
CANADA / JUDGMENT

Luu v. Wang

2010 BCSC 8

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 8 Luu v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Luu v. Wang,

2010 BCSC 8

Date: 20100108

Docket: No. S072661

Registry: Vancouver

Between:

Derrick Luu

Plaintiff

And:

Xianping Wang, Heping Wang, Lily Wang and Lily Wang Trust

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff:

Katherine M. Wellburn

& Kristina Koller

Counsel for the Defendant, Lily Wang:

Peter J. Reardon

& Katherine Reilly

Place and Date of Hearing:

Vancouver, B.C.

October 7 and 8, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 08, 2010

INTRODUCTION

- [1] The plaintiff Derrick Luu applies pursuant to Rule 56 of the Rules of Court for an order that the defendant Lily Wang be committed or fined, or both, for her contempt of court for refusing or neglecting to obey four orders of this Court.
- [2] This is the second contempt proceeding brought by the plaintiff against the defendant Lily Wang. On December 17, 2008 I found that the defendant Lily Wang had committed contempt of court by selling or transferring shares in Sinovac Biotech Ltd. ("Sinovac"), in breach of the order of Mr. Justice Davies pronounced in this action on June 12, 2007 (the "June 12 Order"), which restrained her from selling, pledging, transferring, diminishing or otherwise disposing of or dealing with 1.98 million shares in Sinovac until the final disposition of this action, or further order of the court.

The Plaintiff's Application

- [3] On this application, Mr. Luu alleges that the defendant Lily Wang breached the earlier ex parte order of Mr. Justice Davies made on April 20, 2007 (the "April 20 Order"), which restrained each of the defendants from selling, transferring or otherwise dealing with shares in Sinovac.
- [4] The plaintiff also maintains that the defendant Lily Wang has knowingly contravened three orders I pronounced on October 8, 2008, December 17, 2008, and March 27, 2009 respectively, each of which required Ms. Wang to produce documents, or to deliver lists of documents and affidavits of documents relating either to her dealings in Sinovac shares, or to the use she made of the proceeds of her sales of Sinovac shares.
- [5] With respect to penalty, the plaintiff asserts that Lily Wang's breaches of each of these orders were deliberate. Mr. Luu submits that Ms. Wang's repeated disobedience of orders made in this action constitutes a serious affront to the Court. The plaintiff submits that because Ms. Wang has previously been found in contempt, the only sanction likely to bring home to her the importance of obedience to orders of this Court is committal to prison. Counsel for Mr.

Luu submits that the appropriate punishment in all of the circumstances of this case would be imprisonment for a term of 45 days.

- [6] The plaintiff also applies for an order that the statement of defence of the defendant Lily Wang be struck and that judgment be entered against her as a result of her failure or refusal to obey these Orders. In addition, Mr. Luu seeks special costs against the defendant Lily Wang.

Position of the Defendant Lily Wang

- [7] The defendant Lily Wang admits that she sold Sinovac shares after Mr. Justice Davies made the April 20 Order, but contends that she did not understand its terms when she sold those shares. Ms. Wang submits that her breach of the April 20 Order was inadvertent. With respect to the three orders relating to document production, the defendant Lily Wang argues that she has done her best to comply with those orders. Counsel for Ms. Wang submits that his client has apologized to the Court for any breach of the four orders in issue, and that if on this application there is any finding of contempt against his client, punishment should be minimal.
- [8] Mr. Reardon makes the point that my previous finding of contempt against his client related to Ms. Wang's breach of the June 12 Order, and therefore involved events subsequent to Ms. Wang's breach of the April 20 Order. Counsel for Ms. Wang submits that this is not a case where a contemnor, after having been found in contempt of court, has then wilfully committed further contempts. The defendant says that an order for committal would be an entirely disproportionate sanction, and that any failure on her part to comply with orders of this Court is not so egregious as to warrant the striking of her statement of defence.

BACKGROUND

- [9] It is necessary to briefly set out the background to this application.
- [10] In this action the plaintiff claims against the defendants Lily Wang, Heping Wang, and Xianping Wang for debt and breach of contract. Mr. Luu claims against the defendants jointly in an amount equivalent to \$1,980,000 U.S. funds. The plaintiff alleges that on or about December 30, 2004 he made an oral agreement with the defendants by which he agreed to pay the sum of \$1,980,000 to Sinovac, a company listed on the American Stock Exchange, in payment of debts owed to Sinovac by the defendants Lily Wang and Heping Wang, and by a company controlled by the defendant Xianping Wang. The plaintiff claims that the defendants agreed to repay the sum of \$1,980,000 U.S. funds on or before December 30, 2005 and to grant the plaintiff 1,980,000 shares of Sinovac as collateral security for repayment of their debt to the plaintiff. In his amended statement of claim, the plaintiff pleads that the oral agreement was reduced to writing on September 30, 2005 and was executed by the plaintiff and each of the defendants, Heping Wang, Lily Wang, and Xianping Wang. The plaintiff also claims against the defendant Xianping Wang a debt for an additional

\$1,460,000 U.S. funds. The plaintiff says the defendants failed or refused to pay the amounts he claims.

