
CANADA / JUDGMENT

Li v. Piao

2019 BCSC 488

COURT

Supreme Court of British Columbia

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2019 BCSC 488 Li v. Piao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Piao,

2019 BCSC 488

Date: 20190403

Docket: S158421

Registry: Vancouver

Between:

Da Bei Li

a.k.a. Dabei David Li

a.k.a. David Li

Plaintiff and Defendant by Counterclaim

And

Harry Piao and

Top Car Seller Inc.

Defendants and Plaintiff by Counterclaim

And

Tianjin East China International Trade Co. Ltd, and

Qun Wang, and Maxblue Enterprises Ltd.

Defendants

And

Tianjin East China International Trade Co. Ltd., and

Xue Zhi Wang, Qun Wang, Yu Cheng Jia,

Jie Jia, Hao Qu, and Maxblue Enterprises Ltd.

Third Parties

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Da Bei Li:

S. Xue

C. Ke (Articled Student)

J. Xiao (Articled Student)

Appearing on his own behalf as the Defendants/Plaintiffs by Counterclaim:

Harry Piao

Counsel for Qun Wang, Xue Zhi Wang and Maxblue Enterprises Ltd.:

J.E. Wittmann

No other appearances made.

Place and Date of Trial:

Vancouver, B.C.

June 25-29, July 3-5,

August 27-28 and

September 10, 2018

Place and Date of Judgment:

Vancouver, B.C.

April 3, 2019

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I. Introduction

[1] This is a case about a missing luxury hybrid car, a BMW i8.

[2] The plaintiff Da Bei Li ("Mr. Li") graduated from UBC with a Bachelor's degree in 2015. In February 2015 his mother bought him a brand new BMW i8 car in celebration of his expected graduation. The purchase price of the i8 was CAD \$159,809. Mr. Li wanted to have the i8 shipped to China as he planned to return to Beijing. On February 23, 2015 Mr. Li

entered into an agreement with the defendant Harry Piao ("Mr. Piao") to have the i8 shipped to China. Mr. Piao agreed to pick up the car, prepare the customs declaration, transport the car to China, and take the car through the customs clearance procedure in China. Mr. Li agreed to pay Mr. Piao USD \$116,645.22 for these services.

- [3] On March 30, 2015 Mr. Li transferred the required funds to Mr. Piao's company, the defendant Top Car Seller Inc. ("Top Car"), and the i8 was picked up. Mr. Li has not seen the i8 since March 2015, and remains out of pocket the money he transferred to Top Car. Mr. Li brought this action to recover the losses he suffered as a result of Mr. Piao's failure to deliver the i8 as agreed.
- [4] While Mr. Li's claim appears to be a straight forward breach of contract case, it is complicated by a dense web of corporate and personal dealings between Mr. Piao, Top Car, and the defendants and third parties Qun Wang ("Mr. Wang"), Maxblue Enterprises Ltd. ("Maxblue"), and Tianjin East China International Trade Co. Ltd. ("Tianjin Co."). Mr. Wang stated that his father was the legal representative of Tianjin Co. Mr. Yu Cheng Jia ("Mr. Jia"), another defendant whose name is prominent in the facts of this case, is the cousin of Mr. Wang. These parties dealt with each other with little or no regard for the corporate personalities in play at any point in time, and without troubling themselves with legal niceties such as the legal ownership of the i8.
- [5] Mr. Li claims breach of contract against Mr. Piao and Top Car, and seeks recovery for the value of the i8 and return of the fees paid. He also claims against Maxblue, Tianjin Co., and Mr. Wang in wrongful conversion. While other parties were named as defendants, Mr. Li discontinued against all but Mr. Piao, Top Car, Maxblue, Tianjin Co. and Mr. Wang. Mr. Piao, Top Car, Maxblue and Mr. Wang all filed responses to Mr. Li's notice of claim and appeared at trial.
- [6] Mr. Piao and Top Car commenced third party proceedings against Maxblue, Tianjin Co., and Mr. Wang, as well as a number of other parties, asserting various claims including that some or all were retained by Mr. Li through the agency of Mr. Piao, were responsible for the losses suffered by Mr. Li, and were unjustly enriched by their breach of contract with Mr. Piao (as agent for Mr. Li). Maxblue, Tianjin Co., and Mr. Wang all filed a response to the third party notice, although by the time of trial only Maxblue and Mr. Wang were represented by counsel.
- [7] Tianjin Co. did not file a response to the plaintiff's claim and did not attend the trial. Mr. Piao and Top Car did not discontinue against any of the third parties.
- [8] Mr. Piao also counterclaimed against Mr. Li for wrongfully registering a certificate of pending litigation on his real property.

A. Credibility

- [9] Three witnesses testified at trial: Mr. Li, Mr. Piao and Mr. Wang. While I found Mr. Li to be credible, I have significant concerns with the credibility of Mr. Piao and Mr. Wang.
- [10] All witnesses testified through interpreters, and the critical documents were translated. For the most part, disputes on interpretation or translation were minimal, and were resolved by agreement during the trial. However, in assessing credibility, I am mindful of the comments of Griffin J. in *Fu v. Zhu*, 2018 BCSC 9:
- [39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.
- [40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.
- [41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.
- [42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.
- [43] I also note that there was a great deal of data in front of me to allow me to consider the key witnesses' evidence. For example, key witnesses testified for several days and so I could consider changes in demeanour during the course of testimony and whether those changes in demeanour were generally consistent or inconsistent with the testimony being truthful. Also, I could compare the demeanour of the witnesses as between each other, as they were all from a similar cultural background and required the use of interpreters.

- [44] By the conclusion of the evidence I was confident that I was able to assess credibility largely by considering internal and external consistencies in witnesses' evidence and the actions of the witnesses.
- [45] My assessment of credibility also factored in somewhat, but to a much lesser extent, the demeanour of the witnesses as they answered questions and the inherent probabilities of human behaviour, tempered by an attempted appreciation of cultural context.
- [11] Over the many days the witnesses testified, I was able to observe their demeanor, their responses to challenges to their credibility, their responses to their evidence given on discovery, and the words of the documents as translated. For the reasons articulated by Griffin J. in *Fu*, I am satisfied that I am able to assess the credibility of these witnesses.
- [12] Mr. Piao was evasive and equivocal on many key points, including whether his employee Mr. Zhang was responsible for negotiating a key agreement with Mr. Li, whether Mr. Li actually paid the fee required under the agreement, whether Mr. Li approved the redesignation of consignee on the bill of lading, and whether documents said what they clearly said. He downplayed his own role in the agreement with Mr. Li and his role in the events involving Mr. Wang and the other defendants. He denied and debated the answers he previously gave on discovery. His explanations for many events strained credulity.
- [13] When challenged on the changes he made to his oral testimony, Mr. Piao replied that "evidence is more important than just words". I found these words of Mr. Piao to be insightful when I reviewed his evidence. Where there are conflicts between Mr. Piao's oral testimony and the documentary record, I prefer the documentary record. Further, where Mr. Piao's evidence conflicted with Mr. Li's testimony, I prefer Mr. Li's evidence.
- [14] Mr. Wang was even more evasive than Mr. Piao. I found Mr. Wang to be not credible in most of his evidence. Mr. Wang's testimony was often internally contradictory. The documentary evidence made it clear that he was central to the facts surrounding the loss of the i8, yet in evidence he was evasive and contradictory. Like Mr. Piao, where his testimony contradicts the documentary evidence, I prefer the documentary evidence. Examples of his testimony which I find to be not credible are numerous and include:
- a) At one point Mr. Wang said that a payment of RMB ¥210,000 he received from Mr. Piao was used by Mr. Wang as reimbursement for his losses on an unrelated transaction between him and Mr. Jia. At another point in his testimony Mr. Wang said that the RMB ¥210,000 was spent by Mr. Jia on obtaining a permit for the i8, which was why the money could not be returned. These two explanations are completely inconsistent.
 - b) Mr. Wang started a counterclaim in the name of Maxblue to seek damages arising from the failure of an unrelated agreement between Maxblue and Mr. Piao. Under cross examination he asserted that Maxblue was actually seeking compensation on behalf of Mr. Jia - a fact not pleaded and entirely incredible on the evidence.

