CANADA / JUDGMENT

Li v. Liang

2021 BCSC 862

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2021 BCSC 862 Li v. Liang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Liang,

2021 BCSC 862

Date: 20210506

Docket: E151127

Registry: Vancouver

Between:

Fan Li

Claimant

And

Kun Peng Liang and Henan Huabin Real Estate Company Ltd.

Respondents

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

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Place and Dates of Trial:

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May 6, 2021

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INTRODUCTION

[1] On January 17, 2014, the claimant Fan Li and the respondent Kun Peng Liang entered into a Separation Agreement in British Columbia that comprehensively addressed child support, spousal support, and the division of family property and debt. The parties were divorced by order of a court in China shortly after the execution of the Separation Agreement. In this action, the claimant seeks to vary the property division provisions of the Separation Agreement on the basis that the respondent failed to disclose significant family assets that he owns in China.

[2] The main properties in dispute are seven dormitory buildings located in Xinxiang City, Henan Province, China (the "Dormitories"). There is no issue that Kun Peng Liang acquired the Dormitories during the course of his marriage to the claimant. However, he says that he holds the properties in trust for the corporate respondent Henan Huabin Real Estate Corporation Ltd. ("Henan Huabin"), and has no beneficial interest in them. Henan Huabin is a real estate development company operating in China that was founded by Kun Peng Liang's father, Bao Ping Liang.

[3] The claimant says there are other assets that the personal respondent failed to disclose prior to the execution of the Separation Agreement. The other alleged undisclosed assets consist of companies in China that the personal respondent had a share interest in, and off-shore assets that he used to purchase real estate in British Columbia shortly after the Separation Agreement was executed.

[4] The factual disputes in this case are challenging due, in part, to the absence of any written record of the alleged trust agreement between Kun Peng Liang and Henan Huabin. The respondents' case relies on inferences they say can be drawn from the documents that are in evidence, and the viva voce testimony of the respondents' witnesses. For this reason, credibility is a central issue.

[5] In the event that the Court is persuaded to re-open the Separation Agreement, the respondents say that there should be a redetermination of other assets, even those that were disclosed as family assets and divided in the Agreement. In particular, the respondents say that the former family home on Bridgeport Road in Richmond, British Columbia, which is listed as a family asset in the Separation Agreement, was also held by Kun Peng Liang in trust for Henan Huabin. The respondents say that any modification of the Separation Agreement to account for undisclosed family assets in China should also account for the value the claimant received for the Bridgeport Road property despite it being owned by Henan Huabin.

[6] There are other issues in dispute between the parties relating to child support and parenting arrangements for their daughter, who I will refer to as "C". These issues were not a central focus of this trial. Virtually no evidence was led that would permit an assessment of C's best

interests that would be necessary for any determination of appropriate parenting arrangements. The parties agreed that it would advance the resolution of the disputes that remain between them to have a decision on the property issues that were the subject of evidence at trial, leaving the parenting and child support issues to be resolved in future as necessary.

[7] In the circumstances, I am persuaded that it is in the interests of justice to determine the issues of property division, including the claimant's request for a modification of the Separation Agreement, in advance of the remaining issues of parenting and child support. Rule 14-7(67) of the Supreme Court Family Rules, B.C. Reg. 169/2009, permits the court to order that one or more questions of fact or law arising in a family law case be tried and determined before the others. The family property issues are the major focus of the dispute between the parties. The adjudication of these issues is not intertwined with the determination of parenting and child support issues.

[8] Accordingly, the issues to be resolved at this trial are the family property issues, namely:

i. Did the respondent fail to disclose significant family property prior to the execution of the Separation Agreement?

ii. If so, what is the value of the undisclosed property?

iii. Should the Separation Agreement be modified, and if so how?

BACKGROUND CHRONOLOGY

[9] I will review the history of the relationship between the parties to establish a chronology of events. In doing so, I will not attempt to resolve the numerous factual conflicts relevant to the issues that arise for determination. Rather, I address the factual conflicts later in this judgment in determining the disputed issues.

[10] For ease of reference, because so many of the parties and witnesses share the same last name, I will refer to the parties by their first names. Following the lead of counsel for the respondents, I will refer to the respondent Kun Peng Liang as "Sam", his English name, and to his father Bao Ping Liang as "Bao". I will refer to the claimant as "Fan".

[11] As many of the assets in issue in this case are located in China, the values are frequently expressed in the Chinese currency of renminbi ("RMB" or ¥). The parties agree that, although not precise, the values in renminbi roughly translate into Canadian dollars (CAD) through a 6:1 conversion factor.

The parties' pre-marriage circumstances and marriage

[12] Fan and Sam met in late 2005 in Xinxiang City. Fan was, at the time, working as a receptionist at China Mobile. In 2006, she took a job as a dance director for a theatre. Sam was working for his father's company, Henan Huabin, and living with his parents.

[13] Henan Huabin is a real estate development company that Bao incorporated in 1994 with his business partner Bin Yan. Bao and Bin Yan are the only two shareholders in Henan Huabin. They each made an initial contribution of ¥60 million to the company. This capital was used to fund Henan Huabin's first big real estate project, the Huabin Dasha commercial plaza in Xinxiang City, which was completed in 1997. After the completion of the Huabin Dascha plaza, Bao went to Beijing for a few years and worked on projects there. In 2001, Henan Huabin commenced work on its next major project in Xinxiang City, the Huabin Sunshine Square Plaza ("Sunshine Square"). The Sunshine Square project involved the construction of a 31-story residential and commercial complex. The project was completed in 2008.

[14] Bao testified that Henan Huabin spent ¥80 million on the Huabin Dasha project, leaving ¥40 million of the initial investment by Bao and Bin Yan. The Sunshine Square project was funded by three sources: (i) the ¥40 million that Henan Huabin still had after completion of the Huabin Dasha project, (ii) pre-sales of residential units in the Sunshine Square, and (iii) rental income from Huabin Dasha. Henan Huabin's revenue after the completion of the Sunshine Square consisted primarily of rental income from Huabin Dasha and the Sunshine Square.

[15] When Sam met Fan, he was working for Henan Huabin as a salesperson in relation to the Sunshine Square project. Prior to that, Sam had worked in different jobs at Henan Huabin, starting as a driver at the age of 17. In or around the year 2000, Sam became the assistant manager of the entertainment centre at the Huabin Dascha mall. Between 2001 and 2003, Sam went to New Zealand to study English. In 2006, Sam became the General Manager of Henan Huabin. Bao says he told Sam that he would have to work hard to improve his business knowledge as he would be taking over the company some day.

[16] Bao is the Chairman of Henan Huabin. Bin Yan appears to have played essentially the role of a silent partner. Bin Yan lived for the most part outside of China and left the day-to-day running of the company to Bao. Bin Yan did not testify at the trial.

[17] Bao had a stroke in 2004 and spent a period of time in the hospital. During that period, he continued to run Henan Huabin by providing directions to staff over the phone.

[18] Fan and Sam were married in Xinxiang City on November 29, 2006. Fan was, by this time, pregnant with C. At the time of the marriage, Fan was 25 years old (almost 26) and Sam was 28. Their daughter C was born in July of 2007.

[19] After the marriage, Sam continued to work as a General Manager for Henan Huabin. Fan stopped working in order to stay at home and care for their child. The couple lived in a property with a street address of Unit 302, Xiangrui Garden in Xinxiang City ("Unit 302"). Unit 302 was purchased for Sam and Fan by Bao and his wife, Sam's mother Linda. After moving into Unit 302, Sam and Fan continued to attend family meals with Bao, Linda, and Sam's sister Shelly, who also worked for Henan Huabin.

The move to Canada

[20] At some point after they married, Sam advised Fan of his intention to apply to immigrate to Canada. In 2009, Sam submitted an application for permanent residency to Citizenship and Immigration Canada ("CIC") under the Investor Category. Sam was the principal applicant, and Fan and C were listed as dependents. Sam reported on his application that he had a net worth of $1,039,337 CAD, which primarily consisted of the current value of his bank deposits. Sam also listed his 90% share ownership of a company by the name of "Xinxiang City Golden Key Real Estate Management Co. Ltd." ("Gold Key")[1]. Sam reported that he earned an annual salary of ¥360,000 as General Manager of Henan Huabin.

[21] Sam and Fan first landed in Vancouver in March 2010, leaving C temporarily in China. Fan stayed in Canada for a month and then returned to China to care for C. Sam returned to China a short time later. In October 2010, Sam and Fan returned to Vancouver with C. They lived in a rental house for a brief period before purchasing a house on Bridgeport Road in Richmond (the "Bridgeport Property") in December 2010. The purchase was financed with a $300,000 down-payment and a mortgage from the Bank of Montreal ("BMO"). Fan's evidence is that Sam told her that he took a mortgage on the Bridgeport Property because he wanted to keep his money in China to lend at relatively higher interest rates.

[22] The Bridgeport Property was registered only in Sam's name. Fan's evidence is that Sam told her that they would eventually purchase another property that would be registered in her name. Sam's evidence is that he held title to the house as bare trustee for Henan Huabin, and that Fan was aware of this fact.

[23] Sam returned to China in February or March of 2011, leaving Fan and C living in the Bridgeport Property. While he was in China, Sam would remit money to Fan to pay for the family's living expenses. Sam says that Henan Huabin was the source of the funds that he remitted to Fan in Canada. There is conflicting evidence on this point. It is clear that the money was transferred from China in increments using various accounts. The respondents say this was necessary to avoid Chinese restrictions on the transfer of cash out of China. The respondents' assertion that the money was owned by Henan Huabin is not evidenced by any trust document, payment records, or accounting by Sam to Henan Huabin.

[24] The Bridgeport Property had self-contained suites on the lower level that generated rental income. Fan did not work in Canada until after her divorce from Sam. She says she lived off the rental income and money remitted to her by Sam while he was in China. Fan estimates that the rental income was approximately $35,000 per year. The money remitted by Sam, while the parties were still married, was approximately $100,000 per year. Sam stopped remitting funds to the claimant in the spring of 2012.

The parties' separation and the Separation Agreement

[25] The relationship between Sam and Fan deteriorated in 2011. During a visit to China that year, Fan accused Sam of having an affair. At some point, the two began to discuss the possibility of a divorce. The parties separated on April 15, 2012. At that time, Sam had temporarily returned to Canada for a period of a few weeks. He stayed at the Bridgeport Property, but says that he and Fan did not sleep together. It was at this time that they agreed to separate, and Sam returned to China.

[26] In January 2013, Sam filed a notice of claim in the People's Court of Weibing District, Xinxiang City seeking an order dissolving the marriage, as well as orders for division of property and child custody. He sent a copy of the notice of claim to Fan at the Bridgeport House. In February of 2013, Fan filed a notice of family claim in British Columbia.

[27] The issues between the parties were ultimately addressed through the Separation Agreement, which was executed in British Columbia on January 17, 2014. The facts stated in the recitals to the Agreement include the following:

· the parties have lived separate and apart since April 15, 2012;

· Sam is a businessman with substantial business and investment in China, and an expected annual income of $100,000;

· Fan is a homemaker with an annual income of $1,200;

· the family assets and debt, and their value as of November 30, 2013, are as follows:

o the Bridgeport Property, with an assessed value of $964,000 and an outstanding mortgage of $700,000;

o Unit 302 in Xinxiang City, with an assessed value of $100,000;

o various bank accounts in Fan's sole name with a total value of $10,000; and

o various assets in Sam's sole name and under his control with a total value of $1.5 million.

[28] Term 1 of the Separation Agreement provides that each party warrants that the statement of facts in the recitals are true and acknowledges that the other party is relying on them.

[29] In relation to the division of family assets and debt, Term 14 of the Separation Agreement provides that Sam will retain sole ownership of the Bridgeport Property and Fan will retain sole ownership of Unit 302. Sam is to pay Fan an equalization payment in the amount of $700,000, of which $500,000 is to be paid within 30 days of the execution of the Agreement and the remainder in monthly installments. The parties otherwise retain their own property and investments. In consideration of the division of family assets and the equalization payment, Fan agrees to waive any claim for spousal support.

[30] The Separation Agreement anticipated that C would ordinarily reside with Sam, with Fan having weekend parenting time and such other parenting time as the parties agree to. The Agreement does not require Fan to pay child support to Sam. However, the Agreement provides that if C resides with Fan for 15 days or more in any month, then Sam will pay child support for the month in the amount of $1,000.

[31] If the family assets listed in the Separation Agreement were equally divided, each party would receive a $937,000 share. In fact, Fan's share of the family assets under the Separation Agreement, including the equalization payment, totalled $810,000. Fan says she agreed to this division (a 57/43 split) because it was anticipated that Sam would have primary care of C, and that Sam and C would live at the Bridgeport Property.

[32] The Separation Agreement contains the following release:

40 Except as otherwise provided in this Agreement, each party gives up all claims at law, in equity, or by statute against the other, including, without restricting the generality of the foregoing, all claims under the Family Law Act, the Wills Variation Act, the Estate Administration Act, and the Divorce Act, with respect to

(1) support,

(2) property,

(3) succession rights, and

(4) any other matter arising from their relationship.

