

CANADA / JUDGMENT

Wu v. Xiao

2021 BCSC 1692

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Supreme Court of British Columbia

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2021 BCSC 1692 Wu v. Xiao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wu v. Xiao,

2021 BCSC 1692

Date: 20210827

Docket: S214415

Registry: Vancouver

Between:

Sarah Wu

Plaintiff

And

Weihua Xiao, Jie Su, Deshun Su and Shangying Wang

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiff:

J. Dawson

Counsel for the Defendants:

R. Robertson

Place and Date of Hearing:

Vancouver, B.C.

July 28, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 27, 2021

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INTRODUCTION

- [1] There are two applications before the Court. The defendants apply to cancel two certificates of pending litigation (CPLs) registered against properties owned by two of them. The plaintiff applies for a Mareva injunction to preserve the sum of \$260,000, which is a substantial portion of her claim, pending trial.
- [2] In the underlying action, the plaintiff alleges that the defendants wrongfully conspired to defraud the plaintiff of funds she entrusted to the defendant Weihua Xiao ("Ms. Xiao"). It is alleged that Ms. Xiao was engaged in a business of assisting individuals in transferring money out of the People's Republic of China ("China"), despite that country's strict currency controls. The plaintiff alleges that the remaining defendants, who are all family members of Ms. Xiao, were also involved in the currency business.
- [3] There is no dispute that the plaintiff transferred Chinese currency to the defendants in October 2020 in an amount equivalent to approximately \$260,000 Canadian (CAD), and that the funds have not been repaid. There is a dispute as to whether the defendants have intentionally defrauded the plaintiff, as the plaintiff alleges, or whether the funds were inadvertently lost, as the defendants maintain.
- [4] The central issue on the defendants' application to cancel the CPLs is whether the notice of civil claim asserts a viable claim to an estate or interest in land. One of the properties in issue is a house in New Westminster owned by the defendant Jie Su ("Mr. Jie"), who is Ms. Xiao's spouse (the "New Westminster Property"). The New Westminster Property is currently the family home. The second property is a house owned by Ms. Xiao in Burnaby (the "Burnaby Property"). In the notice of civil claim, the plaintiff alleges that she holds an equitable mortgage over the two properties, or, alternatively, that she has an equitable interest in the properties based on a constructive trust. After the plaintiff demanded repayment of the funds, Ms. Xiao listed the Burnaby Property for sale and granted a mortgage to her father-in-law, the defendant Deshun Su ("Mr. Deshun"). The plaintiff alleges this mortgage constitutes a fraudulent conveyance.
- [5] The defendants argue that the plaintiff's claim, at base, is an action for the recovery of a debt, and that her pleading does not disclose a viable claim for an interest in land. On this basis, the defendants apply to cancel the CPLs pursuant to s. 215 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]. Alternatively, the defendants seek summary judgment dismissing the claims for an equitable mortgage and constructive trust pursuant to R. 9-6(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR].

- [6] At the time of the hearing of these applications, there was an impending closing date for the sale of the Burnaby Property. The plaintiff acknowledged that Ms. Xiao would suffer hardship and inconvenience within the meaning of s. 256 of LTA if the sale could not complete because of the CPL. The parties agreed that in order to address the hardship and inconvenience, while preserving the plaintiff's position pending a decision on these applications, Ms. Xiao would post \$260,000 as security for the lifting of the CPL.
- [7] If the CPLs are cancelled, Ms. Xiao is entitled to a return of the security, subject to the outcome of the plaintiff's application for a Mareva injunction. If the CPLs are not cancelled and the security is not reduced, the plaintiff agrees that the currently posted security is sufficient security for her claims. In that event, there is no apparent necessary for a Mareva injunction. The plaintiff's application for a Mareva injunction is advanced as an alternative to her opposition to the cancellation of the CPLs or the reduction in the security that the defendants should be required to post.

THE PLEADINGS

The notice of civil claim

- [8] The plaintiff filed her notice of civil claim on May 4, 2021.
- [9] The notice of civil claim alleges that Ms. Xiao, with the assistance of the remaining defendants, operated a consulting business through which, for a fee, she has helped clients exchange and transfer Chinese renminbi (RMB) held in China into Canadian or American dollars, which was then paid to Ms. Xiao's clients in Canada. The plaintiff alleges that Ms. Xiao's consulting business was, in fact, a "sham" and that the defendants were engaged in a fraudulent scheme to abscond with monies entrusted to Ms. Xiao. It is alleged that the plaintiff, and other clients of Ms. Xiao, were directed to transfer funds into bank accounts controlled by the defendants, which the defendants then misappropriated.
- [10] The plaintiff pleads that she was introduced to Ms. Xiao by a mutual acquaintance in December 2019. It is alleged that during their first meeting, Ms. Xiao stated that she was familiar with Chinese currency regulations and was aware of loopholes that would allow the plaintiff to transfer money out of China. Ms. Xiao is said to have represented to the plaintiff that the plaintiff's funds would be safe and secure, that Ms. Xiao would be personally liable for the repayment of funds, and that funds the plaintiff entrusted to the defendants would be paid to her in Canada within nine days.
- [11] The plaintiff pleads that she made two relatively smaller transfers of Chinese RMB to the defendants in December 2019 and October 2020. The defendants repaid these amounts. It is alleged that in or around October 15, 2020, Ms. Xiao encouraged the plaintiff to transfer the larger sum of 1.34 million RMB to her, which Ms. Xiao would then repay to the plaintiff in US dollars (approximately \$200,000 USD) on a favourable exchange rate. The plaintiff further alleges that Ms. Xiao and Mr. Jie agreed that they would be personally liable for the repayment of the funds in full, and also that they would grant mortgages against the New

