

CANADA / JUDGMENT

Luo v. SMG Asset Canada Inc.

2020 BCSC 64

COURT

Supreme Court of British Columbia

DECIDED

21 January 2020

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2020 BCSC 64 Luo v. SMG Asset Canada Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Luo v. SMG Asset Canada Inc., 2020 BCSC 64 Date: 20200121 Docket: S-189246 Registry: Vancouver Between: Jian Hong Luo and Jia Ming Shen Plaintiffs And: SMG Asset Canada Inc., SMG Securities Inc. and Liang Wei Wee also known as William Wee Defendants Before: The Honourable Madam Justice Murray Reasons for Judgment Counsel for the Plaintiffs: H. Parsons Counsel for the Defendants: M.J. Hewitt Counsel for: Altentech Power Inc., SMG Custom Drytech Corp., Mission Wood Pellet Inc., SMG Biopower Limited, and SMG Power Limited Partnership W.D. Godfrey and W.J.S. Scrooby, Articled Student Place and Date of Hearing: Vancouver, B.C. December 4, 2019 Place and Date of Judgment: Vancouver, B.C. January 21, 2020

Introduction

- [1] The applicant plaintiffs, Jian Hong Luo and Jia Ming Shen (the applicants), seek orders compelling debtors of the defendant SMG Asset Canada Inc. (SMG Asset) to pay amounts owing from them to SMG Asset into court pursuant to garnishing orders to satisfy a debt due to them by SMG Asset.
- [2] The application respondents oppose the application arguing that their debts to SMG are not due or accruing due.
- [3] Throughout these reasons I will refer to the respondents in this application as the application respondents. They are also the garnishees.

Background

- [4] SMG Asset manages and supports various biomass energy projects including those being developed by the application respondents. The application respondents are in the initial funding, research and development stages of their projects and are completely dependent on funding received by investors.
- [5] SMG Asset is not a parent company of the application respondents but it has an interest in their long-term success. SMG Asset's objective is to provide administrative and managerial services to support the application respondents until they are in a cash surplus position.

- [6] To assist in attaining this goal, SMG Asset entered into management agreements with the application respondents which stipulate that management fees would be due within a time certain after the delivery of an invoice by SMG Asset. However according to Jung Moon, the controlling party of the SMG Group of Companies, and the application respondents, SMG Asset has an unwritten deferral policy which provides that the application respondents are not required to pay the amounts owing until they have the cash flow to do so.
- [7] Consistent with this unwritten agreement is the deferral provision in the written loan agreement SMG Asset has with one of the application respondents, Biopower LP which stipulates that repayment to SMG Asset is suspended if the payment by Biopower "would cause the borrower to be in a cash deficit position" (the Deferral Policy).
- [8] In December 2015 the plaintiff applicants loaned SMG Asset \$300,000, the principal of which became due and owing under the loan agreement on December 8, 2017. According to the plaintiffs, SMG Asset has failed to pay the principal and has also failed to pay interest owing under the loan agreement since November 2018. The plaintiffs bring this application in an effort to collect the money through the application respondents as debtors of SMG Asset.
- [9] On June 4, 2019 the plaintiffs were granted pre-judgment garnishing orders against the application respondents in the amount of \$317,045.01 for debts owing by them to SMG Asset. The garnishing orders were served on the application respondents on June 6, 2019. On June 19, 2019 the application respondents filed dispute notes stating that while they are indebted to SMG Asset, the debts are not due or accruing due. Issue
- [10] This application turns on whether the intercompany debts owing by the application respondents to SMG Asset are "due" or "accruing due." The Law
- [11] A garnishing order before judgment is an extraordinary remedy, the primary purpose of which is to provide a plaintiff security for the claim advanced: *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 at para. 17.
- [12] Section 3(2) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 (COEA), allows a Judge or Registrar to grant a garnishing order against a garnishee that is indebted to the defendant in an action for debts due from the garnishee to the defendant.
- [13] "Debt due" is defined in s. 3(1) of the COEA as: "debt due" and "debts due" include debts, obligations and liabilities owing, payable or accruing due and wages that would in the ordinary course of employment become owing, payable or due within 7 days after the date on which an affidavit has been sworn under subsection (2) or subsection (3) [Emphasis added.]

Analysis

- [14] The plaintiffs contend that the debts from the application respondents to SMG Asset are due and owing and therefore properly garnisheed. They rely on financial statements dated December 31, 2016 that show that all of the application respondents were indebted to SMG Asset for various amounts which are described as "payable," "outstanding," "accrued" and "due." The plaintiffs highlight that nowhere do the financial statements state that the intercompany debts are conditional or subject to a deferral policy.
- [15] The plaintiffs further rely on Mr. Moon's affidavit in which he deposes that reimbursable expenses and management fees "would be payable within 30 days or 7 days as the case may be, only after delivery of an invoice (or demand) by SMG Assets" as proof that the intercompany debts are demand loans and as such constitute a debt due under the COEA.
- [16] The application respondents deny that the debts are demand loans. Rather the amount owing by each of them to SMG Asset is a loan payable for reimbursable expenses and/or management services and is only due when invoiced. Because the amount owing has not been invoiced it is not yet due or accruing due. They stress that both they and SMG Asset have throughout conducted themselves in a manner consistent with the deferral policy that SMG Asset implemented in 2017.
- [17] They point out that the financial statements relied on by the plaintiffs pre-date the deferral policy. Liabilities for reimbursable expenses and management fees are now listed in the applicant respondents' financial statements as non-current liabilities as they are not intended to be paid by them within the 12 months following the reporting period. The corresponding asset is recorded the same way in the statements of SMG Asset.
- [18] A debt is not "accruing due" if payment is contingent on the occurrence of a future event: *Ahaus Developments Ltd. v. Savage*, [1994] B.C.J. No. 1455 (B.C.C.A.) at paras. 25-30.
- [19] All of the circumstances attaching to the agreement creating the debt must be considered. The true test is whether anything else has to be done by the judgment debtor as a condition precedent to payment: *Heward Milling Co. v. Barrett*, 1909 CanLII 142 (Sask. Q.B.) at para. 16.
- [20] I am not satisfied in all of the circumstances of this application that Mr. Moon's description of the loan agreement as payable within a time specified after invoice (or demand) makes the loans demand loans. All of the evidence is contrary to the intercompany debts being demand loans. A demand loan would be contrary to the objective of SMG Asset in supporting the development and long-term longevity of application respondent companies. I accept that in 2017 SMG Asset implemented a deferral policy which they followed and the application respondents relied on. Accordingly I am satisfied that in this case two things have to occur to make the debt due. First SMG Asset has to issue an invoice and second, the application respondents have to be in a financially viable position. Neither of those things have occurred.

[21] Having regard to all of the circumstances I find that the debts from the application respondents to SMG Asset were neither due nor accruing due at the time the garnishing orders were served on the application respondents. As such there is no debt which can be garnisheed.

Conclusion

[22] The plaintiffs' application is dismissed.

[23] Costs to the application respondents. "The Honourable Madam Justice Murray"

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