

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Li v. Liu*,
2023 BCSC 1996

Date: 20230921
Docket: S215077
Registry: Vancouver

Between:

Zhen Li

Plaintiff

And:

**Xiaohong Liu, Zhongping Xu, Garibaldi Springs Water Company Ltd., Canada
Sparkle Long Holdings Ltd., 1205816 B.C. Ltd., Hong Guo, Guo Law
Corporation, Xu Chen, and Maple Union Industry Inc.**

Defendants

And:

Zhongping Xu and Xiaohong Liu

Plaintiffs by way of counterclaim

And:

Zhen Li

Defendants by way of counterclaim

Before: The Honourable Justice Edelmann

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

G. Forrester

Counsel for Defendants:

D. Chen
D. Way

Place and Date of Trial/Hearing:

Vancouver, B.C.
September 21, 2023

Place and Date of Judgment:

Vancouver, B.C.
September 21, 2023

Overview

[1] **THE COURT:** There are two related applications before me. In the first application, the plaintiff seeks an order transferring the shares in Garibaldi Springs Water Company Ltd. - presently registered in the name of 125816 B.C. Ltd ("816") - to him and an order replacing a director of the company. Should the order sought by the plaintiff be granted, the Sparkle respondents (I will refer to the respondents on the application as "the Sparkle respondents" or "the Sparkle defendants") seek a preservation order.

Clean Hands

[2] What is being sought today is an equitable remedy. The Sparkle respondents raise the issue of clean hands. I am going to address that at the outset. They say the plaintiff does not come before the court with clean hands based on two allegations.

[3] The first is based on an unsubstantiated hearsay relayed in Zhongping Xu's affidavit that the plaintiff sent "gangsters" or "members of a criminal organization" to his offices in Hong Kong to intimidate his staff. I note there is a complete lack of detail of how the individuals in question were identified as gangsters, what, if any, threats were made, and how it was established they were sent by the plaintiff. I do not find this allegation to be made out on the evidence before me.

[4] The second is a complaint that Mr. Xu was arrested by Chinese authorities after the plaintiff reported allegations of fraud to them. The allegations presumably reflect those being made in the amended Notice of Civil Claim in this proceeding. There is no indication that the plaintiff threatened such a report or was otherwise engaged in extortion or an abuse of process. I do not find a report to the Chinese authorities with respect to an allegation of fraud by one Chinese national against another to warrant a finding that the plaintiff comes before this Court with unclean hands.

Transfer of Shares

[5] On its face, the issue on the main application is rather straightforward. On the pleadings of both parties, and according to the only affidavit filed by Mr. Xu on this application, 816 holds the shares of Garibaldi in bare trust for the plaintiff. It is abundantly clear on the materials before me that the plaintiff has made multiple demands for the return of the shares. The obligation of a bare trustee to return trust property on demand is well-established (see *Bronson v. Hewitt*, 2010 BCSC 169).

[6] In submissions before me, the Sparkle respondents seek to resile from the position taken in their pleadings, their response to the application and the only affidavit filed in this application by Mr. Xu, as well as a reference in the affidavit of Xiaohong Liu to the same effect. For the first time in submissions, counsel for the Sparkle respondents suggest that the clear assertion in the pleadings that the shares in Garibaldi are held in bare trust for the plaintiff are false. For reasons that have not been explained, the Sparkle respondents have not sought to amend their pleadings, their response to the application, nor to file a further affidavit for Mr. Xu or Ms. Liu correcting the purported error or providing an alternate version of facts.

[7] I do not propose to go into the background in detail. Suffice to say the plaintiff provided \$7.5 million for the purchase of Garibaldi. It would appear, based on his examination for discovery and an affidavit filed in this matter, that the original intention was for the purchase of the shares in Garibaldi to be done through an overseas company created for that purpose. Essentially, the plaintiff would provide the funds and the shares would have been purchased by a holding company wholly controlled by the overseas company.

[8] All the parties agree that this is not what took place. Instead, the defendant Mr. Xu registered 816 in his name and under his sole control. The shares in Garibaldi were purchased using the plaintiff's funds and ultimately transferred to 816. In the original Notice of Civil Claim, the plaintiff alleged, among other things, unjust enrichment and breach of trust by Mr. Xu. In the Response to Civil Claim, the Sparkle defendants unequivocally asserted that the shares were being held in bare

trust for the plaintiff. The plaintiff, therefore, amended his Notice of Civil Claim accepting the assertion that the shares were being held in trust for him but continuing to assert various other breaches of trust I do not propose to engage with today.

