IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Han v. Cho,***
2008 BCSC 1621

Date: 20081125
Docket: L050150
Registry: Vancouver

Between:

Chul-Soo Han and Suk Hee Park and Jae Bok Yun

Plaintiffs

And:

Soonam Cho, also known as Jeong Eun Cho, also known as Jung Eun Cho, also known as Soon Yi Jung, also known as Cho Chong-Un, also known as Su-Nam Cho, also known as Bora Kang, Subi Park, also known as Subi Yu, Jioh Park also known as Jioh Yu, also known as Yang Hyun Park and Young Chan Shim

Defendants

Before: The Honourable Madam Justice Griffin

Supplementary Reasons for Ruling

Counsel for Plaintiffs:	F.G. Potts T. Goepel
The Defendants, Soonam Cho & Subi Park:	No one appearing
The Defendant, Jioh Park:	Appearing on her own behalf
Date and Place of Hearing:	November 5, 2008 Vancouver, B.C.

Introduction

[1] The plaintiffs have brought two applications seeking to strike the pleadings of the defendants for failure to comply with their discovery obligations.

[2] The first application is as follows:

> 1. Pursuant to Rule 2(2), (5) and (6) for an Order that the Counterclaim of the Defendant Jioh Park, also known as Jioh Yu, also known as Yang Hyun Park (“Jioh Park”), be dismissed with costs to the Plaintiffs, and for an order that the Statement of Defence of Jioh Park and Subi Park, also known as Subi Yu (“Subi Park”), be struck and the Plaintiffs be at liberty to proceed as if no Appearance had been filed, and;

2. Pursuant to Rule 25(8), for Judgment in Form 86 as against the Defendants Subi Park and Jioh Park for damages to be assessed and costs, with liberty to proceed with the balance of the Plaintiffs' claims as against the said Defendants, and;

3. Pursuant to Rule 25(14) and (16) that the assessment of damages as against the Defendants Subi Park and Jioh Park be proceeded with summarily, on the basis of affidavits, and that the Plaintiffs have liberty to have such assessment heard prior to the trial of the remaining matters in respect of the Defendant Soonam Cho, and;

4. Alternatively, pursuant to Rule 2 that the Defendants Subi Park and Jioh Park each attend at an Examination for Discovery, on such date as the Plaintiffs select, provided only that they are given forty eight (48) hours notice of such date, which Examinations for Discovery shall take place at the offices of Reportex Agencies Ltd., located at 1010-925 West Georgia Street, Vancouver, British Columbia, and that the said Defendants shall forthwith, in any event of the cause, pay the Plaintiffs'' special costs thrown away, including the Plaintiffs' costs of travelling from and returning to Korea, by reason of their non-attendance at Examinations for Discovery scheduled for August 27 and 28, 2008, and;

5. In any event, the special costs of and incidental to this application, assessed summarily, and payable forthwith in any event of the cause.

[3] The second application is as follows:

1. Pursuant to Rule 2(2), (5) and (6) for an Order that the Counterclaim of the Defendant Soonam Cho, also known as Jeong Eun Cho, also known as Jung Eun Cho, also known as Soon Yi Jung, also known as Cho Chong-un, also known as Su-nam Cho, also known as Bora Kang ("Cho"), be dismissed with special costs to the Plaintiffs, and for an order that the Statement of Defence of Cho be struck and the Plaintiffs be at liberty to proceed as if no Appearance had been filed, and;

2. Pursuant to Rule 25(8), for Judgment in Form 86 as against the Defendant Cho for damages to be assessed and special costs, with liberty to proceed with the balance of the Plaintiffs' claims as against the said Defendant, and;

3. Pursuant to Rule 25(14) and (16) that the assessment of damages as against the Defendant Cho be proceeded with summarily, on the basis of affidavits, and that the Plaintiffs have liberty to have such assessment heard prior to the trial of the remaining matters in respect of the remaining Defendants, and;

4. In any event, the special costs of and incidental to this application, assessed summarily, and payable forthwith in any event of the cause.

