

CANADA / JUDGMENT

Li v. Yan

2015 BCSC 1067

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1067 Li v. Yan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Yan,

2015 BCSC 1067

Date: 20150622

Docket: S137498

Registry: Vancouver

Between:

Shi Min Li aka Christine Shi Min Li

Plaintiff

And

Ben Yan

Defendant

And

Brella Wireless Inc., Ricky Li and 0805521 B.C. Ltd.

Defendants by Counterclaim

Before: Master MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

L.A. Lam

Counsel for the Defendant:

J.W. Bilawich

Counsel for the Defendant by Counterclaim, Ricky Li:

J.R. Schmidt

Place and Date of Hearing:

Vancouver, B.C.

March 26 and May 6, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2015

The Application

[1] Shi Min Li seeks to add parties to this proceeding and to amend her notice of civil claim accordingly. In particular, she seeks to add:

- a) 0805521 B.C. Ltd. ("0805 Ltd."), a company in which she is the sole shareholder and director, as a plaintiff; and
- b) Brella Wireless Inc., as a defendant ("Brella").

[2] The defendant, Ben Yan and the defendant by counterclaim, Brella, oppose the application.

[3] Ms. Li's application is brought pursuant to Rule 6-2(7)(b) and (c) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which provide:

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

The Background Facts

- [4] Ms. Li alleges that in 2007, Sheena Sim, Ms. Li's colleague or friend, approached her regarding an opportunity to purchase shares in Brella. Mr. Yan, who was one of Brella's two shareholders, had shares he wished to sell. The defendant by counterclaim, Ricky Li (no relation to the plaintiff), was the other shareholder. It is that share purchase which is the subject of this litigation.
- [5] It is unclear whether Ms. Sim was acting on her own behalf or as an agent with respect to the share purchase. If acting as an agent, it is also unclear whether Ms. Sim acted for Ms. Li, 0805 Ltd., Mr. Yan, or for Brella. Ms. Sim, through one of her companies, had already invested in Brella. In her affidavit, she says that, after attending a Brella presentation, she was encouraged to bring in more investors.
- [6] In any event, Ms. Sim was Ms. Li's only contact with Mr. Yan with respect to the share purchase.
- [7] In the fall of 2007, Ms. Li agreed to invest \$250,000 to purchase Class B Brella shares from Mr. Yan. Ms. Li, who appears to be quite naïve as to the nature of the share purchase transaction, says that she was unaware of how many shares she was purchasing but she understood that the shares were to be registered to a company in which she would be a part owner along with three other shareholders.
- [8] 0805 Ltd. was incorporated to hold the Brella shares. Ms. Li was given 51 common shares and was the majority shareholder. The three other shareholders, Ms. Sim, Jeffrey Wong and Francis Ting, divided the remaining 49 shares. All four shareholders were appointed directors. As of October 15, 2013, the three other shareholders had resigned as directors and 0805 Ltd. repurchased the shares held in their names. Since then, Ms. Li has been 0805 Ltd.'s sole shareholder and director.
- [9] As what she understood was to be her contribution towards the purchase of the Brella shares, Ms. Li provided \$250,000 to Ms. Sim to be paid to Mr. Yan. At Mr. Yan's discovery in these proceedings, Ms. Li says that she learned for the first time that the other 0805 Ltd. shareholders did not make any cash contribution to the Brella share purchase.
- [10] The materials do not explain why Ms. Li gave the share purchase funds to Mr. Yan as opposed to advancing or loaning those funds to 0805 Ltd. In any event, Ms. Sim provided Ms. Li with a written receipt for the funds and delivered the funds to Mr. Yan. Mr. Yan confirmed payment for the shares and endorsed Brella Share Certificate No. 7B for 500,000 Class B shares to 0805 Ltd.