Westminster Property and the Burnaby Property to secure the funds.

- [12] The plaintiff alleges that, pursuant to her agreement with Ms. Xiao and Mr. Jie, she transferred 1.34 million RMB to the defendants between October 16, 2020 and October 22, 2020. It is alleged that the defendants received the funds on trust with the condition that they were not to be used other than for the purpose of purchasing US currency. The plaintiff says that in breach of the alleged trust agreement, the defendants did not remit funds to the plaintiff, and instead misappropriated them for their own use. In the alternative, the plaintiff pleads that the defendants have been unjustly enriched by their receipt of the funds, and that that funds are impressed with a constructive trust in favour of the plaintiff.
- [13] To extent that the funds which are alleged to have been wrongfully misappropriated by the defendants were used to improve or maintain the New Westminster Property or the Burnaby Property, the properties are said to be impressed by a constructive trust. Further, it is alleged that the mortgage that Ms. Xiao granted to Mr. Deshun against the Burnaby Property was not made in good faith or with good consideration, and that Ms. Xiao's intention in granting the mortgage was to delay, hinder and defraud creditors of their just and lawful remedies. The mortgage is alleged to be a fraudulent conveyance.
- [14] The relief sought against all defendants includes a pre-trial Mareva injunction, judgment in CAD equivalent of 1.34 million RMB plus contractual interest, aggravated and punitive damages, a declaration that the defendants are trustees of any funds received from the plaintiff and an accounting and tracing of the funds. The relief sought against Ms. Xiao and Mr. Jie includes a declaration that the plaintiff is the holder of an equitable mortgage over, and equitable interest in, the New Westminster Property and the Burnaby Property, and orders for CPLs against the properties. The relief sought against the plaintiff and Mr. Deshun includes an order setting aside the mortgage granted to Mr. Deshun.

The response to civil claim

- [15] The defendants filed their response to civil claim on June 7, 2021.
- [16] In their response to civil claim, the defendants deny the alleged fraudulent scheme and say that the plaintiff is improperly trying to hold them liable for the loss of money the plaintiff was attempting to smuggle out of China, and which was taken or confiscated by an unknown government actor or third party. The defendants say that the plaintiff, at all material times, was aware of Chinese foreign exchange control laws which prohibited and restricted the removal of money from China. It is alleged that the plaintiff approached Ms. Xiao and asked her to assist in an illegal scheme to smuggle money out of China.
- [17] The defendants allege that Ms. Xiao knew of certain individuals who could play the role of "middlemen" in an illegal currency smuggling operation, and that she offered to assist the plaintiff by communicating with these middlemen on the plaintiff's behalf in return for small fee. The defendants say that this was the extent of any contractual relationship with the plaintiff. The remaining defendants say that the contract was only with Ms. Xiao. They

deny that they had any contractual relationship with the plaintiff. The defendants deny that any of them owed fiduciary obligations to the plaintiff, and deny ever agreeing to a mortgage against the New Westminster or Burnaby Properties. The defendants plead that there is no proper basis for the plaintiff's claim to a CPL because the claims against the defendants are not, in essence, a claim for any interest in land.

- [18] The defendants deny that any of them made the representations alleged by the plaintiff, or that any of them misappropriated the plaintiff's funds. They say the plaintiff knew the currency smuggling operation was risky and illegal. The defendants plead that the doctrine of *ex turpi causa non oritur actio* precludes the plaintiff's claim, given that she was engaged in illegal activity.

