IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Dragon Driving School et al,***
2005 BCSC 1093

Date: 20050714
Docket: S041357
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And

Dragon Driving School Canada Ltd., Foon-Wai (David) Chiu, Fung Kwan (Tammy) Lo, Crispine Argana Diaz, also known as Crispina Argana Diaz, Bao Kang Huang, Yu Fei Zhang, Yi Liu, Yam Hau Chan et al

Defendants

Before: The Honourable Mr. Justice Groberman

Oral Reasons for Judgment
July 14, 2005

Counsel for the Plaintiffs	F.G. Potts Brad Martyniuk
Counsel for the Defendant Diaz	G. Abraham Goeujon
Appearing in Person	David Chiu Tammy Lo
Date and Place of Trial/Hearing:	June 27 – 30 July 4 - 8, 11 – 13, 2005 Vancouver, B.C.

[1] The plaintiff claims damages arising out of a fraudulent scheme for the issuance of British Columbia driver's licences. Mr. Chiu was the principal of Dragon Driving School. Ms. Diaz was a driving examiner and an employee of the plaintiff. It has been admitted that in exchange for payments from Mr. Chiu, Ms. Diaz fraudulently recorded that Dragon's clients had passed knowledge and road tests, and she fraudulently issued driver's licences to them.

[2] The issue at this juncture is how the jury should be instructed on the assessment of damages.

[3] The plaintiff is a public corporation offering automobile insurance in British Columbia, and it is also the public agency charged with licensing drivers under s. 25 of the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318. It claims that it has suffered damages as a result of the fraudulent scheme operated by Dragon Driving School, Mr. Chiu and Ms. Diaz. In particular, it says that some drivers who obtained their driver's licences fraudulently subsequently caused accidents and that the plaintiff made payments in respect of those accidents. It says that it would not have made the payments had it been aware that the drivers were not properly licensed. It also seeks to

recover the considerable sums that it says it expended to investigate the bribery scheme and to establish which licensees had not properly been examined.

[4] The plaintiff, however, claims that it is entitled to elect to receive damages on an alternative basis, as well. It says that it is entitled to recover from Mr. Chiu and Ms. Diaz all the money that each of them received as a result of the bribery scheme. Further, it argues that those funds are impressed with a trust and that it is entitled to tracing remedies allowing it to recover from Ms. Lo (Mr. Chiu's common-law wife) any of the funds that found their way into her assets.

[5] This judgment is given under significant time pressures. Although counsel for the plaintiff has provided the court with four extensive books of authorities over the course of this trial, it was not until yesterday afternoon that the parties were able to present their arguments. This trial was scheduled to be completed last week, and the members of the jury have, accordingly, already been detained for longer than they bargained for. The parties agree, as do I, that final addresses should proceed this morning and that I should complete my address to the jury this afternoon.

[6] Characteristically, Mr. Potts has been very fair in his presentation of his client's argument. The court is, nonetheless, somewhat handicapped by the lack of a full adversarial presentation. Mr. Goeujon has, for the most part, supported the plaintiff's position. Neither Mr. Chiu nor Ms. Lo, whose interests are most affected by the plaintiff's argument, have legal training and neither is represented by counsel. Without meaning any disrespect to them, their presentations have not been particularly helpful in discussing the legal issues that I must resolve at this point.

Compensatory Damages

[7] The plaintiff's claims for compensatory damages are of two types: first, it seeks to be reimbursed for amounts it paid out as a result of accidents caused by persons who operated vehicles under fraudulently obtained driver's licences.

[8] The plaintiff's contention is not (as one might assume) that as a result of the fraudulent scheme, incompetent drivers were let loose on the road, wreaking havoc. Such a claim would raise difficult issues of causation. Instead, the claim is that the drivers who drove under fraudulent licences were, from a legal standpoint, unlicensed and therefore in breach of conditions of insurance. In the result, ICBC's liability ought to have been limited to third party claims under s. 21 of the ***Insurance (Motor Vehicle) Act,*** R.S.B.C. 1996, c. 231 and it ought to have had a right to recover money paid for such claims from the unlicensed driver.

