

CANADA / JUDGMENT

Xu et al v. Centre Pacific Management Ltd. et al

2004 BCSC 141

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 141 Xu et al v. Centre Pacific Management Ltd. et al IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Xu et al v. Centre Pacific Management Ltd. et al, 2004 BCSC 141 Date: 20040204 Docket: S000485 Registry: Vancouver Between: JIAN XIANG XU, JI XIAO, QI-SEN TAN, ZHOU GAN, YUEN WONG, ZHUO MING LI, NING WANG, YUE ZHONG LIANG, JIA YAO GUO, QING-ZHONG YU, QIU-PING LUO, WAI TUNG CHAN, SUET-FAI LAM, TIAN HE PLAINTIFFS And CENTRE PACIFIC MANAGEMENT LTD., CENTRE PACIFIC IMMIGRATION CONSULTANCY CO., CENTRE PACIFIC BUSINESS MANAGEMENT LTD., FMD ENTERPRISES LTD. FMD MANAGEMENT LTD., ALBERTA INVESTMENT FUND CORPORATION, KBK NO. 183 VENTURES LTD., MPAR HOLDILNGS LTD., 781128 ALBERTA LTD., VIRTUAL 360 SYSTEMS LTD., VIRTUAL 360 DEVELOPMENTS LTD., SAMANTHA WAI FUN KEUNG, VINCENT CHING, PHILIP LOUIS, HSBC, CHEN & LEUNG, PAUL LEUNG and ANNE ROONEY DEFENDANTS Before: The Honourable Mr. Justice Shaw Reasons for Judgment Counsel for the Plaintiffs D. Lunny and J. Dawson Defendants appearing on their own behalf Samantha Y. Fun Keung and Vincent Ching Date and Place of Trial: January 5-9, 12-16, and 19, 2004 Vancouver, B.C.

- [1] The plaintiffs are immigrants from the People's Republic of China and Hong Kong. They came to Canada in about 1997 with their families pursuant to the Immigrant Investor Program of the Canadian government. By investing in certain investment funds, the plaintiffs obtained landed immigrant visas.
- [2] In about 1995 and 1996, in the cities of Guangzhou and Hong Kong, the plaintiffs dealt with the defendants Samantha Y. Fun Keung and Vincent Ching. Ms. Keung and Mr. Ching had set themselves up as immigration consultants. They did so under the corporate name Centre Pacific Immigration Consultancy Co. They attracted the plaintiffs and others to use their services by means of advertising and presentation of seminars.

- [3] As part of their services, they held themselves out as independent advisors on appropriate investment funds under the Immigrant Investor Program. They advised the plaintiffs to purchase either FMD Enterprises Ltd. for investment in the province of British Columbia, or Alberta Investment Fund Corporation for investment in the province of Alberta. The plaintiffs followed their advice and invested in one or the other of the two funds.
- [4] Ms. Keung and Mr. Ching did not tell the plaintiffs that they were the owners and managers of these investment funds. Nor did they tell the investors that a large portion of the invested funds were going to be posted as security for investor bank loans, and that doing so would make it impossible for the investment funds to comply with Canada's requirement that 70% of the funds be invested in active eligible businesses.
- [5] By various fraudulent means, Ms. Keung and Mr. Ching bilked the investment funds essentially dry and left the plaintiffs with worthless investments.
- [6] Ms. Keung and Mr. Ching acted in concert throughout.
- [7] The plaintiffs claim against Ms. Keung and Mr. Ching damages for fraudulent misrepresentation and fraudulent conversion of the invested monies. These claims include out of pocket losses, aggravated damages and punitive damages. In addition, the plaintiffs claim tracing orders in respect of minor amounts of their invested funds that they have been able to locate. In this regard, they seek orders that these funds be paid in trust to their solicitors. Finally, they ask for special costs.
- [8] Until recently, this proceeding was much more complicated than it is now. As a result of various settlements, dismissals and discontinuances, the only remaining claims are against the defendants Ms. Keung and Mr. Ching.
- [9] The defendants Ms. Keung and Mr. Ching, were duly notified by the plaintiffs pursuant to the Rules of Court to attend the trial to be cross-examined by counsel for the plaintiffs. Ms. Keung and Mr. Ching were both well aware of when the trial was to commence and the dates upon which they were required to attend (the second and third days of the trial). Ms. Keung and Mr. Ching elected not to show up. Accordingly, I granted judgment to the plaintiffs on the liability aspect of their claims against Ms. Keung and Mr. Ching. I also quashed the counterclaims of Ms. Keung and Mr. Ching against the plaintiffs.
- [10] The trial then proceeded as an assessment of the plaintiffs' damages. PERSONAL LIABILITY
- [11] Ms. Keung and Mr. Ching achieved their fraudulent ends largely by acting through various corporate entities. However, the use of corporate entities does not allow Ms. Keung and Mr. Ching to escape personal liability for fraud. In *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 at 40 (B.C.C.A.), Seaton J.A. for the Court said: In my view, the proper remedy is not to lift the corporate veil, but to award damages for fraud against the individuals and the company that committed the fraud.... See also: *Beise v. Harwood*, [1999] B.C.J. No. 653 (S.C.) (Q.L.) at paragraph 32. PECUNIARY DAMAGES