ISSUE 1: THE DEFENDANTS' APPLICATION TO CANCEL THE CPLs

The legal framework

- [19] Section 215 of the LTA entitles a person who is "claiming an estate or interest in land" to register a CPL against the land. A party may apply to court to cancel the CPL if the pleadings are not capable of supporting a claim to an interest in land. A party wishing to challenge the merits of a pleaded interest in land may, alternatively, apply for summary dismissal of that part of the claim pursuant to R. 9-6(4) of the SCCR. The tests under the two procedures are summarized by the Court of Appeal in *Xiao v. Fan*, 2018 BCCA 143:
- [27] Accordingly, the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the Land Title Act is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be considered, and the test to be applied is whether there is a bona fide triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.
- [20] Rule 9-6 of the SCCR permits the court to grant judgment on the basis of a limited review, but not weighing, of the evidence. A defendant can succeed on an application under Rule 9-6(4) by showing that the case pleaded by the plaintiff is unsound, or by adducing sworn evidence that provides a complete answer to the plaintiff's claim: *Beach Estate v. Beach*, 2019 BCCA 277 [Beach] at para. 48. If the court is satisfied, based on the evidence, that the plaintiff has no chance of success then summary judgment may be granted under Rule 9-6. If a determination of the merits of the plaintiff's claim requires weighing of the evidence then judgment cannot be granted under Rule 9-6: *Beach* at paras. 48-49.

- [21] On an application under R. 9-6(4), the onus is on the defendant to show that the plaintiff's claim is "bound to fail", or, put another way, that it is "manifestly clear" or "beyond a reasonable doubt" that there is no genuine issue for trial: 4 Corners Properties Ltd. v. Boffo Developments (Smithe) Ltd., 2013 BCSC 1926 at para. 15.

Analysis

The defendants' application under s. 215 of the LTA

- [22] The plaintiff says that her notice of civil claim advances three claims to an interest in land, each of which is sufficient to support the claim for a CPL against one or both of the New Westminster Property and the Burnaby Property:
- i. The plaintiff claims a remedial constructive trust on account of the defendants' misappropriation of the plaintiff's funds, which are alleged to be impressed with a trust, and use of the funds to improve or maintain the subject properties; [Notice of civil claim, Part 1, paras. 10, 20, 36 and 38]
 - ii. The plaintiff has an equitable mortgage over the properties as a result of her agreement with Ms. Xiao and Mr. Jie that the latter would secure their personal liability to the plaintiff by granting a mortgage against the properties; [Notice of civil claim, Part 1, paras. 28 to 31]
 - iii. The mortgage that Ms. Xiao granted to Mr. Deshun in relation to the Burnaby Property is alleged to be a fraudulent conveyance, designed to defeat creditors, and is therefore invalid; [Notice of civil claim, Part 1, paras. 39-40].
- [23] The defendants say that none of these pleaded claims disclose a viable claim on the part of the plaintiff to an interest in land. I will address each in turn.

The alleged remedial constructive trust

- [24] The defendants argue that the case law supports the cancellation of a CPL where a claim of constructive trust is in essence a monetary claim, and a monetary award would be a sufficient remedy. The defendants say that the court should look past a bare plea of constructive trust if the claim, in essence, is not for an interest in land. Without a viable claim for an interest in land, a CPL cannot be used as "one of the weapons in a claimant's war chest": Drein v. Puleo, 2016 BCSC 593 at para. 10.
- [25] In Nouhi v. Pourtaghi, 2019 BCSC 794 [Nouhi] Justice Matthews helpfully summarized the relevant principles on an application to cancel a CPL under s. 215 of the LTA where the pleadings include a claim of a remedial constructive trust. As reviewed in Nouhi, a remedial constructive trust is available to remedy claims of unjust enrichment or breach of fiduciary duty, and may also be available where a plaintiff claims that funds obtained through wrongful means, such as fraud, can be traced to the acquisition or improvement of land: Nouhi at paras. 23-24. A party seeking to establish a constructive trust must satisfy two criteria, in addition to the cause of action or circumstances on which the remedial trust is

based: (i) a substantial and direct link, a causal connection or a nexus between the claim and the property on which the remedial constructive trust is to be based; and, (ii) a monetary award is inadequate, insufficient or inappropriate in the circumstances: *Nouhi* at para. 26.

