

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Insurance Corporation of British Columbia
v. Lo,***
2006 BCCA 7

Date: 20060103

Docket: CA033177

Between:

Insurance Corporation of British Columbia

Appellant
(Plaintiff)

And

Fung Kwan (Tammy) Lo

Respondent
(Defendant)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Low

Oral Reasons for Judgment

F.G. Potts
B. Martyniuk

Counsel for the Appellant

W. Ryan

Counsel for the Respondent

Foon-Wai (David) Chiu, appearing on his own
behalf

Place and Date:

Vancouver, British Columbia
3 January 2006

[1] **ROWLES, J.A.:** On 2 December 2005, the Insurance Corporation of British Columbia ("ICBC") brought an application for an order that Mr. Chiu and Dragon Driving School Canada Ltd. ("Dragon") be added as respondents on the appeal and that the style of proceedings be amended to include Mr. Chiu and Dragon as respondents. Mr. Chiu appeared in person on the application for himself and for Dragon.

[2] The order was granted by Madam Justice Huddart in brief reasons. In those reasons, she said:

[1] This is an application by the appellant to add Foon-Wai Chiu, also known as David Chiu, and Dragon Driving School Canada Ltd. as parties to this appeal. In effect, this is an application to extend the time to appeal what was a ruling of Groberman J. in the course of a jury trial. Mr. Chiu

and the driving school were parties to the action and whether I look at it as an application to extend the time for appeal or as an application to add him as a party, in my view, the application must succeed.

. . .

[4] In these circumstances Mr. Chiu is a necessary party to the appeal. Mr. Chiu has known of the grounds of appeal since 18 July or, at the very latest, 25 July when he appeared to make submissions for Ms. Lo. He has had the factum since 24 October, so he has known one of the errors alleged by the trial judge was the one that I have identified. There is no prejudice to Mr. Chiu. He could put forward no prejudice other than he did not want to be in this Court, that he had suffered enough being in the Supreme Court for a three week jury trial. He did not suggest that there is not merit in the appeal. While counsel for ICBC admits an error, counsel's errors are not usually visited on their clients. It is generally thought to be in the interests of justice if an arguable appeal is heard and all of the necessary parties are here.

[3] We were informed by counsel that at the time the application was made, Mr. Chiu indicated that he did not wish to have the appeal adjourned and that he was not going to seek counsel, but it appears from discussions this morning, that Mr. Chiu may not have been aware of the extent that the appeal, if it were successful, might affect him. Specifically, if a new trial were ordered, it would, of course be costly, and if the restitutionary remedy sought was granted, the effect on Mr. Chiu would be both direct and indirect.

[4] In the appellant's factum, the relief sought is set out in paras. 74 – 78. What appears in para. 76(c) would directly affect Mr. Chiu. The nature of the order sought is as follows:

74. That there be a determination that all monies paid to Chiu by reason of the Conspiracy are held in trust for the Plaintiff; and
75. That the dismissal of the Appellant's claim as against Lo be set aside; and
76. That there be a mistrial in respect of Lo and a direction that the trial against her continue before the Honourable Mr. Justice Groberman sitting as a judge alone, and that His Lordship:
 - (a) determine the amount of funds held by Chiu in trust for the Plaintiff; and
 - (b) determine what funds and/or assets are held by Lo in trust for the Plaintiff, or for which she is accountable to the Plaintiff, and;
 - (c) determine, in the event the Plaintiff were to elect a restitutionary remedy what amount, if any, of punitive damages ought be awarded as against Chiu.
77. Upon resolution of the outstanding issues by the learned trial judge, or at such time as the trial judge directs, the Appellant be given an election as to what remedy it will pursue;
78. In any event, costs of and incidental to this appeal.

[5] I note as well that Mr. Wayne Ryan, who appears for Ms. Lo on the appeal, cannot be expected to advise or represent Mr. Chiu because there appears to be a potential conflict of interest between Ms. Lo and Mr. Chiu based on the relief sought on the appeal.

[6] I have asked Mr. Chiu whether he wishes to have an adjournment to seek legal advice in view of what has been said this morning and he has indicated that he does wish to obtain legal advice.

[7] I should add that Mr. Potts does not suggest that the matter proceed and is content that it be adjourned.

[8] The appeal is therefore adjourned, my colleagues, I understand, concurring.

[9] **RYAN, J.A.:** I agree.

[10] **LOW, J.A.:** I agree.

[11] **ROWLES, J.A.:** There will be no costs of the proceeding this morning.

“The Honourable Madam Justice Rowles”

Correction: 19 January 2006

The date on the top right hand corner of the judgment should be changed to 20060103.