
CANADA / JUDGMENT

Szeto (Re)

2014 BCSC 1563

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 1563 Szeto (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Szeto (Re),

2014 BCSC 1563

Date: 20140815

Docket: B121407

Registry: Vancouver

IN THE MATTER OF THE BANKRUPTCY OF

ALAN SZETO

of the City of North Vancouver, in the Province of British Columbia

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

(In Chambers)

Counsel for the Applicant,

Cruise Connections Canada:

Mark R. Davies

Counsel for the Respondent,

Alan Szeto:

William D. Riley

Place and Date of Hearing:

Vancouver, B.C.

August 11, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 15, 2014

Introduction

[1] The applicant, Cruise Connections Canada ("Cruise Connections"), applies for a declaration that the judgment granted in its favour against Alan Szeto on January 17, 2012 in *Cruise Connections Canada v. Cancellieri, Robert Stover, Mark Stortz, Grace Markus, Alan Szeto, et al*, Vancouver Registry No. S066404, including the costs awarded, constitutes debts or liabilities falling within s. 178(1)(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") that will not be released by the discharge of Alan Szeto from bankruptcy.

Background

[2] On January 17, 2012, this Court, following a 27-day trial, by reasons for judgment indexed as *Cruise Connections Canada v. Cancellieri*, 2012 BCSC 53, held that Mr. Szeto and four other defendants were jointly and severally liable to Cruise Connections for \$590,000 in damages for breach of the confidentiality terms of their contracts for services, and the torts of civil conspiracy and conversion.

[3] By further order made on January 2, 2013, the Court awarded Cruise Connections costs against all defendants at Scale C and special costs against Mr. Szeto and others for two applications made in the action. The applicant has prepared Bills of Costs totalling approximately \$380,000, which will be assessed at a taxation to be held in September 2014.

[4] On February 14, 2012, Mr. Szeto made an assignment in bankruptcy. He has not paid any portion of the judgment rendered against him.

[5] Three of Mr. Szeto's co-defendants have partially paid the judgment, leaving a balance outstanding of approximately \$260,355.00, subject to the outcome of the taxation of costs.

[6] On April 24, 2014, Mr. Szeto applied to the Court for an absolute discharge of bankruptcy. The discharge was opposed by Cruise Connections. Registrar Cameron adjourned the discharge application generally to permit Cruise Connections to apply for a judicial determination for whether this Court's judgment constitutes debts or liabilities falling within s. 178(1)(d) and (e) of the BIA.

[7] Section 178(1) of the BIA provides in part, that an order of discharge does not release the bankrupt from:

- (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity
 - (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim.
- [8] When this application came on for hearing, Cruise Connections confined its submissions to s. 178(1)(e). The applicant properly conceded that in light of the Court's finding at trial that Mr. Szeto and his colleagues did not owe any fiduciary obligation to Cruise Connections, s. 178(1)(d) has no application in the circumstances of this case.

Issue

- [9] The issue on this application is whether the judgment against Mr. Szeto constitutes a debt or liability resulting from his having obtained property of the applicant by false pretences or fraudulent misrepresentation.

The Cruise Connections' Action

- [10] In the action brought by Cruise Connections, the defendants Darrin Cancellieri, Robert Stover, Grace Markus and Alan Szeto were cruise booking specialists who provided services as contractors to Cruise Connections until September 2006.
- [11] The relevant findings of the Court in that action may be briefly summarized.
- [12] In August and September 2006, the four defendant cruise booking specialists and the defendant Melanie Iverson, Cruise Connections' office manager, formed a common design to terminate their respective relationships with Cruise Connections and to move together as a partnership to a rival travel agency operated by the defendants Meridian Travel Limited and Vision 2000 Travel Group Inc. ("Vision 2000").
- [13] In breach of the good faith and confidentiality provisions of their contractor agreements, the cruise booking specialists misappropriated confidential client lists which were the property of Cruise Connections and used them for the purpose of conducting business on behalf of Vision 2000.
- [14] The cruise booking specialists used the client information from the plaintiff's WinCruise database in order to contact Cruise Connections' customers and to facilitate the transfer of their business to Vision 2000. By doing so, the defendants, including Mr. Szeto, used confidential information of Cruise Connections for a prohibited purpose contrary to the confidentiality terms of their contractor agreements.
- [15] The individual cruise booking specialists, including Mr. Szeto, took the plaintiff's client lists as part of a coordinated effort.

