

CANADA / JUDGMENT

Ascent One Properties Ltd. v. Liao

2020 BCCA 247

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 247 Ascent One Properties Ltd. v. Liao

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ascent One Properties Ltd. v. Liao,

2020 BCCA 247

Date: 20200831

Dockets: CA44559; CA44560

Between:

Ascent One Properties Ltd.

Appellant

(Plaintiff)

And

Li Chiao Liao

Respondent

(Defendant)

And Between:

0949652 B.C. Ltd.

Respondent

(Plaintiff)

And

Ascent One Properties Ltd., Rena Canada Properties Ltd.,

and Fwu Yang

Appellants

(Defendants)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Fisher

On appeal from: Orders of the Supreme Court of British Columbia, dated

June 20, 2017 (Ascent One Properties Ltd. v. Liao, 2017 BCSC 1017,

Vancouver Docket S144729 and S163678).

Counsel for the Appellants

(via videoconference):

H.C.R. Clark, Q.C.

Counsel for the Respondents

(via videoconference):

M.J. Braidwood

V.L. Reakes

Place and Date of Hearing:

Vancouver, British Columbia

May 27, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 31, 2020

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Fitch

Summary:

Appeals of the dismissal of an action against the respondent Liao alleging breach of her fiduciary duty as a director and the allowance of an action brought by Liao for repayment of a shareholder's loan dismissed. In the first action, the trial judge did not err in concluding that Liao did not breach her fiduciary duty. Although the judge erred in his analysis of the second action, there is no basis to interfere with his ultimate conclusion that all funds held in trust for the company were available to repay the original shareholder loans in equal amounts.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] These appeals concern an aborted real estate development undertaken by the appellant, Ascent One Properties Ltd. (Ascent One). In the first action, Ascent One alleged that the respondent, Li Chiao Liao, breached her fiduciary duty as a director of the company. That action was dismissed. In the second action, Ms. Liao's holding company, 0949652 B.C. Ltd. (652) sought the return of a \$2.3 million shareholder loan it had provided to Ascent One at its inception, alleging that it took priority over a subsequent \$1.3 million advance made to Ascent One by the appellant Fwu Yang. That action was allowed.
- [2] Ascent One, Mr. Yang and the appellant Rena Properties Ltd., a holding company owned by Mr. Yang (Rena), allege both errors of fact and law in the trial judge's reasons.
- [3] It is my view that the trial judge made no error in concluding that Ms. Liao was not in breach of her fiduciary duty and dismissing the Ascent One Action. It is also my view that the judge erred in his analysis of the 652 action but I would not interfere with his ultimate conclusion that the \$1.3 million advance was available to repay the original shareholder loans advanced by Ms. Liao and Mr. Yang (on behalf of 652 and Rena respectively) in equal amounts.
- [4] For the reasons that follow, I would dismiss the appeal.

Facts

- [5] Ms. Liao immigrated to Vancouver from Taiwan in 2011. She befriended Gerald Chiang, a consultant experienced in the development and marketing of real estate. Through Mr. Chiang, Ms. Liao met Mr. Yang. Messrs. Chiang and Yang were planning a two-phase mixed commercial and residential development project in Maple Ridge (the Project). Ms. Liao decided to invest in the Project.
- [6] On July 12, 2012, the three entered into a memorandum of understanding (MOU), the relevant terms of which were summarized by the trial judge as follows:
 - a) Yang would be president of the development company to be incorporated;
 - b) Chiang would be the Chief Executive Officer ("CEO") of the company;

- c) Liao would be the Chief Financial Officer ("CFO") of the company;
 - d) each of Yang and Liao would invest \$2.3 million in the company which, together with a bank line of credit in the amount of \$585,000, would be used to purchase the Project lands and fund the pre-construction design and development approval process. Bank financing would be used to fund the construction;
 - e) a thorough, comprehensive feasibility study would be prepared;
 - f) profits from the sale of Phase 1 of the Project would be rolled over and used to meet the equity requirements of Phase 2; and
 - g) the \$4.6 million invested by Yang and Liao would be repaid at the end of the Project before any profit was distributed.
- [7] Pro-forma financial budgets and projections prepared by Mr. Chiang were attached to the MOU. The expectation at that time was that no equity investment beyond the \$2.3 million from each of Mr. Yang and Ms. Liao would be required. However, on August 6, 2012, the MOU and pro-formas were amended to provide for a third phase of development.
- [8] On August 29, 2012, Ascent One was incorporated for the purpose of undertaking the Project. Mr. Chiang, Mr. Yang and Ms. Liao were directors and shareholders. Mr. Yang and Ms. Liao were each issued 450 non-voting preferred shares and 500 Class "A" common voting shares. Mr. Chiang was issued 100 non-voting preferred shares in exchange for managing the Project.
- [9] On the same day, Ascent One entered into a shareholder loan agreement with each of Mr. Yang and Ms. Liao, which provided that their respective \$2.3 million investments were loans to Ascent One and were not repayable until six months after completion of the Project. Mr. Chiang, Mr. Yang and Ms. Liao also entered into a shareholders agreement that largely incorporated the terms of the MOU and set out each individual's role in the management of the company (the Shareholders Agreement). The Shareholders Agreement also provided that the respective \$2.3 million shareholder loans would have priority over any subsequent shareholder loans.
- [10] On September 8, 2012, each of Mr. Chiang, Mr. Yang and Ms. Liao transferred their rights, title, interest, and obligations in and under the MOU, Shareholders Agreement and shareholder loan agreements to their personal holding companies (0949659 B.C. Ltd., Rena, and 652 respectively).
- [11] In October 2012, Ascent One purchased the land to be developed. It then engaged various professional consultants and began preparing a detailed design for what had become a three-phase Project.
- [12] During the detailed design, it was discovered that the Phase 2 and 3 building footprints would not allow for the amount of parking required for the number of units to be built. The consultants recommended that a substantial portion of the Phase 2 and 3 parking and

infrastructure be built as part of Phase 1. Although this would increase the projected Phase 1 costs by about \$7 million, and expenses would be incurred during Phase 1 construction that could not be recovered from the sale of Phase 1 units, it would save money in the long run. Messrs. Chiang and Yang agreed with this approach.

