
CANADA / JUDGMENT

Li v. Liang

2020 BCSC 141

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 141 Li v. Liang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Liang,

2020 BCSC 141

Date: 20200206

Docket: E151127

Registry: Vancouver

Between:

Fan Li

Claimant

And

Kun Peng Liang and Henan Huabin Real Estate Company Ltd.

Respondents

Before: The Honourable Madam Justice Horsman

Ruling on Mid-Trial Applications

Counsel for the Claimant:

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T. Brayer

Counsel for the Respondent Henan Huabin Real Estate Company Ltd.

M. Perry

L. Nambiar

Place and Date of Hearing:

Vancouver, B.C.

January 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2020

THE APPLICATIONS

- [1] This ruling addresses two applications brought by the claimant in the course of this family trial seeking orders that: (i) an appraisal report be admitted as expert opinion evidence on a financial issue, with the claimant having leave to dispense with the requirement for a joint expert, and (ii) the claimant has leave to withdraw deemed admissions.
- [2] This family trial commenced on January 13, 2020. The trial was set for three weeks but did not complete within that time. The parties' last hearing day before me was on January 30, 2020. The trial is scheduled to continue for a further seven days beginning March 23, 2020.
- [3] The applications require some factual context. I will review this context as minimally as possible in light of the fact that this trial is ongoing. Nothing in this ruling should be construed as influencing the outcome of the substantive matters in dispute.
- [4] The parties entered a separation agreement in January 2014. The claimant alleges that the respondent, Mr. Liang, did not disclose the existence of significant family assets at the time the separation agreement was signed. In particular, the claimant says that the respondent failed to disclose a property in China consisting of seven dormitory buildings that he acquired in 2011 (the "Dormitories").
- [5] The respondents dispute that the Dormitories are family assets. They say that Mr. Liang holds the Dormitories on a bare trust for the corporate respondent, Henan Huabin Real Estate Company Ltd. ("Henan Huabin"). Mr. Liang's father, Bao Ping Liang, is the Chairman of Henan Huabin. The respondents say that as a result of restrictions on the sale of the Dormitories, title could not transfer to Henan Huabin and therefore the Dormitories were put in the respondent's name.
- [6] There are other issues in this trial. However, I understand that a key issue in dispute is whether the Dormitories are family assets, and if so how they should be valued.

- [7] This is the fourth scheduled trial date in this action. The second scheduled trial date, December 4, 2017, was adjourned by consent to November 19, 2018 pursuant to the order of Madam Justice Burke issued on November 2, 2017 (the "Burke Order"). At a trial management conference ("TMC") on November 9, 2018, Master Scarth determined that the trial was not ready to proceed, and adjourned it from November 19, 2018 to January 13, 2020.

THE APPLICATION TO TENDER EXPERT APPRAISAL EVIDENCE

Background

- [8] The claimant seeks to tender in evidence the expert report of Bowen Real Estate Appraisal Cost Group Ltd. ("Bowen") concerning an appraisal of the Dormitories (the "Bowen report"). Bowen is a real estate appraisal company that is based in Beijing, China. The Bowen report is not a joint expert report. It is tendered only on behalf of the claimant.
- [9] The Burke Order, which adjourned the December 4, 2017 trial date, provided by consent that valuations of the properties in dispute should be conducted by July 31, 2018. Between May 2018 and June 2018, counsel for the claimant and counsel for the respondents corresponded regarding the appointment of an expert appraiser. The claimant suggested that the parties jointly retain Bowen. There were discussions between counsel as to how the costs of an appraisal might be covered. These discussions did not lead to agreement on the joint retainer of an expert.
- [10] On October 10, 2018, the claimant filed a Notice of Application seeking, inter alia, an order for the appointment of Bowen as a joint expert. The application came on for hearing before Master Taylor on October 29, 2018. Master Taylor ordered that the Dormitories be appraised, with the costs shared equally between the claimant and respondent on a without prejudice basis. Pursuant to the order, the respondent had until noon on Friday November 2, 2018 to advise if Bowen was acceptable as a joint expert, and if there was no response then Bowen would be the joint expert appointed.
- [11] There was an exchange of communication between the parties in early November 2018 regarding the appointment of an appraiser. Counsel for Mr. Liang advised of his concern that Bowen was not an appropriate joint expert due to the fact that Bowen appeared to believe that it was retained only by the claimant. Counsel for the claimant indicated his intention to proceed to retain Bowen on behalf of the claimant alone. Counsel for the claimant also suggested that the respondents provide the name of three proposed joint experts from which the claimant would select one.
- [12] The parties did not resolve the controversy over the appointment of a joint expert prior to the TMC of November 9, 2018, at which point the trial was adjourned to January 13, 2020. After November 9, 2018, there appears to have been no further communication between the parties on the topic of an expert report until the fall of 2019.

