

CANADA / JUDGMENT

Yang v. 0923879 B.C. Ltd.

2021 BCSC 1565

COURT

Supreme Court of British Columbia

DECIDED

24 March 2021

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2021 BCSC 1565 Yang v. 0923879 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yang v. 0923879 B.C. Ltd.,

2021 BCSC 1565

Date: 20210324

Docket: S201254

Registry: Vancouver

Between:

Zhenduo Yang, Jianhui Wu and

Larry Zou Zhao

Plaintiffs

And

0923879 B.C. Ltd., 546332 B.C. Ltd. and

Howard Michael Colton

Defendants

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiffs, appearing via videoconference on January 28, 2021 and via teleconference on February 12 and March 24, 2021:

C.H.C. Law

Counsel for Defendants, appearing via videoconference January 28, 2021 and via teleconference on February 12 and March 24, 2021:

D.W. Gibbons

Place and Dates of Hearing:

Vancouver, B.C.

January 28, February 12 and

March 24, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2021

- [1] THE COURT: The plaintiffs apply to add a new party, a company called 1220081 B.C. Ltd. ("122"), and for leave to amend the notice of civil claim to make certain additional claims.

Background

- [2] The litigation as a whole arises out of a commercial relationship involving companies and shareholders. The proposed claims have changed from the inception of this notice of application to the conclusion of submissions. The application has followed a tortuous path.
- [3] The application response on behalf of the existing defendants and 122 takes the straightforward position that the claims sought violate the rule in *Foss v. Harbottle*. That rule is summarized in *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.*, 2017 BCCA 405 at para. 27, which in turn quotes *Hercules Management v. Ernst & Young*, [1997] 2 S.C.R. 165:
- [27] The rule in *Foss v. Harbottle*, [(1843), 2 Hare 461, 67 E.R. 189 (Ch.)], (provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354, at p. 367, as follows:

The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over

the fortunes of the company by the exercise of his voting rights in general meeting.

[4] At para. 32 of EY Holdings, the court says as follows:

[32] There are exceptions to the rule in Foss v. Harbottle, but the only one said to apply in this case is the principle noted by Justice Newbury in Everest [Canadian Properties Ltd. v. CIBC World Markets Inc., 2008 BCCA 276] at para. 9, that "the rule does not apply in respect of a cause of action that 'belongs to' an individual member of the corporation or the association personally." This is perhaps less an "exception" than the statement of the converse of the rule.

[5] The reason from my point of view that the application has followed such a tortuous path is that when I heard the initial submissions on behalf of the plaintiffs, I was not satisfied that the plaintiffs had grappled head-on with the defence of Foss v. Harbottle, and I wanted to give the plaintiffs an opportunity to reconsider the submissions and to perhaps address the Foss v. Harbottle issue more directly.

[6] The matter then came back before me for a continuation, and counsel for the plaintiffs wished to rely on additional case authorities which had not been referred to initially. I was concerned about the procedural fairness of that and directed that the parties deliver written submissions, which I have read. Counsel have now appeared before me today for the third time.

Discussion

[7] It is clear from the written and oral submissions of the plaintiffs that the application is now being framed very differently from the notice of application. The plaintiffs now do not wish to proceed with any amendments addressing breach of contract and wish to withdraw further proposed amendments that would run head-on into the rule in Foss v. Harbottle.

[8] As of today, the amendments sought are narrow. What the plaintiffs seek to do is to raise a claim by the plaintiff, Ms. Wu, for conversion and unjust enrichment with respect to a \$100,000 investment that she says she made and did not get credit for personally.

[9] The difficulty with the position now being taken is that at para. 4 of Part 3: Legal Basis of the notice of application, the plaintiffs say as follows:

There exists a cause of action against the Proposed Party, namely that it was unjustly enriched by obtaining the benefit of 118's assets and fixtures purchased by Joanna on behalf of 118.

That statement in the notice of application is reflected in the original notice of civil claim at para. 41, which states:

In paying the approximate amount of \$100,000 for furnishings and supplies for the retail store on behalf of BC1180055, Joanna relied on the Furnishing Representation.

