SUPREME COURT OF YUKON

Citation: *Qiu's Restaurant Inc v Wen*, 2021 YKSC 56

Date: 20211022
S.C. No. 19-A0161
Registry: Whitehorse

BETWEEN:

QIU'S RESTAURANT INC.

PLAINTIFF

AND

XUN WEN

DEFENDANT

AND BETWEEN:

S.C. No. 18-A0109
Registry: Whitehorse

QIU'S RESTAURANT INC.

PLAINTIFF

AND

GUO HUA QIU and 535993 YUKON INC.

DEFENDANTS

Before Justice K. Wenckebach

Counsel for the plaintiff on file 19-A0161 — Mark Wallace
Counsel for the plaintiff on file 18-A0109 — Jack Wang

Counsel for the defendant on file 19-A0161 — Jack Wang
Counsel for the defendants on file 18-A0109 — Meagan Lang

REASONS FOR DECISION

INTRODUCTION

[1] The defendant in *Qiu's Restaurant Inc v Xun Wen*, S.C. No. 19-A0161 (the "Misappropriation Action"), seeks that the action be stayed pending the outcome of *Qiu's Restaurant Inc v Guo Hua Qiu and 535993 Yukon Inc.*, S.C. No. 18-A0109 (the "Derivative Action"), or, in the alternative, that the plaintiff of the Misappropriation Action be required to apply for leave retroactively to file the claim.

[2] The plaintiff to the Misappropriation Action also filed an application, which is to have the trial of the Misappropriation Action joined with the Derivative Action.

[3] The two applications were heard together.

[4] The stay application concerns whether the Misappropriation Action was filed in bad faith.

[5] The application for the actions to be joined is about whether the matters will proceed more efficiently and expeditiously if they are tried together.

FACTS

[6] Qiu's Restaurant Inc. ("QRI") is a closely held corporation with two shareholders: Guo Hua Qiu, who is also the corporation's sole director, and Xun Wen. QRI operated a restaurant, Sakura Sushi, until October, 2015. Mr. Qiu and Mr. Wen ran and worked at Sakura Sushi (although the extent to which each contributed is disputed).

[7] In September 2015, Mr. Qiu withdrew $100,000 from QRI's bank account, and deposited into his own bank account. In October, 2015, Mr. Qiu shut down the restaurant, without Mr. Wen's knowledge or consent. In January, 2016, Mr. Qiu opened a new restaurant, Golden Sakura Sushi, in the same location, under a new corporation, 535993 Yukon Inc. The reasons why Mr. Qiu took these actions, and the ramifications

that flowed from them, is the subject of both the Derivative Action and the Misappropriation Action.

[8] For his part, Mr. Wen alleges that Mr. Qiu wrongfully used the assets and profits from QRI and funnelled them to himself and into 535993 Yukon Inc. The assets 535993 now controls properly belong to QRI. The profits Golden Sakura Sushi has earned should also be QRI's.

[9] Mr. Wen's allegations are that Mr. Qiu harmed the corporation. Therefore, any action commenced must be in the corporation's name. As a shareholder, however, Mr. Wen required leave of the court to commence the action on behalf of the corporation. Mr. Wen therefore commenced a Petition, *Xun Wen v Guo Hua Qiu and Qiu's Restaurant Inc*, S.C. No. 16-A0091, seeking leave to commence a derivative action. Veale C.J., (as he was then), granted leave to Mr. Wen to commence a derivative action on July 5, 2018 (2018 YKSC 31). Mr. Wen then filed the Derivative Action.

[10] Given that Mr. Wen has conduct of the Derivative Action, I will refer to Mr. Wen, rather than QRI, when naming the plaintiff in the Derivative Action.

[11] Mr. Qiu also has allegations of wrongdoing, involving Mr. Wen. In response to the statement of claim in the Derivative Action, Mr. Qiu filed a statement of defence, in which he laid out his allegations.

[12] Mr. Qiu stated that he shut down Sakura Sushi after it became apparent that funds were being misappropriated from the restaurant. He preserved QRI's assets by withdrawing funds from QRI's bank account to which employees of Sakura Sushi had access, and using those funds himself to pay for QRI's expenses, and closing the restaurant to have an audit conducted.

[13] The audit revealed that approximately $700,000 in unauthorized cash withdrawals were made, mostly by Mr. Wen.

[14] QRI was no longer able to operate Sakura Sushi because of the loss of money, and because the staff from Sakura Sushi were hired to work at a competing business run by members of Mr. Wen's family.