- [11] The defendants deny that they owe the amounts claimed and have raised defences which put in issue many of the transactions said to give rise to the debt. These are transactions among the parties, Sinovac, and various privately held Chinese corporations in which the parties have invested.
- [12] The April 20 Order was a Mareva injunction. Paragraph 1 of the April 20 Order provided:
- The Defendants, their agents, servants or employees are hereby restrained from selling, mortgaging, pledging, transferring, assigning, diminishing or otherwise disposing of or dealing with any of the shares in Sinovac Biotech Ltd, situated in British Columbia or wherever situated, whether those assets are held directly or indirectly by him or her through any company trust, partnership or other entity beneficially owned or controlled by him or her until the final disposition of this action or until further Order of this Court.
- [13] Paragraph 2 of the April 20 Order required that all shares of Sinovac held in escrow by Devlin Jensen LLP for the defendants be held by that firm until further order of the court.
- [14] On the afternoon of April 24, 2007 the defendant Lily Wang was served in California, where she resides, with the April 20 Order together with copies of the plaintiff's materials in support of his Mareva injunction application, and the writ and statement of claim in this action.
- [15] The defendant Lily Wang had authority from her brother Heping Wang to trade securities, including Sinovac shares, held in his accounts with both Wachovia Securities and Fidelity Investments.
- [16] Ms. Wang admits that on April 25 and 26, 2007 she sold 475,000 Sinovac shares held in Heping Wang's Fidelity Securities account, and that the proceeds of those sales totalled \$1,472,140 U.S. funds.
- [17] On May 1, 2007, Ms. Wang transferred \$200,000 U.S. funds from Heping Wang's Fidelity Securities account to her Citibank account, and on May 2, 2007, she transferred a further \$1,000,000 U.S. funds to her Citibank account. The funds that Ms. Wang transferred on May 1 and 2, 2007 were proceeds of her sale of her brother's 475,000 Sinovac shares. On the same date, the defendant Lily Wang withdrew \$1,000,000 U.S. funds from her Citibank account, and transferred those funds to the account of a company she controlled, San-Ly International Investments Inc. ("San-Ly").

- [18] On June 2, 2007 Ms. Wang swore an affidavit in support of her application to vary the April 20 Order. In her affidavit, the defendant Lily Wang deposed that in order to raise sufficient funds to pay the debt owed by Heping Wang to Sinovac, she needed to sell some of her Sinovac shares, but was unable to do so as a result of the April 20 Order. Ms. Wang did not disclose that she had sold 475,000 Sinovac shares from Heping Wang's account after she had been served with the April 20 Order.
- [19] On June 12, 2007 on Ms. Wang's application, Mr. Justice Davies varied the April 20 Order. Paragraph 1(b) of the June 12 Order provided that "the defendant Lily Wang, her agents, servants or employees are hereby restrained from selling, mortgaging, pledging, transferring, assigning, diminishing, or otherwise disposing of or dealing with 1.98 million shares of Sinovac Biotech Ltd. situated in British Columbia, or wherever situated, until the final disposition of this action or until further order of this Court".
- [20] The June 12 Order continued to restrain the defendants Heping Wang and Xianping Wang from selling, transferring or otherwise dealing in any Sinovac shares. That Order also provided for the delivery of 1.5 million shares in Sinovac issued to Heping Wang and then held in escrow by Devlin Jensen LLP to Lang Michener LLP, the solicitors for the defendants Heping Wang and Lily Wang, to be held in trust until further order of the court.
- [21] On October 7, 2007 Ms. Wang transferred 200,000 Sinovac shares from her account to the Fidelity Securities account of her son, Mac Wu. That transaction did not reduce her shareholdings in Sinovac below 1.98 million shares.
- [22] Between November 7, 2007 and September 2008, the defendant Lily Wang made various sales or transfers of her shares that did reduce her Sinovac shareholdings below the 1.98 million shares she was required to hold pursuant to the June 12 Order. The fact that Ms. Wang had sold or transferred shares in breach of the June 12 Order only came to light as a result of persistent inquiries by plaintiff's counsel. After the discovery of her contravention of the June 12 Order, the defendant Lily Wang purchased sufficient Sinovac shares to restore her shareholdings to 1.98 million shares by September 29, 2008.
- [23] I found that Ms. Wang, by transferring or selling shares in quantities that reduced her shareholdings below the level required, intentionally committed acts in breach of the June 12 Order, and that her conduct constituted a serious contempt. By Reasons for Judgment indexed as *Luu v. Wang*, 2009 BCSC 1786, I determined that the appropriate punishment for that contempt was a fine in the amount of \$50,000. I also ordered the defendant Lily Wang to pay special costs to the plaintiff.
- [24] In addition to selling or transferring Sinovac shares from her own account, Ms. Wang also engaged in further transactions involving Sinovac shares held in the defendant Heping Wang's accounts.

