

CANADA / JUDGMENT

Zhang Estate v. Yin

2025 BCSC 666

COURT

Supreme Court of British Columbia

DECIDED

8 April 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 666 Zhang Estate v. Yin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang Estate v. Yin,

2025 BCSC 666

Date: 20250408

Docket: S2010412

Registry: Vancouver

Between:

Junjie Tao, Executor of the Estate of Tong Zhang aka

Tony Zhang, Deceased

Plaintiff

And:

Hang Yin, Yan Chun Liu, Yu Yin, 1011066 B.C. Ltd., 1079770 B.C. Ltd.,

1032734 B.C. Ltd., 1085842 B.C. Ltd., 1079775 B.C. Ltd., and

1084960 B.C. Ltd.

Defendants

And:

Chunli Zhang

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Funt

Reasons for Ruling (New Witnesses)

Counsel for the Plaintiff:

M.J. Hewitt

Counsel for the Defendants:

V. Pappas

R. Gagnon

J. Spencer

A. Wang, Articled Student

Counsel for the Defendant by way of Counterclaim (Severed):

(No appearance expected)

Place and Date of Hearing:

Vancouver, B.C.

April 4, 2025

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2025

1.0 The Application

- [1] The defendants make application to call three further witnesses which were listed on their amended witness list dated March 28, 2025.
- [2] On March 31, 2025, the trial started.
- [3] The plaintiff, Ms. Tao, opposes the application.

2.0 Relevant Background

- [4] The defendants, in their written submissions, set forth their factual basis for their application, which, with Tab references removed but with recent ruling citations included, reads:
 - 1. On January 27, 2025, the Defendants filed their Trial Brief.
 - 2. On January 31, 2025, Justice Leblanc granted a trial management order (the "TMC Order") providing, inter alia, that the Defendants shall provide their amended trial brief by February 10, 2025, containing an updated witness list, if any.

3. On February 10, 2025, the Defendants filed an Amended Trial Brief. The Amended Trial Brief included new expert witnesses: Dr. Juan Wang and Ms. Alesandra Leggio Di Matteo.
4. By way of applications filed February 28, 2025, the Defendants sought to amend their response to civil claim in order to plead the defence of *ex turpi causa non oritur actio*; serve Dr. Juan Wang's primary expert report after the deadline for doing so; and amend their Counterclaim; as well, the Defendants also resisted an application to sever their Counterclaim from the main action at the same time as the foregoing applications ("Pre-Trial Applications").
5. The Defendants' Amended Trial Brief included witnesses relevant to their desired amended pleading and expert report for trial. When the defendants were ultimately unsuccessful in amending their pleading to include their desired defence (on March 19, 2025) [2025 BCSC 510] and relying on their desired expert report (on March 13, 2025) [2025 BCSC 467] and opposing severance of their Counterclaim (on March 24, 2025) [2025 BCSC 547], they were forced to reconsider the approach to their defence.
6. To this end, on March 28, 2025, the Defendants amended their witness list (the "Amended Witness List") to include three new witnesses:
 - (a) [Yin] Jun
 - (b) Shao Dongxue
 - (c) Qinghe Liu(the "New Witnesses")
7. On March 28, 2025 at 12:12PM, the Defendants served their Amended Witness List, including Will Say statements for each listed witness, on the Plaintiff via email.

3.0 The Law

- [5] In 685946 B.C. Ltd. v. Nijjar, 2023 BCSC 1037, Justice Girn set forth the relevant law:
- [46] In *Fu v. Zhu*, 2017 BCSC 749, Justice Griffin, then of this Court, summarized 4 factors to consider when exercising discretion to allow a party to call a witness not previously disclosed on a witness list in accordance with time requirements of the Rules: [at para. 50]
- (a) Will there be prejudice to the opposing party due to the lack of notice?
 - (b) Is there a reasonable explanation for the failure to give notice? For example, is the lack of notice due to something new learned during trial or was the witness known to the party before trial and a strategic decision was initially made by that party to not call the witness?
 - (c) Will precluding the witness being called prevent determination of an issue in the case on the merits?
 - (d) Should the party be permitted to call the witness in the interests of justice?