[15] Mr. Qiu then filed the Misappropriation Action on behalf of QRI on January 13, 2020. In that action, the plaintiff alleges that Mr. Wen misappropriated funds from Sakura Sushi, and seeks repayment of the amounts taken. Mr. Wen, in his statement of defence, denies misappropriating funds, and says that all the monies paid to him were for his wages or to pay for Sakura Sushi's legitimate business expenses.

[16] As in the Derivative Action, the named plaintiff in the Misappropriation Action is QRI. Because Mr. Qiu has conduct of the action on behalf of QRI, I will refer to Mr. Qiu when referring to the plaintiff of the Misappropriation Action.

RESULT

[17] I deny Mr. Wen's application to stay the Misappropriation Action. I also do not grant the alternative relief, that Mr. Qiu be required to seek leave to commence the Misappropriation Action.

[18] I grant Mr. Qiu's application to join the Derivative Action and the Misappropriation Action.

ISSUES

A. Should the Misappropriation Action be stayed pending the result of the Derivative Action?

B. Should Mr. Qiu be required to retroactively apply for leave to commence the Misappropriation Action?

C. Should the two actions be heard together?

ANALYSIS

A. Should the Misappropriation of Funds Action be stayed pending the result of the Derivative Action?

[19] Mr. Wen submits that Mr. Qiu is in a conflict of interest in bringing the Misappropriation Action on behalf of QRI. He says that Mr. Qiu is bringing the action to harass and intimidate him. The Supreme Court of Yukon, in granting him leave to commence the Derivative Action, found there was preliminary merit to the case. In addition, Mr. Wen says that counsel acting for Mr. Qiu in the Derivative Action is in a conflict of interest. As a result, the Misappropriation Action should be stayed pending the outcome of the Derivative Action.

[20] In support of this submission, Mr. Wen states that Mr. Qiu is the sole director of QRI, and is therefore the person responsible for commencing the Misappropriation Action. However, in doing so, he has put himself in a conflict of interest by suing the person who is effectively suing him. This is particularly so given that his ethics and conduct are called into question in the action in which he is the defendant. The inference is that Mr. Qiu filed the Misappropriation Action in retaliation against Mr. Wen for bringing the Derivative Action.

[21] During the course of oral submissions, counsel to Mr. Wen agreed to the proposition that if there is a valid case against Mr. Wen of misappropriation of funds, then it would likely be in the best interests of the company to bring an action to recover

the money. In that case, there may be a positive duty on a director to bring an action against Mr. Wen.

[22] However, in this case, the timing of filing the Misappropriation Action confirms that it was brought as a collateral attack on Mr. Wen, and not in the legitimate best interests of the company. The Misappropriation Action, if made in good faith, should have been filed before the Derivative Action. Instead, it was not brought until after the Derivative Action was commenced. I should therefore conclude that Mr. Qiu has brought the Misappropriation Action as a tactical move, and should stay the action pending the outcome of the Derivative Action.

[23] During oral submissions, in response, Mr. Qiu's lawyer noted that Mr. Wen improperly based the stay application on Rules 1(6) and 27(8) of the *Rules of Court* of the Supreme Court of Yukon ("*Rules of Court*"). Counsel to Mr. Qiu nevertheless did not oppose the hearing of the application, and made arguments on the substance of the application.

[24] I agree with counsel to Mr. Qiu that Rules 1(6) and 27(8) are not the correct basis upon which to bring the application to stay the Misappropriation Action. Rule 27(8) is about who can be examined in examinations for discovery.

[25] Rule 1(6) concerns the objects of the Rules, and states:

> The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,

> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.

[26] Rule 1(6) can support an application for a stay of proceedings, but it cannot serve as the sole basis for it.

[27] Mr. Qiu's counsel stated that this application could have been brought under Rule 20(26). Again, I agree. Rule 20(26)(d) allows a party to bring an application to strike or stay a proceeding on the ground that it is "… an abuse of the process of the court".

[28] Applications to strike or stay on the grounds of abuse of process may be brought when a party alleges that the court's process is being used in bad faith or with an ulterior motive. In *Flavelle et al v Mahood et al* (1980), 25 BCLR 236 (BCSC) at p. 242, the Court cited the decision in *Fesser v McKenzie*, [1971] 1 WWR 617 (ABSC) at para. 18 wherein Riley J. stated: "… Where it is made out that the process of the court is used against good faith and not *bona fide*, the court ought to interfere to prevent it …" The Court in *Flavelle* went on to say, at para. 20: "A pleading is an abuse of process if made knowing there is no factual basis for the allegations made or if made for some improper or collateral purpose."

