

CANADA / JUDGMENT

Zhang v. Zhang

2022 BCSC 2156

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2156 Zhang v. Zhang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang v. Zhang,

2022 BCSC 2156

Date: 20221209

Docket: S1913633

Registry: Vancouver

Between:

Ming Zhang and Xiaoqin Yang

Plaintiffs

And

Guang Ning Zhang and Ping Hui Lu

Defendants

And

Yue Zhang and Can-Pacific Enterprises Ltd.

Plaintiffs by way of Counterclaim

- and -

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 way of Counterclaim

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs in both Actions:

J.A. Henshall

E. Bojm

(June 20, 21, July 5, 13, 14 and

October 17 to 21, 2022 only)

H. Nie

Counsel for the Defendants and Plaintiffs by Counterclaim in both Actions:

D.P. Davison

D.R. North

Place and Dates of Trial:

Vancouver, B.C.

June 20-24; 27-30;

July 4-8; 11-15; 18-22; 25-26; October 17-21, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2022

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- [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.
- [3] In Vancouver Registry Action No. S1913633 (the "Discounted EVC Units Trust Action"), the plaintiffs allege that the defendants, Guang Ning Zhang ("Nick") and Ping Hui Lu ("Helen") (collectively, that "Discounted EVC Units Trust Action defendants"), hold certain shares and warrants in trust for them and that they suffered loss as a result of the defendants' conduct in denying the trust and refusing to sell the shares and warrants at a favourable time. The

plaintiffs also allege that the defendants have failed to account for the proceeds of sale of certain other shares ("Light & Effects Investment").

- [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.
- [5] Unless otherwise specified, I will refer to the defendants in both the Discounted EVC Units Trust Action and the Unison Trust Action collectively as the "defendants".
- [6] Although the Unison Trust Action defendants ultimately admitted the existence of two of the three alleged trusts, they continued to repudiate any obligation to the plaintiffs in respect of them. They say they were induced by the plaintiffs' fraudulent misrepresentations to invest in an unrelated corporate enterprise and that the plaintiffs subsequently agreed to give them all of the trust shares in partial repayment of their investment losses.
- [7] In addition, the Unison Trust Action defendants assert in both actions that the trusts are unenforceable on the basis that they are vague and uncertain as to the trust participants, and that they were entered into for an improper purpose, namely in furtherance of a scheme to hide assets from the plaintiffs' creditors in China and to mislead the Canadian government into granting them permanent resident status in Canada.
- [8] The Discounted EVC Units Trust Action defendants also plead the expiration of a limitation period in respect of the right to claim the proceeds of the sale of the Light & Effects Investment.
- [9] The Unison Trust Action defendants are the legal owners of the shares of the Unison. Issues related to their conduct as Unison shareholders, including an oppression remedy, were severed prior to the commencement of this trial and will be determined at a later date.
- [10] A great deal of evidence elicited by the defendants related to the plaintiffs' debts in China and how they arose. Because the alleged illegality of the trusts depends, at least to some extent, on the plaintiffs' credibility, the defendants also focused their case on the veracity of the information provided by the plaintiffs to Canadian government in their immigration applications.

- [11] The defendants have counterclaimed for damages arising from alleged fraudulent misrepresentations made by the plaintiffs that they say induced them to enter into various investments. They also claim that any liability they may have is offset by promises of payments in other business dealings between the parties.
- [12] The various transactions dealt with in this case involve a number of different currencies. Where not stated otherwise, all dollar figures provided in these reasons are in Canadian dollars.

The Parties

- [13] The plaintiff, Ming Zhang ("Myles") is a businessman. The plaintiff, Xiaoquin Yang ("Rose"), is his wife. Myles was the founder of a company called "Sichuan Sunfor Light Co. Ltd." ("Sunfor") in Chengdu, China. Sunfor is a manufacturer of LED lighting products for commercial applications. Prior to June 2015, Myles and Rose collectively were the largest shareholders of Sunfor, holding approximately 51% of the shares. Myles held the positions of CEO, chairman, and director. Myles' two younger brothers owned approximately 5% of Sunfor. A group comprising friends of Myles owned 20% of Sunfor through an investment corporation. The investors in this corporation were "Wei", "Juan Yang", "Xingyu Liao", "Foo", and a company named "ABC Windtech Venture Capital Investment Management Co. Ltd." (collectively the "Sunfor Minority Investors").
- [14] The Discounted EVC Units Trust Action defendants, Nick and Helen, are husband and wife. Helen has a degree in engineering. The plaintiff-by-counterclaim, Yue Zhang ("Jack") is their son. Helen and Nick immigrated from China to Canada in May 2000. Shortly thereafter, Nick incorporated the plaintiff-by-counterclaim, Can-Pacific Enterprises Ltd. ("Can-Pacific"). Can-Pacific imports fireplaces from China and sells them to customers all over North America. It does business under the name "Dynasty Fireplaces".