Ruling

[4] On November 17, 2008, I issued my ruling as follows (2008 BCSC 1568):

> [3] I have decided to dismiss the plaintiffs' applications to strike the defendants' pleadings. Because of the importance of letting the parties know sufficiently in advance of trial so that they can prepare for trial, I have delivered this ruling now, with reasons to follow.
>
> [4] The plaintiffs will remain free to argue at trial that the defendants' failure to attend discovery in a timely way, and the defendants' failure to produce documents at all or in a timely fashion, ought to result in the court drawing adverse inferences against the defendants and ought to be taken into account in any costs award at trial.
>
> [5] I also order the following ancillary relief in respect of the plaintiffs' applications:
>
> (a) no matter what the outcome of the current litigation, the defendants Jioh and Subi Park must pay the plaintiffs' out-of-pocket disbursements thrown away as a result of the

examinations for discovery that these defendants did not attend on August 27 and 28, 2008, including the costs incurred in relation to any of the plaintiffs travelling from and returning to Korea in order to attend and instruct counsel on the discoveries; and,

(b) the defendant Subi Park is ordered to produce to counsel for the plaintiffs the documents in her possession or control relating to her application for refugee status in Canada.

[6] Finally, I must emphasize to the defendants that, while I have decided to not strike out their pleadings, they have ongoing obligations to produce documents to the plaintiffs including bank records. This court has previously ordered the defendants to produce all banking records, Korean, Canadian, or otherwise, in their names or in the names of aliases between the period of February 11, 2004 to October 10, 2008, without exception. The defendants do not have the option of refusing to produce these records or of arguing that the records are not relevant.

[7] Given the impending trial date, I will seek submissions on costs of this motion at the close of trial.

[5] These are the reasons for my ruling.

Legal Principles

[6] The plaintiffs say that the defendants have failed to comply with their obligations to make themselves available for examination for discovery and to produce documents, justifying the sanction of striking the defendants' appearances, statements of defence, and counterclaims. The plaintiffs rely on Rules 2(2), (5) and (6) which provide:

(2) Subject to subrules (3) and (4), where there has been a failure to comply with these rules, the court may

(a) set aside a proceeding, either wholly or in part,

(b) set aside any step taken in the proceeding, or a document or order made in the proceeding,

(c) allow an amendment to be made under Rule 24,

(d) dismiss the proceeding or strike out the statement of defence and grant judgment, or

(e) make any other order it thinks just.

…

(5) Where a person, contrary to these rules and without lawful excuse,

(a) refuses or neglects to obey a subpoena or to attend at the time and place appointed for his or her examination for discovery,

(b) refuses to be sworn or to affirm or to answer any question put to him or her,

(c) refuses or neglects to produce or permit to be inspected any document or other property,

(d) refuses or neglects to answer interrogatories or to make discovery of documents, or

(e) refuses or neglects to attend for or submit to a medical examination

then

(f) where the person is the plaintiff, petitioner or a present officer of a corporate plaintiff or petitioner, or a partner in or manager of a partnership plaintiff or petitioner, the court may dismiss the proceeding, and

(g) where the person is the defendant, respondent or a third party, or a present officer of a

corporate defendant, respondent or third party, or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no appearance had been entered or no defence had been filed.

(6) Where a person, without lawful excuse, refuses or neglects to comply with a direction of the court, the court may make an order under subrule (5) (f) or (g).

[7] Striking out a defence or claim for failure to comply with discovery obligations is a discretionary remedy. It has been described by the British Columbia Court of Appeal as "a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence": ***Muscroft (Homer Estate) v. Eurocopter*** 2003 BCCA 229, 12 B.C.L.R. (4th) 321 (C.A.) at para. 4. The Court of Appeal has emphasized that a sanction for a party's failure to comply with the ***Rules*** should be proportionate to the circumstances: ***House of Sga'nisim v. Canada (Attorney General)*** 2007 BCCA 483, 72 B.C.L.R. (4th) 269 at paras. 26-31.

[8] The simple issue, therefore, is whether or not the defendants have failed to comply with their discovery obligations in circumstances sufficiently serious to justify the striking of their pleadings. The plaintiffs' position is that there have been such serious failures, as follows:

1. failure on the part of Jioh and Subi Park to attend examination for discovery;

2. failure on the part of Jioh and Subi Park to produce documents in a timely way or at all, or to provide a reasonable explanation for the failure to produce;

3. failure on the part of Soonam Cho to provide dates for discovery within 60 days of the direction of Dillon, J. made April 24, 2008.

