
CANADA / JUDGMENT

Luu v. Wang

2012 BCSC 626

COURT

Supreme Court of British Columbia

DECIDED

1 May 2012

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2012 BCSC 626 Luu v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Luu v. Wang,

2012 BCSC 626

Date: 20120501

Docket: S072661

Registry: Vancouver

Between:

Derrick Luu

Plaintiff

And

Xianping Wang, Heping Wang, Lily Wang

and Lily Wang Trust

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(Re: Costs)

Counsel for the Plaintiff:

K. Wellburn

& K. Koller

Counsel for the Defendant,

Xianping Wang:

G. Weatherill, Q.C.

& A. Nathanson

Counsel for the Defendants,

Heping Wang and Lily Wang:

P.J. Reardon

& K.A. Reilly

Written Submissions Received from the

Plaintiff:

August 31

and September 28, 2011

Written Submissions received from the Defendants:

September 21, 2011

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2012

INTRODUCTION

- [1] The plaintiff, Derrick Luu, was substantially successful at trial and now applies for an order of special costs, or alternatively, increased costs at Scale C.
- [2] Mr. Luu submits that the defendants engaged in conduct in the litigation deserving of the court's rebuke, including making baseless allegations against him of forgery, misappropriation of corporate shares, and fraudulent misrepresentation, unnecessarily complicating and prolonging the proceedings, and failing to obey court orders and the Rules of Court.
- [3] Following a particularly hard-fought 22-day trial, I issued Reasons for Judgment indexed as *Luu v. Wang*, 2011 BCSC 1078. Mr. Luu claimed against the defendants for debts totalling U.S. \$3,440,000. The plaintiff obtained judgment against the defendants, Xianping Wang, Heping Wang and Lily Wang jointly, in the amount of U.S. \$1,680,000. Mr. Luu also recovered a judgment against the defendant, Xianping Wang for the additional amount of U.S.

\$1,320,000.

BACKGROUND

- [4] In order to fully appreciate the parties' positions on costs, some background is necessary. The debts claimed by the plaintiff arose from three business ventures in which Mr. Luu and Xianping Wang were the key participants. The first concerned the acquisition by reverse takeover of a privately held Chinese bio-medical company and its successful transformation into Sinovac Biotech Ltd. ("Sinovac"), a publicly traded corporation. Mr. Luu and Xianping Wang were also business associates in two later and unsuccessful projects to acquire privately held Chinese corporations and convert them to public companies in order to attract foreign investors. Those projects concerned Veyu International Ltd. ("Veyu International"), a company involved in the development of technology for micro-debt payments in the Third World, and Xinhua China, a book-publishing and distribution enterprise.
- [5] Mr. Luu's debt claim against the defendants had two components. First, the plaintiff claimed that at the request of Xianping Wang, he paid \$1,980,000 to Sinovac in payment of various debts owed to that company by the defendants, Lily Wang and Heping Wang, and by Shenzhen Bio-Port, a company controlled by Xianping Wang, and that the defendants defaulted on their agreement to repay the \$1,980,000 to him. Mr. Luu claimed that all of the defendants signed an agreement dated September 23, 2005 for the repayment to him of the \$1,980,000. The defendant, Lily Wang, denied she signed that agreement. At trial, the defendants suggested to Mr. Luu in cross examination that he had forged Ms. Wang's signature to the September 23, 2005 agreement. He denied doing so.
- [6] I found that Mr. Luu had paid a total of \$1,680,000 for which the defendants were jointly liable, and that Lily Wang had signed the September 23, 2005 agreement.
- [7] Mr. Luu also claimed against Xianping Wang for additional debts totalling \$1,460,000 U.S., consisting of:
- (a) his payment of an investment on behalf of Xianping Wang in Veyu International in the amount of \$140,000 U.S.;
 - (b) payment of \$120,000 at the request of Xianping Wang to satisfy a debt owed by Lily Wang to the Primarius group of investment companies for share handling fees; and
 - (c) payment in January 2006 of a debt owed by Lily Wang to Primarius for a penalty fee in the amount of \$1,200,000 U.S.
- [8] I found that the plaintiff failed to establish that he had paid \$140,000 on Xianping Wang's behalf to Veyu International. Mr. Luu succeeded on the balance of his claim against the defendant, Xianping Wang.

