

# COURT OF APPEAL OF YUKON

Citation: *Qiu's Restaurant Inc. v. Wen*,  
2022 YKCA 6

Date: 20220622  
Docket: 21-YU882

Between:

**Qiu's Restaurant Inc.**

Respondent  
(Plaintiff)

And

**Xun Wen**

Appellant  
(Defendant)

Before: The Honourable Chief Justice Bauman  
The Honourable Mr. Justice Goepel  
The Honourable Madam Justice Charlesworth

On appeal from: An order of the Supreme Court of Yukon, dated October 22, 2021  
(*Qiu's Restaurant Inc v. Wen*, 2021 YKSC 56, Whitehorse Docket 19-A0161).

Counsel for the Appellant  
(via videoconference):

J. Wang

Counsel for the Respondent:

M. Wallace

Place and Date of Hearing:

Whitehorse, Yukon  
May 17, 2022

Place and Date of Judgment:

Vancouver, British Columbia  
June 22, 2022

**Written Reasons by:**

The Honourable Mr. Justice Goepel

**Concurred in by:**

The Honourable Chief Justice Bauman  
The Honourable Madam Justice Charlesworth

**Summary:**

*The appellant appeals from the dismissal of an application to stay an action. The underlying action arises from a dispute between the shareholders of Qiu's Restaurant Inc. ("QRI"), a closely held corporation with two shareholders, Guo Hua Qiu and Xun Wen with Mr. Qiu being the sole director. QRI operated a restaurant. Mr. Qiu shut down the restaurant without Mr. Wen's knowledge or consent before opening a new restaurant under a different name. Mr. Wen brought a derivative action alleging Mr. Qiu wrongfully used the assets and profits of QRI to open a new restaurant (the "Derivative Action"). Later, QRI commenced an action against Mr. Wen alleging he misappropriated \$700,000 from QRI (the "Misappropriation Action"). The chamber judge dismissed Mr. Wen's application seeking a stay of the Misappropriation Action and ordered that the matters be tried together. Mr. Wen alleges the chambers judge erred in failing to exercise her inherent jurisdiction to control the court process and recognize a conflict of interest in Mr. Qiu's direction to QRI to sue Mr. Wen for misappropriation, and that the chambers judge erred by conflating the issue of conflict of interest with abuse of process. Held: Appeal dismissed. The evidence does not demonstrate that the Misappropriation Action was commenced in bad faith or is an abuse of process, nor is there a conflict of interest.*

**Reasons for Judgment of the Honourable Mr. Justice Goepel:****INTRODUCTION**

[1] Qiu's Restaurant Inc. ("QRI") is a closely-held corporation with two equal shareholders: Guo Hua Qiu and Xun Wen. Mr. Qiu is the sole director. Commencing in May 2008, QRI operated the Sakura Sushi Japanese Restaurant ("Sakura") in Whitehorse. Mr. Qiu and Mr. Wen were both involved in the running and operation of the restaurant.

[2] In October 2015, Mr. Qiu shut down Sakura without Mr. Wen's knowledge or consent. In January, 2016, Mr. Qiu, under a new corporation, 535993 Yukon Inc. ("535993") opened a new restaurant, Golden Sakura Sushi in the same location. The reasons why Mr. Qiu took these actions, and the ramifications that flowed from them is now the subject of two related actions, referred to hereafter as the Derivative Action and the Misappropriation Action.

[3] Mr. Wen was granted leave to commence the Derivative Action on 5 July 2018 (*Wen v. Qiu*, 2018 YKSC 31) and filed the Derivative Action on 31 October 2018. The Derivative Action alleges that Mr. Qiu wrongfully used the assets and

profits of QRI and funnelled them to himself and 535993. QRI seeks a return of profits or compensation for the loss of its business opportunities from both defendants and repayment of funds misappropriated by Mr. Qiu. The Derivative Action was brought in the name of QRI and Mr. Wen has conduct of the action.

[4] On December 7, 2018, Mr. Qiu and 535993 filed their defence in the Derivative Action. They denied the allegations contained in the statement of claim and also pled that QRI was no longer able to operate Sakura because of Mr. Wen's misappropriation of funds.

[5] On January 13, 2020, QRI commenced the Misappropriation Action against Mr. Wen. In the Misappropriation Action QRI alleges that Mr. Wen misappropriated approximately \$700,000 in unauthorized cash withdrawals and seeks repayment to QRI. Mr. Wen says in defence that all of these withdrawals were to pay himself for his wages or to pay for other legitimate business expenses, including cash salaries.

[6] The plaintiff in both actions is nominally QRI, but Mr. Wen has conduct of the Derivative Action, and Mr. Qiu has conduct of the Misappropriation Action. Mr. Wen applied to have the Misappropriation Action stayed pending the outcome of the Derivative Action. Mr. Qiu applied to have the two matters joined together for trial. The two applications were heard together.

