

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Dragon Driving School*** ,
2007 BCSC 389

Date: 20070302
Docket: S041357
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

**Dragon Driving School Canada Ltd., Foon-Wai (David) Chiu,
Fung Kwan (Tammy) Lo, Crispine Argana Diaz, also known as
Crispina Argana Diaz, Zi Shan Guo, li De Mai, Ze Yu Luo, Mao Hai Li,
Mei Qiong Li, Xi Sen Lin, Bao Kang Huang, Yu Fei Zhang, Yi Liu, Jie Fang Cai,
So Kum Chu, Yong Qiang Li, Zhuo Wen Li, Gui Qing Zhang, Yu Xiong Zhang,
Yam Hau Chan, Qing Guang Zeng, Jian Ping Zeng**

Defendants

And:

**Dragon Driving School Canada Ltd., Foon-Wai (David) Chiu,
Crispine Argana Diaz, also known as Crispina Argana Diaz**

Third Parties

Before: The Honourable Mr. Justice Groberman

Oral Reasons for Judgment

In Chambers
March 2, 2007

Counsel for Plaintiff

F. Potts
B. Martyniuk

Appearing on own behalf

F-W (D.) Chiu
F.K. (T.) Lo

Date and Place of Trial Continuation:

February 26 – March 1, 2007
Vancouver, B.C.

[1] **THE COURT:** The trial in this matter took place before a jury from June 27 through July 18, 2005. As a result of a Court of Appeal decision pronounced December 21, 2006, certain matters have been remitted to me for decision. These are my reasons for judgment on those matters.

Background

[2] The defendant Mr. Chiu was a driving instructor who operated the defendant Dragon Driving School. The defendant Diaz was a driving examiner and an employee of the plaintiff. In exchange for payments from Mr. Chiu, Ms. Diaz fraudulently recorded that Dragon's clients had passed knowledge and road tests and she fraudulently issued driver's licences to them.

[3] The statement of claim alleges that Mr. Chiu paid Ms. Diaz \$500 each time she fraudulently passed a client on a knowledge test or a road test. Mr. Chiu negotiated payments from his clients to himself of between \$2,000 and \$8,000 for each such transaction. Mr. Chiu is deemed to have admitted these figures, as his statement of defence was struck out for failure to comply with the **Rules**. In any event, the evidence before the jury was sufficient in my view to establish those figures as accurate.

[4] Mr. Chiu also assisted some clients by arranging for them to receive forged Chinese driver's licences. By using these licences, the clients were able to falsely claim that they were experienced drivers and to avoid initially being given restricted licences under the two-year graduated licencing program in force in British Columbia. Ms. Diaz assisted with this scheme by ensuring that supervisors did not examine the forged licences. It does not appear that Ms. Diaz was paid any additional sum for steering the forged Chinese licences away from supervisors, and it appears that Mr. Chiu negotiated higher fees in those cases where he arranged for forged documentation.

[5] The measure of damages that could be claimed by the plaintiff was an issue at trial. In reasons pronounced on July 14, 2005 (*ICBC v. Dragon Driving School*, 2005 BCSC 1093, 43 BCLR (4th) 330), I accepted that the plaintiff could elect to accept either compensatory damages or equitable damages representing the amounts of the bribes received by Ms. Diaz. I rejected the contention that the plaintiff was entitled to equitable damages representing the amount of money received by Mr. Chiu from his clients. Instead I held that those amounts were to be considered only in assessing punitive damages.

[6] The claim against Ms. Lo, Mr. Chiu's wife, was based on the contention that the money he received was held in trust and could be traced into assets held by her. Because I found that the money received by Mr. Chiu was not impressed with a trust, I dismissed the claim against her.

[7] The plaintiff appealed, and in reasons release on December 21, 2006 (2006 BCCA 584), the Court of Appeal allowed the appeal, holding that the money received by Mr. Chiu from his clients properly formed part of the equitable damages that the plaintiff could claim and were impressed with a constructive trust in favour of the plaintiff. The court remitted to me those issues that had not been left to the jury. I understand those issues to be two:

- a) How much money did Mr. Chiu receive in respect of the fraudulent schemes? and
- b) Can that money be traced into specific assets of Ms. Lo?

How much did Mr. Chiu receive in respect of the fraudulent schemes?

