

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yang v. Lu*,
2024 BCSC 729

Date: 20240430
Docket: S2013500
Registry: Vancouver

Between:

**Xiaoqin Yang
Ming Zhang**

Plaintiffs

And

**Ping Hui Lu, Unison International Holdings Ltd., Baocheng Su,
Yong Jiu Jiang and Chang Jun Qiao**

Defendants

And

Ping Hui Lu

Plaintiff by Counterclaim

And

**Xiaoqin Yang
Ming Zhang**

Defendants by way of Counterclaim

Before: The Honourable Justice Shergill

Reasons for Judgment

In Chambers

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Counterclaim:

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Place and Date of Hearing:

Vancouver, B.C.
April 4, 2024

Place and Date of Judgment:

Vancouver, B.C.
April 30, 2024

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Overview

[1] In this application, the Plaintiffs seek an order pursuant to s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. [BIA], that the automatic stay of this action against Ping Hui Lu be lifted.

[2] At issue is whether the Plaintiffs are likely to be materially prejudiced by the continuation of the stay, or if there are other equitable grounds for lifting the stay.

[3] This application turns on whether the matters which the Plaintiffs wish to try in the proposed litigation have already been determined by another court or have merged into that earlier judgment.

Background

[4] Ms. Lu is one of four personal defendants named in the underlying action commenced by the plaintiffs. The personal defendants are all shareholders and directors of Unison International Holdings Ltd. The dispute centers around the purchase of shares and warrants by Unison in Electrameccanica Vehicles Corp. (“EVC”) and involves allegations of breach of trust and oppression.

[5] The within action was commenced in 2020 (the “2020 Action”). Through it, the Plaintiffs (who are husband and wife) sought a declaration, amongst other things, that Ms. Lu held 25 shares in Unison in trust for Ms. Yang (the “Unison Trust”), and that Unison held some warrants in trust for Mr. Zhang. In December 2021, Justice Veenstra severed the claims against Ms. Lu for breach of trust and consequential relief (and Ms. Lu’s counterclaim) from the other claims in the 2020 Action, and ordered the latter to be heard with Vancouver Action No. 1913633 (the “2019 Action”).

[6] The Plaintiffs in this action commenced the 2019 Action against Ms. Lu and her husband, Guang Ning Zhang. In it, the Plaintiffs alleged that the Defendants held some units of EVC in trust for the Plaintiffs. They sought various declarations, an accounting, a tracing order, and damages.

[7] The trial against Ms. Lu and her husband proceeded before Justice Weatherill in 2022. The Plaintiffs were successful on all counts. In lengthy reasons for judgment indexed at *Zhang v. Zhang*, 2022 BCSC 2156, Justice Weatherill dismissed the counterclaims in both actions, and ordered Ms. Lu and her husband to pay damages for breach of trust and unjust enrichment totalling more than \$6 million (plus interest), punitive damages, and an accounting and tracing order for monies they received from the sale of EVC shares.

[8] Ms. Lu was deemed bankrupt as of September 21, 2023. The earliest date for her discharge from bankruptcy is June 2025. It is expected that the discharge will be contested.

[9] There is no dispute that the Plaintiffs are the single largest creditor in Ms. Lu's bankruptcy.

[10] The second half of the bifurcated trial is set to proceed in June 2025, for 20 days.

Legal Framework

[11] Pursuant to s. 69.4 of the *BIA*, the court may lift a stay of proceedings on application of a creditor if it is satisfied that:

- a) the creditor is likely to be materially prejudiced by the continued operation of the stay; or
- b) it is equitable on other grounds to lift the stay.

[12] The circumstances in which the court will exercise its discretion under s. 69.4 of the *BIA* to lift the stay, include:

1. actions against the bankrupt for a debt to which a discharge would not be a defence;
2. actions regarding a contingent or unliquidated debt, the proof and valuation of which has a degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *BIA* 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; and
5. actions which, at the date of bankruptcy, have progressed to a point where logic dictates that the action should be permitted to continue to judgment.