[9] The plaintiff says that the defendants concealed the fact that drivers were not properly licensed and thereby prevented it from asserting its rights under s. 21. In this action, it seeks to recover from the defendants Bao Kang Huang, Yam Hau Chan and Yi Liu the amounts that it paid out in respect of at-fault accidents that they were involved in. It seeks to have Mr. Chiu and Ms. Diaz declared jointly and severally liable with Mr. Chan and Mr. Liu in respect of first party payments arising out of their accidents.

[10] I am satisfied that these claims for reimbursement are well founded in law, and I will instruct the jury on the quantification of them.

[11] The second type of compensatory claim that is made by the plaintiff is a claim to be reimbursed for the costs of investigating the fraudulent licensing scheme. I am satisfied that the reasonable costs of investigating a fraudulent scheme are recoverable by the victim of the fraud: ***ICBC v. Sanghera*** (1991), 55 B.C.L.R. (2d) 125 (CA); ***ICBC v. Eurosport Auto Co.*** 2004 BCSC 164, 8 C.C.L.I. (4th) 236.

Disgorgement of Bribe Money

[12] As an alternative claim the plaintiff seeks judgment against Ms. Diaz and Mr. Chiu in the amount of the bribe money that Ms. Diaz was paid.

[13] The remedy of disgorgement is a restitutionary one rather than one based on compensation. It is not necessary for the plaintiff to demonstrate that it has suffered actual harm as a result of Ms. Diaz's conduct. Equity considers it improper for a person occupying a position of trust to exploit that position for his or her own gain. Where a person does so, that person will be liable to account to his or her principal for any gains made in breach of

the relationship of trust. This will be so even if the gain results from an opportunity which the principal did not wish to take or, indeed, could not legally have taken: ***Attorney General v. Goddard*** (1929), 98 L.J.K.B. 743; ***Warman International Limited v. Dwyer*** (1995), 182 C.L.R. 544 (HC Aust). Further, it is now established that equity imposes a constructive trust on the money in the hand of the person who is in breach of the trust relationship: ***Attorney General for Hong Kong v. Reid***, [1994] 1 A.C. 324 (P.C.(N.Z.)).

[14] I am satisfied, as well, that a person who pays a bribe in order to convince a fiduciary to breach a trust will also be liable in the amount of the bribes to the person whose trust is breached. There is a long line of cases standing for this proposition. They are well-summarized in Paul M. Perell, *Remedies for the Victims of a Bribe*, (2000), 22 LQR 198.

[15] I accept, then, that it is well-established that where one person bribes another to violate his or her duty, both the briber and bribee will be liable in the amount of the bribe to the person to whom the bribee owes duties of good faith, a person often referred to as the "victim" of the bribe.

[16] In the case at bar, therefore, the plaintiff is entitled to claim as an alternative to the claim for compensatory damages the amounts of the bribes received by Ms. Diaz. The remedy is available as a joint and several remedy against Dragon Driving School, Mr. Chiu and Ms. Diaz.

Disgorgement of Money Paid to Mr. Chiu

[17] The plaintiff argues that it should be entitled to a similar remedy with respect to amounts received by Mr. Chiu from his clients in exchange for him arranging for Ms. Diaz to issue driver's licences.

[18] It argues that this result can be achieved by characterizing Mr. Chiu as having received all money from his clients as an agent for Ms. Diaz. With such a characterization, the money in issue would belong, in law to Ms. Diaz and in equity to the plaintiff. In my respectful view, on the evidence in this case, there is no air of reality to that characterization, such that it could be put before the jury. While the evidence does indicate that Mr. Chiu and Ms. Diaz acted in concert, it is also apparent that the relationship was not one of principal and agent.

[19] The plaintiff argues, in the alternative, that as Mr. Chiu and Ms. Diaz were acting in concert, equity should provide the same remedy in respect of money he received as it provides in respect of money that she received.