- [12] Each plaintiff invested in one of the two funds. Those who invested in FMD Enterprises Ltd. paid \$200,000. Those who invested in Alberta Investment Fund Corporation paid \$150,000. In addition, they signed for bank loans arranged by Ms. Keung and Mr. Ching. The FMD Enterprises Ltd. investors' loans were for \$150,000 bringing each of their investments to \$350,000. The Alberta Investment Fund Corporation investors' loans were for \$100,000 bringing each of their investments to \$250,000. Each investor also posted Treasury bills with the bank for 10% of their loans, that is, \$15,000 for the larger loans and \$10,000 for the smaller loans. Each investor paid bank interest. Some of the investors were persuaded by Ms. Keung and the bank to repay the bank loans. The other investors did not repay their bank loans and, because of dismissal of claims by the bank, they will never have to. All the investors lost their Treasury bills because the bank gave them to the investment funds controlled by Ms. Keung and Mr. Ching.
- [13] I find that all the above payments made by the plaintiffs and the lost Treasury bills are pecuniary damages. AGGRAVATED DAMAGES
- [14] The plaintiffs were particularly vulnerable because they spoke little or no English. They pinned their hopes and those of their families upon stable immigration to this country. The fraudulent conduct of Ms. Keung and Mr. Ching caused each of the plaintiffs considerable stress. Ms. Keung and Mr. Ching told them that if they did not repay the bank loans, they stood to lose their immigration status. This threat was made with full knowledge that it was false. The plaintiffs were thus subjected to the fear of not being able to stay in Canada. They suffered financial hardship by being faced with expenses they had not planned upon before coming to Canada. Many suffered internal family strife. Many were humiliated.
- [15] Fortunately, most of the plaintiffs and all their families have since become Canadian citizens. The plaintiffs who have not yet obtained Canadian citizenship intend to do so.
- [16] In accordance with the approach to aggravated damages taken by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 743 to 747, I find that this is a case where aggravated damages should be awarded to compensate for non-pecuniary losses caused by fraudulent conduct. Iacobucci J. for the majority said at paragraph 107: In my view, there is no valid reason why the scope of compensable injuries in defamation situations should not be equally recognized in the context of wrongful dismissal from employment. The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible....
- [17] I assess aggravated damages in the amount of \$15,000 for each of the 14 plaintiffs, for a total of \$210,000. PUNITIVE DAMAGES
- [18] Ms. Keung and Mr. Ching bilked the investment funds of practically all of the monies the plaintiffs put into them. The dealings by Ms. Keung and Mr. Ching were marked by lies throughout. They preyed on their victims by disguising the true nature of the investments,

particularly their own interests in the two investment funds. The plaintiffs were particularly vulnerable because of their lack of knowledge of the English language, their lack of understanding of eligible Canadian investments, and their intense desire to immigrate to Canada. Ms. Keung and Mr. Ching took advantage of their vulnerability. Their conduct was malicious, dishonest and offensive to any sense of decency.

- [19] There is need to deter this kind of mistreatment of legitimate immigrants to this country. The conduct of Ms. Keung and Mr. Ching was planned and deliberate. Their deception continued from approximately 1995 to 1999. They knowingly and deliberately took advantage of the vulnerability of their victims. They have not, so far, been subjected to criminal prosecution. They should be punished for their behaviour.
- [20] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, Cory J. for the Court at paragraph 196 described punitive damages as follows: Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.
- [21] The conduct of Ms. Keung and Mr. Ching fits well within that described by Cory J. as warranting the imposition of punitive damages.
- [22] I have considered whether the combined award of general and aggravated damages is sufficient to achieve the goal of punishment and deterrence. In the circumstances of this case, I am of the view that the combined general and aggravated damages do not suffice to serve as punishment and deterrence.
- [23] In assessing punitive damages, I have kept in mind the distinction between aggravated damages and punitive damages and have taken care to see that they do not overlap.
- [24] *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at 634 to 637 sets out principles applicable to assessing punitive damages. I have considered and applied these principles.
- [25] I award punitive damages to each of the 14 plaintiffs in the sum of \$25,000, for a total of \$350,000. SETTLEMENTS

- [26] The plaintiffs' solicitors Messrs. Devlin Jensen have already received \$2,327,500 in settlement of various claims in this proceeding apart from the claims against Ms. Keung and Mr. Ching. In order to avoid double recovery, the settlement funds plus any interest accrued thereon will be applied on a pro rata basis to reduce each of the damage awards.

