

CANADA / JUDGMENT

Lee v. Li

2001 BCSC 434

COURT

Supreme Court of British Columbia

DECIDED

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2001BCSC0434

Citation: Lee, Lee and Lee v. Li et al Date:

Docket:

20010322

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2001 BCSC 434 Registry:

Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHEN CHEN LEE,

EANA LEE ALSO KNOWN AS CHU CHU LEE AND LING LING LEE

PLAINTIFFS

AND:

TE-TSUNG LI ALSO KNOWN AS THOMAS LI,

AND LIAO KWEI-LAM

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE SATANOVE

Counsel for the Plaintiffs: J.D. Shields

Counsel for the Defendants: B. Kerfoot

Dates and Place of Trial: January 8,9,10,11,12
and 15, 2001

Vancouver, BC

- [1] Dr. Cheng Chi Li died in Vancouver on June 7, 1995 at the age of 93. Six daughters and one son survived him. His wife, one son and one daughter had pre-deceased him.

- [2] Dr. Li's assets at the time of his death primarily consisted of real estate and a few stocks and bonds in Taiwan, where he had resided all his life until 1993 when he moved to Canada.
- [3] The three plaintiffs, Chen Chen Lee, Eana Lee and Ling Ling Lee are daughters of Dr. Li. The male defendant Thomas Li is his son and the female defendant Liao Kwei-Lam is Thomas Li's wife.
- [4] After Dr. Li's death, the defendants produced to the plaintiffs two copies of documents which the defendants alleged were holograph wills, written and signed by the hand of Dr. Li and bearing a Chinese date equivalent to the occidental date of April 9, 1994 (the "Wills"). The Wills were not witnessed, but they bore a notary's stamp and signature attesting to the fact they had been "re-confirmed" by Dr. Li on May 26, 1995.
- [5] One of the alleged Wills devolved the entire interest and a valuable piece of real property in Taiwan to Thomas Li solely. The other alleged Will devolved the interest in a less valuable piece of real property to the family members of the eldest son and to all the daughters to share equally, although one of the daughters had already died.
- [6] In March, 1998 the plaintiffs commenced this action seeking: a declaration that the Wills were fraudulently made by the defendants and were null and void; damages; punitive damages; and costs. The basis of the plaintiffs' claim in fraud is set out in paragraph 17 of the amended statement of claim:
17. The Defendants intend to disinherit the Plaintiffs of their rightful inheritance by wrongful and fraudulent means. Particulars of the Defendants' fraud include the making of two wills under purported date of April 9, 1994 and attempting to pass them off as the genuine wills of the Father in order to secure for the Defendants a greater share of the estate of Li, Cheng Chi to the detriment of the Plaintiffs and the other beneficiaries of the Father's estate.
- [7] In their amended statement of claim the plaintiffs further alleged that Thomas Li wrote the Wills, or a portion of them, without the knowledge and compliance of Dr. Li.
- [8] The defendants' amended statement of defence denied all the plaintiffs' allegations and averred that Dr. Li was domiciled in Taiwan at the time of his death and that he wrote and executed the Wills in accordance with the laws of Taiwan. The defendants pleaded that "the formal and essential validity of the Wills was governed by the laws of Taiwan" where proceedings to determine this "may" be commenced. The defendants questioned the jurisdiction of this Court in this matter and in particular the convenience of British Columbia as the appropriate forum to hear this action.
- [9] Thus the issues which were joined on the pleadings were these:
1. Does British Columbia have jurisdiction over this matter?
 2. If so, should British Columbia decline jurisdiction in favour of Taiwan as the appropriate forum?

3. Were the defendants liable for perpetrating a fraud against the plaintiffs?
4. If so, what was the measure of the plaintiffs' damages?

[10] It is important to note that technically, the issue of the validity of the Wills was not before me. This was not a probate action. The defendants sought no relief from this Court other than the dismissal of the action. The defendants admitted the Wills were not valid under British Columbia law.