(*Panorama Parkview Homes Ltd. (Re)*, 2017 BCSC 2071 (“*Panorama*”) at para. 10, citing with approval, *Re Advocate Mines Limited* (1984), 52 C.B.R. (N.S.) 277 (Ont S.C.) (“*Advocate Mines*”) at p. 278)

[13] To lift the stay, the court must be satisfied that one or more of the above factors from *Advocate Mines* are present, and that the applicant is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration: *Panorama* at para. 11.

[14] Continuing an action after a bankruptcy filing is an exceptional situation. Consequently, “mere pleadings disclosing a claim are not sufficient to warrant an exemption from a stay”: *Burke v. Red Barn at Mattick’s Ltd.*, 2019 BCSC 69 at para. 14.

[15] To justify the lifting of the stay, the plaintiff must provide some evidence to support the conclusion that there is a fair issue to be tried. This is not a high onus and falls short of proof on a balance of probabilities: *Burke* at para. 14.

[16] It is not the court’s role in such an application to determine the proposed claim on its merits: *Burke* at para.15.

Analysis

[17] The Plaintiffs submit that factors 1, 2, 3, and 5, from *Advocate Mines* apply in this case.

[18] According to the Plaintiffs, the remaining issues to be tried as against all Defendants (including Ms. Lu), are:

- a) whether the conduct of the registered directors of Unison, including Ms. Lu, was oppressive and unduly prejudicial to Ms. Yang;
- b) whether the registered directors of Unison, excluding Ms. Lu, acted as trustees de son tort for Ms. Yang and therefore assumed personal liability in connection with the EVC shares and warrants that Ms. Yang indirectly owned through owning 25 shares in Unison;
- c) whether Unison held 1,000,000 EVC warrants in trust for Mr. Zhang and breached the said trust by refusing to transfer the said warrants or the benefit of them to Mr. Zhang on his request;
- d) whether the registered directors of Unison, including Ms. Lu, are liable for causing Unison to breach the said trust;
- e) whether Ms. Lu is in breach of trust by transferring US \$668,124.01 held by her in trust for Ms. Yang to Unison for Unison to purchase 210,000 replacement shares;
- f) whether Unison holds the 210,000 replacement shares in a constructive trust or resulting trust for Ms. Yang;
- g) whether Mr. Zhang and Ms. Yang should be awarded damages for breaches of trusts and if yes, the amount of damages should be awarded and how the liability should be apportioned amongst Unison and the registered directors of Unison including Ms. Lu.

(the “remaining issues”)

[19] Of these issues, the following ones relate specifically to Ms. Lu:

- a) whether Ms. Lu acted in an oppressive manner;
- b) whether Ms. Lu, acting in her capacity as director of Unison, caused Unison to commit breach of trust with respect to the EVC shares, and is therefore liable for the same;
- c) whether Ms. Lu is in breach of trust with respect to profits obtained by selling the EVC shares; and
- d) whether the plaintiffs should be awarded damages for breaches of trust, and if so, how much; and how should liability be apportioned amongst Unison and the registered directors including Ms. Lu;

(the “proposed claim”)

[20] The Plaintiffs submit that they will be materially prejudiced if the stay is not lifted, as this may prevent the fair and complete adjudication of their claims.

Specifically, they say that the above claims against Ms. Lu which flow from the remaining issues, will not be adjudicated. They further submit that even if prejudice is not proven, the stay should be lifted on equitable grounds.

[21] It is Ms. Lu's position that the proposed claim against her is *res judicata*, and further, that the cause of action giving rise to the breach of trust and other claims against her, particularly the claims linked to the EVC shares, have merged into the judgment of Justice Weatherill.

[22] As the main point of contention is whether the issues in the proposed claim against Ms. Lu are barred due to *res judicata* or merger, I will address that matter first.

[23] The following analysis is conducted bearing in mind that it is not the role of this Court to determine the proposed claim on its merits. Nevertheless, I must assess the evidence to see if the Plaintiffs have provided some evidence that there is a fair issue to be tried in the proposed claim.

[24] Subsequent to the trial, the Plaintiffs amended their Notice of Civil Claim ("NOCC") in the 2020 Action for the fourth time. The further amendments included the findings of fact made by Justice Weatherill, and also sought additional orders.

