

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120329
Docket: S121144
Registry: Vancouver

Between:

**Xueshan Yang, Richform Group Ltd., Sino Spirit Holdings Ltd.
Rich Goldgroup Inc. and Real Sincere Limited**

Plaintiffs

And:

**Christopher R. Lee, Christopher R. Lee carrying on business as
Christopher R. Lee Partners Ltd. and Christopher R. Lee
carrying on business as Canmark International Resources Inc.,
Du Markowitz Llp and Stephen Du (also known as Song Hai Du)**

Defendants

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiffs:

G.P. Forrester

Counsel for the Defendant, Christopher Lee:

B. Yep

Date and Place of Hearing:

March 29, 2012
Vancouver, B.C.

Date and Place of Reasons for Judgment:

March 29, 2012
Vancouver, B.C.

[1] THE COURT:**Orders Sought**

[2] This is an application by the defendant Mr. Lee for an order varying an injunction issued by Mr. Justice McEwan of this court on February 15, 2012. The applicant seeks to vary an exception to the injunction allowing for the payment of ordinary reasonable and *bona fide* expenses to include business expenses.

[3] The applicant also seeks an order replacing references to schedule A in the order of McEwan J. with references to schedule B. That order goes by consent.

[4] The applicant also seeks an order that he be permitted to withdraw \$15,870 from his Bank of Montreal account (described by account number in the material) on account of legal fees. For reasons that will follow, an order is granted permitting that withdrawal may be made from the account so described for the specific purpose described in the notice of application.

[5] An application is also brought for an order permitting the defendant to withdraw \$2,715 from the same Bank of Montreal account for business expenses currently outstanding and permitting the defendant to withdraw \$3,715 from the same account each month commencing April 1, 2012, for recurring living and business expenses and an order for costs. For reasons that will follow, that application is dismissed with leave to renew the application on terms I will describe.

Background

[6] When the application came on for hearing before Mr. Justice McEwan, it was brought on, as are virtually all *Mareva* injunctions, without notice. The resulting order prohibited Mr. Lee or his agents, servants and others from dealing with any of his assets, as described in the order, until the final disposition of this action or until further order of this court, except is as necessary for the payment of ordinary reasonable and *bona fide* living expenses, and except as necessary to pay *bona fide* and reasonable sums for legal advice.

[7] The order also required Mr. Lee within seven days of service of the order to deliver an affidavit identifying full particulars of assets and their location and bank accounts, real property and personal property and in particular, the location of all moneys obtained by Lee from the plaintiffs, and if those moneys have been disposed, full particulars of to whom the moneys were paid, the circumstances of the payment and a consideration received for the payment for the period from March 1, 2007, to the date of the *Mareva* injunction order.

[8] At the time of the application for a *Mareva* injunction, I understand the pleadings did not include a specific claim to a proprietary interest in the bank accounts to which I have referred. Counsel for the plaintiffs indicates that that is because at the time the application was sought, the plaintiffs did not yet have particulars of the account in question. It was only as a result of the service of the *Mareva* injunction and the order for disclosure that the plaintiffs learned of the funds in the account in question.

[9] The plaintiffs then amended the notice of civil claim, on March 29, 2012, with a view toward obtaining declarations in relation to the funds in the specific account and to advance a proprietary interest in relation to those funds.

[10] The plaintiffs say where a *Mareva* injunction is issued on the basis of a claim to a proprietary interest in property, the subject of the injunction ought not to be permitted to use the funds or the asset over which a proprietary interest is claimed to pay for legal or personal living expenses. To do so would permit the respondent to the *Mareva* injunction to use the other party's assets to pay legal expenses, and that ought not to occur, particularly where the plaintiffs allege the assets were fraudulently obtained, as in this case.

[11] The evidence in support of the claim to a proprietary interest is limited. For reasons that I have already described, the plaintiffs are still learning about the assets held by the defendant Lee. The plaintiffs say the defendant Lee has not yet complied with the obligation described in the order of Mr. Justice McEwan to disclose what was done with the funds paid by the plaintiff to the defendant Lee.

[12] For that reason, the plaintiff may not be able to establish at this point on the evidence the proprietary interest claimed in the account in question.

[13] The cases cited to me distinguish between the test that must be met for use of funds subject to a *Mareva* injunction in circumstances where there is a claim to a proprietary interest in the funds, and that which must be met where the use of funds is enjoined by a *Mareva* injunction arising out of a strong *prima facie* case and a threat of the removal of assets from the jurisdiction, in the absence of such a propriety claim.

[14] In certain of the cases cited, in particular in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.T.C. 7, there was clearly evidence before the court tracing funds into the accounts in question and evidence of a proprietary interest. The court held that before the funds in question could be used to pay legal or any other expenses, the defendant would be required to show none of the funds in question could be traced to fraudulent transactions. There might be an onus on the defendant in such circumstances to show that there was no *prima facie* merit to the plaintiff's claim to an interest in the funds in question.