- [11] Ms. Li says that she assumed that the shares were thereafter registered to 0805 Ltd. She did not learn, until July or August 2013, that the Brella shares were never registered to 0805 Ltd. and have always remained registered in Mr. Yan's name. Mr. Yan's evidence is that, after he endorsed the certificate, he gave it to 0805 Ltd.'s accountant. He took no further steps until much later.
- [12] Mr. Yan says that in September 2012, Ms. Sim contacted him requesting information about the Brella investment. In turn, he sought information from Brella's managing director, Mr. Li. His request for information was ignored.
- [13] In August 2013, Ms. Li's husband demanded information about the share purchase and purported to repudiate it and demand a return of the \$250,000. Mr. Yan has since requested that Brella re-register the shares in 0805 Ltd.'s name but it, or Mr. Li, have not done so.
- [14] In October 2013, Ms. Li commenced this action for return of the money she paid to Mr. Yan as a result of his failure to register the Brella shares in 0805 Ltd.'s name. In the notice of civil claim, she alleged that Ms. Sim was acting as an agent for Mr. Yan with respect to the sale of his Brella shares and that Ms. Sim made certain representations to her in that regard.
- [15] Ms. Li alleges that Mr. Yan was to hold the \$250,000 in trust for her benefit until the share transfer completed, which never occurred. She seeks a declaration that Mr. Yan held the \$250,000 in an express, implied, resulting or constructive trust on her behalf. Alternatively, she seeks a declaration that Mr. Yan has been unjustly enriched or a declaration that she suffered damages arising from Mr. Yan's misrepresentations.
- [16] Ms. Li seeks orders that: Mr. Yan return the transferred funds or trust funds to her; or an order for damages as a result of his misrepresentations; and an accounting; interest; and costs.
- [17] In her submissions on this application, counsel for Ms. Li indicated that when she commenced this action, Ms. Li's information about the nature of these transactions was incomplete.
- [18] Mr. Yan filed a response to the civil claim denying Ms. Li's allegations.
- [19] In particular, he denies that Ms. Sim was acting as his agent. In his version of the facts he says that he was approached by Ms. Sim who, acting as Ms. Li's agent or on behalf of all of the investors in 0805 Ltd., advised him that she knew of one or more investors who were interested in purchasing at least 500,000 Brella shares. He pleads that he entered into a share sale agreement with 0805 Ltd. rather than dealing with any one or all of the four shareholders.

- [20] Mr. Yan acknowledges receipt of Ms. Li's money and says that he endorsed the share certificate indicating that, for \$250,000, he had transferred 500,000 Class B Brella shares to 0805 Ltd. Mr. Yan says that he delivered the endorsed share certificate to an accountant who was an authorized representative of 0805 Ltd. He was not asked to do anything further. He did not know what 0805 Ltd. did with the share certificate.
- [21] As a result, Mr. Yan says that he completed his obligations under the share purchase agreement. He acknowledges that the 500,000 Brella shares, still registered in his name, are beneficially owned by 0805 Ltd. and that, until re-registered in that company's name, he holds them as a bare trustee for 0805 Ltd.
- [22] Mr. Yan says that the fact that the Brella shares are not registered in 0805 Ltd.'s name was as a result of its failure to tender the share certificate for registration and/or Brella's or Mr. Li's unreasonable refusal to register the shares to 0805 Ltd. He says that, in compliance with Brella's articles, he had Mr. Li's consent before agreeing to sell his shares to 0805 Ltd.
- [23] Mr. Yan filed a counterclaim against Brella, Mr. Li and 0805 Ltd. In it, he alleges that he and Mr. Li each owned 50% of the issued and outstanding Class A shares of Brella and options to purchase Class B shares. Brella had made efforts to raise capital through the sale of Class B shares and certain prospective investors were introduced to it by Mr. Wong (as set out above, one of 0805 Ltd.'s shareholders). By approximately February 2007, Brella had received investor commitments to purchase all of the available Class B Brella shares and, in recognition of Mr. Wong's efforts, Mr. Li and Mr. Yan agreed to sell him 30,000 of their Class A shares for \$30,000.
- [24] Mr. Yan alleges that Brella's articles restrict the transfer of its shares but that Mr. Li consented to Mr. Yan transferring at least 500,000 of his shares to Ms. Sim's investors who had incorporated 0805 Ltd. as a holding company.
- [25] In his counterclaim, in addition to other relief, Mr. Yan seeks an order that Mr. Li is estopped from denying or withdrawing his consent to the transfer of Mr. Yan's Class B shares to 0805 Ltd. and an order that Brella cancel the share certificate in his name, issue a new certificate in 0805 Ltd.'s name, and update its securities register accordingly.
- [26] On November 29, 2013, Ms. Li and 0805 Ltd. each filed a response to the counterclaim which, for the most part, repeated the facts alleged in the notice of civil claim. 0805 Ltd. did not file a counterclaim at that time. On December 12, 2013, Mr. Li filed a response to the counterclaim denying that he had ever agreed to permit the share transfer from Mr. Yan to 0805 Ltd. Brella has not filed a response.
- [27] Ms. Li and Mr. Yan have exchanged lists of documents. Ms. Li examined Mr. Yan for discovery on September 23, 2014 and Mr. Yan examined Ms. Li the following day.