[8] While the jury was not asked to determine how much money Mr. Chiu received from the fraudulent schemes, it was instructed to determine how much was paid to Ms. Diaz. I instructed the jury in the following terms:

Ms. Diaz was employed in a position of trust by ICBC. The law forbids her from accepting an advantage attributable to her position. In the result, one measure of damages that you must assess is the amount of the bribes that she obtained. It is up to you to determine how to assess this amount. Mr. Chiu and Ms. Diaz, though they disagreed entirely on the number of fraudulent licences and the amount paid per licence, both agreed the total was about \$50,000 to \$60,000. That amount, however, is not consistent with the deemed admissions. Those admissions are that she received \$500 per fraudulent licence. The admissions take in 153 instances. That would seem to place a floor on the amount that you can assess as damages for bribes paid. If we take Ms. Diaz's estimate of fraudulent licences (over 250) as accurate, the bribes would seem to amount to more than \$125,000. That number may be another one you consider in making this assessment. Again it will

be up to you, doing the best you can with the evidence, to provide your best estimate of the amounts received by Ms. Diaz as bribes.

[9] The jury found that Ms. Diaz received \$175,000 in bribe money. That award suggests that it found that there were approximately 350 transactions. That number is certainly one that is supportable on the evidence, and I accept that the jury found there to have been 350 fraudulent transactions.

[10] In arriving at this number I do not ignore the fact that there was a suggestion in Mr. Chiu's evidence that Ms. Diaz was paid not only for the fraudulent licence transactions but also for providing confidential examination papers to him. He said that he paid her \$5,000 for those papers. Ms. Diaz denied that she was paid for them.

[11] It is my expectation that the jury rejected Mr. Chiu's evidence in that regard. Mr. Chiu appeared to me to be anxious throughout the trial to portray Ms. Diaz as the real villain in the piece, but this characterization was in no way realistic. The picture that clearly emerged from the evidence was that Mr. Chiu was much more powerful than Ms. Diaz and that he was always in control of the situation. Ms. Diaz could not afford to cross Mr. Chiu. I found Mr. Chiu's suggestion that he paid Ms. Diaz beyond the amounts he paid for the fraudulent licences to lack credibility.

[12] In any event, even if the jury did, contrary to my impression, accept the evidence with respect to the \$5,000, it would only reduce the number of fraudulent transactions from 350 to 340. In view of the broad range of the amounts that Mr. Chiu received for each licence, a difference of 10 transactions is not particularly important to the assessment of damages.

[13] With the deemed admissions that Mr. Chiu received, \$2,000 to \$8,000 per transaction, and what I take to be the jury finding that there were 350 transactions, this means that Mr. Chiu received at least \$700,000 including the amount that he paid to Ms. Diaz.

[14] Mr. Chiu's evidence on how much money he received for each transaction was inconsistent. At one point he said he received the same amount of money as Ms. Diaz. At other times he admitted payments up to \$4,500. The evidence of Constable Li, an undercover agent, was of a transaction in which he paid Mr. Chiu \$6,500.

[15] At one point in discovery Mr. Chiu said that most commonly he received \$3,000 to \$3,500 for a licence. That estimate is probably close to the truth. Assuming the mean was in that range, Mr. Chiu would have received between \$1,050,000, and \$1,225,000. Taking the amount that the jury found he paid to Ms. Diaz off of that total, his share of the fraudulently obtained funds would be \$875,000 to \$1,050,000. That range appears to me to be the best estimate that can be achieved on the evidence.

[16] At the end of my instructions to the jury on punitive damages I instructed them as follows:

Whether you choose to award punitive damages and if so in what amount is entirely up to you. I do say this, however: You have heard evidence from which you might infer that some of the defendants have enjoyed substantial profits from the fraudulent scheme. Punitive damages may well be necessary in this case in order to ensure that those defendants do not profit from their wrong. It is open to you to consider the amounts that have been realized by the various parties in assessing whether and how much to award in punitive damages. Keep in mind that punitive damages are directed at the defendants individually. They are designed to punish and serve as an example. You should consider carefully what amount if any of punitive damages should be awarded against each individual.

[17] The jury awarded punitive damages against Mr. Chiu in the amount of \$950,000. I expect the bulk of that amount represents the profit that the jury found that Mr. Chiu made in his fraudulent business. This number is consistent with the range that I have described as the best estimate that can be achieved on the evidence. I find that Mr. Chiu obtained \$900,000 from his clients over and above the amounts he paid Ms. Diaz.

