

CANADA / JUDGMENT

Xu v. Xu

2023 BCSC 289

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Supreme Court of British Columbia

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2023 BCSC 289 Xu v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xu v. Xu,

2023 BCSC 289

Date: 20230301

Docket: S1710818

Registry: Vancouver

Between:

Jia Chun Xu

Plaintiff

And

Shou Xu and Li Zhang

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

Z.C. Ng

Counsel for Defendant, Shuo Xu:

S. Xue

Counsel for the Defendant, Li Zhang:

S. Xue, appearing as agent for

R. Liang

Place and Date of Hearing:

Vancouver, B.C.

January 25, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2023

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Overview

- [1] The plaintiff, Jia Chun Xu, is the biological father of the defendant, Shuo Xu. He is also the former husband of the defendant, Li Zhang.
- [2] The underlying action was commenced approximately five years ago. In it, the plaintiff seeks various forms of relief in relation to property that he says was misappropriated from him by the defendants. In the course of pre-trial document discovery, Ms. Zhang disclosed certain documents to the plaintiff. There is no dispute that these documents are protected by litigation privilege (the "privileged documents") and are subject to an implied undertaking of confidentiality.
- [3] The plaintiff wishes to use the privileged documents to commence a new action against Ms. Zhang. To that end, the plaintiff intends to seek an order from the court to be relieved of the implied undertaking in relation to those documents (the "Release Application"). It is anticipated that the Release Application will be heard in April 2023.

- [4] The Notice of Application and affidavits in support of the Release Application have been prepared, but have not yet been filed. The Notice of Application refers to the privileged documents, which are also attached to the affidavits.
- [5] In the application before me, the plaintiff seeks a sealing order over the Notice of Application and affidavits.
- [6] Ms. Zhang has an interest in the documents, and ultimately intends to oppose any Release Application. However, she does not oppose the sealing order, provided that:
- a) she has sufficient time to obtain, and have translated into English, evidence from China prior to the Release Application being heard, including obtaining an expert report on Chinese law relating to the plaintiff's intended new action; and
 - b) any sealing order made will also cover the responding materials that the defendants file in answer to the Release Application.
- [7] Shuo Xu does not have any interest in the documents, nor does he oppose the granting of the sealing order. However, he argues that the process the plaintiff proposes to follow is not supported by the authorities.
- [8] The central issue before me in this application, is what procedure ought to be followed when a party seeks to rely on privileged documents in support of an application to be relieved of an implied undertaking of confidentiality.

Positions of the Parties

- [9] The plaintiff argues that if a party is applying for an order releasing it from its implied undertaking, that party may present the privileged documents for review by the court after obtaining a sealing order over the privileged documents. The court could then review the privileged documents without them being released to the public in order to decide the merits of the Release Application.
- [10] The plaintiff submits that this procedure is supported by this Court's decision in *Mann v. Elphick*, 2015 BCSC 1853, and more recently, by the Court of Appeal's decision in *AM Gold Inc. v. Kaizen Discovery Inc.*, 2021 BCCA 70 [Gold].
- [11] Shuo Xu submits that prior to the plaintiff seeking a sealing order over privileged documents, the plaintiff must obtain permission from the court to use those privileged documents on the Release Application. It is submitted that a sealing order should only be granted once the court is satisfied that the documents are necessary for adjudication of the Release Application. He argues that this is the proper interpretation of the Gold decision, and is the procedure that ought to be followed in this case.

- [12] Ms. Zhang's submissions are silent on the process advocated by the plaintiff or Shuo Xu. She simply argues that the application for a sealing order is premature. It is Ms. Zhang's position that the plaintiff should bring the application for a sealing order once the plaintiff has received the unfiled application response materials from the application respondents. The parties could then proceed with obtaining a sealing order by consent a few days prior to the Release Application being heard.