[7] Madam Justice Wenckebach heard the applications on 23 August 2021. On 22 October 2021, she dismissed the application to stay the Misappropriation Action and ordered that the two actions be joined for trial. Her reasons are indexed at 2021 YKSC 56.

[8] Mr. Wen now appeals the dismissal of the stay application. If the appeal fails, he does not challenge the order that the matters be tried together.

### **THE JUDGE'S REASONS**

[9] The chambers judge viewed Mr. Wen's submissions as arguing two grounds for a stay: (1) that Mr. Qiu is bringing the Misappropriation Action to harass and

intimidate Mr. Wen; and (2) that Mr. Qiu (or his counsel) is in a conflict of interest.

She summarized Mr. Wen's submissions as follows:

[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.

[10] The chambers judge treated the first argument as grounded in Rule 20(26)(d) of the *Rules of Court*, Y.O.I.C. 2009/65 which allows a stay on the ground that the action is "an abuse of the process of the court." The chambers judge cited *Flavelle v. Mahood* (1980), 25 B.C.L.R. 236 (S.C.) at 242, and *Fesser v. McKenzie* (1970), [1971] 1 W.W.R. 617 (A.B.Q.B.) at 625 for the proposition: "[w]here 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."

[11] The chambers judge found that Mr. Wen was unable to establish that the Misappropriation Action was an abuse of process. She reasoned as follows:

[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.

[12] The chambers judge also found there was no merit to the submission that Mr. Qiu's counsel in the Misappropriation Action was in a conflict of interest because he acts as QRI's solicitor on a day-to-day basis. In that regard she pointed out that Mr. Wen has conduct of the Derivative Action and QRI's counsel has not been involved in the Derivative Action.

### **ON APPEAL**

[13] On the appeal Mr. Wen alleges:

1. the chambers judge failed to exercise her inherent jurisdiction to control the court process by refusing to recognize a conflict of interest in Mr. Qiu's direction to QRI to sue Mr. Wen for misappropriation of corporate funds; and
2. the chambers judge erred by conflating the issue of conflict of interest with the issue of abuse of process.

[14] QRI submits the chambers judge did not err as alleged. In that regard it submits there was no evidence that Mr. Qiu was in a conflict of interest in directing QRI to bring the Misappropriation Action and there is no foundation for an order staying that action.

**DISCUSSION**

[15] While Mr. Wen now raises the issue of the Court's inherent jurisdiction and submits the chambers judge erred conflating the issue of conflict of interest with the issue of abuse of process, the foundation of his complaint remains that Mr. Qiu was in a conflict of interest when he directed QRI to commence the Misappropriation Action and it would be an abuse of process to allow that claim to continue. Mr. Wen alleges that Mr. Qiu was in a conflict of interest because he was suing Mr. Wen, who was effectively suing him in the Derivative Action. Mr. Wen submits because Mr. Qiu has an interest in the outcome of the Derivative Action, he could not direct QRI in the Misappropriation Action.

[16] With respect, there is no basis for this submission. Mr. Qiu's interest in the outcome of the Derivative Action does not create a conflict of interest or disqualify Mr. Qiu in his capacity as a director of QRI from directing QRI in the Misappropriation Action. In the Misappropriation Action, QRI is seeking to recover money that it alleges is owed to it. The recovery of money owed to a corporation is clearly in the best interest of the corporation.

[17] Mr. Qiu does not have a direct interest in the Misappropriation Action. While Mr. Qiu may gain personally as a shareholder, if QRI is successful in the Misappropriation Action, that is not evidence of a conflict of interest. Mr. Qiu's only interest in the Misappropriation Action is that of a shareholder.

[18] The law does not require the directors and officers in all cases must avoid personal gains through direct or indirect results of honest and good faith efforts in the control of a corporation. Often, the interests of the director will coincide with the interests of the corporation: *People's Department Stores Inc. (Trustee Of) v. Wise*, 2004 SCC 68 at para. 39.

[19] In this case there is no evidence that Mr. Qiu was not acting honestly and in good faith in his direction of QRI in the Misappropriation Action. In the course of submissions, Mr. Wen acknowledged the Misappropriation Action may be in QRI's best interest. His sole ground of complaint appeared to be that the Misappropriation

Action was commenced subsequent to the Derivative Action. He acknowledged that if the Misappropriation Action had been commenced first, there would be no basis upon which it could be stayed.

[20] Whether Mr. Wen's application is seen through the lens of inherent jurisdiction or abuse of process it is without merit. I agree with the chambers judge that the evidence does not demonstrate that the Misappropriation Action was commenced in bad faith or is an abuse of process.

[21] Mr. Wen's alternate ground that the chambers judge erred by conflating the issues of conflict of interest with the issue of abuse of process is similarly flawed. Absent a readily identifiable conflict of interest, the issue does not arise. For the reasons set forth above in my respectful opinion, Mr. Qiu was not in a conflict of interest.

[22] In the result therefore, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Charlesworth"