- [13] By June 2013, disagreements had emerged among Ms. Liao, Mr. Yang and Mr. Chiang over the handling of Ascent One's finances and the financial viability of the Project. Ms. Liao was unhappy that Mr. Yang had approved certain undocumented expense claims. The three discussed the need for increased equity financing of \$1 million to provide for the increased Phase 1 costs. Ms. Liao requested an updated profit and loss statement and a "capital increase budget sheet" for the Project. By August, Mr. Yang was frustrated by Ms. Liao's requests and he and Mr. Chiang discussed the possibility of one of Ms. Liao and Mr. Yang purchasing the other's shares in Ascent One. In September, Ms. Liao refused an offer by Rena to purchase 652's shares for \$2 million.
- [14] Ms. Liao's attendance at directors' meetings became sporadic. Initially, she attempted to have others attend in her place, but Messrs. Chiang and Yang refused this alternative. Ms. Liao continued to request a full financial risk assessment to allow for a re-evaluation of the investment but these requests were not met. She believed she was not receiving sufficient information to fulfill her role as CFO. She felt unable to verify the accuracy of the financial documents that were provided to her. Mr. Chiang took the position that Ms. Liao had been provided with or had access to all of the information that was available and if she could not understand the documents or was unable to fulfill her role as CFO, that was "too bad".
- [15] By October 2013, Ms. Liao had had enough. On October 8, she commenced an action against Ascent One, Mr. Yang and Mr. Chiang, seeking orders that a shareholder's meeting be held forthwith, a receiver manager be appointed or alternatively the company be liquidated or dissolved, and various declarations, including that Messrs. Yang and Chiang had breached their fiduciary duties to the company, and the affairs of the company were being conducted in an oppressive manner. Her expressed intent in commencing the action was not to shut the company down but rather to resolve its "operational problems" and ensure controls on its financial management and exposure to risk.
- [16] Eventually, on January 30, 2014, Ms. Liao consented to a dismissal of the action. However, she continued to raise the need for a reassessment of the Project's budget and projections. She resumed attending directors' meetings, although sporadically, and often expressed her views and voted by email. She continued to disagree with the others about how the Project should proceed.
- [17] On June 18, 2014, Ascent One commenced the first action against Ms. Liao, alleging that she breached her fiduciary duty as a director, in part by commencing the October 2013 action (the Ascent One Action).

- [18] Meanwhile, Ascent One continued to seek further financing for the Project. On October 10, 2014, it received a proposal from the Canadian Western Bank (CWB) for \$13.75 million in construction financing. The proposal required, inter alia, that Ascent One increase its equity by \$870,000, Messrs. Yang and Chiang provide personal guarantees, and Ms. Liao provide a personal financial statement and consent to a credit check. Just before this, Mr. Yang rejected an offer from Ms. Liao to sell her shares for \$2.3 million plus interest.
- [19] Ms. Liao did not provide CWB with her financial statement, indicating that she needed to review the loan documents. Messrs. Chiang and Yang determined that the company needed to increase its equity to \$1.3 million rather than \$870,000 as required in the CWB proposal. They proposed that Mr. Yang and Ms. Liao increase their "investment" by providing the additional funds pro rata as per the common shareholding structure, but Ms. Liao refused to provide further funds until she received the documents she requested and was able to substantiate the need for such funds. At a directors' meeting on December 5, 2014, Messrs. Chiang and Yang approved a resolution that Mr. Yang and Ms. Liao provide the funds pro rata. Ms. Liao opposed the resolution by email. Mr. Yang agreed to provide the entire \$1.3 million. While the minutes of the December 5, 2014 meeting indicate a proposal for a further shareholder investment of \$2.6 million, only \$1.3 million was ultimately considered to be necessary.
- [20] On December 8, 2014, Ascent One received a commitment letter from CWB for the financing, which was subject to 31 conditions, including an additional personal guarantee from Ms. Liao and a unanimous resolution of the shareholders and directors confirming that the financing was in the best interest of the company.
- [21] On December 11, 2014, Ascent One, through counsel, notified Ms. Liao of its position that she had repudiated the Shareholders Agreement, which repudiation it accepted, by commencing the October 2013 litigation, refusing to attend directors' meetings, refusing to approve matters proposed by other directors, complaining about the lack of information she could have obtained for herself, frustrating the company's efforts to proceed with the Project, and refusing to execute documents reasonably required for the company's ongoing business.
- [22] Also on December 11, 2014, Messrs. Yang and Chiang purported to pass resolutions "to affirm the receipt by the company of additional investment" of \$1.3 million from Mr. Yang, authorizing the company to enter into a separate loan agreement with him that would have priority over the existing shareholder loans, and issuing 528 Class "A" common shares and 528 Class "B" preferred shares to Mr. Yang. The common shares were valued at \$5,280 and the preferred shares at \$1,294,720, and the latter amount was to be advanced as a loan to be secured by a mortgage. Mr. Yang voted in favour of the resolutions despite his interest in the transaction. Ms. Liao opposed the resolutions by email, in the same manner as she had for the December 5 meeting.

- [23] Ms. Liao denied that she had repudiated the Shareholders Agreement and later took the position that the "declaration" made by the appellants on December 11, 2014 that the Shareholders Agreement was at an end, as well as the "unilateral declaration" granting a separate loan agreement to Mr. Yang with priority over the existing shareholder loans, constituted a repudiation by them of the Shareholders Agreement, which repudiation she accepted. She demanded a return of her \$2.3 million shareholder loan, and in April 2016, commenced the second action in the name of 652 to recover these funds (the 652 Action).
- [24] Ultimately, Ascent One was unable to meet the conditions in the CWB commitment letter and did not attempt to obtain alternate financing. In August 2016, it sold the development lands for \$3.9 million. The company lost \$2.138 million. The net sale proceeds of \$1,903,648 together with Mr. Yang's additional \$1.3 million, are held in trust.

The trial judgment

- [25] In the Ascent One Action, the company alleged that Ms. Liao had breached her fiduciary duty to the company by filing the October 2013 lawsuit, refusing to participate in the day-to-day management of the company, and thwarting the bank financing. The trial judge concluded that Ms. Liao did not breach her fiduciary duty, finding as follows:
- While the October 2013 lawsuit was ill-conceived, it was not an attack on the company. Rather, it was an oppression action brought qua shareholder (although improperly in Liao's name, rather than 652) to protect the interests of Ascent One.
 - Although Ms. Liao failed to attend most directors' meetings in person, she responded to many of the agendas by email, a permitted method of attendance as indicated on the agendas themselves, and also attempted to have others attend the meetings with her or on her behalf.
 - Ms. Liao had no obligation to invest additional funds in the company or to provide the personal guarantee required by CWB.
- [26] Despite this conclusion, the judge went on to consider the issues of causation and damages. He found no causal connection between Ms. Liao's conduct and the loss occasioned by the failure of the Project. He found that Ascent One had failed to demonstrate a real and substantial possibility that it would have obtained the financing required to proceed with the Project absent the impugned conduct, and even if such a likelihood were established, Ascent One did not show that it was likely to realize any "real substantial monetary value in the form of the Project" (at para. 203).
- [27] The judge concluded that Ascent One, had it proven liability, would not have been entitled to damages for lost profit as it failed to establish that the Project would have been profitable if it had proceeded, but that it would have been entitled to its costs thrown away in an amount to be determined by the Registrar.