- [13] On October 18, 2019, the claimant served the Bowen report on the respondents pursuant to Rule 13-6 of the Supreme Court Family Rules [SCFR]. The report was written in the Mandarin language. In the cover letter enclosing the report, counsel for the claimant advised that the report was being translated into English. The claimant served a translated version of the Bowen report on December 17, 2019. A revised report was served on December 19, 2019.
- [14] The Bowen report is dated November 2018. Counsel for the claimant advises that the final preparation and service of the report was delayed by the difficulties his firm faced in communicating instructions to Bowen about the requirements for an expert report under the SCFR.
- [15] The respondents object to the admission of the Bowen report on three grounds:
- i. The Bowen report is not a joint expert report as required by Rule 13-3(2) of the SCFR;
 - ii. The English version of the Bowen report was not delivered in accordance with the time requirements of Rule 13-6(3) of the SCFR, which requires that an expert report must be delivered at least 84 days before the scheduled trial date;
 - iii. There are differences between the various versions of the Bowen report that have been served, and pages appear to be missing from the final version delivered on December 19, 2019. Also, the Bowen report states that the appraisal was only to be used for a period of one year, and therefore its expiry date was in the fall of 2019.

Analysis

- [16] Pursuant to Rule 13-2(2)(a) of the SCFR, the court may make an order relieving a party of the requirement to present evidence on financial issues through a joint expert. While the discretion must be exercised judicially, the discretion should not be unduly fettered by limitations that are not apparent in the SCFR: *Bartch v. Bartch*, 2017 BCCA 94 at para. 28.
- [17] Rule 13-6(3) of the SCFR also provides the court with discretion to relieve a party from compliance with the requirement to serve an expert report at least 84 days in advance of trial. The discretion may be exercised where the non-compliance is unlikely to cause prejudice. What is most important is that the opposing party have adequate notice to effectively cross-examine the expert and to instruct their own expert if they choose to retain one: *Cao v. Chen*, 2019 BCSC 844 at paras. 20-21.
- [18] In the present case, I consider it in the interests of justice to exercise my discretion under Rule 13-2(2)(a) to relieve the claimant of the requirement to present evidence through a joint expert. All parties have been aware at least since the Burke Order was made on November 2, 2017, that a valuation of the disputed properties would have to be conducted for the purpose of trial. Indeed, the respondents consented to the term of the Burke Order that required valuations to be conducted by July 31, 2018.