[29] In this case, Mr. Wen alleges that Mr. Qiu has brought the Misappropriation Action as a tactical manoeuvre, and as retaliation against him. The legal basis for the application is, therefore, that the action is an abuse of process.

[30] The legal basis for the application is important because it affects the principles that are brought to bear on the facts of the case.

[31] An application to strike, or to stay generally, under Rule 20 will only be granted in the clearest of cases. However, the onus is not as heavy when the party is seeking an interim stay (*Can-Dive Services Ltd v Pacific Coast Energy Corp* (1993), 96 BCLR (2d) 156 (BCCA) at paras. 11-14).

[32] Mr. Wen did not provide any case law in which an interim stay was granted for abuse of process. In situations in which two cases that significantly overlap are pending, stays are often sought because it is more efficient to have one matter heard first, and prejudicial to have them both proceed concurrently (*Ainsworth Lumber Co Ltd v The Attorney-General of Canada and Paul Martin*, 2001 DTC 5136 (BCCA) at para. 11).

[33] It seems to me, however, that considerations of efficiency do not apply when determining whether to grant an interim stay because of abuse of process as alleged by Mr. Wen. Instead, in this unique situation I believe that the determination of whether to grant an interim stay turns on whether Mr. Wen can demonstrate that Mr. Qiu filed the Misappropriation Action for an improper purpose.

[34] Even though the onus on Mr. Wen is not as high as it would be on an application to strike, I conclude that the evidence does not demonstrate that the Misappropriation Action is an abuse of process.

[35] The only evidence Mr. Wen identifies as establishing that Mr. Qiu is acting in bad faith is that Mr. Qiu brought the Misappropriation Action after Mr. Wen commenced the Derivative Action.

[36] He also says that, in giving him leave to commence the Derivative Action, the Supreme Court of Yukon acknowledged that it had merit.

[37] This does not, in my opinion, establish that Mr. Qiu commenced the Misappropriation Action with ulterior motives. In his defence in the Derivative Action, Mr. Qiu pleaded that there had been a misappropriation of funds from the restaurant. In another type of action, it would have been open to Mr. Qiu to counterclaim against Mr. Wen. Here, however, a counterclaim is not possible, as a counterclaim would require that QRI be the defendant, and Mr. Wen be the plaintiff. That an action seeking damages for misappropriation of funds was filed, therefore, is not surprising.

[38] Moreover, if the funds have been misappropriated, then recouping them is likely in QRI's interests. Therefore, the director of QRI may have a fiduciary duty to institute an action to recoup the funds.

[39] That Mr. Wen was granted leave to bring the Derivative Action also does not assist his argument. The bar for granting leave to bring a Derivative Action is low. In considering this issue Tysoe J. said, in *Primex Investments Ltd v Northwest Sports Enterprise*, [1996] 4 WWR 54 (BCSC) at para. 41: "The authorities are clear that the Court should not attempt to try the case when deciding whether the requirement in s. 225(3)(c) [here s. 241] has been satisfied. The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail." The applicant must establish nothing more than a *prima facie* case.

[40] Given this, I reject Mr. Wen's argument that the Misappropriation Action was commenced in bad faith.

Conflict of Interest - Counsel

[41] Mr. Wen also argued that Mr. Qiu's counsel in the Misappropriation Action is in a conflict of interest, as Mr. Qiu's lawyer in the Misappropriation Action acts as QRI's

solicitor on a day-to-day basis. When Mr. Wen was given leave to bring the Derivative Action, QRI's lawyer withdrew with regards to that matter. Mr. Wen says, although less emphasis was put on this in oral submissions, that QRI's lawyer is now in a conflict of interest in the Derivative Action.

[42] A conflict of interest may arise where a lawyer acts for a client on one matter, and in a manner that would harm the client's interests in another matter. Here, counsel to QRI has not been involved in the Derivative Action. Mr. Wen has never been a client. I do not see a conflict.

B. Should Mr. Qiu be required to retroactively apply for leave to commence the Misappropriation Action?

[43] If a stay is not granted, Mr. Wen seeks, in the alternative, that Mr. Qiu be required to apply for leave retroactively to file the misappropriation statement of claim, and relies on s. 242 of the *Business Corporations Act*, RSY 2002 c.20 (the "*BCA*"), in support of this position.

[44] This relief was sought for the first time during the course of hearing the application. Counsel for Mr. Qiu noted that this had not been included in the Notice of Application, but responded to the argument on the merits.