- [28] In the 652 Action, 652 alleged that the Shareholders Agreement and shareholder loan agreement were repudiated by the actions of Ascent One and Messrs. Yang and Chiang, and the \$2.3 million loan was therefore payable. She relied on the priority provision in the Shareholders Agreement and also argued that the mortgage granted to Mr. Yang was invalid.
- [29] The trial judge held that neither party could enforce the terms of the Shareholders Agreement because they all maintained positions that the Agreement had been terminated by the other party's repudiation. The main issue addressed by the judge was whether the \$1.3 million provided to Ascent One by Mr. Yang was available to repay the original shareholder loans. He concluded that it was, because each of the transactions that flowed from the December 11, 2014 resolutions was invalid, including the mortgage and the issuance of shares to Mr. Yang. His reasons are set out at paras. 223-224:
- [223]
- a) section 18.10 of Ascent One's Articles deems the quorum of directors to be two;
 - b) sections 17.2 and 17.3 of the Articles and s. 149(2) of the BCA [Business Corporations Act, S.B.C. 2002, c. 57] provide that a director who holds a disclosable interest in a contract or transaction into which the company proposes to enter is not entitled to vote on any directors' resolution to approve that contract or transaction, although the interested party may still be counted when determining whether a quorum exists;
 - c) section 18.2 of the Articles requires that resolutions of the company be decided by a majority of the directors who are entitled to vote;
 - d) Yang was not entitled to vote on the December 11, 2014 because of his interest in the transaction. Chiang voted in favour. Liao voted (by email) against. Accordingly, the resolution failed and Ascent One lacked the requisite authority to enter into the Second Yang Loan Agreement and Yang Mortgage and issue the common and preferred shares that it issued to him.
- [224] Neither a resolution of Ascent One was passed nor was an application brought by Yang or Ascent One pursuant to s. 68 of the BCA for an order that the purported issuance of shares to Yang on December 11, 2014, or the terms upon which the issuance took place, be validated.
- [30] The trial judge found the attempt by Messrs. Yang and Chiang to increase the company's equity "by subverting Liao's position as an equal holder of Ascent One's common shares and undermining the priority of her \$2.3 million shareholder loan in violation of the company's Articles and the BCA and in the face of Liao's known opposition" to be "indefensible" (at para. 225).
- [31] The trial judge also found that Mr. Yang advanced the \$1.3 million "because he perceived that the additional equity was necessary for there to be any chance of the CWB financing coming through and for the Project to proceed, both of which he desired" (at para. 228). He

found no basis to find that the advance failed for lack of consideration or otherwise had to be rescinded and returned to Mr. Yang. He concluded that the \$1.3 million advance formed part of the capital of Ascent One and constituted funds held by Ascent One available to repay the \$2.3 million shareholder loans of each of Ms. Liao and Mr. Yang in equal amounts.

On appeal

[32] It is contended that the trial judge made numerous errors of fact and law in dismissing the Ascent One Action and allowing the 652 Action.

[33] In the Ascent One Action, the appellant submits that the trial judge erred:

- (a) in finding that Ms. Liao commenced the October 2013 action qua shareholder;
- (b) in permitting Ms. Liao to take a position concerning the nature of the October 2013 action that was inconsistent with that taken in an earlier proceeding; and
- (c) in holding that the appellant had not established causation.

[34] In the 652 Action, the appellants (Ascent One, Mr. Yang and Rena) say the judge erred in ordering that the net proceeds from the sale of the development lands as well as the \$1.3 million advanced by Mr. Yang be distributed to Ms. Liao and Mr. Yang equally. More particularly, the appellants submit that the trial judge erred:

- (a) in holding that a director could attend and vote at a meeting of directors by email;
- (b) in finding the transactions that flowed from the December 11, 2014 directors' resolutions to be "void";
- (c) in finding that Mr. Yang received consideration for the \$1.3 million advance; and
- (d) in finding that Mr. Yang's \$1.3 million advance was intended to be a capital contribution.

[35] It is common ground that the trial judge's findings of fact are entitled to deference absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

1. Ascent One Action

[36] The substantive issue before this court is whether the trial judge erred in concluding that Ms. Liao did not breach her fiduciary duty as a director in commencing the October 2013 action against Ascent One.

[37] The appellant's submission focused largely on an asserted breach of fiduciary duty that relies on the trial judge's negative comments about Ms. Liao's credibility (at para. 155), in particular that:

- (c) the October 2013 Lawsuit was founded upon alleged facts that Liao has admitted were false. Indeed, she deposed that she did not in fact want any of the relief that she sought in the action but rather her primary focus was to force a meeting with Yang to address her personal complaints and concerns
- [38] The appellant says it is "axiomatic" that such conduct constitutes a breach of a director's fiduciary duty, and the only way around this conclusion was to find that Ms. Liao commenced the October 2013 action qua shareholder, not qua director. It submits that the judge made a palpable and overriding error in this finding since the action was commenced in Ms. Liao's name and she held no shares in the company. In addition, in a prior related proceeding (an application to discharge a certificate of pending litigation Ms. Liao had filed against the development property), Ms. Liao took the position that she had commenced the action qua director. The appellant contends the trial judge erred in permitting Ms. Liao to change her position on this issue, as this was an abuse of process.
- [39] Ms. Liao submits that the trial judge made no error in finding she commenced the October 2013 action qua shareholder, as it is amply supported by the assertions made and the relief sought in the Notice of Civil Claim. She also submits that the position taken by her counsel in the earlier court application was not at all clear, did not amount to an abuse of process, and in any event, the question of abuse of process was not raised in the court below and therefore ought not to be raised in this court.
- [40] There was no question at trial that Ms. Liao, as a director of the appellant, had a fiduciary duty to act honestly and in good faith in the best interests of the company. The appellant based its allegation of breach of fiduciary duty not only on the filing of the October 2013 action but also on assertions that Ms. Liao refused to participate in the day-to-day functioning of the company, frustrated the business of the company, and attempted to thwart the bank financing proposal. In this appeal, the appellant relies only on the October 2013 action to ground its argument, accepting the trial judge's findings on the other aspects of Ms. Liao's conduct. In light of those findings, it is my view that this ground of appeal cannot succeed.
- [41] As noted above, the trial judge found Ms. Liao had legitimate concerns about the feasibility of the Project, commenced the October 2013 action in an attempt to protect the company's interest, made consistent and ongoing attempts to engage herself in the business of the company despite failing to attend most directors' meetings in person, and had no obligation to put herself in further financial risk by investing further money or signing a personal guarantee.
- [42] The judge recognized that the October 2013 action was ill-conceived but rejected the appellant's argument that it was an attack on the company. His findings on this issue are set out at para. 191 of his reasons:

