COURT OF APPEAL FOR ONTARIO

CITATION: Wescom Solutions Inc. v. Minetto, 2019 ONCA 251
DATE: 20190401
DOCKET: C64415

van Rensburg, Hourigan and Huscroft JJ.A.

BETWEEN

Wescom Solutions Inc.

Plaintiff
(Respondent)

and

Nadia Minetto aka Nadia Arsenault,
Eric Yip aka Sam Yip aka Samuel Yip aka Samson Man Chun Yip,
GF International, Gabriel Kit Chun Fung,
Plus One Solutions, John Doe #1 and John Doe #2

Defendants
(Appellants)

John Russo and Dina Milivojevic, for the appellants

Jeffrey Brown and Melissa Wright, for the respondent

Heard: March 25, 2019

On appeal from the judgment of Justice Michael G. Emery of the Superior Court of Justice, dated September 14, 2017.

REASONS FOR DECISION

[1] This appeal seeks to overturn the judgment of the trial judge, holding that the appellant, Gabriel Kit Chun Fung, knew or was wilfully blind to the fraudulent means by which Nadia Minetto obtained iPhones and iPads (the "Apple Products") that he purchased from her between early 2012 and July 2014.

[2] The total value of the Apple Products was $6.2 million. Mr. Fung purchased them from Ms. Minetto with cash, generally meeting in parking lots. Ms. Minetto was the accounting manager of the respondent, Wescom Solutions Inc. ("Wescom"). In January 2011, she began purchasing the Apple Products through the fraudulent use of Wescom's corporate credit card. She then sold the Apple Products for her own personal gain.

[3] The parties agreed on the issues to be determined at trial and that agreement was reflected in a court order directing the trial of the following issues:

(1) Whether the defendant Gabriel Kit Chun Fung knew or was willfully blind to the fact that he was purchasing stolen goods or goods fraudulently obtained by Nadia Minetto; and

(2) If Mr. Fung in fact knew or was willfully blind to the fact that he was purchasing stolen goods or goods fraudulently obtained by Ms. Minetto, did this apply to all the transactions or just transactions after a certain date.

[4] In his reasons, the trial judge considered the nature and development of the sales relationship between Mr. Fung and Ms. Minetto. He divided the sales scheme into three phases:

1. From November 2011 to early 2012, when they would meet to exchange Apple Products for cash in the parking lot of Yorkdale Mall ("Stage 1");

2. From early 2012 to mid-April, 2013, when they would meet in the parking lot of the Ikea store at Highway 7 and Highway 404 to exchange Apple Products for cash ("Stage 2"); and

3. From mid-April 2013 to July 2014, when Ms. Minetto would direct Apple Inc. to ship products directly to the address of a virtual office that Mr. Fung had rented at 15 Allstate Parkway ("Stage 3").

[5] The trial judge found Mr. Fung was not wilfully blind during Stage 1, was wilfully blind during Stage 2, and had actual knowledge during Stage 3 that the Apple Products were stolen goods or fraudulently obtained by Ms. Minetto. He awarded damages to Wescom in the amount of $5,094,7674.72 plus interest for the Apple Products purchased by Mr. Fung during Stages 2 and 3.

[6] On appeal, Mr. Fung and corporations controlled by him submit that the trial judge erred by: (i) applying an objective standard to his wilful blindness analysis rather than a subjective standard; and (ii) making credibility findings against Mr. Fung, while at the same time noting that his evidence was unshaken and consistent, and in the face of evidence that Ms. Minetto was concealing her illegal activities from Mr. Fung.

[7] We do not give effect to either of these submissions.

[8] We agree with the appellants' submission that the trial judge engaged in an objective analysis. Indeed, as part of his wilful blindness analysis, the trial judge stated that wilful blindness is made up of two components:

a. In circumstances that arouse the suspicions of a reasonable and honest person that are strong or sufficient enough to raise a duty to inquire; and

b. Whether someone in that person's position chooses to remain deliberately ignorant to the knowledge that inquiry would reveal.

[9] The respondent submits that the objective analysis was appropriate because this was a knowing receipt case. It is true that knowing receipt can be proven not only by establishing actual knowledge or wilful blindness, but also by establishing "constructive knowledge" using objective criteria. Specifically, knowing receipt can be proven by showing that the defendant: (i) had knowledge of circumstances that would indicate the facts to an honest and reasonable person; or (ii) had knowledge of circumstances that would put an honest and reasonable person on inquiry: *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458 (CanLII), 131 O.R. (3d) 273, at para. 62; see also *Gold v. Rosenberg*, 1997 CanLII 333 (SCC), [1997] 3 S.C.R. 767, at paras. 53, 74. However, in this case the agreed issues for the trial judge were whether Mr. Fung had actual knowledge or was willfully blind to the fact that he was purchasing stolen goods or goods fraudulently obtained by Ms. Minetto. The trial judge was not asked to consider whether Mr. Fung as a reasonable person would have been alerted to a potential breach of trust.

[10] The trial judge erred in law in his articulation of the concept of wilful blindness. As stated by this court in *R. v. Malfara* (2006), 2006 CanLII 17318 (ON CA), 211 O.A.C. 200 (C.A.), at para. 2, "Where wilful blindness is in issue, the question is not whether the accused should have been suspicious, but whether the accused was in fact suspicious." In short, a finding of wilful blindness, which is the same standard in criminal and civil proceedings, involves a subjective focus on the workings of a defendant's mind.

[11] Notwithstanding this mischaracterization, we are not satisfied that the trial judge erred when he concluded that Mr. Fung was wilfully blind. It is clear from his reasons that he made findings of fact that established that subjectively Mr. Fung was wilfully blind:

> [128] I also reach this conclusion because Mr. Fung admitted not once, but twice that the iPhones and iPads he was purchasing from Ms. Minetto were not upgrades. This is contrary to his evidence that he took comfort in purchasing cell phones through his store that were mostly upgraded products that had been legitimately obtained. As the availability of Apple products in this volume that were not upgrades, Mr. Fung had to know they were probably products that had been stolen or obtained through fraud.
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> [130] I further find as a fact that Mr. Fung made a conscious choice not to seek verification or further information about the source of the Apple products he was purchasing from Ms. Minetto. He chose to remain deliberately ignorant as to the source of those products. I make this finding of fact because of Mr. Fung's evidence that he may have asked Ms. Minetto a second time if the products he was purchasing from her were legitimate.

[12] These findings establish that Mr. Fung knew that the Apple Products were probably stolen or obtained by fraud, but that he made a deliberate choice not to investigate. This conduct meets the definition of wilful blindness articulated in *R. v. Sansregret*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570, at p. 584, which arises when a "person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth." See also *R. v. Briscoe*, 2010 SCC 13 (CanLII), [2010] 1 S.C.R. 411, at paras 21-24. Therefore, despite the trial judge's error in defining wilful blindness, we do not give effect to this ground of appeal.

[13] With respect to the second ground of appeal, we are not persuaded that the trial judge erred in his credibility analysis. He made adverse credibility findings against Mr. Fung during Stages 2 and 3. These findings were well rooted in the evidence, including the fact that Mr. Fung asked Ms. Minetto a second time in Stage 2 whether the Apple Products were legitimate while they were trading in a much higher volume, and the fact that Mr. Fung saw invoices in Stage 3 that showed, among other things, that the Apple Products were being purchased by Wescom at full retail price.

[14] The appeal is dismissed. The appellants shall pay Wescom its costs of the appeal, fixed in the agreed-upon all-inclusive sum of $22,500.

"K. van Rensburg J.A."
"C.W. Hourigan J.A."
"Grant Huscroft J.A."