[33] As acknowledged in the Separation Agreement, Sam and Fan both received independent legal advice before signing the Agreement. Each party acknowledges having read the entire Agreement carefully and understanding its contents. Pursuant to Term 41(11) of the Separation Agreement each party acknowledges that he or she:

(11) understands that the provisions of this Agreement, if considered by the Supreme Court to be substantially unfair due to the non-disclosure of a material fact, may be reviewed and varied by the Court despite the mutual agreement of the parties that this Agreement is final and binding.

[34] Fan's evidence is that her knowledge of Sam's income and assets at the time of the execution of the Separation Agreement came from his 2011 and 2012 Canadian tax returns, and the information provided on his application for permanent residency. It is not in dispute that Fan was present with Sam when he met with his accountant to finalize his 2011 and 2012 tax returns, and also present during Sam's immigration interview. Fan did not see Sam's 2013 Canadian tax return before executing the Separation Agreement.

[35] Although the Separation Agreement anticipated that C would reside primarily with Sam, Sam did not permanently move to Canada until the fall of 2018. Between 2011 and 2018, Sam moved back and forth between Canada and China. Since the execution of the Separation Agreement, C has resided primarily with Fan.

[36] Sam still owes Fan $100,000 of the equalization payment he was to provide her under the Settlement Agreement. As I understand it, he has held off paying the final amount pending resolution of this proceeding.

The parties' divorce and Divorce Agreement

[37] Following the execution of the Separation Agreement, Sam and Fan travelled together to China to resolve the divorce proceedings that Sam had initiated. They entered into a divorce agreement in China that confirmed the parties' negotiated resolution of matters relating to child custody and the division of family property and debt (the "Divorce Agreement"). The Divorce Agreement included the following relevant terms:

2. During the term of their matrimonial relationship, properties and immovable properties registered in the name of the individual shall be owned by the individual. The other Party shall voluntarily renounce joint ownership rights of properties and immovable properties in the name of the opposing Party. Personal properties and immovable properties prior to the marriage shall be owned personally by both Parties.

. . .

5. This Agreement shall not affect the Separation Agreement signed by both Parties in Canada on January 17, 2014.

[38] Shortly after the divorce was finalized, perhaps as soon as the next day, Sam married Shang Kun.

The claimant's discovery of the Dormitories and corporate shares

[39] Fan's evidence is that at some point after the execution of the Separation Agreement and the Divorce Agreement, she learned from a cousin in China that Sam might have acquired assets during their marriage that he did not disclose to her. Fan hired a lawyer in China to investigate. The investigation led to the discovery of a Property Rights Transfer Certificate evidencing Sam's acquisition of the Dormitories in July 2011 for a purchase price of ¥37.6 million. The Dormitories consist of seven buildings - Buildings 2, 3, 4, 5, 7, 8, and 9 - at 20 Xueyan Street, Xinxiang City, Henan Province.

[40] The Dormitories were formerly owned by the Henan Mechanical and Electrical Engineering College (the "College"). Sam's evidence is that he learned from a friend who was a teacher at the College that the Dormitories were going to be put up for sale. Sam discussed the prospect of purchasing the Dormitories with Bao, who agreed it was a good development opportunity for Henan Huabin. The evidence of Sam and Bao is that Henan Huabin

nominated Sam to hold on to the Dormitories as trustee for Henan Huabin. This was necessary due to restrictions on the ability of a corporation to own the property.

[41] Title to the Dormitories was not formally transferred to Sam until April 2014. Fan suggests the timing of the registration is suspicious, coming shortly after the parties' execution of the Separation Agreement. Sam and Bao have testified that the delay in the transfer of formal title into Sam's name is due in part to the fact that local government approval was required before the transfer could occur.

[42] The respondents have tendered in evidence a significant volume of documents to show the complex series of transactions that generated financing for the Dormitories. The respondents say this evidence demonstrates that all of the financing, including acquisition and renovation costs, came from Henan Huabin. This evidence is addressed in greater detail later in this judgment. For present purposes, I simply note that despite the voluminous nature of the record, there is no document in evidence that reflects the existence or terms of the alleged trust arrangement between Sam and Henan Huabin.

[43] Fan's investigation also uncovered, through a search of the corporate registry in China, the existence of Sam's shareholder interests in various corporations in China. The corporate records indicate that Sam paid a share subscription fee to acquire the shares during the course of the parties' marriage. Fan says that Sam also did not disclose his interest in these companies prior to the execution of the Separation Agreement.

The parties' current circumstances

[44] Fan and Sam now both reside in British Columbia. As noted, Sam permanently moved to Canada in the fall of 2018. Sam lives with Shang Kun and their children. C sometimes stays with them. Fan has purchased her own residence.

[45] Sam purchased two properties in Richmond in 2014 following his separation from Fan: one on Decourcy Crescent (the "Decourcy Property"); the other on Trumond Drive (the "Trumond Property"). Sam sold the Decourcy Property in 2015, and reported a capital gain on his personal tax return. Proceeds from the sale of the Decourcy Property were used to build a new house on the Trumond Property. Sam now lives with his family in the Trumond Property, although he occasionally resides in the upstairs of the Bridgeport Property when family is visiting from China. Sam continues to rent the lower suites of the Bridgeport Property. He declares the rental income on his personal tax returns, and also declares himself as the owner of a 100 percent interest in the property.

[46] Sam is the registered owner of the Trumond Property, was the registered owner of the Decourcy Property, and declared the capital gain on the sale of the Decourcy Property as well as rental income from the Bridgeport Property on his tax return. However, Sam maintains that he has held these properties as a bare trustee for Henan Huabin.

LEGAL FRAMEWORK

Family property and debt division under the Family Law Act

[47] The division of family property and debt, subject to the terms of any marriage agreement, is governed by Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].

[48] Section 81 of the FLA provides that, subject to an agreement or order which states otherwise, spouses have a presumptive entitlement to an equal interest in all family property and are equally responsible for family debt.

[49] Section 84 of the FLA defines family property to include all real and personal property that is owned by at least one spouse on the date of separation or in which at least one spouse has a beneficial interest that is not excluded property under s. 85.

[50] Section 85(1) defines excluded property to include property acquired by a spouse before the relationship began, inheritances, gifts to a spouse by a third party, a settlement or award of damages to a spouse to compensate for injury or loss, and property derived from excluded property. The onus of proving that property should be excluded is on the party advancing the claim: s. 85(2).

[51] Family debt includes all financial obligations incurred by a spouse during the relationship and after separation if it is incurred for the purpose of maintaining family property: FLA, s. 86.

[52] Section 87(a) of the FLA provides that, subject to an agreement or court order, the value of family property is based on its fair market value. Section 87(b) provides that the value of family property or debt must be determined: (i) as of the date an agreement dividing the family property or debt is made, or (ii) as of the court hearing respecting the division of family property and debt.

[53] Pursuant to s. 95 of the FLA, a court may order an unequal division of family property or family debt, or both, if an equal division would be "significantly unfair". Section 95(2) enumerates the factors that may be considered by a court in ordering an unequal division:

(a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[54] Significant unfairness justifying an unequal division must be "compelling or meaningful having regard to the factors set out in s. 95(2)": Jaszczewska v. Kostanski, 2016 BCCA 286 at para. 41 [Jaszczewska], quoting Remmem v. Remmem, 2014 BCSC 1552. Reapportionment requires something objectively unjust, unreasonable, or unfair in some important or substantial sense Singh v. Singh, 2020 BCCA 21 at para. 134 [Singh].

[55] It is common ground between the parties that the court has the jurisdiction to make orders respecting the ownership and division of extraprovincial property pursuant to s. 109 of the FLA.

Agreements under the Family Law Act

[56] Section 92 of the FLA provides that spouses may make agreements respecting the division of family property and debt.

[57] Pursuant to s. 93 of the FLA, the court may set aside a written agreement for the division of family property and debt in prescribed circumstances. Section 93(3)-(5) provides:

93 (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;

(b) the intention of the spouses, in making the agreement, to achieve certainty;

(c) the degree to which the spouses relied on the terms of the agreement.

[58] Section 93 of the FLA contemplates a two-pronged inquiry into the enforceability of an agreement. The first inquiry is directed at the fairness of the process that led to the agreement, having regard to the enumerated factors in s. 93(3). If the court concludes that the agreement was fairly reached, it must go on to consider whether the agreement is significantly unfair having regard to the factors listed in s. 93(5): Asselin v. Roy, 2013 BCSC 1681 at paras. 125-127.

[59] The factors listed in s. 93(3) should be considered holistically and not in isolation. The combination of certain factors may lead to setting aside an agreement where a single factor alone would not. Conversely, the presence of a factor favouring setting aside the agreement may be ameliorated by the absence of another factor. What is required is a fact-specific inquiry into the factors listed in s. 93(3), including the relative vulnerabilities of the parties and the relative information each has about the other's financial affairs: Y.L. v. G.L., 2020 BCSC 808 at para. 285(a) and (b) [Y.L.].

[60] Section 93(3)(a) of the FLA reflects the principles articulated by the Supreme Court of Canada in Rick v. Brandsema, 2009 SCC 10 [Brandsema], in relation to the parties' duty to make full and honest disclosure in negotiating a separation agreement. As stated in Brandsema:

[47] In my view, it flows from the observations and principles set out in Miglin that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.

[48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, prima facie, is based on the informed consent of both

parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.

[61] A party's assertion that he or she did not believe the other party had a claim to the assets and therefore did not disclose them, is not an answer if there is an arguable claim that the undisclosed assets are family assets. Disclosure is mandatory, separate and apart from any argument as to whether the assets are, in fact, subject to division: Y.L. at para. 285(c).

[62] If the court finds a separation agreement to be either procedurally or operationally unfair, the court may set aside or replace all or part of the agreement. In setting aside part of an agreement, the court should consider the terms as a whole to ensure that any order modifying the agreement will result in a scheme that is fair and that substantially complies with the objectives of the FLA: Young v. Sherk, 2019 BCSC 312 at para. 116 [Sherk].

ASSESSMENT OF CREDIBILITY

[63] The assessment of credibility is a central issue in this case. The respondents say that Fan's evidence in chief as to her understanding of Sam's net worth is not credible or reliable and was shown to be demonstrably false in cross-examination. Fan says that Sam and Bao are not credible in their evidence that virtually all of the assets owned by Sam are held by him as a bare trustee on behalf of Henan Huabin.

[64] The assessment of a witness's credibility involves examination of such factors as their ability and opportunity to observe events, the firmness of their memory, whether the witness's evidence is consistent with independent evidence that has been accepted, whether the witness can be influenced to change or modify their evidence, whether the witness's testimony seems unreasonable, impossible, or unlikely, and whether the witness has a motive to lie: see Bradshaw v. Stenner, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[65] For the reasons that follow, I have concerns with the credibility of the viva voce evidence of all of the parties.

[66] I agree with the respondents that Fan was not a credible or reliable witness. She made assertions of fact without qualification that proved, in cross-examination, to be untrue and beyond her personal knowledge. For example, she testified in her evidence in chief that Sam paid for Unit 302 and that he owned two other properties in Xinxiang City before they were married. In cross-examination, when shown the title documents, Fan conceded that perhaps Sam did not own the other properties and she may also be incorrect in her understanding of who had purchased Unit 302. Fan gave evidence that Sam was running a business in New Zealand, then later conceded she had no personal knowledge of this. Fan gave evidence that Sam owned several luxury cars in China, then admitted that she did not have direct knowledge of who owned the cars.

[67] It was clear to me from Fan's evidence, particularly in cross-examination, that she has limited personal knowledge of Sam's financial circumstances, his role at Henan Huabin, or the details of Henan Huabin's business operations. Whatever she does purport to know is based on hearsay. Yet Fan had a tendency in her evidence to assert as facts things that were outside her personal knowledge, without noting the limits of her understanding. Fan was often defensive and unresponsive to questions in cross-examination. The intervention of the Court was required on more than one occasion to direct her to answer the question that was being asked. For these reasons, I place no weight on Fan's evidence of Sam's income and assets, or the business of Henan Huabin, except where her evidence is corroborated by other independent evidence that I do accept as credible and reliable.

[68] I also find that Sam is not a credible witness. Like Fan, he was defensive in cross-examination. He refused to give responsive answers to the most basic questions, for example questions that simply asked him to confirm what was written on the page of a document that counsel had referred him to. Sam's evidence at trial was inconsistent with information he declared to be true on his application for permanent residency in Canada and on his Canadian tax returns. Sam appeared unperturbed by the discrepancies. He did not appear to see an issue in misrepresenting his financial circumstances to government officials in Canada in order to qualify for permanent residency, or to facilitate the flow of Henan Huabin's money into Canada under the guise that it is owned by Sam.

[69] Sam's evidence at trial was also inconsistent with prior affidavits that he swore, particularly in relation to the ownership of the Bridgeport Property. At trial, Sam testified that he held title to the Bridgeport Property as a bare trustee for Henan Huabin. In his prior affidavit evidence, Sam swore that the Bridgeport Property was financed with a loan from his parents that he would have to pay back. In the Separation Agreement, Sam warranted that the Bridgeport Property was a family asset, whereas at trial he takes the position that it is not.