- [9] I dismissed the counterclaim of the defendants that the plaintiff had breached an agreement to use the proceeds of sale of Sinovac shares transferred to him by Lily Wang to pay off the debts he claimed in this action. Xianping Wang also failed to establish that the sum of U.S. \$500,000 he paid to Mr. Luu was a partial repayment of debts claimed by the plaintiff in this action.
- [10] For some of the transactions in dispute, the evidence of each party was internally inconsistent, and not readily reconcilable with the preponderance of the probabilities. As I observed at para. 62 of my Reasons, none of the principal protagonists, Mr. Luu, Xianping Wang or Lily Wang were entirely credible witnesses. Heping Wang did not attend the trial. Financial records for all parties were incomplete.

POSITIONS OF THE PARTIES

Position of the Plaintiff

- [11] The plaintiff says he was successful against all defendants and is therefore entitled to costs. Mr. Luu contends that he should have special costs, or in the alternative, increased costs at Scale C of the Supreme Court Civil Rules by virtue of the defendants' misconduct in the litigation.

Position of Defendants

- [12] The defendants properly concede that this matter was of more than ordinary difficulty and that Scale C is appropriate. The defendants deny that they engaged in any reprehensible conduct worthy of the court's rebuke. They submit that in order to justify an award of special costs, it is not enough that they made allegations of criminal or fraudulent misconduct and failed to prove those allegations. Rather, it must be shown not only that the allegations were not proven, but that they were made recklessly, maliciously, or were obviously unfounded: *Mawdsley v. Meshen*, 2011 BCSC 923 at para. 67; *Hung v. Gardiner*, 2003 BCSC 285 at para. 16.
- [13] The defendant Lily Wang denies that she swore a false affidavit and submits that in any event, the affidavit in issue was sworn by her in response to the plaintiff's pre-trial application that she be held in contempt for breaching orders pronounced in this litigation on April 20, 2007, October 8, 2008, December 17, 2008 and March 27, 2009. Ms. Wang has been sanctioned for her contempt and has paid the special costs awarded against her in the contempt proceedings. She submits that the plaintiff has been indemnified by the special costs paid to him in the contempt proceedings. Ms. Wang submits that the matters addressed in the contempt proceedings should not provide any basis for an order for special costs following the trial, and that she should not be punished twice for the same wrongful conduct.

- [14] The defendants submit that the conduct of the plaintiff should also be considered in determining whether special costs are appropriate: *Osooli-Talesh v. Emami*, 2008 BCSC 1749 at paras. 48-49. They say that the court made adverse findings respecting the plaintiff's credibility and that Mr. Luu's document production was also deficient.
- [15] The defendants also say that the plaintiff's choice to bring this action in British Columbia, although none of the parties were resident here, and the complexity of the transactions giving rise to the plaintiff's claims, involving numerous privately held Chinese companies, complicated document production. Documents had to be located in China, and translated into English. Defence counsel submit that because Xianping Wang and Heping Wang both reside in China, were unfamiliar with the Canadian legal process and do not speak English, communications with those defendants were difficult, thus protracting document production. In short, the defendants say they did not deliberately withhold relevant documents, or engage in any other reprehensible conduct that would attract an order for special costs.
- [16] The defendants also oppose any award of increased costs. They submit that in order to receive an award of increased costs pursuant to s. 2(5) of Appendix B, the plaintiff must establish unusual circumstances that would result in a grossly inadequate or unjust award of costs at Scale C. They say there was no misconduct on their part deserving of rebuke, and therefore no unusual circumstances that would justify an award of increased costs in this case.
- [17] The defendants also argue that despite the fact the plaintiff was substantially successful overall, he was unsuccessful on four of seven discrete debt claims. The defendants submit that the court should exercise its discretion under Rule 14-1(15) to apportion costs to them for the claims on which the plaintiff failed.

ISSUES

- [18] The submissions of the parties raised the following issues:
- (a) Is the plaintiff entitled to special costs?
 - (b) If not, has the plaintiff established that he is entitled to increased costs at Scale C?
 - (c) Should there be an apportionment of costs between the plaintiff and the defendants under Rule 14-1(15)?

DISCUSSION AND ANALYSIS

A. Is the plaintiff entitled to special costs?

- [19] In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), Lambert J.A. stated the test for an award of special costs at para. 17:

... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

- [20] By an award of special costs, the court seeks to disassociate itself from misconduct. An award of special costs "goes beyond indemnity and enters the realm of punishment": 380876 *British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 14; *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 305 (C.A.).
- [21] Because special costs are intended to punish improper conduct, the focus of the inquiry must be on a party's blameworthiness: *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar*, 2001 BCCA 204 at para. 23.
- [22] In determining whether an award of special costs in favour of the plaintiff is appropriate, the court may take into account his conduct in the litigation, as well as that of the defendants: *Osooli-Talesh v. Emami*, 2008 BCSC 1749 at paras. 48-49, 55.
- [23] At paragraph 9 of his written submissions, Mr. Luu identifies the following circumstances as wanting an order for special costs against the defendants:
- (a) the defendants' baseless allegations that the plaintiff was guilty of criminal conduct, namely forgery and misappropriation;
 - (b) Lily Wang swore a false affidavit and misled the court;
 - (c) the defendants complicated the proceedings significantly by taking false positions with respect to Xinhua China;
 - (d) the defendants complicated the proceedings significantly by denying that Xianping Wang beneficially owned the Sinovac shares;
 - (e) Heping Wang maintained a defence based on a false assertion of misrepresentation and did not appear for examination for discovery or the trial;
 - (f) the defendants have unreasonably refused to make admissions; and
 - (g) the defendants failed to obey court orders and the Rules of Court.
- [24] The defendants did not plead that the plaintiff forged Lily Wang's signature to be September 23, 2005 agreement. Lily Wang denied she signed that document. At trial, defense counsel put to Mr. Luu in cross-examination that he had signed Ms. Wang's name to the September 23, 2005 agreement. The plaintiff denied doing so.

- [25] After considering all of the conflicting evidence of the parties concerning the execution of the September 23, 2005 agreement, I concluded that on the preponderance of the possibilities Lily Wang had executed the document. In reaching that conclusion I took into account Lilly Wang's acknowledgment that she had signed many Sinovac documents but could not specifically recall which documents she had signed. It was also necessary to carefully consider the similar but not identical facsimile copies of the September 23, 2005 agreement and related documents produced by the parties, and the competing inferences that the plaintiff and the defendant invited me to draw from those documents.
- [26] By late 2006, following the collapse of their business relationship, the defendants distrusted Mr. Luu. They had some cause to do so. I found that Mr. Luu had falsely represented to Xianping Wang that the defendants were indebted to him in the amount of \$1,980,000 when he had paid only \$1,680,000 on their behalf, although that misrepresentation did not induce Xianping Wang to enter into the September 23, 2005 agreement.
- [27] The defendants' position that the plaintiff signed Lily Wang's name to the September 23, 2005 agreement, although unproven, was not obviously unfounded or made recklessly or maliciously.
- [28] The defendant Xianping Wang alleged that the plaintiff misappropriated some or all of 16 million free trading shares in Xinhua China entrusted to him for distribution to investors, and that Mr. Luu used 862,000 of those shares to pay the Primarius penalty.
- [29] Mr. Wang, who was the chief executive officer of Xinhua China, never reported Mr. Luu's alleged misappropriation to that company's solicitor, the police, or the Securities and Exchange Commission. In assessing Mr. Wang's credibility on this issue, I found that it was improbable that if Mr. Wang believed that Mr. Luu had misappropriated Xinhua China shares, he would not have reported the matter to the authorities or have taken effective steps to determine how the plaintiff had acquired the shares he used to pay the Primarius penalty.
- [30] Xinhua China's corporate solicitor gave evidence that the only way to obtain a list of the owners of the free trading Xinhua China shares was to obtain a NOBO list. At para.179 of my Reasons, I found that in January 2007, after the plaintiff and Mr. Wang had fallen out, Mr. Luu informed Mr. Wang that if he wanted to identify the shareholders in Xinhua China, he should obtain a NOBO list, and that Mr. Wang as the sole officer and director of Xinhua China, was the only party able to obtain such a list. Xianping Wang never did so.
- [31] By the time of trial, Xianping Wang had obtained no documents or admissions through the discovery process that supported his allegation of misappropriation. Mr. Wang chose to pursue rather than abandon this allegation. He failed to establish that the plaintiff had misappropriated any Xinhua China shares.
- [32] Normally, in such circumstances, a party who elects to pursue an allegation of serious misconduct must either meet the onus of proof or bear the consequences in the form of an order for special costs: Bronson, para. 117.