- [26] On facts of *Nouhi*, Justice Matthews concluded that the plaintiff did not adequately plead the elements of a cause of action for civil fraud, but that his pleading did disclose a cause of action in unjust enrichment: *Nouhi* at paras. 43-46. The plaintiff's plea that the defendants had used his monetary contributions to purchase, service, and maintain the subject properties was found to have satisfied the criterion of a causal connection or nexus to the properties: *Nouhi* at para. 48. However, the plaintiff did not plead that monetary damages are, or may be, an inadequate or insufficient remedy, which is a precondition to the impression of a remedial constructive trust. It was on this basis that Justice Matthews concluded that the pleadings did not disclose an interest in land, and therefore the CPLs must be cancelled: *Nouhi* at paras. 49-50.
- [27] In the present case, the plaintiff's plea that the properties are impressed with a remedial constructive trust stands on two footings. First, the plaintiff alleges that the defendants wrongfully misappropriated her funds, which they received on trust, and that the funds may be traced to the improvement and maintenance of the properties. The plaintiff has pleaded the elements of civil fraud: a false representation by the defendants that the defendants knew to be false, and which induced the plaintiff to pay the funds that she has now lost: *Nouhi* at para. 34. Second, the plaintiff alleges, in the alternative, that the defendants have been unjustly enriched by the receipt of the plaintiff's funds.
- [28] The defendants do not, as I understand the argument, maintain that the plaintiff has not pleaded a cause of action that could give rise to a remedial constructive trust. Instead, they say the two conditions identified in *Nouhi* are not met: the pleadings do not establish the necessary nexus or connection between the claim and the properties, and the plaintiff has not shown why a monetary award would be an inadequate remedy in any event.
- [29] In my view, bearing in mind that the application under s. 215 of the LTA is to be determined on the basis of the pleadings alone, the notice of civil claim does disclose a claim for an interest in land based on a remedial constructive trust. The plaintiff alleges that the defendants committed fraud and breach of trust in misappropriating her funds. She seeks a tracing order with respect to the funds, and pleads that the properties are impressed by a constructive trust to the extent that the defendants used money to improve or maintain the properties. Thus she pleads a causal connection or nexus between her claim and the properties.
- [30] Unlike the plaintiff in *Nouhi*, and other cases relied upon by the defendants, the plaintiff also pleads that "an award of monetary damages alone is insufficient or inadequate" as an alternative remedy to her constructive trust claim (Notice of civil claim, Part 1, para. 38). The defendants say that there is no evidence that a monetary award for such claims would

be insufficient. However, the defendants' application under s. 215 of the LTA is based only on a review of the pleadings. No evidence may be adduced at this stage. Further, this application is brought at a very early stage of the proceeding. The requirement for the plaintiff to show that damages are an inadequate remedy requires evidence and factual findings, and the relevant evidence may change during the litigation. For example, an apparently solvent defendant may become insolvent, which would make a monetary award much less appropriate than a proprietary one: *BNSF Railway Co. v. Teck Metals Ltd.*, 2016 BCCA 350, at paras. 66-68 [BNSF Railway].

- [31] In my view, the plaintiff's pleading is sufficient, at this stage, to establish the condition that damages are an inadequate alternative remedy to a constructive trust. More generally, I conclude that her pleading of a remedial constructive trust over the properties is sufficient to establish the pre-condition in s. 215 of the LTA that the plaintiff claims an interest in land.

The alleged equitable mortgage

- [32] I am also of the view that the plaintiff's pleading of an equitable mortgage is sufficient to establish an interest in land under s. 215 of the LTA.
- [33] The essence of an equitable mortgage is an intention to make property security for a debt or a present advance. The document creating the mortgage need not use the formal wording of "transfer" or "mortgage" or "assign", but it must in some manner show an intention to grant a property interest to the mortgagee as security for the debt: *Duncalm Resort Inc. v. Rendezvous Lodge Ltd.* (1998), 52 B.C.L.R. (3d) 64 (C.A.) at para. 7. An equitable mortgage creates a charge, in equity, on the property: *Ben 102 Enterprises Ltd. v. Ben 105 Enterprises Ltd.*, 2007 BCSC 1069 at para. 32. Such a charge, in my view, constitutes an interest in land that may support a CPL.
- [34] The plaintiff pleads that she, Ms. Xiao and Mr. Jie entered into an agreement to secure the plaintiff's advance of funds, a material term of which was that Ms. Xiao and Mr. Jie would grant a mortgage against the properties as security for the funds. [Notice of civil claim, Part 1, para. 28]. This is sufficient to plead a claim for an equitable mortgage.
- [35] The defendants argue that there is no written agreement between the parties, and thus there is insufficient evidence to establish certainty of intention. The defendants further says that the agreement pleaded by the plaintiff does not meet the requirements of s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 53, which provides:
- (3) A contract respecting land or a disposition of land is not enforceable unless
- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,

- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
 - (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
- [36] In my view, the defendants' arguments go to the merits of the plaintiff's claim of an equitable mortgage and not the sufficiency of her pleading. The plaintiff has pleaded that the defendants Ms. Xiao and Mr. Jie agreed that the subject properties would stand as security for the debt. She has also pleaded that she transferred substantial funds to the defendants in reliance on that agreement. Whether that agreement exists, whether it is reflected in writing, and whether, if not, whether the conditions of s. 59(3)(b) or (c) of the Law and Equity Act are established, are all issues that require evidence to resolve. The defendants' application under s. 215 of the LTA is confined to consideration of the pleaded claims.
- [37] Accordingly, I conclude that the plaintiff's claim for an equitable mortgage is sufficient to establish an interest in land under s. 215 of the LTA.