[70] I have similar concerns with the credibility and reliability of Bao's evidence. Bao's evidence that the Bridgeport Property was owned by Henan Huabin was inconsistent with his previously sworn evidence that he provided Sam with an interest free loan to purchase the home. When asked about the inconsistency in cross-examination, Bao denied having sworn the affidavit, although he clearly did, and he suggested that Fan must have forged his name. When pressed on inconsistencies between his trial evidence and his examination for discovery evidence, Bao insisted that all of his evidence was accurate and truthful even though his trial and discovery evidence on certain points was irreconcilable.

[71] Bao's evidence was inconsistent with the evidence of other witnesses called by the respondents on critical points. Bao testified that Sam was paid a "meagre" wage at Henan Huabin and, as such, had no assets or savings. Sam, by contrast, testified that he owned at least a portion of the roughly $1 million CAD in personal net worth that he declared on his Canadian immigration application. Neither Bao nor Sam were able to quantify what sums were purportedly advanced to Sam as part of the trust arrangement, and Sam has never provided any accounting to Henan Huabin. Bao and his wife Linda testified that they

covered Sam's living expenses when Sam first arrived in Canada, whereas Sam's evidence is that the living expenses were covered by Henan Huabin.

[72] For reasons I will explain in greater detail later in this judgment, I also view with skepticism the evidence of the respondents' witnesses regarding the financing of the acquisition of the Dormitories. The respondents rely on summaries of account entries which are said to evidence the debt incurred by Henan Huabin, but the only witness who can apparently draw the necessary links is Qing Li Deng ("Ms. Deng"), a Henan Huabin account manager. Bao professed to have no personal knowledge of the method by which the Dormitories were financed, deferring all questions to the accounting staff, while Ms. Deng testified that it was Bao who approved the terms of the lending.

[73] Generally speaking, I found the evidence of the witnesses who were employees of Henan Huabin, some of whom also had family relationships to Sam and Bao, was influenced by their apparent loyalty to the company. The Henan Huabin witnesses appeared to me to have a selective memory about the relevant events. They were reluctant to concede simple points in cross-examination if the answers were seen to be unhelpful to the respondents.

[74] The respondents' case is heavily reliant on the testimony of the Henan Huabin witnesses for such critical facts as how the purchase and renovation of the Dormitories was financed, Sam's salary at Henan Huabin, and the source of the funds that Sam remitted to Fan while they were married. It is a remarkable feature of this case that despite the volume of the evidentiary record tendered by the respondents, there is little in the way of corroborating financial records, other than those created specifically for the purpose of the litigation. Given the concerns I have with the objectivity of the Henan Huabin witnesses, I approach their evidence with caution where it is not corroborated by independent evidence.

[75] While parties to any lawsuit could be perceived as being influenced by self-interest in their evidence, the parties in this case appeared particularly entrenched in their perspectives on the equities of the situation. Fan believes that Sam has deliberately cheated her of her entitlement to family property, aided by his wealthy family who have closed ranks around him. Sam and Bao present Fan as an opportunist, not content with the generous settlement she has received and determined to seek an unjustified share of the wealth of a family business that she played no part in creating. In my view, the evidence of all of the parties was heavily influenced by these perspectives, to the point that objectivity was sacrificed.

[76] I accept that some of the difficulties with the evidence of the witnesses may flow from translation issues. Virtually all witnesses at this trial testified in Mandarin with the assistance of an interpreter. Many witnesses, including Bao, testified via video link from China. I acknowledge the stress that many of the witnesses were under, particularly those who had to testify from China in what was, for them, the middle of the night. I am also mindful of the cautionary words of Justice Griffin, as she then was, in Fu v. Zhu, 2018 BCSC 9 at paras. 39-40, regarding the need to account for cultural and linguistic differences in assessing the credibility of witnesses.

[77] However, acknowledging the challenges the parties faced in presenting evidence at this trial, and the importance of being mindful of linguistic and cultural nuances, does not resolve the credibility and reliability issues I have identified. Given these concerns, I place limited reliance on the viva voce evidence of the main parties where it is not corroborated by independent evidence.

ISSUE 1: DID SAM FAIL TO DISCLOSE SIGNIFICANT FAMILY ASSETS?

The date of separation

[78] Before turning to consideration of the alleged non-disclosure of assets, I will briefly address the question of the date of the parties' separation. In her amended notice of family claim, Fan pleads a separation date of January 17, 2014, which is the date the Separation Agreement was executed. By contrast, the Agreement itself reflects that the parties were living separate and apart as of April 15, 2012. The respondents' position is that the date of separation is April 15, 2012.

[79] In her final submission at trial, Fan suggested that any disagreement over the separation date is inconsequential given that all of the alleged undisclosed assets had been acquired by April 2012. The separation date does have some relevance to matters in issue in this proceeding, for example in relation to Sam's claim for an unequal division of family property based on post-separation contributions. In any event, the record should be clear as to the date of separation.

[80] In my view, it is simply too late for Fan to resile from her consistently-held position that the parties separated in April 2012. As can be seen from the chronology, Sam initiated divorce proceedings in China in January 2013, and Fan herself filed a notice of family claim in British Columbia in February of 2013. In that proceeding, Fan pleaded a separation date of April 15, 2012. This is consistent with the evidence that the parties did not live together after April 2012, and that Fan pursued child and spousal support from Sam as of April 2012.

[81] Furthermore, and of greatest significance, Fan admitted a separation date of April 15, 2012 in her October 18, 2019 response to a notice to admit that was served by the respondents in this proceeding. She has not applied to withdraw this admission, and therefore is bound by it.

The positions of the parties on non-disclosure of assets

[82] Fan seeks to vary the Separation Agreement to account for what she says is Sam's non-disclosure of significant family property that he owned at the time of the Separation Agreement. She also says that Sam took advantage of her vulnerability in the negotiation of the Agreement. However, I understand Fan's primary submission to be that a variation is warranted by Sam's material non-disclosure. Fan says that Sam failed to disclose:

i. the $2,895,300 in off-shore assets he actually held as of November 30, 2013, as opposed to the $1.5 million that he disclosed in the Separation Agreement;

ii. his ownership of the Dormitories; and

iii. his shareholder interest in several Chinese companies.

[83] The respondents oppose any variation of the Separation Agreement. They emphasize that both parties received independent legal advice prior to the execution of the Agreement. The respondents say that the present proceeding is an abuse of process to the extent that it seeks to re-open the negotiated resolution that is reflected not only in the Separation Agreement but also in the Final Order that ended the family proceeding in China.

[84] In the course of final argument, counsel for the respondents agreed that this proceeding would not constitute an abuse of court process if, in fact, Sam had failed to disclose significant family property at the time of the negotiation of the Separation Agreement. As noted, Term 41(11) of the Separation Agreement expressly reflects the parties' acknowledgement that the Agreement may be reviewed and varied in the event of material non-disclosure. Term 5 of the Divorce Agreement provides that the Divorce Agreement does not affect the Separation Agreement.

[85] The respondents' primary position, accordingly, is that there was no material non-disclosure, and that in any event the alleged undisclosed assets are not family property. These are the issues that must be addressed in relation to each of the alleged undisclosed assets.

The $2.895 million in offshore assets

Did Sam disclose the full amount of his assets, as reported in his 2013 tax return, as of November 2013?

[86] Fan says that Sam's Canadian income tax return for 2013, which was filed after the execution of the Separation Agreement, reflects his full financial picture as of November 2013. In his Foreign Income Verification Statement, Sam reported having $395,300 in funds held outside Canada (in the Bank of China), and $2.5 million in indebtedness owed by a resident of China. This may be compared to the Foreign Income Verification Statements that Sam completed for his 2011 and 2012 income tax returns in which he reported that he had $500,000 in funds held outside Canada and at least "+$1 million" in indebtedness owed by non-residents.

[87] Fan says that the only information she had about Sam's financial situation at the time of the execution of the Separation Agreement was what was reflected on his 2011 and 2012 Canadian tax returns, and the information Sam provided through the immigration process. As noted, Fan was present during Sam's immigration interview, and was also present when Sam met with his accountant to finalize his 2011 and 2012 tax returns. Fan says that at the time of the execution of the Separation Agreement she was struggling financially in trying to

care for herself and C after Sam had stopped remitting money to her from China. She accepted Sam's representations that he had assets of $1.5 million under his control because that was consistent with the limited financial information she had from him.

[88] Sam disputes that the amounts reported in his Foreign Income Verification Statement in 2013, or indeed in 2011 and 2012, represent undisclosed assets. This is primarily because Sam disputes that the listed assets are owned by him at all, as opposed to being owned by Henan Huabin. The first issue to be resolved, accordingly, is whether Sam in fact owned the assets that he listed in his immigration application and reported to the Canada Revenue Agency ("CRA").

Sam's salary at Henan Huabin

[89] The respondents say that Sam did not have the financial ability to acquire the assets reported on his immigration application and in his Foreign Income Verification Statements given the minimal salary he earned over time from his employment with Henan Huabin. The respondents tendered in evidence salary sheets that were prepared by Yang Chen, Sam's cousin who is employed by Henan Huabin as a bookkeeper. The salary sheets suggest that Sam earned an annual income of between ¥33,600 and ¥88,240 in the years 2008 to 2012, and between ¥71,000 and ¥108,000 in 2016 to 2018. For reasons that are not apparent to me, Sam was not listed in the salary sheets as an employee of Henan Huabin in the years 2013, 2014, and 2015.

[90] In light of the obvious inaccuracies in the information that is presented in the salary sheets, I do not accept that they represent the actual salary that Sam received from Henan Huabin. The salary sheets do not list certain long-term employees of Henan Huabin while at the same time listing other individuals, such as Sam's wife Shang Kun, who are not employees. Bao testified that as Chairman of Henan Huabin his salary would be at the highest scale, yet the salary sheets suggest he earned the relatively modest annual salary of ¥37,400 in the years 2008 to 2010, and between ¥51,000 and ¥78,000 in the years 2011 to 2018. For reasons that are unexplained, Bao's wife Linda earned an identical salary to Bao each year. In the years 2016, 2017, and 2018, Sam is reported to be earning a higher income than Bao despite the fact that he is junior in rank to Bao.

[91] Yang Chen attempted to explain some of the discrepancies in the salary sheets by suggesting that she understood she had only been asked to provide salary sheets that listed Sam's name. However, this explanation is illogical and incomplete. It does not explain why the salary sheets include the name of employees who are not employed by Henan Huabin, why Bao earned less than Sam in some years, and why Linda earned an identical salary in every year. Yang Chen's purported belief that she was only to produce salary sheets with Sam's name on them is also inconsistent with the fact that she produced salary sheets for the years 2013, 2014, and 2015, when Sam was not listed as a Henan Huabin employee in those years.

[92] In his examination for discovery evidence, Bao testified that the individual who was employed as the General Manager prior to Sam earned a salary of ¥30,000 to ¥40,000 "per month". At trial, Bao agreed he had given truthful evidence on his examination for discovery while at the same time refusing to agree that, according to his discovery evidence, the previous General Manager at Henan Huabin earned an annual salary of at least ¥360,000.

[93] Bao's discovery evidence is consistent with the information provided by Sam in his application for immigration to Canada, which was completed in 2009. Sam reported that he earned an annual income of ¥360,000 as General Manager of Henan Huabin. Sam testified that he relied on his father and his immigration consultant in filling out the application forms. However, he also agreed that in signing the application he was verifying its accuracy, and knew that he could face penalties for any false statements or concealment of a material fact.

[94] In the Separation Agreement, signed in January 2014, Sam represented that he expected to earn an annual income of ¥600,000 per year (or $100,000 CAD) from his "substantial investment and business in China". He warranted that this statement of fact was true. Sam had independent legal advice in negotiating and executing the Separation Agreement. Sam would have no apparent motive to over-report his income given that his support obligations rose with his income.

[95] In my view, the statements made by Sam in his immigration application and the Separation Agreement represent the most reliable evidence before me of the income he earned from Henan Huabin at the relevant times. That is, I conclude that Sam earned an annual income of at least ¥360,000 in his position of General Manager at Henan Huabin at the time he completed his immigration application in 2009, and that his income had risen to at least ¥600,000 by the time he signed the Separation Agreement.

[96] In the interest of clarity, I do not intend these findings to determine Sam's income for the purpose of child support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. For the reasons I have explained, this trial will not resolve the parenting and child support issues that remain between the parties. The issue of Sam's income is relevant to property division only to the extent that the respondents cite Sam's "meagre income" at Henan Huabin, as reflected in the salary sheets, as a reason he could not have accumulated the assets he reported in his immigration application and on his tax returns.

[97] For the purpose of determining the property issues, I have found that Sam's income from Henan Huabin was at least equal to the representations he made to the CIC and in the Separation Agreement. It may be that his income from all sources was even higher. There is certainly a basis to infer this given that Sam was remitting approximately $100,000 annually to Fan for living expenses. However, as the issue of Sam's Guidelines income for child support purposes is not before me, it is unnecessary for me to reach any conclusions on this point.

Did Sam own the assets reported in his Foreign Income Verification Statements?

[98] The respondents say that even if Sam earned ¥360,000 in salary at Henan Huabin, he would have been unable to amass the assets reported on either his immigration application or his Foreign Income Verification Statements.