4. failure on the part of Soonam Cho to produce documents.

Conclusion

[9] Although the evidence establishes some failures on the part of the defendants to comply with their discovery obligations, the evidence regarding the nature of these failures and the defendants' subsequent discovery efforts is in dispute. All of the defendants are from Korea. The defendants Jioh Park and Subi Park are university-age and do not appear sophisticated. The defendant Soonam Cho is in custody in relation to a proceeding in which Korea is seeking to have her extradited from Canada. The evidence does not, in the result, tip the balance to enable me to conclude that the defendants' discovery failures are so egregious as to justify the exercise of my discretion to effectively deny the defendants the ability to defend a trial on the evidence. I have decided to dismiss the plaintiffs' application for striking of the defendants' pleadings.

[10] Given the conclusion I have reached, in these reasons I have been cautious to avoid making specific findings on disputed facts regarding the defendants' alleged failures to comply with their discovery obligations. These issues may be relevant to factual and evidentiary issues which remain to be decided at trial.

Background

[11] The plaintiffs are suing the defendants in relation to an alleged fraud which took place in Korea, purportedly orchestrated by the defendant Soonam Cho. The plaintiffs allege that Ms. Cho then conspired with her daughters, the defendants Jioh and Subi Park, to hide the proceeds of the fraud, part of which was used to purchase a condominium in Jioh Park's name in Vancouver.

[12] The defendants were represented by counsel until the end of August or early September 2008. Most of the purported failures on the part of the defendants to comply with their discovery obligations occurred during the time they were represented by counsel. However, by the time of the hearing of the plaintiffs' applications, all three defendants were unrepresented.

[13] Only the defendant Jioh Park appeared at the hearing of these applications, but she advised that she was agent for her sister as well. I directed her to file an affidavit if she wished to put in any evidence, which she and

Subi Park then did, each filing affidavits on November 7, 2008.

[14] The defendant Soonam Cho is in custody and was not represented at the hearing. However, the defendant Soonam Cho filed an affidavit in response to the plaintiffs' application against her.

Failure on the Part of Jioh and Subi Park to Attend Examinations for Discovery

[15] The evidence is undisputed that Jioh Park and Subi Park failed to attend scheduled examinations for discovery on August 27, and 28, 2008. Their counsel at the time gave notice of their intention to not show up by letter dated August 26, 2008, without any explanation. This late notice was extremely inconvenient. The plaintiffs point out that it should have been anticipated by the defendants that one or more of the plaintiffs would have already made travel plans to come to Canada from Korea to attend the discoveries.

[16] Subsequently Jioh and Subi Park became self-represented, and gave notice by letter dated September 30, 2008 that they were ready, willing and able to attend a rescheduled examination for discovery. Jioh and Subi Park were then examined for discovery by the plaintiffs on October 27 and 29, 2008, respectively.

[17] Jioh Park gave evidence on discovery that she did not attend the earlier discovery because she did not want to, that she "emotionally gave up", and she was "having trouble to get a lawyer for the discovery". In her affidavit, Jioh Park said she did not appear for the discovery because she "had a mental breakdown with all stresses after I lost a lawyer"… and "I became hopeless and gave up". In her affidavit, she offered an apology for wasting the time of plaintiffs' counsel and for not keeping her promise to appear for the discovery.

[18] Subi Park gave evidence on discovery that she did not attend her earlier discovery because her sister did not go. Her affidavit is much the same, stating that after her sister gave up when they lost a lawyer, she "lost encouragement to go to the discovery alone without a lawyer".