Jurisdiction

[11] The issue of jurisdiction was considered by Fraser, J. on December 28, 2000 when the defendants applied for an order that this action be stayed. Fraser, J. dismissed the application, but in doing so made these remarks at para. 18ff:

In considering whether to grant a stay, I embark on an analysis similar in character to the analysis of forum conveniens. Some of the usual considerations favour the plaintiffs. The parties all live here, for example, the expert evidence which has been developed is from experts who carry on their business in British Columbia, and so forth.

I think these considerations, however, are secondary to the reality that if the beneficial interest in these lands continues to be an issue among these parties, sooner or later resort must be had to the courts of Taiwan. In that sense, the claim of the courts of Taiwan to be the legitimate forum for this dispute is very strong.

One of the possibilities in terms of the expeditious disposition of these differences among the parties would be to suggest that the whole matter be left to the courts of Taiwan, which might or might not, depending on the evidence, have to consider the law of British Columbia as to one aspect or the other.

On the allegation of forgery, I do not see any impediment to the jurisdiction of the court in Taiwan to deal with the matter.

Nonetheless I conclude that the application should be denied.

One of the difficulties is that there is no admissible evidence before me as to the status of proceedings, if any, in Taiwan....I regard the evidence as to proceedings in Taiwan as very slender indeed.

At this stage, it is difficult to predict what effect, if any, might be given to a judgment of this court from these proceedings if there are subsequent proceedings in Taiwan. There are a number of possibilities...from recognition of the judgment of this court by the court in Taiwan on certain matters, without embarking on the merits of those issues in Taiwan, to ... a rejection of all of the judgment of the court in British Columbia and a requirement that the parties re-litigate the matters in Taiwan. That there will sometimes be occasions when matters have to be litigated twice in different jurisdictions is established by the decision of Madam Justice Martinson in

Keung v. Wong...2000 BCSC 528.

It is not perhaps the most desirable of situations, but my conclusion is that it would deny the plaintiffs access to the Court system in circumstances where it is not clear that that would be fair or just.

- [12] The defendants conceded that Fraser J. had decided the issue of jurisdiction simpliciter and therefore this issue was *res judicata*. However, they submitted there was still a question of *forum conveniens*, given the evidence at trial that probate is now proceeding before the courts of Taiwan. The defendants submitted that I should decline to exercise jurisdiction in this matter to avoid the possibility of conflicting judgments.
- [13] I was not impressed by these submissions. The defendants have had more than ample opportunity to commence proceedings in Taiwan before now. Thomas Li is the named executor under the Wills and he has held the originals since 1995. He was or should have been aware of the plaintiffs' intention to contest the validity of the Wills. Even by December, 2000 in the application before Fraser, J. it was not clear that the proceedings had been commenced in Taiwan. Very little evidence was offered to me at trial to establish the nature or stage of these proceedings ongoing in Taiwan. It would be grossly unfair at this late stage, after a full trial on the merits, to decline jurisdiction because of recently brought litigation in Taiwan.
- [14] The defendants have been in control of the Wills and Dr. Li's estate since he died. The plaintiffs say the defendants were acting fraudulently and were trying to deprive them of the benefit and the estate to which they were entitled. How then could they stop the defendants but to call upon the courts of the jurisdiction where all the parties reside and where the Wills were made?
- [15] As early as 1736, the Lord Chancellor in *Angus v. Angus* (1736-7), 1 West T. Hard. 23, 25 E.R. 800 (Ch.) said:
- This court acts upon the person as to the fraud and discovery....This had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here; for the jurisdiction of the court as to frauds, is upon the conscience of the party.
- [16] It is an examination of the conscience of the defendants upon which I embark. I am not dealing with land situate abroad. See: *British South Africa Company v. Companhia de Mocambique*, [1893] A.C. 602 (H.L.).
- [17] I do not know what effect, if any, a finding of fraud would have on a Taiwanese court or the devolution of the land there. Nonetheless, in theory, a finding of fraud could affect the parties here because it could lead to an award of damages for the deprivation of the benefit under the Wills.