Legal Framework

[9] The plaintiff seeks the transfer of the Shares and other relief in this application pursuant to Sections 1 and 227 of the *BC Business Corporations Act*, (SBC 2002) C. 57. (the "*BCBCA*"). The Plaintiff says that he has standing under those sections and that he has been oppressed by the conduct of the Sparkle defendants.

[10] Pursuant to section 1 of the *BCBCA* "beneficially own' includes to own through any trustee, personal, other legal representative, agent or other intermediary".

[11] Justice Thomas considered the application of section 227(3) in the context of an application by the beneficial owner of shares for the transfer of shares. He considered the discussion in *1217174 Ontario Ltd. v. 141608 Canada Inc.*, 2017 ONSC 7698 on the issue and found it persuasive. I agree, and find the following discussion a helpful outline with respect to the scope of jurisdiction and the nature of available remedies for oppression:

[35] In my view, the approach advocated by the respondents is not in keeping with the equitable nature of the oppression remedy. Section 248 creates an equitable remedy that "seeks to ensure fairness – what is 'just and equitable'" and gives the court a "broad, equitable jurisdiction to enforce not just what is legal but what is fair" (*BCE Inc. (Re)*, 2008 SCC 69, at para. 58). Courts considering claims for oppression are therefore instructed to engage in fact-specific contextual inquiries looking at "business realities, not merely narrow legalities" (*Wilson v. Alharayeri*, 2017 SCC 39, at para. 23, citing *BCE*, at para. 58). Under section 245(c), the court has an unfettered discretion to determine who is a "proper person" to commence oppression proceedings under section 248 (*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, 2003 CanLII 25511 (ON CA), [2003] O.J. No. 5242 (C.A.), at para. 45). Although section 248 lists the affected interests – those of any security holder, creditor, director or officer of the corporation – I do not read this list of protected interests as closed. To interpret section 248 in such a manner would be inconsistent with a contextual interpretation

that takes into account business realities; it would also negate the language of section 245(c).

[12] I note the courts in other provinces have granted similar relief in the context of an oppression action (see *Frydman v. Pelletier*, 2013 ABQB 225 and *Cumbo v. 1120323 Ontario Limited*, 2016 ONSC 2125). Our Court of Appeal has found that the failure to transfer shares could form the basis for an oppression action under s. 227(2)(b) and ordered transfer of shares as a remedy (*Cross v. Mountain High Recreation*, 2007 BCCA 121).

[13] The test for an interim order in respect to the oppression remedy is the same generally as that which applies to an interlocutory injunction: see *Canada Snow Mountain Investments Co. Ltd. v. Miller Springs Ltd.*, 2015 BCSC 1117 [Canada Snow]; and *Boffo Family Holdings Ltd. v. Mountainview Developments Ltd.*, 2010 BCSC 560.

Serious Issue

[14] Ms. Liu is the sole director of Garibaldi Springs which has neither taken a position nor filed materials on these applications. She states in her affidavit that she was told by Mr. Xu and believes that the plaintiff entrusted Mr. Xu to nominate a bare trustee to hold the shares of Garibaldi and that Sparkle acquired 100 percent of the shares of Garibaldi at the request of the plaintiff. Multiple demands and requests have been made through counsel to all the Sparkle defendants, including Ms. Liu, to transfer the shares to the plaintiff.

[15] Everyone appears to agree that the plaintiff provided \$7.5 million for the purchase of the Garibaldi shares and that it was the plaintiff's money that was used to purchase the Garibaldi shares that ultimately came to be held by 816. On the plaintiff's version, this was in breach of trust and contrary to the agreement reached between them. Given that all the parties agree that the plaintiff intended the funds to purchase the Garibaldi shares, there would appear to be a strong claim for a constructive trust over at least a significant portion of the shares even if the claim in bare trust were found not to be valid.

[16] On the only version from Mr. Xu that is properly before me, 816 holds the shares in bare trust for the plaintiff. In the notable absence of any evidence from Mr. Xu aside from an assertion he held the shares in bare trust for the plaintiff, I see no unfairness arising from a transfer of the shares to the plaintiff. Even on the submissions before me that are unsupported with evidence or pleadings, the Sparkle defendants do not assert a majority interest in the shares, conceding that at least \$7.5 million of the shares belong either directly or indirectly to the defendant.