- [10] Counsel for the plaintiff says that that pleading is not meant to be an admission that the payment of the \$100,000 was only on behalf of 1180055 B.C. Ltd. ("118"), but that Ms. Wu did not receive credit for that investment. I think the attempt to salvage Ms. Wu's personal claim is, to say the least, very problematic, which I think has resulted in the plaintiffs resiling from their position that they wish to include amendments as to breach of contract.
- [11] The original amendments at what would be the new para. 53 include the words:
- the fixtures paid for by Joanna on behalf of BC1180055, the merchandise paid for by BC1180055, ...
- And at proposed new para. 56:
- In particular, BC1220081 has been selling merchandise purchased by and for BC1180055, and using the fixtures purchased by Joanna, for their own benefit, without permission.
- [12] The plaintiffs now seek to amend that amendment by seeking the following:
- In particular, BC1220081 has been using the fixtures purchased by Joanna for their own benefit without permission.
- [13] The defendants take a strong position on the application, as reflected in the written submissions which I have received. The defendants and 122 say the plaintiffs are now improperly attempting to recast their claim in reply in a futile effort to circumvent the clear fact that the claims that they have advanced and are seeking to advance are not their own.
- [14] In their written submissions, the defendants and 122 say that the plaintiffs now argue that Ms. Wu is the true owner of the furnishings and supplies that she purchased for and on behalf of 118, and that this is a new argument which should not be permitted at this stage.
- [15] In their written submissions, the defendants and 122 say that the plaintiffs have seemingly abandoned their pursuit of the claims for breach of contract; have not made any substantive reply or comment with respect to how the plaintiffs' underlying claims are not barred by the rule in *Foss v. Harbottle*; and have sought, instead, to advance in reply a completely new position that is unsupported by any evidence and contradicts admissions and positions already taken. Finally, the defendants and 122 say that the plaintiffs have advised that they will be filing a petition seeking leave to commence a derivative action in any event.
- [16] I am in a conundrum at this point. It was my hope that, with the written submissions, which I anticipated would probably amount to some reframing of the application, I would be able to provide a ruling on the merits of the application. I cannot ignore, however, the procedural unfairness to the defendants and 122 if I accede to the plaintiffs' new position and take a generous approach to the amendments in the hope that as the litigation progresses, the parties will be able to understand the claims that are made and the case that has to be met.
- [17] *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16 sets out the factors that the court should consider in adding parties:

- 1) a party is to be added where that party's participation is necessary for a proper determination of the case;
 - 2) the discretion to add parties should be generously exercised;
 - 3) there need only be an issue between the applicant and the party joined;
 - 4) evidence is not required to support a joinder application;
 - 5) pleadings are assumed to be true and must disclose a cause of action; and
 - 6) amendments should be liberally allowed.
- [18] I agree with those principles, and the merits of the dispute between parties should not rise and fall on the quality of pleadings. Errors in drafting pleadings are not usually fatal, because the court is always concerned with the overriding principle of the just, inexpensive, and speedy disposition of every proceeding on its merits.
- [19] It is possible that there is a proposed notice of civil claim that could be drafted that reflects what the plaintiffs are trying to achieve here, which is to establish that there is an individual claim brought by someone, whether it is Ms. Wu or another plaintiff, that is not caught by the rule in *Foss v. Harbottle*.
- [20] Unfortunately for the plaintiffs, this is not that application. To allow the amendments as now revised would be to permit a grafting of possibly acceptable pleadings on top of contradictory pleadings, and that is certainly not in anyone's interest.
- [21] The defendants, in my view, have been successful in establishing that this application should not be granted, because I think at least on the procedural grounds, the application as originally brought was fatally flawed because of *Foss v. Harbottle*, and it is only as a result of attempts to resurrect a claim that is not caught by the rule that the plaintiffs have survived to today. Even with the revised drafting, there are internal inconsistencies with the existing notice of civil claim that make it impossible for the proposed notice of civil claim to be read in a coherent fashion.
- [22] The plaintiffs are resiling from a major portion of their notice of application with respect to the contract claims. I do not think it is appropriate to adjourn that application as sought by the plaintiffs. The application as framed needs to be ruled on, and even to that extent, the application is fatally flawed.
- [23] The relatively minor amendments that are now being sought do not fit within the scheme of the notice of civil claim as a whole. A stranger to the claim on reading the amended notice of civil claim, if I permitted it, would be very confused about who is claiming what, and whether *Foss v. Harbottle* does or does not apply to any particular portion of the notice of civil claim.

- [24] I am compelled, therefore, to dismiss the application, and I do so. My concern, though, is what might happen if the plaintiffs conduct a wholesale review of the notice of civil claim as currently drafted, especially in view of the fact that the plaintiffs have indicated an intention to file a derivative action proceeding.
- [25] I am prepared to offer the plaintiffs an opportunity to reapply for amendments to the notice of civil claim, but I am also cognizant of the concerns about res judicata and issue estoppel. I admit to concerns in that regard because my inclination is to allow the plaintiffs the lifeline of applying for amendments if they can do so without violating the rule in *Foss v. Harbottle*. But if they cannot do that, then the matter will be an abuse of process if basically the same application is brought and the same flaws are contained in the application.

Conclusion

- [26] I think the safest thing to do is to simply leave the parties to their own devices, for want of a better expression. The plaintiffs' application is dismissed.
- [27] I am not inclined to include a term in the order that the plaintiffs are granted, or are conversely not granted, an opportunity to apply for further amendments, because I think that opportunity always exists, and whether the amendments are granted or not on a further application may depend on whether the proposed amendments are so close to the current amendments that they are considered an abuse of process.
- [28] That concludes my reasons for judgment. Are there any submissions on costs?
- [SUBMISSIONS RE COSTS]
- [29] THE COURT: I think there is a temptation to order costs to the existing defendants in the cause, but we have the existence of a non-party to consider. It is possible that the plaintiffs will eventually be successful, but I have to accede to the position of the defendants and 122 on this application. I think the defence of *Foss v. Harbottle* was front and centre, and regardless of the merits of the actual underlying dispute, on the pleadings point the defendants and 122 have been successful, and therefore I will order that costs on scale B are payable by the plaintiffs to the defendants and 1220081 B.C. Ltd. in any event of the cause but not payable forthwith.
- [30] I should say as a final note that if a transcript of my reasons for judgment is required, I reserve the right to edit for clarity. That completes the proceedings for today.

"Master Harper"

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