IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Dragon Driving School Canada Ltd. et al***, 2004 BCSC 1580

Date: 20041115
Docket: S041357
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Dragon Driving School Canada Ltd., Foon-Wai (David) Chiu, Crispine Argana Diaz, also known as Crispina Argana Diaz, Zi Shan Guo, Li De Mai, Ze Yu Luo, Mao Hai Li, Mei Qiong Li, Xi Sen Lin, Bao Kang Huang, Yu Fei Zhang, Yi Liu, Jie Fang Cai, So Kum Chu, Yong Qian Li, Zhuo Wen Li, Gui Qing Zhang, Yu Xiong Zhang

Defendants

Before: The Honourable Mr. Justice Groberman

Oral Reasons for Judgment

In Chambers
November 15, 2004

Counsel for Plaintiff	F.G. Potts B.T. Martyniuk
Counsel for Defendants Dragon Driving School and Foon-Wai (David) Chiu	P.M. Bolton, Q.C. J. Gratl
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is an application to vary a ***Mareva*** injunction. I initially granted the injunction on a without notice basis on March 8, 2004. The injunction has been subsequently been amended in some respects.

[2] At the time that the injunction was granted, there was an issue as to how reasonable and legal and living expenses ought to be dealt with. I was persuaded that the most appropriate manner of dealing with reasonable legal and living expenses was to set a ceiling on amounts that would be available for those expenses, subject always, of course, to the expenses being of a reasonable nature.

[3] With respect to legal expenses, the ceiling originally applied was $25,000, with a recognition that that was unlikely to be sufficient to cover the litigation. It was anticipated that the defendants Chiu and Dragon Driving School might have to come back before this court, perhaps in fairly short order, to increase the amount available.

[4] The application before me today is to increase the amount available for reasonable legal expenses from $25,000 to $50,000. Mr. Bolton has indicated that the $25,000 was used up some months ago and that without an increase in the retainer, he will be unable to continue to represent the defendant.

[5] The application is opposed by the plaintiff on the basis that the material before the court is insufficient to justify an increase. Counsel points to a series of cases in which Canadian courts have placed restrictions on the availability of frozen fund even for legal expenses where those funds are subject to proprietary claims.

[6] The most important of those cases is ***C.I.B.C. v. Credit Valley Institute of Business and Technology***, [2003] O.J. No. 40 (S.C.J.). Counsel also cites obiter remarks of Southin J.A. on a leave application in ***Grenzservice Speditions GmbH v. Jans***, [1996] B.C.J. No. 980, and a "Memorandum to Counsel" from Neilson J., dated February 2, 2000, in ***I.C.B.C. v. Leland***, No. C993161, Vancouver Registry.

[7] The position of the plaintiff is that authorization to use frozen funds for legal fees should be given sparingly in cases where proprietary claims are made against the frozen funds. Counsel cites, in particular, the tests outlined in ***C.I.B.C. v. Credit Valley Institute of Business and Technology***, supra. At paragraph 26, Molloy J. said:

> [T]he test to be applied is as follows:
>
> (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
>
> (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, *i.e.* assets that are subject to a ***Mareva*** injunction, but not a proprietary claim?
>
> (iii) The defendant is entitled to the use of non-proprietary assets frozen by the ***Mareva*** injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.
>
> (iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

[8] There is, in the case at bar, a material difference from the cases cited to me. Here, the plaintiff's claim is that the defendant has made substantial profits by bribing a driving examiner in order to secure driver's licences for the clients of the Dragon Driving School. Any profits that the defendant made are "the plaintiff's money" only in the sense that one possible remedy for bribery is the imposition of a constructive trust over all profits made by the defendant. The constructive trust claim, in this case, while "proprietary" in the sense that it attaches to specific funds, is not a typical proprietary claim in which the plaintiff's money is being held by the defendant. This is not a case in which the defendant is using money taken from the plaintiff to fund a defence.