[47] Trial by ambush should not be condoned. As Justice Griffin noted in *Fu*, at para. 20:

[Proper pretrial disclosure] is part of what allows opposing parties to be prepared for trial and to be ready to meet and challenge the other side's case. It also allows for the efficient conduct of civil trials, all of which contributes to the fair administration of justice.

[48] It must not be forgotten that one of the objects of the Rules of Court is to ensure just, speedy and inexpensive litigation: Rule 1-3.

[49] As well, R. 13-1(19) states:

When making an order under these Supreme Court Civil Rules, the court may impose terms and conditions and give directions it considers will further the object of the Supreme Court Civil Rules.

4.0 The Defendants' Submissions

[6] In their written submissions, the defendants say:

Whether the delay or failure was a matter of trial strategy

8. The addition of the New Witnesses to the Defendants case was not the result of trial strategy or any desire to ambush the Plaintiffs. The history speaks for itself. The Defendants had hoped to defend their case one way, and then quickly pivoted when met with a series of losses in their Pre-Trial Applications.

The complexity and scale of the particular litigation matter

9. This dispute is a complex commercial fraud case involving allegations of misappropriation, including the improper/personal use of (allegedly) tens of millions of dollars of the Plaintiff's [Mr. Zhang Jr., now deceased] funds through various closely held corporate entities and bank accounts held by the Defendants (which allegations the Defendants deny). In response, the Defendants allege that the purported misappropriated funds were transferred from China by the Defendant by Counterclaim, Chunli Zhang, not the Plaintiff, for the purposes of investing in the real estate projects at issue.
10. The Plaintiff is calling 11 witnesses. Without its New Witnesses, the Defendants only have 5 witnesses, being 3 defendant-witnesses, 1 lay person, and 1 forensic accountant.

Whether refusing to let the witness testify will prevent the determination of the issues on their merits

11. The Defendants submit that refusing to allow them to call the New Witnesses will prevent the determination of the issues of this case on its merits.
12. In their defence, the Defendants plead that they never entered into any oral agreements with the Plaintiff, that the Plaintiff was never involved in any of the real estate projects at issue, and that the Plaintiff never advanced any funds to the Defendants. Rather, the

Defendants have consistently taken the position that it was the Plaintiff's father, Mr. Chunli Zhang Sr. ("Zhang Sr."), the defendant by counterclaim, who had a business relationship with the Defendant Hang Yin ("Mr. Yin"), and that it was Zhang Sr. who advanced funds to the Defendants.

13. As part of this defence, the Defendants seek to prove that the source of the funds for investment in the projects at issue in the litigation was not the Plaintiff, who earned a very modest income, but rather Zhang Sr., a senior government official who obtained significant wealth through improper means and methods. The New Witnesses' testimony is required to determine these issues, including that:
 - (a) Yin Jun: Mr. Jun [Yin] will testify that he assisted Mr. [Hang] Yin with transferring Zhang Sr.'s cash from China to Canada for investment in the projects that are the subject of this litigation.
 - (b) Shao Dongxue: Ms. Dongxue, Mr. [Hang] Yin's accountant, will testify that she assisted Mr. [Hang] Yin with transferring Chunli Zhang's cash from China to Canada.

Without the foregoing two witnesses from China, the Defendants only have Mr. [Hang] Yin's evidence regarding who he contracted with and whose money he received. These witnesses are required to corroborate his version of events, and to explain how the parties moved bags of cash from China to Canada to be invested in the Projects.

- (c) Qinghe Liu: Mr. Liu, is a lawyer residing in China. As a lawyer, he is reticent to provide viva voce evidence, but he is prepared to offer an affidavit. He will aver that he acted for Mr. [Hang] Yin for the purpose of advising him during the investigation by the Jixi prefecture of the Chinese Communist Party Disciplinary Inspection Commission and the National Supervision Committee (DIC-NSC) into Chunli Zhang. He will further aver that in this capacity he learned that while serving as a government employee, Zhang Sr. abused his position by illegally embezzling and fraudulently obtaining millions of yuan in public funds, among other things, for personal use.

