2017 ONCA 664
Ontario Court of Appeal

Arrow ECS Norway AS v. John Doe

2017 CarswellOnt 20490, 2017 ONCA 664, 287 A.C.W.S. (3d) 133

# Arrow ECS Norway AS (Plaintiff / Appellant) and John Doe and Yongqiang Tian (Defendants / Respondent)

Robert J. Sharpe J.A., P. Lauwers J.A., L.B. Roberts J.A.

Heard: July 20, 2017
Judgment: August 22, 2017
Docket: CA C63205

Counsel: David R. Wingfield, David Robins, for Appellant
Richard Worsfold, for Respondent

**Per curiam:**

1 The appellant appeals from the dismissal of its summary judgment motion and the granting of the respondent's summary judgment motion, declaring the respondent to be the legal and beneficial owner of the amounts of CDN $100,000 and US$300,000, which the appellant had paid out under mistake to a third party fraudster.

2 The appellant was defrauded of over US$66 million. In particular, between January 18 and 22, 2016, the appellant was fraudulently induced to forward about US$23 million to an account under the name of HongKong JYC Limited ("JYC") at the Shanghai branch of the Bank of Communications ("BoComm"), a Chinese bank. The appellant recovered some $6 million of the stolen funds. However, over US$17 million of the stolen funds flowed through the JYC account into other bank accounts throughout the world.

3 The respondent's uncontroverted evidence is that he is a highly successful businessman who transferred monies to Canada to support his grandchildren's education and to purchase real estate. He maintained in his affidavit and during his cross-examination that he had no knowledge of and did not participate in the defrauding of the appellant. He also stated that he was unaware of the source of the monies at the time that he had purchased them through his intermediary, Li Wang.

4 There are two transfers in issue on this appeal: the first is the transfer of CDN$100,000 on January 20, 2016, to the respondent's former employee, Hong Yao, to repay monies that he had borrowed from her in November 2015; the second is the transfer of US$300,000 on January 21, 2016 to the respondent's US dollar bank account with the Royal Bank of Canada.

5 The respondent borrowed CDN$100,000 from his former employee, Hong Yao. She deposited this amount to the respondent's Canadian dollar RBC account on November 25, 2015. On the same day, this sum was used to purchase a GIC held in the respondent's account. The GIC was subsequently redeemed on January 27, 2016, prior to service of the *ex parte* order freezing the respondent's accounts which the appellant obtained on that day.

6 In order to repay Hong Yao, the respondent arranged to purchase CDN$100,000 through Li Wang. On January 20, 2016, CDN$100,000 was transferred from Sunny Stable Ltd.'s HSBC account to Hong Yao's RBC account.

7 The respondent arranged to purchase US$300,000 through Li Wang. On January 21, 2016, US$300,000 was ordered to be transferred by JYC from the Sunny Stable HSBC account to the Royal Bank of Canada ("RBC"). RBC deposited the funds to the respondent's US dollar account on January 25, 2016.

8 Between January 21 and 22, 2016, US$1.1 million was transferred from the JYC BoComm account to the account held by Sunny Stable at the Hongkong and Shanghai Bank ("HSBC").

9 After he had received confirmation of the receipt of the Canadian and US dollar transfers, the respondent paid for the CDN$100,000 transfer to Ms. Yao's bank account and the US$300,000 transfer to his bank account by sending the equivalent in Chinese currency respectively on January 21 and 22, 2016, to accounts with the Agricultural Bank of China, as instructed by Li Wang. It was later discovered that these accounts were also held in the name of Sunny Stable.

10 The motion judge held that the appellant had failed to trace its stolen monies to the respondent. Regardless, the motion judge was satisfied that the respondent was innocent and ignorant of the fraud perpetrated on the appellant, and that the respondent was a *bona fide* purchaser for value of the stolen funds. As a result, the motion judge held that the respondent was entitled to the funds.

11 The appellant submits that the motion judge made the following errors:

(i) the motion judge erred in failing to find that the appellant had traced the stolen funds to the respondent;

(ii) the motion judge erred in finding that the respondent was a *bona fide* purchaser for value of the funds stolen from the appellant.

12 With respect to the CDN$100,000, we see no error with the motion judge's conclusion that the appellant had not traced that amount from the appellant's account to the respondent. The transfer of the CDN$100,000 from Sunny Stable was made on January 20, 2016, prior to the transfer of the stolen funds from JYC to Sunny Stable on January 21 and 22, 2016. There was no evidence before the motion judge that the CDN$100,000 transferred from Sunny Stable to Hong Yao came from the appellant.