[19] The case law is replete with examples of the courts considering whether to apply the serious sanction of striking a defence on failure to provide a "lawful excuse" for non-compliance with discovery obligations or whether to apply some lesser sanction: see ***All Weather Products Ltd. v. Napier*** (1982), 28 C.P.C. 130; ***Karas v. Lattin*** (1992), B.C.J. No. 2576, (B.C.S.C.); ***Ultra Fuels v. Kern*** (1992), B.C.J. No. 1697 (B.C.C.A.), 14 B.C.A.C. 306; ***TD Bank v. Pan Pacific Auto***, 2001 BCSC 1841; ***O'Mara v. Son***, 2007 BCSC 871; and ***Muscroft*****.** On these authorities, where the evidence is clear that a defendant has engaged in "obstructive conduct" (***Ultra Fuels***, at 6), or has shown an intention to not comply with the rules of court despite court orders that he do so (***TD Bank***, para. 18), the courts are more willing to apply the sanction of striking the defence.

[20] It is clear that Jioh and Subi Park have provided no acceptable excuse for their failure to attend their original examinations for discovery. It is unacceptable for a party to fail to attend simply because they are suffering from stress. Litigation is stressful but nevertheless parties have legal obligations that they must meet.

[21] Jioh and Subi Park missed only one appointment for examination for discovery. Further, they did make themselves available for discovery after that non-attendance. The case law establishes that typically the courts allow for a two step process on an application to strike for non-attendance at examination for discovery (***McIsaac v. Healthy Body Services Inc.,*** 2007 BCSC 612, at para. 31, citing McTaggart J. in ***Neeld v. Pezamerica Resources Corp.***, [1985] B.C.J. No. 2356 (C.A.), at para. 28). An order to strike pleadings will usually only be made after the second non-attendance at discovery. However, as pointed out by Barrow J. in ***McIsaac***, each case will depend on the facts.

[22] The plaintiffs argue that, while this is the first time that the Park defendants have failed to attend discovery, the circumstances are akin to multiple missed discovery appointments because the plaintiffs had been trying since March 2008 to arrange for discovery dates. The plaintiffs' efforts to arrange discovery dates in May, June, July and early August 2008 were repeatedly put off by the excuse that Jioh and Subi Park were attending courses at the University of British Columbia and that because of this, convenient dates could not be arranged. The plaintiffs have filed evidence that suggests that these excuses were false. The plaintiffs argue that this illustrates that these defendants had no intention of complying with the rules of court.

[23] Both Jioh and Subi Park dispute that they lied about their university schedules. They suggest that their schedules were real but it was because their mother could not pay their tuition that they had to later drop their

courses. This explanation is flawed, say the plaintiffs, because their counsel communicated that they were in school when in fact they were not.

[24] Whether or not Jioh and Subi Park deliberately misled the plaintiffs about their availability for discovery is a credibility issue which I am unable to decide on the affidavits alone. The fact remains that the Parks missed only one discovery that had been set by appointment.

[25] The plaintiffs go on to suggest that Jioh and Subi Park have not been forthright and responsive in their answers on discovery, answering “I don’t know” and “I don’t remember” many times. The plaintiffs say that this also illustrates that these defendants have no intention of complying with their discovery obligations. My difficulty with this submission is that it requires the court to make findings on credibility against the defendants on transcript evidence alone. I am unable to do so in respect of the facts at issue. It may be that these defendants are telling the truth when they cannot recall certain things. For example, when they cannot recall details about their bank accounts, this may in fact be true. One possible reason for their lack of recall may be that they were mere agents for their mother Soonam Cho, simply following her directions without paying any attention to detail at the time. This is consistent with at least one theory of the plaintiffs’ case.

[26] In her submissions, Ms. Jioh Park apologized to the court for not attending discovery. She advised the court that she and her sister do wish the trial to proceed in December.

[27] The plaintiffs did not point to any specific example of prejudice by the delay in the discovery of Jioh and Subi Park, other than the general point that because this is a fraud case, any delay in finding out evidence may also impair the ability to recover on a judgment. The plaintiffs will be free to make any appropriate arguments at trial that the failure of Jioh and Subi Park to produce documents, and their inability to explain financial transactions in their bank accounts on discovery, ought to give rise to adverse inferences being drawn against them in favour of the defendants.

[28] In the circumstances of this case, I am unable to conclude on the evidence before me that the defendants Jioh and Subi Park have been deliberately obstructive and have shown that they have no intention to comply with their obligation to attend and submit to examination for discovery. While the failure of the defendants Jioh and Subi Park to attend on their first appointment for examination for discovery was serious, I decline to exercise my discretion to strike out their pleadings. Rather, I exercise my discretion to make the order that they pay for the plaintiffs’ out-of-pocket disbursements thrown away as a result of their non-attendance, including the costs incurred in relation to any of the plaintiffs travelling from and returning to Korea in order to attend and instruct counsel on the discoveries.