- [33] However here I also take into account Mr. Luu's own misconduct. I have already referred to the plaintiff's misrepresentation that he had paid \$1,980,000 on behalf of the defendants when in fact he had paid \$300,000 less than that amount.
- [34] At trial, Mr. Luu testified that he paid \$180,000 in November 2004 to assist Shenzhen Bio-Port, a company controlled by Mr. Wang, to repay a bank loan. The plaintiff had no record of that payment.
- [35] According to Mr. Luu, Sinovac had pledged its land ownership documents a security for the bank loan to Shenzhen Bio Port . The plaintiff claimed that he made the \$180,000 payment pursuant to a Solution Plan intended to facilitate the return to Sinovac of its land ownership documents. When Mr. Luu gave this evidence an erroneous translation of the Solution Plan into English from Chinese prepared by a certified translator was before the court. According to this translation, Mr. Luu agreed to pay \$180,000 to Shenzhen Bio Port. Later in the trial the translator corrected his error. The Solution Plan, correctly translated, provided that Mr. Luu agreed to lend \$1.8 million to Shenzhen Bio Port, rather than \$180,000.
- [36] Mr. Luu neither corrected nor explained his evidence after the translator corrected the error in his original translation. I found that the plaintiff had devised an explanation for the alleged \$180,000 payment which he tailored to the erroneous translation of the Solution Plan. Mr. Luu failed to establish that he made any payment of \$180,000 to Sinovac, Shenzhen Bio Port or the bank in November 2004.
- [37] In the circumstances of this case, I am not inclined to make a punitive order for special costs in favour of a plaintiff who has engaged in misconduct in the litigation by giving evidence in support of one of his claims that was calculated to mislead the court.
- [38] The plaintiff also claims that Lily Wang swore a false affidavit. Lily Wang swore her affidavit number 8 in response to Mr. Luu's pre-trial applications that she be held in contempt for breaching orders of the court that restrained her from selling, pledging or otherwise disposing of shares she held in Sinovac. In her affidavit she offered an explanation of how her understanding of the effect of the April 20, 2007 order of Davis J. on her ability to sell Sinovac shares had changed. I found that Ms. Wang had deliberately breached orders of the court. Although I found her explanation to be unsatisfactory and implausible, I did not make a finding that she had deliberately attempted to mislead the court.
- [39] By Reasons for Judgment indexed as *Luu v Wang*, 2009 BCSC 1786 and *Luu v. Wang*, 2010 BCSC 8, I found Ms. Wang in contempt of orders of this court, including the orders of Davies J. of April 20, 2007 and June 12, 2007 restraining the sale of Sinovac shares. I awarded the plaintiff special costs against Lily Wang on both his contempt applications, which she has paid.
- [40] The plaintiff has already been indemnified by special costs for the contempt proceedings in which Ms. Wang's affidavit was filed. She ought not to be punished twice for matters addressed in the contempt proceedings.

- [41] In these circumstances, Ms. Wang's affidavit provides no basis for the order for special costs now sought by the plaintiff.
- [42] The plaintiff also argues that the defendants unnecessarily prolonged the trial by raising irrelevant matters relating to Xinhua China. I do not accept that submission. During his direct examination Mr. Luu was asked by his counsel to explain the structure of the Xinhua China venture. Later in the trial, Xianping Wang gave his evidence relating to the structure and history of the Xinhua China project. Xinhua China was relevant to the Primarius transaction. The purported objective of the defendants in selling Sinovac shares to Primarius was to raise money for the second installment of the investment by Xianping Wang and the plaintiff in Xinhua C & D. Although I did not accept much of Xianping Wang's evidence relating to Xinhua China, the evidence of both parties on Xinhua China was relevant to the court's understanding of the business relationship between Mr. Luu and Xianping Wang, and the deterioration of that relationship. The Xinhua China evidence did not unduly protract the trial.
- [43] The plaintiff also submits that the defendants improperly complicated the trial by denying that Xianping Wang was the beneficial owner of Sinovac shares held in the names of Lily and Heping Wang. It was of critical importance to the plaintiff to establish that Xianping Wang was a beneficial owner of the Sinovac shares held in trust by the solicitors for the defendants Lily Wang and Heping Wang in order to ensure the plaintiff would be able to execute against those shares in the event that he succeeded in his claims against Xianping Wang.
- [44] Mr. Luu bore the onus of proving that Xianping Wang was a beneficial owner of the Sinovac shares. There was nothing improper about the defendants taking the position prior to trial that the plaintiff must prove his case. At the commencement of the trial, Xianping Wang made the admission that he was a beneficial owner of the shares. The defendant's failure to make that admission earlier did not constitute reprehensible conduct requiring the court's rebuke.
- [45] I found that Heping Wang's allegation of fraudulent misrepresentation against Mr. Luu had no merit. In his statement of defense, Heping Wang alleged that he signed the September 23, 2005 agreement because he was induced to do so by Mr. Luu's representation that \$1,980,000 was owed to him by Lily Wang. In response to the plaintiff's demand for particulars, Heping Wang asserted that on or about September 23, 2005 Xianping Wang informed him that the plaintiff said the defendants owed him \$1,980,000 and had agreed to provide documentation supporting the amount of the debt later.
- [46] Heping Wang, who did not attend the trial, gave no evidence in support of his plea of fraudulent misrepresentation. Xianping Wang testified that he did not discuss the September 23, 2005 agreement with Heping Wang. In my view, Heping Wang's assertion of fraudulent misrepresentation was unfounded, and ought not to have been made. However, once again I take into account the fact that the plaintiff made a false representation to

Xianping Wang concerning the amount he had paid to Sinovac on behalf of the defendants. In my view, the plaintiff's own misconduct disentitles him to an award of special costs founded on Heping Wang's unfounded pleading of fraudulent misrepresentation.

