
CANADA / JUDGMENT

Lun v. Lun

2020 BCSC 871

COURT

Supreme Court of British Columbia

DECIDED

5 June 2020

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2020 BCSC 871 Lun v. Lun

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lun v. Lun,

2020 BCSC 871

Date: 20200605

Docket: E182238

Registry: Vancouver

Between:

Lan Yuk Celina Lun

Claimant

And

Kon Fai David Lun, aka Kon Fai Lun, C & D Insurance Services Ltd., David Lun Investment Holding Company Ltd and Z & L Renovation and Construction Services Ltd

Respondents

In Chambers

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

Counsel for the Claimant:

H.M Dale

Counsel for the Respondents:

S. Pun

Place and Dates of Hearing:

Vancouver, B.C.

June 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 5, 2020

Introduction

- [1] The parties were married for 25 years before they separated in 2018. The issues in this family law proceeding include the division of family assets. One of those assets is C & D Insurance Services Ltd ("C & D"). The parties bought C & D in 2007. C & D is in the business of selling commercial insurance products and automobile insurance.
- [2] On October 10, 2019, on Ms. Lun's application, Master Keim ordered that the assets of C & D be sold, with the parties having joint conduct of sale.
- [3] Ms. Lun has negotiated the terms of a sale of C & D's assets to an outside purchaser. It is a condition of the sale that Mr. Lun execute a non-competition agreement (the "NCA") that would prevent him from working in the insurance industry in the Lower Mainland or otherwise competing with the purchaser for a period of 2 years from the closing date. In particular, the NCA would require that he not:

directly or indirectly, either alone or in conjunction with any individual, firm, corporation or any other entity (except for or on behalf of the Protected Entities), whether as principal, agent, employee, shareholder or in any other capacity whatsoever carry on, be engaged in, concerned with or interested in any Person carrying on any business that is competitive in whole or in part with the Business anywhere in the Territory, or advise, lend money to, or guarantee the debt or obligations of any Person that is carrying on any business anywhere in the Territory that is competitive in whole or in part with the Business.

- [4] Mr. Lun objects to signing the NCA. He has worked in the insurance industry for more than 2 decades and wishes to continue working in the industry.
- [5] Ms. Lun seeks the following orders:
- a) An order approving the sale of C & D's assets on the terms and conditions Ms. Lun has negotiated; and
 - b) An order restraining Mr. Lun in accordance with the proposed NCA.

- [6] While Mr. Lun opposes the application on various grounds, his principal objection is to the NCA. He submits that his liberty to sell insurance in British Columbia is not an asset of C & D.

Analysis

- [7] The order sought by Ms. Lun is a final order; it is not interlocutory. The purchaser of C & D would acquire rights in exchange for a substantial consideration, and Mr. Lun would be bound not to compete with the purchaser for 2 years in consequence of the order. There would be no further trial or hearing to determine whether the sale was properly approved.
- [8] Before turning to Ms. Lun's arguments in favour of her application, I begin with a basic question. On what basis could the court order Mr. Lun not to engage in lawful business activities?
- [9] The answer, if there is one, must lie in the provisions of the Family Law Act, S.B.C. 2011, c 5 [FLA]. The sale of C & D is intended to facilitate the division of family property and debt pursuant to Part 5 of the FLA. C & D is family property as defined in s. 84.
- [10] The offer identifies three substantial assets to be purchased and values them as follows:
- ICBC licence: \$1,000,000
- Book of business \$357,705
- Strata properties owned by C & D: \$850,000
- [11] The offer is for less than the total of these three amounts, taking into account liabilities of C & D.
- [12] Accordingly, the book of business is an asset representing, in the eyes of the offeror, approximately 16% of the total value of the assets of C & D. But the offeror is only willing to pay that much if it is assured that it will not face competition from Mr. Lun for the same customers in the Lower Mainland for 2 years following the sale. The value of this asset is contingent on Mr. Lun's intentions and the company's ability to restrain him from entering into competition with it.
- [13] There is no reason to think that Mr. Lun will remain an employee of C & D. He has been an officer and director of the company. There are circumstances in which a company may have the right to restrain a former officer from competing with it for a time. However, the evidence does not come close to establishing in this case that C & D would be entitled to restrain Mr. Lun from competing with it on the terms of the proposed NCA. In other words, C & D can sell its book of business, but it cannot oblige Mr. Lun to agree to a term that would maximize the value of the book of business.
- [14] In principle, the order sought goes beyond the division of family property in existence at this time to limit Mr. Lun's future activities. Part 5 of the FLA does not support such an order.