[25] In their Notice of Application, the Plaintiffs provide some context for why they wish to proceed with the proposed claim:

21. On February 10, 2023, at the examination in aid of execution of Ms. Lu, the applicants learned that on or about January 14, 2021, at the urging of the registered directors of Unison other than Ms. Lu, Ms. Lu paid USD \$668,124.01 [C\$840,500.00] to Unison to enable it to exercise 210,000 EVC warrants to replace 210,000 of the 420,000 EVC shares that Unison transferred to Ms. Lu on December 6, 2019. Unison used the said funds to exercise 210,000 EVC Warrants and to acquire 210,000 EVC shares. The notice of civil claim has been further amended to include this cause of action.

22. In June 2023, the applicants learned through document disclosure from EVC that the individual defendants caused Unison to exercise a total of 900,000 warrants of EVC, including the 210,000 warrants referred to in paragraph 20. This was done without the knowledge of the plaintiffs.

[26] It is submitted that this Fourth Amended NOCC includes many of the same allegations already considered and ruled on by Justice Weatherill or were essential to his decision.

[27] Ms. Lu argues that the allegations contained in the Fourth Amended NOCC focus on the 210,000 EVC shares that Unison held in trust and which Ms. Lu transferred to herself in breach of that trust. Justice Weatherill addressed this very issue when he found that Ms. Lu had breached the trust when she sold the 210,000 shares. He awarded Ms. Zhang the Canadian dollar equivalent of the highest price that those shares had traded at after the breach: *Zhang*, paras. 363-366.

[28] The present application is ostensibly brought based on the Plaintiffs' discovery of Ms. Lu's actions in relation to the Unison Trust that they were unaware of at the time of the trial before Justice Weatherill. It is primarily this alleged wrongful conduct that they seek to have remedied.

[29] Ms. Lu makes a compelling argument that either these matters were determined by Justice Weatherill and are therefore *res judicata*, or that the Plaintiffs are foreclosed from raising them under the doctrine of merger. The relevant passages from Justice Weatherill's decision are as follows:

[359] The 210,000 EVC shares that Helen caused Unison to transfer to her are captured by the following words of the Unison Trust "any income or advantage in respect of the Shares". It is clear that Helen holds the shares in trust for Rose.

...

[360] Whenever an express trustee acquires property by means of his or her trusteeship, or his or her control of trust property, the trustee must account for it to the beneficiary. Equity compels the trustee to hold the property on the terms of the express trust by imposing a trust obligation in favour of the beneficiary: *Waters*' at 550–551; *Pirani v. Pirani*, 2020 BCSC 974 at para. 137. A breach of trust occurs whenever a trustee's duty to act precisely within the terms of his or her trust obligations is not fulfilled: *Waters*' at 1356; *Pirani*, at para. 125. A breach of a trustee's duty of loyalty can arise in circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances: *Meng Estate v. Liem*, 2019 BCCA 127 at para. 35.

[361] A trustee's duty of loyalty demands that in the absence of authorization, a trustee is accountable for any right, profit, or benefit acquired by reason of or by use of his or her position: *Chung* at para. 55.

[362] Helen owed a fiduciary duty to Rose. She breached that fiduciary duty and the Unison Trust by trading some or all of the 210,000 EVC shares she held in trust for Rose without Rose's knowledge or consent. She failed to account to Rose for the proceeds of sale and secretly profited from it, preferring her own interests to those of Rose.

[363] After receiving the 420,000 EVC shares in her account on December 5, 2019, Helen sold 548,883 of the shares for proceeds totaling US\$2,388,967.

[364] Plainly, Helen breached the Unison Trust.

[365] Helen breached the Unison Trust on December 5, 2019 when she caused Unison to distribute to her 420,000 EVC shares, 210,000 of which belonged to Rose. The highest price those shares traded at thereafter was US\$13.60 on November 20, 2020.

[366] Following the principles enunciated by the Supreme Court of Canada and by this Court, as set out under the heading dealing with Nick's breach of the Discounted EVC Units Trust above, I find that Rose is entitled to an award of damages against Helen assessed as follows: 210,000 shares at US\$13.60 per share = US\$2,856,000. The Canadian dollar equivalent on November 20, 2020 was US\$2,856,000 x 1.3086CAD/USD = C\$3,737,362.