- [47] The plaintiff submits that Heping Wang's non-attendance at the trial and the fact that he was never examined for discovery are factors militating in favour of an award of special costs. Heping Wang was in ill health and could only have travelled outside China with an attendant. Xianping Wang was the dominant personality and directing mind of the Wang family's business and investing enterprises. Heping Wang had little or no involvement in the family's business decisions. In these circumstances, I declined to draw an adverse inference from Heping Wang's failure to give evidence at trial.
- [48] Nor does the fact that Heping Wang was not examined for discovery flow from any reprehensible conduct on the part of the defendants. Counsel for the plaintiff and the defendants looked into making arrangements to conduct examinations for discovery of Heping Wang and Xianping Wang in Beijing. They discovered that Chinese law and principles of judicial sovereignty prohibited the conduct of discoveries in foreign litigation in Mainland China, without the prior approval of the Chinese authorities, which was unlikely to be granted. Counsel for Heping Wang offered to make his client available for examination for discovery in Hong Kong. The plaintiff did not pursue that option. I find there was no misconduct on the part of Heping Wang relating to either his non-attendance at trial, or the fact that he was not examined for discovery that would support an award of special costs.
- [49] The plaintiff also argues that the defendants unreasonably refused to make admissions. Mr. Luu's principal complaint relates to the defendants' successful application shortly before trial to withdraw their previous admissions that payments made to Sinovac from an account in the name of the plaintiff's wife's aunt, Zhao Ling, were made by the plaintiff.
- [50] On his examinations for discovery Mr. Luu gave conflicting evidence about his use of Zhao Ling's account, and whether he had repaid to his aunt \$400,000 that he paid from her account to Sinovac. Mr. Luu was asked to produce all documents demonstrating that he repaid the money he took from his aunt's account. During his discovery, he initially indicated that he would have no problem in producing such documentation. Later in the discovery, he equivocated and said there were a lot of transactions going on and that he and his aunt were involved "not only in this business, also in some other business".
- [51] During his examination for discovery on December 10, 2008, Mr. Luu was asked to produce the power of attorney he said that he held for Zhao Ling's account. Mr. Luu did not produce that power of attorney until the beginning of the trial, some two years after his discovery.

- [52] In short, after the plaintiff gave equivocal and at times conflicting evidence on discovery concerning his use of funds from Zhao Ling's account, the defendants applied for and were granted to leave to withdraw admissions they had previously made, and to amend their pleadings. In order to minimize any prejudice to the plaintiff, Mr. Luu was granted leave to conduct further examinations of Xianping Wang and Lily Wang. The defendants' withdrawal of their admissions did not constitute misconduct worthy of the court's rebuke.
- [53] Mr. Luu also submits that the defendants' failure to abide by the Rules of Court and to obey court orders provides grounds for an order for special costs.
- [54] Prior to trial in Reasons for Judgment indexed as *Luu v. Wang*, 2008 BCSC 1691 at para. 38, I found the facts that the defendant Heping Wang did not speak English, resided in Beijing, and was unfamiliar with the requirements of the Rules of Court provided a partial explanation for his delay in producing documents and responding to the plaintiff's Notices to Admit. However, I found those facts did not provide a lawful excuse for non-compliance with the Rules of Court. I made an order requiring Heping Wang to deliver a supplemental list of documents and affidavit verifying his list of documents and to provide answers to interrogatories. Those orders were intended to remedy any prejudice sustained by the plaintiff as a result of Heping Wang's non-compliance with the Rules of Court.
- [55] I also found that Lily Wang had not complied with her obligations relating to document production and ordered her to provide affidavits of documents: *Luu v. Wang*, 2009 BCSC 860.
- [56] Following those orders, the defendants, with the assistance of their counsel, did produce further documents. Despite the best efforts of all counsel, instances of incomplete or late document production by the defendants continued up to and during the trial. While in some cases late document production was no doubt attributable to the logistical problems encountered by defence counsel in obtaining the timely production of documents from China, or to the expanding scope of relevant material as the case evolved, that does not provide a complete answer to the plaintiff's complaints of late document production.
- [57] For example, when asked to produce documents from the brokerage houses through which she traded Sinovac shares, Lily Wang initially produced reports generated from her own computer. Ultimately, the plaintiff obtained the documents from the brokerage houses after he applied for and was granted a court order requiring the defendants to sign authorizations for the delivery of these documents to plaintiff's counsel.
- [58] During the trial, Xianping Wang produced documents that the plaintiff had previously specifically requested, including documents concerning the ownership of Shenzhen Biopart and the flow of money from Michael Yang, a business associate of Xianping Wang, to one of his companies, Asia Durable. The defendant, Xianping Wang, produced a number of banking documents during the course of the trial which he had not previously listed, and which assisted him in the presentation of his case. Mr. Wang was able to obtain these documents on short notice from China. I infer from his ability to produce these documents quickly when it was in his interest to do so that through his own exercise of greater diligence

