

CANADA / JUDGMENT

Yang v. Lu

2024 BCSC 993

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 993 Yang v. Lu IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Yang v. Lu, 2024 BCSC 993 Date: 20240611 Docket: S2013500 Registry: Vancouver Between: Xiaoqin Yang Ming Zhang Plaintiffs And Ping Hui Lu, Unison International Holdings Ltd., Baocheng Su, Yong Jiu Jiang and Chang Jun Qiao Defendants And Ping Hui Lu Plaintiff by Counterclaim And Xiaoqin Yang Ming Zhang Defendants by way of Counterclaim Before: The Honourable Justice A. Ross Reasons for Judgment Counsel for the plaintiffs: M. Funt H. Nie Counsel for the Defendants Unison International Holdings Ltd., Baocheng Su, Yong Jiu Jiang, and Chang Jun Qiao: J. Watson X. Liu Place and Date of Hearing: Vancouver, B.C. April 17, 2024 Place and Date of Judgment: Vancouver, B.C. June 11, 2024 Table of Contents Introduction.. 4 Issues. 4 Background to this Litigation.. 5 The Original Ex Parte Application. 11 Terms of Ex Parte Order 12 Allegations of Failure to Provide Full and Frank Disclosure. 13 No adverse findings had been made against these defendants by Justice Weatherill in his trial decision. 15 The claim being put forward by the plaintiff (Myles) was barred by the terms of the warrants. 16 The alleged Directors' Resolution was not in the format of a formal resolution, but was, instead, a WeChat message purporting to be minutes of a shareholder meeting. 17 The remaining defendants, Mr. Su, Mr. Jiang, and Mr. Qiao, were never trustees for the plaintiffs' shares. They are alleged to be trustees de son tort. 19 Helen's assets are sufficient to satisfy a substantial portion of the judgment debt. 19 The amounts claimed as damages (in the injunction application) are the highest possible amounts that could be established if a deliberate breach of trust were established. 19 Myles and Rose had been found by Weatherill J. to be dishonest witnesses, willing to say anything. 20 Argument Based upon Notice to Admit That Was Not Answered. 20 Failure to Give Notice. 21 Summary of Defence Allegations and My Findings. 21 Change in Circumstances - Application to Vary. 21 New Evidence Relating to Mr. Su. 21 New Evidence Relating to Mr. Qiao. 22 New Evidence Regarding Mr. Jiang. 22 New Evidence. 23 Summary and Conclusion.. 24

Introduction

- [1] On December 27, 2023, I granted an ex parte Mareva injunction in favour of the plaintiffs in this action against three of the individual defendants.

- [2] Those defendants now apply to set aside the injunction or to vary its terms. They argue that the plaintiffs failed to meet their duty of full and frank disclosure on the ex parte application. In the alternative, they submit that new evidence, not known to the plaintiffs at the time of the ex parte application, provides grounds to vary the order.
- [3] In the period between the granting of the order and the hearing of this application, the parties negotiated certain variations to the terms of the injunction. Those changes go by consent.
- [4] For the reasons set out below, I make the following findings:
- a) There was no failure by the plaintiffs at the ex parte hearing to advise the court with full and frank disclosure. Hence, there is no basis to set aside the Mareva injunction.
 - b) The defendants have adduced new evidence. When viewing the entirety of the evidence, I am not satisfied that the interests of justice and the balance of convenience favours the defendants. I decline to vary the existing order, except in the manner that has been agreed between the parties.
- [5] Hence, I make no order outside of the consent reached between the parties.
- [6] For convenience and consistency with prior reasons of this Court, I refer to some of the parties by their Western first names. I mean no disrespect by doing so.

Issues

- [7] The issues for me to decide on this application are:
- a) Did the plaintiffs fail to provide full and frank disclosure at the ex parte application to the extent that the defendants are entitled to an order setting the injunction aside?
 - b) In the alternative, are there grounds to vary the terms of the existing order? Background to this Litigation
- [8] The background to this litigation, and the steps within the litigation, are both complex.
- [9] This proceeding is the second half of a severed action. The first half proceeded to trial before Justice G.C. Weatherill in 2022. That trial produced reasons for judgment consisting of 407 paragraphs: *Zhang v. Zhang*, 2022 BCSC 2156 (the "Weatherill Reasons").
- [10] Justice Weatherill awarded the plaintiffs in this proceeding judgment in the amount of \$6,900,000 against the defendant Pin Hui Lu (known in those reasons, and hence in these reasons, as "Helen"). That judgment is under appeal.
- [11] The applicants are Helen's co-defendants.