- [191] As ill-conceived as the October 2013 Lawsuit was, I accept Mr. Braidwood's submissions that, in substance, it was not an attack on the company or an attempt to sabotage or frustrate its financing. Rather, it was an oppression action brought qua shareholder (although improperly in Liao's name rather than that of her company) in an attempt to protect the company's interests in the absence of a full assessment of the viability of the Project prior to further financial commitments being made. The action was not filed qua director. Moreover, Liao did not seek by way of remedy in her action that her shares be purchased.
- (a) The finding qua shareholder
- [43] The appellant acknowledges that the October 2013 action was initially brought as a shareholder's proceeding. However, it submits that the evidence does not support the trial judge's finding that the action was brought qua shareholder, as Ms. Liao did not hold shares in the company, she was sophisticated and understood the difference between herself and her holding company, she did not seek relief tied to the shares, and her object in commencing the action had nothing to do with shareholder rights.
- [44] In my view, the judge's characterization of the October 2013 action was supported by the evidence. Clearly, the action was ill-conceived in several ways and was commenced by the wrong party, but the Notice of Civil Claim described Ms. Liao as a shareholder and for the most part sought shareholder remedies under the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. Importantly, the judge's finding that the action was brought in an attempt to protect the company's interests is one that he was entitled to make. His reasons further expand on the basis for this finding in the paragraphs preceding the above quoted passage:
- [187] In my view, the evidence falls short of establishing such a motive [that Ms. Liao set about on a course of action aimed at forcing one of her or Mr. Yang to buy the other out]. Rather, it shows that Liao repeatedly expressed to Yang and Chiang her concern that the increase in funding being discussed at the directors' meetings warranted a feasibility assessment of the Project beyond the pro-formas that had been prepared by Chiang. Clearly, Liao anticipated her role as CFO as well as the level of sophistication of the financial checks and balances that would be put in place differently than that envisioned by Chiang and Yang.
- [188] Liao sought to have the company prepare an up-to-date profit and loss or feasibility assessment, especially after she had been confronted with fundamental changes to the Project. The MOU specifically contemplated that Ascent One would prepare a thorough, comprehensive feasibility study of the Project to assure its profitability. Liao was concerned that, without such an analysis, the directors did not have the information necessary to conclude that proceeding with Project financing was in the best interests of the company.

- [189] In my view, Liao's concern in that regard was reasonable. Any objective director in Liao's position would not have considered it to be in the best interests of the company to proceed with the financing in the absence of a feasibility study. Indeed, the feasibility study prepared after the fact for the purpose of this litigation demonstrates that, had Ascent One proceeded with the Project, it would have been in a deficit cash flow position after Phase 1 of at least \$6 million with no profit to roll into the riskier Phases 2 and 3.
- [45] Moreover, it is apparent the judge's conclusion that Ms. Liao did not breach her fiduciary duty was based on his broader findings regarding all of the actions taken as a director and officer of the company, not just the circumstances of the October 2013 action. His ultimate finding was:
- [194] on balance, Liao took the actions she did in fulfillment of her role as a director and officer of the company and were aimed at preventing what she bona fide perceived was a potentially disastrous course of action. Such a determination stands in the way of a finding of breach of fiduciary duty.
- [46] This finding is consistent with the application of the principles in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68. In that case, Wise Stores Inc. had acquired Peoples Department Stores Inc. but the joint operation did not function well. Parallel bookkeeping and shared warehousing caused serious problems for both companies, including incorrect inventory records. The Wise brothers, directors of both companies, implemented a joint inventory procurement policy under which the two companies would divide responsibility for purchasing, with Peoples purchasing only from North American suppliers and Wise purchasing from overseas suppliers. Both companies subsequently declared bankruptcy. The trustee for Peoples filed a petition against the Wise brothers, claiming that they had breached their duties as directors under s. 122(1) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 [CBCA], by favouring the interests of Wise over Peoples to the detriment of the creditors of Peoples. The trial judge found the Wise brothers liable but this was reversed by the Quebec Court of Appeal, which result was affirmed by the Supreme Court of Canada.
- [47] For the court, Major and Deschamps JJ. held that the Wise brothers did not breach their fiduciary duty to act honestly and in good faith given the absence of evidence of a personal interest or improper purpose in the procurement policy and given evidence of a desire to make both companies better corporations. The court concluded that an unsuccessful attempt to redress a corporation's financial problems, made honestly and in good faith, does not constitute a breach of fiduciary duty under s. 122(1)(a) of the CBCA.
- [48] In this case, Ms. Liao's conduct in commencing the October 2013 action was both ill-conceived and misguided, but the trial judge found it was an attempt to protect the company's interests in the absence of a full assessment of the viability of the project. He also found that Ms. Liao, in her capacity as a director and officer, took all the actions complained of in an attempt to prevent what she bona fide believed was a potentially disastrous course

of action for the company. I see no palpable and overriding error in these findings. Therefore, despite some of the judge's negative comments about Ms. Liao's credibility and the ill-conceived October 2013 action, he concluded, correctly in my view, that his specific findings regarding her good faith motives and legitimate concerns for the welfare of the company precluded a finding of breach of fiduciary duty.

(b) Permitting Ms. Liao to take a position inconsistent with that asserted in an earlier proceeding

[49] The appellant's submission that the judge erred in permitting Ms. Liao to retract the position she took in an earlier proceeding regarding her standing to bring the October 2013 action is, in my view, without merit. Not only was this not raised before the trial judge, but the position taken in the earlier proceeding was not at all clear and in any event, was taken in a different context and in response to questions from the court.

[50] Generally, a court of appeal should not entertain a new issue on appeal unless the evidentiary record is sufficient and the interests of justice support granting an exception to the general rule. As Duff J. observed in *Lamb v. Kincaid* (1907), 38 S.C.R. 516:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

[51] While I am not entirely satisfied that the interests of justice favour consideration of this issue, the evidentiary record that is required to determine it is sufficient. The appellant relies on the materials filed in respect of its application in December 2013 to discharge a certificate of pending litigation that Ms. Liao had registered against the company's property, as well as the transcript of the hearing before the Supreme Court of British Columbia, all of which has been placed before us. It is my view, however, that nothing in this record demonstrates an abuse of process when the question of the propriety of October 2013 action was later before the trial judge.