- [28] At her examination for discovery, Ms. Li gave evidence which appears to contradict the allegations in her notice of civil claim that Ms. Sim was acting as Mr. Yan's agent. She also appeared to resile from the trust allegations she made against Mr. Yan.
- [29] No trial date has been set and no applications have been filed for summary disposition of the action.
- [30] As set out above, Ms. Li now wishes to add 0805 Ltd. as a plaintiff and Brella as a defendant.

The basis for Ms. Li's application

- [31] Ms. Li says that, after considering the additional information obtained so far in the litigation, including the pleadings and Mr. Yan's discovery evidence, she seeks to add 0805 Ltd. as a plaintiff to make alternative arguments and Brella as a defendant for the purposes of seeking alternate relief. On behalf of 0805 Ltd., the revised pleading seeks an order that it is entitled to rescission of the contract for the purchase and sale of the Brella shares and damages from Mr. Yan for misrepresentation and breach of contract. Alternatively, 0805 Ltd. seeks an order that Brella register the 500,000 Class B shares in the name of 0805 Ltd.
- [32] In addition, Ms. Li and 0805 Ltd. seek an accounting of the profits, dividends, interest, monies and income received by Mr. Yan or Brella on account of either of the plaintiffs in respect of the property subject to the trust or the Brella shares.

Application under Rule 6-2(7)(b)

- [33] As explained by Justice Esson in *Letvad v. Fenwick*, 2000 BCCA 630, Rule 6-2(7)(b) is directed at remedying defects in a proceeding as framed prior to the application to add parties (paras. 16-17).
- [34] To succeed under this subrule, the applicant must establish either that the parties sought to be added ought to have been joined as a party in the first instance or that their participation is necessary to effectively adjudicate the issues between the existing parties.
- [35] In the current notice of civil claim, Ms. Li sued Mr. Yan in her personal capacity as she personally advanced the \$250,000 required to purchase the shares from him. She did not flow the funds through 0805 Ltd. nor does she allege that it was a party to the alleged share purchase agreement. Her original claim is primarily based on Mr. Yan receiving her funds in trust. Brella was not a party to the share purchase agreement and is not alleged to have owed any trust duties to Ms. Li.
- [36] Ms. Li relies, in the alternative, on alleged misrepresentations made to her personally by Mr. Yan or his agent, Ms. Sim. Brella is not alleged to have been a party to those misrepresentations.

- [37] There is no basis in the current pleadings on which to conclude that Brella ought to have been joined as a party at the outset or that its participation is necessary to effectively adjudicate the issues between the existing parties to the proceeding. Brella was not a party to the contract and is not alleged to have owed trust obligations to either plaintiff. The relief sought against Brella in the amended pleading is only that it re-register the shares in 0805 Ltd.'s name.
- [38] As a result, the application to add Brella as a party under this subsection is denied.
- [39] On the other hand, I conclude that if Mr. Yan succeeds in his argument that the agreement to purchase his shares was between him and 0805 Ltd. then it should have been named as a plaintiff at least with respect to the contractual claims. Alternatively, I conclude that 0805 Ltd.'s participation is necessary to permit the issues between the existing parties to be adjudicated on. I therefore grant the order adding 0805 Ltd. as a plaintiff under this subsection.

Application under Rule 6-2(7)(c)

- [40] I now consider whether Brella should be added as a defendant under Rule 6-2(7)(c). Although not necessary given the decision above, I also consider whether 0805 Ltd. should be added as a plaintiff under this Rule.
- [41] In *Meade v. Armstrong (City)*, 2011 BCSC 1591, Justice Dley summarized the cases which set out the court's general approach to applications to add parties:
- 1) A party should be added whether that party's participation is necessary for proper determination of the case;
 - 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters;
 - 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined;
 - 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties;
 - 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action;
 - 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried. (para. 16 without case citations)