13 The motion judge's finding about the US$300,000 is a different matter. We agree with the appellant's submission that the motion judge made an overriding and palpable error in finding that the appellant had not traced US$300,000 of the stolen funds to the respondent.

14 Based on the uncontroverted evidence before the motion judge, including the respondent's own evidence, those monies can be clearly traced from their withdrawal from the appellant's account to their final deposit in the respondent's account. We reject the respondent's submission that the commingling of the appellant's funds with funds in the accounts of JYC or Sunny Stable prevents their tracing. It is irrelevant that the appellant's funds may have been mixed with other funds in the accounts of JYC or Sunny Stable before they flowed out to the respondent's account because the appellant can directly trace the amount of its own contribution to the monies deposited in the respondent's US dollar account: *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504 (S.C.C.), at para. 85.

15 This, however, is not the end of the analysis. As the motion judge stated, even if the appellant could trace all of the stolen funds to the respondent, the respondent was not implicated in the theft but was merely a *bona fide* purchaser for value of the monies that he purchased with Chinese currency.

16 The appellant submits that the motion judge erred in framing his analysis in terms of whether the respondent was a *bona fide* purchaser for value.

17 First, with respect to the US$300,000, the appellant submits that the motion judge should have applied the following test set out in *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Eng. Q.B.), at pp. 535 and 541, as adopted by the Supreme Court of Canada in *B.M.P.*, at para. 22, about tracing money through

the banking system and recovering money paid by mistake. The court accepted the test in *Simms* for recovering money paid under a mistake of fact (at p. 535): "f a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact." However, the court noted three defences under which the claim may fail: first, where: "the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend"; second, where "the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer by a third party by whom he is authorised to discharge the debt"; and third, "where the payee has changed his position in good faith, or is deemed in law to have done so."

18 The appellant submits that having paid the US$300,000 under mistake of fact, the appellant was *prima facie* entitled to the return of the stolen monies that it traced to the respondent. Moreover, the appellant argues, none of the above three defences identified by the Supreme Court in *B.M.P.* was available to the respondent, because the respondent still retained the US$300,000 in stolen funds.

19 We do not accept these submissions.

20 While we agree that the first defence set out in *B.M.P.* has no application in the present case, the motion judge's findings support the availability of the second and third defences. The motion judge accepted the respondent's evidence that he was innocent of any wrongdoing and unaware of the fraud perpetrated against the appellant. The motion judge also found that the respondent had paid valuable consideration for the funds that were deposited to his US bank account. The motion judge expressly rejected the appellant's argument that the respondent was not a *bona fide* purchaser for value who did not legitimately change his position. These findings were available on the record and allowed the motion judge to conclude that the respondent was a *bona fide* purchaser for value. That the motion judge did not make specific reference to *B.M.P.* is immaterial given that he evidently considered and applied the relevant principles concerning the parties' competing claims to the stolen funds. We see no error here.

21 Moreover, we do not read *B.M.P.* as standing for the proposition advanced by the appellant that the second and third defences only apply if the respondent no longer retains the stolen funds. As noted by the Court at para. 65 of that decision, it was not because B.M.P. had retained the stolen funds but because it had not changed its position or given consideration for them that the defences were not available to it:

> In conclusion, BMP had not changed its position and the defence was available neither to it nor to BNS. It is worth noting that cases in which a person who is not a party to the fraud has neither given consideration nor changed its position will be rare. However, that is what has happened here according to the facts found by the trial judge. In these circumstances, all the conditions for recovery of the payment made by mistake are met.

22 As we have already noted, that is not what happened in the present case, as found by the motion judge: the respondent changed his position and paid valuable consideration in Chinese currency for the stolen monies without knowledge of their illegal provenance.

23 The appellant submits that the motion judge erred in any event in finding that the respondent was a *bona fide* purchaser because he had obtained access to all of the stolen funds through his knowing participation in an illegal underground currency exchange that engaged in money laundering.

24 We also reject this submission.

25 The motion judge determined that there was insufficient evidence to demonstrate that the underground currency exchange was illegal or commonly used for money laundering. More important, the motion judge found that there was no evidence that the respondent knew or had reasonable grounds to believe that the funds that he had purchased had an illicit source. Again, these findings were available to the motion judge and contain no error. There is no basis to interfere.

**Disposition**

26 Accordingly, the appeal is dismissed.

27 The respondent as the successful party is entitled to his partial indemnity costs in the agreed-upon amount of $15,000, inclusive of disbursements and HST.

*Appeal dismissed with $15,000 in costs payable by company.*