- c) Under cross examination Mr. Wang testified that Mr. Piao requested a change of the consignee on the bill of lading from Mr. Li's mother to Mr. Jia. Later under further cross examination he testified that it was his idea to change the consignee to Mr. Jia. Again, this evidence was completely contradictory.
- d) Mr. Wang was evasive when examined on text messages between him and Mr. Piao, often claiming the text messages were out of context or altered in some way. However, Mr. Wang at no time provided any proof to contradict the accuracy of the text messages as presented.
- e) Mr. Wang explained one of the reasons he changed his evidence from discovery two years earlier was because of the testimony he heard during the trial. In other words, he tailored his evidence in response to what he heard during the testimony of Mr. Li and Mr. Piao.

II. Facts

A. The Li Agreement

[15] I find that on February 23, 2015 Mr. Li entered into an agreement with Mr. Piao ("Li Agreement") with the following material terms:

- a) Mr. Piao will act as Mr. Li's "agent" in delivering the i8 from Vancouver, Canada to Beijing, China,
- b) The value of the i8 is CAD \$159,809 (before tax) or CAD \$183,780.35 (after tax),
- c) Mr. Li will pay Mr. Piao a total of USD \$116,645.22 (RMB ¥729,488.71) as agent fees,
- d) Mr. Piao will be responsible for "handling a series of procedures including picking up the vehicle, going through customs declaration procedure, shipping the vehicle back to the country [Canada to China], and going through customs clearance procedure",
- e) Mr. Piao promises to Mr. Li that the i8 will be delivered in good condition, the i8 will go through all procedures necessary for a licence plate to be put on it in a normal way, and that if the i8 suffers "accidental loss" Mr. Piao will indemnify Mr. Li for all fees,
- f) a "default" clause which allowed either party the right to terminate the agreement if the opposite party violated any terms of the agreement, and
- g) a provision allowing for additional agreements, stated as: "for matters uncovered herein, the two parties may negotiate supplementary agreements, which shall have the same legal effect as this Agreement".

[16] Other than the terms of the Li Agreement as set out above, virtually all other materials facts in this action are in dispute.

[17] Based on the evidence of Mr. Li, including the purchase agreement for the i8, I am satisfied that the value of the i8 as stated in the Li Agreement is an accurate statement of value in 2015.

- [18] The payment amount specified in the Li Agreement was paid by Mr. Li on March 30, 2015, however he paid in the Canadian equivalent of CAD \$145,288.62. There appeared to be no dispute that this amount was equal to the USD \$116,645.22 (RMB ¥729,488.71) required under the Li Agreement. However, the payment was not made to Mr. Piao personally. It was made to Mr. Piao's company, Top Car. This is the first of many irregularities that characterized the performance of the Li Agreement.
- [19] While the Li Agreement was executed by Mr. Li and Mr. Piao, Mr. Li dealt primarily with an employee of Top Car, a Mr. Zhang, in the negotiations and the performance of the Li Agreement. I find that in all his dealings with Mr. Li, Mr. Zhang operated under the authority of Mr. Piao and Top Car, and Mr. Piao and Top Car are at all times responsible for the actions of Mr. Zhang.
- [20] Mr. Zhang picked the i8 up from Mr. Li after Mr. Li signed the Li Agreement, around the end of March 2015. This was the last time Mr. Li saw the i8. At trial, some three years later, the exact location of the i8 remained unknown.
- [21] From the time Mr. Zhang received the i8 from Mr. Li, Mr. Piao either personally or through his company Top Car was responsible for the i8.
- [22] Unfortunately, Mr. Piao was not able to perform the Li Agreement. The story of his attempt to get the i8 delivered through customs in China is a story filled with misunderstandings, questionable transfers, and bad faith.
- [23] While Mr. Piao undertook in the Li Agreement to have the i8 shipped to China and taken through the customs declaration clearance procedures, it is clear from the evidence that he did not have the knowledge or ability to complete these tasks. He had to retain others to assist him, and he did not choose such assistance wisely.
- [24] Mr. Piao testified that before he entered into the Li Agreement he obtained offers from a number of different parties to assist with the customs clearance process, including Mr. Wang. He decided to select Mr. Wang based on his pricing offer and because he knew Mr. Wang somewhat from other dealings. These dealings figure prominently later in the i8 transaction.
- [25] None of this was disclosed to Mr. Li, who understood he was simply retaining Mr. Piao.
- [26] Once Mr. Piao had received the signed Li Agreement, the i8, and the fees from Mr. Li, he began the process of shipping the i8 to China. The i8 was shipped on April 26, 2015, and it arrived in China on May 16, 2015.
- [27] Mr. Piao prepared a bill of lading for the shipment of the i8 using yet another company he owned, Green New Material Inc., as the shipper. Mr. Li instructed Mr. Piao to use his mother, Ms. Danna Zhu, as the consignee for the i8. Ms. Zhu lived in Beijing and would receive the i8 for her son.

B. The Tianjin Agreement

- [28] There was no written agreement between Mr. Piao and Mr. Wang which predated the arrival of the i8 in China. However, I find that there was an unwritten agreement in place between Mr. Piao and Mr. Wang in advance of the i8 being shipped on April 26, 2015. This agreement was that Mr. Wang would take care of the customs clearance process once the i8 arrived in China. Unfortunately, Mr. Piao did not take steps to formalize the agreement in writing before the car was shipped, leading to the calamity of errors that followed.
- [29] I find that on May 26, 2015 Top Car paid Maxblue RMB ¥210,000 (CAD \$42,546) with regard to the customs clearance fee for the i8, further to the agreement between Mr. Piao and Mr. Wang. I also find that the source of these funds was the payment made by Mr. Li under the Li Agreement. Maxblue is a company owned and controlled by Mr. Wang. Mr. Wang asked Mr. Piao to make the payment to the account of Mr. Jia, but Mr. Piao in fact paid Maxblue. Mr. Wang confirmed that he agreed to receive the RMB ¥210,000 in Maxblue, and that he did not transfer the funds to Mr. Jia.
- [30] Sometime after the i8 landed in Tianjin, the port closest to Beijing, Mr. Wang told Mr. Piao that the consignee on the bill of lading needed to be changed from Ms. Zhu to Mr. Jia. While Mr. Wang testified that Mr. Piao requested the change to Mr. Jia, I do not accept Mr. Wang's evidence which I find to be not credible and inconsistent with the weight of the evidence before me.
- [31] Mr. Zhang then advised Mr. Li that they were not able to get the i8 through customs using Ms. Zhu's name and required the consignee to be changed to a person named Mr. Jia. Mr. Jia was unknown to Mr. Li. However, based on the representations of Mr. Zhang, Mr. Li agreed to this change being made. He was not happy about this change and testified that if he had been advised of this requirement before entering into the Li Agreement he would not have used Mr. Piao. He was suspicious of the fact that the i8 would be transferred to a stranger before being transferred to his mother. As it turns out, his suspicions were justified.
- [32] I find that Mr. Piao, at the request of Mr. Wang, re-issued the bill of lading from his company Green New Material Inc. and changed the consignee to Mr. Yu Cheng Jia.
- [33] The significance of this change was that Mr. Wang and Mr. Jia had total control of the i8 once it arrived in Tianjin, and neither Mr. Piao nor Mr. Li nor Ms. Zhu had the legal authority to receive the i8. As Mr. Wang stated to Mr. Piao in a text message on July 22, 2015, "Legally speaking, the vehicle is under my name now."
- [34] When Mr. Piao challenged this statement and reminded Mr. Wang that the i8 was in the name of the person on the permit, i.e. Mr. Jia, Mr. Wang confirmed with Mr. Piao that he had control over the i8, even though the consignee was Mr. Jia. Mr. Wang replied to Mr. Piao's text message with the statement, "The vehicle is under my control. It is still under control." Mr. Wang further stated, "I have ownership of the cargo."