- [42] As the authorities make clear, Ms. Li must satisfy a two-part test. First, she must show that there exists a real question or issue between 0805 Ltd. as plaintiff and Brella as defendant or Ms. Li as plaintiff and Brella as defendant which relates to relief claimed in, or the subject matter of, the proceeding.
- [43] In *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, the court expressed the test at the first stage as requiring an applicant to establish that there may exist a real issue which is not frivolous or that she has a possible cause of action against the proposed party. Therefore, in this case, Ms. Li must establish that there may exist between 0805 Ltd. and Mr. Yan and/or Brella, and between her and Brella, which is not frivolous or that 0805 Ltd. has a possible cause of action against Mr. Yan and/or Brella. That requirement may be satisfied by reference to the proposed amended pleadings or be supplemented by affidavit evidence. If affidavit evidence is presented, the court does not weigh it to determine the likelihood of proving the proposed allegations but merely to determine whether the evidence supports that a real issue exists between the parties (at paras. 3-5).
- [44] I accept that there is a real issue between Ms. Li and/or 0805 Ltd. and Mr. Yan and/or Brella. If Mr. Yan's counterclaim against Brella or Mr. Li succeeds, Brella may well be required to re-register the shares in 0805 Ltd.'s name because the court will have concluded that Mr. Yan had the authority to transfer the shares. Any such order will be directive to Brella and will benefit Ms. Li and/or 0805 Ltd. and amounts to a real issue between them. Both parties proposed to be added have an interest in both the object and the subject of the litigation.
- [45] The second part of the test requires the court to determine that it is just and convenient to determine the issue in the current proceeding.
- [46] This is a discretionary decision, to be exercised judicially in accordance with the evidence and the guidelines established in the authorities (Letvad, para. 29).
- [47] In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, [1996] B.C.J. No. 234, at paras. 39-40, the court set out a non-exhaustive list of factors to be considered in the exercise of discretion. They include: (a) the extent of the delay; the reasons for it; whether a limitation period has expired; the degree of prejudice arising from the delay; and the degree of connection between the existing action and the proposed new parties and claims such that it is suitable that the issues to be tried together (paras. 39-40). In addition to those factors, I would add the objects of the Rules as set out in Rule 1-3 to secure the just, speedy and inexpensive determination of every proceeding on its merits.
- [48] Applying the factors to this case, I find that there has been significant delay. The share transaction which is the subject of this action occurred on October 30, 2001, the date on which Mr. Yan endorsed the share certificate to 0805 Ltd. after receipt of Ms. Li's funds. As has been discovered, 0805 Ltd. held the endorsed share certificate in its Minute Book from on about that date until July or August 2013 when queries were made about it. If the limitation period ran from the date of the transaction, it had already expired before Ms. Li commenced her action against Mr. Yan. She argues however that any limitation period runs

from the date on which she discovered that the shares had never been registered in 0805 Ltd.'s name.

- [49] However, on learning that the shares had never been registered in 0805 Ltd.'s name, Ms. Li acted promptly to pursue her claim. She started her action in October 2013 and Mr. Yan responded in November. After there was no agreement to adding parties, this application was brought in March 2015.
- [50] I also find that there is a significant connection between the existing action and the proposed new parties. In fact, the proposed new parties have already been the subject of a counterclaim in this action. 0805 Ltd. has a claim in breach of contract against Mr. Yan and, alternatively, a claim against Brella for wrongful refusal of registration of its shares in 0805 Ltd.'s name. The court will be required to determine whether a contract exists between 0805 Ltd. and Mr. Yan and whether there has been a breach of that contract before it can determine the appropriate remedies. Those remedies may include an order for a return of the money Ms. Li advanced for the share purchase or an order requiring Brella to register Mr. Yan's shares in 0805 Ltd.'s name. The matter cannot be concluded without a factual determination of the nature of the arrangements between all these parties.
- [51] It is suitable, and in accordance with the object of the Rules, to have all issues between these parties determined in one action. If this application were denied, 0805 Ltd. would have to commence a separate action against Mr. Yan and Brella which is inefficient and raises the possibility of inconsistent conclusions by two different trial judges.
- [52] On the issue of prejudice, while there is prejudice inherent in any delay in proceedings, no additional prejudice is likely to arise as a result of adding these parties. The existing parties have exchanged lists of documents and some of the discoveries were held in September 2014. Mr. Yan has not examined a representative of Brella or 0805 Ltd. The action is otherwise in the very early stages.
- [53] Finally, there is a possible Limitations Act defence available in these proceedings. Ms. Li and 0805 Ltd. take the position that the limitation period runs from the date of discovery of Mr. Yan's failure to register the shares in 0805 Ltd.'s name or Brella's refusal to do so. If they are correct, then the limitation period has not yet expired with respect to the parties sought to be added. The discoverability issue is not one that I can determine on this application. It will be determined on the evidence at trial. By making the order adding these parties, I reserve Brella's right to argue that the claims are statute barred as against it and Mr. Yan's right to argue that 0805 Ltd.'s claims against him are statute barred.

Conclusion

- [54] For the reasons given above, 0805 Ltd. is added as a plaintiff and Brella is added as a defendant to this action. The notice of civil claim is to be amended in the form filed at the hearing.

[55] Ms. Li sought costs in her notice of application but did not argue for them. If the parties are unable to agree on an appropriate cost order, they may seek to appear before me to speak to costs.

"Master MacNaughton"

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