- [12] These reasons must be read in light of, and with reference to, the Weatherill Reasons. I set the background out in some detail because it provides some idea of the flavour of the litigation. Further, in my opinion, the Weatherill Reasons provide significant context regarding the strength of the plaintiffs' claims against the defendants.
- [13] First, to give some idea as to the nature of the first trial, I set out the first two paragraphs of the Weatherill Reasons:
- [1] The claims and counterclaims in these actions arise out of the business and investment activities of the members of two families. The issues raised are an illustration of the level to which some people will descend to extract retribution when money is lost. Unfortunately, this case is also an example of the willingness on the part of some counsel to advocate a client's position despite it being untethered from the truth.
- [2] The relevant events are convoluted. There are allegations of document fabrication and fraudulent misrepresentation. There are denials of obvious fact. The Rule in Browne v. Dunn, 1893 CanLII 65, 6 R. 67 (H.L) was disregarded throughout the trial despite repeated admonitions from the bench. Most of the viva voce evidence was presented through an interpreter. Many of the questions asked of witnesses were poorly articulated and the meaning was lost in both translation and the nuances of the Chinese language. The court was left to weave as best it could through a labyrinth of irrelevant evidence and dealings that defied common sense.
- [14] In very brief summary, the big picture of the allegations of the plaintiffs in this, and the related proceedings, are:
- a) The plaintiffs Ming Zhang ("Myles") and Xiaoqin Yang ("Rose") are married.
 - b) In 2016, Myles became aware of an opportunity to invest in a private placement of shares in a company called Electrameccanica Vehicles Corp. ("EVC").
 - c) Myles and Rose brought this investment opportunity to a group of friends including the defendants: Helen, Mr. Su, Mr. Jiang, and Mr. Qiao. All of the parties agreed to invest.
 - d) As a vehicle for investment, the plaintiff Rose and the individual defendants incorporated the defendant Unison International Holdings Ltd. ("Unison").
 - e) The investment in Unison was divided between the investors:
 - i. Rose: \$500,000 for 25 shares ii. Helen: \$500,000 for 25 shares iii. Mr. Qiao: \$500,000 for 25 shares iv. Mr. Su: \$300,000 for 15 shares
 - v. Mr. Jiang: \$200,000 for 10 shares
 - f) The officers of Unison were Helen (President), Mr. Qiao and Mr. Su (Directors), and Mr. Jiang (Secretary).

- g) For complex reasons (explained in the Weatherill Reasons), Rose's shares in Unison were held in trust by Helen.
 - h) Unison acquired 2,400,000 shares and 4,000,000 warrants of EVC for \$2,000,000. Each warrant entitled the holder to purchase one common share of EVC at a price of \$2.00 exercisable on or before October 28, 2021.
 - i) There was an agreement between the investors in Unison to provide Myles with 2,000,000 warrants.
 - j) When the shares of EVC increased in value, Myles and Rose requested that their shares be sold and their warrants exercised.
 - k) Helen denied that she held Rose's shares in trust for Rose. She also denied any agreement to allot 2,000,000 warrants to Myles.
 - l) The directors (Messrs. Su and Qiao) and the secretary (Mr. Jiang) of Unison sided with Helen (i.e., against the plaintiffs) and acted in a manner that accepted Helen's denials.
 - m) The directors of Unison exercised the warrants and sold the shares in EVC, realizing a substantial profit.
 - n) Unison distributed the resulting funds among the individual defendants.
 - o) Myles and Rose lost out on their investments as a result.
- [15] I note, again, that the sub-paragraphs listed above are a summary of the plaintiffs' allegations. Those allegations are, to an extent, still in issue in the remaining litigation.
- [16] Backing up in the chronology and in the overall context of the litigation involving these parties, when the plaintiffs filed their original pleading, Messrs. Su, Qiao, and Jiang threw their lot in with Helen. They retained the same counsel and put forward a unified defence denying the existence of the trust over Rose's shares and the allotment of warrants to Myles.
- [17] The strategy of aligning their defence with Helen has not aged well.
- [18] The Weatherill Reasons say the following about Helen's credibility:
- [248] Helen's testimony was replete with unabashed lies. It was rambling, contradictory and devoid of veracity. Rather than answer the questions that were asked of her, she appeared to view the witness stand as a platform for advocating her position in the actions, rarely missing an opportunity to malign Myles' integrity.