- [18] Therefore, a judgment in personam for or against the defendants could constitute a very effective means of resolving this dispute. Under the circumstances it is fair and just that I retain jurisdiction over this suit.
- [19] As the suit is framed in fraud, the burden of proof lies entirely on the plaintiffs. The plaintiffs approbate and reprobate when they submit on the one hand that I must treat this action as a tort action for the purpose of jurisdiction, and on the other hand I must treat the action as one in probate for the purpose of onus of proof. The plaintiffs, having commenced an action in fraud and forgery against the defendants must now prove their case on a civil burden of proof commensurate with the seriousness of the allegations.

The Alleged Fraud

- [20] This issue boils down to whether Dr. Li actually wrote and signed the April, 1994 Wills or whether they were forged.
- [21] The plaintiffs, Sabrina Wei and Lawrence Wong all testified that Dr. Li was in ill health between 1993 and 1995. His hands shook and he had difficulty writing. When he did write, there was a noticeable tremor in the formation of the Chinese characters. Sabrina Wei described her grandfather's handwriting in Canada as "messy and crooked with tremor". Eana Lee said her father did not write clearly, he scribbled and was not very neat. He wrote in small characters with "soft lines". Ling Ling Lee said in 1993, when she studied prescriptions in Taiwan with Dr. Li until he moved to Canada, his hand-written prescriptions showed tremor. Chen Chen Lee said her father's hands trembled when using a pen. Lawrence Wong, Dr. Li's Canadian solicitor, testified that he noticed Dr. Li's hand was trembling quite badly when he signed his immigration application in 1993. It took him quite a while to finish his signature.
- [22] The defendants and their daughter, Alexandra Lee, refused to admit that Dr. Li's health was such that he had trouble writing. In his examination in chief, Thomas Li said sometimes his father caught cold and would fall ill but usually he was okay. In the year before his death he had no particular trouble with his hands. On cross-examination he accepted that in 1993 and 1994 there was a little bit of trembling in Dr. Li's hands, but not "once he got going". Finally, Thomas Li admitted the documents signed in August, 1994 showed trembling.
- [23] Thomas Li's testimony in this regard was not very convincing. He insisted his father's hands could not have trembled in 1994 because the Wills showed they were written by a clear and steady hand. This tautological reasoning from a man who held a law degree was not very helpful to the defendants' case.
- [24] Alexandra Lee testified in chief that her grandfather had no problems with his hands in 1993 to 1995. On cross-examination she admitted that the signature on the two Wills was a little shaky and that Dr. Li would sometimes shake when writing. She admitted that the messy, shaky signatures of Dr. Li on the Wills was indicative of how he wrote in 1993 to 1995.

- [25] Liao Kwei-Lam admitted on cross-examination that Dr. Li had a trembling problem with his hands when using chopsticks and that he would tremble "a little bit" when he wrote, although she did not see him write documents in the last few years of his life.
- [26] Most significantly, the documents which both sides agreed Dr. Li had written (Exhibits 10, 17 and 25) and the 1995 signatures on the Wills showed a noticeable shakiness in the writing.
- [27] As well as the important feature of tremor which appears missing in the text of the Wills, the plaintiffs identified other tell tale characteristics of Dr. Li's handwriting which were not evident on the Wills. Dr. Li would slant some of his strokes to the left and never to the right. Ling Ling Lee testified that he would simplify the characters by omitting certain strokes or linking two together.
- [28] In addition to the testimony of Dr. Li's children and grandchildren, there were the expert reports of Anne Silvers and Don Gamble to consider.
- [29] Ms. Silvers, who was not called for cross-examination by the defendants, opined that each of the Wills was not written by the same person. She also opined that Exhibit 10 (envelope) and Exhibit 19 (letter of 1990) were not written by the same person, nor was it likely that Exhibit 19 had been sent in Exhibit 10 because of the way it was folded.
- [30] Don Gamble, who was cross-examined by plaintiffs' counsel, opined in his report that the Wills were written by the same person who wrote six specimen documents provided to him and which he assumed to have been written by Dr. Li.
- [31] There were several problems with Mr. Gamble's opinion. Firstly, he did not read nor write the Mandarin language himself. He relied on a translator to point out 55 characters which appeared in both the Wills and the comparison documents. Secondly, his methodology appeared incomplete, or less complete than Ms. Silvers' methodology. Mr. Gamble examined writing skill, line quality, internal letter proportions and unique combinations of formations and designs. He said the writing showed the same fluency, rhythm and natural variations. I pause here to query how Mr. Gamble, who cannot create or identify the characters themselves, and in fact has no familiarity with the language at all, is capable of determining which variations were natural and which were not.
- [32] Ms. Silvers, by comparison, reviewed every character in the Wills, the spacing between them, the slant and length of each character, the spatial arrangements of each of the characters, the pen pressure, and the ink absorption of the paper. She holds a degree in Asian studies with emphasis on the study of Chinese and Japanese writing and documents. She has numerous other credentials qualifying her in the field of forensic document analysis, including training by the FBI and United States Secret Service.
- [33] I accept her opinion that the Wills were not penned by the same person. I further accept her opinion that Exhibit 19 was not in the same handwriting as Exhibit 10.