[20] There is no doubt that Mr. Chiu and Ms. Diaz acted, to a degree, in concert. Nonetheless, I can find no doctrinal basis for the application of the equitable principles that apply to Ms. Diaz's position to that of Mr. Chiu. Unlike Ms. Diaz, Mr. Chiu did not owe duties of utmost good faith to the plaintiff. The theory upon which money paid as bribes to Ms. Diaz would be held in a constructive trust is simply not applicable to Mr. Chiu.

[21] No authority has been cited to me in which a court has imposed a trust obligation in a bribery case on a person who is not in a relationship of good faith with the victim. Indeed, both ***Warman International v. Dwyer***, *supra* and ***Fyffes Group v. Templeman***, [2000] 2 Lloyds Rep 643 (Eng. Comm. Ct.), which break new ground in terms of fixing bribers with a duty to account for their profits, fall short of recognizing any proprietary or trust remedy against them. The existence of such a remedy is expressly rejected in the ***Fyffes*** case.

[22] I note that there has not been, this case, any claim of a fraudulent preference or fraudulent conveyance. I do not make any comment as to whether such claims could succeed or whether they remain available to the plaintiff. It may also be that arguments could be made that certain assets held in law by Ms. Lo are in equity the property of Mr. Chiu. Such arguments are not within the pleadings of this matter, and I make no comment as to their viability. My decision today is confined to the issue of whether the money paid to Mr. Chiu is, because he was involved in a bribery scheme, impressed automatically with a trust in favour of the plaintiff. I find that it is not.

[23] In the result, I find there is no basis upon which equity can grant the plaintiff a proprietary or trust remedy that would capture Mr. Chiu's profits. Without such a remedy, the plaintiff's claims to trace funds into the hands of Ms. Lo must fail.

Unjust Enrichment Claim Against Mr. Chiu

[24] The plaintiff argues that even if the money paid by clients to Mr. Chiu is not subject to a trust claim, it should be able to recover damages against him in an amount equal to the amount he received. Such a non-proprietary remedy would be based on unjust enrichment.

[25] ***Warman International v. Dwyer*** and ***Fyffes Group v. Templeman*** hold that where a fiduciary breaches his or her fiduciary duties to his or her principal, the principal can claim against third parties who knowingly profit as a result of the breach of duty. While I accept that in recent years, courts in England and Australia have accepted the existence of such a remedy, I am not aware of any Canadian case that takes a similar approach. Indeed, Canadian authorities, admittedly pre-dating the new approach of other commonwealth courts, do not support the existence of such a claim; see, for example, ***Kranz Investments Ltd. v. S. & D. Investments Ltd.*** (1984), 60 B.C.L.R. 21 (C.A.).

[26] The rationale for the remedy given in ***Warman*** and ***Fyffes*** cases is that it would be inequitable for a person involved in a bribery scheme who thereby profits to keep those profits. Those cases consider that the doctrine of unjust enrichment is sufficiently broad to allow a plaintiff to claim the profits.

[27] It is impossible to quarrel with the idea that a person who participates in a bribery scheme and thereby profits should not be able to keep the profits. I have some difficulty, however, accepting that the doctrine of "unjust enrichment", as it has developed in Canada, provides a jurisprudential basis for the plaintiff's claim to Mr. Chiu's profits.

[28] As discussed in ***Pettkus v. Becker,*** [1980] 2 S.C.R. 834, a claim in unjust enrichment is founded on one party having been enriched, without juridical reason, at the expense of the other. The enrichment of one party must be matched by a corresponding deprivation of the other. That corresponding deprivation is lacking in cases such as the present. While Mr. Chiu has been enriched without juridical reason, I.C.B.C. has not suffered any corresponding deprivation.

[29] The courts in ***Warman*** and ***Fyffes*** were concerned to ensure that people should be deterred from involvement in bribery schemes. They wished to eliminate the possibility that, even after being sued, the third party could walk away with a profit. Those concerns, I think, fit well within the current law relating to exemplary or punitive damages in Canada as discussed in ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18, [2002] 1 S.C.R. 595, particularly at paragraph 124. It seems to me that the profit made by Mr. Chiu ought to be a very important, perhaps even overriding, concern of the jury in assessing punitive damages.