- [25] On October 3 and 6, 2008 Ms. Wang transferred a total of 200,000 Sinovac shares from Heping Wang's account to her account. On December 4, 2008, Ms. Wang transferred the remaining 300,000 Sinovac shares held in Heping Wang's account to her account. Between December 5, 2008 and March 1, 2009 Ms. Wang sold all of the 500,000 Sinovac shares she had transferred from Heping Wang's account.
- [26] Over the two and a half years since Mr. Justice Davies pronounced the June 12 Order, the plaintiff has brought numerous applications resulting in orders for the further discovery of documents from the defendants Lily Wang and Heping Wang, compelling their answers to interrogatories, and requiring those defendants to deliver affidavits of documents. Three orders made by this court on the application of the plaintiff are the subject of this contempt proceeding, together with the April 20 Order.
- [27] On October 8, 2008, I made an order (the "October 8 Order") requiring the defendant Lily Wang to deliver by October 24, 2008 all documents relating to the sale, transfer or other disposition of Sinovac shares by her, or by companies or entities controlled by her, since June 12, 2007. The October 8 Order permitted Ms. Wang to redact entries in those documents relating to shares in companies other than Sinovac.
- [28] On December 17, 2008 I ordered the defendant Lily Wang to deliver a supplemental list of documents and an affidavit of documents to the solicitors for the plaintiff by January 18, 2009 (the "December 17 Order").
- [29] On January 18, 2008 the defendant Lily Wang delivered her affidavit of documents.
- [30] Following the production by the solicitors for the defendants Lily Wang and Heping Wang of documents relating to accounts of Lily Wang and Heping Wang with Wachovia Securities in which those defendants held Sinovac shares, the plaintiff applied for further orders for document production.
- [31] On March 27, 2009 I ordered that each of the defendants Lily Wang and Heping Wang deliver affidavits stating whether certain documents or classes of documents had been in their possession, control or power, and if those documents or classes of documents were no longer in their possession or control or power, stating when they ceased to be in their possession, and what had become of those documents (the "March 27 Order"). The documents in issue included all documents showing the use made by each defendant of all proceeds of sales of Sinovac shares in their names, or in accounts in the name of Heping Wang over which Lily Wang had trading authority; and all documents relating to transfers of Sinovac shares for no consideration between accounts of Lily Wang and Heping Wang, including accounts in the name of Heping Wang over which Lily Wang has or had trading authority. The March 27 Order required Lily Wang to deliver her affidavit by April 10, 2009.

- [32] On April 9, 2009 and again on May 15, 2009, on the application of the defendants Lily Wang and Heping Wang, I extended the time for delivery of the affidavits required by the March 27 Order, initially to April 20, and then to May 29, 2009. I also directed that the defendants deliver unredacted copies of the documents they were able to produce, on the plaintiff's written undertaking not to disclose or make use of those documents for any purpose other than the prosecution of this action.
- [33] I extended the time for delivery of the affidavits required by the March 27 Order because I was satisfied that counsel for the defendants Heping Wang and Lily Wang was making all reasonable efforts to rectify his clients' prior deficiencies in document production, and to obtain the information required for their affidavits.
- [34] The defendant Lily Wang delivered her affidavit of documents by May 29, 2009.
- [35] On July 9, 2009, following further complaints by the plaintiff that the defendants had not made full disclosure of documents relating to their dealings in Sinovac shares, Master Taylor made an order requiring all three defendants to provide authorizations for the plaintiff to obtain documents directly from Fidelity Investments, Wachovia Securities, and Citibank, a third financial institution with which the defendants dealt.
- [36] Pursuant to Master Taylor's order, Ms. Wang provided authorizations to each of the three financial institutions, resulting in the production of further documents. Among the documents produced by Citibank were records of the withdrawal by Ms. Wang of \$1,000,000 U.S. funds from her Citibank account on May 2, 2007. These were the funds that Ms. Wang deposited to the San-Ly account on May 2, 2007.
- [37] Before the document production resulting from Master Taylor's order, Ms. Wang had not disclosed statements of account for the San-Ly account. The plaintiff contends that Ms. Wang's failure to do so is one of a series of breaches of the December 17 and March 27 Orders.
- [38] By orders pronounced on June 15 and October 8, 2009 I varied the April 20 and June 12 Orders to permit the sale of Sinovac shares held as security for the plaintiff's claim, and to substitute cash from the proceeds of sale of those shares, in the amount of \$5,500,000 U.S. funds, as security. As a result, the full amount of the plaintiff's claim in this action, together with a generous allowance for court order interest and costs is now fully secured.

ISSUES

- [39] The issues to be determined on this application are as follows:
- a) Is the defendant Lily Wang in contempt of the April 20 Order?
 - b) Is the defendant Lily Wang in contempt of any of the October 8, December 17 or March 27 Orders?

- c) If the defendant Lily Wang is in contempt of one or more of these Orders, what is the appropriate punishment?

DISCUSSION

[40] The plaintiff bears the onus of establishing beyond a reasonable doubt that the defendant Lily Wang is in contempt of one or more of the orders in issue on this application.

[41] In *TG Industries Limited. v. Williams*, 2001 NSCA105, 196 N.S.R. (2d) 35, Cromwell J.A. (as he then was) described the elements of civil contempt in these terms at para.17:

... Similarly, in civil contempt, it is important to distinguish between an intentional act and knowledge that the act is prohibited. The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is prohibited by it. The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order, is not an essential element of civil contempt.

[42] In order to prove civil contempt, the plaintiff need only show that the defendant Lily Wang had knowledge of the Orders and intended to perform acts prohibited by the Orders: *Topgro Greenhouses Ltd. v. Houweling*, 2003 BCCA 355 at para. 6; *Fresneda v. Ocean Pacific Hotels Ltd.*, 2008 BCSC 238 at para. 41.

[43] I turn now to the particular allegations of contempt raised by Mr. Luu on this application.