- [35] In July 2015 Mr. Piao was becoming increasingly anxious about the i8. It had landed in Tianjin months earlier, but no progress appeared to be made in getting it through the customs clearance process. By July 22, 2015 Mr. Wang and Mr. Piao were engaged in extensive text messages about the process. Mr. Wang required RMB ¥100,000 as a service fee before he would pay the cargo tax/duty on the i8. Mr. Wang suggested that Mr. Li could contact him directly, but Mr. Piao would not agree to release Mr. Li's name or contact information at that time. Similarly, Mr. Wang would not allow Mr. Piao to contact Mr. Jia directly.
- [36] Around July 22, 2015, Mr. Wang presented Mr. Piao with a draft written agreement between Top Car and Tianjin Co. which provided that Tianjin Co. would be responsible for clearing customs for the i8. On July 24, 2015 Mr. Zhang advised Mr. Li that Mr. Piao had a document for him to review that required payment of approximately RMB ¥200,000 in additional fees. Mr. Li testified that he briefly looked at the document which he understood was intended to show him extra fees or duties required in the customs clearance process.
- [37] The document sent to Mr. Li was the agreement between Top Car and Tianjin Co. Mr. Li testified that Mr. Piao did not ask him to approve the agreement, and I accept his evidence. I note that on discovery Mr. Piao agreed he did not get Mr. Li's approval of the agreement. Mr. Li stated that if he was provided with a receipt from a government agency which showed that the clearance process cost more than had been originally estimated, he would be prepared to pay it. However, the agreement he had been sent was not a receipt of any kind and appeared to be an agreement that did not involve him. Mr. Li paid little attention to the agreement.
- [38] Mr. Piao made some changes to the draft agreement and sent it back to Mr. Wang. Mr. Wang confirmed on discovery that Mr. Jia was not involved in the drafting of the agreement. Mr. Wang sent the agreement to Mr. Jia for signature. On July 26, 2015 Mr. Piao, on behalf of Top Car, and Mr. Jia, on behalf of Tianjin Co., executed the agreement ("Tianjin Agreement").
- [39] The terms of the Tianjin Agreement were disputed by Mr. Piao, and the details of this agreement will be discussed in more detail below. The essence of the Tianjin Agreement was that Tianjin Co. would be responsible for clearing customs and other matters regarding the i8, and Top Car would be responsible for paying all related costs. This agreement acknowledged that Top Car had already paid RMB ¥210,000 for various customs clearance fees, and required payment of a further RMB ¥700,000 to Tianjin Co. as a prepayment for the customs duty.
- [40] In relation to the Tianjin Agreement, Mr. Piao did not email directly with Mr. Jia. All communication flowed through Mr. Wang. I note that in the Tianjin Agreement, the parties acknowledge payment of the RMB ¥210,000 by Top Car even though that payment had been made to Maxblue. I find that in July 2015, Mr. Piao understood he was dealing with a company controlled by Mr. Wang when he dealt with Tianjin Co. I find that Mr. Wang represented himself to control Tianjin Co. Mr. Wang also represented to Mr. Piao that he

controlled Mr. Jia in the sense that Mr. Wang had the power to compel and direct Mr. Jia's actions in relation to the i8.

- [41] Almost immediately after the Tianjin Agreement was executed, problems arose. Mr. Wang demanded that Mr. Piao make the prepayment of RMB ¥700,000 to allow the clearance process to complete. Mr. Piao resisted, saying that he wanted proof of the additional charges before he would make the payment.
- [42] Mr. Piao had received a total of approximately RMB ¥729,488 from Mr. Li under the Li Agreement. Under the Tianjin Agreement, he was obligated to pay RMB ¥910,000. Mr. Li had made it clear that he would not pay anything more than the agreed amount of RMB ¥729,488 unless he was given proof from a Chinese agency that the cost exceeded the amount agreed to be paid under the Li Agreement.
- [43] Mr. Piao could have paid the full amount owing under the Tianjin Agreement to get the i8 processed, but this would have required him to advance his own funds to cover the shortfall in the amount he had received from Mr. Li. Once the payment had been made and the i8 was processed, Top Car would have received a receipt which he could have forwarded to Mr. Li for reimbursement. However, it was clear from the testimony at trial that Mr. Piao was not prepared to do so. There was a risk that Mr. Li would not pay any additional funds, as the Li Agreement set a fixed price for shipping and customs clearance. Mr. Piao was clearly not prepared to assume that risk.
- [44] Mr. Wang would not or could not deliver any government agency customs forms in advance of the clearance process, and so would give Mr. Piao nothing in advance. By the end of July 2015 Mr. Piao and Mr. Wang were engaged in a heated dispute about the return of the i8 and associated fees. This dispute was complicated by additional, unrelated dealings between the two involving the importation of a number of other luxury vehicles.
- [45] Mr. Piao did not deliver the RMB ¥700,000 required under the Tianjin Agreement to Mr. Wang, Mr. Jia or Tianjin Co. at any time.
- [46] On July 27, 2015 Mr. Zhang told Mr. Li that he either had to pay the additional RMB ¥200,000 or the money already paid could be refunded, less shipping costs. Neither of these options was fully explained to Mr. Li and he gave no directions to Mr. Zhang in this respect.
- [47] By July 29, 2015 Mr. Piao had demanded the return of the i8 from Mr. Wang and also stipulated that he expected to receive from Mr. Wang either a return of the RMB ¥210,000 already paid, or the permits purchased with the RMB ¥210,000.
- [48] Mr. Wang refused to return the i8 unless Mr. Piao completed terms of an unrelated agreement between Mr. Piao and Mr. Wang. Mr. Wang used the i8 as leverage against Mr. Piao to get him to address the unrelated agreement. I will discuss this in more detail below.