Background to the Disputes

- [15] In approximately 2012, Sunfor initiated an initial public offering ("IPO") through which it planned to become publicly traded. The process was expected to take approximately two years.
- [16] In September 2012, as part of the IPO process and in order to make Sunfor more "attractive" as a public offering, the Sunfor Minority Investors lent a total of RMB 30 million to Myles and Rose for a two-year term (the "Minority Investors' Loans").
- [17] In October 2012, Myles and Rose borrowed an additional RMB 15 million from Juan Yang ("Yang Loan").
- [18] Myles' and Rose's plan was to repay the loans by selling some of their Sunfor shares when they became publicly traded.

- [19] In October 2013, Sunfor, together with two Canadian businessmen, incorporated a Canadian company called Zega LED Ltd. ("Zega"). Sunfor held approximately 70% of Zega's shares. Sunfor and Zega entered into a "cooperation agreement" pursuant to which Zega would market and sell Sunfor's LED lighting products in North America. Myles' role was to provide strategic consulting services and advice to Zega. Zega primarily sold Sunfor's "lighting engine" products. The number of Sunfor products ultimately sold by Zega ended up being, at most, nominal.
- [20] In August 2013, Rose and their two children immigrated to Canada from China. Myles remained in China but frequently visited his family in Canada.
- [21] In 2014, the Chinese government implemented a moratorium on Chinese companies going public. The moratorium resulted in the Sunfor IPO being delayed and its completion not being expected before 2016. The Minority Investors' Loans were extended for a further two years.
- [22] In the Spring of 2014, Myles and Rose engaged a Canadian immigration consultant, Roger Wu. In January 2015, with Mr. Wu's help, they received confirmation of their approval as candidates for immigration to Canada under the British Columbia Provincial Nomination Program ("BCPNP"). Mr. Wu testified that the approval was based on them having been sponsored by Sunfor and, through it, proposing to invest \$1,000,000 in Zega and creating 29 full-time jobs through that entity. The approval stipulated that their Citizenship and Immigration Canada ("CIC") for a work permit had to be received by CIC by on or before April 15, 2015.
- [23] Miles testified that he and Rose met Nick and Helen in approximately May 2014 during one of Myles' trips to Vancouver. Helen and Nick's evidence was that they did not meet until over one year later, during the summer of 2015, although Nick agreed on cross-examination that he was not sure and that they could have met in 2014. Regardless, the two families became friends. They discussed their respective business enterprises and the possibility of some form of collaboration.
- [24] In December 2014, Myles and Rose entered into an agreement in principle to sell the majority of their interest in Sunfor to a large Chinese state-owned enterprise called Sichuan Energy Investment Group Co. Ltd. ("Sichuan Energy").
- [25] Myles and Rose' applications for work permits were refused by CIC in January 2015. They renewed their applications on April 4, 2015, again based on their proposed investment in Zega. The applications were accepted and Myles received a two-year work permit from CIC on September 19, 2015. The permit required that he leave Canada by September 30, 2017.
- [26] In June 2015, Myles and Rose completed the sale of the majority of their interest in Sunfor to Sichuan Energy. Rose sold all of her 2,763,300 shares (2.313% of Sunfor's issued share capital) and Myles' interest was reduced to 12.7%, equating to approximately 16 million shares of Sunfor. Myles' brothers continued to own their approximate 5% interest. Myles

testified that the Sunfor Minority Investors sold one-third of their investment to the same purchaser and that Sichuan Energy assured all of the vendors that it would complete the Sunfor IPO by June 2017.