[44] The plaintiff submits that the following actions of the defendant Lily Wang constitute contempt of court:

- a) selling 475,000 Sinovac shares held in Heping Wang's account on April 25 and 26, 2007 in breach of the April 20 Order;
- b) failing to produce documents relating to Heping Wang's Fidelity Securities account in breach of the October 8 Order;
- c) transferring the 500,000 Sinovac shares from Heping Wang's account to Lily Wang's account in October and December 2008 in breach of the April 20 Order;
- d) failing to list or produce documents relating to the transfer of 200,000 Sinovac shares from Lily Wang to the Fidelity Securities account of her son Mac Wu on October 7, 2007, or the sale of those shares in breach of the December 17 Order and the March 27 Order;
- e) failing to list or produce documents showing the use made of the \$1 million U.S. funds withdrawn from Lily Wang's Citibank account on May 2, 2007 in breach of the December 17 Order and the March 27 Order;
- f) failing to list or produce an e-mail from Helen E. Yang dated April 12, 2007 in breach of the December 17 Order.

a) Sale of 475,000 Sinovac shares on April 25 and 26, 2007

[45] The defendant Lily Wang admits that on April 25 and 26, 2007, after she had been served with the April 20 Order, she sold 475,000 Sinovac shares held in the defendant Heping Wang's Fidelity Investments account.

[46] At paragraph 4 of her Affidavit #8 sworn August 18, 2009, Ms. Wang deposes:

At the time I received the April 20th order, I had never been served with a court order of any kind. I had never previously been involved in a court action of any kind nor, to the best of my recollection, had I ever seen a court order of any kind. I did not understand what the April 20th order meant or its importance. While I do speak, read and write English, my understanding and use of the English language is very basic.

[47] The defendant Lily Wang did contact a securities lawyer on the evening of April 24, 2007 after she had been served with the April 20 Order and the accompanying materials. As is her right, Ms. Wang has declined to disclose any legal advice she received about the April 20 Order, either on the evening of April 24, 2007 or thereafter. However, she does state that it was not until she retained Lang Michener LLP at the beginning of May 2007 that she had any legal advice about this action.

[48] Ms. Wang has not sworn that she did not understand when she sold the 475,000 Sinovac shares on April 25 and 26, 2007, that the April 20 Order prohibited her from selling her shares, or shares held in Heping Wang's account.

[49] Although Ms. Wang asserts that she has only a very basic understanding of the English language, she has sworn at least 10 affidavits in this proceeding without the assistance of a translator. Some of those affidavits, including her affidavit sworn June 2, 2007 in support of her application to vary the April 20 Order, her affidavit sworn May 28, 2009 dealing with document production, and her affidavits responding to this contempt application, deal with relatively complex matters. Further, Ms. Wang is a business woman who has lived, worked, and transacted business in the United States for at least 18 years.

[50] The terms of the April 20 Order are clear. They prohibited each of the defendants from selling, transferring or otherwise dealing in any Sinovac shares pending the final disposition of this action, or further order of the court.

[51] I find that Ms. Wang's explanation that she did not know what the April 20 Order meant is not credible. Her ability to provide affidavit evidence in this litigation without the assistance of a translator, the fact that she has lived and worked in North America for many years, and the fact that she immediately sought legal representation upon being served with the April 20 Order lead me to infer that she had a sufficient grasp of the English language to discern that order restrained her from selling Sinovac shares. Furthermore, if Ms. Wang were in any doubt in the meaning or scope of the April 20 Order, she ought to have awaited receipt of legal advice rather than proceed immediately with the sale of the 475,000 Sinovac shares: *Glazer v. Union Contractors Ltd. and Thornton*, [1960] 25 D.L.R. (2d) 653 (B.C.S.C.) at p. 673

and 677; aff'd [1960] 26 D.L.R. (2d) 349 (B.C.C.A.).

- [52] I find that the defendant Lily Wang, with knowledge of the April 20 Order, and its nature, sold the 475,000 Sinovac shares in Heping Wang's Fidelity account in breach of that order.
- [53] Ms. Wang also deposes that on April 12, 2007 she received an e-mail from Ms. Helen Yang of Sinovac informing her that Heping Wang's debt to that company, in the amount of approximately \$1 million U.S. funds, would have to be paid by the end of May 2007, and recommending that she sell some Sinovac shares in order to pay that debt. Ms. Wang says that her purpose in selling Sinovac's shares on April 25 and 26, 2007 was to pay Heping Wang's debt to Sinovac.
- [54] Ms. Wang evidently had no difficulty in understanding Ms. Yang's e-mail.
- [55] In her affidavit sworn June 2, 2007 in support of her application to vary the April 20 Order, Ms. Wang deposed that in order to raise sufficient funds to repay Heping Wang's debt to Sinovac, she would have to sell some of her own Sinovac shares, but was unable to do so as a result of the April 20 Order. Ms. Wang did not disclose that she had already sold the 475,000 shares in Heping Wang's Fidelity Investment account and had received more than \$1,400,000 U.S. funds from the sale of those shares.
- [56] In her Affidavit #8 sworn August 19, 2009 Ms. Wang swore that when she understood that the April 20 Order prohibited the sale of Sinovac shares, she decided to not transfer the money from the April 25 and 26, 2007 sales to Sinovac because she did not know when she would be able to sell more shares. She says she kept the proceeds from the sale of the shares of late April for living and business expenses for herself and her brothers until they were able to sell more shares.
- [57] Ms. Wang was less than candid when she failed to disclose the April 25 and 26, 2007 sales of Sinovac shares at the time of her application to vary the April 20 Order.
- [58] I find that Ms. Wang's explanations regarding her sale of Sinovac shares held in Heping Wang's Fidelity Investments account on April 25 and 26, 2007 in breach of the April 20, 2007 Order are unsatisfactory and implausible. The plaintiff has established, beyond a reasonable doubt, that Ms. Wang, with knowledge of the April 20 Order, sold the 475,000 Sinovac shares in breach of that Order, and thereby committed civil contempt.
- b) Failure to produce documents relating to Fidelity Investments account of Heping Wang
- [59] The October 8 Order required the defendant Lily Wang to produce all documents, including brokerage statements, transfer slips, instructions, e-mails and correspondence relating to the selling, transferring, or dealing of shares of Sinovac by Ms. Wang or entities controlled by her after June 12, 2007.