- [49] By August 3, 2015 Mr. Piao wrote to Mr. Wang confirming that the i8 had arrived on May 16 and was in storage in China, and asked for a copy of the vehicle permit and for the i8 to be transferred to Mr. Piao so he could complete the customs clearance process himself.
- [50] Mr. Piao testified that he and Mr. Wang reached agreement that the i8 would be shipped back to Vancouver along with the relevant documents and the RMB ¥210,000 which Mr. Piao had advanced to Mr. Wang. At the same time Mr. Piao would return to Mr. Wang the letter of credit which had been provided in relation to the unrelated agreement. However, this agreement was disputed by Mr. Wang. Mr. Piao suggested that Mr. Wang went "back on his word". He agreed under cross examination that Mr. Wang never agreed to simply return the i8 to Mr. Piao without requiring something else in exchange from Mr. Piao.
- [51] Mr. Wang testified that an agreement had been reached to return the i8 to Vancouver, but then Mr. Piao insisted on a return of the RMB ¥210,000 - which was not part of the original agreement. Mr. Wang testified that the RMB ¥210,000 had been spent and could not be returned.
- [52] I find that no agreement was reached between Mr. Wang and Mr. Piao on the return of the i8 to Vancouver.
- [53] At the time of trial, Mr. Wang had still not returned the i8 to Mr. Piao or Mr. Li. I received no direct evidence of the location of the i8 at the time of trial, only hearsay evidence from Mr. Wang that the i8 was in a storage warehouse in Tianjin being paid for by Mr. Jia. I do not find Mr. Wang to be a credible witness and do not accept his hearsay evidence to be credible.
- [54] By October 2015 Mr. Li had been unable to obtain any meaningful information from Mr. Piao about the whereabouts of the i8. On October 10, 2015, Mr. Li commenced this action.
- [55] Mr. Wang gave hearsay evidence that Mr. Jia paid RMB ¥621,279.99 to complete the customs clearance process for the i8 and obtain it from the dock storage. Further, Mr. Wang chose to disclaim personal knowledge of the fees allegedly paid by Mr. Jia or Tianjin Co. in relation to the i8. Mr. Jia did not testify as to the truth of these payments, and Mr. Wang could only present hearsay evidence. As I have found Mr. Wang not to be a credible witness, I am not satisfied with the reliability of this hearsay evidence and I find it to be inadmissible to establish that such payments were actually made.
- [56] After commencing this litigation, Mr. Li registered certificates of pending litigation against property owned by Mr. Piao. Mr. Li agreed to discharge this certificate of pending litigation in March 2017.
- [57] At an examination for discovery in April 2017 Mr. Piao confirmed that the money transferred by Mr. Li to Top Car, less the RMB ¥210,000 paid to Maxblue, remained Mr. Li's money.

- [58] In August 2017 Mr. Piao obtained a refinancing which included a mortgage in support registered against land owned by Mr. Piao. Mr. Piao described this as being an usurious loan, and described the lenders as "loan sharks". Mr. Piao stated he was forced to go to this lender because of the certificate of pending litigation registered against his property. At some point before trial, Mr. Piao and Top Car used the remaining funds received from Mr. Li under the Li Agreement to partially pay down this mortgage debt.
- [59] While Mr. Li argued that the documents of Top Car tendered at trial showed the funds of Mr. Li were used to purchase other luxury vehicles, I am not satisfied that such clear use of Mr. Li's funds was established on the evidence. Rather, I accept Mr. Piao's admission that he used the funds provided by Mr. Li to partially satisfy his own personal mortgage debt.

C. Unrelated business dealings between Mr. Piao and Mr. Wang

- [60] Beginning in 2013 Mr. Piao and Mr. Wang had a business relationship where Mr. Piao would supply Mr. Wang with luxury vehicles to be sold to customers in China.
- [61] At the same time that the problems with the i8 were emerging in July 2015, Mr. Piao and Mr. Wang were engaged in a dispute regarding the shipment of certain other vehicles. Mr. Wang had provided Mr. Piao with a letter of credit in the amount of USD \$100,000 to purchase certain vehicles and ship them to China. Mr. Wang was not satisfied that the vehicles sent by Mr. Piao met his specifications, as they were the wrong colour, and sought either the right vehicles or a return of his money.
- [62] In July 2015, Mr. Wang used the i8 as leverage in his dispute with Mr. Piao in relation to the other vehicles. For example, on July 29, 2015 Mr. Wang wrote the following messages to Mr. Piao:
- "If I can't get the Bill of Lading [referring to other transactions, not the i8] by Friday, I will contact JJ motor myself, arrange for the revocation of the Letter of Credit, and use i8 as a security to exchange for a refund of 100,000 USD commission. Once the money is received, i8 will be shipped back."
- "I8 was delivered to me by you. If you don't return my money to me, I have no choice but to assume that you want to use i8 to pay the debt."
- "I don't care about the i8 matter. I only care about my vehicle."
- [63] When Mr. Piao asked for the documents relating to the importation of the i8 and an explanation for the delay in the customs clearance, Mr. Wang said, "Nobody is going to touch i8 until my vehicles are nailed."
- [64] On August 3, 2015, when Mr. Piao wrote to Mr. Wang about the i8, he also wrote about a solution to the ongoing dispute on the other vehicles.

- [65] Mr. Wang replied to Mr. Piao on August 4, 2015, but only addressed some options for resolving the dispute regarding the other vehicles. He did not respond about the i8.
- [66] On August 5, 2015 Mr. Piao responded to Mr. Wang, and again asked for the i8 to be transitioned to complete the customs clearance process.
- [67] Mr. Wang testified that he used the RMB ¥210,000 Mr. Piao paid to Maxblue under the Tianjin Agreement to address what he considered to be his losses in relation to the agreement for the other vehicles.

III. Issues

[68] The following issues arise in this litigation:

- a) Did Mr. Piao and Top Car breach the Li Agreement?
- b) Were Mr. Piao and Top Car fiduciaries of Mr. Li, and did they breach their fiduciary duties?
- c) Is Mr. Wang liable to Mr. Li in conversion?
- d) Did Mr. Piao or Top Car breach the Tianjin Agreement?
- e) Is Mr. Wang liable under the Tianjin Agreement and, if so, did Mr. Wang breach the Tianjin Agreement?
- f) Did Mr. Li improperly file a certificate of pending litigation against Mr. Piao's property?
- g) Did Mr. Wang and Maxblue defraud Mr. Piao and Top Car in relation to the i8?
- h) Is Top Car entitled to maintain a certificate of pending litigation on Mr. Wang's property?