Mr. Wang could have produced at least some of the documents which the plaintiff had specifically requested well before the beginning of the trial.

- [59] I wish to be clear that I do not attribute the deficiencies in the defendants' document production to any of the counsel acting on behalf of the defendants. I am satisfied that throughout this litigation, defendants' counsel did their very best under challenging conditions to endeavour to ensure that their clients met their obligations under the Rules and complied with orders of this court. Where there were failures to comply, counsel for the defendants did their best to ensure that the defendants remedied their breaches and fulfilled their obligations under the Rules.
- [60] An award of special costs is discretionary. I have found instances of significant misconduct in the litigation by the defendants, including Xianping Wang's unsupported allegation that the plaintiff had misappropriated Xinhua China shares, Heping Wang's unfounded allegation of fraudulent misrepresentation, and the defendants' repeated failures to comply with the requirements of the rules concerning document production.
- [61] The defendants' misconduct is deserving of some rebuke by the court. Considered cumulatively, and without regard to the plaintiff's conduct, the defendants' misconduct would likely justify an order for special costs. However, Mr. Luu's conduct in the litigation is also a factor relevant to the court's exercise of its discretion to award special costs. Mr. Luu's failed attempt to mislead the court respecting the \$180,000 payment is also conduct deserving of rebuke. The court should disassociate itself from that conduct. I conclude that the plaintiff's own misconduct disentitles him to an award of special costs.
- [62] The plaintiff's request for an order for special costs against the defendants is denied.

B. Is the plaintiff entitled to increased costs at Scale C?

[63] Section 2(5) of Appendix B of the Supreme Court Civil Rules provides:

- (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

[64] Section 2(6) of Appendix B provides:

- (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

- [65] In *ICBC v. Patko*, 2009 BCSC 578 at para. 18, the court held that before a party's conduct in the litigation process can constitute "unusual circumstances" within the meaning of what is now s. 2(5) and was then s. 2(4.1), there must be conduct that is deserving of some form of rebuke:
- [18] It is also clear that before a party's conduct in the litigation process can constitute "unusual circumstances" within the meaning of s. 2(4.1), it must be conduct that is deserving of some form of rebuke: *Gurney v. Gurney*, 2007 BCSC 1745 (uplift not ordered); *Bajwa v. Veterinary Medical Association*, 2008 BCSC 905 (multiplicity of proceedings, failure to provide particulars, failure to abide by document disclosure obligations, general non-compliance with the Rules), *D. v. D.*, 2008 BCSC 1260 (wife's evidence unnecessarily lengthy, uninformative and irrelevant, needlessly and significantly prolonging the trial).
- [66] The "unusual circumstances" to justify an award of increased costs may include conduct by the unsuccessful party in the litigation which falls short of attracting an award of special costs: *On Call Internet Services Ltd. v. Telus Communications Company*, 2010 BCSC 1031 at paras. 7-11.
- [67] In *Ron Perrick Law Corp.* at para. 37, Allan J. held that the factors which may amount to unusual circumstances justifying increased costs include:
- (a) misconduct by the unsuccessful party in the litigation;
 - (b) the serious nature of the allegations;
 - (c) the complexity or difficulty of the issues in the litigation; and
 - (d) the importance of the litigation to the parties or to the development of the law.
- [68] The plaintiff's legal fees before taxes and disbursements total approximately \$680,000. Plaintiff's counsel estimates that at Scale C the plaintiff would recover costs in the amount of \$175,000. At scale C with increased costs the plaintiff would receive costs of approximately \$265,000. Costs at Scale C with no increase would result in a recovery of about 25% of the plaintiff's legal fees.
- [69] I have found that there was misconduct in the litigation by the defendants that deserves some form of rebuke. The allegation that Mr. Luu had misappropriated up to 16 million shares in Xinhua China entrusted to him for distribution to investors was serious, as were the defendant's deficiencies in document production. This action involved debt claims of more than usual difficulty and required counsel to investigate and present evidence concerning a complex series of commercial transactions between the parties conducted in a foreign jurisdiction. The amount involved was substantial. The resources and time devoted to this litigation by both the plaintiff and the defendants demonstrate its importance to the parties. Because I have found that the plaintiff is not entitled to special costs, he cannot recover a complete indemnity.