The alleged fraudulent conveyance

- [38] In relation to the plea of a fraudulent conveyance, the plaintiff alleges that on or about March 15, 2021, Ms. Xiao granted a mortgage against the Burnaby Property to the defendant Mr. Deshun that bears no interest and does not require Ms. Xiao to make any monthly payments. The plaintiff pleads that the mortgage contains a term that the mortgage loan shall be fully repaid to Mr. Deshun upon disposition of Ms. Xiao's interest in the Burnaby Property. The plaintiff pleads that, in fact, no funds were owing to Mr. Deshun and that Ms. Xiao's purpose in granting the mortgage was to defeat her creditors. The plaintiff claims that the mortgage is a fraudulent conveyance, and she seeks an order setting it aside.
- [39] Pursuant to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, a disposition of property made to delay, hinder or defraud creditors and others of their just and lawful remedies is void and of no effect against a person whose ability to collect on a debt would otherwise be frustrated.
- [40] The defendants say that the granting of a mortgage cannot constitute a fraudulent conveyance because the granting of a security interest is not a disposition of property. The defendants cite no authority in support of this assertion. Alternatively, the defendants say that even if the granting of a mortgage can constitute a fraudulent conveyance, the only remedy the plaintiff can obtain in the action is to have the mortgage set aside. As there is no remedy against the property itself, the defendants say this claim does not establish an interest in land.

- [41] There are numerous decisions of this Court affirming that the granting of a mortgage, if done to delay, hinder or defraud creditors and others of their just and lawful remedies, may constitute a fraudulent conveyance. Without purporting to be comprehensive in reviewing the relevant law, I refer by way of example to: *College Park Projects Inc. v. 430872 B.C. Ltd.*, 2004 BCSC 955; *Viva Developments Inc. v. Icarus Properties Ltd.*, 2004 BCSC 1176; *Auger v. Hume*, 2001 BCSC 416. It is unnecessary to go further as the defendants have cited no basis in principle or precedent for their assertion that a mortgage cannot constitute a fraudulent conveyance.
- [42] The more difficult issue to resolve is whether a plea of a fraudulent conveyance amounts to a claim for an interest in land in British Columbia.
- [43] The plaintiff relies on the case of *United States (Securities and Exchange Commission) v. Mulholland*, 2016 BCSC 847 [Mulholland], in support of the proposition that a plea that the defendant has made a fraudulent conveyance is a claim for an interest in land. In that case, Justice Funt held that the plaintiff had an arguable case for an interest in land under s. 215 of the LTA on the basis of pleaded claims for a constructive trust or a fraudulent conveyance: Mulholland at paras. 33-35. The plaintiff in Mulholland was a judgment creditor, having obtained a judgment in the United States that it was attempting to enforce against property in British Columbia. As I understand the decision, it was on this basis that Justice Funt concluded that the fraudulent conveyance claim gave rise to an interest in land.
- [44] The plaintiff did not point to any decision of the British Columbia courts in which it has been held that a fraudulent conveyance claim by a plaintiff who is not, or at least not yet, a judgment creditor discloses an interest in land. Instead, the plaintiff relies decisions of the Ontario courts holding that a plea of a fraudulent conveyance supports the issue of a CPL.
- [45] There are relevant differences in the statutory language authorizing the registration of a CPL in Ontario and British Columbia. Section 103(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43, provides that a certificate of pending litigation may be issued in a proceeding in which "an interest in land is in question". The Ontario courts have reasoned that an action to set aside a fraudulent conveyance is an action in which title to or an interest in land is brought into question. Accordingly, it has been long held in that jurisdiction that a fraudulent conveyance claim supports the issuance of a CPL under the Ontario Courts of Justice Act, whether or not the plaintiff claims an interest in land: *Bank of Montreal v. Ewing* (1982), 35 O.R. (2d) 225 (Div. Ct.); *United States Securities & Exchange Commission v. Boock*, 2010 ONSC 2340 at para. 9; *Fernandes v. Khalid*, 2021 ONSC 190 at para. 33.
- [46] The language authorizing the registration of a CPL in British Columbia is different. Section 215 of the LTA permits the registration of a CPL where a party is "claiming an interest in land". A party alleging a fraudulent preference is not, at least not necessarily, claiming an interest in land. If the plaintiff's claim of a fraudulent conveyance in the present case succeeds, the mortgage granted to Mr. Deshun may be void and ineffective as against the plaintiff. This will improve the plaintiff's ability to enforce a monetary judgment against Ms.

Xiao by increasing the available equity in the Burnaby Property for enforcement purposes. However, the plaintiff would not have an interest in the Burnaby Property by virtue of success on the fraudulent conveyance claim alone.

- [47] Given my conclusions that the plaintiff's claims for a constructive trust and an equitable mortgage support the registration of the CPLs in this case, it is unnecessary for me to reach a definitive conclusion as to whether the plaintiff's claim of a fraudulent conveyance is, on its own, sufficient to support the CPLs. I am reluctant to reach a firm conclusion in the absence of more fully developed submissions from the parties. In the circumstances, without finally deciding the point, I simply express my doubt as to whether the CPLs could be justified in this case on the basis of the fraudulent conveyance claim alone.