- [16] Until late September 2006, when she resigned from Cruise Connections to join Vision 2000, another defendant, Ms. Bernadette Estrada was employed by Cruise Connections as a customer care supervisor. After Cruise Connections had restricted the cruise booking specialists' access to WinCruise, Ms. Estrada exported client lists from WinCruise for the cruise booking specialists and printed reports from WinCruise listing booked cruises for which customers had paid deposits. Ms. Estrada also sent each of the cruise booking specialists' client lists to the defendant Cancellieri's personal email account and provided her WinCruise password to Mr. Cancellieri so that he could access the WinCruise database.
- [17] Mr. Cancellieri, acting for himself and for the other departing cruise booking specialists, obtained some client lists from Ms. Estrada and then, after requesting and receiving her password, he downloaded additional client information from the plaintiff's WinCruise database.
- [18] Mr. Szeto, like each of his colleagues, used client information exported from the plaintiff's WinCruise database for promotional and marketing activities after he joined Vision 2000.
- [19] The cruise booking specialists attempted to conceal the export of client information from WinCruise.
- [20] The records that the cruise booking specialists misappropriated from WinCruise included booking documents and cruise deposit confirmation forms which they then used to contact customers to transfer, or attempt to transfer bookings and commissions from Cruise Connections to Vision 2000.
- [21] Each of the defendant cruise booking specialists acted in breach of their duty of good faith when in pursuit of their own self-interest they attempted to transfer as many cruise bookings as possible from Cruise Connections to Vision 2000 using confidential client information taken from the plaintiff.
- [22] The defendant cruise booking specialists used client information from WinCruise in order to contact the plaintiff's customers and facilitate the transfer of their business to Vision 2000.
- [23] None of the cruise booking specialists sought or obtained the permission of Cruise Connections before taking and using the plaintiff's WinCruise client information.
- [24] Two of the defendant cruise booking specialists, other than Mr. Szeto, made false entries in WinCruise that customers had cancelled cruises for medical reasons in an attempt to conceal the fact that they had cancelled those cruises and re-booked them through Vision 2000.

- [25] In order to facilitate the transfer of bookings from Cruise Connections to Vision 2000, the cruise booking specialists devised a booking release form using Cruise Connections' letterhead. Mr. Szeto and other defendants signed booking release forms prepared on Cruise Connections' letterhead by which they falsely represented they were acting on behalf of Cruise Connections in releasing bookings from the plaintiff to Vision 2000. Each of the defendants admitted that they knew what they did was wrong.
- [26] Without her knowledge, the defendant cruise booking specialists used the name of Ms. Wendy Nixon, a travel agent at Vision 2000, as the purported recipient of the transferred bookings in order to conceal from the cruise lines the fact that they were transferring bookings without Cruise Connections' knowledge, and for their own benefit.
- [27] The defendant cruise booking specialists acted in concert in wrongfully taking client lists from WinCruise and collaborated with Ms. Iverson in arranging for the import of those WinCruise client lists into Vision 2000's client management system. By taking the plaintiff's confidential client list without the permission of Cruise Connections and then using that client information to contact clients and to market and sell cruise-related products on behalf of Vision 2000, the individual defendants, including Mr. Szeto, committed the tort of conversion.
- [28] The defendant cruise booking specialists and Ms. Iverson also committed the tort of civil conspiracy, for which they were jointly and severally liable.
- [29] In its further amended statement of claim, Cruise Connections pleaded that the defendants had fraudulently transferred bookings from Cruise Connections to Vision 2000. The particulars of fraud pleaded by Cruise Connections consisted of 11 letters sent by the defendants on Cruise Connections' letterhead to various cruise lines between September 19, 2006 and September 27, 2006 purporting to authorize the transfer of cruise bookings to Vision 2000. Four of those letters were signed by Mr. Szeto. However, Cruise Connections chose to pursue the torts of conversion and civil conspiracy and to not pursue its claim in fraud. Accordingly the court made no finding of fraud against Mr. Szeto, or any of the other defendants.

Positions of the Parties

Cruise Connections' Position

- [30] Cruise Connections contends that the actions of Mr. Szeto and his co-conspirators as set out in the reasons constitute "obtaining property ... by false pretences or fraudulent misrepresentation". The applicant relies upon *Re McKee*, [1997] A.J. No. 1323 (Q.B.) at para. 35, for the proposition that both false pretences and fraudulent misrepresentation involve wrongfully obtaining or misappropriating the property of others through deceit, whether by a positive act or by failing to disclose material facts.