- [27] The purchase price to be paid by Sichuan Energy for Rose's shares was RMB 37,801,944 (approx. \$6 million). The taxes and fees required to be paid by Rose on the transaction totalled RMB 7,173,526.8. Those monies, together with the value of the Minority Investors' Loans, were agreed to be held in escrow by Sichuan Energy pending payment of those obligations. Myles testified that Rose received approximately RMB 10,000,000.
- [28] In August 2015, Myles sold 200,000 of his remaining Sunfor shares to a woman named Yinghong Jia ("Lucy") for RMB 2,736,000. Myles testified that Lucy did not pay him RMB 300,000 of that amount. Myles testified that he did not transfer the shares to Lucy but rather held them in trust for her. Lucy testified that she did not pay the full amount for the shares because Myles suggested she pay the balance upon receipt of the share registrations, that ultimately never came.
- [29] In October 2015, Nick and his son, Jack (a recent electrical engineering graduate from the University of British Columbia), visited Chengdu. Myles arranged for them to have a tour of Sunfor's facilities as well as those of Chengdu Century Photosynthesis Technology Co. Ltd. ("Light & Effects"), a company operated by Myles' son, Ben. Nick testified that he was very impressed with Sunfor's factory and lighting products and that he, Jack, and Myles discussed the prospect of selling Sunfor's products in North America. Myles testified that Jack expressed keen interest in the potential for Sunfor's LED lighting technology being used in the horticulture industry in North America, specifically in green houses and marihuana grow operations.
- [30] Jack testified that, during the tour, Myles told him he (Myles) was "the owner" of Sunfor, that it was an innovative company in the LED lighting industry with unique technologies and that it had projects internationally, including in Canada. Jack testified that Myles made no mention to him of having resigned from Sunfor or of his debts and lawsuits against him in China.
- [31] Myles testified that Jack began to research the potential for sales of LED lighting products for the horticulture industry in North America and determined that it was significant. He testified that Jack forwarded his research to him and that they had further meetings at Sunfor's facilities in December 2015 and in Vancouver in February 2016. Jack testified that all his research was conducted by him at Myles' request and he thought he was doing it on behalf of Sunfor.
- [32] In or about the end of 2015, Myles pledged his 12.7% of Sunfor shares (including those he had sold to Lucy) to the Shanghai Bank as security for a loan of RMB 150 million. Myles testified that the loan proceeds were used by him for Sunfor operations and that Sunfor guaranteed the loan.

- [33] In February 2016, Myles advised Jack in a WeChat email that "in all honesty we haven't learned that much about [plant-based lighting products]" and that they were still learning about them. Shortly thereafter, Jack began further research on plant-based lighting products and reported the results of his research to Myles.
- [34] Jack testified that, in February 2016, Myles asked him to work as Sunfor's representative in North America and sent to him a "letter of appointment". Myles testified that the letter was sent at Jack's request because he wanted to be able to show prospective clients that he had a relationship with Sunfor and that it would assist him in his research.
- [35] In March 2016, Sichuan Energy commenced an investigation into irregularities in respect of Sunfor's 2014 financial statements.

Lumenari Biosciences Inc.

- [36] Myles testified that, in April 2016, after Jack had attended an indoor horticulture lighting industry Trade Show in Las Vegas, Jack advised him that he (Jack) was in the process of incorporating a Canadian company called Lumenari to market and sell plant-based LED lighting products to the horticultural industry in North America. Jack testified that he was under the impression that Lumenari was going to be a Sunfor company. At Myles' request, Jack purchased a sample grow light product and sent it to Ben in China.
- [37] Nick testified during his evidence in chief that by the end of April 2016, he, Helen and Jack had decided to go into the LED lighting business with Myles and Rose.
- [38] On May 1, 2016, Myles arrived in Vancouver from China.
- [39] On May 3, 2016, Myles and Rose met with Nick and Helen at the latter's home (the "May 3, 2016 meeting"). Helen testified that Myles told her and Nick about him having attended a prestigious university in China which Helen knew would only be attended by successful business people who would have "expansive networks". She testified that Myles spoke about his experience and success in founding and operating Sunfor and that it had advanced LED lighting technology with an efficient management team. Helen testified that she was aware that Jack and Nick had been impressed by their tour of the Sunfor factory. She testified that Jack had already gathered a substantial amount of information regarding plant-based lighting products. Nick testified that, because Sunfor products were being sold all over the world, he thought that Myles would have had a good idea of the North American market for its products.
- [40] Helen testified that Myles discussed how Sunfor and Lumenari could work together and that Myles would be able to use his contacts and experience at Sunfor such that Sunfor products "would be potential products in Canada", that his team at Sunfor could work to obtain patents for products developed by Sunfor for Lumenari, that he could help Lumenari build a North American market for plant-based lighting products, and that Helen and Nick's fireplace customers could be potential purchasers.

