IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hsu v. International Private Vaults Inc.,* 2024 BCSC 335

Date: 20240228
Docket: S231176
Registry: Vancouver

Between:

Michael Dale Hsu

Plaintiff

And

International Private Vaults Inc.

Defendant

Docket: S228442
Registry: Vancouver

Between:

Terence Dilan Kulanayagam

Plaintiff

And

International Private Vaults Inc., Katherine Thomas and William (Bill) Thomas

Defendants

Before: Associate Judge Bilawich

Reasons for Judgment

Counsel for the Plaintiff in both actions:	A. Spence
Counsel for Defendant(s) in both actions:	A. Grewal S. Syal
Place and Date of Hearing:	Vancouver, B.C. January 24, 2024
Place and Date of Judgment:	Vancouver, B.C. February 28, 2024

Introduction

[1] In actions S231176 (the "Hsu Action") and S228442 (the "Kulanayagam Action"), the respective plaintiffs apply, pursuant to s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") to lift a stay of proceedings. If granted, this would allow them to commence/continue proceedings against Katherine Thomas and William (Bill) Thomas, both of whom are currently protected by a stay by virtue of having filed consumer proposals, pursuant to s. 66.13 of the *BIA*.

[2] In the Hsu Action, Mr. Hsu also applies to add Mr. and Ms. Thomas as defendants. They are already defendants in the Kulanayagam Action.

Background

[3] International Private Vaults Inc. ("IPV"), a defendant in both actions, is a private BC company which was in the business of renting safety deposit boxes, on either a known renter or anonymous renter basis. The boxes were located in a secure vault at IPV's office located at 120 - 8160 Park Road, Richmond, BC.

[4] In the Kulanayagam Action, Ms. Thomas is described as sole director of IPV. Mr. Thomas is described as being an employee and principal of IPV. In the application material he is also referred to as Chief Executive Officer.

[5] Access to IPV's vault involved several layers of security, including:

a) A security key card was issued to each renter, which was required to enter IPV's office. Each card had a serial number;

b) An iris scan was taken of each renter. Anyone wishing to enter IPV's vault was subjected to an iris scan to confirm their identity; and

c) Each safety deposit box required two keys to open. IPV had one key and the second was given to the renter. Keys had no identifying information on them.

[6] In the Kulanayagam Action, Mr. Kulanayagam says he rented a safety deposit box [#103], apparently on an anonymous basis, and deposited the following into it:

a) 1 - 1 oz Gold Maple coin purchased for $1,661;

b) 4 - 1 oz gold Maple coins purchased for $6,444;

c) 2 - 1 oz Gold Maple coins purchased for $3,236;

d) 3 - 1 oz Gold Maple coins purchased for $4,986;

e) 3 - 1 oz AUS PAMP gold bars purchased for $5,145 AUD;

f) $6,700 AUD;

g) 3,390 CHF;

h) $54,316 CAD;

i) $143,130 HKD; and

j) £1,100 GBP.

[7] He estimates the market value of these items was about $116,000.

[8] In the Hsu Action, Mr. Hsu says he rented a safety deposit box [#170], apparently on an anonymous basis, and deposited the following into it:

a) 180 - 1 oz Pan American Rounds (silver);

b) 30 - 5 oz Pan American bars (silver);

c) 3 - 1 oz Pan American bars (silver);

d) 12 - 10 oz Pan American bars (silver);

e) 40 - 1 oz Stagecoach round (silver);

f) 10 - 1 oz Stagecoach bars (silver);

g) 32 - 1 oz Canadian Maple Leaf (silver);

h) 2 - 100 oz Royal Canadian Mint bars (silver) with seal numbers;

i) 4 - 1 oz RMC bar (silver) 0.999;

j) 1 - 1 oz Johnson Matthey bar (silver);

k) 17 - 1 oz bars 0.999 (gold);

l) 6 - 1 oz Canadian Maple Leaf coin (gold);

m) 2 - 1 oz Krugerrand (gold);

n) 3 - 1 oz Perth Mint bar 0.9999 (gold);

o) 2 - 1 oz bar 0.9999 (gold);

p) 2 - 1 oz Credit Suisse bar (platinum);

q) 4 - 1 oz Canadian Maple Leaf coin 0.9995 (platinum);

r) 32 - 1 oz Valcambi Suisse bar 0.9995 (platinum);

s) 7 - 1 oz bar 0.9995 (platinum);

t) $1,000 AUD; and

u) $18,000 CAD.

[9] He estimates the market value of these items at about $176,557.

[10] IPV failed to keep its office rent in good standing. In January 2020, its landlord exercised its right of distraint with respect to the contents of IPV's office.

[11] On June 10, 2022, Mr. and Ms. Thomas filed a joint consumer proposal under s. 66.13 of the *BIA*.