- [34] I do not accept Mr. Gamble's opinion that Dr. Li wrote both Wills. Mr. Gamble found both Wills to have been written by the same person who wrote the comparison documents, including Exhibit 19. His assumption that all the comparison documents were penned by Dr. Li was not proved to be factual. For this and the other reasons referred to above I do not accept Mr. Gamble's opinion.
- [35] I also prefer the plaintiffs' evidence with respect to their father's handwriting over that of the defendants' evidence. I found the plaintiffs and Ms. Wei and Mr. Wong to be credible witnesses who were unshaken on cross-examination. The defendants made no submissions about the credibility of the plaintiffs. They submitted that I should give no weight to Mr. Wong's opinion that Dr. Li did not write the Wills and I agree. However, I do assign weight to Mr. Wong's observation as a disinterested third party that Dr. Li's hand trembled when he signed his name in 1994 and it took him a long time to complete the signature.
- [36] Finally, it should be noted that to some extent it was apparent on the face of the documents that there were discrepancies between the handwriting in the text of the Wills and in the documents that were admitted at trial to be written in Dr. Li's handwriting.
- [37] The Court is entitled to some extent to view the writing itself and make its own determination: *Lawrence v. Pehlke* (Trustee of), [1937] O.J. No. 63 (Q.L.) (Ont. S.C.C.A.); *Pratte v. Voisard* (1918), 57 S.C.R. 184.
- [38] I say "to some extent" because I would be foolish indeed to profess to be able to tell differences in Chinese handwriting. However, any form of writing by a trembling hand may evidence tremor or shakiness in the lines used to form the writing. I could see the tremors in Exhibits 10, 17 and 25 and I could see them in the signatures on the far left side of the Wills. This was consistent with both the plaintiffs and defendants' evidence that Dr. Li suffered from trembling hands between 1993 and 1995. I saw no tremors or evidence of shakiness anywhere else in the Wills. As these Wills were purportedly written by Dr. Li in April, 1994 it was inconsistent and highly suspicious that they did not appear to have been written by a trembling hand.
- [39] This, coupled with the evidence of the plaintiffs that Dr. Li's writing slanted to the left, was messy (a trait which it seems is shared by doctors the world over) and used short cut strokes is sufficient to satisfy the civil burden of proof that Dr. Li did not write the body of the Wills.
- [40] It cannot be inferred from this fact alone that Thomas Li forged the Wills. The only evidence led by the plaintiffs to show that Thomas Li forged the Wills was the admission of the defendant Ms. Lam on examination for discovery. She was not confronted with the statement in her examination for discovery when she was cross-examined, nor did she refer to it in her evidence in chief. While it carries some weight, I do not think it was sufficient on its own to prove conclusively that Thomas Li wrote the Wills.