Irreparable Harm

[17] I find there to be a significant potential prejudice to the plaintiff in his interest in the shares if Mr. Xu continues to control them through 816. On the basis of the evidence of Mr. Gordon, Garibaldi is at risk of losing its water licenses which are its primary asset. The evidence presented on behalf of Ms. Liu does not satisfy me she will ensure the continuing viability of Garibaldi and the maintenance of its water licenses given the current situation. I find the plaintiff has established the pressing necessity to ensure reliable management of Garibaldi to address the licensing issue.

Balance of Convenience

[18] I find that the plaintiff has a significant interest in ensuring the viability and maintenance of the value in the Garibaldi shares. As the current holders of the shares do not assert a beneficial interest in the shares in the pleadings before me and that the plaintiff at the very least has a significant pecuniary interest in the viability of Garibaldi, I find the balance of convenience favours the plaintiff having control of the shares in Garibaldi.

[19] Given that he will have control of the shares in Garibaldi, I will also make the order replacing Ms. Liu with the directors named by the plaintiff as that could be done by way of a general meeting in any event. Given the pressing situation with respect to the water licences, I find it appropriate in the circumstances to make the order directly.

Preservation Order

[20] Given that the plaintiff's pleadings as well as his affidavit and testimony in examination for discovery leave open the possibility that there are other beneficial owners of the shares, I do find it appropriate to put a preservation order in place. It would appear that both parties may be seeking to amend their pleadings given the evidence and submissions before me.

[21] On all the versions before me it seems clear the plaintiff has an interest of some \$7.5 million that will be returned before any other returns might be payable. It appears to be common ground that if Garibaldi is able to hold on to its water licences it is worth substantially more than \$7.5 million and that if it is not able to hold on to the water licences it may not be worth anything at all.

[22] I am satisfied that the Sparkle defendants have raised an arguable case that they are entitled to some portion of Garibaldi that would have to be determined. I find that the most appropriate interim measure balancing all the interest at play is for the plaintiff to have control of the shares but that there be a preservation order on a portion of any funds being distributed from any sale of the shares or sale or transfer of the shares.

[SUBMISSIONS RE PRESERVATION ORDER]

[23] THE COURT: So with respect to the preservation order, I accept the point of counsel with respect to the materials on the preservation order. However, I see the preservation order as tied to my decision with respect to an interim remedy under 227. While the test has been met in that the balance of convenience favours the plaintiff having control of the shares at this point, there remain arguable cases for other types of ownership structures and it is unclear who actually owns these shares. That is something that is going to need to be determined at trial.

[24] So in my view, while the balance of convenience favours the plaintiff having control of the company and control of the shares in the interim, the value of the company ought to remain in the company until these issues can be resolved, whether that is at trial or through some other mechanism. That being said, on

everybody's version the plaintiff would be getting \$7.5 million before other profits and other interests were dealt with.

[25] Therefore, I will make an order that there be \$1.5 million that will remain in the company. If there is a sale or transfer of assets for more than \$1.5 million, any amount above \$1.5 million up to \$7.5 million in total would be transferred or given to the plaintiff, and any other proceeds of the sale or transfer would remain under the preservation order until further order of this court.

[26] So hopefully that is clear. Essentially there would be \$1.5 million that would be preserved if there is a sale or transfer. Then the plaintiff would get his \$7.5 million and then anything additional would remain under the preservation order until this matter is sorted out.

[CLARIFICATION BY THE PLAINTIFF RE ORDER]

[27] THE COURT: I will just be clear. The reason for that is that in a sale at \$9 million, in my view, the probability that there would be an interest higher than \$1.5 million becomes negligibly small. It is only as the sale proceeds get higher that the interest of the defendants may start to go up. I find that \$1.5 million is an appropriate amount in the circumstances.

[28] Given the pleadings as they currently stand, the defendants have yet to present the assertions made in submissions before me. As noted, their current pleading is that the shares are being held in bare trust. In terms of the overall circumstances, those are things that will need to be addressed going forward in the litigation.

[29] In terms of costs, in my view there has been mixed success on this application and each party can bear their own costs.

Edelmann, J.