[18] In making this finding I do not ignore the fact that, in addition to the punitive damages awarded against Mr. Chiu, the jury awarded \$500,000 in punitive damages against Dragon Driving School. The plaintiff invites me to add the jury's award of punitive damages against Mr. Chiu and the award of punitive damages against Dragon together and to assume that the aggregate represents, in large part, the amounts received by Mr. Chiu in the bribery scheme. I am not prepared to follow that suggestion. It seems to me that the evidence was fairly clear that

the amounts received by Mr. Chiu in the bribery scheme went to him personally, and I doubt that the jury's award against Dragon was meant to reflect amounts of fraudulently obtained money. Rather, I take the \$500,000 punitive damage award against Dragon to have been largely a symbolic one designed to ensure that the asset used by Mr. Chiu to perpetrate his fraud was rendered completely worthless. In any event, quite apart from trying to divine what part of the punitive damages award represents money received by Mr. Chiu, it appears to me that \$900,000 is, as I say, the best estimate that can be achieved on the evidence.

[19] In the result, if the plaintiff elects to take equitable damages against Mr. Chiu rather than compensatory damages, the amount will be \$1,075,000, consisting of \$900,000 taken by Mr. Chiu and \$175,000 in bribes that he handed over to Ms. Diaz. The \$175,000 figure would represent a joint and several award against Ms. Diaz as well as Mr. Chiu.

Punitive Damages

[20] I agree with counsel for the plaintiff that some level of punitive damages is appropriate. The type of corruption evidenced in this case is abhorrent, and punitive damages ought to be awarded, in part, as a deterrent to others. More importantly, however, I find that punitive damages are justified with reference to Mr. Chiu's own attitude towards the fraud. Mr. Chiu was clearly the person who was most culpable in the enterprise, having initiated it and having continued it by keeping Ms. Diaz under his control and preying on her vulnerability. I find his attempts in court to excuse his conduct by blaming Ms. Diaz or by blaming the plaintiff to be both bizarre and repulsive. His characterization of the enterprise as just a normal business is indicative of a seriously perverted value system.

[21] On the other hand, I recognize that the damage award in this case is very substantial and will leave Mr. Chiu deeply in the hole. In addition to having to disgorge what he himself received, he will have to pay an amount equal to what Ms. Diaz received, and in that respect I note that there is no likelihood whatsoever that Ms. Diaz will ever be able to pay those damages. He will also be liable for the very significant costs of trial, which I will award as special costs. As well, he still faces criminal charges.

[22] On the whole, I find the appropriate amount of punitive damages to be \$50,000, which is also in keeping with the jury's award once the portion of damages attributable to profit is subtracted.

[23] In summary, then, if the plaintiff elects to take equitable damages against Mr. Chiu it is entitled to the amount of \$900,000 against Mr. Chiu alone, an additional \$175,000 jointly and severally against Mr. Chiu and Ms. Diaz and an additional \$50,000 in punitive damages. The plaintiff is also entitled to special costs as awarded in my order of July 18, 2005, as well as special costs of this continued hearing of the trial.

[24] I understand that certain amounts have been recovered by the plaintiff since trial, and the defendant will of course be given credit for the amounts already recovered.

The Claim Against Ms. Lo

[25] As I understand the judgment of the Court of Appeal in this matter, the amount that Mr. Chiu obtained from his clients in return for his fraudulent services must be found to be impressed with a trust. Of those funds \$175,000 went to Ms. Diaz. The balance, which I have found to be \$900,000, remained with Mr. Chiu. To the extent that the plaintiff is able to trace those funds, it is entitled to a declaration that they or the assets into which they are traced are held in trust for the plaintiff.

[26] The plaintiff seeks a declaration in respect of two assets: the home on Woodward's Road in Richmond and a Mercedes automobile. These assets are or were in Ms. Lo's name.

[27] Both Mr. Chiu and Ms. Lo resist the plaintiff's claim for a declaration. Both represented themselves on this hearing and, owing to their lack of knowledge of the intricacies of trust law, their submissions were not particularly helpful to the court. As I understand their position, however, it is that the assets belong to Ms. Lo and that ICBC should not have any claim to them.

[28] I take as the point of departure the proposition that where a trustee disposes of trust property to a volunteer,

i.e. to anyone other than in a *bona fide* transaction for value where the person taking the property does not have notice of the trust, the property continues to be held for the *cestui que* trust by the volunteer. This is a basic proposition of trust law and is well illustrated by the case of **Huguenin v. Basley** 14 Ves. 273, 33 ER 526 cited by the plaintiff.