- [41] Nick testified that Myles said he would devote his experience, capabilities in the lighting industry and his knowledge of Sunfor's products and technology to Lumenari's business. Nick testified Myles indicated that, through his connections at Sunfor, he would be able to bring its products to the North American market and suggested that sales could be \$2.5 million in the first year after incorporation, \$5 million in the second year and that Lumenari could go public by the third year. Helen testified that Myles provided "sales estimates" for Lumenari, that the first year's sales "could" reach \$2.5 million, "could" reach \$5 million in the second year and by the third year it "could get ready to go public". Helen agreed during her cross-examination that her expectations for Lumenari's sales in 2016 were not very high.
- [42] Each of Myles and Rose denied that there were any statements made by them to the effect that Lumenari would generate specific revenue amounts by specific times, that Myles' China-based company's patents would lead to sales for Lumenari, that they or either of them had specialized knowledge of the sale of lighting products in Canada, or that Nick and Helen would receive significant profits if they invested in Lumenari. Rose specifically denied that there was any discussion during the meeting regarding future sales or earning projections.
- [43] Myles and Rose each testified that, during the May 3, 2016 meeting, the parties discussed how the ownership of Lumenari could be structured. They testified that Nick and Helen suggested that each of the two families hold 50%. However, Myles and Rose advised that it was possible they might need to change the key employment basis for his and Rose's immigration application from Zega to Lumenari. Myles testified on cross-examination that the reasons for the change were: (a) that he was going to resign his management position at Sunfor, and (b) that the cooperation between Zega and Sunfor was not working out. Myles testified that Nick responded by suggesting that Myles and Rose's family hold 51% of the company and his family hold 49%. Myles and Rose agreed. Nick testified that the share structure was decided on the basis that Myles and Rose had more experience in the industry and that one family should have a slightly higher percentage ownership in order that any decision-making deadlock could be broken.
- [44] Myles and Rose testified they suggested to Nick and Helen that a portion of their 49% be allocated to Jack to provide motivation for him in the new business. Helen testified that the only discussion about percentage ownership of Lumenari was that one family should own a larger percentage than the other, but she was unable to provide an explanation as to why. She testified it was decided that her family's 49% would be allocated entirely to Jack.
- [45] Myles and Rose testified that compensation and allocation of responsibilities were discussed and agreed at the May 3, 2016 meeting as follows:
- a) Jack: CEO, recruitment and marketing (\$4,000 to \$5,000 per month);
 - b) Myles: intermediary between Lumenari and China contacts (\$3,000 per month);
 - c) Nick: client relations and reporting (\$1,500 per month);

- d) Helen: establishment of accounting and management systems (\$0 remuneration);
- e) Rose: basis day-to-day bookkeeping (\$0 remuneration).

Helen testified it was never anticipated that she would be involved in any aspect of Lumenari's business because she was busy with her own fireplace business. Nick testified it was agreed that Myles would be in charge of the overall management of Lumenari, responsible for Sunfor products and support. Jack would be in charge of marketing and Rose in charge of day-to-day accounting. Nick would provide logistics and general assistance as needed.