[15] In my view, it would be unfair to require the plaintiff at this point to establish the nature of its proprietary interest. The defendant has not yet complied with the obligations under the first injunction order.

[16] I have granted the order permitting the payment out of funds to pay legal expenses so that Mr. Lee may be in a position to retrain and instruct counsel for the purpose of responding to the obligations that he has under the existing *Mareva* injunction. He should have the means to produce the affidavit required of him, and if necessary, to respond to any application that may be brought by the plaintiffs for further and better particulars in relation to the funds provided to the defendants by the plaintiffs and providing further particulars with respect to the funds that form part of the Bank of Montreal account. He should be able to address the question whether there is a *prima facie* claim to proprietary interest in that fund.

[17] In the meantime, while awaiting that material, I will vary the injunction issued by Mr. Justice McEwan so as to provide that on an interim basis, until further order of this court, there shall be no further disposition or withdrawal of funds from the account referred to in the materials for any purpose without the consent of all parties in writing or further order of this court.

[18] The extension of the injunction to that effect will continue for a reasonable period so as to permit there to be appropriate discovery in relation to the source of the funds and so as to permit the plaintiff to bring on an application to continue that injunction until trial, should the plaintiff determine that it is appropriate to do so. I wish to place a time limit on the injunction. I am considering, counsel, what time ought to be appropriate. I will hear submissions from you.

[19] Mr. Yep and Mr. Forrester, it is my intention that there should be an interim injunction for a reasonable period restraining the use of the fund in question for any purpose until there has been sufficient discovery to permit the parties to determine whether there is a *prima facie* case to a proprietary interest in that fund. At that point, in my view, it should fall upon the plaintiff to apply to continue the interim injunction that I am issuing to trial.

[20] I am considering making the additional injunction that I am issuing today effective to May 31st, 2012, giving the parties approximately 60 days to address such questions as they may need to address and to bring on an application, if necessary, to extend the injunction in relation to the bank account.

[21] Is that sufficient time, Mr. Yep and Mr. Forrester, for you to make discovery of what has to be discovered, provide affidavit evidence as necessary and address any questions with respect to your respective entitlements?

[22] MR. FORRESTER: Certainly enough time to do that, My Lord. I am a little bit unclear as to moneys that are being released. Am I to understand that there are moneys still to be released and that these were also to cover other aspects of the proceeding?

[23] THE COURT: Yes. Initially as I went through the application, I indicated that an order would be made releasing \$15,780 from the account for the purposes of paying legal fees. Those funds may be released forthwith to counsel at the direction of Mr. Lee, for the purpose of paying legal fees and disbursements.

[SUBMISSIONS]

[24] THE COURT: For clarification, Mr. Forrester, what I am in effect saying is this. First, the variation sought by consent may be made in relation to the exhibits or appendices. Second, the funds sought for legal fees to date and as a retainer may be released from the account in question, at the direction of Mr. Lee to his counsel. Third, there will be an interim interlocutory injunction extending the injunction issue by Mr. Justice McEwan to May 31, 2012. The purpose of doing so is to permit you to obtain what has been ordered to be produced by way of affidavit and for you and Mr. Yep to determine what further discovery or application may be necessary for you to be in a position to argue that there is a *prima facie* case to a proprietary interest in the funds in the account.

[25] If that issue can be resolved by May 31, 2012, the parties can, by consent, extend or set aside the interlocutory injunction in relation to the funds in the bank account. If not, an application will have to be brought, Mr. Forrester, by your client for an order continuing the interlocutory injunction I am issuing today. I have expressed my view in the course of argument, the injunction issued by Mr. Justice McEwan did not address a proprietary interest in the bank account in question. I might have asked you to address that claim to a proprietary interest now had there been compliance with the requirements of the order of Mr. Justice McEwan. There has not. I am give the parties an opportunity to fully address that question so that the issue can be properly argued.

[26] With respect to costs, there has been some partial success on the application in that there was an order that the funds be paid out for the purposes of paying legal fees, but success has been mixed. In my view, costs should be costs in the cause. Mr. Forrester says his client has a strong case in fraud and there may be costs of all

proceedings payable to his client ultimately at the end of the day. If he is wrong in that regard, then costs in the cause I think will effect a just result in this application.

"P. Willcock J."

The Honourable Mr. Justice P. Willcock



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PLAINTIFFS

AND:

Christopher R. Lee, Christopher R. Lee Carrying On Business As Christopher R. Lee Partners Ltd. And
Christopher R. Lee Carrying On Business As Canmark International Resources Inc., Du Markowitz LLP And
Stephen Du (Also Known As Song Hai Du)

DEFENDANTS

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment.

In Chambers
March 29, 2012

Counsel for the Plaintiff

Glen Forrester

Counsel for the Defendant Christopher R. Lee

Byron yep

Place of Trial/Hearing:

Vancouver, B.C.

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