[45] Mr. Wen's counsel took considerable issue with the fact that opposing counsel had mentioned that the relief was not sought in the Notice of Application. He submitted that the Court has the ability to take into account any applicable law in making its decision. Given this submission, I believe it is helpful to discuss the issues of procedure before turning to the merits.

[46] The *Rules of Court* require applications to be made using Form 52. Form 52, in turn, requires that the applicant set out the orders sought and the legislation, regulation, or rule relied upon in bringing the application.

[47] In addition, where, as here, the application is set for longer than 30 minutes, an outline is to be filed. The outline is to contain the relief sought and the legal and factual basis for seeking the relief.

[48] Setting out the relief sought, and the basis for seeking the relief provides the opposing party and the court notice about the facts and law at issue. The opposing party is entitled to notice so that they can prepare and respond to the application. Otherwise, they are faced with an application proceeded by way of ambush. The court also benefits from notice, as then the court can meaningfully engage with the arguments presented during the oral hearing.

[49] When an argument is foisted upon the opposing party and the court in the middle of a hearing, the chances are high that the issue will not be as fully and as carefully canvassed as it should be. Including all the relief sought, and the legal basis for it in the notice of application and the outline, is, therefore, a material procedural step and not simply an empty formality.

[50] In this case, at the hearing, Mr. Wen's lawyer submitted that the language of s. 242 of the *BCA* gives the court broad discretion to make orders in derivative actions. Section 242 therefore gives the court the discretion to make an order requiring that Mr. Qiu apply for leave to file the Misappropriation Action.

[51] Section 242 states:

> In connection with an action brought or intervened in under section 241 or paragraph 243(3)(q) [oppression

> proceedings], the Supreme Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following
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> (a) an order authorizing the complainant or any other person to control the conduct of the action;
>
> (b) an order giving directions for the conduct of the action;
>
> (c) an order directing that all or some of any amount adjudged payable by a defendant in the action shall be paid directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;
>
> (d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

[52] I agree with Mr. Wen's lawyer that in stating that the Supreme Court may "…at any time make any order it thinks fit…" the intent of the provision is to give the court wide authority to make orders in the management and resolution of derivative actions.

[53] Section 242 of the *BCA* also provides that the court may make orders which are "… [i]n connection with an action brought or intervened in under section 241 or paragraph 243(3)(q)…" Arguably, this permits the court to make orders regarding proceedings that are not derivative or oppression proceedings themselves, but are connected to derivative actions or oppression proceedings.

[54] This interpretation does not hold, however, when the context of the legislation is considered. The *BCA* provides for different types of proceedings in different situations. For instance, a shareholder is entitled to apply to court for a determination of the fair value of shares (s. 193(6)); and applications may be made to the court to supervise the

liquidation of a corporation, or to revive a corporation that has been dissolved (s. 211). The procedures and remedies vary depending on the type of problem at issue.

[55] Likewise, the court's authority is determined by the nature of the proceeding, the procedures in place, and the available remedies. The court's powers are therefore paired to the specific proceedings and issues at play.

[56] This applies to the court's authority under s. 242. The court's powers are granted to deal with the peculiarities of derivative actions and oppression proceedings. Its authority does not, therefore, extend to other kinds of proceedings, even if related to a derivative action or oppression proceeding.

[57] I cannot, therefore, make an order in the Misappropriation Action under s. 242 because it is not a derivative action or oppression proceeding.

C. Should the two actions be heard together?

[58] In *St Cyr v Atlin Hospitality Ltd,* 2020 YKSC 4 at para. 8, Duncan J., (as she was then), set out the two questions to be asked in determining whether actions should be tried together:

(i) Are there common claims, disputes and relationships between the parties? and

(ii) Is there any advantage or prejudice the parties are likely to experience if the actions are kept separate or tried together?

(i) Common claims, disputes and relationships

[59] The factors relevant to deciding whether there are common claims, disputes and relationships are, as noted in *St Cyr*, at para. 8:

- whether there is overlap between the parties;

- whether the lawyers are the same;
- whether the claims are interwoven, making separate trials; and
- whether there is expected to be significant overlap of evidence or witnesses between the proceedings.

Overlap Between the Parties

[60] Here, the parties are the same. The Derivative Action is brought by QRI, Mr. Wen has conduct of the action, and is brought against Mr. Qiu and his new corporation, 535993 Yukon Inc. The Misappropriation Action is also brought by QRI, but in this case Mr. Qiu has conduct of the action. The defendant is Mr. Wen.

