IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Insurance Corporation of British Columbia v. Dragon Driving School Canada Ltd. et al***
2005 BCSC 1831

Date: 20050627
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

And:

Dragon Driving School Canada Ltd., Foon-Wai (David) Chiu, Crispine Argana, also known as Crispina Argana Diaz

Third Parties

Before: The Honourable Justice Groberman

Oral Reasons for Judgment
June 27, 2005

Counsel for the Plaintiff:	F.G. Potts B.T. Martyniuk
Counsel for the Defendant and Third Party Crispina Diaz:	A. Goeujon
Counsel for the Defendant Fung Kwan (Tammy) Lo:	W. Ryan
Appearing on his own behalf:	Foon-Wai (David) Chiu
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** I have before me an application by Fung Kwan (Tammy) Lo to set aside a default judgment taken against her, and also to set aside an injunction. There is an alternative remedy sought of an adjournment of the trial with respect to her.

[2] The situation is this. This action was commenced in 2004 against a number of defendants. For the purposes of this application, it is fair to say that the basis of the action was that Mr. Chiu, Dragon Driving School, and Ms. Diaz entered into transactions whereby drivers' licences were issued to students at the school who did not legitimately qualify for them. The allegation is that the students paid Mr. Chiu or Dragon Driving School substantial sums of money in order to obtain the fraudulent licences. It is alleged further that Mr. Chiu or Dragon paid Ms. Diaz

a fee for each knowledge test or road test that was inappropriately registered as a pass.

[3] In January of 2005, the plaintiff applied to add Ms. Lo as a defendant. Ms. Lo, as I understand it, is the common law partner of Mr. Chiu. She was added only on the basis that money obtained by Mr. Chiu and Dragon Driving School, as part of the scheme for the fraudulent issuing of drivers' licences, made its way into assets held in Ms. Lo's name. I am told there are three such assets, the main one of which is the current family home.

[4] The application to add Ms. Lo came before me on January 28th, 2005. Although Ms. Lo had been served with the materials, she did not attend on that date. Mr. Chiu and his counsel, however, did attend on January 28th and were aware of the application. At that time I granted leave to add Ms. Lo as a party without prejudice to her right to move to set aside my order. In particular I noted at that time that it was not intended that my ruling would preclude Ms. Lo or the other new defendants from seeking an adjournment of the trial date, given the proximity of the trial at that time. The trial at that time was approximately five months in the future.

[5] Ms. Lo indicates in her affidavit material that although material was served on her on January 24th and subsequently, she was in the habit, as she says is common within her culture, of leaving these kinds of business matters to her husband, by whom she means Mr. Chiu. Mr. Chiu was in fact outside of Canada from February 3rd, 2005 through June 11th of this year. Ms. Lo says that she did not really appreciate the jeopardy that she faced until after his return, and says that she has moved expeditiously to set aside the default judgment.

[6] On behalf of ICBC, it is noted that several documents were served on Ms. Lo subsequently to her addition as a party, and in fact, examinations for discovery took place, including an examination for discovery in which Mr. Potts, on behalf of ICBC, attempted to expressly draw to Ms. Lo's attention the jeopardy that she faced.

[7] The court faces a difficult decision in addressing the importance of cultural idiosyncrasies on an application of this sort. On the one hand, as Mr. Ryan emphasizes, Canada is a multicultural country, and the court must be sensitive to the practices of various cultures. On the other hand, the court ought not to place a premium on ignorance, and ought not to provide special benefits for those who choose to place their lives in the hands of others, and not to pay attention to the process of the court.

[8] To my mind, however, as difficult as those questions might be, they are fairly easily dealt with in this case. Ms. Lo was perfectly entitled, in my view, to decide to entrust her well-being to Mr. Chiu, either culturally or for any other reason. In doing so, however, she took the risk that Mr. Chiu would ignore her wellbeing. Mr. Chiu was present on January 28th when this court added Ms. Lo as a party. He was fully aware of the allegations against her. Ms. Lo cannot be in the position of saying she was entitled to trust him, and at the same time saying that despite all efforts of the plaintiff to bring matters to her attention, despite the mounting evidence that she must have had that her interests were being ignored by him, she was entitled to maintain that trust and not come to this court by herself until June 11th.