Legal Framework

- [13] This application for a sealing order engages two competing principles of law: the open court principle, and the principle of confidentiality underlying the implied undertaking rule.
- [14] The open court principle is grounded in the "public's right to know", and advances accountability and fairness in the justice system. It requires that court proceedings presumptively be open and accessible to the public and to the media: *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para. 10, and *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 1.
- [15] The implied undertaking rule is grounded in the principles of privacy and confidentiality. It protects the privacy interests of litigants which are infringed when they are compelled by law to abide by the rules of discovery: *Gold* at paras. 13-14, citing *Juman v. Doucette*, 2008 SCC 8 at para. 20.
- [16] By imposing an implied undertaking of confidentiality on the receiving party, the rule restricts the use of information obtained through pre-trial discovery. Specifically, it provides that documentary or oral evidence produced during pre-trial discovery from a party to civil litigation, can only be used by the parties for the purpose of the litigation in which it was obtained: *Juman* at para.1.
- [17] Where a party wishes to use material obtained in a court proceeding for a purpose outside the scope of the underlying litigation, that party must obtain consent from the listing party, or permission from the court, to be relieved of the implied undertaking: *Gold* at para. 22.
- [18] Where the material filed in support of a Release Application includes reference to the privileged documents which are the subject of the Release Application, a sealing order may be made so that the court can review the material.
- [19] In *Gold* the Court heard an appeal of an interlocutory order sealing an affidavit filed in support of an application for leave to base another action against another party on documents disclosed in the underlying case. The appellant had filed the affidavit attaching privileged documents without first seeking leave of the Court to do so. As a remedy for the breach of the implied undertaking, the respondent sought a sealing order from the chambers judge. The chambers judge sealed the affidavit pending further order of the Supreme Court.

- [20] The appellant argued that the chambers judge had failed to consider the prejudice created by the filing, and the deleterious effects of the sealing order on both free expression and the public interest in the open court principle. In dismissing the appeal, Justice Saunders (for the majority) stated as follows:
- [21] I conclude that the filing of such protected documents in support of an application in which the only relief sought by the applicant is permission to start other proceedings against other parties based on the documents, is not permitted by the language of Justice Binnie in paras. 25 and 27 of *Juman*, or the language of the commitment set out in Form 22. While it is clearly open to a party to apply for leave to use documents that are subject to an undertaking to the court, a party that does so must refer to the documents it wishes to use in a way that does not breach the undertaking, or a preliminary arrangement fitting within the proviso of Form 22 must be made so as to ensure the undertaking is not broken.
- [22] In other words, with respect to documents disclosed in an action, there is an implied undertaking to the court to use the documents only in the underlying action. The parties can agree to waive it or come to whatever resolution they see fit, but what one party cannot do, absent agreement, without leave of the court, is attach the confidential documents to an affidavit in support of relief from the implied undertaking and file it in open court, as was done in this case.
- [23] Here the respondent was content to apply for a sealing order and I would not interfere with that choice. It is important to note, however, that in another case, a listing party could commence contempt proceedings, seek to have the affidavit withdrawn, or seek such other remedies as are discussed in the jurisprudence.
- [emphasis in original.]
- [21] Justice Saunders went on to note that the defendant did not ask to have the affidavit struck. Consequently, the circumstances in the case did not warrant the chambers judge striking the affidavit on the Court's own motion: *Gold* at paras. 23-24.
- [22] In his separate reasons for judgment, Justice Groberman (while concurring in the result of the appeal), would have held that the chambers judge should have struck the affidavit from the Supreme Court's record pending an application for permission to use the affidavit. He concluded that the affidavit over which the sealing order was granted, "should not be considered by the Supreme Court unless the appellant first applies for and obtains that court's permission to use the affidavit": *Gold* at para. 47.
- [23] In coming to this conclusion, Justice Groberman noted that "the remedy granted by the chambers judge -- a sealing order that left the affidavit in the court record -- did not go far enough in distancing the court from the breach [of the implied undertaking] and in ensuring that damage to confidentiality was minimized": *Gold* at para. 26.

- [24] Justice Groberman then went on to consider the question that is also before me in this hearing:
- [34] How, then, does a party apply for permission to use documents disclosed in litigation for purposes other than the litigation itself? In many situations, it is entirely unnecessary to disclose confidential information on an application of that sort. A generic description of the circumstances, which does not disclose confidential information, will usually be sufficient to allow a court to determine whether the implied undertaking should be relaxed so as to allow documents to be used for specific purposes outside the litigation.
- [35] In some cases, however, it will be necessary to reveal the documents to the court in order for a judge to determine whether a party should be allowed to use them in a way that would, absent court order, be contrary to the implied undertaking of confidentiality. In such cases, a party should make a preliminary application to the court, seeking to be allowed to use the documents for the limited purpose of making their application for broader relief from the implied undertaking. The preliminary application should be supported by an affidavit that explains why reference to the underlying documents will be necessary on the broader application, without revealing their content in such a way as to breach the implied undertaking of confidentiality.
- [36] If a court decides to grant the preliminary order, it will also be in a position to determine whether it is necessary that the documents, when filed, be sealed in the court file. It will do so by considering the nature of the documents, and the importance of public access to them in the interests of the open court principle. The weighing of the various factors may be problematic at the preliminary stage, before the judge has full access to the documents, and in some cases, the court may seal the documents on an interim basis.