ASSESSMENT OF DAMAGES

- [27] I assess the damages of the plaintiffs as follows:

- [28] Jia Xiang Xu Investment Loss: \$150,000.00 Pre-Judgment Interest thereupon \$ 43,569.13 Loss of Debt Service Reserve Funds \$ 10,000.00 Pre-Judgment Interest thereupon \$ 2,923.43 Interest Expense \$ 13,208.33 Pre-Judgment Interest thereupon \$ 1,107.36 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$260,808.25 Less pro rata share of Settlement Funds \$119,667.90 Amount of Judgment \$141,140.35
- [29] Ji Xiao Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 57,567.37 Loss of Debt Service Reserve Funds \$ 15,000.00 Pre-Judgment Interest thereupon \$ 4,523.43 Interest Expense \$ 22,312.50 Pre-Judgment Interest thereupon \$ 1,823.56 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$341,226.86 Less pro rata share of Settlement Funds \$163,250.37 Amount of Judgment \$177,976.49
- [30] Qi-Sen Tan Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 58,019.47 Loss of Debt Service Reserve Fund \$ 15,000.00 Pre-Judgment Interest thereupon \$ 4,523.43 Interest Expense \$ 22,937.50 Pre-Judgment Interest thereupon \$ 2,159.76 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$342,640.16 Less pro rata share of Settlement Funds \$164,016.65 Amount of Judgment \$178,623.51
- [31] Zhou Gan Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 58,290.73 Loss of Debt Service Reserve Funds \$ 15,000.00 Pre-Judgment Interest thereupon \$ 4,523.43 Interest Expense \$ 19,187.50 Pre-Judgment Interest thereupon \$ 1,540.19 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$338,541.85 Less pro rata share of Settlement Funds \$161,795.94 Amount of Judgment \$176,745.91
- [32] Yuen Wong Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 57,898.91 Loss of Debt Service Reserve Funds \$ 15,000.00 Pre-Judgment Interest thereupon \$ 4,523.43 Interest Expense \$ 22,937.50 Pre-Judgment Interest thereupon \$ 2,189.17 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$342,549.01 Less pro rata share of Settlement Funds \$163,967.21 Amount of Judgment \$178,581.80
- [33] Xhou Ming Li Investment Loss: \$150,000.00 Pre-Judgment Interest thereupon \$ 43,569.13 Loss of Debt Service Reserve Funds \$ 10,000.00 Pre-Judgment Interest thereupon \$ 2,923.43 Interest Expense \$ 14,041.67 Pre-judgment Interest thereupon \$ 1,238.76 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$261,772.99 Less pro rata share of Settlement Funds \$120,190.70 Amount of Judgment \$141,582.29

- [34] Ning Wang Investment Loss: \$150,000.00 Pre-Judgment Interest thereupon \$ 43,591.74 Loss of Debt Service Reserve Funds \$ 10,000.00 Pre-judgment Interest thereupon \$ 2,923.43 Interest Expense \$ 10,312.50 Pre-Judgment Interest thereupon \$ 703.29 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$257,530.96 Less pro rata share of Settlement Funds \$117,891.99 Amount of Judgment \$139,638.97
- [35] Yue Zhong Liang Investment Loss: \$150,000.00 Pre-Judgment Interest thereupon \$ 43,569.13 Loss of Debt Service Reserve Fund \$ 10,000.00 Pre-judgment Interest thereupon \$ 2,923.43 Interest Expense \$ 20,041.67 Pre-Judgment Interest thereupon \$ 2,516.98 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$269,051.21 Less pro rata share of Settlement Funds \$124,134.95 Amount of Judgment \$144,916.26
- [36] Jai Yao Guo Investment Loss: \$150,000.00 Pre-Judgment Interest thereupon \$ 43,591.74 Loss of Debt Service Reserve Funds \$ 10,000.00 Pre-Judgment Interest thereupon \$ 2,920.61 Interest Expense \$ 20,041.67 Pre-Judgment Interest thereupon \$ 2,516.98 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$269,071.00 Less pro rata share of Settlement Funds \$124,145.35 Amount of Judgment \$144,925.65
- [37] Qing-Zhong Yu Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 57,567.37 Loss of Debt Service Reserve Fund \$ 15,000.00 Pre-Judgment Interest thereupon \$ 4,523.43 Interest Expense \$ 19,812.50 Pre-Judgment Interest thereupon \$ 1,620.86 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$338,524.16 Less pro rata share of Settlement Funds \$161,785.89 Amount of Judgment \$176,738.27
- [38] Qui-Ping Luo Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 57,567.37 Interest Expense \$ 17,593.75 Pre-Judgment Interest thereupon \$ 1,256.14 Repayment of Loan \$150,000.00 Pre-Judgment Interest thereupon \$ 28,091.10 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$494,508.76 Less pro rata share of Settlement Funds \$246,315.00 Amount of Judgment \$248,193.76
- [39] Wai-Tung Chan Investment Loss: \$200,000.00 Pre-Judgment Interest thereupon \$ 63,540.57 Repayment of Loan \$150,000.00 Pre-Judgment Interest thereupon \$ 28,091.10 Interest Expense \$ 15,718.75 Pre-Judgment Interest thereupon \$ 987.77 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$498,338.19 Less pro rata share of Settlement Funds \$248,393.82 Amount of Judgment \$249,944.37
- [40] Suet-Fai Lam Investment Loss less Repayment of \$9,982.50 "dividend" \$190,017.50 Pre-Judgment Interest thereupon \$ 59,436.05 Loan Repayment \$150,000.00 Pre-Judgment Interest thereupon \$ 28,091.10 Interest Expense \$ 24,281.25 Pre-Judgment Interest thereupon \$ 2,413.57 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$494,239.47 Less pro rata share of Settlement Funds \$246,272.70 Amount of Judgment \$247,966.77