[52] While the fact Ms. Liao's holding company owned the Ascent One shares was raised in the application materials and before the judge hearing the matter, the appellant's primary submission in that application was that Ms. Liao's pleading did not contain an interest in land. During the course of that submission, the appellant's counsel advised the court that Ms. Liao was "not even a shareholder anymore", after which the court questioned Ms. Liao's counsel about this:

THE COURT: So you're in agreement that your client's shares were transferred to a numbered company?

[COUNSEL]: Yes. At the time of the pleading my client didn't advise me that and I didn't see anything of the assignment from my client's name to the numbered company that she is the sole owner.

THE COURT: So Mr. Liao [sic] doesn't really have standing to bring this action because he's [sic] not a shareholder it's the company that would have standing to bring this action.

[COUNSEL]: Oh, yes. My client, yes, but she's still the director of the company and the oppression in the company - oppressive manner of the operation of the business.

THE COURT: So you're saying that basically your client remains a director of the company.

[COUNSEL]: Yes.

THE COURT: And what she's doing is commencing an oppression action against the company.

[COUNSEL]: Yes.

THE COURT: How, then, through an oppression action could she personally claim an interest in land as a relief? Any relief that she could claim would be on behalf of the company. It would be the company that would have an interest in land, not her.

[COUNSEL]: Yes, my client, through the company

THE COURT: The director can't act through the company. The director as an individual can claim oppression against the company, but how can she claim a personal interest in the land owned by the company as a result of an oppression action?

[53] It appears from this exchange that both the court and counsel may have confused a shareholder's oppression proceeding under s. 227 of the BCA with a derivative action brought in the name of the company under s. 232. However, it is quite clear that the court's primary concern was that Ms. Liao could not claim a personal interest in the company's land. In fact, the appellant did not raise the standing issue and argued only that Ms. Liao was not entitled to an interest in land because (1) she was no longer a shareholder, (2) even as a shareholder, she had no interest in the assets of the company, and (3) the remedies claimed in an oppression action did not give rise to any claim for such an interest.

[54] In my view, nothing that took place at the December 2013 hearing would or should have had any bearing on the issue of the propriety of the October 2013 action that was before the trial judge. I do not see this as an attempt to re-litigate an issue in the sense discussed in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, as argued by the appellant. The trial judge's references to Ms. Liao's conduct qua shareholder were brief, and formed only a part of his overall findings about her bona fide motivations as a director of the company.

[55] Therefore, I see no basis for this court to interfere with the trial judge's conclusion that Ms. Liao did not breach her fiduciary duty as a director.

[56] In light of this conclusion, it is not necessary to address the issue of causation.

2. 652 Action

- [57] In respect of the 652 Action, the appellants submit the trial judge erred (1) in finding that the transactions which flowed from the December 11, 2014 directors' resolutions were "void" when the resolutions were validly passed by a majority of directors present at the meeting who were entitled to vote, or alternatively, (2) by "voiding" only one side of the transaction and permitting the company to retain the benefit of the \$1.3 million contribution without providing Mr. Yang with shares and security for the loan. The appellants rely on unjust enrichment to support their alternative submission.
- [58] The trial judge and the parties generally referred to Ms. Liao as the party rather than 652. In an effort not to confuse matters, I have generally used her name as well, given that she is the company's directing mind.
- [59] The appellants' first submission raises the issue of whether Ms. Liao properly participated in the December 11, 2014 directors' meeting by email, and the second raises several issues regarding the trial judge's findings and conclusions about the effect of the parties' asserted repudiation of the Shareholders Agreement, the validity and enforceability of the transactions purportedly approved on December 11, 2014, and the nature of Mr. Yang's \$1.3 million advance.
- (a) Did Ms. Liao properly participate in the December 11, 2014 directors' meeting by email?
- [60] There is no dispute that Mr. Yang was not entitled to vote on the December 11, 2014 resolutions because he had an interest in the transactions, but that his presence at the meeting could be counted to determine the quorum. There is also no dispute that Ms. Liao did not attend this meeting in person but rather sent comments and her voting position on the agenda items by email.
- [61] The appellants submit that Ms. Liao was not entitled to vote by email and therefore, given the quorum of two directors, Mr. Chiang's affirmative vote was sufficient to pass the resolutions. The respondent submits that the directors agreed that participation at a meeting by email was permitted, as reflected in the meeting agendas, and the trial judge made no palpable and overriding error in finding that Ms. Liao had voted at the December 11, 2014 meeting.
- [62] The trial judge said little about this issue in his analysis of the 652 Action, finding only that Ms. Liao "voted (by email) against" the December 11, 2014 resolutions. However, earlier in his reasons, in his discussion of the Ascent One Action, the judge noted that the agendas provided that email was a permitted method of attendance.
- [63] The appellants contend that it is an error of law to hold that a director can vote by email, as both the BCA and the company's Articles require that directors must be able to communicate with each other, and the Articles also require that all directors consent to attendance by "other communications medium".
- [64] Section 140 of the BCA provides:

140(1) A director who is entitled to participate in, including vote at, a meeting of directors may participate

- (a) in person, or
 - (b) unless the memorandum or articles provide otherwise, by telephone or other communications medium if all directors participating in the meeting whether by telephone, by other communications medium or in person, are able to communicate with each other.
- (2) A director who participates in a meeting in a manner contemplated by subsection (1)(b) is deemed, for all purpose of this Act and of the memorandum and articles of the company, to be present at the meeting.

[65] Section 18.4 of the company's Articles reflects this provision and adds a requirement of consent:

18.4 A director may participate in a meeting of the directors in person or by telephone if all directors participating in the meeting, whether in person or by telephone or other communications medium, are able to communicate with each other. A director may participate in a meeting of the directors by a communications medium other than telephone if all directors participating in the meeting, whether in person or by telephone or other communications medium, are able to communicate with each other and if all directors who wish to participate in the meeting agree to such participation. A director who participates in a meeting in a manner contemplated by this Article 18.4 is deemed for all purpose of the Business Corporations Act and these Articles to be present at the meeting and to have agreed to participate in that manner.

[66] The appellants submit there was no consent to Ms. Liao's attendance in this manner, her emails were sent prior to the meeting, and there was no evidence that she could have communicated with the other directors in this manner. They say the provision in both the BCA and the Articles that directors are able to communicate with each other requires active two-way communication during a meeting.

