IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lonking (China) Machinery Sales Co. Ltd. v. Zhao,* 2024 BCSC 1437

Date: 20240808
Docket: S165799
Registry: Vancouver

Between:

Lonking (China) Machinery Sales Co. Ltd.

Plaintiff

And

Xingfu Zhao also known as Xing Fu Zhao and Rentao Li also known as Ren Tao Li

Defendants

- and -

Docket: S165800
Registry: Vancouver

Between:

Lonking Machine Replace Parts Co. Ltd., Longyan Fujian

Plaintiff

And

Xingfu Zhao also known as Xing Fu Zhao and Rentao Li also known as Ren Tao Li

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for Plaintiffs:	D. R. McGowan
Counsel for Defendants:	S. R. Schachter, K.C. J. Parker E. Chen
Place and Dates of Hearing:	Vancouver, B.C. May 16, 2024
Place and Date of Judgment:	Vancouver, B.C. August 8, 2024

[1] On January 17, 2024, after trial I dismissed the plaintiffs' action seeking the recognition and enforcement of two commercial judgments obtained by the plaintiffs against the defendants in the People's Republic of China (the "Chinese Judgments"): *Lonking (China) Machinery Sales Co. Ltd. v. Zhao*, 2024 BCSC 79.

[2] The parties were unable to agree on costs.

[3] The defendants seek an award of special costs of the proceeding, including on this application. In the alternative, they seek an award costs of this proceeding and this application to be assessed as double costs after November 15, 2019, the date of a formal settlement offer.

[4] The plaintiffs submit that each party should bear their own costs. In the alternative, they submit that an award of costs against them should be set off against the amount owing under the Chinese Judgments.

[5] For the reasons that follow, I award the defendants costs for all steps taken up to and including November 15, 2019, as costs at Scale B, and costs for all steps taken after November 15, 2019, including this application, as double costs.

Where special costs are warranted

[6] This Court has the jurisdiction to make an award of special costs pursuant to its inherent jurisdiction and R. 14-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009: *Westsea Construction Ltd v. 0759533 B.C. Ltd*., 2013 BCSC 1352 at para. 25.

[7] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, the Court described the function and standard for special costs as follows:

> [8] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word "reprehensible". The term represents a general and all encompassing expression of the applicable standard for an award of special cost. "Reprehensible" conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof or

> rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself …

[8] In *Westsea*, the Court identified various "thematic groups" where courts have considered that an award of special costs was appropriate. These thematic groups include:

a) "Misleading the Court" (at paras. 65–72). Justice Gropper noted that untruthful testimony is a particularly reprehensible form of conduct deserving of rebuke (at para. 65) and cited *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305, leave to appeal to SCC ref'd, [2011] S.C.C.A. No. 442 for the proposition that a person "who attempts to perpetrate a deceit on the court is guilty of reprehensible conduct": *Westsea* at para. 69.

b) "Sharp Practice Derogating from the Rules of Professional Conduct and the Rules of Court" (at paras. 58–64). Justice Gropper cited as an example *Grewal v. Nijjer*, 2011 BCCA 505, where the court upheld an order of special costs finding "[t]he Nijjers put Mr. Grewal to much trouble and expense in striving to obtain proper document discovery and particulars, only to be met with what the judge found to be 'ongoing delay and obfuscation'": *Grewal* at para. 17.

[9] As Justice Gropper noted in *Westsea*:

> [37] ... the purpose of a special costs award is to chastise a litigant. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue.

[10] The line is drawn between evidence which is merely rejected by the court, not warranting an award of special costs, and evidence which is intended or designed to mislead, or is otherwise put forth for an improper motive, which does warrant the court's rebuke: *Westsea* at paras. 70–72; *Mayer* at paras. 12–15; *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at para. 73.

[11] Special costs are not justified just because a party robustly challenged the credibility of an opponent's witness or because a party prosecuted or defended an action in an uncompromising and zealous way: *McEvoy v. Ford Motor Co*. (1990), 45 B.C.L.R. (2d) 363, [1990] B.C.J. No. 2961 (S.C.) at para. 11.