The defendants' summary judgment application under R. 9-6(4)

- [48] The defendants argue, in the alternative, that even if the notice of civil claim pleads an interest in land, her claims of a constructive trust and equitable mortgage are bound to fail and should be summarily dismissed. The defendants' arguments on the application for summary judgment can be condensed to the following points:
- a) There is no merit to the plaintiff's allegation that the defendants participated in a fraudulent scheme to misappropriate the plaintiff's money. Rather, the plaintiff deliberately chose to engage in the inherently risky activity of currency smuggling, and should be taken to have been aware of and accepted the risk of loss.
 - b) In any event, there is no evidence to establish the two conditions for the remedy of a constructive trust; that is: (i) that the plaintiff's funds contributed to the improvement or maintenance of the New Westminster or Burnaby Properties, and (ii) that damages are an inadequate remedy.
 - c) There is no evidence of a written agreement between the parties that the New Westminster or Burnaby Properties would stand as security for the funds transferred by the plaintiff, and therefore no genuine issue for trial in relation to the claim of an equitable mortgage.
- [49] I will address the evidence before me on these applications in respect to each of these assertions. Given that I am ultimately dismissing the defendants' application for summary judgment, my review of the evidence will be a limited one.

The claim of wrongful misappropriation of funds

- [50] A large volume of evidence has been adduced on this application of the communication between the plaintiff and Ms. Xiao both before and after the plaintiff transferred money to the defendants. Much of the evidence consists of translated communication that the parties had on the social media platform WeChat. The plaintiff says the communication evidences Ms. Xiao's assurances to the plaintiff that her money would be safe, and her acknowledgment of responsibility for the plaintiff's loss. The defendants say that the

evidence before the Court is incomplete, and that the plaintiff is relying on discrete passages that are taken out of context.

[51] Aside from the WeChat conversations, the plaintiff also points to Ms. Xiao's affidavit evidence on these applications which appears to acknowledge that she gave assurances to the plaintiff that the money transfers were risk free. In her Affidavit #2, Ms. Xiao deposes:

9. Looking back I feel terrible now because I used to carelessly advise the Plaintiff that the money transfers were completely safe. I used to toss around words in conversation like "guaranteed" and "put your mind at ease" when sending text messages to the Plaintiff to assure the Plaintiff that the money transfers were safe. In reality, her money was never safe.

....

38. The loss of Wu's money has brought home for me the realities and risks of these kinds of transfers. Again, I feel terrible that I used to tell Wu that there was no risk. This was clearly bad and careless advice on my part.

[52] Ms. Xiao does "state categorically" that she never defrauded the plaintiff. Her evidence is that the plaintiff's funds were somehow lost in the course of the transfer due to the actions of unidentified third parties. However, it is impossible for the plaintiff to test these assertions at this stage of the proceeding given that the defendants have not, to date, provided any discovery, including even an initial list of documents. Two of the defendants, Mr. Deshun and his spouse Shangying Wang, did not even provide affidavits on the summary judgment applications to deny the fraud allegations, despite the plaintiff's evidence that at least a portion of the missing funds were transferred to their accounts.

[53] There is also some evidence that Ms. Xiao has repaid some of the money to the plaintiff in incremental installments. Ms. Xiao says she has repaid \$60,000, the plaintiff says she has received \$40,000. The plaintiff has tendered in evidence a "Loan Repayment Installment Schedule", dated February 28, 2021, that she says Ms. Xiao agreed to. The Schedule sets out monthly principal and interest payments to be made by Ms. Xiao to retire the \$260,000 loan. The interest rate is 12% per annum. The defendants deny the repayments made by Ms. Xiao to date constitute any admission of liability, or that Ms. Xiao agreed to be bound by the Loan Repayment Installment Schedule. Ms. Xiao did not make the payments anticipated by the Schedule.

[54] Accordingly, there is evidence before the Court on the summary judgment application to support that the plaintiff transferred a large sum of money to Ms. Xiao and other defendants, that Ms. Xiao has repaid some but not all of the money, and that the plaintiff has suffered a substantial financial loss. There is also evidence to support that Ms. Xiao gave assurances to the plaintiff that the money transfers were risk free, when in reality the plaintiff's money "was never safe". Yet the defendants invite the Court to dismiss the claims of fraud and unjust enrichment before discovery has even occurred. They do so on the basis of Ms. Xiao's bare assertion that the money was lost rather than taken, and Mr. Jie's bare

denial of knowing anything about the plaintiff's money transfers despite the fact that money was transferred into his account.

- [55] As the plaintiff points out, it is difficult, if not impossible, to test the defendants' bare assertions, or to explore the defendants' actions and motives, without discovery from the defendants. At this stage, the plaintiff has not even received production of Ms. Xiao's banking records. I note, finally, that the defendants have tendered no evidence at all from the two remaining defendants who are also alleged to have participated in the fraud.
- [56] In these circumstances, the defendants have not met their onus to establish that the plaintiff's claims that the defendants have wrongfully misappropriated her funds are bound to fail. The claims raise a genuine issue for trial.