[67] I am unable to accept the appellants' submission. To the contrary, the evidence suggests that there was consent to Ms. Liao's attendance by email and the directors were able to communicate about the matters on the meeting agenda.

[68] The agenda for the December 11, 2014 meeting--as was generally the case with all the meeting agendas as noted by the trial judge--explicitly provided that "voting can be conducted and accepted by email". As was Ms. Liao's pattern, she provided "email/voting comments" in relation to each agenda item. The agenda for the December 11, 2014 meeting contained four "finance" items:

[1] To consider the approved finance from CWB, the Commitment Letter for construction loan, and decide upon any action required as a result

The board of directors of Ascent One is hereby to acknowledge and accept the approved finance offer for construction loan as per the requirements manifested and confirmed in the CWB commitment letter -

- Each of directors - Fwu Yang, Fu Chiang Chiang, and Li Chiao Liao - accedes to affording limited liability guarantee respectively in the amounts as below in favour of CWB:
 - i. Fwu Yang - \$7,000,000
 - ii. Fu Chiang Chian - \$1,000,000
 - iii. Li Chiao Liao - \$500,000
- The director board is to pass an [sic] unanimous resolution to have the finance offer by CWB approved

[2] To confirm and ratify the receipt of additional investment

In accord with the resolution passed in the director meeting on the 5th of December, 2014, the Company is hereby to affirm the receipt of additional investment from Fwu Yang in the amount of \$1,300,000

[3] To enter a secured loan agreement for the additional investment

In accord with the resolution passed in the director meeting on the 5th of December, 2014, the Company shall enter into a separate loan agreement with Fwu Yang in the received amount of \$1,294,720 with priority over the existing shareholder loan.

[4] To issue additional common and preferred shares for the additional investment

Further to warrant the additional investment, the Company shall issue additional common and preferred shares to Fwu Yang as per the following particulars:

- \$5,280 (the "Share value") is made to Ascent One Properties Ltd. by Fwu Yang in return of subscribed 528 common shares
- A loan in the amount of \$1,294,720 (the "Loan") is made to Ascent One Properties Ltd. (the "Borrower") by Fwu Yang (the "Lender") in return of subscribed 528 preferred shares

and the Company will grant a mortgage as security to the secured loan.

[69] Ms. Liao indicated a no vote for each agenda item. Her comments regarding the second item referred back to the position she took at a previous meeting on December 5, 2014 and stated that her "position was clear in that regard". At the December 5, 2014 meeting, the directors were asked to "confirm and approve the solution of raising more investment from shareholders by means accepted and ratified by the director board".

[70] The minutes of the December 5, 2014 clearly indicate that Ms. Liao was "present by email" and set out what occurred:

Recording Secretary, Anthony Zhou, confirms that with two directors being present in person and one director being present by e-mail, the quorum was met and the meeting was duly held

The Director, Fu Chiang Chiang, read the first agenda of the meeting for board discussion, presented to the board why a further investment of \$2,600,000 is required from all shareholders, and then invited the board to discuss and consider this further investment to be advanced by the shareholders. The board discussed on this topic, Fu Chiang Chiang read Li Chiao Liao's e-mail discussion of this first agenda. Fwu Yang urges that Li Chiao Liao make efforts to have better understanding of the proposal of this investment.

The Director, Fu Chiang Chiang, invited the board members to proceed with the second agenda, i.e. to approve the proposal that a further shareholder investment of \$2,600,000 in pro-rata with the share position of the common shareholders of the Company, being \$1,300,000 by Fwu Yang and \$1,300,000 by Li Chiao Liao. The two directors present in person voted in favour of the proposal and the director present by e-mail voted against the proposal. Fwu Yang further stated that he will make investment in accordance with his share position and wish that Ms. Liao acts reasonably on the matter.

The Directors present in person further discussed the e-mail discussion of Li Chiao Liao.

- [71] There is no equivalent minute of the December 11, 2014 meeting. However, the attendance record for the company appears to indicate that Ms. Liao attended both of these meetings (and others) by email, and in any event, she participated in the same manner on December 11 as she did on December 5, 2014. I see no basis on which to interfere with the trial judge's conclusion--albeit an implicit one--that attending the December 11 meeting by email, as a permitted method, was one that had the agreement of the directors.
- [72] Nor do I see a basis on which a finding could be made that the directors were not able to communicate with each other. Section 140(1) of the BCA does not limit the manner in which directors are able to communicate with each other, and no authority was cited to us suggesting otherwise. Ms. Liao's opposition to the raising of additional funds by the shareholders was clearly stated. While it would have been better had she been present to discuss the details of the proposal for a secured loan agreement, there is no question that Ms. Liao opposed anything that the directors purported to do in relation to the additional "investment" funds.
- [73] The appellants referred to *Western Canadian Coal Corp. v. Fawcett*, 2006 BCSC 463 for the proposition that the court cannot rectify non-compliance with the BCA. That case, however, does not assist the appellants. It was about the inability of directors with an interest in a transaction to sign a consent resolution, and says nothing about s. 140(1)(b) and the manner of attending meetings. The court simply points out the two ways for directors to pass a resolution: first, for a majority of directors present at a meeting having a quorum to vote in favour of the resolution, and second, for all directors to consent to the resolution. In the latter case, a meeting of directors is not required.