[70] However there are unusual circumstances in this case and I find that an award of costs at scale C would be grossly inadequate and unjust.

[71] Subject to the following discussion on apportionment, I find that the plaintiff is entitled to increased costs at Scale C for all steps in the action, other than those applications on which he was unsuccessful, and the applications for which the court has previously ordered costs at Scale B. As previously noted, the plaintiff has already recovered special costs for the contempt proceedings.

C. Should there be an apportionment of costs between the plaintiff and the defendants?

[72] Rule 14-1(15) provides the court with the discretion to depart from the usual principle that costs should follow the event and to apportion costs between the parties.

[73] Rule 14-1(15) provides:

15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[74] The test for the apportionment of costs under Rule 14-1(15) has three elements:

(1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;

(2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;

(3) it must be shown that apportionment would effect a just result.

Sutherland v. Canada (Attorney General), 2008 BCCA 27 at para. 31

[75] The court's discretion to apportion costs must be exercised judicially. There must be circumstances "which render it manifestly fair and just to apportion costs": Sutherland at para. 30; *British Columbia v. Worthington (Canada) Inc.*(1988), 29 B.C.L.R. (2d) 145 (C.A.).

[76] Apportionment will achieve a fair and just result where the party who is ultimately successful has unnecessarily prolonged the litigation. A party may unnecessarily prolong the case by raising an unnecessary issue, by taking an unsupportable position on an issue, or by over-litigating an issue properly raised by either party: Sutherland at para. 35.

- [77] Orders for the apportionment of costs under Rule 14-1(5) are relatively rare; the applicant for apportionment must show that the failure to apportion costs would result in basic unfairness: *Webber v. Canadian Aviation Insurance Managers Ltd.*, 2003 BCSC 274 at paras. 22, 23, 26.
- [78] The defendants submit that there were four discrete issues on which they succeeded and for which costs should be apportioned to them:
- (a) the alleged \$25,000 payment to Sinovac in September 2004;
 - (b) the alleged \$95,000 payment to Sinovac in October 2004;
 - (c) the alleged \$180,000 payment to Shenzhen Bio-Port or Sinovac in November 2004; and
 - (d) the alleged \$140,000 payment on behalf of Xianping Wang for an investment in Veyu International.
- [79] The plaintiff claimed the first three amounts as components of the debt totalling \$1,980,000 he claimed against the defendants jointly pursuant to the written agreement signed by all of the defendants in September 2005. The fourth amount, the alleged investment in Veyu International, formed part of the additional \$1,460,000 U.S. which the plaintiff claimed against the defendant, Xianping Wang, under an agreement they made in writing in March 2006. The plaintiff succeeded in proving most of his debt claim, but failed to establish that he had made these particular payments for the defendants.
- [80] Each of the four debt claims on which the plaintiff failed did involve discrete matters of fact. However, when viewed in the context of the full range of issues canvassed during the trial, they consumed relatively little trial time. At para. 60 of my Reasons, I framed the issues as follows:
- (a) Has the plaintiff established on the balance of probabilities that he paid \$1.98 million in satisfaction of debts owed to Sinovac by the defendants, Lily Wang and Heping Wang, and of Shenzhen Bio-Port, a company controlled by the defendant Xianping Wang?
 - i. Is the plaintiff entitled to claim for the \$800,000 paid from Zhao Ling's account?
 - ii. Did the plaintiff pay \$25,000 to Sinovac in September 2004 on behalf of the defendants?
 - iii. Did the plaintiff pay \$95,000 to Sinovac in October 2004 on behalf of the defendants?
 - iv. Did the plaintiff pay \$180,000 to Shenzhen Bio-Port or Sinovac in November 2004 on behalf of the defendants?
 - (b) What was the purpose of the settlement agreement made on June 9, 2005, between the defendant, Lily Wang, and the plaintiff's company Sinoglobe Worldwide Ltd., and the transfer by Lily Wang of 1.5 million Sinovac shares to Sinoglobe?