The claim for a constructive trust

- [57] For substantially similar reasons, I conclude that it cannot be said at this stage of the proceeding that the plaintiff is bound to fail in establishing a nexus or connection between her claims and the subject properties, and that damages are an inadequate remedy.
- [58] With respect to the nexus between the claims and the properties, the plaintiff points out that Ms. Xiao and Mr. Jie engaged in a lengthy, and apparently expensive, construction of a new house on the New Westminster Property over the past two years. It is unclear on the evidence how the construction, in addition to high monthly mortgage payments on both the New Westminster and Burnaby Properties, could have been financed on Mr. Jie's annual salary of \$140,000. Ms. Xiao deposes that she is unemployed. The details of the funding of the construction and the mortgages are known only to the defendants, and, once again, they have not yet provided any discovery. It cannot be the plaintiff's burden in these circumstances to prove facts that are solely within the knowledge of the defendants before the defendants have even produced a list of documents. In the absence of a fuller evidentiary record, it cannot be said at this stage that the plaintiff is bound to fail in establishing a nexus between her claims and the properties.
- [59] I have already addressed the prematurity of the plaintiff's plea that damages are not an adequate remedy for the defendant's unjust enrichment and wrongful misappropriation of funds. As held by the Court of Appeal in BNSF Railway, the requirement for the plaintiff to show that damages are an inadequate remedy requires evidence and factual findings. There is a legitimate basis for the plaintiff's concern at this stage that damages will be an inadequate remedy given the recent actions of Ms. Xiao in listing the Burnaby Property for sale, and granting a \$500,000 mortgage to her father-in-law. It is at least arguable that Ms. Xiao may be attempting to render herself judgment-proof, at the same time that the defendants collectively argue that Ms. Xiao is the only party against whom judgment could issue.

- [60] I conclude, accordingly, that it cannot be said at this stage of the proceeding that the plaintiff is bound to fail in establishing the conditions for the remedy of a constructive trust.

The claim of an equitable mortgage

- [61] The defendants argue that the plaintiff's claim for an equitable mortgage over the New Westminster and Burnaby Properties is bound to fail in the absence of a clear written mortgage agreement between the parties.
- [62] The plaintiff alleges that Ms. Xiao and Mr. Jie agreed that they would grant mortgages against the properties to secure repayment of the funds she transferred to the defendants. The plaintiff points to WeChat communication between herself and Ms. Xiao in which Ms. Xiao acknowledged that the funds advanced by the plaintiff were a "loan". The plaintiff says that these discussions provide the backdrop for the Loan Repayment Installment Schedule, which is in writing and which provides inferential support for the plaintiff's allegation of a mortgage agreement. The plaintiff emphasizes that pursuant to s. 59(3)(b) of the Law and Equity Act, an agreement respecting land or a disposition of land may be enforceable where the party to be charged has done an act or acquiesced in an act that indicates a contract or disposition not inconsistent with the one alleged.
- [63] In my view, the defendants have also not met the onus of establishing that there is no genuine issue for trial in relation to the alleged equitable mortgage. The parties' evidence conflicts as to what was agreed. To resolve this claim, it will be necessary for a trier of fact to weigh evidence, which cannot be done on a summary judgment application.

Summary on the defendant's application for summary judgment

- [64] The defendants have not met their burden of establishing the necessary conditions for summary judgment. It is not "manifestly clear" or "beyond a reasonable doubt" that there is no genuine issue for trial in relation to the plaintiff's claims for a constructive trust and equitable mortgage. The plaintiff's claims raise factual conflicts that will require a trier of fact to weigh evidence to resolve. The action has not progressed beyond the pleadings stage. In the absence of more developed evidentiary record, it would be unsafe to grant judgment on the basis of the defendants' bare denials which the plaintiff is unable to test.
- [65] For the foregoing reasons, I dismiss the defendant's application for summary judgment.

The amount of security on the Burnaby Property

- [66] As noted at the outset of this judgment, a sale of the Burnaby Property was imminent at the time of the hearing of these applications. The parties consented to an interim arrangement whereby the CPL would be lifted to allow the sale to complete, and the defendants paid \$260,000 as security. This was an interim arrangement only, and without prejudice to the defendants' position on the applications.