[99] Sam's evidence is that the personal net worth of $1,039,337 CAD that he declared on his immigration application was comprised of his salary at Henan Huabin, commissions that Bao had promised to pay him, and some undefined level of future contribution from Bao. In other words, Sam's evidence is that he did not have the level of personal net worth that he declared on his application. In his evidence at trial, Sam was unable to quantify what portion of the personal net worth he declared on his application for permanent residency was actually owned by him, as opposed to Henan Huabin. Bao's evidence, by contrast, was that Sam had no savings at all and that all of his assets were owned by Henan Huabin.

[100] As for the income reported on the Foreign Income Verification Statements, Sam's evidence is that the amounts he reported as the "funds held outside Canada" related to bank accounts in his name but controlled by Henan Huabin. The "indebtedness owed by non-residents" was, Sam says, not actually indebtedness owed to him by non-residents but an amount representing some unquantified sum in commissions he was owed by Henan Huabin, in addition to future investment that Henan Huabin planned to make in Canada. Sam testified that he was told by his accountant that it would be easier for Henan Huabin to transfer money into Canada if Sam reported having foreign assets on his personal income tax returns.

[101] I do not accept the evidence of Sam and Bao as to the source and ownership of the funds that Sam reported on his immigration application and in his tax records. I have already stated my general concerns with the credibility of Sam and Bao. Beyond their bare assertions, there is no evidence to support the suggestion that the personal wealth that Sam reported to government officials in Canada in fact belonged to Henan Huabin. Sam's accountant was not called as a witness at trial. As such, I place no weight on Sam's evidence that he relied on the advice of his accountant in reporting Henan Huabin's anticipated future investment in Canada as his personal assets on his tax returns.

[102] I do place reliance on the information in Sam's declared personal net worth in his application for permanent residency in Canada, as well as the amounts he reported in his Foreign Income Verification Statements. Sam declared this information to be true, and he understood that he faced personal penalties if he provided false information. I also place reliance on Sam's representation in the Separation Agreement that the $1.5 million in assets that he disclosed were in his sole name and under his control.

[103] The fact that Sam owned the assets he reported in his 2013 Canadian tax return is also corroborated by Sam's banking records that show that in 2014 he received approximately $1.6 million in foreign transfers into his personal BMO account in Canada. Sam used at least a portion of these funds to purchase the Trumond Property and the Decourcy

Property, both of which were used for his personal benefit. The Trumond Property continues to be Sam's primary family residence in Canada. In his 2014 tax return, Sam reported having approximately $1.3 million in off-shore assets in his Foreign Income Verification Statement, which is consistent with Sam arranging to have $1.6 million of his off-shore assets transferred to him for his personal use in 2014.

[104] The respondents suggest that Fan has not demonstrated how Sam could have acquired this level of wealth, even assuming his annual salary at Henan Huabin was ¥360,000. In other words, the respondents say that their bare denial that Sam actually owns the assets he declared in his immigration application and tax returns places an evidentiary burden onto Fan to prove that Sam actually owns the assets in China that he reported to government agencies in Canada.

[105] In my view, placing such an evidentiary burden on Fan would lead to perverse results in this case. It is clear, as the respondents have repeatedly stressed, that Fan had limited personal knowledge of Sam's financial circumstances. Fan would have been aware of whatever bits of information about Henan Huabin that she managed to glean at family dinners while the couple still lived in Xinxiang City. It appears to be uncontroverted between the parties that Fan did not have direct access to the banking and financial records, including Henan Huabin records, that might have allowed her to comprehensively assess Sam's financial position. Indeed, the respondents' primary challenge to Fan's credibility is that she purported to have knowledge of Sam's finances when in fact she did not.

[106] When the couple moved to Canada, they did not have joint bank accounts. Sam arranged to have his BMO bank statements mailed to a private banker rather than having them delivered to the family residence. Fan assumed that the $100,000 remitted to her from China annually to cover living expenses came from Sam. There is no reliable evidence that Fan was aware, as the respondents now assert, that this was money was paid by Henan Huabin. Nor is there reliable evidence that the money was, in fact, paid by Henan Huabin.

[107] Given the lack of access Fan has to information about Sam's business and investments in China, in my view it is nonsensical to suggest there is an evidentiary burden on her to disprove representations made by Sam about his personal net worth to the CIC, the CRA, and to Fan in the Separation Agreement.

[108] In any event, Fan did point to a potential source of assets beyond Sam's Henan Huabin salary in Sam's explanation that he intended to keep his money in China rather than purchase the Bridgeport Property outright so that he could lend his money in China at higher interest rates. This is consistent with the amounts reported by Sam as "indebtedness owed by non-residents" on his Foreign Income Verification Statements.

[109] That explanation is, in my view, more plausible than the respondents' proffered explanation. The respondents' case, in essence, is that Sam knowingly made misrepresentations about his personal net worth in his application for permanent

residency in order to be admitted to Canada under the Investor Category when he did not, in fact, qualify for the program. He then reported off-shore assets on his Canadian tax returns that he did not actually own in order to facilitate investment in Canada by Henan Huabin on the premise that the money was actually owned by Sam. In this manner, Henan Huabin could carry on business in British Columbia without establishing a corporate presence in the Province and without paying tax on corporate earnings. Sam then represented in the Separation Agreement that he had more income and assets than he actually possessed in order to provide Fan with a larger property settlement than she was entitled to under the FLA. I do not find the respondents' theory to be a plausible one. Further, its only evidentiary support lies in the testimony of witnesses who are not credible.

[110] In summary, I conclude that the off-shore assets Sam owned as of November 30, 2013, leaving aside for the moment the Dormitories, totalled $2,895,300, as reported in the Foreign Income Verification Statement that Sam completed with his 2013 tax return, and not the $1.5 million that Sam disclosed in the Separation Agreement.

Did Sam disclose the full extent of his off-shore assets?

[111] The respondents say that Sam did not fail to disclose the full extent of the assets reported on his 2013 Foreign Income Verification Statement, and that Fan's argument is based on a misunderstanding of how the tax forms are filled out.

[112] The version of the Foreign Income Verification Statements that were in use in tax years 2011 and 2012 did not ask the taxpayer to specify the exact amount of the foreign assets. Instead, taxpayers were required to check a box. The largest amount that a taxpayer could report on this version of the form was by checking a box that indicated "+ $1 million". In 2013, the form changed to require the taxpayer to disclose the precise amount of the foreign assets. Accordingly, the respondents say that amounts reported in the 2013 tax return are, in fact, consistent with the amounts reported in the 2011 and 2012 form. It is just that the form changed.

[113] I take from this that the respondents' position is that Sam would have reported having $2,895,300 in off-shore assets in his 2011 and 2012 tax returns if the Foreign Income Verification Statements in use in those years had permitted such a precise quantification. Further, they say there is no material non-disclosure because Fan had access to the information in the 2011 and 2012 tax returns, she just failed to understand the information reflected in the forms.

[114] In my view, Sam did fail to disclose significant family property in reporting at the time of the Separation Agreement that he owned assets in the amount of $1.5 million, rather than the $2,895,300 reported on his 2013 Foreign Income Verification Statement. The fact that Fan was generally aware of Sam's 2011 and 2012 tax filings and that they indicated that he had "+ $1 million" in foreign assets does not constitute full disclosure of Sam's assets. It was reasonable for Fan to assume, by reference to the 2011 and 2012 tax returns, the accuracy of Sam's representation that he had $1.5 million in assets that were in his name and under his

control as of the time the Separation Agreement was executed.

Are the additional sums reported in the Foreign Income Verification Statement in Sam's 2013 tax return family property?

[115] I have already dealt at length with the respondents' arguments that Sam did not actually own the assets that are reported in his Foreign Income Verification Statement. For the reasons I have given, I do not accept this argument. I conclude that Sam did own these assets and he failed to disclose them to Fan.

[116] The additional undisclosed off-shore assets of $1,395,300 are family property. As I have noted, the respondents say that Sam had the same level of off-shore assets in 2011, 2012, and 2013, and it was just that the CRA form changed in 2013 to require a precise quantification of assets. I therefore conclude that Sam had acquired the additional undisclosed assets as of the date of the parties' separation on April 15, 2012.

The Dormitories

Did Sam disclose his ownership of the Dormitories?

[117] Sam's evidence is that prior to the execution of the Separation Agreement, he told Fan many times about his acquisition of the Dormitories and the fact that he held the properties only as a bare trustee for Henan Huabin. His explanation for not listing the Dormitories in the Separation Agreement is that he believed it was unnecessary to do so because he had no beneficial interest in the property, and he had already advised Fan of this fact. Fan's evidence is that Sam never told her about his acquisition of the Dormitories and she had to find out through her own investigations after the execution of the Separation Agreement.

[118] I have already expressed the concerns I have with the credibility of both Sam and Fan. It would be difficult to resolve this factual conflict if the evidence consisted only of their competing assertions as to the content of their discussions about the Dormitories prior to the execution of the Separation Agreement. However, there is other independent evidence that, in my view, corroborates Fan's version of events.

[119] I find it implausible that Sam would not have insisted that the Dormitories be referenced in the Separation Agreement if, in fact, Fan was informed about the properties and agreed they were not subject to division as a family asset. Sam received independent legal advice in the course of negotiating the Separation Agreement. I presume the advice he received would have included an emphasis on the importance of full and transparent disclosure of Sam's assets, so as to avoid future disputes. Sam's explanation for omitting the Dormitories from the Separation Agreement is, moreover, inconsistent with the fact that the Bridgeport Property was referenced in the Separation Agreement despite Sam's position that he also has no beneficial interest in that property and is holding it for Henan Huabin.

[120] Furthermore, Sam executed Marriage Property Agreements in China with his second wife, Shang Kun, in April 7, 2014, that confirm that the Dormitories are solely owned by Sam. This was three days before the Dormitories were formally registered in Sam's name. Sam and Shang Kun signed separate Marriage Property Agreements in relation to each of the seven buildings that comprise the Dormitories. Each Agreement states:

Having our marriage registered on February 28, 2014, we are in a legitimate conjugal relationship. In accordance with the Marriage Law (19) and relevant laws and regulations, with respect to the real property jointly purchased by both parties in the wedlock and located at [building number], 20 Xueyan Street, it is agreed through mutual negotiations, that the real property shall be solely owned by LIANG Kun Peng and having nothing to do with SHANG Kun. Therefore, this agreement is hereby established and both parties shall abide by it. Any legal consequences arising out of it shall be borne by both parties. The real property registration authority shall be held harmless.

[121] Sam's explanation for the Marriage Property Agreements was that this was just a "formality" to ensure that it was clear that the Dormitories were company assets. I note that is not what the Agreements state. In any event, the fact that Sam considered it important to protect Henan Huabin's interest in the Dormitories by way of the Marriage Agreements in China is inconsistent with his failure to reference the Dormitories at all in the Separation Agreement in British Columbia.

[122] I also find it implausible that Fan would incur the expense of hiring a lawyer in China to investigate assets that she already knew existed and had agreed belonged to Henan Huabin. I can conceive of no reason for Fan to execute a property settlement in January 2014 with full knowledge of the Dormitories, only to embark on an expensive quest to locate the assets after-the-fact.

[123] Finally, there is in evidence a transcript of a telephone conversation between Sam and Fan in or around June 2015 during which Fan specifically asked Sam whether he had purchased school property, and Sam denied that he had. If Sam had told Fan about the Dormitories "over a thousand times", as he testified to, the denial makes no sense. Sam did not dispute that he had the conversation with Fan that is recorded in the transcript.

[124] I therefore conclude that Sam did not disclose the existence of the Dormitories to Fan prior to the execution of the Separation Agreement. I reject his evidence to the contrary. It is inconsistent with other objective evidence that I do accept, including the terms of the Separation Agreement and the Marriage Property Agreements. It is also contrary to reason and common sense.

Are the Dormitories family property?

[125] This leads me to the issue of central dispute between the parties as to whether the Dormitories are family property. The resolution of this issue turns on whether the evidence establishes, as asserted by the respondents, that Sam holds the Dormitories as a bare trustee for Henan Huabin.

[126] The parties agree that in the absence of pleading and proof of foreign law, the question of whether Sam holds the Dormitories on trust for Henan Huabin must be resolved in accordance with the law of British Columbia: Corlett v. Hoelker, 2012 BCSC 25 at para. 68. The respondents allege a bare trust between Sam and Henan Huabin, which is a form of express trust. Express trusts are established when the certainties of intention, subject (property subject to the trust), and object (identity of beneficiaries) have been established and the property has been vested in the trustee. The intention may be express or implied, and may arise from words and conduct. The onus is on the party asserting a trust to prove the certainties of intention, subject, and object on a balance of probabilities: Xu v. Hu, 2021 BCCA 2 at paras. 12-15.

[127] The features of a bare trust are described in Waters' Law of Trusts in Canada, 4th ed., by Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith (Toronto: Carswell, 2012) at pp. 33-34:

The usually accepted meaning of the term "bare", "naked", or "simple" trust is a trust where the trustee or trustees hold property without any duty to perform except to convey it to the beneficiary or beneficiaries upon demand. It is true, of course, that so long as a trustee holds property on trust he has the duty to account for the property, keeping it secure and unharmed. The trustee cannot divest himself of this duty, and, if that is his sole duty, he must transfer that property to the beneficiary on demand.