IV. Analysis

A. Did Mr. Piao and Top Car breach the Li Agreement?

- [69] There is no dispute between the parties that in the Li Agreement Mr. Piao agreed to pick up the i8 and take it through the customs clearance process in China, and that the cost of the service was to be USD \$116,645.22 (RMB ¥729,488.71).
- [70] Mr. Piao argued that the Li Agreement was an agency agreement which he completed faithfully and for which he received no consideration. He argued that if Mr. Li had a complaint, the complaint lay with Mr. Wang and not himself.
- [71] I find that the Li Agreement was not an agency agreement. While the agreement refers to the payment of funds being "agent fees", I find that the substance of the agreement is not one of agency.
- [72] Three elements must be present in a particular relationship for that relationship to be, in law, one of agency as opposed to some other kind of relationship. These are confirmed in *Travelbrands Inc. v. Bramalea Travel Centre Inc.*, 2018 ONSC 5090, and *Applewood Place Inc. v. Peel Condominium Corp.*, [2003] O.J. No. 3318 (S.C.J.) at para. 35:

- a) consent of both the principal and the agent,
 - b) authority given to the agent by the principal, allowing the former to affect the latter's legal position, and
 - c) the principal's control of the agent's actions.
- [73] I find that in substance the Li Agreement is an agreement wherein Mr. Li retained Mr. Piao to perform a particular service. It does not create an agency relationship whereby Mr. Li gave Mr. Piao the authority to affect his legal position.
- [74] I now consider whether Mr. Piao and Top Car breached the terms of the Li Agreement.
- [75] The Li Agreement was entered into between Mr. Piao and Mr. Li personally. However, it is clear that Mr. Piao directed his solely owned company, Top Car, to perform the Li Agreement:
- a) Mr. Piao is the president and sole director of Top Car,
 - b) Mr. Li negotiated the Li Agreement with Mr. Zhang, an employee of Top Car,
 - c) Top Car received the payment from Mr. Li which the Li Agreement stipulated was to be paid to Mr. Piao,
 - d) Top Car paid Maxblue RMB ¥210,000 for customs clearance fees for the i8 out of the funds paid by Mr. Li,
 - e) Top Car entered into the Tianjin Agreement with Tianjin Co. with respect to the customs clearance process for the i8 and under the Tianjin Agreement identified the i8 as belonging to a client of Top Car, and
 - f) Sometime after 2017 Top Car transferred the remaining funds received from Mr. Li to Mr. Piao's lender pursuant to a mortgage registered against Mr. Piao's property.
- [76] It is clear that Top Car was directed by Mr. Piao to assume performance of his obligations under the Li Agreement, and that Top Car did in fact assume some or all of Mr. Piao's obligations.
- [77] Top Car argues that it is not a party to the Li Agreement and therefore is not bound by it. I do not agree.
- [78] While ordinarily the common law doctrine of privity of contract would prohibit the imposition of obligations on a person who is not a party to the agreement, the Supreme Court of Canada has recognized a principled exception to this doctrine: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108. While this exception comes into play most commonly where a third party claims the benefit of a contract to which it is not a party, in certain circumstances liability may also be imposed on a third party.

- [79] In 1196303 Ontario Inc. v. Glen Grove Suites Inc., 2015 ONCA 580 at paras 94-104 the Ontario Court of Appeal reviewed the law and stated, with reference to the case of Seip & Associates Inc. v. Emmanuel Village Management Inc., 2009 ONCA 222:
- [103] To summarize, in Seip, the privity of contract rule was relaxed and liability imposed where the following three factors were present: 1) the parties to the initial agreement intended to impose an obligation on the third party; 2) the activities of the third party, upon which basis the parties sought to impose liability, were within the scope envisaged under the agreement and 3) the third party had knowledge of the provision assigning it liability and, by its conduct, the third party assumed the agreement. The first two criteria mirror the requirements of Fraser River, supra. Arguably, all three criteria are present in this case.
- [80] I find that both Mr. Li and Mr. Piao knew that Top Car would be involved in the performance of the Li Agreement, as confirmed by the payment by Mr. Li to Top Car. Top Car performed obligations imposed on Mr. Piao under the agreement and, by its conduct, assumed substantially all of the agreement. As such, I find Mr. Piao and Top Car are jointly liable in the performance of the Li Agreement.
- [81] Mr. Piao argues that the Li Agreement did not assert a deadline by which the i8 was to be cleared through customs and received by Ms. Zhu and that Mr. Li breached the Li Agreement by commencing this action before the Li Agreement could be performed. I do not agree.
- [82] Where no specific time is stipulated for the performance of a contractual obligation, the Court will infer that obligation is to be performed within a reasonable time. What constitutes a reasonable time is a question of fact that depends upon the nature of the contract and the circumstances of the case: Illidge v. Sona Resources Corporation, 2018 BCCA 368 at para. 61.
- [83] Mr. Li testified that he was told by Mr. Zhang that it would take about one month to ship the i8 to China, and another 2-3 months for the i8 to clear customs. Mr. Li testified that he expected the transaction to be completed between 3-6 months after he released the i8 to Mr. Piao. I accept the evidence of Mr. Li. Mr. Li released the i8 to Mr. Piao and Top Car in early April 2015. The i8 arrived in China in mid-May 2015. The i8 should have cleared customs in July 2015. This is consistent with the text messages between Mr. Piao and Mr. Wang, where the dispute between these men regarding delivery reached an angry height at the end of July.
- [84] In the circumstances of this case, including the representation made to Mr. Li at the time the Li Agreement was executed, and the delivery expectations of Mr. Piao as articulated in text messages with Mr. Wang, I find that a reasonable time for completion of the Li Agreement was the end of July 2015. Mr. Piao and Top Car failed to complete the Li Agreement in a timely way and Mr. Li did not breach the Li Agreement by commencing this action.

- [85] Top Car received full consideration from Mr. Li under the Li Agreement in the amount of USD \$116,645.22 (RMB ¥729,488.71). Mr. Piao or Top Car received the i8 from Mr. Li and shipped the i8 to China using yet another company owned by Mr. Piao, namely Green New Material Inc.
- [86] Mr. Piao and Top Car failed to deliver the i8 through the customs clearance process in China for Mr. Li. Three years later, Mr. Piao continues to have no knowledge of the whereabouts of the i8.
- [87] I find that Mr. Piao and Top Car fundamentally breached the Li Agreement. Failure to deliver the i8 through Chinese customs within a reasonable time went to the very root of the contract, thereby depriving Mr. Li of the whole benefit of the Li Agreement: *Karimi v. Gu*, 2016 BCSC 1060 at para. 190.

[88] On October 10, 2015, Mr. Li accepted the breach by bringing this action against Mr. Piao.

B. Were Mr. Piao and Top Car fiduciaries of Mr. Li and did they breach their fiduciary duties?

[89] A fiduciary relationship arises when the following conditions are met:

- a) the fiduciary has scope for the exercise of some discretion or power,
- b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests,
- c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power, and
- d) an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.

Lac Minerals Ltd. v International Corona Resources Ltd., [1989] 2 S.C.R. 574 at 646; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at paras. 121-123.

[90] Under the terms of the Li Agreement, Mr. Li "entrusted" the i8 to Mr. Piao, and Mr. Piao had full responsibility to deliver the i8 to China intact and without damage, with complete documentation and ready for the normal application of licensing. Mr. Piao was also to provide for customs declarations and customs clearance. Further, I find that the undertaking given by Mr. Piao to deliver the i8 "intact and without damage", his agreement to indemnify Mr. Li for any accidental loss, and his assurances given to Mr. Li throughout, satisfy the requirement that Mr. Piao undertook to act in Mr. Li's best interests in relation to the i8.

[91] Mr. Piao had complete discretion as to how his obligations under the Li Agreement would be performed. Mr. Piao engaged Top Car in the performance of his obligations, as discussed above, and as the directing mind of Top Car he had the unilateral power to affect Mr. Li's legal and practical interest in the i8 itself and in its delivery to China. Because Mr. Li

transferred the i8 to Mr. Piao and Top Car, Mr. Li was vulnerable and at the mercy of the decisions of Mr. Piao both personally and as the directing mind of Top Car. I find that all of the conditions of a fiduciary relationship were met under the Li Agreement, and that both Mr. Piao and Top were fiduciaries of Mr. Li in relation to the i8.