[29] In the case at bar I am satisfied that the trust money went into the acquisition of both the Mercedes automobile and the house. With respect to the automobile, the evidence of Patrick Wong is that he sold Ms. Lo an automobile in September 2001 for \$74,500 plus taxes. The car was paid for with a trade-in of \$24,500, a balance consisting of \$5,000 on Ms. Lo's MasterCard and \$53,679.35 in seven separate cheques. The cheques are in the amount of \$20,000, \$7,000 in three cases, \$5,000, \$3,000 and \$4,679.35. Mr. Wong was unable to say on whose accounts the cheques were drawn.

[30] The plaintiff asks that I find all of these amounts to be proceeds of Mr. Chiu's frauds. To some extent, the plaintiff relies on similar fact evidence in asking me to find that the money was proceeds of fraud. In October of 2001 Mr. Chiu purchased a BMW automobile and paid \$68,585 for it. This was made up of a \$25,000 trade-in, four cheques totalling \$21,600 and a payment of the balance of \$29,562.10, the details of which are not in evidence. The four cheques totalling \$21,600 are in evidence. They are in the amounts of \$4,000, \$5,000, \$6,600 and \$5,000. In each case the payors appear to have received fraudulent licences. While Mr. Chiu and Ms. Lo attempted to explain these cheques, their explanations were utterly unbelievable and at times inconsistent. I find that each of these cheques was given to Mr. Chiu in respect of one or more fraudulent licence transactions and at his request the payee was left blank. He then used the cheques to pay for the automobile.

[31] I find it most likely that a similar situation prevailed in respect of the Mercedes automobile. I am satisfied on the balance of probabilities that three cheques for \$7,000, the cheque for \$5,000 and the cheque for \$3,000 were from Mr. Chiu's clients and related to the fraudulent transactions. I am not satisfied that the cheque for \$20,000 was in respect of a fraudulent transaction. The amount is simply too high for it to be one for a fraudulent licence. The cheque for \$4,679.35 is not in keeping with the usual pattern of the cheques, that is, that they were in round numbers. I find it most likely that that was a cheque on a family bank account to make up the balance of the purchase price.

[32] In respect of the Mercedes I find that \$29,000 out of the total of \$83,679.85 paid for the vehicle came directly from clients paying for fraudulent licences. The trade-in vehicle was most probably an asset acquired before the fraudulent transactions commenced and therefore does not represent fraud money. The origin of the remaining \$29,679.35, consisting of \$5,000 charged on MasterCard, \$4,679.35, which is a cheque that I find was probably drawn on a family member's bank account, and a cheque for \$25,000 of unknown origin is not entirely clear.

[33] Before returning to these matters, I will turn to the Woodward's Road house. It was purchased in August 2003 for \$468,000 plus taxes and other closing costs and adjustments. The house was paid for with a deposit of \$25,000, a mortgage of \$304,200 and a bank draft for \$147,454.26. Of this latter amount, \$85,000 came from a bank account in Hong Kong and the balance from an account in Canada. Mr. Chiu's evidence was that although the house was jointly owned with Ms. Lo, he came up with all of the money for the purchase.

[34] The plaintiff asks me to find that all of the money for the house other than the mortgage is proceeds of fraud. It says, first, that I should draw that inference from Mr. Chiu's failure to properly disclose his Hong Kong banking records and failure to provide a credible explanation for a source of these funds at trial.

[35] I agree that some adverse inference is appropriate. Mr. Chiu's stories about making the money through loan sharking and having made a gambling windfall in Macau were, in my view, complete fabrications. His story about having made money in an immigration business, while not entirely fabricated, was greatly exaggerated. I agree with counsel for the plaintiff that the only money made in those operations was the money obtained from Mr. Koo, totalling \$20,775.

[36] It appears, as well, that Mr. Chiu was paid some money by his partner for a restaurant in which he held a share. That amounted to \$40,000, according to Mr. Cheung's evidence. The only other income in evidence is that shown on the tax returns of Mr. Chiu, Ms. Lo and Dragon totalling \$116,616.20 over the four-year period from the beginning of 2000 to the end of 2003. An amount of \$86,000 was sent to Hong Kong immediately after Mr. Chiu was arrested. The balance of the income is not anywhere near enough to pay the ordinary living expenses of the

family, let alone purchase a house or expensive cars.

[37] The plaintiff says that it would have been a straightforward matter for Mr. Chiu to demonstrate that he had accumulated wealth prior to commencing the fraudulent operations in 2000 or to demonstrate that he had had other sources of income during the period 2000 to 2003 had that been the case. The explanations that he gave at trial were wholly incredible. In the circumstances, given the absence of any explanation of where the funds came from and the large amount of proceeds of fraud that have vanished and are unaccounted for, the plaintiff asks me to infer that the money that went into the down payment for the house was fraud money and that the entirety of the payment for the Mercedes car likewise was fraud money.