The definition of the care, naked or simple trust assumes two things: (1) that the beneficiary or beneficiaries are able to call for the property on demand; and (2) either that no active duties were ever required by the settlor or that the active duties have been performed.

[128] The dispute between the parties centres on whether the respondents have discharged their burden to show a clear intention to create a trust at the time the Dormitories were acquired. Fan argues that the respondents have simply invoked the concept of a bare trust as a strategic means of shielding the Dormitories from her claim for family property division under the FLA. She says the inference that most readily arises from the evidence is that Sam acquired the Dormitories for his own benefit, perhaps with the assistance of an initial loan from Henan Huabin.

[129] In the absence of an express trust agreement between Sam and Henan Huabin, the respondents point to the circumstances surrounding the acquisition of the Dormitories to corroborate the evidence of Sam and Bao that they intended to create a trust. The respondents' case relies, among other things, on the transaction summaries prepared for the purposes of this litigation, and adopted by Ms. Deng, the Henan Huabin account manager, in her evidence. I will summarize the respondents' case before addressing the

question of whether I am satisfied on the evidence that Sam holds the Dormitories as a bare trustee for Henan Huabin, as the respondents assert.

The respondents' case

[130] Sam's evidence at trial was that he was the one who first learned of the possible sale of the Dormitories. He raised the business opportunity with Henan Huabin management. Inquiries were made of College officials, who advised that the property would be publicly auctioned. Shortly thereafter, on April 30, 2011, the College published a notice of asset transfer relating to lands and real property located on the north and south courts of the Eastside of the College. This public notice is in evidence. The notice sets out a list price of ¥71 million for the south court property, and ¥37.2 million for the north court. The "Requirements of the Intended Transferee" in the notice included:

The Intended Transferee shall be a natural person or business legal entity with full legal capacity and with ability to engage in education and health business

[131] In light of this requirement, Henan Huabin was unable to directly purchase the Dormitories as the company was not engaged in education and health business. As such, the respondents say that Sam and Bao agreed that Sam would act as nominee for Henan Huabin in purchasing the Dormitories as a bare trustee. Only Sam and Bao were present for the discussion that led to the creation of the oral trust agreement. They say the decision was later announced at an internal company meeting.

[132] Sam testified that representatives of Henan Huabin attended the auction, but he did not. It was reported back to Sam that he was the only bidder at the auction and therefore it could not be completed. Subsequently, Sam and other Henan Huabin representatives negotiated directly with the College for the purchase of the property on the north court. At a meeting on June 29, 2011, an agreement was reached. The final purchase price was ¥37.6 million, which was to be paid in full within seven days of the execution of the agreement. The transfer agreement between the College and Sam was executed on July 6, 2011.

[133] The respondents say the financing of the purchase of the Dormitories, which also required payment of approximately ¥5.1 million in taxes, was accomplished through a complex series of transactions involving a flow of money through bank accounts held by individuals, including Sam, but which the respondents say were under the control of Henan Huabin.

[134] As Henan Huabin was said to be short of funds at the time the Dormitories were purchased, Henan Huabin engaged the assistance of a loan broker, the Dingsheng Investment Guarantee Co. Ltd. ("Dingsheng"). Dingsheng, in turn, secured 123 private lenders.

[135] The 123 loan agreements with the private lenders are in evidence. They are identical in their terms, other than as to the identity of the lender. They are term loans that require repayment after six months. Dingsheng guaranteed the loans from the private lenders in the total amount of ¥34.45 million. Pursuant to its agreements with Dingsheng, which are in evidence, Henan Huabin agreed to indemnify Dingsheng by way of the grant of a mortgage over a portion of the Huabin Dasha shopping mall to secure the debt.

[136] The respondents say that the money from Dingsheng was received in tranches over a period of time and then deposited into four accounts, including accounts under Sam's name. The respondents say that Henan Huabin does business through accounts held by related individuals as a matter of "convenience" and to save on bank fees. For this point, they rely on the viva voce testimony of Henan Huabin bookkeeper Yang Chen. There is no evidence from banking officials in China that this method of corporate account holding creates efficiencies or reduces banking fees.

[137] After the funds were received from Dingsheng, they were moved to various accounts through a process described by the respondents as a "complex chain of deposits and withdrawals" until the purchase funds were ultimately paid to the College.

[138] The manner in which the loans were repaid is equally complex. The respondents say that Henan Huabin had insufficient cash to repay the Dingsheng loans when they became due. Accordingly, Henan Huabin entered into a series of further loan agreements between the years 2012 and 2014, the money from which was used to pay off the Dingsheng lenders.

[139] These loan agreements are not in evidence. The respondents rely on a chart prepared by Ms. Deng, entitled "2012-2014 Borrowing Details", that summarizes account entries showing the transfer of funds that are said to relate to the repayment of loans. The identity of the lenders is entirely unclear from Ms. Deng's chart. For many entries the listed transferor is a related company of Henan Huabin. Ms. Deng says this was because banks would not lend money to Henan Huabin at the time and therefore Henan Huabin used its affiliates to secure the necessary financing. She does not explain why the related companies were able to secure loans more successfully than Henan Huabin. Again, there are no corroborating records to support the contention that the transfer of funds reflected in Ms. Deng's charts relate to loans incurred for the Dormitories.

[140] Finally, the respondents say that the loans that Henan Huabin took out between 2012 and 2014 to repay the Dinsheng loans were paid off in 2014 when Henan Huabin entered into loan agreements with the China CITIC Bank through two related companies: Henan Huabin Construction and Decoration Engineering Co. Ltd. ("Henan Decoration Company") and XinXiang City Tayuan Mercantile Trading Co. Ltd. ("Tayuan"). Bao and his wife Linda are personal guarantors of these loans.

[141] The CITIC loans went into default and the Bank commenced a lawsuit in the Chinese courts to enforce the loans, including the personal guarantees by Bao and Linda. In two judgments dated April 29, 2019, the Henan Zhengzhou Intermediate People's Court granted judgment

in the amount of ¥84 million, including court fees and interest. The respondents say that the CITIC Bank has agreed to a payment plan by which the debt will be repaid in 24 installments. This, say the respondents, is how the loans incurred for the acquisition of the Dormitory were finally paid off.

[142] The respondents say that Henan Huabin not only financed the entirety of the cost to acquire the Dormitories, but also paid ¥10 million towards renovation costs, as well as paying for services such as water and electricity. Although many of the invoices for the water and electricity were actually paid by Gold Key, the respondents say the money in fact came from Henan Huabin and that Gold Key was effectively a "department" of Henan Huabin.

[143] In sum, the respondents say that Sam holds title to the Dormitories on behalf of Henan Huabin, and only because the conditions of sale did not permit Henan Huabin to be the purchaser. The respondents say Sam is a bare trustee with no beneficial interest in the Dormitories.

Analysis

[144] There is no written trust agreement in this case. There are only two parties to the relevant discussions around the creation of the alleged trust: Sam and Bao. The evidence regarding the financing of the acquisition of the Dormitories may be relevant to the extent that it permits inferences to be drawn about ownership. However, the focus of the analysis remains on the question of what the evidence discloses about the parties' intentions at the time the trust was created.

[145] I start by highlighting a number of difficulties I have with the respondents' evidence about the manner in which the Dormitories were acquired and financed:

a) Sam has given inconsistent evidence as to the circumstances of the decision to purchase the Dormitories. In his evidence at trial, Sam testified that the decision that he would hold the Dormitories for Henan Huabin was made once the public notice came out, which identified the restriction on ownership. This was before the auction was held, which Sam testified he did not attend. In a prior affidavit in this proceeding, sworn February 4, 2016, Sam's evidence was that he did attend the auction on behalf of Henan Huabin and that the restriction on Henan Huabin's ability to own the Dormitories was only discovered after a purchase price was negotiated with the College.

b) The evidence of the respondents' witnesses that the complex scheme of money transfers between accounts was necessitated by banking practices in China was not corroborated by any independent witnesses who would have direct knowledge of such matters. As Fan's counsel points out, the respondents called a number of bank officials to verify bank statements, yet none of these witnesses were asked to verify that the complicated structure of the financing of the Dormitories could be explained by Chinese banking rules.

c) Ms. Deng agreed in cross-examination that an initial ¥16 million deposit towards the purchase price of the Dormitories did not come from the Dingsheng loans. Even accounting for the taxes that had to be paid on the purchase, which totalled approximately ¥5.1 million, the amount borrowed through Dingsheng (¥34.54 million) was still significantly more than was required to cover the remaining amount owed on the purchase, which was approximately ¥26.7 million (the purchase price of ¥21.6 million, after deduction of deposit, plus ¥5.1 million in taxes).

d) Despite the discrepancy, Ms. Deng denied that there had been any extra borrowing from Dingsheng beyond that required for the purchase of the Dormitories. This is inconsistent with the evidence of both Sam and Bao. Bao testified that some of the funds received through the Dingsheng loans were used to make renovations to the Huabin Dasha and Sunshine Square malls, although he could not quantify the amount. In his affidavit of February 4, 2016, Sam testified that approximately ¥8 million was used by Bao for other business purposes.

e) Ms. Deng testified that any funds towards the purchase of the Dormitories came from Henan Huabin, including the initial ¥16 million. She also testified that Sam did not, to her knowledge, contribute funds. However, her testimony is not corroborated by any contemporaneous document.

f) There is no supporting evidence, beyond summaries prepared for the purpose of this proceeding, for the respondents' assertion that the Dingsheng loans were paid off through further loans incurred by Henan Huabin between 2012 and 2014. There are no loan agreements in evidence. There are no records confirming the repayment of the Dingsheng loans. There is only the summary of account entries that purport to represent the loan transactions, and Ms. Deng's viva voce evidence adopting those summaries as accurate.

g) The respondents' evidence was not consistent as to who had the authority to arrange the loans in issue. Sam testified that he had no involvement in arranging the loans, and generally was not involved in financial matters at Henan Huabin. Among the reasons he cited for this was Bao's "strict rule" that no one but him was allowed to "touch the financial matters". Ms. Deng's evidence was that Bao had final say over the terms of the Dingsheng loan agreements. Bao, by contrast, testified that he had no personal knowledge of the details of the loan arrangements, who provided the loans, how the money flowed, or where it flowed. Bao deferred to Henan Huabin's accounting staff on any question to do with the details of the loans. Given the level of control Bao otherwise exerted over Henan Huabin's day-to-day finances, it is implausible, in my view, that Bao would have no direct knowledge of the structure of the financial arrangements for Sam's ¥37.6 million acquisition of the Dormitories on Henan Huabin's behalf.

h) The 2014 loan agreement between Tayuan and the CITIC Bank does not reference the Dormitories. The 2014 loan agreement between CITIC Bank and the Henan Decoration Company was not tendered in evidence. In the civil judgment the CITIC Bank obtained in 2019 in relation to the Tayuan loan, the purpose of the loan was stated to be "to buy electric cables".

i) The timing of the CITIC Bank loans is consistent with, and possibly explained by, the start of a new real estate development in 2014, the Huabin Mei Yu project. Bao testified that Henan Huabin was not directly involved in the Mei Yu project, but rather he agreed that a friend of his could use the Henan Huabin name for the development without paying an upfront fee. This is despite the fact that Henan Huabin was apparently suffering from cash flow problems at the time. Ms. Deng could not recall if she had ever heard of the Mei Yu project, despite her otherwise intimate knowledge of all aspects of Henan Huabin's business.

j) In any event, there are no documents in evidence to indicate that any portion of the proceeds of the 2014 CITIC Bank loans went to paying off debt that arose from the acquisition of the Dormitories. Bao's evidence is that he could not exactly recall what Henan Huabin did with the ¥80 million received from the CITIC Bank, except that he believed some of the money would have gone to pay the debt for the Dormitories. Bao suggested that Henan Huabin's accounting department should have records of the details of the distribution of the loan proceeds, but no such records are in evidence.

k) There are no documents in evidence to indicate that Henan Huabin made any attempt to mortgage the Dormitories as a means of paying off the Dingsheng loans, rather than engage in the elaborate repayment scheme reflected in the charts. On the evidence of the respondents' own expert appraiser, the Dormitories were worth over ¥63 million by January 2014.

l) The respondents' evidence regarding the renovation of the Dormitories is also problematic. The respondents led evidence from Jing Hui Liang ("Jing Hui"), the manager of Henan Huabin's engineering department, who testified that he oversaw approximately ¥10 million in renovation work at the Dormitories. He identified the contracts that related to the work. However, the amounts reflected in the contracts that are in evidence total significantly less than ¥10 million. Some of the contracts require a calculation based on square footage, but Jing Hui could not recall the square footage. Many of the contracts relate to Building 10, which is not one of the dormitory buildings that Sam acquired.

m) Many of the utility receipts for the Dormitories were issued to Gold Key. This is the company that Sam holds a 90 percent share ownership in, as reported on his application for permanent residency in Canada. Ms. Deng testified that Gold Key was managing the Dormitories, and that the company was simply a department of Henan Huabin, with no separate existence. This is inconsistent with the information declared to be true on Sam's immigration application.