[92] In the exercise of their discretion Mr. Piao and Top Car made the following decisions which impacted Mr. Li:

- a) Mr. Piao retained Mr. Wang to assist in the performance of his obligations under the Li Agreement without taking steps to formalize an agreement with Mr. Wang that would protect Mr. Li's interest in the i8,
- b) without investigating whether and why such a change was actually necessary, Mr. Piao advised Mr. Li that the consignee must be changed to a person named Mr. Jia, who was unknown to both Mr. Piao and Mr. Li,
- c) Mr. Piao changed the consignee of the i8 to Mr. Jia without any agreement in place between Mr. Jia and Mr. Piao,
- d) Top Car entered into an agreement with Tianjin Co. after the i8 had arrived in Tianjin which required a significant prepayment fee, and
- e) Top Car refused to pay the prepayment fee pursuant to the Tianjin Agreement.

[93] All of these discretionary decisions by Mr. Piao and Top Car put Mr. Li's legal and practical interests in the i8 in jeopardy. Mr. Piao and Top Car had a fiduciary obligation to ensure that the steps taken within their discretion protected the i8. Mr. Piao and Top Car failed to deliver the i8 to Mr. Li. Mr. Piao and Top Car failed in their fiduciary obligation and allowed the i8 to be transferred to Mr. Jia with no enforceable protections for Mr. Li.

[94] Mr. Li provided Top Car with USD \$116,645.22 (RMB ¥729,488.71) pursuant to the terms of the Li Agreement. Under Mr. Piao's direction, Top Car provided Mr. Wang, through Maxblue, with RMB ¥210,000 (CAD \$42,546) as a customs clearance fee. In addition, Mr. Piao, through one of his companies, paid USD \$2,937.07 to ship the i8 to China.

[95] The amounts spent by Mr. Piao in relation to the i8 represent only a fraction of the amount paid by Mr. Li. On discovery, Mr. Piao agreed that the remaining funds were Mr. Li's money, being held by Mr. Piao for the benefit of Mr. Li in the completion of the Li Agreement. However, at trial Mr. Piao testified that he took Mr. Li's funds and used the money to pay loan sharks, as discussed above.

[96] A breach of fiduciary duty may traditionally give rise to a remedial constructive trust. Four conditions in the determination of remedial constructive trust were identified in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 45:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[97] Mr. Piao and Top Car owed a fiduciary duty to Mr. Li arising from the terms of the Li Agreement. Following his breach of the Li Agreement, Mr. Piao and Top Car retained the funds which had been provided by Mr. Li. In the face of his fundamental breach of the Li Agreement, Mr. Piao had no legal interest in the funds and the funds remained the property of Mr. Li, as Mr. Piao himself acknowledged on discovery in 2017. Finally, there is a real concern that Mr. Piao may not have the financial means for Mr. Li to collect on a damages award. I consider collectability to be a legitimate reason in this case: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357 at para. 35. I find that a remedial constructive trust does arise in this case with respect to the remaining funds paid under the Li Agreement.

[98] I find that Mr. Piao and Top Car took Mr. Li's funds, which were provided as payment for completing the customs clearance process in China for the i8, and converted these funds for Mr. Piao's own use, namely to pay down his mortgage debt, all in breach of their contractual and fiduciary obligations. I find that these monies were impressed with a constructive trust in favour of Mr. Li.

C. Is Mr. Wang liable to Mr. Li in conversion?

[99] Mr. Li argues that Mr. Wang has wrongfully converted the i8 to his own use by receiving the i8 and refusing to return it to either Mr. Piao or Mr. Li.

[100] The tort of conversion involves a wrongful taking or exercise of dominion over goods that is inconsistent with the owner's right of possession: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 para. 31; *R.F. Fry & Associates (Pacific) Ltd. v. Reimer*, [1993] B.C.J. No. 779 (C.A.) at para. 23.

[101] The elements of the tort of conversion are summarized by the court in *Ast v. Mikolas*, 2010 BCSC 127 at para. 126:

- a) a wrongful act by the defendant involving the goods of the plaintiff,
- b) the act must consist of handling, disposing, or destroying the goods, and

- c) the defendant's actions must have either the effect or intention of interfering with, or denying, the plaintiff's right or title to the goods.

[102] Under the Li Agreement, Mr. Li did not give up his ownership right to the i8. Once the i8 landed in China, however, the right to receive the i8 had been designated to Mr. Jia, under the control of Mr. Wang.

[103] Mr. Wang confirmed in evidence that he exercised full control over the i8 in China. He also confirmed that the i8 remains in China and has never been returned to Mr. Li or Mr. Piao.

[104] While Mr. Wang testified that the i8 was held by Mr. Jia or Tianjin Co., I find that, at all times after the consignee was changed to Mr. Jia, Mr. Wang retained control over the i8 and had the power to direct the return of the i8 at any time.

[105] In July 2015 Mr. Wang improperly used the i8 as leverage in an attempt to force Mr. Piao to resolve an unrelated business dispute. Mr. Wang refused to return the i8 to Mr. Piao, as requested, until the unrelated business dispute was resolved to the satisfaction of Mr. Wang. Mr. Wang resisted returning the i8 to Mr. Piao or Mr. Li notwithstanding numerous communications and requests for him to do so. As will be discussed below, I find that Mr. Wang, and those agents working on his behalf including Tianjin Co., had no legal right to retain the i8 following the demand by Mr. Piao.

[106] Because Mr. Wang requested the consignee to be changed to Mr. Jia, who worked under the direction of Mr. Wang, Mr. Wang directly interfered with the ability of Mr. Li to regain title to the i8. This interference has continued to the present and Mr. Wang has retained the i8 to his own benefit.

[107] I find Mr. Wang liable to Mr. Li in conversion as a result of his wrongful retention of the i8 and his failure to return the i8 to either of Mr. Piao or Mr. Li.

D. Did Mr. Piao or Top Car breach the Tianjin Agreement?

[108] On its face the Tianjin Agreement included the following material terms:

- a) Tianjin Co. is responsible for clearing the i8 through customs and other matters related to the i8,
- b) Top Car is responsible for paying all related costs,
- c) An acknowledgement that RMB ¥210,000 had already been paid by Top Car for the customs clearance permit fee, customs clearance service fee, other miscellaneous expenses, and the fee for the permit provided by the "foreign client",
- d) the only fee that was unpaid was the customs duty,
- e) Top Car agreed to pay RMB ¥700,000 to Tianjin Co. as a prepayment for the customs duty,

