
CANADA / JUDGMENT

Lam v. Chiu

2012 BCSC 442

COURT

Supreme Court of British Columbia

DECIDED

21 February 2012

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2012 BCSC 442 Lam v. Chiu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lam v. Chiu,

2012 BCSC 442

Date: 20120221

Docket: S118154

Registry: Vancouver

Between:

Miguel Lam

Plaintiff

And:

May Mee Ling Chiu and

Ultimate 24K Gold Co. Ltd.

Defendants

Before: The Honourable Madam Justice Gray

Oral Ruling on Admissibility of New Documents

Counsel for the Plaintiff:

E. Wong

B. Blake

Counsel for the Defendants:

W.J. McMillan

D. Field, A/S

Place and Date of Trial:

Vancouver, B.C.

January 23-27, 2012 and

February 20-21, 2012

(and continuing)

Place and Date of Ruling:

Vancouver, B.C.

February 21, 2012

- [1] THE COURT: I am making a ruling today in an unusual debt case. The reason it is unusual is that the plaintiff and the individual defendant were at one time engaged to marry each other.
- [2] The plaintiff claims that the defendants owe \$100,000 in respect to a loan. The plaintiff says that the loan was made in August or September of 2007, and that it arose when the individual defendant, Ms. Chiu, asked the plaintiff, Mr. Lam, to arrange for Mr. Lam's friend, Mr. Johnson, to make a loan of \$100,000. The ruling is in respect of the ability of plaintiff's counsel to use a document in the direct examination of Ms. Chiu, who has been called as an adverse party witness. I have not seen the document in question, but I am told it is a title search document relating to Ms. Chiu's home.
- [3] Yesterday in evidence, Ms. Chiu testified that she had sold a condominium in a building and then purchased a different condominium in the same building. The witness, Ms. Chiu, also gave evidence about when she had the second condominium in the building. So the plaintiff seeks to put this title search document to Ms. Chiu.
- [4] Mr. Wong, for the plaintiff, has argued that he intends to use the document to impeach the witness who he has called as an adverse party witness. However, Mr. Wong also suggests that the document may be relevant to the ultimate issue of whether the loan was made. As I understand it, Mr. Wong seeks to contradict Ms. Chiu about her evidence of when the sale occurred and how much was the sale price, and show that the witness is incorrect in her evidence on those points, and also to suggest that some of the money that she used for this purchase may have come from this loan.

- [5] The focus of this case is credibility. Mr. Lam says he arranged the loan from Mr. Johnson, and he delivered the money to Ms. Chiu. Ms. Chiu says there was no such loan made. The objection of the defence to the production of this document is that the document was not listed on any list of documents. I am told that the document is dated yesterday at about five o'clock and so it did not come into existence until that time.
- [6] The law is set out by the Court of Appeal in *Stone v. Ellerman*, 2009 BCCA 294, and here are the four factors for the court to consider:
1. prejudice to the party, in this case, the defendant;
 2. whether there was a reasonable explanation for the other party's failure to disclose;
 3. whether excluding the document would prevent a determination of the issue on the merits; and
 4. whether in the circumstances of the case, the ends of justice require that the document be admitted.
- [7] Defence counsel has referred me to a decision of Madam Justice Ross in *Ball v. GAP (Canada) Inc.*, 2001 BCSC 824. In that case, the document that was sought to be admitted was a letter from the plaintiff's lawyer to Trial Scheduling of this court. Defence counsel got the letter from the registry, and Madam Justice Ross wrote, at para. 10, that she agreed that the document arguably fell within the scope of the solicitor's brief privilege. She says that the mere fact that the document is a privileged document sought to be used in cross-examination does not provide a reasonable justification for the failure to disclose.
- [8] I am not going to take the time to read the case that Madam Justice Ross refers to on that point. What I do not entirely understand is if it is privileged and does not need to be listed on the list of documents, how is it that she is saying it should be listed on the list of documents. Madam Justice Ross says:
- [11] none of the concerns with respect to the interests of justice and truth in testimony are present. [It] was not authored by the plaintiff. It was not a statement of the plaintiff, nor did it contain any evidence of the plaintiff. I have reviewed the letter and find nothing in it which is inconsistent in any material way with evidence already given by the plaintiff in chief and in the course of her cross-examination. I see nothing in the letter which would reflect upon Ms. Ball's credibility in any material way.
- [12] There is no reasonable justification for the failure to list the document pursuant to Rule 26. I am satisfied that the interests of justice do not require the admission of this document.