- [249] Although Helen attempted to portray herself as a naïve, confused, and easily manipulated innocent victim, I find she is anything but. I find that Helen is an experienced and tenaciously strong-willed business-person who is used to and fully capable of getting her way. She is a person who takes a "hands on approach" to her business dealings. Nick testified that Helen makes all of the financial decisions in their family, stating: "Helen handles everything".
- [250] Her true character was plainly evident during her cross-examination, as was the spuriousness of her factual defences to these actions.
- [251] Despite her protestations to the contrary, I find that Helen was intimately involved in Lumenari's day-to-day business operations until November 2018. She regularly participated in the Lumenari WeChat Group communications. She was well aware of Lumenari's dire financial circumstances yet continued to inject capital into the business by way of shareholders' loans because she believed in Lumenari's future potential. Her evidence that she did not have the energy to review 2017 the Lumenari financial statements because her mother had died (over a year earlier) was absurd. Her attempt to distance herself from the Lighting Invoices, by giving evidence during her examination for discovery that her brother, Guang Ming Lu, merely worked at Vanshen Enterprises when in fact he had incorporated the company and has always been its sole shareholder and by denying any involvement in the preparation of the Lighting Invoices was dishonest. Her handwritten note described what was included in the Lighting Invoices, including "make payment to Vanshen Enterprises". Her evidence that she was unaware of the invoices until late April 2019 and must have made the note at that time was undermined by the fact that she participated in a voicemail exchange about the invoices with Rose in May 2018. Her convoluted attempts to explain her notes and render benign her June 21, 2019 WeChat post to Rose were incapable of belief.
- [252] Helen's testimony regarding Unison was equally untruthful. In her affidavit sworn February 1, 2021 in this proceeding, Helen deposed that: [Rose] and [Myles] were not "founders" of Unison and were not shareholders of Unison - beneficial or legal. [] [] there was no discussion between me and either of [Myles] or [Rose] about me holding shares of Unison in trust for [Rose] [] [] at no time did [Myles] engage in any services on behalf of Unison to negotiate lower prices or better deal terms between Unison and [EVC] with regard to shares, warrants, units, or otherwise [] [] I have attended meetings and social gatherings with [Rose] and/or [Myles] but never in the context of a shareholders meeting or directors meeting of Unison [] I did not draft the minutes [of the November 19, 2016 Shareholders' Meeting] That evidence was demonstrably false.