[60] In response to the October 8 Order, Ms. Wang produced documents showing some transactions in her Fidelity Investments accounts in 2007 and 2008. Ms. Wang's document production of October 23, 2008 in response to the October 8 Order did not include any documents relating to Heping Wang's Fidelity Investments account even though she had trading authority for that account and was able to request and obtain statements for her brother's account from Fidelity Investments.

[61] By her Affidavit #8, Ms. Wang has deposed that:

Directly following the making of the October 8 order, I made requests from Fidelity and delivered through my counsel the brokerage statements from my and Heping's Fidelity and Wachovia statements as I received them.

[62] Although Ms. Wang has said that she did her best to comply with the October 8 Order and subsequent orders of this court, she has not fully explained why she was unable to deliver any statements relating to Heping Wang's Fidelity account in response to the October 8 Order. However, after the plaintiff applied for and obtained the December 17 Order, Ms. Wang did disclose documents relating to the transfer of the 200,000 Sinovac shares from Heping Wang's account to her account in October, and her transfer of the remaining 300,000 Sinovac shares in December 2008.

[63] The December 17 Order required Ms. Wang to deliver a supplemental list of documents listing any and all documents in her possession or control relevant to matters in issue in this action, and an affidavit verifying her list of documents. In response to the December 17 Order, Ms. Wang provided three supplemental lists of documents together with an affidavit verifying those lists. Among the documents listed in the defendant Lily Wang's third supplemental list of documents dated January 15, 2009 were redacted copies of Fidelity Investments reports for both Lily Wang and Heping Wang for the period June 2007 to December 2008. In her affidavit of documents, Ms. Wang also deposed that she did not have in her possession Fidelity Investments account statements for herself or Heping Wang for the period January 2005 through May of 2007, that she was attempting to obtain copies of those statements, and that if she was able to obtain them, she would disclose the portions of those statements relevant to this litigation.

[64] By January 15, 2009 Ms. Wang had obtained and disclosed documents showing the transfer of the 500,000 Sinovac shares from Heping Wang's Fidelity Investments account to her account, as required by the October 8 and December 17 Orders.

[65] By her Affidavit #10, sworn September 25, 2009 and filed in response to this application, Ms. Wang has sworn that when she was first asked to obtain copies of her Fidelity account statements, she did not have those documents. However, she was able to obtain copies of statements online for the previous 18 months and then ordered the earlier statements from Fidelity. Ms. Wang further deposed that all of the statements that she obtained were sent to her counsel, who subsequently listed and produced them.

- [66] In response to the March 27 Order, the defendant Lily Wang produced her fourth, fifth and sixth supplemental lists of documents. Her fourth supplemental list of documents includes unredacted copies of Fidelity Investments monthly investment reports for her accounts from January 2005 to March 2009 and for Heping Wang's accounts from April 2005 to January 2009, as well as Ms. Wang's Citibank statements from August 2005 through March 2009.
- [67] Although Ms. Wang's initial document production in response to the October 8 Order did not fully comply with the requirements of that Order, through the efforts of her counsel, and as a consequence of the December 17 and March 27 Orders, she has now substantially complied with the document production required by the October 8 Order. Her document production includes copies of all of the Fidelity Investments account statements for both her accounts and those of her brother Heping Wang.
- [68] The plaintiff contends that Ms. Wang deliberately withheld from her document production in response to the October 8 Order the account statements for Heping Wang's Fidelity Investments account in order to conceal the share transfers she had made from that account on October 3 and 6. I do not accept that submission. By October 8, 2008 the plaintiff had delivered his application to have Ms. Wang found in contempt of the June 12 Order. Ms. Wang was represented by competent counsel who, I am satisfied, were making all reasonable efforts to ensure that Ms. Wang complied with the October 8 Order, and subsequent Orders of this Court relating to document production. In these circumstances, I am not persuaded that Ms. Wang's initial failure to produce the Fidelity Investments statements for Heping Wang's account was deliberate, or constituted a contempt of court.
- c) Transfer of 500,000 Sinovac shares from Heping Wang's to Lily Wang's account in October and December 2008
- [69] Lily Wang admits that she transferred 100,000 Sinovac shares from Heping Wang's account to her account on each of October 3 and 6, 2008 and that she transferred a further 300,000 Sinovac shares from Heping Wang's account to her account on December 4, 2008.
- [70] Mr. Luu maintains that this is a further breach of the April 20 Order, as varied by the June 12 Order. Ms. Wang submits that her actions in transferring the 500,000 shares from Heping Wang's account to her account and then selling those shares do not contravene the April 20 Order or the June 12 Order. At the times she transferred and sold the 500,000 shares from Heping Wang's account, she held more than 1.98 million Sinovac shares in her own accounts, as required by the June 12 Order.
- [71] In her Affidavit #5, sworn May 25, 2009, Ms. Wang deposed that in June, 2006 she transferred 500,000 Sinovac shares from her Wachovia account to her brother Xianping Wang's Wachovia account. She also swore that in December, 2006 Xianping Wang transferred those shares to Heping Wang's Wachovia account and that some time in August, 2008 "Wachovia had the shares put into a share certificate and sent that certificate to Heping in Beijing." Ms. Wang deposed that Wachovia sent the share certificate to an incorrect address for Heping Wang, and that it was not until late September, 2008 that he located the certificate and

deposited it to his Fidelity Investments account. Ms. Wang has sworn that Wachovia sent the share certificate to Heping Wang without prior notification to him, when it closed his account.