- [41] Although it has not been proven that Thomas Li forged the Wills, the conduct of the defendants points to their having the requisite knowledge and intention to perpetrate a fraud on the plaintiffs and on the court in Taiwan.
- [42] Thomas Li testified that he saw his father write the Wills and kept them in safekeeping for him. In light of all the earlier evidence I have reviewed concerning Dr. Li's handwriting, I can only conclude that Thomas Li was being untruthful. It was in the perpetration of this untruth that the defendant Thomas Li was behaving fraudulently. He would have this Court, and the court in Taiwan, believe that the Wills were hand-written by his father and therefore valid and operable in Taiwanese law to transfer this substantial piece of real property to him alone. He was not satisfied simply to proffer the Wills as executor and let the Court decide their validity. He swore under oath that they were written by his father in his presence. The motive for saying this was obvious: a holograph will in the testator's writing was the only instrument which could accomplish his purpose without the involvement of a third party.
- [43] Thomas Li could not explain why he did not take his father to his lawyer, Mr. Wong to have the Wills prepared. There was no explanation why the notary, Mr. Gee, was not called to testify about the reconfirmation on the Wills by Dr. Li. Thomas Li refused to produce the original of the Wills to be forensically examined until this Court ordered him to do so. His demeanour when testifying about the Wills was noticeably agitated in comparison to his demeanour during other parts of his testimony.
- [44] Similarly, I find much of the evidence of the defendant Lam to be unworthy of belief. She did not purport to be present when Dr. Li wrote the Wills, but she said she was present when Mr. Gee confirmed them. This contradicted her husband's examination for discovery evidence wherein he stated that Ms. Lam was not present. She refused to agree that her husband could be mistaken or lying on his examination for discovery but she still insisted she had been present during the meeting with Mr. Gee.
- [45] The defendants are attempting to perpetrate a fraud in the broad sense of the word. They are not trying to induce the plaintiffs to do anything to the plaintiffs' detriment, but they are unconscionably asserting legal rights which they have created through falsehood.

While deceit is an identifiable and separate tort and a precisely classified cause of action, fraud is the wider sense in which the term is used when it is stated as a ground for equitable relief; it is so infinite in its varieties that the courts have not attempted to define it. Courts of Chancery used the term to describe conduct falling short of deceit but nevertheless imparting a duty to which equity attached its sanctions. In this sense, it extends to transactions in which courts are of the opinion that it is unconscientious for a person to avail himself of a legal advantage which he has obtained. (L.N. Klar et al., *Remedies in Tort*, vol. 1 (Toronto: Carswell, updated to 2001) c. 5 at 11-12.)

Damages

- [46] I have no hesitation in granting the plaintiffs the declaratory relief sought. However, even in an action for fraud, plaintiffs must show that damage has been suffered before they can recover damages. The measure is not a contractual measure of damages but rather a measure of consequential damages caused by the fraud (S.M. Waddams, *The Law of Damages*, looseleaf ed. (Toronto: Canada Law Book, 2000) para. 5.590).
- [47] Here, the damage is anticipatory only. If the defendants are successful in probating the Wills in Taiwan, the plaintiffs will be deprived of their rightful inheritance and this will be the measure of their damages. However, if the defendants are unsuccessful in Taiwan or if they voluntarily withdraw the Wills and allow the estate to devolve as on intestacy, then the plaintiffs will have suffered only damages, if any, arising from the delay in receiving their share of the estate.
- [48] I am of the view that it is appropriate to adjourn generally the issue of damages, including punitive damages, until the Taiwanese proceedings are concluded. Then either party will be at liberty to raise the matter before me.
- [49] In the meantime, the defendants' fraudulent and dishonest conduct has caused the plaintiffs to bring this law suit and to incur all the expense that this has entailed. Regardless of the ultimate disposition of the question of damages, the plaintiffs are entitled to special costs of this action, payable forthwith.

"D.A. Satanove, J."

The Honourable Madam Justice D.A. Satanove

March 30, 2001 -- Memorandum to the Legal Publishers advising that on page 2, paragraph 2, the first sentence should read:

"[2] Dr. Li's assets at the time of his death primarily consisted of real estate and a few stocks and bonds ..."

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