi Jiang and the high rent paid to Tian Qi Jiang. The claimant seeks a declaration of fraudulent conveyance and an order for repayment against both of them.

[Emphasis added.]

[26] The claimant sought a compensation order in relation to overpayment of rent, but did not seek a declaratory order that the Gordon Way Properties are family property.

[27] The respondent's closing submissions do not reference a claim to an interest in the Gordon Way Properties arising as a result of an express or implied trust or fraud. There is no reference to the factors that would have to be addressed if the claimant sought to establish that the Gordon Way Properties are family property as defined by s. 84(1)(b) of the Family Law Act, S.B.C. 2011 c. 25: later acquired property derived from family property. The submission with respect to costs suggests the claimant had investigated whether John was the source of funds used to purchase the Gordon Way Properties, but had been unable to establish that was the case.

[28] In closing, counsel for the respondent made the following written submissions with respect to adverse inferences:

The Respondent Tian Qi Jiang elected not to call evidence, despite having opportunity to do so.

- a. The issue of the non-arms-length salaries to Tian Qi Jiang, even after he left WIT, and the high rent paid by WIT for warehouses in Tian Qi Jiang's name, both supported by the expert reports, were contested issues.
- b. As he did not testify, we seek an adverse inference against him on both issues, namely,
 - i. that he was indeed paid salary for no reason than to divert profits from WIT and thus from John's income, and
 - ii. that the rent was indeed over market value, thus further diverting profits from WIT and thus from John's income.

[29] This submission is repeated in the reasons for judgment, at para. 682 (cited above). Significantly, in my view, the respondent did not seek an adverse inference with respect to "the ownership of Gordon Way" as suggested by the trial judge when he described the evidence that might have been adduced through Mr. Jiang.

[30] The claimant did not argue in support of the proposition stated by the judge in para. 687 of the judgment, that the burden of proof had shifted to the appellant to prove that the transfer of the Gordon Way Properties to him from the prior owner was not fraudulent.

[31] In the absence of any evidence that John had an interest in the Gordon Way Properties, it is difficult to see why the appellant should have been expected to testify to avoid the drawing of an adverse inference with respect to ownership. While the trial judge referred to this Court's decision in *Wu v. Sun*, 2011 BCCA 239, in my opinion he did not heed the cautionary note expressed in that case that an adverse inference should not be used to make something out of nothing. As Justice Donald wrote:

- [40] In *Cunha*, [*Cunha v. Cunha* (1994), 1994 CanLII 3195, 99 B.C.L.R. (2d) 93 (S.C.)] Mr. Justice Fraser urged a robust exercise of the adverse inference power when in matrimonial litigation one party conceals assets, since costs seldom provide an adequate remedy for concealment. In *Laxton*, [*Laxton v. Coglon*, 2008 BCSC 42] Mr. Justice Kelleher proposed a kind of formula where in cases of non-disclosure the inference to be drawn is that the value of undisclosed assets is at least equal to the value of the disclosed assets.
- [41] I am not the first to observe that non-disclosure is the Achilles heel of family assets litigation. Strong measures are justified in discouraging it. However, one cannot make something out of nothing. The right note of caution was sounded by Madam Justice Baker in *Palanca v. Palanca*, 2005 BCSC 1014:
- [127] I accept that Mr. Palanca did not meet his [disclosure] obligations but an adverse inference is not an adequate substitute for evidence about specific assets, the ownership of those assets, whether the assets were used for a family purpose, or otherwise met the definition of family assets, or the value of the family assets, sufficient to allow for the making of a compensation order that is more than a guess.
- [32] In my view, there was no evidence from which one could draw an inference adverse to the appellant with respect to the Gordon Way Properties. To the contrary, the evidence suggested that a review of the financial records produced by the appellant caused the complainant to abandon the allegation that John was an owner or had a beneficial interest in them.
- [33] The respondent says an inference might have been drawn from her evidence that the Gordon Way Properties had been leased by WIT and renovated by WIT at the start of its business in 2011, before they were transferred to the appellant in 2016. There appears to have been consensus that the cost of the leasehold improvements was about \$200,000. The respondent says the fact he made such significant leasehold improvements suggests John had an ownership interest or at least some equity in the properties in 2011. However, there was no evidence of the terms of the lease between WIT and the prior owner, or the terms upon which the property was purchased by the appellant; the argument that John had an interest in the Gordon Way Properties arising from the payment for improvements was not put to John; and it was not argued before the trial judge. The theory is not supported by any evidence other than evidence that, as a tenant, WIT improved the property, which is equivocal and insufficient to justify the drawing of an adverse inference.
- [34] The respondent further suggests that it was enough to plead and argue that all properties used by WIT were in fact owned by John; to establish that he engaged in efforts to conceal income and assets by transferring properties to family members; and that his evidence was rejected in its entirety with respect to ownership of the properties used by his businesses. I would not accede to that argument, because it is founded solely upon the absence of evidence with respect to the properties in question, and the absence of evidence alone is insufficient to justify the drawing of an adverse inference.

Objection to the Hearing of the Appeal

- [35] At the hearing of the appeal, the respondent raised the preliminary objection that the appeal should not proceed because the appellant is in breach of the order that required him to pay the respondent \$81,829.24. This order was not appealed, but neither was it stayed. We are unaware of efforts, if any, made to enforce or execute upon the judgment.
- [36] In *A.N.H. v. L.D.G.*, 2021 BCCA 325, DeWitt-Van Oosten J.A. recently noted:
- [57] In *Larkin v. Glase*, 2009 BCCA 321, this Court affirmed a discretion to refuse to hear or to dismiss proceedings for non-compliance with court orders even though the "disobedience" at issue may not extend to the order under appeal (at para. 31). That discretion is "based on the policy of this Court to protect the administration of justice by avoiding circumstances where the Court could be held in disrepute by assisting a party who has exhibited disdain for the judicial process" (at para. 31). See also *K.P.B. v. A.S.R.*, 2016 BCCA 382 at para. 37; *Bullock v. Bullock*, 2008 BCCA 162 at paras. 2-7; *Berry v. Berry*, 2002 BCCA 129 at paras. 1-4; *Arrocha v. Harrison*, 2019 ONCA 838, leave to appeal to S.C.C. ref'd, 39036 (23 April 2020).
- [37] While I am sympathetic to the respondent's argument, it is not clear to me that the appellant, by his conduct, has exhibited disdain for the judicial process. Importantly, the unpaid judgment in this case is not a spousal or child support order, the breach of which may be contemptuous.
- [38] It is unclear on the record whether the declaration that the Gordon Way Properties are family property posed an obstacle to the appellant raising the funds to pay what he indisputably owes. The setting aside of the declaratory order will remove any such obstacle or any obstacle to the registration of the judgment against the property as a means of executing on the compensation order.
- [39] For these reasons, I would dismiss the respondent's preliminary objection.

Conclusion

- [40] I would allow the appeal and set aside that portion of para. 11 of the Order that reads as follows:
11. The following property is family property:
- d. the commercial properties registered in the name of the Respondent Tian Qi Jiang, located at 3110 and 3120-21331 Gordon Way, Richmond, BC (the "Gordon Way Properties").

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Justice Griffin"

I agree:

"The Honourable Madam Justice Horsman"

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