[72] When cross-examined on her affidavits by plaintiff's counsel, Ms. Wang maintained that all of the Sinovac shares held in Heping Wang's accounts belonged to her, including 500,000 Sinovac shares in issue on this application. However, there are difficulties with this assertion. On her examination for discovery of January 23, 2008 by counsel for the plaintiff, Ms. Wang gave the following evidence regarding her gift of the 500,000 Sinovac shares to Xianping Wang in 2006:

554 Q So there was another transfer, I think you said, of 500,000 to Xianping Wang in 2006?

THE WITNESS: Yes.

555 Q Okay And what was the reason for that transfer?

A Because I want to transfer it to him.

556 Q There's no reason. Now, you weren't allowed to sell your own shares? Is that what you said?

A I can just sell it. I could sell it but I prefer to just, you know, transfer it to him.

559 Q Okay. So in 2006 -- I'm sorry, what was the reason for your transferring shares to Xianping Wang in 2006?

THE WITNESS: There's no reasons. I like to transfer to him.

560 Q Did he ask you to transfer shares to him?

A No, I want to transfer to him.

561 Q Okay.

THE WITNESS: Yeah, because I wanted my brother on some share, not only the share all by myself.

562 Q Is there any reason why you wanted him to have some shares?

THE WITNESS: No reasons.

[73] That evidence is inconsistent with Ms. Wang's assertion that she retained ownership of these Sinovac shares.

[74] Furthermore, when Xianping Wang transferred the 500,000 Sinovac shares to Heping Wang in December, 2006, Sinovac issued a certificate dated December 16, 2006 certifying that Heping Wang owned the 500,000 shares. Ms. Wang signed that share certificate as Chief Financial Officer for Sinovac.

- [75] Before she transferred and sold the 500,000 shares from Heping Wang's account, Ms. Wang received legal advice that she ought to seek the Court's permission prior to transferring or selling those shares. Unfortunately, Ms. Wang disregarded that advice.
- [76] In Reasons for Judgment indexed as *Luu v. Wang*, 2009 BCSC 860, at paras. 63-69, I found that the defendant Heping Wang was in contempt of court when, with knowledge of the Order of this Court prohibiting him from selling, transferring or otherwise disposing of Sinovac shares, he, at the request of Lily Wang, signed letters of instructions authorizing the transfer of shares from his Fidelity Investments account to the defendant Lily Wang's account. I found that the defendant Heping Wang committed civil contempt of court by transferring or facilitating the transfer of Sinovac shares to his sister. However, in circumstances where Lily Wang had initiated and conducted the trades culminating in her sale of 500,000 Sinovac shares, and where Heping Wang had apologized to the court, I found that the defendant Heping Wang had purged his contempt.
- [77] The sale by Ms. Wang of the 500,000 Sinovac shares formerly held in Heping Wang's account did not reduce her shareholdings below the 1.98 million share threshold she was required to maintain pursuant to the June 12 Order. However, in order to acquire those shares, she induced the defendant Heping Wang to assist her in transferring or facilitating the transfer of Sinovac shares held in his name in breach of the April 20 Order, as varied by the June 12 Order. By early October 2008, Ms. Wang was under no misunderstanding about the meaning or scope of either order. Nonetheless, she procured a breach by her brother of the April 20 Order to facilitate her sale of the 500,000 Sinovac shares. By doing so, and by initiating the transfer of Sinovac shares held by Heping Wang to her account she committed acts prohibited by the April 20 Order, and thereby committed civil contempt of court.
- d) Failure to list or produce documents relating to transfer of 200,000 Sinovac shares from Lily Wang to Mac Wu
- [78] The defendant Lily Wang acknowledges that on October 7, 2007 she transferred 200,000 Sinovac shares from her Fidelity Investments account to the Fidelity Investments account of her son Mac Wu. Ms. Wang also acknowledges that she did not list any documents relating to this share transfer in response to the March 27 Order. Ms. Wang explains that she had forgotten about this transfer and therefore did not include her authorization letter to Fidelity Investments for this transaction in the list of documents not currently in her possession when she swore in her Affidavit #7 of May 29, 2009.
- [79] Ms. Wang's transfer of the 200,000 Sinovac shares to her son in October 2007 did not reduce her shareholdings below the 1.98 million threshold required by the June 12 Order. This transfer was not relevant to any matter then in question in the action and therefore did not fall within the classes of documents that Ms. Wang is required to list pursuant to the December 17 Order. However, the March 27 Order did require the defendant Lily Wang to deliver an affidavit of documents that included all documents showing the identity of recipients and transferors of all transfers of Sinovac shares from Ms. Wang's accounts. The

transfer of shares to Mac Wu was therefore subject to disclosure under the March 27 Order.