[38] With some exceptions, I agree with the plaintiff that those inferences should be drawn. With respect to the Mercedes, I find on the balance of probabilities that the amount of \$29,000 came directly from Mr. Chiu's clients, as I have said, and that both the cheque for \$4,679.35 and the amount of \$5,000 charged to the MasterCard are traceable to fraud funds. I am not prepared to make the same finding with respect to the \$20,000 cheque, which is more mysterious, and I cannot find that it is necessarily connected with the fraud funds.

[39] With respect to the house, I am prepared to find that all of the equity in the house at the date of purchase is traceable to the fraud. I am not prepared to make the same finding with respect to any equity built up subsequently in mortgage payments, as it appears that some of that money may have come from the proceeds of sale of another home, the acquisition of which predated the fraud. I am also, of course, unaware of what the source of funds after 2003 might have been.

[40] This leads to a situation in which trust money has been commingled with other funds not traceable to the fraud. On the basis of *Foskett v. McKeown* 2001 A.C. 102, [2000] 3 All E.R. 97 (HL(E)) and *Ruwenzori Enterprises Ltd. v. Walji* 2006 BCCA 448, 58 B.C.L.R. (4th) 23, I accept the proposition that the plaintiff is entitled to a declaration that a proportion of each asset is held in trust for it.

[41] In the case of the Mercedes, then, I find that \$38,679.85 is traceable to the fraud.

[Discussion between the Court and Counsel]

[42] In the case of the house, the amount traceable to fraud is \$147,454.26 out of a total value of \$476,654.26, which amounts to approximately 30.9 percent of the gross value of the house.

[43] The plaintiff is seeking here an order for registration of its interest on title and an order for vacant possession of the home. With respect to the registration of the plaintiff's interests, I think that the best way to proceed is for the plaintiff to determine what documentation will be required by the Land Title Office. There is also a complicating factor, which is that the existing mortgage ought to be over the interests of the defendants and not over the interest of the plaintiff. I suspect that sorting out title may require all holders of charges to be served with an application. Vacant possession also ought not to be ordered at present, in my view, because the plaintiff does not hold title to the exclusion of the defendants. The matter will have to be subject of an application for partition and sale.

[44] While I am prepared to hear any matters that are necessary for the clarification of this order, I want to make it clear that there is no particular reason why I need be seized of future applications dealing with partition and sale.

[45] Before closing I should indicate that the fact that this portion of the trial only involves Mr. Chiu and Ms. Lo as defendants creates some potential issues. If, as I expect, the plaintiff elects to take equitable damages rather than compensatory damages, the issue of how, if at all, this affects the defendants who were, under the judgment given in 2005, jointly and severally liable on compensable damages, is not an issue that has been fully considered by me or fully argued in court. I suspect that it is not an issue that will have any practical consequences, but if it does, all parties are free to come back before the court to have that issue determined.

Is there anything further that I have not dealt with?

MR. POTTS: I may have missed it, My Lord, but I take it your finding in respect of the 30.9 percent is as against both Mr. Chiu's interest and Ms. Lo's interest?

THE COURT: It is 30.9 percent that is traceable into the house. That is, in the result, a 30.9 percent interest in the

total value of the home.

[46] With respect to the interests of Ms. Lo and Mr. Chiu, whatever balance of equity remains, which will be the equity built up through mortgage payments, is divided between them, and I make no comment as to how, in equity, that is divided. If that is an issue on an application for partition and sale, it can be argued by them.

MR. POTTS: Yes.

[47] THE COURT: So it is 30.9 percent of the total value of the home. The mortgage, of course, will take up the bulk of the balance.

MR. POTTS: The only other matter, My Lord, is I expect I know what my instructions will be in terms of election, but I am going to have to get them. And I would like some direction on how you would like to deal with the formal matter of election.

[48] THE COURT: In my view, the law is clear that election need not be instantaneous. In fact, some of the cases speak of election taking place only after examinations in aid of execution. So, I am not going to require that your client make the election at this point. The election ought to be ultimately embodied in a formal court document, preferable in the order resulting in these reasons. You are at liberty to settle the order in terms of the election that is made.

“J.S. Sigurdson, J. for H.M. Groberman, J.”
The Honourable Mr. Justice J.S. Sigurdson
for The Honourable Mr. Justice H. M. Groberman