Mr. Qinghe is the Defendants only witness, apart from Mr. [Hang] Yin, with firsthand knowledge of Zhang Sr.'s access to substantial funds, to support that Zhang Sr. is the most likely Zhang family member who contracted with Mr. [Hang] Yin, as the Defendants allege.

14. Precluding the New Witnesses from testifying will prevent the Defendants from making out their defence.

Prejudice to the other party

15. The Plaintiff was served with the Amended Witness List on March 28, 2025. Trial commenced on March 31, 2025. The Defendants open their case on April 28, 2025.

16. Permitting the New Witnesses to provide evidence at trial will not prejudice the Plaintiff. The Plaintiffs have had adequate time (over one month) to prepare for cross-examinations of the New Witnesses, who are testifying on limited aspects of this case.
17. In light of all of the foregoing, the Defendants respectfully request they be permitted to call their proposed New Witnesses.

5.0 Analysis

a) Proposed New Witnesses, Jun Yin and Shao Dongxue

- [7] I will first address whether Mr. Jun Yin and Ms. Shao Dongxue should be allowed to testify.
- [8] Mr. Jun Yin is Mr. Hang Yin's younger brother. As may be seen from the defendants' written submissions, Ms. Dongxue is Mr. Hang Yin's accountant.
- [9] Mr. Hang Yin knew each of Mr. Jun Yin and Ms. Dongxue before the start of the matters giving rise to the litigation and their whereabouts.
- [10] As may be seen from paragraphs 12 and 13 of their written submissions, the testimony of each of Mr. Jun Yin and Ms. Dongxue the defendants submit is now "required" to prove the source of funds for Mr. Zhang Jr.'s investment. In 2022, Mr. Zhang Jr. died. The action before the Court was filed on October 16, 2020.
- [11] One of the defendants' defences is that any funds and related investments were actually those of Mr. Zhang Sr., and accordingly, Mr. Zhang Jr. was never a person with a claim as against the defendants to found the current action.
- [12] In sum, the foregoing defence is not a new defence.
- [13] Bluntly stated, if the evidence of either Mr. Jun Yin or Ms. Dongxue was "required", they should have been listed at the outset. Their existence, whereabouts, and potential testimony, has been known before the start of the litigation.
- [14] Our common law litigation is driven by the parties. The parties frame the action and bring the evidence they may wish to present. As Justice Girn notes, one of the objects of the Rules of Court is to "ensure just, speedy and inexpensive litigation".
- [15] In *Fu v. Zhu*, Justice Griffin considered the prejudice associated with a lack of notice, and whether it could have been avoided. In this regard, Justice Griffin stated:
- [34] In *Sabbagh v. Li*, 2015 BCSC 2653 [Sabbagh], the trial commenced on January 12, 2015, and the plaintiff gave notice of four new witnesses he wished to call on January 6, including will-say statements. An amended witness list, including the four new witnesses, was delivered on January 9. The Court clearly considered that it was necessary for the plaintiff to obtain the Court's leave to call the four witnesses (see para. 14). The Court allowed only two of the four witnesses to be called.