- [31] Counsel for Cruise Connections argues at para. 9 of his written submission that Mr. Szeto and the other cruise booking specialists with whom he is jointly and severally liable made deceitful statements by:
- (a) sending correspondence on Cruise Connections' letterhead to divert commission funds from Cruise Connections to Vision 2000 in which they falsely represented they were authorized representatives of Cruise Connections;
 - (b) making false entries in WinCruise to conceal the true reasons for the re-booking of cruises; and
 - (c) using Ms. Estrada's password to access confidential client information the defendant cruise booking specialists were specifically prohibited from having. The applicant argues that use of Ms. Estrada's password to access the WinCruise program constituted a false "statement". The applicant contends that the deceptive use of Ms. Estrada's password was a representation or assurance to Cruise Connections through its computer program that the client information could be safely released when in fact the defendants, including Mr. Szeto, intended to use that information for the prohibited purpose of advancing their own, and Vision 2000's, economic interests.

Mr. Szeto's position

- [32] Mr. Szeto submits that the Court made no finding of fraud or deceit against him. The respondent says that his liability for damages flowed from the Court's findings of breach of the confidentiality terms of his contract, conversion and civil conspiracy, none of which engage s. 178 (1)(e) of the BIA.
- [33] The respondent contends that he obtained no property by false pretences. The bookings transferred through the unauthorized use of Cruise Connections' letterhead were all reversed and accordingly no damages were assessed for those transactions.
- [34] Mr. Szeto also submits that because Cruise Connections chose not to argue fraud, he has not had the opportunity to defend against the plaintiff's claim in fraud. The respondent says that he should not be prejudiced by the plaintiff now requesting the Court to make findings of false pretences and fraudulent misrepresentation when Cruise Connections did not pursue such claims at trial.

Discussion and Analysis

- [35] Where a creditor has obtained judgment prior to the bankruptcy and alleges that the claim is one that falls within s. 178(1) and survives the bankruptcy, the court may examine the pleadings and reasons for judgment to determine if the claim comes within s. 178(1): *Re Covey*, 2012 ABQB 565 at para. 11; *Re Hottman*, 2003 BCSC 98 at paras. 20-23; and *Holmes v. Mayer*, [2000] O.J. No. 1857 (Ont. S.C.).

- [36] The onus is on Cruise Connections, as the creditor, to prove that its claim comes within s. 178(1)(e) of the BIA: *Toronto Dominion Bank v. Merenick*, 2007 BCSC 1261 at para. 48.
- [37] For the purposes of s. 178(1)(e), a fraudulent misrepresentation requires proof that the bankrupt made a representation; the representation was false; the representation was made knowingly, without belief in its truth, or with reckless indifference to whether it was true or false; and the creditor relied upon the representation in turning over the property: *Merenick* at para. 30.
- [38] The Criminal Code, R.S.C. 1995 c. C-46, defines a false pretence as follows:
- A false pretence is a representation of a matter of fact, either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.
- [39] That definition has been adopted for the purposes of s. 178(1)(e): *Celanese Canada Inc. v. Murray Demolition Corp.*, [2010] O.J. No. 6347 at para. 22 (Ont. S.C.).
- [40] The core content of both "false pretences" and "fraudulent misrepresentation" is the making of a deceitful statement: *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.*, [1999] O.J. No. 2807 at para. 14 (Ont. C.A.). Both a "fraudulent misrepresentation" and a "false pretence" may be made verbally, or by the non-disclosure of material facts through "blameworthy (or cunning or strategic) silence": *Garofoli v. Kohm*, [1989] M.J. No. 528 at p. 8 (Man. QB); *Merenick* at para. 31.
- [41] Although the concepts of false pretences and fraudulent misrepresentation are very similar, they are not identical. A creditor need not show that it relied on a representation made to it by the bankrupt in order to establish that the bankrupt obtained its property by false pretences. In *St. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52 at paras. 104-107, the Court held that a bankrupt who falsely held out to a cattle transport driver and the auctioneer the cattle were his to sell, and that he was entitled to the proceeds of sale, had made representations to third parties that deprived the creditor of property to which it was entitled. The bankrupt, by making something that was not the case appear to be true, had obtained property by false pretences.
- [42] In *Celanese Canada Inc.*, the bankrupt, Mr. Hamaliuk, was a former employee of the plaintiff. Mr. Hamaliuk obtained confidential information from Celanese about its plant during his employment. He obtained additional confidential information by bribing a Celanese employee, and from an unsuccessful bidder for demolition work at the plant. The court found that in breach of his confidentiality agreement, Mr. Hamaliuk had intentionally obtained Celanese's confidential information and then sold it to third parties. The court held that Celanese was entitled to judgment against Mr. Hamaliuk for damages for breach of confidence and misappropriation of confidential information.

[43] The court then went on to consider whether Celanese was entitled to an order that the judgment survived Mr. Hamaliuk's bankruptcy under either s. 178(1)(d) or (e) of the BIA. The claim under s. 178(1)(d) failed because Mr. Hamaliuk was not a fiduciary of the plaintiffs.