[12] On or about June 25, 2020, the landlord gave IPV notice that its lease was terminated.

[13] IPV was able to reach an agreement with the landlord which allowed it to re-enter the premises, drill out the safety deposit boxes and remove their contents. The contents were placed into boxes and taken to a new location for safekeeping.

[14] Mr. Thomas swore an affidavit in the Kulanayagam Action asserting that during the distraint or re-letting process, all security and computer equipment in IPV's former office was destroyed, including a server on which iris scan data was stored. This impaired IPV's ability to identify customers, particularly those who had rented boxes on an anonymous basis.

[15] IPV rejected demands from Mr. Kulanayagam and Mr. Hsu that it return the contents of their respective boxes, on the basis they had failed to establish to IPV's satisfaction that they were the renter.

The Kulanayagam Action

[16] On October 19, 2022, Mr. Kulanayagam filed a notice to civil claim naming IPV, Ms. Thomas and Mr. Thomas as defendants. He alleges they removed and converted the contents of his box [#103] and that they wrongfully conspired to take possession and control of the contents without lawful authority and have wrongfully withheld them from him. He claims for return of the contents, a declaration that the contents are subject to a remedial constructive trust in his favour, or alternatively damages for conversion or unjust enrichment.

[17] Under the Legal Basis section, he generically references conversion, conspiracy, trusts, unjust enrichment and law of contract. Presumably the claim in contract only applies to IPV, as he does not allege Mr. and Ms. Thomas were parties to the rental agreement in their personal capacities. He does allege that the defendants [plural] violated the terms of the agreement, have refused to provide him access to the box and its contents and unlawfully took possession of his property and have committed wilful misconduct in doing so.

[18] IPV initially failed to file a response to civil claim. There was some delay in serving Mr. and Ms. Thomas. On May 11, 2023, Mr. Kulanayagam applied for default judgment as against IPV. On June 16, 2023, the application was adjourned generally and IPV filed a response to civil claim.

[19] On September 29, 2023, Mr. Kulanayagam filed an application to serve Mr. and Ms. Thomas by alternative means. By consent order pronounced November 29, 2023, alternative service was allowed via email sent to defendants' counsel. The order also provided that the contents of box #103 be inventoried by counsel or by a mutually agreeable third party and thereafter be delivered to plaintiff's counsel in trust. The inventory took place on November 20, 2023. The box was empty.

The Hsu Action

[20] On February 21, 2023, Mr. Hsu filed a notice of civil claim, naming IPV as the only defendant. IPV did not file a response to civil claim.

[21] On June 2, 2023, Mr. Hsu obtained a default judgment against IPV. The order initially provided that IPV was to deliver the items listed at para. 8 of these reasons to Mr. Hsu or pay him their value, to be assessed.

[22] On June 16, 2023, IPV applied to set aside the default judgment. Justice Gomery declined to do so, but he varied the terms of the order to provide that the parties retain a mutually agreed third party to inventory the contents of box #170, after which they be delivered to plaintiff's counsel.

[23] When inventoried, the contents included the silver items listed as para. 8 a) - j) of these reasons, but did not include the gold, platinum or currency listed as k) - u). During argument, plaintiff's counsel suggested the silver items had a collective estimated value of about $2,500.

[24] The draft amended notice of civil claim attached to the application sets out proposed allegations regarding Mr. and Ms. Thomas. It does not specify what their respective roles with IPV were. It alleges IPV and/or its agents drilled out the lock to

his safety deposit box, emptied it into another container and moved that container to a new location. Upon doing so, IPV became trustee for the plaintiff's property and assumed an obligation to protect his interests. He goes on to say the defendants [plural] removed and converted the contents of his box. IPV breached its trust obligations and Mr. and Ms. Thomas knowingly assisted IPV in this breach of trust. Further or in the alternative, Mr. and Ms. Thomas are in receipt of trust property for their own personal benefit. Relief sought includes return of the box contents, a declaration that any money or assets for which the defendant[s] cannot account are subject to a remedial constructive trust, damages for conversion or unjust enrichment, and tracing.

Application to Lift Stay or Proceedings

[25] In both actions, the respective plaintiffs apply to lift the stay of proceedings in respect of Mr. and Ms. Thomas.

Applicable Law

[26] Section 69.3 of the *BIA* provides for a stay of proceedings on the bankruptcy of any debtor. This includes a debtor who makes a consumer proposal.

> **Stays of proceedings — bankruptcies**
>
> **69.3 (1)** Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[27] A creditor who is subject to a stay can apply to court under s. 69.4 of the *BIA* for a declaration that s. 69.3 no longer operates in respect of that creditor:

> **Court may declare that stays, etc., cease**
>
> **69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> **(a)** that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> **(b)** that it is equitable on other grounds to make such a declaration.