- [80] Ms. Wang did disclose the Fidelity Investments accounts statement showing this transfer in October 2008. I agree with the submission of counsel for Ms. Wang that her failure to include her letter of authorization to Fidelity for this transaction in response to the March 27 Order has not in any way prejudiced the plaintiff. Further, the defendant Lily Wang had nothing to gain by concealing this particular transaction. Ms. Wang's explanation that she simply forgot about this transaction when she prepared her affidavit of documents in response to the March 27 Order is plausible and raises a reasonable doubt about whether her failure to refer to this transaction in her affidavit of documents was deliberate. I am not persuaded that Ms. Wang intentionally withheld documents relating to the transfer of the 200,000 Sinovac shares to Mac Wu on October 7, 2007 or that her failure to list documents relating to that transaction constitutes a contempt of court.
- e) Failure to list or produce documents showing use made of \$1 million withdrawn from Lily Wang's Citibank account on May 2, 2007
- [81] The plaintiff submits that the defendant Lily Wang breached the December 17 and the March 27 Orders by failing to list or produce documents showing what she did with the \$1,000,000 U.S. funds she withdrew from her Citibank account and transferred to the corporate account of San-Ly on May 2, 2007. These funds formed part of the proceeds of sale of the 475,000 Sinovac shares held in Heping Wang's account that Ms. Wang had sold on April 25 and 26, 2007.
- [82] The March 27 Order required Ms. Wang to deliver an affidavit of documents showing the use she made of all proceeds of sale of Sinovac shares. The affidavit of documents Ms. Wang delivered in response to the March 27 Order did not identify documents relating to this transaction. In her Affidavit #10, Ms. Wang explained that she withdrew \$1,000,000 U.S. funds from her Citibank account and transferred those funds to the San-Ly account. She deposed that she had not previously disclosed documents relating to this transaction because she did not think they were relevant. Pursuant to Master Taylor's Order, Ms. Wang authorized Citibank to provide documents relating to this transaction directly to plaintiff's counsel. The plaintiff now has the account statements relating to San-Ly.
- [83] The withdrawal on May 2, 2007 of \$1,000,000 U.S. funds from Citibank's account is recorded in the Citibank accounts which Ms. Wang listed and produced to plaintiff's counsel as part of her fourth supplemental list of documents dated May 28, 2009. The documents showing the transfer of those funds to the San-Ly account ought to have been produced in response to the March 27 Order. However, because Ms. Wang had previously produced the Citibank account statements relating to the deposit and withdrawal of these funds, I am satisfied that Ms. Wang's failure to produce the San-Ly documents was not an attempt to conceal the transfer of funds from her Citibank account to the account of San-Ly. The plaintiff has established that Ms. Wang failed to comply fully with the March 27 Order but has not shown that Ms. Wang deliberately or wilfully refused to obey that Order.

f) Failure to produce e-mail from Helen Yang dated April 12, 2007

[84] The plaintiff submits that Ms. Wang's failure to list the e-mail dated April 12, 2007 reminding her that the balance of Heping Wang's debt to Sinovac fell due on May 31, 2007 and recommending that she sell Sinovac shares was a deliberate breach of the December 17 Order. Ms. Wang first produced a copy of that e-mail as an exhibit to her Affidavit #8 sworn in answer to this contempt application.

[85] The e-mail correspondence from Helen Yang is relevant to the contempt application in so far as it formed part of Ms. Wang's explanation for her sale of 475,000 Sinovac shares from Heping Wang's account on April 25 and 26, 2007. The plaintiff brought this contempt application in July 2009. Ms. Yang's e-mail did not relate to any matter in question in this action at the time of the December 17 Order. Accordingly, Ms. Wang's failure to disclose that document in response to the December 17 Order did not amount to a breach of that Order.

Punishment for Contempt

[86] The plaintiff has established that Ms. Wang committed civil contempt of the April 20 Order when she transferred and sold 475,000 Sinovac shares on April 25 and 26, 2007. I have also found that Ms. Wang procured the breach by Heping Wang of the April 20 Order, and knowingly breached that Order by initiating the transfer and sale of 500,000 Sinovac shares held by Heping Wang. Mr. Luu has not shown that Ms. Wang is in contempt of the October 8, December 17 or March 27 Orders.

[87] In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at p. 931, McLachlin J., as she then was, held:

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain that process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

[88] Rule 56 of the Rules of Court gives the court jurisdiction to punish a contemnor by committal to prison or by the imposition of a fine or both. In civil contempt cases, the court will take the following factors into account when determining the appropriate punishment:

- (a) the gravity of the offence;
- (b) the need to deter the contemnor;
- (c) the past record and character of the respondent, and in particular whether the alleged contemnor has committed previous contempts;
- (d) the protection of the public;
- (e) the successful party's ability to realize the judgment; and

- (f) the extent to which the breach was intended.

Law Society of British Columbia v. Hanson, 2004 BCSC 825, at para. 108, aff'd 2005 BCCA 354.