Failure on the part of Jioh and Subi Park to produce documents or to provide a reasonable explanation for the failure to produce

[29] The key focus of the plaintiffs’ position that Jioh and Subi Park have failed to produce documents is the defendants’ banking records, both in Canada and in Korea. The plaintiffs say this is a failure of the defendants’ discovery obligations and is contrary to orders of the court that they produce the records. The plaintiffs also say that Jioh and Subi Park have failed to provide an explanation for not producing these documents, also contrary to court order. As well, the plaintiffs say that Jioh Park has failed to produce documents in relation to complaints she made to the police in Korea against the plaintiff, Mr. Han, and that Subi Park has failed to produce documents in relation to her claim for refugee status in Canada.

[30] In ***United Furniture Warehouse LP v. 551148 Ltd.***, 2007 BCSC 1252, at para. 24, Pitfield J. provided guidance as to what may be considered not to be a lawful excuse for failing to produce documents in the context of Rule 2(5)(c):

> [24] In my opinion, a lawful excuse for purposes of Rule 2(5)(c) is one which, in the discretion of the judge acting judicially, is worthy of acceptance. The rule stipulates that it will apply in the case of refusal or neglect to produce. Refusal connotes a deliberate failure to produce a document of which a party has knowledge. Neglect connotes carelessness in the search for, and location of, documentation relating to a matter in issue that should be produced in accordance with Rule 26. Because an action may be struck when the lack of production has been occasioned by negligence,

the degree of negligence required should be more than moderate on a scale ranging from mere negligence to gross negligence.

Bank documents

[31] The evidence from Jioh and Subi Park is confusing on the issue of their ability to obtain all of the bank documents at issue, particularly the Korean banking documents. They say they produced Canadian banking documents in their possession and control at their examination for discovery, except for one account which Ms. Subi Park forgot about but for which the plaintiffs had obtained some records directly from the bank, and one account in Korea which Jioh Park says was opened on a trip back to Korea in November 2005. They have not adequately addressed the fact that they were ordered to produce their banking records well before their discoveries by order of this court made July 24, 2008.

[32] The plaintiffs also complain that Jioh and Subi Park have not complied with this court's order made July 24, 2008, that if they could not produce certain categories of documents, "the defendants provide affidavit evidence describing in detail the efforts they made to obtain the documents and the reasons why they have not been produced, within 21 days". The plaintiffs point out that Jioh and Subi Park have not provided any affidavit evidence sworn by them personally. Subi and Jioh Park submit that they did not think the order meant they had to swear their own affidavits. They say that they did file affidavit evidence, sworn by their lawyer's legal assistant, as to the steps taken to get the documents. The steps to obtain the documents were taken by the law firm itself and not directly by Jioh and Subi Park. Arguably the order made against them is capable of being interpreted this way, as simply requiring affidavit evidence from the most knowledgeable person. Since Jioh and Subi Park have since submitted to examination for discovery, and agreed that they could be questioned about their document production efforts on discovery, there is little prejudice to the plaintiffs by reason that they did not file affidavits.

[33] It appears clear on the evidence that the defendants Jioh Park and Subi Park have been dilatory in producing their bank records. However, given their personal circumstances, namely their youth and their possible language and cultural issues, I am unable at this stage, on the evidence before me, to draw conclusions of fact that these defendants have deliberately refused to produce banking documents in their possession or control. There are issues I am unable to resolve on this application as to whether all the banking documents at issue exist, whether copies are already in the defendants' possession, and whether or not the defendants have the ability to obtain all the banking documents from the banks themselves. These conclusions of fact may be more readily made upon hearing all the evidence at the trial of this action.