Whether the lawyers are the same

[61] The lawyer for Mr. Wen is the same for both actions. The lawyers are different for Mr. Qiu in the Misappropriation Action and the Derivative Action.

Whether the claims are interwoven

[62] The central issue in both actions is about whether the payment of funds to Mr. Wen from QRI was legitimate. In the Derivative Action, Mr. Wen alleges that Mr. Qiu closed Sakura Sushi, then used QRI's assets to re-open as a new restaurant under a new corporation, therefore depriving QRI of its assets and profits. Mr. Qiu's defence is that Mr. Wen misappropriated funds, leaving QRI without sufficient assets to continue the business.

[63] In the Misappropriation Action, Mr. Qiu alleges that Mr. Wen misappropriated funds from QRI. Mr. Wen's defence is that the money paid to him were expenditures for salaries to employees and him, and used for the benefit of QRI. The factual issues in the actions are, therefore, two sides of the same coin.

[64] Given this, the same facts would be canvassed in both trials.

Overlap of Evidence, Witnesses

[65] As the central issue is the same in both actions, it follows that the same events are involved, and the same evidence and witnesses will be called at both trials.

(ii) Is there any advantage or prejudice the parties are likely to experience if the actions are kept separate or tried together?

[66] The non-exhaustive list of factors used to determine this question is in accordance with *St Cyr*, at para. 8:

- whether a decision in one action, if tried separately from the first, would likely put an end to the other action, significantly narrow the issues, or increase the likelihood of settlement;
- whether the issues in one action are relatively straightforward compared to the complexity of the other action;
- whether there is a risk of inconsistent findings or judgments if the actions are not joined; and
- whether the parties will save costs or have costs increased if the actions are joined together.

[67] In addition, in this case, there is the question of whether either party would be prejudiced by delay.

Ending the Action, Narrowing the Issues, or Increasing the Likelihood of Settlement

[68] Given that the factual matrix of the claims is the same or very similar, it is likely that the resolution of one of the actions could narrow the issues of the other. There is at

least an argument to be made, once one action is tried, that issue estoppel applies to the other.

[69] At the same time, in order to narrow the issues, it may be necessary for the question of issue estoppel to be litigated, not only about whether it applies, but also the extent to which it applies. Thus, it may be necessary to expend additional resources in order to narrow the issues.

[70] Moreover, as matters stand now, the parties should be proceeding through all the steps necessary to bring both actions to trial. Even if the issues are narrowed at the conclusion of one of the proceedings, doing so may not bring about as many efficiencies as it would if the matters were heard together.

Complexity of the Issues in the Actions

[71] There are some additional issues that may arise in the Derivative Action that are not applicable in the Misappropriation Action. In particular, Mr. Wen in the Derivative Action is seeking an accounting of profits. This is a distinct issue that is not applicable to the Misappropriation Action, and accounting of profits is not always a straightforward task.

Inconsistent Findings or Judgments

[72] The cases are fact-driven, and the factual issues overlap. There is therefore a risk of inconsistent findings of fact if the two matters proceed to trial.

Cost Savings

[73] As there is factual overlap, two trials would mean that costs would be incurred in calling the same evidence twice. Hearing the trials together would, in contrast, mean that costs are not spent unnecessarily.

Delay

[74] Counsel to Mr. Qiu in the Derivative Action submitted that the two actions should be heard together. She noted that QRI cannot be wound up until the actions are concluded. Hearing the actions separately will likely extend the time for their ultimate resolution, thus delaying QRI's ability to be wound up.

[75] Having regard to all the factors, hearing the trials together would result in fewer delays, more efficiency, and will prevent the possibility of inconsistent results.

CONCLUSION

[76] It is not in anyone's interest that the actions continue to be heard separately. Where actions are as interrelated as they are in these circumstances two options are to stay one of the proceedings pending resolution of the other, or to hear the actions jointly.

[77] In this case, Mr. Wen did apply for a stay of the Misappropriation Action. He did not bring it on the basis that there was significant overlap in the matters, and that resolving one would result in savings of costs and resources, however, but on the basis of abuse of process. I have found there is no abuse of process, and so do not grant the stay application.

[78] Mr. Qiu brought an application to have the matters joined together. It would be a better use of the parties' and the Court's resources to hear the trial of the actions together.

[79] I therefore order that the actions be joined, and that pre-trial and trial evidence in

one action be evidence in the other.

[80] Costs may be spoken to in case management if the parties are unable to agree.

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WENCKEBACH J.