[9] I accept the test proposed by Molloy, J. is, nonetheless, helpful in guiding the exercise of the court's discretion. The first question is whether the defendant has established on the evidence that he has no assets available to pay expenses other than those frozen by the injunction. The injunction in this case is the worldwide ***Mareva*** injunction over all of the assets of the defendants, Chiu and Dragon Driving School. By definition, therefore, those defendants can have no assets other than frozen assets from which they can pay legal expenses.

[10] The plaintiff suggests that Mr. Chiu must show not only that he has no assets that are not frozen, but also that he has no other means of paying expenses, such as available lines of credit, or third parties who might voluntarily pay his expenses. I have significant doubt that the test should be expanded in that fashion. However, the issue does not arise in this case, because Mr. Chiu has satisfied even this expanded test. He swears in an affidavit that appears to have been affirmed November 15th, 2004 (though the jurat indicates May 27, 2004) that aside from the assets and funds frozen by the court order, he has "no other assets and no other means to provide for [his] legal expenses or living expenses."

[11] The second question is whether the defendant, on the evidence, has shown that there are assets frozen by the injunction that are from a source other than the plaintiff, that is, assets that are frozen by the ***Mareva*** injunction but not covered by any proprietary claim. In my view, this test is well-suited to situations in which proprietary claims can clearly be attached to particular assets. In the case at bar, it is not at all clear what assets are intended to be covered by the proprietary claim.

[12] Given the nature of the claim in the case at bar, I would not place an onus on the defendant to show that particular assets are not covered by the broad and vague proprietary claim that is made.

[13] Moving to the last part of the test, if there are proprietary assets (*i.e.* assets covered by the constructive trust) that the defendant proposes to use, it is a question of balancing the plaintiff's rights against the defendant's.

[14] The plaintiff argues that the defendant has not put forward affidavit evidence to the effect that the allegations in the Statement of Claim are false. I agree with the plaintiff that it would have been helpful to know whether or not the defendant Chiu disputes the allegations in more than a formal manner. It may well be that if there are future applications, I would expect such evidence to be forthcoming from the defendant. At this stage, however, the plaintiff's claim is sufficiently novel and legally difficult that it seems to me that it is worthy of a defence, at least at this preliminary juncture.

[15] On the other side of the balance, the funds over which a proprietary remedy is claimed are not funds that belonged to the plaintiff in any sense other than a constructive one. It seems to me that the plaintiff's claim to absolutely freeze the funds is not as strong as the claims were in the cases that have been referred to.

[16] In the circumstances, at this early juncture of the case, I am satisfied that the balance favours the defendant, and if more funds are necessary to pay reasonable legal fees, that the defendant ought to be allowed to draw on his frozen assets for the purpose of paying those fees.

[17] The defendant's assets appear to consist of some that are in Canada, as well as some that are offshore. The court may be minded to make an order that those assets that are less easily exigible be used first in the payment of legal fees; for instance, that offshore accounts as

opposed to domestic ones be used first. That is a matter for the details of the order.

[18] As well, before I make any order, I must be satisfied that reasonable legal expenses require a higher amount than the current $25,000 that the ***Mareva*** injunction allows to use for legal expenditures. As I have indicated, I intend to accept submissions from the defendant *in camera* to determine whether or not a higher ceiling is necessary in order to fund anticipated legal advice and procedures.

(Discussion)

[19] THE COURT: The plaintiff argues that any order allowing funds to be used for legal fees should be without prejudice to the plaintiff's right to argue, in future, that a tracing remedy would allow the funds to be followed into the hands of a solicitor. The plaintiff also wishes to ensure that my order will not prejudice its right to seek to be allowed to tax the defendant's bills at the conclusion of the trial.

[20] As I indicated in the course of argument, the issues raised by the plaintiff are complex. They require detailed argument, and a consideration of public policy issues. In the course of argument, I indicated that I did not intend to decide those matters on this application. Nothing in my judgment should be taken as precluding future argument over them from either side.

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