Madam Justice Ross ruled the document inadmissible. While she wrote that there was no reasonable justification for failing to list the document, she also said there was nothing in the document which would reflect on the witness' credibility in any material way. So I read that decision as providing two explanations for the ruling, one of which was that the document was irrelevant to the issue of credibility.

- [9] Plaintiff's counsel, Mr. Wong, has referred me to the decision of Mr. Justice Fraser in *Blake v. Gill*, [1996] B.C.J. No. 2041. Paragraphs 20 through 24 are as follows:
- [20] Mr. Kane, for the plaintiff, has referred disparagingly to "trial by ambush". There is a debate whether the system's requirements of disclosure frustrate legitimate and effective cross-examination or, conversely, improve the ultimate reliability of the testimony. Some suggest that the kind of disclosure which might frustrate cross-examination has the virtue of promoting settlement. Informed persons reasonably may differ on the policy issue.
- [21] It is unarguable that the thrust of contemporary civil procedure is towards disclosure. But ambush does have at least one virtue: the potential to expose lies (and the willingness to lie) by the use of evidence put to a witness for the first time on cross-examination. It is a staple of the literature on advocacy.
- [22] I conclude that it sometimes may be, and in this case was, reasonable for counsel to withhold disclosure of a document in order to make better use of it for cross-examination purposes.
- [23] If the document is one which ordinarily ought to be disclosed, non-disclosure carries with it the risk that leave will not be granted to use the document. This introduces a self-policing aspect to the tactical decision being made. Fairness will govern.
- [24] Of course, this ruling does not imply that a party may be excused ever for failure to disclose a document which would be helpful to the opposite party.
- [10] So I am now going to go through the factors listed in *Stone v. Ellerman*. The first is whether there is any prejudice to the party, in this case, the defendant. The document itself would reflect a transaction that the defendant was involved in and would know about. Had defence counsel been told at five o'clock yesterday that the document had come into existence, defence counsel probably would not have been entitled to talk to the witness about her evidence because she had been called as an adverse party and the direct evidence can be conducted in the manner of cross-examination. Mr. McMillan argued that there might be other steps he might take if he had seen the document, such as doing other research about it. I do not see why that cannot be done later in the course of this trial, such as overnight tonight. It is clear that this witness will be in the witness box tomorrow morning, and so I do not see any real prejudice in this case to Ms. Chiu from admission of this document.

- [11] Secondly, was there a reasonable explanation for plaintiff's counsel's failure to disclose it? Well, the explanation is that it only came into existence at five o'clock yesterday, and that it may be part of the solicitor's brief, being part of the investigation done by counsel in response to an answer given by the witness. In my view, that is a reasonable explanation for the failure to list it.
- [12] The third question is whether excluding the document would prevent a determination of the issue on the merits. The primary question for the court is, was the loan made. Part of proof of that may be what was done with the money if Ms. Chiu received the money. Excluding the document could have a bearing on that. Although it was not pleaded that this is what Ms. Chiu did with the money, and the evidence to this point had suggested that she used the money to purchase jewellery in Hong Kong, the use of the loan proceeds is not normally something that a party alleging an unpaid loan is required to prove. Determining the use of the loan proceeds is really part of Mr. Lam seeking to contradict Ms. Chiu's denial of the loan.
- [13] The fourth question is whether, in the circumstances of the case, the ends of justice require that the document be admitted. Mr. McMillan argued that it might be possible to mark the document and have it become an exhibit for identification only, but not an exhibit at trial, and that it could be used for cross-examination, but not used for making findings of fact. I do not know as a practical matter how the court could accept evidence in that way. Mr. McMillan's response was that that in itself proves that there is a problem with admitting the document.
- [14] I have considered these factors and, in my view, they weigh in favour of allowing the document to be used by Mr. Wong in his examination of this witness.
- [15] Just to summarize, the only possible prejudice to the defendant, Ms. Chiu, can be dealt with through any necessary adjournment, but I suspect that the overnight break would be adequate, in any event. There is a reasonable explanation for plaintiff's counsel's failure to disclose the document. The document may have an impact on the determination of the issue on the merits and, in the circumstances of this case, the ends of justice require that the document be admitted.

"Gray J."

The Honourable Madam Justice Gray

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