- [74] Therefore, it is my view that the trial judge did not err in concluding in the particular circumstances here that Ms. Liao voted by email at the meeting of December 11, 2014, as the evidence was consistent with the requirement that the practice had been agreed to and that the directors were able to communicate.
- (b) The trial judge's findings and conclusions about the effect of repudiation of the Shareholders Agreement, the validity and enforceability of the transactions purportedly approved on December 11, 2014, and the nature of Mr. Yang's \$1.3 million contribution
- [75] The appellants submit that the trial judge made palpable and overriding errors in finding that the transactions flowing from the December 11, 2014 directors' resolutions were "void", that Mr. Yang received consideration for his \$1.3 million advance, and that his advance was intended to be a capital contribution.
- [76] The respondent concedes the judge erred in finding that the issuance of shares to Mr. Yang was invalid, but submits that he made no error with respect to the invalidity of the loan agreement and mortgage. It submits that Mr. Yang's \$1.3 million advance was a capital contribution provided in exchange for shares, constituted paid up capital, or was a shareholder loan ranking in priority behind the original shareholder loans. The respondent notes that the appellants conceded before the trial judge that the loan agreement purporting to grant priority over the existing shareholder loans was in breach of the Shareholders Agreement, and says that the mortgage was problematic not only because the resolution approving it was invalid but also because it was contrary to the company's commitment to the bank not to financially encumber its interest in the Project without its consent.
- [77] To properly assess the transactions in issue, it is important to go back to the essential claim made by 652, which was an assertion that Messrs. Yang and Chiang had repudiated the Shareholders Agreement, and Ms. Liao's acceptance of that repudiation entitled 652 to be repaid the \$2.3 million shareholder loan.
- [78] I have come to the same conclusion as the trial judge that the \$1.3 million advance was available to pay the original shareholder loans in equal amounts, but I do so for different reasons. It is my view that the trial judge erred in failing to assess the evidence regarding each party's alleged repudiation and apply the relevant legal principles to his findings. It is also my view that the judge erred in concluding that the transactions underlying the December 11, 2014 resolutions were invalid. However, as I explain below, the loan and mortgage transactions constituted a repudiation of the Shareholders Agreement and were unenforceable as against the respondent, and it was unnecessary for the judge to consider whether the advance was a loan or capital contribution or otherwise failed for lack of consideration. Therefore, it is not necessary to consider the issue of unjust enrichment as raised by the appellants.
- (i) Repudiation of the Shareholders Agreement and its effect

- [79] Ms. Liao's primary submission was that Article 3.05 of the Shareholders Agreement entitled 652 to be paid in priority to Mr. Yang's subsequent shareholder loan and mortgage. There was no dispute that the priority provision in Mr. Yang's subsequent shareholder loan was in breach of the Shareholders Agreement.
- [80] The trial judge rejected that submission on the basis that all of the parties had maintained their respective positions that the Shareholders Agreement was at an end as a result of the other party's repudiation and therefore neither party could enforce its terms (at para. 217).
- [81] It is true that each party alleged that the other had repudiated the Shareholders Agreement. On December 11, 2014, counsel for the appellants wrote to counsel for the respondent asserting that Ms. Liao's conduct on behalf of 652--commencing the October 2013 litigation, refusing to attend directors' meetings, refusing to approve matters proposed by other directors, complaining about the lack of information she could have obtained for herself, frustrating the company's efforts to proceed with the Project, and refusing to execute documents reasonably required for the company's ongoing business--constituted a fundamental breach of the Shareholders Agreement and accepting the repudiation of it. On January 15, 2015, counsel for 652 wrote to counsel for the appellants asserting that the declaration made on December 11, 2014 that the Shareholders Agreement was at an end, as well as the resolution approving the second loan agreement to Mr. Yang with priority over the existing shareholder loans, constituted a wrongful repudiation of the existing agreements, including the Shareholders Agreement, and accepting the repudiation.
- [82] Repudiation of a contract occurs where a party evinces a clear and unequivocal intention not to be bound by its terms. Such an intention may be evinced by a refusal to perform or by a fundamental breach of a primary obligation: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40; *Kuo v. Kuo*, 2017 BCCA 245 at paras. 39-40.
- [83] The appellants did not challenge Ms. Liao's assertions, but Ms. Liao challenged theirs. In a letter dated December 17, 2014, her counsel expressly disagreed that her conduct constituted a breach of the Shareholders Agreement. The trial judge made no findings on this, apparently assuming that the assertions were not in dispute. However, in the *Ascent One Action*, he found that actions of Ms. Liao--essentially the same conduct complained of by the appellants as constituting repudiation--were taken "in fulfillment of her role as a director and officer of the company" and "aimed at preventing what she bona fide perceived was a potentially disastrous course of action" (at para. 194). These findings are inconsistent with a clear and unequivocal intention not to be bound by the Shareholders Agreement.
- [84] On the other hand, the trial judge found the December 11, 2014 resolutions to be an "indefensible" attempt to subvert Ms. Liao's position as an equal shareholder and to undermine the priority of her shareholder loan (at para. 225), and noted the appellants' concession that the priority granted to Mr. Yang in the subsequent shareholder loan was in breach of the Shareholders Agreement. These findings are consistent with a clear and unequivocal intention not to be bound by the Shareholders Agreement.

[85] In my opinion, the trial judge erred in failing to consider whether Ms. Liao had evinced an intention not to be bound by the Shareholders Agreement and in concluding that the parties could not enforce the terms of the Shareholders Agreement. Had the trial judge properly assessed the evidence and the applicable legal principles, he would have concluded that Ms. Liao was the non-repudiating party who had elected to accept the repudiation of the other parties.

[86] The effect of Ms. Liao's acceptance of the repudiation was that the Shareholders Agreement was terminated but the rights and obligations under it that had matured continued to be enforceable. This was explained in *Guarantee Co. of North America* at para. 40:

40 Contrary to rescission, which allows the rescinding party to treat the contract as if it were void ab initio, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for past or future breaches" (emphasis in original): Cheshire, Fifoot and Furmston's *Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

[Underline emphasis added.]

[87] Chitty on Contracts, 32nd ed., (London: Sweet & Maxwell Ltd., 2015) provides a similar analysis on the effect of a non-repudiating party's acceptance of the other's repudiation at 1772-1773:

Where the innocent party is entitled to, and does, treat himself as discharged by the other's breach, he is thereby released from future performance of his obligations under the contract.

Although both parties are discharged from further performance of the contract, rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.

[88] It is clear, therefore, that in such circumstances, the contract remains valid and binding in the sense that the terms are enforceable against the defaulting party in a claim for damages for past defaults. The principle for awarding damages for breach of contract aims to provide the innocent party with the monetary equivalent of performance: John D. McCamus, *The Law of Contracts*, 2nd ed., (Toronto: Irwin Law Inc., 2012) at 678-682, and 873-874.

[89] In this case, the Shareholders Agreement was terminated as a result of Ms. Liao's acceptance of the appellants' repudiation, but the company remained obligated to fulfill obligations that had not been extinguished. The Shareholders Agreement itself addressed continuing obligations after a termination in Article 7.02:

The termination of this Agreement will not affect the obligations of any Shareholder or the Company arising pursuant hereto prior to the date of termination to make payment of any balance owing on the purchase price in respect of any Investment as may have been agreed upon pursuant to this Agreement

[90] "Investment" was defined in the Shareholders Agreement as including "any Loan and accrued interest thereon" and "any other right or claim the Shareholder may have against the company as a Shareholder".

[91] The obligation to repay the shareholder loans in priority to any subsequent loans had not been extinguished. 652 had the right to sue for damages for breach of contract and to be placed in the same position as if the Shareholders Agreement had been performed, i.e., with priority of payment over subsequent shareholder loans.