- [35] In *Sabbagh* it was clear that in exercising his discretion, Hinkson C.J.S.C. considered that the defendants were well able to anticipate the evidence of one of the permitted witnesses because there had been a full disclosure of that witness's file for some time, being medical records.
- [36] In the case of the other permitted witness in *Sabbagh*, Hinkson C.J.S.C. considered that the plaintiff was not to be faulted for the late notice because the witness was only necessary since the previously intended witness had died.
- [37] In *Sabbagh*, Hinkson C.J.S.C. did not permit the plaintiff to call two of the witnesses who were added late to the witness list. The facts of the ruling suggest this was because there was nothing new about these witnesses' evidence that could not have been discovered earlier and it was simply a change in the plaintiff's trial strategy to decide to call them.
- [38] In *Sabbagh*, the Court referred to two earlier decisions of this Court in which parties were not given leave to call witnesses not named on a witness list delivered in accordance with the time requirements of the Rules. In both of the earlier authorities the Court had taken into account the fact that the witness was known to the party as a potential witness within the time to give proper notice. In other words, a change in trial strategy was not seen as a valid reason for the exercise of the Court's discretion to permit the calling of a belatedly disclosed witness.
- [39] The Court in *Sabbagh* did not refer to *Houston v. Kine*, 2011 BCCA 358 [Houston], although the Court can be taken to have been aware of that decision.
- [40] In *Houston* Hinkson J.A., as he then was, held that a trial judge had erred in refusing to allow a defendant to call additional witnesses at trial, not previously identified in the defendant's trial brief. In that case the key reason was that the evidence of these witnesses was newly discovered and these witnesses could not have been known earlier.
- [41] The *Houston* case involved a claim for damages for personal injuries. There was a hiatus in the trial during which the plaintiff went on holiday. The new witnesses observed the plaintiff on holidays and were to testify as to her activities which could be considered inconsistent with her evidence as to her injuries.
- [42] The Court in *Houston* held that the evidence of the new witnesses should have been admitted at trial because these witnesses could not have been known before the hiatus in the trial when the events took place about which they were going to testify. As well, the Court held that their evidence went to the merits of the issues in the case.
- [43] The case of *Houston* was relied on in *Walker v. John Doe*, 2012 BCSC 1091. In that case, the trial judge permitted a party to rely on documents at trial that had not been listed before trial on the basis that the parties had not known of the documents before trial. The Court expressly noted that it was not a case where the plaintiff had withheld documents for a strategic purpose.

- [16] With respect to both Mr. Jun Yin and Ms. Dongxue, the rule that a change in trial strategy is not a valid reason to permit calling of a belatedly disclosed witness applies. Further, there is not newly disclosed evidence.
- [17] In the circumstances, the very late listing of Mr. Jun Yin and Ms. Dongxue as witnesses is unfair and prejudicial to the plaintiff in the preparation and presentation of the plaintiff's case.
- [18] Although not a tactical ambush, the prejudicial effects on the presentation of the plaintiff's case is the same, especially having regard to the fact that much of the defendants' proposed evidence through these two witnesses arose and occurred in China.
- [19] Except with the future consent of plaintiff's counsel, I will not allow either Mr. Jun Yin or Ms. Dongxue to be called as witnesses in this trial.
- b) Proposed New Witness, Mr. Qinghe Liu
- [20] If I were to grant leave to call Mr. Qinghe Liu, I understand that he is now willing to testify by video link.
- [21] I do not see the utility in calling Mr. Liu as a witness.
- [22] As counsel, Mr. Liu represented Mr. Hang Yin with respect to a purported investigation by the Chinese authorities into Mr. Zhang Sr.
- [23] In considering the defendants' application to call Mr. Liu, I will assume that there was such an investigation.
- [24] From the defendants' summary of Mr. Liu's expected evidence, the key aspects are that as part of his representation of Mr. Hang Yin, he learned:
- a) the Chinese authorities investigated Mr. Zhang Sr. for corruption as a public official;
 - b) the Chinese authorities interviewed Mr. Hang Yin in relation to their investigation of Mr. Zhang Sr.;
 - c) the Chinese investigation revealed that Mr. Zhang Sr. provided large amounts of cash to Mr. Hang Yin for real estate investments in our Province;
 - d) based on the investigation by the Chinese authorities, Mr. Zhang Sr. is now wanted for the crimes of embezzlement, bribery, misappropriation of public funds and corporate bribery; and
 - e) Mr. Zhang Sr. has fled China and is now on the People's Republic of China's "wanted list".
- [25] The defendants submit that the foregoing testimony will support their clients' position that they contracted with Mr. Zhang Sr. and not Mr. Zhang Jr. Accordingly, Ms. Tao, as the executor of Mr. Zhang Jr., is not the proper plaintiff to bring the claim. In short, if there is a claim, it is a claim that should be brought by Mr. Zhang Sr.