- [19] It is unfortunate that the parties did not communicate more consistently. It appears from the record that there was a flurry of activity as each rescheduled trial date approached, followed by a long period of inactivity after an adjournment was granted. I accept that the claimant ought to have brought this application earlier given that the respondents had not consented to dispense with the requirement for a joint expert. However, the respondents were aware of, and consented to, the terms of the various court orders that addressed the need for an expert appraiser. It was obvious that the court would require valuation evidence in this case. The respondents knew that the claimant had retained Bowen for that purpose.
- [20] I note that while the respondents oppose the claimant's request for an order dispensing with the requirement for a joint expert, the respondents are not proposing the appointment of a joint expert other than Bowen. Instead, the respondents take the position that the court should be left without any expert valuation evidence at all. In my view, such an evidentiary gap would not be in the interests of justice.
- [21] For many of the same reasons, I consider it in the interests of justice to abridge the time for delivery of the Bowen report pursuant to Rule 13-6(3) of the SCFR. The respondents have had a Mandarin version of the Bowen report since October 18, 2019, and thus had specific notice of the claimant's intention to rely on an expert appraisal report. The parties themselves speak Mandarin so it was of course open to the respondents to read the report when it was first delivered. For the reasons already stated, the absence of expert evidence on valuation would leave an evidentiary gap. In the event that the court ultimately determines that the Dormitories are family assets, the court would have no evidentiary basis on which to value the assets as of the date of trial.
- [22] The respondents did not argue that they have been unable to prepare for cross-examination of Mr. Bowen. The respondents did suggest that in the event that time is abridged for delivery of the Bowen report, the respondents should also have leave to serve a late expert report in advance of the continuation of this trial in March 2020. The claimant does not oppose such an order as a means of mitigating any prejudice to the respondents.
- [23] In summary, then, I order that the claimant is relieved from the requirement to present expert evidence through a joint expert. She may tender the Bowen report at trial. The time for delivery of a translated version of the Bowen report is abridged. Unless otherwise agreed to by the parties, the respondents may deliver an expert appraisal report to the claimant by March 20, 2020.
- [24] Finally, I conclude that the respondents' arguments about the differences in the various versions of the Bowen report, and the expiry date on the valuation, are matters that goes to the weight of the report rather than its admissibility. The respondents will be entitled to cross-examine the author of the report when the trial continues and is entitled to review the expert's file. The respondents can make whatever arguments they wish to the court at the end of the day as to what weight, if any, ought to be placed on the Bowen report.

THE APPLICATION TO WITHDRAW DEEMED ADMISSIONS

Background

- [25] The respondent, Mr. Liang, served a notice to admit on the claimant on November 2, 2018 (the "Notice to Admit"). This was shortly before the third scheduled trial date of November 19, 2018, which was adjourned at a TMC on November 9, 2018. The Notice to Admit sought the claimant's admission to facts stated in 116 paragraphs. It additionally sought admissions in relation to documents that included water bills for the Dormitories and bank statements of Mr. Liang and Henan Huabin. The documents for which admissions were sought were not appended to the Notice to Admit.
- [26] The admissions sought in the Notice to Admit cover matters that I understand to be at the heart of the dispute between the parties in this action. Many of the admissions sought relate to the rather complex financial operations of Henan Huabin, and the methods by which the respondents assert that the Dormitories were acquired on behalf of Henan Huabin. Other admissions were sought in relation to the true ownership of the family home in Richmond. By way of example, the Notice to Admit sought admissions that:
- Henan Huabin did business under the respondent's name, including maintaining bank accounts under the respondent's name that contained money owned by Henan Huabin (paras. 49-52);
 - As a result of the Chinese regulation of real estate corporations, other corporations had to be incorporated by Henan Huabin or Bao Ping Liang in order to engage in business such as property management (para. 53);
 - To the claimant's knowledge, the house she and the respondent acquired in Richmond when they first moved to Canada was purchased on behalf of, and using the funds of, Henan Huabin (paras. 62-65, 74);
 - Henan Huabin could not purchase the [Dormitories] in its own name due to regulation in China. Henan Huabin was, and is, the beneficial owner of the Dormitories (paras. 85-86).
- [27] On January 21, 2019, counsel for Mr. Liang wrote to counsel for the claimant advising of Mr. Liang's position that as no response had been received to the Notice to Admit, all of the admissions sought were deemed to be admitted.
- [28] Counsel for the claimant responded on January 31, 2019. Counsel noted that due to inadvertence, the Notice to Admit had not been brought to his attention. He stated his intention to "reply to your Notice to Admit in due course".
- [29] By letter faxed on October 18, 2019, counsel for the claimant provided a detailed response to the Notice to Admit. A limited number of the facts on which admissions were sought were admitted to. Others were denied or objected to on the basis that the requested admission was improper.

- [30] The respondent Mr. Liang takes the position that by operation of Rule 9-6(2) of the SCFR, the claimant is deemed to have admitted the truth of facts in the Notice to Admit having failed to respond to the Notice to Admit within 14 days of service. He opposes an order permitting the claimant to withdraw the deemed admissions.
- [31] Although there is some confusion in the application material, I proceed on the assumption that the claimant is applying only to withdraw the admissions she is otherwise deemed to have made in failing to respond to the Notice of Admit within 14 days of service. I do not understand the claimant to be applying to withdraw the express admissions made in her formal response to the Notice to Admit sent on October 18, 2019. I will proceed to deal with the application on that basis.