(ii) Validity and enforceability of the share issuance, the loan and the mortgage

[92] While the December 11, 2014 resolutions were not properly approved by the directors, it is my view that the trial judge erred in concluding that the transactions "that flowed from" them were invalid. He took guidance from *Blue-Red Holdings Ltd. v. Strata Plan VR 857*, [1994] B.C.W.L.D. 2769 (S.C.), a case involving a strata corporation. There, special resolutions purportedly passed at an Extraordinary General Meeting that imposed special assessments were held to be "void and of no effect" as they did not comply with the strata's bylaws and were also found to be unfairly prejudicial.

[93] In the corporate law context, a transaction that does not comply with certain provisions of the BCA or has not been properly approved may not be rendered invalid. For example, although s. 68 of the BCA permits the issue of shares inconsistent with the Act to be validated, it has been held that the issuance of shares without full payment in contravention of s. 64 of the BCA does not result in a void transaction. Rather, under s. 154(2), a director is liable to compensate the company for any loss by reason of the issuance of a share in contravention of that section: *Oakley v. McDougall* (1987), 17 B.C.L.R. (2d) 134 (C.A.).

[94] Similarly, in circumstances where a director has an interest in a transaction, the transaction is not rendered invalid where it has not been approved. Section 151 of the BCA provides:

151 A contract or transaction with a company is not invalid merely because

- (a) a director or senior officer of the company has an interest, direct or indirect, in the contract or transaction,
- (b) a director or senior officer of the company has not disclosed an interest he or she has in the contract or transaction, or
- (c) the directors or shareholders of the company have not approved the contract or transaction in which a director or senior officer of the company has an interest.

[Emphasis added.]

- [95] Part 5, Division 3 of the BCA (ss. 147-153) deals with conflicts of interests and the duties of directors to disclose such interests and refrain from voting on resolutions approving transactions in which they have an interest, and the power of the court to make orders where a transaction is not fair and reasonable to the company. None of this was developed in the submissions before us, and I do not intend to address this further. Suffice it to say that the trial judge fell into error in his conclusion on this issue, and this led him to consider--unnecessarily in my view--whether the \$1.3 million advance was a loan or a capital contribution.
- [96] The issuance of shares to Mr. Yang and the loan and mortgage transactions that were entered into were not rendered invalid merely because the resolutions authorizing those transactions lacked majority approval. Mr. Yang was entitled to retain the shares and hold the mortgage.
- [97] That said, it does not necessarily follow that these transactions are enforceable--at least as against the respondent--despite their technical validity. The judge also concluded that they were "of no force and effect" (at para. 223) and that the mortgage was "unenforceable" (at para. 231), and I do not disagree. As discussed above, these transactions constituted a repudiation of the Shareholders Agreement. They also converted Mr. Yang's position from that of an equal shareholder and unsecured creditor to that of a majority shareholder and secured creditor with priority over the original shareholder loans. The trial judge's findings make it clear that he considered the transactions to be "indefensible":
- [225] Mr. Clark submits that, with the exception of it being granted priority over the existing shareholders' loans, the \$1.3 million loan from Yang was 'substantively fair to the company' because the company would not have otherwise had sufficient equity to continue with the Project. That may well be. However, in my view, the attempt by Chiang and Yang to do so by subverting Liao's position as an equal holder of Ascent One's common shares and undermining the priority of her \$2.3 million shareholder's loan in violation of the company's Articles and the BCA and in the face of Liao's known opposition is indefensible.
- [98] Mr. Yang's additional investment and the issuance of shares to him would not in itself have been problematic given that Ms. Liao was offered the same opportunity. However, in the context of these somewhat unusual circumstances and given the clear findings of the trial judge, it would be inequitable to enforce the priority provision in the subsequent loan agreement. It is therefore my view that the loan agreement and mortgage, while not invalid per se, are unenforceable as against the respondent.

(iii) Loan vs. capital contribution

- [99] Whether an advance of funds to a company by a shareholder is a loan or a capital contribution is a question of fact, which requires that the substance of the transaction be examined in the context of all the surrounding circumstances: *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BCSC 286 at para. 59; *Ghassemvand v. Premium Weatherstripping Inc.*, 2017 BCCA 309 at para. 51.
- [100] The trial judge concluded that the \$1.3 million advance by Mr. Yang formed part of the capital of Ascent One. His only findings on this issue are set out at para. 228 of his reasons:
- [228] On the whole of the evidence, and in particular the circumstances facing Ascent One in December 2014, I find that Yang advanced the \$1.3 million because he perceived that the additional equity was necessary for there to be any chance of the CWB financing coming through and for the Project to proceed, both of which he desired. Although the consideration for the advancement of the money in the form of issuance of the shares and the Yang mortgage were unauthorized and therefore invalid, I find that Yang nevertheless received some consideration in the form of the ongoing chance that the Project would proceed. Yang did not provide any evidence that he would not have advanced the funds in the absence of the share issuance and grant of the Yang mortgage. Accordingly, there is no basis upon which I can find that the \$1.3 million advance fails for lack of consideration or otherwise must be rescinded and returned to Yang.
- [101] I do not intend to address this issue in any detail other than to say that the evidence about it was conflicting and inconsistent. In his affidavit, Mr. Yang deposed that he "invested a further \$1.3 million in the company in exchange for the issue of further shares". Mr. Chiang deposed that the purpose of seeking the additional funds "was to increase the amount of cash advanced to the project in order to meet the equity requirement of the financing" and both Mr. Yang and Ms. Liao were offered "the opportunity to participate and advance further cash in exchange for shares". Curiously, neither Mr. Yang nor Mr. Chiang made mention of the December 11, 2014 resolutions and the granting of the subsequent loan and mortgage, although they acknowledged those documents in cross-examination. These transactions documented a loan in respect of the amount advanced for the preferred shares. In considering "the whole of the evidence" it is not clear how the trial judge took into account the documentary evidence, but it appears that he discounted it due to his conclusion that the transactions were invalid.
- [102] In any event, given my conclusions above, it is not necessary to resolve this issue.

Conclusion

- [103] Accordingly, I would not interfere with the trial judge's conclusion that Ms. Liao did not breach her fiduciary duty as a director. Although for different reasons, I would also not interfere with the trial judge's ultimate conclusion that Mr. Yang's \$1.3 million advance was available, along with the net proceeds of sale, to repay the original shareholder loans of each of Ms. Liao and Mr. Yang (on behalf of their holding companies) in equal amounts.

[104] I would therefore dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Fitch"

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