[emphasis added]

- [25] Justice Groberman considered the approach suggested by the Court in Mann. The "Mann" approach is similar to the one advocated by the plaintiff in this case. It was summarized in Mann as follows:
- [37] I had been asked to outline a procedure for bringing these applications for relief of an implied undertaking. It is important to note that the application before me was brought in the context of a busy chambers list and counsel had not put their mind to a procedure.
- [38] I find that one suggested course of action could be for the party seeking to be relieved of the implied undertaking to seek an order sealing the affidavit materials containing the documents to which the implied undertaking attaches. At that application, notice should be given to all persons who would be effected by the order and argument could be made at that time, balancing the interests at play. Following that ruling, the party would then bring the application to be relieved from the implied undertaking.

- [26] Justice Groberman noted that the Mann approach was problematic, as it still "required [the court] to examine documents that are being used for an unauthorized purpose. It is for that reason that I consider that the initial application should not merely be for a sealing order, but rather for permission to use the documents at all on the application": Gold at para. 44.
- [27] Justice Groberman's approach in Gold has been followed in *Stewner v. Sawires*, 2022 BCSC 1495, and cited with approval in *Fibrogen, Inc. v. Akebia Therapeutics, Inc.*, 2022 FCA 135 at para. 68.
- [28] In *Stewner*, Master Robertson was asked to make an order releasing a party from an implied undertaking as to confidentiality regarding documents obtained in a prior action. She summarized the issue before the Court as follows:
- [9] On this application, counsel for the plaintiff not only takes issue with the relevance of these documents but the manner in which the defendant proceeded with this application given the implied undertaking. In particular the plaintiff argues that the defendant improperly disclosed confidential information in brining [sic] this application by identifying the names of the three experts who provided reports on behalf of the plaintiff, and by submitting those reports to the court, albeit in a sealed envelope.
- [29] Master Robertson then considered the appropriate process that ought to be followed with respect to the Release Application. Citing paras. 34-36 of Gold, Master Robertson noted that Justice Groberman's comments are consistent with a two-stage process, such that "a preliminary determination ought to be made as to whether such documents are needed to determine the application and, if so, how they will be dealt with including as to whether they are to be filed under seal": *Stewner* at paras. 12 and 15.
- [30] To grant the sealing order, the court must have regard to the criteria established in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [Sierra Club]: Gold at para. 17.
- [31] The *Sherman Estate* decision was released a few months after the B.C. Court of Appeal's decision in Gold. The Court in *Sherman Estate* reframed the *Sierra Club* test, as follows:
- [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and, (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness -- for example, a sealing

order, a publication ban, an order excluding the public from a hearing, or a redaction order -- properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

- [32] The onus is on the party seeking the sealing order to demonstrate that there exists an important public interest that prevails over the presumption of the open court rule: *Sherman Estate* at paras. 38, 62, 76.
- [33] The court must assess whether a sealing order should be granted, regardless of whether both parties consent to the sealing order. When considering whether to make a sealing order, it is imperative that a judge give proper consideration as to whether the open court principle demands such restriction on public access: *Gold* at para. 45.
- [34] An application for a sealing order in a civil or family case must be set for hearing, and cannot be brought by desk order, even if by consent: *Sealing Orders in Civil and Family Proceedings*, Practice Direction, PD-58 (10 February 2020).
- [35] The following principles or guidelines emerge from the jurisprudence regarding the procedure which ought to be followed when a party seeks to rely on privileged documents in support of an application to be relieved of an implied undertaking of confidentiality:
- a) Where a party wishes to use material obtained in a court proceeding for a purpose outside the scope of the underlying litigation (the "privileged material"), that party must obtain consent from the listing party, or permission from the court, to be relieved of the implied undertaking in relation to the privileged material (the "Release Application").
 - b) It is not always necessary for the court to review the privileged material when determining the merits of the Release Application. When making such an application, the applying party must refer to the privileged material it wishes to use, in a way that does not breach the undertaking.
 - c) Where it is necessary for the court to review the privileged material in order to adjudicate the Release Application, then the moving party should make a preliminary application, supported by affidavit material, explaining why the privileged documents are necessary to the adjudication of the Release Application.
 - d) In making the preliminary application, the applying party must refer to the privileged material it wishes to use, in a way that does not breach the undertaking.
 - e) If the preliminary order is granted, the court may then consider whether a sealing order is necessary, taking into consideration the criteria established in *Sierra Club. of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 and *Sherman Estate v. Donovan*, 2021 SCC 25.
 - f) The preliminary application seeking to rely on privileged documents in the Release Application, and the application for a sealing order, may be brought at the same time.