[28] In *Re Maple Homes Canada Ltd.*, 2000 BCSC 1443 at para. 28, Justice L. Smith summarized the grounds on which the court will lift a stay of proceedings:

> **28** Some grounds on which courts will lift stays of proceedings were set out in *Re Advocate Mines Limited* (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.) at p. 278:
>
> > The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
> >
> > 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> >
> > 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
> >
> > 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> >
> > 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
> >
> > 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

[29] At para. 33, Justice Smith summarized the applicable principles:

> **33** The principles that emerge from the jurisprudence may be summarized:
>
> > (1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the *Bankruptcy and Insolvency Act*, which is to permit the rehabilitation of the bankrupt unfettered by past debts.
> >
> > (2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.
> >
> > (3) The existence of one or more of the factors listed in *Re Advocate Mines* will be an important consideration, but is not determinative.
> >
> > (4) The court is not to attempt to determine the proposed claim on its merits.
> >
> > (5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants.

[30] Section 178(1)(d) of the *BIA* provides that an order of discharge does not release the bankrupt from any debt arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity:

> **Debts not released by order of discharge**
>
> **178 (1)** 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 or, in the Province of Quebec, as a trustee or administrator of the property of others;

[31] Section 67(1)(a) of the *BIA* provides that the property of a bankrupt divisible among his (or her) creditors shall not comprise property held in trust for any other person:

> **Property of bankrupt**
>
> **67 (1)** The property of a bankrupt divisible among his creditors shall not comprise
>
> **(a)** property held by the bankrupt in trust for any other person;
>
> …

Analysis

[32] Mr. Kulanayagam and Mr. Hsu argue there are compelling reasons to lift the stays, that they would be materially prejudiced if the stays continue and it would be equitable to make the declarations sought. The claim/proposed claim against Mr. and Ms. Thomas involve debts or liabilities arising out of alleged fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. A discharge would not constitute a defence: see s. 178 (1)(d) of the *BIA*.

[33] Further, they say certain types of debtor misconduct can impress funds or property with a constructive trust in favour of a third party, such that it does not form part of the bankrupt's property which vests in the trustee. They rely on *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160 at paras. 33-37, amongst other authorities. Mr. and Ms. Thomas, as strangers to the trust, could be held found liable (a) as "trustees *de son tort*", (b) if they knowingly assisted in a fraudulent or

dishonest design on the part of the trustee, or (c) if they knowingly received trust property.

[34] IPV, Mr. Thomas and Ms. Thomas do not take issue with the summary of the relevant law set out by the applicants. They say there are several other actions started by other IPV customers in which the Mr. and Ms. Thomas were named as defendants. The claims against them in those actions have also been stayed. One of the objects of the *BIA* is that all creditors of the same class be treated equally and another is to provide for an orderly distribution, with creditors of the same rank standing on an equal footing. They complain the applicants seek put themselves in a superior position to these other claimants whose actions are stayed. They also suggest the applicants have failed to establish they would be materially prejudiced by the stay continuing. At most, they have asserted vague claims regarding what they think occurred. Mr. and Ms. Thomas deny the allegations made against them and say they acted in their capacities as officer and director of IPV respectively to protect customer assets.

[35] There are some differences in the factual basis and legal basis in the notice of civil claim (“NCC”) in the Kulanayagam Action and proposed amendments to the NCC in the Hsu Action. Those in the Hsu Action are more detailed. Both applications were argued before me on the same basis. I am assuming for purposes of this decision that counsel intends to amend the Kulanayagam NCC to conform with what is set out in the Hsu NCC. The key allegation is that upon IPV arranging to have customer boxes drilled, removing the contents and relocating those elsewhere, it became a trustee in relation to each customer’s property. Mr. and Ms. Thomas are alleged to have either knowingly assisted IPV in breaching that trust and/or to have taken all or some of the contents for themselves, thus putting them in knowing receipt of trust property.

[36] Neither of the parties referred me to any authority in which a knowing assistance or knowing receipt claim was the basis for having a stay lifted.

[37] A stranger to a trust can be found liable for breach of trust if (a) a trust is found to exist, (b) that the trustee perpetrated a dishonest or fraudulent breach of trust and (c) that the stranger participated in and had knowledge of the dishonest and fraudulent breach of trust: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 at para. 34. The knowledge requirement includes recklessness or wilful blindness: *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787 [*Air Canada*] at paras. 39-41.