- [15] Ms. Lun submits that approval of the NCA is implicit in Master Keim's order that the assets of C & D be sold because it was known at the time of the application before Master Keim that an NCA was contemplated, though the details were not known. In the materials before Master Keim, Mr. Lun objected that he could not agree to an NCA and Ms. Lun responded as follows:
44. In further response to paragraph 63, the time when Mr. Lun would be potentially bound by a non-complete clause is when the assets of C & D are actually sold. This is a matter that would more appropriately be dealt with at a time when the court is being asked to approve the terms of a particular sale of C & D's assets, not now, when I am seeking an order to sell the assets of C & D with sole or joint conduct of sale.
- [16] So far as I can tell on the materials before me, Master Keim accepted Ms. Lun's position and left the question of approval of an NCA to be determined by me. Her entered order does not address the matter.
- [17] Ms. Lun submits that Supreme Court Family Rules, R. 15-8(3) provides a basis for the order. The subject matter of R. 15-8 is a sale by the court where, in the words of subrule (1), "it appears necessary or expedient that property be sold". Subrule (3) lists directions the court may make for the purpose of effecting a sale. By subrule (3)(i), these may include directions that any document necessary to complete the sale be executed on behalf of any person by a person designated by the court.
- [18] In considering whether it is appropriate to make a direction contemplated by subrule (3)(i), it is necessary to identify the property to be sold and address the connection between the document in question and the sale.
- [19] In this case, the property is C & D's book of business. The document is the proposed NCA. The book of business exists independently of the NCA. The NCA would enhance the value of the book of business in the particular circumstances of this case, but might not in other circumstances, say if Mr. Lun were ill and unable to work. It is noteworthy that the parties purchased C & D's book of business in 2007 without an NCA on the basis that the previous owner was planning to retire. There is no evidence to establish that C & D's book of business would be utterly worthless without the NCA, even in the face of the intended competition from Mr. Lun. In such circumstances, the book of business may still have some value.
- [20] In my view, the court's power to give directions pursuant to R. 15-8(3) exists to facilitate the transfer of property rights. The proposed NCA would not involve a transfer of property from C & D to the purchaser, because C & D does not have a right to restrain Mr. Lun in his future business activities that can be transferred to the purchaser, at least not on the terms proposed. An order that would permit Ms. Lun to sign the NCA on Mr. Lun's behalf is outside the purpose and intent of the Rule.

- [21] Ms. Lun submits that, even if R. 15-8(3) does not support an order permitting her to sign the NCA on Mr. Lun's behalf, the court may pronounce an injunction in the terms of the NCA to permit the sale to proceed as contemplated by the agreement with the purchaser negotiated by Ms. Lun. As I have already noted, this would be a final, time-limited injunction, not an interlocutory injunction. An applicant for final injunctive relief must establish that it is legally entitled to an injunction; *Cambie Surgeries Corp v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para. 28.
- [22] Ms. Lun's argument for an injunction fails because she is not legally entitled to force Mr. Lun to refrain from working in the insurance business in the Lower Mainland for the next two years. The fact that such an injunction would permit the proposed sale to take place is not sufficient reason to justify a restraint on Mr. Lun's activities that is not legally grounded.
- [23] Ms. Lun submits that the NCA comprises an essential aspect of the value of the family assets which have been ordered sold, citing *Christian v. Christian* (1992), 7 O.R. (3d) 441 (H.C.). *Christian* involved the determination of the value of an accounting proprietorship for the purpose of a division of family assets and the court held that the value should be determined on the basis of a notional sale on normal commercial terms, including an appropriate restrictive covenant for a transitional term to preserve goodwill. This proposition was approved as a general rule in *Lightle v. Kotar*, 2014 BCCA 69 at para. 52.
- [24] It may well be appropriate for C & D to be valued on the basis of an NCA given by Mr. Lun, in which case the consequence of Mr. Lun's refusal to give an NCA will be that the value realized from the sale of C & D's assets will be less than it should have been. If the result is substantial unfairness to Ms. Lun, she may be entitled to a reapportionment of the proceeds of sale in her favour pursuant to s. 95 of the FLA. This is an issue to be addressed at the trial. The possibility that Ms. Lun will succeed on this point would not justify an order submitting Mr. Lun to a restraint that is not otherwise legally justified.
- [25] Finally, Ms. Lun relies on s. 222(b) of the FLA, which authorizes the court to make an order to manage behaviours that might frustrate the resolution of a family law dispute by agreement or order. I do not think that Mr. Lun's refusal to agree to the NCA qualifies as a behaviour that might frustrate the resolution of this dispute, as contemplated by this provision. He is taking a position that he is legally entitled to take.
- [26] In summary, the orders sought by Ms. Lun go beyond the division of family property to limit Mr. Lun's future activities. They are not legally justified. I dismiss Ms. Lun's application.
- [27] MS. DALE: My Lord?
- [28] THE COURT: Yes.
- [29] MS. DALE: If I may make a request that this application may be adjourned, so that we can maybe resubmit the offer without the NCA?

- [30] THE COURT: I am not going to adjourn the application, because I have decided it. I don't think there is anything in the order I have just pronounced that would prevent you from bringing forward a new application to put forward a different offer.
- [31] MS. DALE: Okay. I just didn't want my client to be prohibited from reapplying without it, so that was the basis for my request. Thank you.
- [32] THE COURT: I understand. Master Keim's order stands. It is open to the parties, either one of them because it's an order for joint conduct of sale, to bring forward an application to approve a different sale and that will have to be addressed on the circumstances of that particular sale. Is there anything else arising?
- [33] MR. PUN: My Lord, costs.
- [34] THE COURT: Well, you have succeeded in the application, Mr. Pun. You are entitled to costs in the ordinary way, but I am not going to make any special order that would give you costs in any event of the cause or costs payable forthwith.
- [35] MR. PUN: Yes, that's costs in the usual way.
- [36] THE COURT: Yes, costs follow the event. Thank you.

"Gomery J."

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