[146] It appears likely, and I do not take Fan to argue otherwise, that a portion of the purchase price of the Dormitories was financed through the Dingsheng loans that were arranged by Henan Huabin. The timing of the receipt of the loan funds is consistent with the payments to the College. Fan accepts that any valuation of Sam's ownership of the Dormitories must account for the initial debt of ¥26.7 million that was incurred to purchase the Dormitories.

[147] However, I do not accept the respondents' assertion that Henan Huabin incurred cascading debt relating to the acquisition of the Dormitories between 2012 and 2014, which was eventually paid off with the ¥80 million loans from the CITIC Bank in 2014. There is no evidence that the CITIC Bank loans related to the acquisition of the Dormitories. On the contrary, the only description of the purpose of the loans that is reflected in the documents suggests that the loans were for the purchase of electric cables.

[148] In any event, the details of the financing of the purchase of the Dormitories are only relevant to the extent that the financing arrangements permit the drawing of inferences about the existence of the alleged express trust. The respondents say that the existence of a trust can be inferred from evidence that Henan Huabin was solely responsible for all costs associated with the acquisition and renovation of the Dormitories, and to this day continues to be responsible for debt payments. For the reasons stated, I do not accept the respondents' evidence.

[149] The onus is on the respondents to prove the existence of an express trust. I conclude that the respondents have not led satisfactory evidence to establish an intention to create a trust at the time of Sam's acquisition of the Dormitories. The more plausible inference that arises from the evidence is that Sam orchestrated the purchase of the Dormitories in his own name and for his own benefit, with a portion of the purchase price financed through the Dingsheng loans, which Sam either has repaid or is liable to repay. Such an arrangement is consistent with the documentary record, including the Marriage Agreements between Sam and Shang Kun. It is also consistent with Bao's evidence that Sam needed business experience as it was expected that he would eventually be responsible for running Henan Huabin.

[150] It is significant, in my view, that Sam and Bao are the only parties who were present at the discussions that led to the alleged trust agreement. Notably, Bao did not find it necessary to include the other Henan Huabin shareholder, Bin Yan, in the discussions. This is notable because when Sam was appointed General Manager of Henan Huabin in 2006, Bao says he insisted that Bin Yan make the appointment so as to avoid the appearance of conflict. Yet at the same time, on the respondents' theory, Bao considered himself free to unilaterally nominate his son as the trustee of a significant corporate asset without consulting Bin Yan and without a written trust agreement.

[151] The credibility of the respondents' assertion that the Dormitories are held in trust by Sam is further undermined by the manner in which they have invoked the concept of bare trust in relation to other property in issue in this proceeding in order to maximize their own

financial advantage. The respondents say that the Bridgeport Property is held on trust for Henan Huabin, despite the fact that Sam represented the house to be family property in the Separation Agreement, used rental income from the house for family expenses, and continues to use the house to this day for personal purposes. The respondents say the Trumond Property is held in trust for Henan Huabin, despite the fact that it has only ever been used for the benefit of Sam and his extended family. Not only are there no trust agreements in evidence, there are also no records to show any accounting by Sam to Henan Huabin in his management of the alleged trust properties.

[152] I infer that the respondents have invoked the concept of a bare trust for strategic purposes in this litigation; that is, to avoid any liability to Fan for the undisclosed assets.

[153] For these reasons, I conclude that Sam owns the Dormitories in his own right and not as bare trustee for Henan Huabin. The Dormitories are a family asset. Sam was obliged to disclose his ownership of the Dormitories to Fan in the course of the negotiation of the Separation Agreement, and he failed to do so.

The corporate shareholdings

Did Sam fail to disclose his interest in the companies?

[154] The final instance of Sam's alleged failure to disclose family property at the time of the execution of the Separation Agreement relates to Sam's shareholder interest in three companies:

i. Xinxiang Yongcheng Investment Consulting Ltd.: Sam is listed as a shareholder since incorporation on May 12, 2011, having contributed a total subscription of ¥1.8 million;

ii. Xinxiang City Anbaiyi Real Estate Co. Ltd.: Sam is listed as a share holder since January 2011, having contributed a total subscription of ¥1.5 million; and

iii. Xinxiang Huisidun Hotel Management Co. Ltd.: Sam is listed as a shareholder, with a total subscription of ¥750,000 as of April 25, 2011.

[155] It is not in dispute that the Chinese corporate registry records that are in evidence in this proceeding record that Sam owns shares in these companies and that the above noted subscription amounts were paid on the dates listed. The respondents say that Fan could easily have located these records had she looked for them. The respondents profess puzzlement at Fan's failure to find the records prior to the execution of the Separation Agreement by retaining a lawyer or private investigator to inquire into Sam's assets.

[156] I am not persuaded by the respondents' argument on this point. Sam had an obligation to disclose all family property to Fan at the time they were negotiating the Separation Agreement, including any assets that were arguably family property. The test is not whether the property is reasonably discoverable on investigation by the other party. It was Sam's obligation to disclose his shareholdings, and he failed to do so at the time the Separation Agreement was negotiated and signed.

Are the shareholdings family property?

[157] The respondents next argue that the subscription amounts noted on the face of the corporate records were paid by Henan Huabin rather than Sam, and that all of the companies are owned and controlled by Henan Huabin. As such, the respondents say the shares are not family property.

[158] Once again, Henan Huabin's alleged payment of the share subscription fees is not evidenced by any documentary record. The respondents' position relies entirely on the oral evidence of the respondents' witnesses. In cross-examination, Bao suggested that "payment stubs" did exist to demonstrate that it was Henan Huabin who paid the subscription amounts. He offered to "look into that" if such documents were required and had not yet been produced. Such documents had not been produced by the respondents by the time Bao was cross-examined on this point, on day 19 of a 24-day trial. I therefore infer that either no documents exist that speak to Henan Huabin's payment of the share subscription, or to the extent that relevant documents do exist, they would not be helpful to the respondents.

[159] Even if records did exist to evidence Henan Huabin's payment of the share subscription, this would not be the end of the matter as it would be necessary to consider the purpose for any such payments. The payment of share subscriptions might, for example, constitute a form of employee compensation. In the absence of any records documenting the alleged payments by Henan Huabin, it is impossible to discern their purpose.

[160] Further, I note that Sam and Bao both testified that it was Henan Huabin and not Sam who paid the ¥450,000 share subscription for Gold Key. Yet on his application for permanent residency, Sam listed his share ownership of Gold Key as part of his personal net worth, and estimated its market value at ¥450,000. For the reasons I have already stated, I find Sam's declaration on his immigration application to be a more reliable source of information about his assets than Sam and Bao's evidence at trial. Sam's representations on his immigration application as to the value of Gold Key is in direct conflict with the evidence of Sam and Bao that the share subscriptions for Gold Key, and the companies that were later incorporated and are the subject of Fan's claim in this trial, were paid by Henan Huabin and have no personal value to Sam.

[161] For these reasons, I conclude that Sam's shareholder interest in the three companies is family property. The respondents also say that, in any event, these three companies now have no active operations and the shares have no value. That is an issue that goes to the value of Sam's shareholder interest, not its status as a family asset.

ISSUE 2: WHAT IS THE VALUE OF THE UNDISCLOSED ASSETS?

The valuation date

[162] Section 87 of the FLA provides:

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

(a) the value of family property must be based on its fair market value, and

(b) the value of family property and family debt must be determined as of the date

(i) an agreement dividing the family property and family debt is made, or

(ii) of the hearing before the court respecting the division of property and family debt.

[163] In Y.L. at para. 92, Justice Matthews considered the effect of s. 87 in the context of an application to set aside a separation agreement pursuant to s. 93 of the FLA. She held as follows:

[92] Interpreting s. 87 in a manner that is consistent with the jurisprudence pertaining to enforcing or setting aside agreements under s. 93 of the Family Law Act, discussed below, I conclude that the values of the property and debt at separation are relevant to the exercise of determining whether to set aside the May 3, 2015 agreement pursuant to s. 93 of the Family Law Act. If the agreement is not set aside, then the valuation date is presumptively the date of the agreement. If the agreement is set aside, then the presumptive date for valuing the property and debts is the date of trial, subject to the discretion of the court to depart from that date if that would create significant unfairness.

[164] Y.L. does not directly address the circumstances that arise in the present case. Fan does not seek to set aside the Separation Agreement, but rather to modify its terms by including additional provision for the division of the undisclosed assets. The respondents seek to uphold the Separation Agreement, or alternatively, in the event it is varied, they seek an order excluding the Bridgeport Property. As such, none of the parties seek to set aside the Separation Agreement in its entirety, or to redetermine the value of family assets that are already divided under the Separation Agreement. There is no evidence before me, for example, of the present value of the Bridgeport Property or Unit 302.

[165] In these circumstances, it seems to me that the value of family property as of the date of the Separation Agreement is not only relevant to the exercise of determining whether the Agreement should be modified, but also to determining what modification should be ordered. Such an approach is consistent with the wording of s. 87(b)(i) of the FLA. It is also

consistent with at least one objective of the court's power to modify an agreement for the division of family property, which is to uphold the integrity of the negotiation process at the time the agreement was executed. On the present facts, the use of the Separation Agreement as the valuation date for the undisclosed assets also avoids the use of two different valuation dates for the purpose of family property and debt division.

[166] I acknowledge, specifically in relation to the Dormitories, that it may be unfair to Fan to value the undisclosed assets as of the date of the Separation Agreement in determining an appropriate modification of the Agreement. The Dormitories increased in value after the Separation Agreement, and Fan has been deprived of her interest in the interim. However, it seems to me that any such unfairness may be addressed through the court's discretion under s. 87(b) of the FLA to depart from the presumptive valuation date. Such a departure is effectively a reapportionment or unequal division of family property, which can only be based on a finding that the use of the presumptive valuation date would lead to significant unfairness within the meaning of s. 95(2) of the FLA: Kumagai v. Campbell Estate, 2018 BCCA 24 at para. 76. The existence of undisclosed assets is a factor relevant to the exercise of the court's discretion under s. 95(2): Singh at para. 140.

[167] Accordingly, I conclude that the date of the Separation Agreement is the relevant date for determining both the issue of whether there are grounds to modify the Agreement and also the issue of what modified terms are appropriate. This is subject to the court's discretion to depart from this presumptive valuation date in the event its use would result in significant unfairness.

The off-shore assets

[168] There is no valuation issue to resolve in relation to the off-shore assets that Sam failed to disclose to Fan during the negotiation of the Separation Agreement. I have found that he owned the $2,895,300 that was reported on his 2013 tax return, rather than the $1.5 million that he disclosed on his Separation Agreement. As such, the value of these undisclosed family assets as of the Separation Agreement is $1,395,300.

The Dormitories

Renovation and use of the Dormitories

[169] Following Sam's acquisition of the Dormitories, renovation work was carried out. Jing Hui, the Henan Huabin engineering manager, testified to his involvement in the renovations. Jing Hui described the Dormitories as "worn out" and "shabby" prior to the renovations. The renovation work performed included painting, replacement of windows, and updating plumbing and electrical systems. The renovation work was completed by 2013. Jing Hui testified that the actual work was performed by contractors, who were paid by Henan Huabin. He estimates the total cost of the renovations to have been ¥10 million.

[170] There are some difficulties with Jing Hui's evidence. While he estimates the total cost of the renovation to be ¥10 million, the cost reflected in the contracts that are in evidence totals just over ¥2 million. As noted, many of these contracts relate to work carried out on Building 10, which is not a building owned by Sam. Fan says this supports an inference that Henan Huabin was not the owner of any of the buildings, but rather performing renovation work for the owners; that is, for Sam as owner of the Dormitories, and for whoever was the owner of Building 10.

[171] Given that I have already concluded that Sam owns the Dormitories in his own right and not as trustee for Henan Huabin, it is not necessary for me to revisit the issue of ownership. The renovation costs are relevant to the issue of the value of the Dormitories and the division of value as between Sam and Fan. However, for the purpose of determining value and property division, it does not matter whether Sam paid for the renovations himself or with financial assistance from Henan Huabin. For the reasons stated later in this judgment in addressing Sam's claim for an unequal division of the Dormitories, it is also not necessary to precisely quantify the costs of the renovations.

[172] The title certificates for six of the seven Dormitory buildings listed their planned use as "residential". The exception is Building 2 which has a planned use of "non-residential". The Contract for Assignment of the Right to Use State-Owned Construction Land, executed between Sam and the State Land Resources Bureau of Xinxiang City in October 2013, states the purpose of the assigned land as "for science education". Sam paid a land use fee of approximately ¥5.44 million. The parties referred to the land use rights defined in this contract as a form of zoning. I will assume that characterization to be accurate.

[173] The evidence was not entirely clear as to the process that would be required to change the zoning for the Dormitories. I take the evidence, in summary form, to be that it may be possible to change the zoning, but the process could be time consuming and expensive. Bao agreed in his evidence that the south parcel of the lands auctioned by the College in 2011 was purchased by a hospital, which then sold the land to a real estate developer. Bao agreed that the developer was able to purchase and develop the property despite the existence of the same land use restrictions as apply to the Dormitories.