[36] With the above in mind, I turn to considering the matter before me.

Analysis

- [37] The plaintiff wishes to use confidential documents which are subject to an implied undertaking for two purposes: first, to support an application to be relieved of the implied undertaking; and second, to commence a new action against Ms. Zhang.
- [38] As noted earlier, Gold establishes that where a party wishes to use material obtained in a court proceeding for a purpose outside the scope of the underlying litigation, that party must either obtain consent from the listing party to be relieved of the implied undertaking, or permission from the court.
- [39] In her filed Application Response, Ms. Zhang opposes the documents being used to commence a new action against herself, but does not object to them being used to support the Release Application, provided that certain conditions are met (see paragraph 6, *infra*.)
- [40] The position articulated by Ms. Zhang in her Application Response could be understood to mean that she consents to relieving the plaintiff of the implied undertaking regarding the privileged documents for the purposes of the Release Application. However, the submissions made on her behalf at this hearing, suggest otherwise.
- [41] Based on the position taken at the hearing before me, it seems that Ms. Zhang agrees with Shuo Xu that the proper process that needs to be followed is that set out by Justice Groberman in Gold. If that is the case, then it would indicate that Ms. Zhang is of the view that the plaintiff must obtain leave of the court before using the privileged documents in the Release Application. This would mean that she does not consent to relieving the plaintiff of the implied undertaking for that purpose.
- [42] The confusion as to whether Ms. Zhang is consenting to relieve the plaintiff of the implied undertaking for the Release Application arises because Ms. Zhang's Application Response does not address this issue directly, and her counsel was not present at the hearing of this application to clearly explain her position to the Court. Rather, Ms. Zhang's interests were advanced by Mr. Xue (counsel for Shuo Xu), who appeared as agent for counsel for Ms. Zhang. In his oral submissions, Mr. Xue stated that the defendants have "a shared position" in that they both take no position on the application for the sealing order, and share a concern regarding the process the plaintiff is using to obtain the sealing order. This would indicate that Ms. Zhang agrees with Shuo Xu that the plaintiff cannot rely on the privileged documents in support of his Release Application, without first obtaining permission from the court. This in turn suggests that Ms. Zhang does not consent to the privileged documents being used by the plaintiff to support the Release Application.

- [43] Absent a clear indication from Ms. Zhang, I am left to conclude that the plaintiff does not have consent from Ms. Zhang to relieve him of the implied undertaking with respect to the privileged documents. Therefore, he must obtain leave of the court prior to using them in support of the Release Application.
- [44] In the circumstances, the plaintiff's application for a sealing order is premature.
- [45] In order to use the privileged documents to support his Release Application, the plaintiff must obtain leave from the court, by bringing a preliminary application explaining why the privileged documents are necessary to the adjudication of the Release Application.
- [46] In making the preliminary application, the plaintiff is required to follow the procedure set out above at paragraph 36.

Orders Made

- [47] The plaintiff's application for a sealing order is adjourned as follows:
- a) In the event that the plaintiff wishes to rely on privileged documents in support of an application to be relieved of the implied undertaking in relation to those documents (the "Release Application"), the plaintiff must bring a preliminary application seeking leave from the court to use those privileged documents in the Release Application.
 - b) The preliminary application may be heard together with the sealing order application.
 - c) The parties are at liberty to set the preliminary application for hearing in accordance with the timelines set out in the Supreme Court Civil Rules, or by consent.
- [48] I am not seized of this matter.

Costs

- [49] Costs are ordinarily awarded to the party that is successful in the application. In this case, although he did not take any position on the application for a sealing order, the procedure outlined by Mr. Xu's counsel correctly interprets the applicable jurisprudence as to the correct process that must be followed. In the circumstances, it is appropriate for this Court to award costs of this application payable by the plaintiff to the defendant, Shuo Xu, in the cause.
- [50] Given Ms. Zhang's position in the application, and the outcome, no award of costs to her is warranted.

"Shergill J."

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