- [67] The defendants say that, in the event the CPL on the Burnaby Property is cancelled on the ground of hardship and inconvenience, they should not be required to pay security or, at most, to pay only nominal security pursuant to s. 257(1) of the LTA. The defendants rely on s. 257(3) of the LTA, which provides that the court, in determining the amount of security, may consider the probability of the party's success in the action in respect of which the CPL was registered. The defendants repeat their arguments about the lack of merit in the plaintiff's claims for a proprietary remedy.
- [68] The defendants further say that in assessing the probability of success, it is only the plaintiff's proprietary claims that are relevant, not her probability of success generally in securing a monetary award in the action. The defendants rely on *Mariash v. 0715422 B.C. Ltd.*, 2012 BCSC 788 at para. 46. It is not clear to me that such an interpretation can be supported on the language of s. 257(3) of the LTA which refers to "the probability of success in the action". In *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379 at para. 29 [Enigma Investments], Goepel J., as he then was, held that the language of s. 257(3) does not support limiting the assessment of a plaintiff's potential success to the proprietary claims.
- [69] In any event, it is not necessary for me to resolve this point, and I received limited submissions from the parties that would assist me in doing so. I have already dealt at length with the defendants' submissions on the alleged lack of merit in the plaintiff's claims for proprietary remedies. The plaintiff's claims are at least arguable. They are certainly not so lacking in merit that it would be just to cancel the CPL against the Burnaby Property without the payment of substantial security.
- [70] In my view, the amount of security that the defendants have paid, \$260,000, is a satisfactory amount to have stand as security pending trial. I base this assessment on three primary factors, aside from the *prima facie* merit of the plaintiff's claims.
- [71] First, this is not a case in which there is significant uncertainty associated with the assessment of the amount of money the plaintiff transferred to the defendants. She transferred \$260,000 CAD. While it appears that Ms. Xiao has paid some of this money back, \$260,000 is a reasonably accurate estimate of the amount that the plaintiff is currently out-of-pocket, factoring in interest. Furthermore, the plaintiff could recover significantly higher damages at trial if her claims for aggravated and punitive damages succeed.
- [72] Second, there is no suggestion on the evidence that Ms. Xiao will suffer hardship if the \$260,000 remains in trust pending trial. The delay may prevent Ms. Xiao from immediately paying \$500,000 to Mr. Deshun pursuant to the allegedly fraudulent mortgage. However, Ms. Xiao's evidence is that Mr. Deshun only requested the mortgage to secure his past financial contributions to Ms. Xiao, who is Mr. Deshun's daughter-in-law, when it appeared that Ms. Xiao and Mr. Jie might separate. Mr. Deshun wished to ensure repayment in the event that Ms. Xiao and Mr. Jie divorced. Ms. Xiao says that she and Mr. Jie are now reconciled. There is no indication that Mr. Deshun is continuing to press for the mortgage funds, and the

mortgage itself does not bear interest.

- [73] Third, in fixing an amount of security, the court may take into account the financial circumstances of the person being called upon to post security: Enigma Investments at para. 30. In light of the positions taken by the defendants in this action, there is a prospect that the plaintiff will only be able to recover her losses from Ms. Xiao. Ms. Xiao deposes that she is unemployed. It is doubtful what equity, if any, will be left in the Burnaby Property if the security is paid out to Ms. Xiao, and she is permitted to distribute \$500,000 of the net sale proceeds to Mr. Deshun. Mr. Jie is the sole registered owner of the New Westminster Property. There is, therefore, a significant risk that the plaintiff would be unable to collect on a trial judgment against Ms. Xiao absent the payment of security on cancellation of the CPL on the Burnaby Property.
- [74] For these reasons, I dismiss the defendants' application for an order that the defendants pay no security or nominal security on the cancellation of the CPL. The \$260,000 that has been posted as security will remain as security pending trial.
- [75] Finally, I note that it is not evident to me whether it is necessary for the CPL to remain on the New Westminster Property given that a substantial sum has been posted as security in relation to the Burnaby Property. The parties, understandably, did not direct submissions to this point given that it turned on the outcome of the application to cancel the CPLs. Accordingly, I wish to be clear that my judgment is without prejudice to any future application by the defendants to cancel the CPL on the New Westminster Property.

THE PLAINTIFF'S APPLICATION FOR A MAREVA INJUNCTION

- [76] In light of my decision on the defendants' application to cancel the CPLs, it appears to me that it is unnecessary to resolve the plaintiff's application for a Mareva injunction. To account for the possibility that the plaintiff may have a reason for pursuing the application for a Mareva injunction that is not apparent to me, I will generally adjourn her application rather than dismissing it.

ORDERS

- [77] For the foregoing reasons, I make the following orders:
- a) The defendants' application to cancel the CPLs pursuant to s. 215 of the LTA is dismissed;
 - b) The defendants' application for summary judgment dismissing the plaintiff's claims which plead an interest in land is dismissed;
 - c) The \$260,000 that the defendants posted as security on an interim basis on the cancellation of the CPL on the Burnaby Property shall remain as security pending trial;
 - d) The foregoing terms are without prejudice to any future application by the defendants to cancel the CPL on the New Westminster Property;

e) The plaintiff's application for a Mareva injunction is adjourned generally.

[78] The plaintiff is entitled to her costs of these applications, in the cause.

"Horsman J."

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