[44] Before turning to s. 178(1)(e), the court considered the policy considerations underlying both 178(1)(d) and (e):

20 At the same time, however, I appreciate the spirit underlying these two provisions of the Bankruptcy and Insolvency Act. It was stated in *Simone v. Daley* (1999), 43 O.R. (3d) 511 (Ont. C.A.) where Blair J. at p. 522, quoted with approval the following observation of Master Funduk in *Jerrard v. Peacock* (1985), 57 C.B.R. (N.S.) 54 (Alta. Master) at p. 63:

Paragraphs (d) and (e) are morality concepts which look at conduct. Those kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability.

21 I agree with the plaintiffs' submission that it would be wrong to permit a person who misappropriates or misuses confidential information to avoid the consequences of his or her actions through the mechanism of declaring bankruptcy. Having said that, however, the desirability of that objective cannot distort the plain wording of the statute.

[45] In *Celanese*, at para. 23, the court held that the bankrupt had obtained property by false pretences and accordingly, was not released from liability for the judgment:

In this case, Mr. Hamaliuk obtained confidential information by misleading others as to his intended use of that information. To all outward appearances, he properly obtained the information through his role as a consultant to Canadian Bearings and his consequent involvement in the demolition project for the Edmonton plant. He portrayed himself as having a legitimate reason to obtain the property when he knew that his actual intention was very different. In those circumstances, it is not an unfair or unrealistic characterization of the conduct of Mr. Hamaliuk to say that he obtained the confidential information through false pretences. The judgment arises from that improper conduct and it would therefore follow that, by virtue of s. 178(1)(e), the discharge does not release the liability that the judgment represents.

[46] *Celanese Canada Inc. and Ste. Rose* are persuasive authority for the principle that while a creditor seeking to establish that the bankrupt's liability results from obtaining property or services by false pretences must show that the bankrupt obtained the property or service by making a deceitful statement, that statement need not have been made to the creditor. I recognize that in *Merenick*, at para. 29, Justice H.J. Holmes referred to the governing authorities treating the concepts of "false pretences" and "fraudulent misrepresentation" in s. 178(1)(e) as "virtually interchangeable". As Her Ladyship observed, "each rests ultimately on deceit". In *Merenick* the bankrupt was alleged to have made false statements to the creditor. The court was not required to consider whether s. 178(1)(e) also applies where a bankrupt obtains the creditor's property by deceptive statements made to third parties.

- [47] Counsel for the bankrupt referred to *Long and McQuade Ltd. v. Torres*, 2010 BCSC 1842, where Burnyeat J. held at para. 25 that conversion is not included in s. 178(1)(d). The plaintiff Long and McQuade had entered into a contract with the defendant Rafael Torres that permitted him to purchase musical instruments and make monthly payments until the cost was repaid. The defendant purchased a guitar for \$4,088 but only paid the \$200 down-payment. His wife sold the guitar shortly before Mr. Torres made an assignment into bankruptcy. The plaintiff claimed against Mr. and Mrs. Torres for fraudulent conversion and obtained judgment for \$3,888.
- [48] Long and McQuade then applied for an order that the judgment survived the bankruptcy under s. 178(1)(d) of the BIA.
- [49] The court held there was no wrongful taking of the guitar because title had passed to the defendant before the guitar was sold. Further, the debt arose out of the contract between the plaintiff and the defendant, rather than from any taking.
- [50] The court also held at para. 18 that there was no element of moral turpitude where title had passed to the defendant and he was in the position to sell the guitar. Accordingly, there was no wrongful use or receipt of the guitar.
- [51] Long and McQuade is distinguishable from the case at bar. Mr. Justice Burnyeat was concerned with the interpretation of s. 178(1)(d), rather than s. 178(1)(e). Further, in this case there is no question that Mr. Szeto wrongfully obtained confidential information which was the property of Cruise Connections. Although "conversion" is not included in s. 178(1)(d), under s. 178(1)(e) an order for discharge does not release a bankrupt from any liability resulting from obtaining property by false pretences or fraudulent misrepresentation. In my view, if through false pretences the bankrupt converts the creditor's property to his own use, he has obtained the creditor's property by false pretence, and s. 178(1)(e) is engaged.
- [52] Does Mr. Szeto's liability under the judgment result from his having obtained property of Cruise Connections by false pretences or fraudulent misrepresentation?
- [53] By paragraph 50(b) of its Further Amended Statement of Claim, Cruise Connections pleaded the following allegation of fraud by the cruise booking specialists and Ms. Iverson:

Without the knowledge or consent of the Plaintiff, the relevant cruise line or the customer or some or all of them, fraudulently transferred bookings from Cruise Connections to Meridian or cancelled and re-booked the same or similar cruise packages.