[174] As of the time the parties' appraisal experts conducted their assessments, most of the Dormitory buildings had been leased out for use as hotels.

The expert evidence

[175] In a mid-trial ruling issued during a break in the trial schedule, I granted leave to Fan to tender an appraisal report as expert opinion evidence on a financial issue, that being the value of the Dormitories, and dispensed with the requirement for a joint expert. The respondents were granted leave to file a response report: Li v. Liang, 2020 BCSC 141. When the trial resumed, appraisal experts on both sides provided evidence.

Fan's appraisal expert

[176] Fan's expert is Mingju Liu, who is an appraiser with Bowen Real Estate Appraisal Cost Group Ltd. in Beijing, China. At the time he prepared his report, Mr. Liu had not seen the land use restrictions which established the permitted use of the Dormitories as "science education". For the purpose of his report, Mr. Liu assumed that six of the seven Dormitories, all except Building 2, were planned for residential use as reflected in the title certificates. He determined their value using a market comparison approach. In his report, Mr. Liu described his approach as follows:

Technical path of the comparison method: Instances of transactions of properties in a similar area and with similar purposes and structures are selected and are adjusted in terms of the location, physical conditions and rights pertaining to the comparable instances based on the analytical comparison with the appraised objects to determine the value of the appraised objects.

[177] In a Technical Report appended to Mr. Liu's main report, he identified three comparables each for the residential and non-residential Dormitory buildings. For the six Dormitory buildings that had a planned use of residential, Mr. Liu used condos listed for sale in a luxury apartment building as the relevant comparables. Based on the comparison approach, Mr. Liu determined the value of the Dormitories as ¥266,290,200, as of November 6, 2018.

[178] Mr. Liu did not appraise the Dormitories as of the date of the parties' Separation Agreement in January 2014. The only appraisal he has provided is in relation to the value of the Dormitories as of November 2018.

[179] In cross examination, Mr. Liu agreed that he did not visit the site of the Dormitories or the site of the comparables for the purpose of preparing the appraisal. Mr. Liu had an assistant, a Mr. Li, who did the site visits and reported back. It appears that Mr. Li was also the primary author of the expert report. Mr. Liu agreed that it was fair to say that the report contained Mr. Li's opinion, which Mr. Liu accepted as correct on the basis of their discussions. Mr. Liu's file does not include notes of any of his discussions with Mr. Li.

[180] Mr. Liu insisted in cross-examination that he and Mr. Li considered many comparables before choosing the three comparables that are referenced in his report. He was unable to identify the other comparables, or the basis on which he decided not to use them. Mr. Liu said that adjustments were made in his report to account for potential differences in value between his comparables and the Dormitories. He could not, or would not, explain exactly how the adjustments were made. Mr. Liu referred to this as a "business secret".

[181] Mr. Liu did not agree with the proposition put to him in cross-examination that condos in a luxury apartment building did not serve as appropriate comparables for Dormitory buildings that had a restricted use of "science education". Mr. Liu stated that in the event of such inconsistency, the appraisal code required him to use the "highest and best use" of the property, which in this case was the planned purpose of residential use.

The respondents' appraisal expert

[182] The respondents' appraisal expert is Qing Zhong Cao of Henan Ju Zhong Yuan Real Estate Land Property Appraisals Ltd. Mr. Cao provided two reports which valued the Dormitories at two different points in time: January 1, 2014, and February 25, 2020.

[183] Mr. Cao rejected the market comparison approach as an appropriate valuation methodology for the Dormitories, given the difficulty of identifying comparable assets on the open market. Mr. Cao separately assessed the value of the Dormitory buildings and the land use rights. He used a cost approach to value the buildings, which estimates the replacement costs of the assets, factoring in depreciation. To value the land use rights, Mr. Cao relied on the Benchmark Land Coefficient Correction Method. This approach is described by Mr. Cao as:

based on the benchmark land prices, the benchmark land price modification coefficient table and the principle of replacement in comparing the regional conditions and the unique conditions of the land parcels with the average conditions of the region to derive the value of the subject parcel on the benchmark date.

[184] Using these methodologies, Mr. Cao assessed the value of the Dormitories as of January 1, 2014 at ¥63,050,314, and the value as of February 2020 at ¥84,840,029.

[185] In cross-examination, Mr. Cao agreed that several of the Dormitory buildings were presently being leased to hotels. Mr. Cao did not agree that his appraisal should have accounted for the actual current use of the land, which was not limited to science education. Mr. Cao stated that the appraisal must rely on the legal zoning for the Dormitories, rather than their impermissible use as hotels. Mr. Cao also did not agree that a market comparison approach could have been used by locating comparable residential units. In his view, comparing the Dormitories to residential condos is not appropriate because of the restrictive land use condition.

Findings on value of the Dormitories

[186] The central point of disagreement between the experts is whether it is appropriate to use a market comparison approach in valuing the assets without regard to the fact that the Dormitories are zoned for use as science education. For the following reasons, I do not accept Mr. Liu's opinion on value.

[187] Mr. Liu's expert report is deficient in numerous respects. Mr. Liu chose comparable units for the purpose of his analysis through a process he cannot now articulate, and did not record. He cannot explain the deductions he made to arrive at a fair market value. Indeed, Mr. Liu is not even the primary author of the report, but instead appears to have simply endorsed what Mr. Li wrote. While this may be acceptable as a matter of Chinese appraisal practice, as Fan's counsel argued, Mr. Liu is testifying in a British Columbia proceeding. In this jurisdiction, an expert opinion must be that of an individual expert falling within the

scope of their expertise, and not simply a report on the opinions of others: Heidebrecht v. Fraser-Burrard Hospital Society (1995), 15 B.C.L.R. (3d) 189 at pp. 190-91 (S.C.).

[188] These issues aside, I also do not accept Mr. Liu's use of a market comparison approach in the circumstances of this case. His invocation of the "highest and best use" principle presumes that the development of the Dormitories into condos is an available use. However, such a use is currently prohibited by the zoning restriction. I acknowledge that a number of the Dormitories are presently leased out as hotels, which does not appear consistent with use for "science education". However, I accept Mr. Cao's view that the appraisal of fair market value should not be influenced by the fact that an owner may be putting land to a use that is not permitted by zoning restrictions.

[189] Finally, Mr. Liu's valuation does not pass the reasonableness check of comparison with the original purchase price for the Dormitories. Mr. Liu's appraisal suggests that the fair market value of the Dormitories increased by 700 percent between the time of the original purchase in 2011 (for ¥37.6 million), and his valuation date of November 6, 2018 (over ¥266 million). Mr. Liu does not identify trends in the Xinxiang City property market over that period that could explain such an increase.

[190] I accept Mr. Cao's criticisms of Mr. Liu's use of the market comparison method to estimate the value of the Dormitories, given the lack of available comparators. Mr. Cao has used a recognized valuation methodology. It is one that accounts for the unusual nature of the property, and the zoning restrictions that presently apply. I accept Mr. Cao's appraisal of the Dormitories as the most accurate evidence before the Court to determine value.

[191] Accordingly, I conclude that the Dormitories had a value of ¥63,050,314 as of the date of the Separation Agreement on January 17, 2014. Fan suggests, and I accept on the evidence, that ¥26.7 million should be deducted from the appraised value prior to any property division. This is the amount of the Dingsheng loans that were used for the initial property acquisition. For the reasons already stated, I do not accept that Henan Huabin's ¥80 million liability to the CITIC Bank is tied to the repayment of the Dingsheng loans.

[192] Fan also suggests that there should be some deduction for the renovation costs incurred between 2011 and 2013 to improve the condition of the Dormitories, although she does not agree with Jing Hui's estimate of ¥10 million in renovation costs. In my view, the parties' relative contributions to the Dormitories is an issue that goes to the unequal division of assets sought by the respondents. I will therefore address the renovations, and other post-separation contributions to the property, in considering the claim for unequal division.

The corporate shareholdings

[193] Finally, it is necessary to value Sam's interest in the corporate shareholdings that he failed to disclose to Fan prior to the Separation Agreement. Once again, the corporate shareholdings consist of:

i. Xinxiang Yongcheng Investment Consulting Ltd.: Sam is listed as a shareholder since incorporation on May 12, 2011, having contributed a total subscription of ¥1.8 million;

ii. Xinxiang City Anbaiyi Real Estate Co. Ltd.: Sam is listed as a share holder since January 2011, having contributed a total subscription of ¥1.5 million; and

iii. Xinxiang Huisidun Hotel Management Co. Ltd.: Sam is listed as a shareholder, with a total subscription of ¥750,000 as of April 25, 2011.

(Collectively the "Share Interests")

[194] The respondents say that these corporations are not distinct entities but effectively departments of Henan Huabin that were set up to serve Henan Huabin's interests. They say that in each case the subscription fees were contributed by Henan Huabin, not Sam, and that none of these companies are currently operational or have any assets.

[195] I will begin by addressing the respondents' repeated assertion that these three companies, and Gold Key, were treated as departments of Henan Huabin and had no independent existence. No expert on Chinese law testified regarding the legal nature of corporate status in China. In the absence of proof of foreign law, I must decide this case on the basis of the law of British Columbia. In British Columbia, corporations have independent legal status separate from their owners. Under s. 84(2)(a) of the FLA, a spouse's share or interest in a corporation is family property.

[196] The respondents' position is that all of the share subscription amounts were paid by Henan Huabin and that the companies are now defunct so the shares are worthless. This position relies almost entirely on the viva voce evidence of Sam, who I have found not to be a credible witness. Henan Huabin employee Yang Chen also testified to her understanding of the operation of the three corporations, but I found her evidence to be vague and the source of her knowledge uncertain. I do not accept the evidence of these witnesses in the absence of supporting documents.

[197] The respondents have not produced any documents to evidence that the share subscription fees were paid by Henan Huabin rather than the shareholder. I find it implausible that there would be no documentation of the transfer of large sums of money by Henan Huabin to cover Sam's share subscriptions. Indeed, Bao suggested in his evidence that such payment records do exist. However, they have never been disclosed. The evidence of the respondents' witnesses is also in direct conflict with the information Sam provided on his immigration application, which included his shares in Gold Key as a personally-held asset with a value of ¥450,000.

[198] There is also no documentary evidence to establish the value of the shares, beyond the registration certificates which evidence the initial share subscription. There are no company financial records in evidence or corporate tax returns.

[199] The Court is thus left with a very unsatisfactory record. The evidence demonstrates the existence of undisclosed family property, that being the Share Interests, but there is limited evidence on which to value the property. The best evidence I have of the value of the Share Interests is the share subscription fees he paid, as reflected in the corporate records. In the absence of any more reliable basis on which to assess value, I will assume that the value of the Share Interests as of the date of the Separation Agreement is equal to what Sam paid for the shares in 2011. Accordingly, I value the Share Interests as of the date of the Separation Agreement at ¥4,050,000.

ISSUE 3: MODIFICATION OF THE SEPARATION AGREEMENT

[200] I have concluded that Sam failed to disclose significant family assets at the time of the negotiation of the Separation Agreement. The value of these assets as of the date of the Separation Agreement is significant. The assets consist of:

i. the additional $1,395,300 CAD in offshore assets, consisting of funds held in the Bank of China and indebtedness owed by a resident of China, that Sam owned as of the date of the Separation Agreement but which were not disclosed to Fan;

ii. his equity in the Dormitories, which had a value of ¥36,350,314 (roughly $6.9 million CAD), as of the date of the Separation Agreement; and

iii. his corporate shareholder interests, which had a value of ¥4,050,000 (roughly $775,000 CAD) as of the date of the Separation Agreement.

[201] I have no difficulty concluding that the existence of these assets was relevant to the negotiation of the Separation Agreement, within the meaning of s. 93(3)(a) of the FLA. In my view, Sam's failure to disclose the assets undermined the integrity of the parties' negotiations. The Separation Agreement was reached through a process that was unfair to Fan. Given the value of the undisclosed assets, I would not replace the terms of the Settlement Agreement with an order that is substantially similar. For this reason, s. 93(4) of the FLA is not applicable.

[202] To remedy the non-disclosure, Fan does not seek to set aside the Separation Agreement in its entirety. Rather, she seeks an order that modifies the current family property division under the Separation Agreement only to the extent of dividing the undisclosed family assets. Where an agreement is set aside in part, the court must consider the terms of the agreement as a whole to ensure that any modification is fair to the parties and consistent with the objectives of the FLA: Sherk at para. 116.

[203] In my view, it would be fair to the parties and consistent with the objectives of the FLA to modify the Separation Agreement to include the undisclosed assets within the list of the parties' family property and debt, and order a division of the value of the assets. Before determining the exact terms to be ordered, it is necessary to address Sam's claim for an exclusion of the Bridgeport Property, and for an unequal division of the undisclosed assets.

The Bridgeport Property

[204] Although the Bridgeport Property was listed as family property in the Separation Agreement, the respondents argue that, in fact, Sam has no beneficial ownership of the property because he holds it in trust for Henan Huabin. The respondents say that although Sam was prepared to treat the Bridgeport Property as family property for the purpose of negotiating the Settlement Agreement, the issue should be revisited now that Fan is seeking to vary the Agreement.