[38] Knowing receipt arises where a stranger to a trust has received trust monies or property for his or her personal benefit. See *Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805. The elements include that (a) property the defendant has received was subject to a trust in favour of the plaintiff, (b) that the property was taken from the plaintiff in a breach of trust, (c) that the defendant had knowledge of the facts sufficient to put a reasonable person on notice or inquiry regarding the breach of trust (constructive knowledge) and (d) that the defendant received the trust property and applied it for their own use and benefit: summarized in *Kherani v. Bank of Montreal*, 2012 ONSC 2230 at para. 128.

[39] I am satisfied that if Mr. and Ms. Thomas are found to have knowingly assisted IPV in breaching a trust or to be knowingly receipt in trust property, this would be considered a debt for which a discharge would not be a defence. If they are in possession of trust property, it would not form part of the assets divisible among their creditors.

[40] I am also satisfied that the applicants would suffer material prejudice if the stays of proceedings are continued as against them and that it is equitable in all the circumstances to grant the exemptions sought.

[41] With regard to the Mr. and Ms. Thomas' argument that lifting the stay in these two actions is inappropriate because claims by other IPV customers have been stayed against them, there is no evidence that the plaintiffs in those other actions have applied to lift the stays and had their applications dismissed. Failure on the part of other plaintiffs to apply to lift the stays does not prevent Mr. Kulanayagam and Mr. Hsu from doing so.

[42] I grant the applications of Mr. Kulanayagam and Mr. Hsu to lift the stay of proceedings in relation to their claims/proposed claim against Mr. and Ms. Thomas.

Application to Add Defendants

Applicable Law

[43] Mr. Hsu applies to add Mr. and Ms. Thomas as defendants to his action. He relies on Rule 6-2(7)(b) and (c) of the *Supreme Court Civil Rules* ("*SCCR*"), B.C. Reg. 168/2009:

> **Adding, removing or substituting parties by order**
>
> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> …
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[44] In *Madadi v. Nichols*, 2021 BCCA 10 at paras. 21–24, the court of appeal summarized the approach to these two sub-rules as follows:

> [21] Rule 6-2(7)(b) has been interpreted narrowly, as being concerned with remedying defects in the proceedings. A plaintiff applicant must establish either that the proposed defendant "ought to have been joined as a party" or that their "participation in the proceeding is necessary": *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16-17; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15; and *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 at para. 36.
>
> [22] Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is

> not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45 [*Neilson Architects*]; *Strata Plan LMS 1816 v. Acastina Investments Ltd.,* 2004 BCCA 578 [*Acastina*]; and *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.) [*Binstead*]. I would define a frivolous issue as an issue that does not go to establishing the cause of action, does not advance a claim known to law, or serves no useful purpose and would be a waste of the court's time and public resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-5(1)(b): see, for example, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65, citing in *Willow v. Chong*, 2013 BCSC 1083 at para. 20.
>
> [23] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the proposed defendants. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendants: *Neilson Architects* at paras. 60, 62, and 75.
>
> [24] If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. …

[45] In *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16, the court set out a summary of general principles for interpretation of Rules 6-2(7)(b) and (c):

> 1) A party should be added where that party's participation is necessary for the proper determination of the case …;
>
> 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters …;
>
> 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined …;
>
> 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties …;

> 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action …;
>
> 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried….
>
> [Citations omitted.]

Analysis

[46] Mr. Hsu says the draft pleadings establish a cause of action against Mr. and Ms. Thomas and sets out material facts which are sufficient to establish a real and not frivolous issue between them.

[47] IPV, Mr. Thomas and Ms. Thomas argue that the acts alleged as against Mr. and Ms. Thomas are not in their personal capacities but rather based on acts they undertook as officer and director respectively of IPV. They say Mr. Hsu is attempting to pierce the corporate veil.

[48] I note that in *Air Canada* at paras. 61-62, the Supreme Court concluded that a director of a company can be held personally liable for knowing assistance in a breach of trust where the director is aware that money received by a corporation is to be held in trust for a third party and not used for general corporate purposes. Likewise, if Mr. and Ms. Thomas were to be found to have taken trust funds or property and used them for their personal benefit, that would clearly fall outside the scope of their roles with IPV.

[49] In view of the facts and legal based that are set out in the proposed draft Amended Notice of Civil Claim, I am satisfied that Mr. Hsu has identified a real question or issue between him and Mr. and Ms. Thomas that relates to or is connected with the relief, remedy, or subject matter of the proceeding against IPV and which is not frivolous.

[50] I grant Mr. Hsu's application to add Mr. and Ms. Thomas as defendants to the Hsu Action and grant him eave to file an amended NCC in the form attached as Schedule "A" to his application.

Costs

[51] Mr. Kulanayagam and Mr. Hsu have been successful in their applications and as such are each entitled to costs in the cause as against IPV, Mr. Thomas and Ms. Thomas.

"Associate Judge Bilawich"