[30] The doctrine of merger stands for the principle that a judgment acts as a bar to the original cause of action such that the cause is merged into the remedy of the judgment. Consequently, a plaintiff is obliged to claim all the relief that they are entitled to in the first instance. The plaintiff cannot return to the court for a second time for the same cause. Once a final order of judgment is passed, the cause of action is extinguished. *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256, at para. 64.

[31] I conclude that the doctrines of *res judicata* and merger have application to this case. Having regard to all of the material before me, I find that the Plaintiffs have failed to meet the burden of providing some evidence that there is a fair issue to be tried in the proposed claim.

[32] Further, I see no material prejudice to the Plaintiffs if the stay of the proposed action is not lifted. It is evident from the Reasons for Judgment that Justice Weatherill did not trust Ms. Lu and did not believe her at trial when she said she was disclosing everything in relation to her dealings with the Unison Trust. Consequently,

he required Ms. Lu and her husband to provide a full accounting of all monies received from the sale of shares in EVC, by either of them or by Unison, together with a tracing order and such ancillary orders as were necessary to carry out the accounting and tracing orders: *Zhang* at paras. 383-384; Justice Weatherill Order of December 9, 2022, Term 4.

[33] In my view, Term 4 provides the Plaintiffs with the ability to obtain the relief they are now seeking, without having to convince the Trustee of further wrongdoing on Ms. Lu's part. In addition, these Reasons do not foreclose the Plaintiffs from pursuing Ms. Lu after she is discharged from bankruptcy. In other words, by refusing to lift the stay, I am not extinguishing the Plaintiffs' claim against Ms. Lu. Rather, the claim continues to be suspended by operation of the *BIA*.

[34] Finally, I do not find any equitable or other grounds to lift the stay and require Ms. Lu to incur the cost of participating in a 20-day trial, given the lack of evidence that there is a fair issue to be tried in the proposed claim. To that end, I note the following in relation to the *Advocate Mines* factors.

[35] Regarding factor 1, the parties agree that the proposed claim for oppression cannot survive the bankruptcy. There is also no dispute that the remaining issues (2-4) may potentially survive Ms. Lu's discharge from bankruptcy. Section 178(1)(d) of the *BIA* provides that an order of discharge does not release the bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation, or defalcation, while acting in a fiduciary capacity: *Global Royalties Ltd. v. David Brook*, 2015 ONSC 6277; leave to appeal ref'd, 2016 ONCA 50. However, as I have noted, those claims are hindered by the doctrines of *res judicata* or merger.

[36] With respect to factor 2, I agree that where there are a number of actions in which the bankrupt is one of the defendants, and those actions involve complex issues such as fraud, conversion, and breach of trust, it may be appropriate to lift the stay: *Re Montalban*, 2003 BCSC 811. However, in this case, the issues of fraud, conversion, and breach of trust in relation to Ms. Lu's handling of the Unison Trust were already addressed by Justice Weatherill. To capture the current concerns

regarding the secret profit that Ms. Lu allegedly took from her handling of the Unison Trust, the Plaintiffs have the tracing and accounting relief that Justice Weatherill has already provided. There is no reason why they cannot use the usual procedures in the *BIA* to obtain that relief; they do not need to convince the trustee of further wrongdoing.

[37] This brings me to factor 3. On application of the Plaintiffs, Justice Veenstra found that the claim against Ms. Lu was severable from the claims against the other defendants. That is why the trial proceeded before Justice Weatherill on a bifurcated basis. If the Plaintiffs genuinely believed that the issues regarding Ms. Lu were intimately connected to the issues regarding the other Defendants, they should not have sought severance. Insofar as the remaining issues are concerned, Ms. Lu does not need to be a party to the upcoming litigation in order to provide the evidence that the Plaintiffs may need to prove their claims against the remaining Defendants.

[38] The Plaintiffs' reliance on factor 5 also does not assist. This factor does not apply as the issues raised in the proposed claim have already been adjudicated.

[39] I wish to note one final thing. To the extent that the stay prevents the Plaintiffs from obtaining an accounting and pursuing the tracing remedy provided for in Term 4, it may be appropriate to have the stay lifted for that limited purpose. Such an order was not sought, though I note that Ms. Lu does not object to a lifting order being granted for that limited purpose.

Order Made

[40] The application is dismissed, with costs to Ping Hui Lu.

“Shergill J.”