[205] The answer to the question of whether the Bridgeport Property is, as the respondents now assert, beneficially owned by Henan Huabin has significant remedial implications. In order to obtain a secure remedy in relation to the undisclosed assets, all of which are in China, Fan seeks in rem remedies against Sam's property in British Columbia, including the Bridgeport Property.

[206] It is common ground between the parties that the presumption of indefeasible title in s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], may be rebutted by the operation of an agreement between the parties that is contrary to the registered legal title: Suen v. Suen, 2013 BCCA 313 at para. 34. The issue is whether the respondents' evidence is sufficient to rebut the presumption.

[207] I have already reviewed (at paras. 21-24) the evidence regarding the purchase of the Bridgeport Property. In keeping with the trend of the respondents' evidence in this case, their assertion that the Bridgeport Property is owned by Sam in trust for Henan Huabin is unsupported by any documentary evidence. There is no trust agreement, there is no record of money forwarded to Sam by Henan Huabin for the purchase, and there is no record of an accounting by Sam to Henan Huabin. There is only the viva voce evidence of Sam and Bao that Henan Huabin intended to engage in real estate development in British Columbia, using Sam as the conduit. They insist that the Bridgeport Property and the Trumond Property are, as Bao characterized it in his evidence, "commodity properties" rather than family assets.

[208] For the following reasons, I do not accept the evidence of Sam and Bao that the Bridgeport Property is held by Sam on trust for Henan Huabin.

[209] Sam and Bao's evidence regarding the ownership of the Bridgeport Property is inconsistent with previous affidavits they each swore in this proceeding to the effect that Sam purchased the property with a loan from his parents. It is also inconsistent with Sam's filed tax returns in which he presented himself as the owner of 100 percent of the interest in the Bridgeport Property for the purpose of declaring rental income from the property.

[210] Sam agreed that Fan collected the rental income from the Bridgeport Property, and simply reported the totals to him so that he could report the amounts on his income tax returns. Fan used the rental income to cover living expenses, particularly after Sam stopped remitting money from China. Sam now says Fan should not have been spending the rental

money because he had to account for it to Henan Huabin. This begs the question of how Sam imagined Fan was supporting herself and C, other than through the rental income. In any event, there is no evidence that Sam ever made any effort to render an accounting of the rental income to Henan Huabin.

[211] Sam represented the Bridgeport Property to be family property in the Separation Agreement. I find it implausible that Sam would gratuitously include the Bridgeport Property within the parties' property division when he did not, in fact, own it. Sam insists that Fan was aware at all times that the Bridgeport Property was held in trust for Henan Huabin. In that event, one would have expected a qualifying provision to that effect in the Separation Agreement.

[212] Sam has owned the Bridgeport Property for over ten years. To this day, he continues to use the Bridgeport Property as a second family home, while he collects the rental income and reports it on his Canadian tax returns. If the Bridgeport Property is intended to be a commodity property for Henan Huabin, as Sam and Bao insist, it is entirely unclear how the parties anticipate that Henan Huabin will ever realize on its investment.

[213] The respondents' case that Sam holds the Bridgeport Property in trust for Henan Huabin is entirely based on Sam and Bao's bare assertions that this is so. It is not simply that the existence of the alleged trust is not evidenced in the documentary record; rather the documentary record, including Bao and Sam's prior sworn evidence, is entirely inconsistent with the existence of the supposed trust.

[214] For these reasons, I conclude that the respondents' have failed to rebut the presumption of indefeasible title in s. 23(2) of the LTA. Sam is the legal and beneficial owner of the Bridgeport Property; he does not hold the property on trust for Henan Huabin. Bao and Sam's evidence to the contrary is simply not credible.

[215] This leads to the issue of Sam's claim for an unequal division.

Sam's claim for unequal division (FLA, s. 95(2))

[216] In the event that the Court concludes that any of the undisclosed assets are family assets, Sam seeks a reapportionment wholly in his favour pursuant to s. 95(2) of the FLA. As I understand Sam's argument, he relies primarily on what he says is the short duration of the parties' marriage, and Fan's lack of contribution to the acquisition of the property to warrant an unequal division.

[217] In my view, neither of these factors constitute significant unfairness within the meaning of s. 95(2) of the FLA that would justify reapportionment. The parties were married for five and one-half years, which is a significant period of time. They had a child together. During their marriage, Fan was primarily responsible for child care while Sam was free to pursue his career at Henan Huabin. The main property in issue - the Dormitories - was acquired during the marriage. This is not a case in which one spouse brought significant excluded

property into a short marriage.

[218] As for Fan's contributions to the property during the marriage, this is not a factor specifically listed in s. 95(2) of the FLA. Section 81 provides that spouses are both entitled to family property regardless of their use or contribution. The significant unfairness contemplated by s. 95(2) of the FLA requires something more than differing financial contributions in a marriage. Cases in which unequal contribution to family expenses were found to constitute significant unfairness have involved "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens": Khan v. Gilbert, 2019 BCCA 80 at para. 32. There is no evidence of such circumstances here.

[219] I accept that s. 95(2)(f) of the FLA may have some relevance in these circumstances in relation to the Dormitories. Section 95(2)(f) provides that on a claim for unequal division of family property on the basis of significant unfairness, the court may consider:

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

[220] Consideration of this factor is consistent with the overall excluded property scheme in which each spouse presumptively keeps what is theirs but shares in the value of family property accumulated during the relationship: Jaszczewska at para. 51.

[221] The evidence in this case supports a finding that Sam did, after separation, cause a significant increase in the value of the Dormitories beyond market trends. The Dormitories were essentially student residences when Sam acquired them in July 2011. He undertook an extensive process of renovation, although the precise value of the renovation may be open to debate. He paid the utility bills and the ¥5 million fee to transfer the land use rights.

[222] Fan accepts that Sam's post-separation contributions to the Dormitories ought to be accounted for in the property division, although her proposed accounting consists of a deduction of the renovation costs. In my view, it is unnecessary to attempt a precise quantification of the renovation costs and other expenses Sam incurred in developing the Dormitories. Sam's post-separation contributions are relevant to the overarching question of whether it would, viewed holistically, be significantly unfair to equally divide the property.

[223] Given that the Dormitories were tendered for sale through a public auction by third party sellers, I accept that the amount that Sam paid for the Dormitories in 2011 reflected the fair market value of the property at that time. The Dormitories had almost doubled in value by January 2014. I infer from the evidence that a substantial explanation for the increase in value is the result of Sam's efforts in renovating the Dormitories, and that much of the renovation occurred after the parties' separation on April 15, 2012. Accordingly, I conclude that after separation, Sam increased the value of the Dormitories beyond market trends.

[224] On the other hand, there is also unfairness to Fan in these circumstances. She has been deprived of her interest in the Dormitories since January 2014, while Sam has concurrently retained Fan's interest. According to Mr. Cao's appraisal, the Dormitories had significantly more value in 2020 than they did in January 2014. Because I have determined that the presumptive valuation date is the date of the Separation Agreement, Fan does not benefit from the increase in value. She has also lost the opportunity, over the past seven years, to invest any compensation she might have received in relation to her interest in the Dormitories.

[225] In these circumstances, I find it would be fair to reapportion the value of the Dormitories so that Sam receives 60 percent of the value and Fan receives 40 percent. Sam would be entitled to a greater proportion of the share in the Dormitories in light of his post-separation contributions if he had not failed to disclose the properties to Fan at the time of the negotiation of the Separation Agreement. Factoring in the unfairness to Fan in having been deprived of her entitlement to the Dormitories since 2014, I consider that a 60/40 division strikes a fair balance.

[226] I find it is not significantly unfair within the meaning of s. 95(2) of the FLA to order an equal division of the remaining undisclosed assets. As such, Fan is entitled to an equal division of the $1,395,300 in undisclosed off-shore assets and the ¥4,050,000 value of the Share Interests.

What new terms should be ordered?

[227] This leads, finally, to the question of how the modification to the Settlement Agreement should be structured, having regard to the fact that all of the undisclosed assets are located in China. Section 109 of the FLA provides as follows in relation to extraprovincial property:

109 (1) If the Supreme Court has authority under this Division to make an order respecting extraprovincial property, the Supreme Court may make an order respecting the ownership and division of the extraprovincial property.

(2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:

(a) instead of dividing the extraprovincial property,

(i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or

(ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;

(b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,

(i) preserve the extraprovincial property,

(ii) provide for the possession of the extraprovincial property,

(iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or

(iv) provide for any other matter in connection with the extraprovincial property;

(c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

[228] Fan does not seek in rem remedies against the property in China, assuming such orders could ever be enforced. Instead, she requests an order modifying the Separation Agreement to the extent of quantifying her entitlement to the undisclosed family property, and transferring all of Sam's property in British Columbia, namely the Bridgeport Property and the Trumond Property, to her in partial satisfaction of her entitlement.

[229] The remedial issue is a difficult one, and the parties' arguments are undeveloped. Fan does not cite the provision of the FLA that she relies on in support of her proposed remedy of a transfer of Sam's British Columbia properties to her in satisfaction of her interest in the undisclosed assets. The respondents made no submissions on remedy at all, beyond requesting a redetermination of ownership of the Bridgeport Property in the event that the Court was persuaded to set aside any part of the Settlement Agreement pursuant to s. 93(3) of the FLA.

[230] It is clear that the Court has jurisdiction to order Sam to pay compensation to Fan in relation to the undisclosed assets, pursuant to s. 109(2)(a)(ii) of the FLA. It is less clear that the Court has the jurisdiction to order the transfer of Sam's British Columbia properties as a means of enforcing Fan's entitlement to a share of the undisclosed assets. For example, the Trumond Property is not family property under the Settlement Agreement; it was purchased later. Section 109(2)(a)(i) refers to "property" rather than "family property" in defining the court's power to order the substitution of property in British Columbia for rights in extraprovincial property. On a pure textual reading, s. 109(2)(a)(i) might support an order transferring any of Sam's property in British Columbia to Fan, regardless of whether it is family property. It is not clear to me whether such an interpretation may be supported on a contextual and purposive interpretation of the provision, and I have received no submissions from the parties on the point.

[231] Section 230(2)(a) of the FLA provides an alternative means of securing Fan's entitlement to a share of the undisclosed assets. This section authorizes the Court, on application by a party, to order a charge on property as a means of enforcing financial obligations that arise under an order: Partridge v. Partridge, 2018 BCSC 1687 at paras. 78-85. Such an order may be sufficient to secure Fan's interest in the undisclosed assets, which I gather is her primary objective.

[232] In the circumstances, I consider it appropriate, at this stage, to simply order that Sam provide Fan with compensation in an amount equal to her interest in the undisclosed assets. I will grant leave to Fan to seek further orders from the Court in relation to Sam's properties in British Columbia, in the event that proves necessary, on the basis of more complete submissions on the jurisdictional basis for such orders. I understand that Fan has registered certificates of pending litigation (CPLs) against both the Bridgeport Property and the Trumond Property. The CPLs ought to provide sufficient security to Fan if they remain on title until the remedial issues are fully resolved.

SUMMARY OF DECLARATIONS AND ORDERS

[233] For the foregoing reasons, I issue the following declarations and orders:

a) The issue of property division shall be tried in advance of the remaining issues in this proceeding;

b) Sam failed to disclose significant family property, consisting of:

i. $1,395,300 CAD in offshore assets that he owned as of the date of the Separation Agreement, but which were not disclosed to Fan;

ii. the Dormitories; and

iii. his Share Interests,

(Collectively the "Undisclosed Assets")

c) The Separation Agreement shall be modified as follows:

i. The Undisclosed Assets shall be included in the list of family assets and liabilities in Recital G(1);

ii. The following provision shall be added to Term 14(2):

Sam shall pay compensation to Fan in an amount equal to her entitlement to the Undisclosed Assets, which comprises:

An equal share of the $1,395,300 CAD in offshore assets;

An equal share of the Share Interests as of the date of the Separation Agreement, which had a value of ¥4,050,000; and

A forty percent share of the equity in the Dormitories as of the Separation Agreement, which had a value of ¥36,350,314.

d) The parties have leave to seek a further hearing before the Court if they are unable to agree on the Canadian dollar equivalent of the compensation Sam owes Fan for her share of the Undisclosed Assets;

e) The existing provisions in the Separation Agreement concerning the division of family property and debt otherwise remain operative, including Sam's existing obligation to pay Fan the $700,000 equalization payment in relation to the other family assets pursuant to Term 14(4);

f) Fan has leave to seek a further hearing before the Court on the issue of the in rem remedies she seeks against Sam's property in British Columbia.

[234] Subject to circumstances of which I am unaware, Fan is entitled to her costs. If the parties cannot agree on an appropriate form of costs order, they may seek a further hearing before me on the issue of costs through Supreme Court Scheduling within 30 days of the date of this judgment.

"Horsman J."

[1] The company referenced in Sam's immigration application has the name "Xinxiang Gold Key Property Management Co., Ltd." in corporate registry records. The evidence variously refers to the company by that name, or by "Xinxiang Golden Key Property Management Ltd. Co." It is a single company. For the purpose of consistency, I will refer to the company as "Gold Key" in this judgment.

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