- [19] Of particular note, in the trial before Weatherill J., the applicants here, Messrs. Su, Jiang, and Qiao, also denied the existence of any trust wherein Helen held 25 Unison shares in trust for Rose. They (along with Helen) continued that denial more than two weeks into the trial, despite the testimony of the solicitor who drafted the written trust agreements. Justice Weatherill wrote, referring to this action (Action No. S2013500):
- [4] In Vancouver Registry Action No. S2013500 (the "Unison Trust Action"), the plaintiffs allege that the defendants, Helen, Baocheng Su ("Su"), Yong Jiu Jiang ("Jiang"), and Chang Jun Qiao ("Qiao") (collectively, the "Unison Trust Action defendants"), hold shares in a company called Unison International Holdings Ltd. ("Unison") in trust for them. Throughout this litigation, the Unison Trust Action defendants denied the very existence of the trust, alleging that signatures had been forged. That position was advocated by their counsel. On day 16 of the trial, in the face of overwhelming evidence of their participation in and knowledge of the trust, the Unison Trust Action defendants relented and conceded the obvious--that the trust existed and that the signatures had not been forged.
- [20] Hence, in my opinion, the "tenor" of the litigation to date involves the individual defendants (applicants here) siding with a co-defendant who took positions that were "untethered from the truth" (Weatherill Reasons at para. 1). That fact informs my view of the entire litigation and this application.
- [21] As noted, the Weatherill Reasons granted judgment in favour of the plaintiffs in excess of \$6,900,000. That amount included punitive damages of \$100,000. That judgment is under appeal. Helen has since been deemed bankrupt. The claim against Helen constitutes the other half of this severed litigation.
- [22] In this half of the litigation, the plaintiffs claim against:
- a) Messrs. Su, Qiao, and Jiang:
 - i. for oppressive conduct as directors; ii. as trustees de son tort for Rose; iii. for breach of trust as directors; iv. for knowing participation in a breach of trust.
 - b) And against Unison for:
 - i. breach of trust on Myles' warrants; ii. conversion of Myles' warrants; iii. unjust enrichment via Myles' warrants;
- [23] In essence, the claim against the individual defendants is that they assisted Helen in her breach of trust by taking steps in their positions as directors to prevent the plaintiffs from reaping the benefits of the group's agreement and Rose's investment. They further permitted the distribution of the profits from the EVC investment. The Original Ex Parte Application
- [24] On December 27, 2023, Mr. Funt appeared before me, ex parte, and explained the basis of the plaintiffs' application:

- a) The second half of the action was scheduled to proceed to trial on January 8, 2024, against Unison and Messrs. Su, Qiao and Jiang.
- b) The defendants had applied for an adjournment of the trial on November 30, 2023. That application was dismissed by Associate Judge Hughes on December 15, 2023.
- c) Messrs. Su, Qiao, and Jiang had retained counsel for the purpose of the adjournment application, but there was no counsel of record.
- d) There was evidence that each of the individual defendants had a significant connection to China, suggesting that they may leave the jurisdiction.
- e) There was evidence that Mr. Jiang:
 - i. had listed his property (his only known asset in the jurisdiction) for sale on December 18, 2023 (three days after Master Hughes' order); ii. had lowered the asking price for the property on December 20, 2023 (two days later).
- f) There was evidence that Mr. Qiao's family home (owned by his wife) was listed for sale (although it had been listed for some time).
- g) The individual defendants and Unison had taken no steps in the litigation, including: not retaining counsel, not responding to a long notice to admit and not attending examinations for discovery.

[25] Mr. Funt's submission was that, on the basis of the facts disclosed above:

- a) the plaintiffs have a strong prima facie case against the individual defendants and Unison, based upon the findings of fact in the Weatherill Reasons;
- b) there was a significant risk that the defendants would be disposing of assets or moving assets out of the jurisdiction; and
- c) the interests of justice resided with the granting of the injunction.

[26] I accepted those submissions. Terms of Ex Parte Order

[27] The ex parte order was in the standard form and included the following terms (paraphrased):

- a) Except as permitted by this order, the individual defendants (Messrs. Jiang, Qiao, and Su) must not:
 - i. remove from British Columbia or in any way dispose of or deal with or diminish the value of any of his assets that are in British Columbia, whether in his own name or not and whether solely or jointly owned; ii. without limiting the specificity of paragraph 1(a), the defendants are entitled to sell any assets provided that the net sale proceeds are paid directly to the defendant(s)' solicitor's trust account and held in trust as security for any judgment.

- b) If the total value of the defendants' assets in B.C. net of all secured interests, exceeds \$10,000,000, the defendant may remove any of those assets from B.C. so long as the total net value of the assets in B.C. remains above \$10,000,000.
- c) This order does not prohibit the defendants from spending \$10,000 on ordinary living expenses and on ordinary and proper business expenses and \$100,000 collectively on legal advice.