Analysis

- [32] The court has a discretion under Rule 9-6(2) to permit a party to withdraw admissions. The factors that guide the exercise of this discretion include consideration of: any prejudice caused by the withdrawal, whether the admission was inadvertent, whether there was a delay in bringing the application to withdraw and, if so, the reasons for any delay, and whether the admission relates to a triable issue that ought to be determined on its merits. The overarching question is whether it is in the interests of justice to decide the matters in issue based on the admissions rather than on the merits: *Seinen v. Seinen*, 2018 BCSC 1455 at paras. 23-25.
- [33] The deemed admission rule in Rule 9-6(2) of the SCFR, and its equivalent in Rule 7-7(2) of the Supreme Court Civil Rules, is intended to streamline the litigation process by focussing the parties' attention on what is and is not in dispute. Parties must act expeditiously in responding to a notice to admit or face the consequence that they will be deemed to have admitted facts. However, the Rule also provides for judicial discretion in excusing or relieving from such consequences in appropriate circumstances: *Piso v. Thompson*, 2010 BCSC 1746 [Piso] at para. 20. As observed by Master Caldwell in *Piso*, the deemed admission Rule:
- [21] does not, nor was it intended to, create a trap or add an inescapable obstacle to ensnare or trip up sloppy or inattentive counsel to the detriment of parties to the litigation.
- [34] The court must be mindful that a refusal to permit a party to withdraw a deemed admission will deny a party the opportunity to have the case heard and decided on its merits.
- [35] In the present case, I consider it in the interests of justice to allow the claimant to withdraw the deemed admissions. Of central importance to my mind is the fact that the admissions relate to matters that are of central dispute in this lawsuit. Indeed, if the claimant is bound to the facts in the Notice to Admit it is difficult to see what there is left to litigate. The issues in this case should be decided on their merits, particularly in light of the fact that we have already had 14 days of trial during which facts covered by the Notice to Admit have been hotly contested.

- [36] The respondent, Mr. Liang, says he would be prejudiced by the withdrawal of the admissions because he did not cross-examine the claimant on certain topics in reliance on the deemed admissions. This prejudice is not apparent to me. The claimant gave evidence in direct at this trial over the course of one and a half days, following which she was cross examined by counsel for the respondents for close to four days. Her evidence covered much of what is addressed in the Notice to Admit, including the ownership of the family home in Richmond, the claimant's knowledge of Henan Huabin's business operations generally, and her specific knowledge of the ownership arrangements for the Dormitories. These are clearly triable issues.
- [37] The time it took claimant's counsel to respond to the Notice to Admit, particularly once he was put on notice that the respondents intended to rely on the deemed admissions, was unduly lengthy. I accept the submission of claimant's counsel that the delay was inadvertent and not the fault of the claimant herself. Counsel for the claimant quite properly accepted responsibility for the delay.
- [38] Although the delay was lengthy, counsel for Mr. Liang was on notice of the claimant's intention to respond. A detailed response to the Notice to Admit was delivered three months in advance of trial. As noted, I am not persuaded that the respondents were prejudiced by the delay, certainly not to a level that outweighs the significant prejudice to the claimant in being deprived of an adjudication on the merits.
- [39] I agree with the respondents that the claimant has offered no justification for the delay in bringing the application to withdraw the admissions. In the result, trial time had to be used to argue the application and this has impacted trial scheduling. However, I am of the view that an award of costs is a sufficient remedy for the impact of such delay.

CONCLUSION/ORDERS

[40] In conclusion, I make the following orders:

- i. The claimant has leave to dispense with the requirement of a joint expert and tender the Bowen report in evidence at trial;
- ii. The time for service of a translated version of the Bowen report is abridged;
- iii. Unless otherwise agreed to by the parties, the respondents have leave to serve an expert appraisal report by March 20, 2020;
- iv. The claimant has leave to withdraw admissions deemed to have been made by her in failing to respond to the Notice to Admit within 14 days of service.

[41] The costs of the application in relation to the Bowen report are in the cause. The respondents are entitled to their costs in responding to the application to withdraw admissions in any event of the cause, although not payable forthwith.

"Horsman J."

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