[34] The plaintiffs are advancing claims of fraud and conspiracy against these defendants and seeking considerable damages. I have concluded that even if the defendants Jioh and Subi Park have not fully complied with their discovery obligations in a timely way, and appear to have treated court orders regarding the production of documents in a cavalier manner, it would be a disproportionate sanction to treat these claims as undefended. The prejudice to the plaintiffs in this particular case, while real, is not so great as to make it unfair to require them to proceed to trial on the merits of their claim. The plaintiffs will be able to advance arguments at trial that adverse inferences should be drawn against the defendants for any untimely or incomplete production of banking records. As well, these are matters which can properly be taken into account in any order relating to costs at the end of trial.

Documents concerning police complaints against Mr. Han

[35] There is another category of documents which has not been produced. The plaintiffs say that Jioh Park has failed to produce documents in relation to complaints she made to Korean legal authorities against the plaintiff Mr. Han. These documents are clearly relevant to Jioh Parks' allegations against Mr. Han that he threatened, assaulted and battered her, kidnapped her, and took some of her property. Jioh Park advances these allegations in her Further Amended Statement of Defence and in a counterclaim against Mr. Han. No evidence has been filed by Jioh Park identifying why the documents have not yet been produced, although she suggested in her submissions that she had produced the records to her prior counsel and she does not understand why they have not been produced.

[36] In her affidavit filed November 7, 2008, Jioh Park states that she promised counsel for the plaintiffs that she

would produce all the documents "related to the kidnapping incident in Korea". Given that she has promised to do, I expect this to have occurred immediately and so I have not made any order in this regard. However, the counterclaim advances quite serious allegations against Mr. Han and he could be seriously prejudiced if he does not have all the evidence in relation to these allegations in advance of trial. It will remain open to Mr. Han to seek rulings on inadmissibility of late produced documents at trial, or to argue that adverse findings should be made on the credibility of Ms. Jioh Park, if these documents were not produced to him by the time of delivery of these reasons.

Refugee claim documents

[37] The plaintiff argues that Subi Park has failed to produce documents in relation to her refugee claim in Canada, which may have some relevance to Jioh Park's counterclaim against Mr. Han. I am not satisfied that Subi Park's failure to produce these documents can lead to the relief sought on this motion, namely, striking of her pleadings. In her affidavit, and on her discovery, Subi Park appears to suggest that these documents are confidential and she is not sure they are relevant. Given that she does not advance a counterclaim against Mr. Han, her position is understandable. However, she says that if the documents are related to this action, she will cooperate. I conclude that, given the nature of the allegations made by Subi Park's sister, a co-defendant, against Mr. Han, the documents ought to be produced as they may relate to matters in question in the action. Further, any claim by Subi Park to immigration authorities is likely to touch on her financial circumstances, which is directly relevant to the plaintiffs' tracing claim against her. I therefore have ordered Ms. Subi Park to produce these documents to counsel for the plaintiffs.

Failure on the part of Soonam Cho to provide dates for discovery within 60 days of the direction of Dillon, J. made April 24, 2008

[38] On April 24, 2008 certain applications in this proceeding were heard before Madam Justice Dillon. In the course of that hearing, Dillon J. addressed submissions by the plaintiffs seeking an order compelling the defendant Cho to attend discovery within 60 days. She declined to make that order, noting that no appointment had been served yet. However, performing a management function of the court, she directed that "counsel for Ms. Cho provide available dates for discovery of Ms. Cho within the next 60 days to counsel for the plaintiff so that an appropriate appointment may be taken out."

[39] Counsel for Ms. Cho subsequently took the position that this direction only meant that sometime within the next 60 days he was to provide available dates for discovery; not that those available dates must be within the 60 days. Thus, within the 60 days, on May 30, 2008, counsel for the defendant Ms. Cho provided a letter to counsel for the plaintiffs proposing dates for examination for discovery of Ms. Cho at the end of August 2008.

[40] Counsel for the plaintiffs complains that this was a deliberate misreading of the direction of Dillon, J. It may well have been. It is hard to conceive of any other explanation. The court would not have expected that it would take counsel for the plaintiff up to 60 days to provide available dates: he could have done so immediately upon returning to his office and looking at his calendar. It was incumbent on counsel for Ms. Cho to seek clarification from Dillon, J. if he felt there was ambiguity in her direction rather than risk not complying with the court's direction. But I note that Ms. Cho's counsel was not here to explain his position, since he is no longer retained. Since Ms. Cho did ultimately make herself available for discovery, and the discovery proceeded, I am of the view that the delayed discovery does not justify the extreme sanction of an order striking out Ms. Cho's pleadings.