- i. Were those shares transferred pursuant to an agreement made between Derrick Luu and Xianping Wang in 2003 that the plaintiff would receive 1.5 million Sinovac shares as part of his compensation for arranging the reverse takeover of Sinovac, or were the shares transferred for the purpose of enabling Mr. Luu to fund the repayment of the debts owed to him by the defendants and to make future debts payments on behalf of the defendants?
- ii. What application, if any, does the parol evidence rule have to the interpretation of the settlement agreement?
- (c) Has the plaintiff established that he paid \$140,000 on behalf of Xianping Wang for an investment in Veyu International?
- (d) Has the plaintiff established that the defendant, Xianping Wang, is indebted to him in the amount of \$200,000 for the Primarius finder's fee and \$1.2 million for the penalty charged by Primarius?
- (e) Did Xianping Wang pay \$500,000 to the plaintiff in May 2006 in partial repayment of the debts claimed by Mr. Luu in this action, or were the monies intended to reimburse Mr. Luu for amounts he had paid to Michael Yang at Xianping Wang's request?
- (f) In any event, is the September 23, 2005 guarantee binding upon the defendants?
- i. Did Lily Wang sign the September 23, 2005 guarantee?
- ii. Were the defendants induced to sign the guarantee by misrepresentations of the plaintiff?
- (g) Is the defendant Xianping Wang bound by the March 9, 2006 memorandum?
- (h) What is the proper law of the September 23, 2005 guarantee and the March 9, 2006 memorandum?
- (i) Are the defendants entitled to judgment on their counterclaim against the plaintiff for \$3,569,042.18, or any amount?
- [81] Determining the time attributable to each of these items would be time consuming and an inefficient use of the court's time. The greater part of the time at trial was consumed by the presentation of evidence concerning the relationships between the parties; their roles in the Sinovac transaction; the background and structure of the Sinovac reverse takeover; whether the defendant, Lily Wang, executed the September 23, 2005 agreement; the true purpose of the agreement by which Lily Wang transferred 1.5 million Sinovac shares to the plaintiff; whether Xianping Wang's \$500,000 payment to the plaintiff was a partial repayment of debts owed by the defendants to Mr. Luu; Chinese law; the role of trust between business associates in Chinese commercial transactions; the Primarius transaction and the plaintiff's acquisition and use of shares of Xinhua China to pay the Primarius penalty and finder's fee; and cross examination of all parties regarding their credibility.

- [82] With respect to the \$25,000 and \$95,000 payments to Sinovac, and the \$140,000 payment for the Veyu International investment, after assessing the conflicting evidence of the plaintiff and the defendants I found Mr. Luu had failed to establish on the balance of probabilities that he had made these payments at the request of the defendants. Each of Mr. Luu's debt claims in dispute in this action was hotly contested. However, the plaintiff did not "over-litigate" or unduly prolong the trial regarding any of these three claims.
- [83] With respect to the \$180,000 payment, I found that the plaintiff had devised a false explanation for that payment which he had tailored to the erroneous English translation of the Solution Plan. The mistake in the translation came to light later in the trial when the translator testified that he had made an error in his certified translation, and the amount set out in the Solution Plan correctly translated was \$1.8 million rather than \$180,000. As I have stated previously in these Reasons, in the case of the \$180,000 payment, Mr. Luu gave evidence that was calculated to mislead the court.
- [84] By doing so he advanced a claim based on evidence he knew to be unsupportable. To the extent that trial time was expended on the cross-examination of Mr. Luu with respect to this transaction and to call the translator to explain his error, the trial was unnecessarily prolonged.
- [85] It would be unjust for the plaintiff to recover costs for time at trial expended on his discredited claim that he paid \$180,000 to Shenzhen Bio-Port or Sinovac in November, 2004. Doing the best that I can, I would estimate that this matter, including the recalling of the translator late in the trial, consumed no more than one day of trial time. In my view, the just result is to deprive the plaintiff of his costs for one day of the trial.

RESULT

- [86] The plaintiff's request for special costs is denied.
- [87] Except for the costs of interlocutory applications previously awarded to the plaintiff at Scale B, and those applications on which he was unsuccessful, the plaintiff will have increased costs of this action at Scale C, with the costs of the trial to be assessed for 21 days of trial.
- [88] There will be no apportionment of costs to the defendants for any of the four debt claims on which the plaintiff was unsuccessful.

"PEARLMAN J."

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