- [89] In *West Lincoln (Township) v. Chan*, [2001] O.J. No. 2133 (Ont. S.C.J.), at para. 27, the Ontario Superior Court of Justice stated that in determining the appropriate sentence in respect of a finding of contempt, the court may consider: available sentences, proportionality, similar sentences in like circumstances, mitigating and aggravating factors, deterrence, reasonableness of incarceration, a party's ability to pay a fine, promoting reformation and rehabilitation of the offender, and the joint submissions of counsel.
- [90] The penalty for contempt must be proportionate to the gravity of the contempt, should serve to deter the contemnor from further breaches of court orders, and should also provide for general deterrence: *B.C. Public School Employers Assoc. v. B.C. Teachers Federation*, 2005 BCSC 1490 at para. 30.
- [91] Sanctions for contempt "must be significant and of such consequence as to ensure the administration of justice is not brought into disrepute": *SNC-Lavalin Profac Inc. v. Sankar*, [2008] O.J. No. 2048 (Ont. S.C.J.) at para. 37.
- [92] With respect to the gravity of the offence, Ms. Wang, with knowledge of the April 20 Order sold 475,000 Sinovac shares held in the account of the defendant Heping Wang. Her disobedience of the April 20 Order constitutes a serious contempt of court. Ms. Wang's transfers of the 500,000 shares from Heping Wang's account to her own account in October and December 2008 occurred after the plaintiff had commenced proceedings against her for her contempt of the June 12 Order. That, in my view, is an aggravating factor.
- [93] The breach of a Mareva injunction engages the public interest in the administration of justice. As Groberman J.A. stated in *Majormaki Holdings LLP v. Wong*, 2009 BCCA 349 at para. 24, "the effectiveness of such injunctions depends on the defendants' honesty and trustworthiness Courts must have some assurance that their orders can be effective."
- [94] The findings of contempt on this application, like the prior contempt proceeding, involve breaches of a Mareva injunction. Counsel for Ms. Wang submits that the fact that Ms. Wang's sales of Sinovac shares on April 25 and 26, 2007 were her first breaches of an order of this Court is a mitigating factor. However, I have found that at the time Ms. Wang sold the 475,000 Sinovac shares, she did with knowledge of the April 20 Order, and the nature of that Order. Any mitigating effect attributable to the timing of her sale of those shares is offset by Ms. Wang's later breach of the April 20 Order, which occurred after she had received legal advice warning her against selling Heping Wang's shares without first obtaining the permission of the Court. Taken as a whole, Ms. Wang's misconduct on this application is comparable to her breach of the June 12 Order.
- [95] In my view, a sentence of imprisonment, as urged by the plaintiff, would be disproportionate to the gravity of Ms. Wang's offence. Although a term of imprisonment may be imposed for civil contempt, generally, incarceration is reserved for criminal contempts,

contempt involving public defiance of court orders, or repeated and unrepentant acts of contempt: *Glase v. Glase*, 2009 BCCA 321 at para. 52; *Transportation Lease Systems Inc. v. Viridi*, 2009 BCSC 695 at para. 17, citing *Health Care Corp. of St. John's v. N.A.P.E.*, [2001] N.J. No. 17 (Nfld. T.D.). I am not persuaded that a term of imprisonment is necessary to ensure Ms. Wang's compliance with orders of this Court.

- [96] Ms. Wang has the means to pay a significant fine. Following the court ordered sale of some of her Sinovac shares formerly held as security in the plaintiff's claim, and the substitution of \$5,500,000 as security in place of the Sinovac shares, Ms. Wang received the surplus funds realized on the sale of her shares.
- [97] Ms. Wang's apology for her breach of the April 20 Order is a mitigating factor.
- [98] In this case, Ms. Wang's breaches of the April 20 Order fortunately have not impaired the ability of Mr. Luu, if he is successful at trial, to realize on his judgment.
- [99] With respect to the need to deter the contemnor, Ms. Wang was ordered to pay a fine of \$50,000 for her contempt of the June 12 Order. She must also pay to the plaintiff special costs of the contempt proceedings relating to her breach of that order. The sanction imposed in the earlier contempt proceeding has likely brought home to her the importance of complying with orders of this court.
- [100] Although Ms. Wang has previously been found in contempt of court, that finding concerned events subsequent to her breaches of the April 20 Order on April 25 and 26, 2007. I have already identified, as an aggravating factor, Ms. Wang's further breach of the April 20 Order in October and December, 2008, which occurred after Mr. Luu had initiated proceedings against Ms. Wang for contempt of the June 12 Order.
- [101] The sanction I impose in this case must address the affront to the Court arising from Ms. Wang's breaches of the April 20 Order. Although, as a result of the recent imposition of a significant fine for the defendant Lily Wang's breach of the June 12 Order, individual deterrence is not as significant a factor as would be the case if this were the first finding of contempt against Ms. Wang, a sanction is still necessary to meet the objectives of general deterrence and denunciation of Ms. Wang's contraventions of the April 20 Order.
- [102] Taking all of these factors into account, I impose a fine of \$40,000 to be paid by the defendant Lily Wang within 21 days of the release of these Reasons. In default of payment, there will be an order for committal to imprisonment for 10 days.
- [103] Although I have found Ms. Wang in contempt of the April 20 Order, I have not found her in contempt of the October 8, December 17 or the March 27 Orders, all of which related to the production of documents and the delivery of affidavits of documents.
- [104] In *Luu v. Wang*, 2009 BCSC 860, I dismissed an application by the plaintiff to strike Ms. Wang's defence for breaches of the Rules of Court relating to document production, including production required by the March 27 Order. I did so because I was satisfied that

the defendant Lily Wang, through the efforts of her counsel was endeavouring to remedy her failures to comply with the Rules of Court, and to complete the document production required by Orders of this Court. I remain satisfied that Ms. Wang has, through her counsel, made reasonable efforts to ensure that her document production obligations in this action are fulfilled. I therefore decline to strike Ms. Wang's statement of defence.

Costs

[105] The plaintiff has succeeded on this application in establishing that Ms. Wang has committed civil contempt of the April 20 Order. Mr. Luu has once again been put to significant expense in bringing a proceeding to enforce an order of this Court. The party who has obtained a court order should not have to bear the additional cost of compelling compliance with that order: *Fresneda v. Ocean Pacific Hotels Ltd.*, 2008 BCSC 238 at para. 44. By transferring and selling shares held in Heping Wang's account in breach of the April 20 Order, Ms. Wang has engaged in conduct deserving of rebuke. The plaintiff will have the costs of this application as special costs payable forthwith by the defendant Lily Wang upon assessment.

"Pearlman J."

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