[41] Because of the fast approaching trial date, I conclude this is a matter which can best be dealt with when considering the appropriate costs order at the end of the trial.

Failure on the part of Soonam Cho to produce documents

[42] The plaintiffs argue that the defendant Ms. Cho has failed to produce all banking records that she was previously ordered by this court to produce, in the time period ordered or at all. Further, the plaintiffs say that

contrary to prior court orders, Ms. Cho has failed to produce all documents regarding a property transaction in China which Ms. Cho has claimed was the source of the funds she transferred to her daughter Jioh Park, used to purchase the Vancouver condominium.

[43] The plaintiffs' position is summarized in their written submission as follows:

> The Defendant Mrs. Cho swore at her Examination for Discovery that she opened two bank accounts in each of her daughters' names and one under her name, Jung Eun Cho. She has only provided sporadic statements of the bank account in Jung Eun Cho's name, and has only provided sporadic bank statement sin relation to one account hat she opened in her daughter Subi's name. The evidence as to how she produced some of the documents, but not all of the documents, is unclear. She filed an affidavit where she deposed that she does not have any other accounts, although she admits to opening them. She swore that she purchased the Chinese property with money received from a Mr. Kim, but does not provide any documents in support.

[44] The plaintiffs point to the fact that Ms. Cho has made partial but not full production of Korean banking records and documents regarding the Chinese property transaction, and suggest that this shows she is not living up to her obligation to produce all of these documents. The plaintiffs make a good point. On this interlocutory application, however, complicating the issue of whether or not records are within Ms. Cho's possession or control are the facts that: Ms. Cho is in custody in Canada; she is presently unrepresented; she may have limited or no English-language skills; she is normally a resident of Korea; the documents at issue originate in Korea or China; and there is no evidence that these documents have been in Ms. Cho's possession in Canada. Despite pointing to these unique circumstances, I am also mindful that Ms. Cho was represented by counsel for the majority of the pre-trial proceedings and so it must be assumed that her discovery obligations were brought home to her by her counsel.

[45] While I have concerns about Ms. Cho's document production efforts (or lack of effort), I find myself in the same position as I did regarding her daughters' efforts. Ms. Cho filed an affidavit on September 26, 2008, setting out her position on the documents she has produced and her efforts to obtain documents. The plaintiffs take issue with Ms. Cho's evidence and argue that she is not credible. However, I am unable to make findings on credibility at this stage.

[46] Furthermore, some of the findings I would need to make to find that Ms. Cho failed to produce documents in her possession and control are contrary to the theory of the plaintiffs' case. For example, the plaintiffs say that the source of funds used to purchase the Vancouver condominium was their own money, defrauded from them by Ms. Cho. It seems to me inconsistent with this theory to suggest that when Ms. Cho fails to produce documents supporting her theory that the source of funds was a property transaction in China, she is in breach of her document production obligations. Perhaps, consistent with the plaintiffs' theory, no such documents truly exist. The existence or non-existence of documents proving that a Chinese property transaction was the source of the funds used to purchase the Vancouver condominium is an issue better left for trial.

[47] It will be open for the trial judge to make any conclusions on the truthfulness of Ms. Cho's evidence, and if appropriate to draw adverse inferences against her based on her non-production of documents.

Costs

[48] The plaintiffs did not succeed in obtaining all the relief sought on this motion, but may have arguments that they should nonetheless be entitled to costs. It is often appropriate to make a costs award on an interlocutory application if necessary to deter wrongful conduct, rather than await the conclusion of trial: ***G.W.L. Properties Ltd. v. W.R. Grace & Co. of Can.*** (1993), 14 C.P.C. (3d) 91 (S.C.), 38 A.C.W.S. (3d) 888. However, the trial is to commence on December 1, 2008 and so there will not be a long delay if the costs decision awaits the outcome of trial. I thus defer the issue of the costs of this motion until the conclusion of trial.

"S. Griffin, J."

The Honourable Madam Justice S. Griffin