- f) Once all customs procedures were complete, a customs duty form generated by the customs agency would be provided, and any necessary adjustments to the payment amount would be made. If the prepayment was in excess of the actual customs duty required, the difference would be refunded to Top Car. If the prepayment was insufficient, Top Car would pay the difference.
 - g) If the customs clearance was not completed as scheduled for any reason after Top Car made the RMB ¥700,000 prepayment for customs duty:
 - i. Tianjin Co. would ship the i8 back to Canada, refund Top Car the RMB ¥700,000 prepayment minus expenses such as harbor demurrage fee and storage fee, and refund Top Car the RMB ¥210,000 custom clearance fee and service fee.
 - ii. If the i8 needed to be shipped back to Canada, Top Car would be responsible for freight. If Tianjin Co. was unable to ship the i8 back to Canada, Tianjin Co. must transfer the vehicle price of CAD \$150,000 to Top Car.
 - h) If Top Car fails to transfer the "customs duty of 700,000 prepaid" to Tianjin Co. in a timely way, Top Car "will be responsible for the consequences arising therefrom."
 - i) Tianjin Co. must report on the progress of customs clearance in a timely manner.
- [109] Mr. Piao argued that the Tianjin Agreement did not require prepayment of RMB ¥700,000, and that such payment was only required upon proof of the actual customs clearance fees paid. Mr. Piao relied on the clause of the agreement which stated that Tianjin Co. must report on the progress of the customs clearance in a timely way to support this argument.
- [110] I cannot accept Mr. Piao's argument. The Tianjin Agreement clearly identified the payment of RMB ¥700,000 as a prepayment, which amount would be adjusted once the customs clearance process had completed. The Tianjin Agreement did not require Tianjin Co. to provide proof of custom clearance fees or charges prior to the prepayment being made.
- [111] While I find that the Tianjin Agreement required a prepayment from Top Car, which Top Car failed to provide, I also find that Top Car was entitled to cancel the Tianjin Agreement and did so at the end of July 2015. As such, there was no breach of agreement by Top Car which would give rise to relief in this case. The cancellation of the Tianjin Agreement and its impact on the parties will be discussed further below.

E. Is Mr. Wang liable under the Tianjin Agreement and, if so, did Mr. Wang breach the Tianjin Agreement?

1. Liability of Mr. Wang

- [112] Mr. Wang was not a party to the Tianjin Agreement. Mr. Wang testified at trial that he was not a director or shareholder of Tianjin Co. and that he had no control over the company. No corporate documents relating to Tianjin Co. were tendered at trial to confirm Mr. Wang's evidence. Mr. Wang also testified that he had no control over Mr. Jia. I find that Mr. Wang's testimony on these points is not reliable and is inconsistent with the whole of the evidence.
- [113] A finding of apparent authority may be made where some representation, through words or conduct, on the part of the principal leads a third party to believe that the agent has the authority in question. This authority is "a product of the principal's outward conduct with respect to third parties, not of the principal's internal agreements or arrangements with its agent": *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 at para. 28. Where an agent has apparent authority, the principal is estopped from denying that such a representation of authority was made and is bound by the agent's actions.
- [114] I find that Tianjin Co. and Mr. Jia were, at all times, agents of Mr. Wang in relation to the i8 for the following reasons:
- a) Mr. Wang provided Mr. Piao with an estimate and offer to take the i8 through the customs clearance process,
 - b) Prior to the i8 being shipped to China, Mr. Wang and Mr. Piao had an agreement that Mr. Wang would assume responsibility for taking the i8 through the customs clearance process in China,
 - c) Mr. Piao paid the customs clearance fee of RMB ¥210,000 to Mr. Wang's company, Maxblue,
 - d) Mr. Wang demanded the change of the consignee to Mr. Jia,
 - e) Mr. Wang represented to Mr. Piao that he retained control of the i8 in China,
 - f) in relation to the Tianjin Agreement, Mr. Piao did not email directly with Mr. Jia and all communication flowed through Mr. Wang,
 - g) Mr. Jia was not involved in the drafting of the Tianjin Agreement, and was directed by Mr. Wang to execute the document on behalf of Tianjin Co.,
 - h) in the Tianjin Agreement, the parties acknowledge payment of the RMB ¥210,000 by Top Car even though that payment had been made to Mr. Wang's company Maxblue,
 - i) in July 2015, based on Mr. Wang's conduct, Mr. Piao understood he was dealing with a company controlled by Mr. Wang when he dealt with Tianjin Co., and
 - j) Mr. Wang represented himself to Mr. Piao to control Mr. Jia and have the power to direct Mr. Jia's actions in relation to the i8.

[115] I find that Mr. Wang led Mr. Piao to believe that Tianjin Co. was an agent under his direction and control. I find that Mr. Wang's initiative and actions in drafting the Tianjin Agreement for execution by Top Car and Tianjin Co., after the i8 had arrived to the port of Tianjin, led Mr. Piao to believe that Mr. Wang authorized Tianjin Co. to act as agent for Mr. Wang.

[116] I find that Tianjin Co. operated as an agent for Mr. Wang and that Mr. Wang directed Tianjin Co. in the performance of the Tianjin Agreement. As such, all actions taken by Mr. Jia or Tianjin Co. were actions which bound Mr. Wang as principal. To the extent Tianjin Co. breached the Tianjin Agreement, Mr. Wang remains responsible for that breach as principal.

2. Breach of the Tianjin Agreement

[117] Because Mr. Piao failed to make the prepayment, Tianjin Co. was not obligated to process the i8 through the customs clearance process.

[118] Mr. Wang argues that Tianjin Co. had no obligation to deal with the i8 in the face of Mr. Piao's failure to make the contractual prepayment of RMB ¥700,000. In essence, Mr. Wang takes the position that Tianjin Co. was entitled to retain the i8 until Top Car made the prepayment. I do not accept this argument.

[119] Mr. Piao requested the return of the i8 once it became clear that there was a dispute between the parties as to the prepayment obligation in July 2015.

[120] Mr. Wang argued that Top Car's failure to make the prepayment was a fundamental breach and rendered Top Car liable "for any consequences arising therefrom", relying on the following language in the Tianjin Agreement:

If Party A [Top Car] fails to make a payment in a timely way, Party A [Top Car] will be solely responsible for any consequences arising therefrom.

[121] Mr. Wang argued that as a result of Top Car's fundamental breach, Tianjin Co. was entitled to retain the i8. Mr. Wang argues that if and when Top Car pays the expenses incurred by Tianjin Co. in having the i8 cleared through the customs clearance process and released from storage, the i8 will be released to Top Car and Mr. Piao.

[122] The Tianjin Agreement is poorly worded. It is not clear what "any consequences" is intended to mean. I cannot accept that it is intended to mean that Tianjin Co. is entitled to retain the i8 indefinitely, and then charge Top Car for any expenses incurred indefinitely. I find that the consequences referred to in this clause include such things as additional storage fees or other costs associated with any delay by Top Car in making the prepayment. However, this clause does not permit Tianjin Co. to refuse to return the i8 as demanded by Top Car.

[123] The Tianjin Agreement addressed a procedure to be followed if the customs clearance process was not completed. The procedure is described as follows:

If customs clearance is not completed as scheduled for any reason after Party A [Top Car] makes a prepayment of 700,00.00 for customs duty, Party B [Tianjin Co.] will be responsible for shipping Party A's vehicle back to Canada. Party B must refund RMB700,000.00 prepaid by Party A as customs duty minus expenses such as the container harbour demurrage fee and storage fee. This amount should be converted to US dollars based on the exchange rate effective at the time Party A makes payment Party B. The US dollars should be paid to the account designated by Party A. If the vehicle needs to be shipped back to Canada, Party A will be responsible for freight. Party B will be responsible for contacting the forwarder.