[12] Special costs will not be awarded just because witness testimony was accepted or rejected: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal to SCC ref'd, 34725 (21 June 2012).

Does the plaintiffs' conduct warrant special costs?

[13] The defendants submit that leading up to the summary trial in April 2019, the plaintiffs supported their case with the allegation that actual notice of the Chinese Judgements had been given to the defendants and grounded it in the affidavit evidence of Mr. Zhang and Mr. Qiu.

[14] The defendants submit that the record demonstrates that the plaintiffs intended to mislead the court, in particular to obtain judgment on summary trial, by its failure to produce key documents in a timely manner and by relying on the false but critical evidence of Mr. Zhang.

[15] The Court held that due to significant issues of credibility, the matter was not suited to be determined by way of summary trial.

[16] The defendants submit that the plaintiffs misled the court at the summary trial, without key documents or facts having been disclosed. If the summary trial had resulted in judgment against the defendants, they submit that documents and facts, including Mr. Qiu's admission under cross-examination at trial that the Chinese lawsuits were not discussed on a key November 2013 phone call, would never have seen the light of day in court.

[17] The defendants argue that the narrative the plaintiffs put before the court on the summary trial in 2019 was misleading, and the truth only emerged at trial, in part as a result of last-minute disclosure of important documents by the plaintiffs.

[18] Much of the concerns raised by the defendants relate to the evidence of Mr. Zhang. Mr. Zhang was external legal counsel to the plaintiffs in China at the time of the incidents in question and remained in that position at the time he provided affidavit evidence considered in the summary trial. At the time of trial, he was no longer external legal counsel. I found Mr. Zhang's evidence to cause concern regarding both its reliability and credibility:

> [91] For the first time, at trial Mr. Zhang testified that he received a call from Mr. Zhao in early November 2013, after the litigation was filed but before the November 15, 2013 call which included Mr. Qiu. He testified that on the earlier call Mr. Zhao acknowledged being sued by Lonking. Mr. Zhang explained this call as the call he mentions in his pre-trial evidence, and that he did not actually recollect the November 15, 2013 call at all until he recently reviewed his notebook. The defendants deny this earlier call ever took place.
>
> [92] Mr. Zhang seems to discover evidence to refresh his memory each time he goes back and reviews his phone records and other documents. This includes not only notes of the November 15, 2013 call, but also email correspondence with Ms. Liu (Ms. Li's sister-in-law and former Hexing employee) on March 12, 2014 using Mr. Zhang's personal email address in which she provides him with banking, passport and Canadian address information of the defendants. He testified he thought the March 12 email referred to the address of the defendants' daughter and he did not think he could make use of the bank and passport information, so he forgot about it. This makes no sense given Mr. Zhang's role and the payments Lonking were seeking. The email was also sent to Yueda Huang the CFO of Lonking Sales, contained an email address clearly revealing Ms. Liu's identity, contained further personal information of the defendants and it showed that Lonking had the address for the defendants before obtaining the judgments. Yet Lonking never sent the defendants any notice that would have enabled them to appeal or seek a retrial within the deadlines. Lonking did produce a later, anonymous-looking screenshot of an email from Ms. Liu from April 2015 and described the sender as an informant. This supported earlier pre-trial evidence of Mr. Zhang that Lonking did not know how to reach the defendants until well after the effective dates of the judgment. This raises serious concerns about Mr. Zhang's credibility and the reliability of his recollection.

[19] The evidence of the past CEO of the plaintiffs did not raise similar concerns:

> [96] I accept that Mr. Qiu may have believed that the subject of the call was about resolving the Chinese litigation. However, what the defendants testified they understood from Mr. Qiu's words, including the fact that he did not confirm the existence of a lawsuit and referred generally to litigation being the responsibility of Mr. San Yim Li (Chairman of Lonking), is that Mr. Qiu was not going to sue them. As aptly described by the defendants, the parties were ships passing in the night.

[20] The plaintiffs submit that Mr. Zhang's conduct, and the conduct of the plaintiffs in the proceedings generally was not reprehensible. They note that Mr. Zhang was not an employee of the plaintiffs nor was he ever under their control. The history of discovery and production was not extraordinary. Disclosure was made as documents came to their attention, admittedly being late-in-the-day for some documents.