[26] In written submissions, Ms. Tao's counsel says (in part):

2. According to the summary of Mr. Liu's anticipated evidence and counsel's submissions, the defendants seek to rely on his evidence to establish the truth of the criminal allegations against Chunli Zhang in China.
3. The plaintiff objects to the addition of Mr. Liu to the defendants' witness list not only due to the prejudice to the plaintiff's ability to prepare to properly test and respond to this evidence, but also due to its inadmissibility of hearsay evidence.
4. Admissibility is relevant to the court's exercise of its discretion in considering whether to allow late additions to the witness list, as the utility of the evidence is a relevant factor to assessing the interests of justice. There is no utility in permitting the defendants to call, and requesting the plaintiff to respond to, obviously inadmissible evidence.

[27] With respect to hearsay evidence and the principled exception that allows evidence with the indicia of necessity and reliability to be tendered for the truth of its contents although not falling within a traditional exception, in *Saadati v. Moorhead*, 2013 BCSC 636, I wrote:

[11] [] the Supreme Court of Canada stated in *R. v. Khelawon*, 2006 SCC 57, adopting its earlier summary in *R. v. Mapara*, 2005 SCC 23, to describe the governing framework. In *Khelawon*, the Court stated:

[42] It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (Wigmore on Evidence (2nd ed. 1923), vol. III, s. 1420, at p. 153). This Court first accepted this approach in *Khan* [*R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531] and later recognized its primacy in *Starr*, [*R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40]. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
- (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

- (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

And then further,

- [14] In *Khelawon*, the Supreme Court of Canada discussed the principles of necessity and reliability as they relate to a fair trial. Necessity and reliability are the underlying elements of the principled approach exception to the rule against hearsay. These two principles, when lacking, may also result in the "rare case" where a statement otherwise falling within a traditional exception may still be excluded. In describing trial fairness, the Court stated:
- [49] The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.
- [28] Mr. Liu's proposed evidence is mainly and fundamentally based on that which he was told or read.
- [29] The proposed evidenced does not fall within any of the traditional exceptions to hearsay.
- [30] With respect to the principled exception, I have doubts as to both necessity and reliability.
- [31] With respect to any charges, I do not have evidence that the People's Republic of China does not have an official record of charges of the nature alleged, which may not be obtained. To the extent that the People's Republic of China does not provide access to an official record of charges, this in turn raises questions of reliability.

[32] With respect to reliability, I am not satisfied that the cross-examination of the relevant Chinese officials would "add little if anything to the process". I also cannot find that the "circumstances allow for sufficient" testing of evidence other than by contemporaneous cross-examination.

[33] Further, as I raised during oral submissions, the fact that a person has been charged with an offence under our Criminal Code is not a judicial finding and would have little, if any, probative value.

[34] Separately, the defendants submit with respect to Mr. Liu (as they do with the other two new witnesses they proposed) that:

Permitting the New Witnesses to provide evidence at trial will not prejudice the Plaintiff. The Plaintiffs have had adequate time (over one month) to prepare for cross-examinations of the New Witnesses, who are testifying on limited aspects of this case.

[35] Presently, the trial has been stood down for this week, but will resume next week for the following 40 available court days (other than for three and-a-half court days). The trial is scheduled to finish on June 13, 2025.

[36] When witnesses reside in a different country, many time zones away, and speak a different language, it makes it particularly difficult for counsel wishing to prepare for cross-examination to make inquiries or to collect possible further information.

[37] On sitting days, counsel usually have no time available other than to attend to the trial and all the related trial matters occurring both during court hours and before and after court hours. In addition, counsel will usually need to attend to matters arising from existing clients and those seeking to retain counsel for new matters.

[38] I do not accept that with the late disclosure of Mr. Liu as a New Witness (and Mr. Jun Yin and Ms. Dongxue as New Witnesses) that the plaintiff would not be prejudiced.

Conclusion

[39] The defendants' application to call the three new witnesses listed on their amended witness list dated March 28, 2025 is dismissed.

"Funt J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/06/2025BCSC0666.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/zhang-estate-v-yin-2025-bcsc-666>

Prepared on 28 October 2026 · Esheria