- [124] In effect, the Tianjin Agreement set out a procedure whereby the parties would be put back in the position they were in originally, less specified expenses. This includes a return to Mr. Piao and Top Car of the RMB ¥700,000 and RMB ¥210,000 paid by Top Car. Tianjin Co. would be reimbursed for its costs incurred.
- [125] Days after signing the Tianjin Agreement, Mr. Piao demanded a return of the i8 along with repayment of the RMB ¥210,000. At that point, I find that Tianjin Co. was obligated to return the i8 and the monies already paid, less expenses such as demurrage and storage. While the clause of the Tianjin Agreement referred to above refers to the non-completion of customs clearance after the prepayment has been made, I do not find the prepayment to be material to the operation of this clause. I find that this clause, in essence, is intended to set out the terms of cancellation of the agreement if the clearance process cannot be completed. It required Top Car to compensate Tianjin Co. for any expenses incurred up to the date of cancellation, and required Tianjin Co. to return the i8 and any remaining funds to Top Car. I find these terms of cancellation were applicable on the facts as they arose at the end of July 2015.
- [126] Instead of returning the i8 and the funds as required by the Tianjin Agreement, Mr. Wang and Tianjin Co. refused to return the i8 until his dispute with Mr. Piao over an unrelated transaction was resolved.
- [127] I find that in refusing to return the i8 when requested by Top Car on or about July 29, 2015, Mr. Wang, through his agent Tianjin Co., breached the Tianjin Agreement.

F. Did Mr. Li improperly file a certificate of pending litigation against Mr. Piao's property?

- [128] Mr. Piao filed a counterclaim against Mr. Li and argued that Mr. Li improperly registered a certificate of pending litigation against his property, which resulted in Mr. Piao becoming unable to obtain a regular mortgage. As a result, Mr. Piao says he had to go to "loan sharks" to obtain usurious loans.
- [129] To support a certificate of pending litigation, the plaintiff must have a claim to an interest in land. There must be a sufficient connection between the misappropriated funds and the property to support a claim for a remedial constructive trust that would sustain a certificate of pending litigation: *Drucker, Inc. v. Hong*, 2011 BCSC 905 at para. 39.

[130] In this action Mr. Li registered the certificate of pending litigation relying on his claims for tracing, unjust enrichment, and constructive trust. Such claims to property support a certificate of pending litigation.

[131] If the certificate of pending litigation created hardship and inconvenience for Mr. Piao before trial, Mr. Piao could have applied to court to have it released or cancelled under the Land Title Act, R.S.B.C. 1996, c. 250. He failed to do so.

[132] Mr. Piao failed to set out any clear legal basis for his counterclaim in relation to the certificate of pending litigation. I am not satisfied that Mr. Piao has established any wrongdoing by Mr. Li in filing the certificate of pending litigation against his property. Further, I find that a certificate of pending litigation is appropriate for Mr. Li to file against the property of Mr. Piao given Mr. Piao's use of Mr. Li's funds in partial payment of mortgage obligations registered against Mr. Piao's property.

G. Did Mr. Wang and Maxblue defraud Mr. Piao and Top Car in relation to the i8?

[133] While Mr. Piao and Top Car sought an order declaring that Mr. Wang and Maxblue committed a fraud against the plaintiff as well as Mr. Piao and Top Car, the particulars of this claim of fraud were not adequately pleaded. Further, final argument shed no additional light on this alleged fraud.

[134] Mr. Wang and Maxblue submit that fraud is a very serious allegation and to be successful, the claimant must establish a high probability that the fraud occurred. Mr. Piao and Top Car have not met the high burden on them in proving any allegations of fraud.

[135] I make no findings of fraud on the part of Mr. Wang or Maxblue.

H. Is Top Car entitled to maintain a certificate of pending litigation on Mr. Wang's property?

[136] Top Car registered a certificate of pending litigation against property in the name of Mr. Wang, and in the name of two other parties, namely Hao Qu and Jie Jia. At the close of evidence I discharged the certificates of pending litigation against the properties owned by Hao Qu and Jie Jia.

[137] Top Car produced no evidence at trial which would support a finding that any of the RMB ¥210,000 paid by Top Car to Maxblue was used to purchase or improve Mr. Wang's property. In the absence of any such evidence, I must, and do, discharge the certificate of pending litigation registered by Top Car against the property owned by Mr. Wang.

V. Conclusion

A. Damages - Breach of the Li Agreement

[138] Mr. Li is entitled to damages flowing from the breach of the Li Agreement by Mr. Piao and Top Car. Mr. Li is entitled to be placed in the same position he would have been in if the Li Agreement had been performed, to the greatest degree possible. If the Li Agreement had

been performed he would have had possession of the i8 in China since 2015, and would have received the value of his payment for shipping and customs clearance. The i8 is no longer available to the parties. Therefore, because Mr. Li has received nothing from his payment of the required fees under the Li Agreement, and has lost the i8, Mr. Li's damages are measured by the monies paid under the Li Agreement, and the value of the i8.

[139] Mr. Piao and Top Car are jointly liable to Mr. Li in the amount of CAD \$145,288.62, which represents the value in Canadian dollars of the payment amount described in the Li Agreement.

[140] I have found Mr. Wang liable in conversion in relation to the i8, and Mr. Piao and Top Car liable for breach of contract and breach of fiduciary duty in relation to the i8. As such, Mr. Wang, Mr. Piao and Top Car are jointly liable to Mr. Li in the amount of CAD \$183,780.35, which represents the value of the i8, inclusive of taxes paid, in 2015.

B. Damages - Breach of the Tianjin Agreement

[141] I found Mr. Wang, through his agent Tianjin Co., in breach of the Tianjin Agreement. I find that Tianjin Co. was obligated to return the i8 and RMB ¥210,000, less expenses, to Top Car under the terms of the Tianjin Agreement, and failed to do so. No expenses incurred after July 29, 2015, when the demand by Mr. Piao was made, are recoverable against Mr. Piao, Top Car, or Mr. Li. I further find that Mr. Wang has not proven any expenses were incurred prior to July 29, 2015.

[142] As such, I find that Mr. Wang is liable to reimburse Top Car the full RMB ¥210,000.

[143] While I have found Mr. Piao, Top Car and Mr. Wang are jointly liable to Mr. Li for the value of the i8, as between Top Car and Mr. Wang, I find that Mr. Wang is liable to Top Car for the full value of the i8.

C. Tracing

[144] I found that Mr. Piao converted the remaining funds under the Li Agreement to his own use, and that such funds are impressed with a constructive trust in favour of Mr. Li. A tracing order enables a claimant to identify their original property and substitute traceable proceeds for their original property as the subject matter of their claim: *Eagle Ridge Animal & Bird Hospital v. Sharpe*, 2009 BCSC 1486 at para. 93. A claimant is entitled to a tracing order when they can establish a proprietary right or interest to the property or proceeds: *Tracy* at paras. 31, 41. The constructive trust awards a right in property: *Lac Minerals* at 678.

[145] I consider a tracing order is appropriate. Mr. Li is entitled to a tracing order as against Mr. Piao and Top Car.

D. Injunction and declaration

[146] Mr. Li also sought an injunction and declaration preserving the i8 and restraining the third parties from disposing of the i8. The evidence regarding the present status of the i8 was inconclusive. In light of the incomplete evidence regarding the i8 at present, and the other orders I have made, I decline to order the preservation of the i8.

E. Certificate of pending litigation

[147] The certificate of pending litigation registered by Top Car against Mr. Wang's property is discharged.

F. Costs

[148] The parties have leave to make submissions as to costs within 45 days of this decision.

"Baker J."

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