[28] I am informed that the parties negotiated a consent variation to the injunction order in the following terms:

- a) Paragraph 3 of the order was varied such that:
 - i. the defendants collectively could spend \$500,000 on legal advice and representation; and ii. the following monthly amounts could be spent:
 - (1) Mr. Su: \$10,000
 - (2) Mr. Jiang: \$15,000
 - (3) Mr. Qiao: \$10,000

[29] Again, those changes will go by consent. Allegations of Failure to Provide Full and Frank Disclosure

[30] First, I note that there is no dispute on the legal test for the granting of a Mareva injunction. The Court of Appeal in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 (with my alterations to the line-breaks):

[18] In sum, British Columbia has forged a flexible approach to applications for Mareva injunctions from the more stringent rules-based approach in *Aetna*. Under this approach, "[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case": *Mooney v. Orr* No. 2 at para. 43. The legal test requires an applicant to establish:

- (1) the threshold issue of a strong prima facie or good arguable case; and
- (2) in balancing the interests of the parties, to consider all the relevant factors, including
 - (i) the existence of exigible assets by the defendant both inside and outside the jurisdiction, and (ii) whether there is evidence of a real risk of disposal or dissipation of those assets that would impede the enforcement of any favourable judgment to the plaintiff.

[31] There is also no dispute between the parties that the obligation on the applicant in an ex parte application is to provide full and frank disclosure. That duty was described as follows by Justice Dley in *Pierce v. Jivraj*, 2013 BCSC 1850:

[37] On an ex parte application, the relevant principles include the following:

- 1) the applicant must make full and frank disclosure of all material facts;
 - 2) a material fact is one that may affect the outcome of the application;
 - 3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;
 - 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
 - 5) the extent of the inquiries required depend on the circumstances of the particular case;
 - 6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;
 - 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
 - 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the ex parte hearing;
 - 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and
 - 10) not every omission necessarily results in the order being set aside. *Girocredit Bank Aktiengesellschaft Der Sparkassen v. Heidrun Hedwig Bader, Anton Hans Bader and Tomax Enterprises Ltd.*, (25 June 1998) Vancouver CA 021618 (B. C. C. A.) at para 45; *Procon Mining and Tunneling Ltd. et al v. McNeil, Bonnar et al.*, 2007 BCSC 454 at paras. 10-11.
- [38] An ex parte applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defenses may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The duty of disclosure is onerous, particularly when seeking the draconian nature of Anton Piller relief: *Green v. Jernigan*, 2003 BCSC 1097, at paras. 24-25.
- [32] The overall theme of the defence submission was that the plaintiffs failed to provide the court with a full and accurate description of the tenor of the litigation. The notice of application sets out a number of areas where the plaintiffs allegedly failed to make full and frank disclosure. The defendants argue that these mis-steps, individually and as a group, constitute a failure by the plaintiffs to disclose information in a degree that requires the setting-aside of my ex parte order. I discuss those areas below. I note that, in oral submissions, counsel trimmed down the list of alleged infractions. I have included all of the items listed in the notice of application for the sake of completeness.
- [33] For ease of reference, I have set out the defence submissions from the notice of application, followed by the plaintiffs' response, and then my finding on each isolated issue. No adverse findings had been made against these defendants by Justice Weatherill in his trial decision.

- [34] The defendants submit that the plaintiffs should have advised the court that Justice Weatherill's reasons make no adverse findings against these defendants.
- [35] I do not consider this to be a matter that the plaintiffs were obligated to bring to my attention. The plaintiffs' action had been severed such that their claim against Helen proceeded first and the claim against the current defendants (Unison, Mr. Su, Mr. Jiang, and Mr. Qiao) would proceed second. Hence, there was no basis for Justice Weatherill to make findings about these defendants.
- [36] To the extent that the defendants may be referring to adverse findings about their credibility, it is my understanding from the Weatherill Reasons that, of the current defendants, only Mr. Su testified. Msrs. Qiao and Jiang did not testify. Hence, there could be no adverse finding regarding their credibility.
- [37] The following paragraphs of the Weatherill Reasons address Mr. Su's credibility:
- [274] Su gave his evidence in chief in a down-to-earth and forthright manner. He became terse and assertive during his cross-examination, particularly where the questioning concerned the Unison Trust which he considered had been done behind his back. I accept his evidence as generally credible and reliable, with the exception of his assertion that Helen had nothing to do with his refusal to sign the Unison resolutions authorizing the transfer of Rose's trust shares. While I accept that Su was upset at not having been made aware of the trust, it makes no sense that his anger was the sole reason for his refusal. Rather, I find that Helen persuaded him not to sign the resolution because she had determined she would keep Rose's Unison shares to offset her Lumenari shareholders' loans.
- [38] This is a finding on Mr. Su's credibility. I consider it neither favourable nor unfavourable. It does not assist me, or detract from the force of the plaintiffs' submission.
- [39] The only other comment on the individual defendants is the one quoted above (paragraph 4 of the Weatherill Reasons). While that paragraph does not specifically make an adverse finding against these defendants' credibility, it is a finding that their counsel (who was also Helen's counsel) took a position on the central issue in the litigation that was "untethered to the truth".
- [40] Hence, on the specific point raised by the defendants, there was really no thing to which my attention should have been brought. Quite the opposite, viewing the Weatherill Reasons with a wider lens does not assist the applicants. The claim being put forward by the plaintiff (Myles) was barred by the terms of the warrants
- [41] The defendants argue that the terms of the warrants barred transfer. Hence, they say, there was no prospect of the warrants being placed in Myles' name or in someone else's name in trust for Myles. The defendants argue that this defence negatively impacts the "strong prima facie case" that the plaintiffs suggested. They submit that plaintiff's counsel should have advised me of this defence.