[9] I cannot escape the conclusion that Ms. Lo had ample notice of the claim against her and chose, inappropriately, to ignore that claim up until the date of trial. In saying that, I do not ignore cultural aspects or her trust in Mr. Chiu. I recognize that this court has, on occasion, said, for instance, that a lawyer's negligence ought not to be visited on the client in cases like this, and it may seem harsh that Mr. Chiu's negligence would be visited on Ms. Lo. That would be an important consideration, were I convinced that Ms. Lo is unduly prejudiced by the default judgment.

[10] However, I have concluded that the default judgment is not unduly prejudicial to her. I say that for this reason. The affidavit evidence of Ms. Lo indicates that she did not know of the fraudulent schemes, did not participate in them, and rightly or wrongly, alleges that as a matter of law, the fraudulent schemes do not result in a claim against her. I say "rightly or wrongly" because matters of law ought not to normally appear in affidavits. I do not understand how the default judgment precludes Ms. Lo from making any of these arguments at trial.

[11] The decision of this court in ***Whalley v. Splashdown Waterparks Inc.*** 2005 BCSC 923 has been drawn to my attention. That decision would appear to leave it open to Ms. Lo to challenge any amount of claim that is made here. Equally, I do not see the default judgment as precluding her from making legal argument as to the availability of the claim against her. All that the default judgment does is preclude her from challenging admissions of fact that are deemed made. Those admissions of fact, as I understand it, pertain to the fraudulent scheme itself, the scheme which Ms. Lo disclaims any knowledge of, and which scheme has been admitted by the principals of the scheme.

[12] I do not understand how it would serve the ends of justice to reopen that issue in respect of Ms. Lo. Notwithstanding the default judgment, Ms. Lo is still entitled to defend this matter, firstly by arguing that as a matter of law, the claim against her is not one that can stand. Secondly, she is not precluded from arguing that particular amounts from the scheme have not reached her property. Although there is a deemed admission that some amount has gone into the property, that amount may well be negligible, and I do not understand any great prejudice in that admission.

[13] In the circumstances, I find that there has not been diligence in defending this matter. I find that while there may be a defence worthy of investigation, that defence is not precluded by the default judgment, and for those reasons I do not find that it is inequitable to allow the default judgment to stand, and I would decline to set it aside.

[14] Now, there is also a motion under Rule 19 to dismiss the claim. It is alleged before me that the claim cannot be a valid one on the law as it exists. As Mr. Ryan understands, the test for striking out a claim under rule 19(24), as set out in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, is a very stringent one. The fact that a claim is of a novel character will not bar it under Rule 19(24).

[15] In the case at bar there is a line of authority, including the case of ***A.G. Hong Kong v. Reid***, [1994] 1 A.C. 324 (PC (NZ)), which suggests that a person who has been bribed and the person who bribes that person may be liable to a person in a fiduciary relationship for the amount of the bribe. Mr. Ryan correctly points out that that is not necessarily sufficient to found the bulk of the claim here. That is a difficult question of law, one that I am not going to pass on today, but I am satisfied that it is at least an arguable claim, and ought not to be dismissed under Rule 19(24).

[16] For those reasons, I am dismissing the application. I should say that while there is an application for an adjournment, no specific argument has been put before me on the issue of adjournment, and I am not convinced that an adjournment is required in the interests of justice.

[17] Some discussion has taken place in the course of this motion as to whether the claims against Ms. Lo should properly be heard by a jury. I have expressed some concerns about the complexity of this case. However, there is no motion before me by any party, nor has there been a motion heard by me on the issue of appropriateness of a jury trial – I should add parenthetically that some defendants did bring such a motion, but by virtue of settlements, the motion was not pursued. I have, as I say, no motion before me. I am not going to, of my own motion, hear an application to strike the jury notice. It is late in the day, in many respects. A jury has been empanelled. If a motion is to be heard, it is going to have to be brought formally.

[18] In short, the application is dismissed.

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