- [54] In Appendix C to the Further Amended Statement of Claim, Cruise Connections particularized its claim in fraud by listing 11 instances of the defendants, including Mr. Szeto, signing false booking release forms prepared on Cruise Connections' letterhead to purportedly authorize the transfer of bookings from Cruise Connections to Vision 2000.

- [55] The Court found that while the defendants' use of false cruise booking release forms was unlawful, Cruise Connections suffered no damage from that conduct. Each of the cruises which the defendants transferred using the false booking release forms was transferred back to Cruise Connections. Although Mr. Szeto participated in the deceptive conduct alleged, and falsely represented that the transfers were authorized by Cruise Connections, no damages were assessed for that misconduct. The bankrupt incurred no liability under the judgment as a result of that conduct.
- [56] I agree with the submissions of counsel for Mr. Szeto that where, as here, Cruise Connections chose not to argue fraud at trial, and where the fraudulent conduct alleged in the pleadings did not cause any of the loss for which the bankrupt was found liable, it would be unfair to now characterize other aspects of Mr. Szeto's conduct as constituting fraudulent misrepresentation when those matters were neither pleaded nor argued at trial.
- [57] The joint and several liability of Mr. Szeto and the other cruise booking specialists for the damages awarded for the transferred and cancelled bookings arose from the cruise booking specialists' misappropriation of Cruise Connections' confidential client information and the use of that information by the defendants to contact clients and solicit the transfer of their business to Vision 2000. The Court assessed damages in the amount of \$120,000 for the transferred and cancelled bookings.
- [58] The Court awarded an additional \$470,000 as damages flowing from the defendants' past and future use of Cruise Connections' client contact information. Those damages were assessed for Cruise Connections' loss of bookings from existing clients in the WinCruise database at the time of the defendants' departure in September 2006. Those damages were for the misappropriation of the plaintiff's confidential client information, for the duration of the period that Cruise Connections' business was affected by the defendants' breach of the confidentiality terms of their contracts and the torts of conversion and civil conspiracy.
- [59] At para. 399 of my Reasons for Judgment, I summarized the award of damages as follows:
- [399] I have assessed damages of \$120,000 for the plaintiff's loss caused by the defendants' misuse of confidential client information to transfer or cancel and rebook cruises through Vision 2000. In addition, I have assessed damages in the amount of \$470,000 for the loss of revenues the plaintiff would have received between September 2006 and December 2009 but for the defendants' breaches of contract and torts. All of those damages were caused by the breaches of contract of the defendants Cancellieri, Stover, Marcus, Szeto and Iverson, by their tortious misconduct, including their conspiracy to convert and misuse the plaintiff's confidential information, and by the corporate defendants' wrongful interference with the plaintiff's contractual relations.

- [60] The liability of the bankrupt under the judgment was founded on breach of contract, conversion and civil conspiracy, rather than fraudulent misrepresentation or false pretence. The gravamen of misconduct of the bankrupt and his co-defendants that resulted in their liability for damages was the surreptitious taking and subsequent unlawful use of the plaintiff's confidential information.
- [61] While the Court found that two of the cruise booking specialists had made false entries in the WinCruise database concerning the reasons for cancelling certain cruise bookings, there was no finding that Mr. Szeto participated in that deceptive conduct.
- [62] The Court found that the cruise booking specialists were jointly and severally liable for the torts of conversion and civil conspiracy. However, I am not persuaded that it necessarily follows that for the purposes of s. 178(1) of the BIA the Court may find the judgment constitutes a liability resulting from the bankrupt obtaining property by false pretences or fraudulent misrepresentation based on his joint liability for deceptive statements made by his co-defendants. There was no pleading or finding of fraudulent misrepresentation or false pretence with respect to the conduct or statements now alleged to constitute fraud, including Ms. Estrada's unauthorized use of the WinCruise password to misappropriate Cruise Connections' client information. The applicant has cited no authority where deceit by a person other than the bankrupt has been held to engage s. 178(1)(e).
- [63] I conclude that the liability of Mr. Szeto for the wrongful taking and use of Cruise Connections' property resulted from his breach of contract and the torts of conversion and civil conspiracy, rather than from his obtaining property by false pretences or fraudulent misrepresentation. Accordingly, the application of Cruise Connections for a declaration that the judgment constitutes a debt or liability falling within s. 178(1)(e) of the BIA is dismissed.
- [64] Each party will bear their own costs.
- "PEARLMAN J."

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