- [41] Tian He Investment Loss: \$150,000.00 Pre-Judgment Interest thereupon \$ 43,184.76 Interest Expense \$ 2,937.50 Pre-Judgment Interest thereupon \$ 54.30 Repayment of Loan \$100,000.00 Pre-Judgment Interest thereupon \$ 18,727.40 Aggravated Damages \$ 15,000.00 Punitive Damages \$ 25,000.00 Total Damages: \$354,903.96 Less pro rata share of Settlement Funds \$170,659.27 Amount of Judgment \$184,244.69 OTHER MATTERS Monies in Trust Account
- [42] On July 4, 2002 the sum of \$56,259.73 was paid into the trust account of the law firm Basham, Thompson and Liu from the proceeds of sale of Ms. Keung's property. I find that these monies are traceable to the monies invested by the plaintiffs. I order this amount plus any interest accrued thereon be paid to Messrs. Devlin Jensen in trust for the plaintiffs. These monies are to be applied in partial payment of the judgments rendered against Ms. Keung and Mr. Ching. Monies in Court
- [43] On July 17, 2002 the sum of \$112,132.53 was paid into court by the law firm Faskin, Martineau & DuMoulin. I find that these monies are traceable to the monies invested by the plaintiffs. I order that this amount be paid out of court to the plaintiffs' solicitors Messrs. Devlin Jensen in trust for the plaintiffs. These monies are to be applied in partial payment of the judgments rendered against Ms. Keung and Mr. Ching. SPECIAL COSTS
- [44] I find that the conduct of the defendants Ms. Keung and Mr. Ching with respect to this proceeding has been reprehensible and is deserving of an order to pay special costs.
- [45] On an application to set aside a Mareva injunction that was granted against Ms. Keung and Mr. Ching, they filed affidavits and were cross-examined thereon. At that time, their evidence was taken at face value. Their false evidence led to the Mareva injunction being set aside. This deprived the plaintiffs of a distinct advantage. Later on, during the course of this trial, this evidence was shown to be utterly false.
- [46] The false evidence also led the plaintiffs to abandon a motion for summary judgment pursuant to Rule 18A of the Rules of Court.
- [47] Amongst other things, Ms. Keung and Mr. Ching swore that each of the plaintiffs orally agreed to repay the bank loans upon receiving their immigration visas. They said that the failure of the plaintiffs to repay the loans upon receipt of their visas explained why they were unable to invest 70% of the invested monies in active eligible businesses. At trial, this evidence was exposed as being entirely fabricated. There were no such oral agreements.
- [48] Ms. Keung and Mr. Ching were given written notice to attend the trial as witnesses. They wilfully refused to obey the notices. This conduct is contempt of court: Rule 56 (4) of the Rules of Court.
- [49] I conclude that the defendants Ms. Keung and Mr. Ching have played fast and loose with the process of the court to defeat its legitimate usage, to delay the proceeding as long as possible and to take advantage of the delay.
- [50] I order special costs. SUMMARY

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- [51] The plaintiffs will recover judgments for damages and pre-judgment interest against the defendants Ms. Keung and Mr. Ching for the amounts set out in paragraphs [28] to [41] of these reasons for judgment.
- [52] The monies described in paragraphs [42] and [43] will be paid to Messrs. Devlin Jensen in trust.
- [53] The plaintiffs will also recover special costs. "D.W. Shaw, J." The Honourable Mr. Justice D.W. Shaw
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