[42] The plaintiffs provide two substantive answers to this position:

- a) The entity that invested in EVC was Unison. The plaintiff Rose and the individual defendants were investors in Unison. Each of the individual investors (excluding the plaintiff Rose) profited from the exercise of the warrants. Hence, if the shareholders in Unison could benefit from the exercise of warrants, there is no reason that Myles could not also receive the same benefit. In other words, Unison could have exercised the warrants, sold the resulting shares, and then distributed any profit to Myles. Hence, this defence carries no water.
- b) Although the notice of application sets out this purported defence to Myles' claim, it is a defence that has never been pled by the defendants.

[43] In my opinion, both of the plaintiffs' arguments represent a complete answer to the defence position on this issue. The obligation of the plaintiffs, and their counsel, is to make full and frank disclosure. That obligation cannot extend to pointing out potential defences that the defendants' counsel had not advanced in their pleadings. This litigation was commenced in 2019 and was four years old by the time of the injunction application.

[44] I also accept the argument that, on the evidence before me, nothing would have stopped Unison from exercising the warrants on Myles' behalf. The alleged Directors' Resolution was not in the format of a formal resolution, but was, instead, a WeChat message purporting to be minutes of a shareholder meeting.

[45] This is an argument that was addressed in the Weatherill Reasons.

[46] I put no stock in the defence allegation that plaintiff's counsel failed to advise me of this defence.

[47] My understanding of the defence submission is that plaintiffs' counsel overstated the importance of the communication. The defence submits that by characterizing the communication as a "Directors' Resolution", counsel placed undue importance upon it as a factor in the strength of their case.

[48] However, in my opinion, the nature and importance of the communication was not overstated by the plaintiffs' counsel on the ex parte motion.

[49] The importance of the communication is evident from the Weatherill Reasons. Counsel drew my attention to those portions of the Weatherill Reasons.

[50] In short, following a meeting of the prospective shareholders of Unison, Helen sent a text message regarding shareholdings to the group of investors. That text indicated each party's shareholding and the roles of the executives. She then sent that message to a solicitor (Mr. Mao) who drafted the trust agreement. Justice Weatherill made the following findings.