[30] Given the flexibility of the remedy of punitive or exemplary damages in Canadian law, there is no need to break new ground in this case by accepting the existence of the remedy discussed in ***Warman*** and ***Fyffes***. It would not be appropriate, in my respectful opinion, to bend the doctrine of unjust enrichment to deal with the problem that is adequately dealt with through exemplary or punitive damages in Canadian law.

[31] In the result, I will not instruct the jury that the plaintiff has a remedy of disgorgement with respect to Mr. Chiu's profits. I will, however, instruct the jury that any profits made by Mr. Chiu ought to be a consideration for them in deciding whether or not to award punitive damages against him, and, if they decide punitive damages ought to be awarded, in determining the amount of such damages.

Timing of Election of Damages in a Jury Trial

[32] The next matter that I should address is not a particularly controversial one. The law is clear that where a claim for compensatory damages and an alternate claim for restitutionary damages exist, it is open to a plaintiff to elect between the two. In general, a plaintiff has the right to refrain from making that election until such time as the plaintiff can adequately gauge which remedy is more advantageous. In some cases, such an election may be delayed until after trial, after post-trial examinations of the judgment debtors.

[33] The timing of the election is not, however, one of substantive law. In ***Tang Man Sit v. Capacious Investments***, [1996] A.C. 514 (P.C. (H.K.), the point was made that the timing of election is a matter of procedure. Lord Nicholls of Birkenhead, delivering the unanimous opinion said (at 521-22):

> In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule…. The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider

public interest in the conduct of court proceedings.

[34] The case at bar is a case before a jury. It is a case where punitive damages are likely to be of significance. The jury cannot properly consider what, if any, punitive damages to award until it has determined what level of ordinary damages is awarded. As the Supreme Court of Canada commented, in ***Whiten v. Pilot Insurance Co.***, *supra*, at paragraph 94, "punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient …." Therefore, before the jury can assess punitive damages, it must know what election will be made by the plaintiff.

[35] That leaves two procedural options. The jury could be asked to consider ordinary damages. Once they have assessed those damages, they could return, in order for the plaintiff to make an election as to whether to accept a purely compensatory or a restitutionary remedy. Thereafter, the jury could be sent back to the jury room to deliberate on punitive damages. Alternatively, the plaintiff could be required to elect its remedy from the outset.

[36] It would be inconvenient and impractical for the jury deliberations to be bifurcated, and counsel do not seek that method of proceeding. I anticipate that, given the rulings I have made in this judgment, the election will be a fairly straightforward one. The plaintiff will be in a position to tell the jury to assume that whichever award, restitutionary or compensatory, yields higher damages will be the one elected for. The result is that the method of determining the election can be articulated before the jury begins deliberations and there will be no need for a bifurcated deliberation.

[37] That is a "practical application of [the] general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings" as discussed in ***Tang Man Sit***, *supra*, and in particular, the special public interest that attaches to jury proceedings.

Costs in Regard to Ms. Lo

[38] Ms. Lo's participation in this case has been minimal. She has not filed an appearance or Statement of Defence and she has not, except for a brief period, been represented by counsel in this matter. She has not presented legal argument. While I recognize that parties who represent themselves are not disqualified from being awarded costs (***Skidmore v. Blackmore*** (1995) 2 B.C.L.R. (3d) 201, 122 D.L.R. (4th) 330 (CA)), the discretion to award costs to a self-represented litigant should not be exercised where litigant does not take an active role in litigation and does not provide the assistance to the court that is to be expected. I accept that Ms. Lo's capabilities of assisting the court may not have been great and that there may be various reasons why she has failed to comply with the rules in bringing her defence. All that said, this is not a case where I would award costs to an self-represented litigant.

"H.M. Groberman, J."
The Honourable Mr. Justice H.M. Groberman