[21] After considering the submissions of the defendants and the history of the litigation as they set it out, I do not find that the conduct of Mr. Zhang or the plaintiffs in the handling of this action raise concerns over the propriety or motives of the plaintiffs which would attract an award of special costs.

Where double costs are warranted

[22] Rule 9-1 addresses costs awards when there has been an offer to settle. Rule 9-1(4) stipulates the court can consider a settlement offer when deciding the issue of costs. Rule 9-1(5) sets out the options for costs in the face of a settlement offer, and paragraph (b) specifically grants the court discretion to award double costs.

[23] Rule 9-1(6) sets out the factors to consider when assessing costs in the face of an offer to settle:

> (6) In making an order under subrule (5), the court may consider the following:
>
> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[24] The dominant and overarching objective of R. 9-1 is to promote reasonable settlements and to attach some consequences to the failure of a party to accept a reasonable settlement: *Brewster v. Li*, 2014 BCSC 463 at para. 15.

[25] In *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16, leave to appeal to SCC ref'd, [2008] S.C.C.A. No. 454, the Court of Appeal explained:

> [16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

[26] An award of double costs against the plaintiff for the period following a settlement offer to the end of trial is typical when the plaintiff recovers less at trial than was offered: *Level One Construction Ltd. v. Burnham*, 2019 BCSC 548 at para. 15.

[27] With respect to the issue of the costs for the costs application itself, R. 9-1(5)(b) provides the Court wide discretion to award double costs for "all or some" of the steps taken following a settlement offer. This was affirmed in *927966 Ontario Ltd. v. Cogenix Development Corp.,* 2002 BCSC 442 at para. 8 [Cogenix]:

> While the authorities are helpful as a guide, the court clearly has the discretion to make whatever order in respect to costs is deemed appropriate in all the circumstances of the case.

[28] The Court of Appeal cited the above principle from *Cogenix* with approval in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.,* 2020 BCCA 69 at para. 140. One example of the Court awarding double costs for the costs application itself is *Dodgshon v. Marier*, 2023 BCSC 1648 at para. 32.

Are double costs warranted?

[29] The defendants retained present counsel in mid-September 2018. In October 2018, the defendants applied for and obtained orders adjourning the plaintiffs' summary trial applications and requiring Mr. Qiu and Mr. Zhang to be cross-

examined on their affidavits. In November 2018, the defendants cross-examined Mr. Zhang.

[30] On December 10, 2018, the defendants made a settlement offer to the plaintiffs to settle the case for $2.5 million, which set out the defendants' clear position after their new counsel had taken stock of the proceedings:

> There is some common ground in this case that provides our client with a very strong argument that the judgments will not be enforced. Our clients were not served with notice of the Chinese Actions in a manner that satisfies the Canadian standards of natural justice. Your client knew that our clients were in Canada and how to contact them, yet did not deliver the claims to their attention or to the attention of the Hexing business representative in China. In regard to the latter, I am attaching an unsworn affidavit of Ms. Pan, which we expect to be sworn in this form. It will demonstrate that your client proceeded to obtain the judgments without disclosing to the court the existence of two tri-party agreements. This should be viewed as a fraud on the Chinese courts and will provide additional motivation to the British Columbia court to refuse to enforce the judgments.
>
> If the court does not dismiss the enforcement proceedings outright because of the failure to properly serve the claims, it will then have to address the apology letters and the telephone calls that are in dispute. It is very likely that the court will not deal with the disputes in the evidence on a summary trial application and will direct a full trial so the court can observe the witnesses who participated in the calls, our clients and Messrs Qiu and Zhang.

[31] This offer was not accepted, and the plaintiffs pursued their summary trial application, which as I noted above was found to be unsuitable for summary disposition.

[32] On May 15, 2019, following the summary trial but before reasons for judgment were issued, the defendants made an offer for $2.9 million and stated:

> It is our view that the evidence supports the outright dismissal of Lonking's applications and that Madam Justice Mathews appeared motivated to get to that result. At best for your client, the matter will be referred to the trial list. Should the matter be referred to the trial list, a trial judge will very likely conclude that the Chinese proceedings did not accord with Canadian principles of natural justice, both because of the service issues and the failure to disclose the Tri-Party Agreement to the trial court.