- [80] On October 14, 2016, Helen posted the following on the Lumenari WeChat Group page:
Company Name: Unison International Holdings Ltd. Address: #200-3071 NO. 5 Road,
Richmond, BC V6X 2T4 Share Holders: President - [Helen], 50%, SIN: [] [address] Director -
[] Qiao, 25% SIN [address] Director - [] SU, 15%, SIN: [] [address] Secretary - [] Jiang, 10%,
SIN: [] [address] Note: Hidden Shareholder: [Rose], 25%, SIN: [] [address] [Rose]'s share will
be hold [sic] by [Helen]. We need the agreement.
- [81] Helen sent this WeChat post to Mr. Mao. Mr. Mao testified that it was Helen who instructed
him to prepare an agreement documenting that Helen would hold 25% of Unison in trust for
Rose.
- [51] Hence, whether the communication was a directors' resolution or not, Weatherill J. found
that it represented the intentions of the group.
- [52] I do not see that the plaintiffs misrepresented that communication at the ex parte
application. Frankly, it would be hard to misrepresent the nature of that text, given the
findings of fact in the Weatherill Reasons.
- [53] I do not accept this allegation of the defendants. The remaining defendants, Mr. Su, Mr.
Jiang, and Mr. Qiao, were never trustees for the plaintiffs' shares. They are alleged to be
trustees de son tort.
- [54] The defence submits that the plaintiffs had an obligation to inform the court that the
remaining defendants were never trustees over the plaintiffs' shares.
- [55] I disagree. I was never under the impression that they were trustees.
- [56] As noted above, the amended notice of civil claim specifically pleads that the applicants
were trustees de son tort. It is clear from the Weatherill Reasons that Helen was the
individual who held the shares in trust. The primary source of (potential) liability of the
remaining individuals is through their acts as directors. Helen's assets are sufficient to
satisfy a substantial portion of the judgment debt.
- [57] This appears to be a submission in search of evidence.
- [58] Helen is bankrupt.
- [59] The plaintiffs have a \$6,900,000 judgment that has not been paid. The amounts claimed as
damages (in the injunction application) are the highest possible amounts that could be
established if a deliberate breach of trust were established.
- [60] This statement is correct. It is also a fact that was relayed to me by counsel at the ex parte
hearing.

- [61] The plaintiffs' claim for damage in the amount of \$13,000,000 must be placed in the context of the plaintiffs having already obtained judgment against Helen in the amount of \$6,900,000. There was no failure to disclose this point in the ex parte application. Myles and Rose had been found by Weatherill J. to be dishonest witnesses, willing to say anything.
- [62] Before addressing this allegation, I must note that, as a starting proposition, it is only half-true. Justice Weatherill found Myles to be "a person who will say anything he perceives is necessary to achieve what in his view would result in justice for him and his family." (at para. 245).
- [63] However, the same cannot be said for Weatherill J.'s assessment of Rose's credibility. He wrote: Rose
- [246] Rose gave her evidence in an honest, consistent, and credible manner. She was forthright and did not attempt to embellish or justify her testimony. Her credibility as a witness was enhanced during her cross-examination, which only served to demonstrate that it was Myles who, throughout, made their family's business decisions and Rose merely followed his directions.
- [247] However, I find that, because she followed her husband's instructions, Rose knowingly participated in Myles' scheme to make investments by way of trust in order to avoid creditors.
- [64] I was under no illusions about the findings regarding Myles' credibility. I do not accept that Mr. Funt failed to be full and frank on that issue. Argument Based upon Notice to Admit That Was Not Answered
- [65] The defence submits that the plaintiffs' argument on the ex parte application was weighted on a number of purported admissions made by the defendants. They submit that the plaintiffs had a duty to inform the court that those admissions may be withdrawn. They note that the notice to admit was sent during a time when the individual defendants, who are not fluent in English, did not have counsel.
- [66] In short, I do not accept this proposition. The transcript of the ex parte hearing indicates that counsel specifically stated that he did not want to overstate the effect of the matters that were deemed admitted. He noted that the notice to admit received no response.
- [67] Everyone involved in litigation understands the upshot of that situation. Failure to Give Notice
- [68] The defence further submits that it was improper for the plaintiffs to move ahead with an ex parte application when they knew that Fraser Litigation had been retained by the defendants.

- [69] I put no stock in this submission. It is my understanding that Fraser Litigation was retained solely for the purpose of applying for the adjournment of the trial. The firm was not representing the defendants in the action. Summary of Defence Allegations and My Findings
- [70] It follows from my discussion above that the defendants have failed to establish that plaintiffs' counsel was less than full and frank in his ex parte submissions.
- [71] I dismiss the application to set aside the Mareva injunction. Change in Circumstances - Application to Vary
- [72] In the alternative, the defendants submit that I should vary the terms of the Mareva injunction based upon new evidence tendered by the defendants.
- [73] For the reasons set out below, I decline to vary the terms of the injunction. In short, although Messrs. Su and Qiao have provided evidence that would assist in this application, the plaintiffs have obtained new evidence regarding Mr. Jiang. That new evidence causes me significant concern regarding the veracity of all of the individual defendants. I find that the interests of justice favour the continuation of the injunction. New Evidence Relating to Mr. Su
- [74] In support of this application, Mr. Su swore an affidavit. Based upon that affidavit, I accept the following:
- a) He originally arrived in Canada in 2003 and is now a citizen (since 2022).
 - b) He is married and has three adult children, all permanent residents.
 - c) He works as a golf instructor.
 - d) He has not visited China since 2014.
- [75] The defendants submit that there is no evidence that Mr. Su plans to leave Canada or dispose of assets. New Evidence Relating to Mr. Qiao
- [76] Mr. Qiao tendered an affidavit indicating:
- a) He is 62 years old and a permanent resident of Canada.
 - b) For the past 13 years, he has split his years between Canada and China.
 - c) He works when he is in China.
- [77] Importantly, Mr. Qiao's affidavit addresses the plaintiff's submission regarding the listing of the family home. Mr. Qiao deposes:
- a) The family home is in his wife's name, not his.
 - b) In February 2022, his wife entered into a pre-sale contract to purchase a condo in White Rock.

- c) The family home was listed for sale in March 2022, and it remains unsold since that time.
- [78] The defendants submit that there is no evidence that Mr. Qiao plans to leave Canada or dispose of assets. New Evidence Regarding Mr. Jiang
- [79] Mr. Jiang swore an affidavit indicating the following:
- a) He immigrated to Canada in 2012 with his wife and son. He is a citizen of Canada since 2017.
 - b) He makes his living, trading stocks for his own account.
 - c) He purchased his current home in 2013.
 - d) His wife passed away in February 2023. In July 2023, his mother became ill, causing him to travel to China to care for her.
 - e) He decided to list his house for sale when he returned to Vancouver in November 2023. He says that he planned to purchase an apartment with the proceeds of the sale.
 - f) He says he originally listed the property at \$1,780,000, but he reduced the listing price on the advice of his realtor.
- [80] Mr. Jiang's affidavit also set out the entirety of his assets.
- [81] The notice of application states, "there is no evidence at all that he plans to dispose of his assets so as to put them out of reach of the plaintiffs". New Evidence
- [82] In the period between December 27, 2023, and April 17, 2024 (the hearing of this application), the plaintiffs obtained certain banking records of Mr. Jiang.
- [83] The plaintiffs tendered evidence indicating that on December 12, 2023, within days before the application to adjourn the trial of this matter, Mr. Jiang wire transferred \$1,290,000 from an account in BC to an account in Singapore controlled by a company that he owns.
- [84] As noted above, Mr. Jiang swore an affidavit on January 12, 2024, in support of this application to set aside the Mareva injunction. In that affidavit, he provided a list of his assets. The \$1,290,000 is not listed among his assets.
- [85] I note, again, that the defendants' notice of application states, "There is no evidence at all that he plans to dispose of his assets so as to put them out of reach of the plaintiffs should they obtain judgment against him." That submission may have been correct for a moment, but that moment passed when the plaintiffs obtained evidence of the wire transfer of \$1,290,000 out of this jurisdiction.
- [86] I find that Mr. Jiang's failure to disclose the existence of, and the transfer of, significant funds is determinative of the question for me. In my opinion, two things taint the entirety of the defendants' application to vary the existing Mareva injunction:

- a) The movement of significant funds by Mr. Jiang indicates an actual movement of assets out of BC.
- b) Mr. Jiang's clearly false affidavit which exposes, or continues, the true "tenor" of the litigation.

[87] On that basis, I return to the statement from Kepis, "[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case". In my opinion it is.

[88] I decline to vary the injunction. Summary and Conclusion

[89] The defendants' application to set aside the Mareva injunction is dismissed.

[90] The defendants' alternate application to vary the terms of the injunction is also dismissed.

[91] As noted above, in the period between the granting of the order and the hearing of this application, the parties negotiated certain variations to the terms of the injunction. Those changes go by consent.

[92] The plaintiffs have been fully successful on this application. They are entitled to their costs in any event of the cause. "A. Ross J."

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