[33] Neither of the defendants' offers cited above contained the mandatory language for costs consequences under the *Rules*, but the offers would have made

clear to the plaintiffs the defendants' theory of the case and view of the probable outcome.

[34] After the matter was referred to the trial list, on November 15, 2019, the defendants again offered to settle for $2.9 million. This offer contained the mandatory language for a formal offer under R. 9-1(c)(iii). This offer was not accepted by the plaintiffs.

[35] The claims of the plaintiffs totalled approximately RMB 34 million plus interest since 2013. In late December 2018, the principal outstanding equalled approximately $5 million.

[36] The plaintiffs submit that because this was essentially a credibility contest, they should not be expected to have accepted an offer of less than the full amount. They point to their own offer made in 2021 in the amount of RMB 19 million (approximately $3.7 million) which was rejected by the defendants and submit this supports the reasonableness of the plaintiffs' rejection of the defendants' offers. I am at a loss as to how the plaintiffs can reasonably submit their prior offer to settle for less than the full amount supports this proposition.

[37] The defendants' offer was not a nuisance offer. The amount involved was a significant portion of the amount claimed by the plaintiffs (more than 50% of the principal amount).

[38] The defendants are retired individuals facing protracted and expensive litigation. The plaintiffs are a very large, international, publicly traded conglomerate and could afford to take the risks associated with losing claims of this size.

[39] The defendants had pointed out the frailties of the plaintiffs' case in previous offer letters, and it turned out that their case failed on the same basis as outlined in those letters. The plaintiffs were well aware from the result at summary trial that its witnesses would be subjected to cross-examination at a full trial. The plaintiffs were in the position to assess these witnesses and the previous evidence given by them

in affidavits, particularly Mr. Zhang. In that context, the offer was generous and should reasonably have been accepted.

[40] The defendants are entitled to their costs in the proceeding as costs at Scale B and double costs after November 15, 2019, including the costs of this application.

The plaintiffs' submission that the parties should bear their own costs

[41] The plaintiffs make a surprising submission that the parties should bear their own costs since the successful defendants admitted to owing money to the plaintiffs. This, they submit, is a conflicting position. It is not. That was not the subject matter of the claims.

The plaintiffs' submission that set-offs should apply

[42] The plaintiffs submit that because there are valid judgments in China, this Court should order and offset of any award of costs against those judgments. They submit:

> This Court should not condone or facilitate the intentional non-payment of one's debts, regardless of whether this Court is prepared to allow enforcement process on such debts in Canada. It would be antithetical to the well-established principles of comity to allow the Defendants to enforce a costs award against Lonking in Canada while at the same time allowing the Defendants to ignore their debts in China. One way to remedy that unusual situation is to order that any costs award pronounced in this proceeding in favour of the Defendants be equitably set-off against their judgment debt owing under the Chinese Orders.

[43] In support of their argument, the plaintiffs refer me to *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689, 1985 CanLII 144 (B.C.C.A.) at para. 23; *Baxter v. West Coast Air Ltd.*, 2012 BCSC 1097 at paras. 31–45; *Surespan Construction Ltd. v. Dawson Recreation & Landscaping*, 2023 BCSC 531 at paras. 2, 25.

[44] None of those decisions involve an equitable set-off between foreign and domestic judgments. Further, I held that the Chinese Judgments were not enforceable in British Columbia.

[45] This is not an unusual situation. This is the risk that creditors take when seeking to enforce a foreign judgment in Canada. The defendants in effect seek to enforce the Chinese Judgments using the costs process as a back door when they were not allowed through the front door.

Conclusion

[46] The plaintiffs are jointly and severally responsible to pay the defendants' costs of this proceeding, to be assessed as follows:

a) costs for all steps taken up to and including November 15, 2019, will be assessed as ordinary costs at Scale B; and

b) costs for all steps taken after November 15, 2019, including this application, will be assessed as double costs at Scale B.

"Wilkinson J."