- [46] Myles and Rose testified the parties agreed that Lumenari would be financed by way of the parties contributing shareholders loans in amount proportional to the respective shareholding. Rose testified that the parties discussed an initial shareholders loan of \$100,000 per family. Helen testified that she recalls there was discussion about how much each family's initial investment in Lumenari would be but could not recall whether specific amounts were discussed. Rather, she testified that the families would invest money as needed by Lumenari. Nick testified that an initial investment of \$300,000 per family was discussed but that they all agreed that money would be invested as needed.
- [47] It was suggested to Rose on cross-examination that Myles had stated words to the effect that the maximum Nick and Helen would need to invest was \$100,000 and that their investment would be repaid in a short period of time. Rose stated that this suggestion was "preposterous".
- [48] Rose testified that Helen advised she was very familiar with the BCPNP and would happily assist Myles and Rose with their application. Nick and Helen denied that any such discussion had occurred or that they were even aware of a plan by Myles to immigrate to Canada. Jack testified on cross-examination that he and his parents "always knew that Myles was in the process of immigrating to Canada".
- [49] Each of Rose and Helen testified that there was never any mention of Zega at the May 3, 2016 meeting.
- [50] Helen testified that she was very impressed with what had been discussed at the meeting and admired Myles' success. She testified that Myles painted a wonderful picture of Lumenari's future, that she considered its prospects were "great" and that she felt "happy" and "overjoyed" by the discussion. Nick testified that he was very encouraged by the meeting and felt that there was a great opportunity for Lumenari and that he was prepared to invest whatever amount of money was required. He testified that he spoke to Jack and encouraged him to work hard and learn from Myles' experience.
- [51] Helen and Nick testified that Myles did not advise them that he and Rose had sold most of their shares in Sunfor, or that they had significant debts and legal troubles in China, or that he intended to resign from Sunfor. They testified that, had he done so, they would not have invested in Lumenari.

[52] Myles returned to China on May 11, 2016.

[53] On May 13, 2016, Helen attended at the office of John Mao, a solicitor with whom Helen had a long-standing relationship. They retained him to incorporate Lumenari. Lumenari Biosciences Inc. ("Lumenari") was incorporated on that date with the following share allocations:

- a) Rose: 51%
- b) Helen: 19%
- c) Jack: 30%

Helen testified that Jack's share percentage was reduced from 49% to 30% on Mr. Mao's advice.

[54] Lumenari bank accounts were opened with each of Rose, Helen, and Jack having signing authority.

[55] Helen created a private Lumenari WeChat Group for the purpose of facilitating the communication of Lumenari-related information among Helen, Rose, Jack, Nick and Myles.

[56] On May 18, 2016, Myles resigned as CEO of Sunfor. He continued to hold the positions of deputy chairman and director with Sunfor.

[57] On June 12, 2016, Myles returned to Canada to be with his family. He testified that he advised Nick of his resignation from Sunfor. Nick denied any knowledge of the resignation until October 2020. Helen testified that Myles never advised her of his resignation.

[58] Myles testified that, in June, 2016, Jack commenced full-time employment at Lumenari. Lumenari also hired Conner Smith ("Conner"), one of Jack's university friends. Conner was paid \$3,000 per month. Subsequently, Lumenari hired David Jones, a friend of Connor's, for \$2,500 per month.

[59] Jack testified that he did not start working at Lumenari until July 2016, when Myles formally asked him to participate in the company, telling him that the company would do "very well under [Myles'] leadership and would earn \$2.5 million in the first year and \$5 million in the second year". Jack testified that Myles made these statements many times during dinners and car rides. Jack agreed on cross-examination that he never understood that any of these projections was a guarantee. Rather he felt that, if Myles brought Sunfor's products to North America, these projections could be achieved.

[60] Jack testified that Myles also told him not to worry about the products or where they came from, that they would be "world class", that he had many connections in China and would be able to use patents that he had there. Jack testified his understanding was that Lumenari's plan was to sell only Sunfor products.

- [61] Myles testified that he began working with Jack, Nick and Helen towards developing Lumenari into a viable business. Nick testified that he involved himself in Lumenari's office renovations, set up its showroom, and performed other duties as needed. Helen denied any involvement in Lumenari's day-to-day operations or business affairs. Jack testified that his role was to learn about the business, do marketing and research and set up on-line sales platforms. In an affidavit he swore on August 8, 2021, he described his role as "CEO of sales".
- [62] Shortly thereafter Rose, Myles and Mr. Wu met with a BCPNP official (Mr. Poon) and advised him that Myles had left his management position at Sunfor and started Lumenari. Myles' immigration application was amended to stipulate that he was a key employee of Lumenari rather than of Zega. A document entitled "Performance Agreement" was prepared by BCPNP after discussions between Mr. Poon and Mr. Wu. It stipulated that, as terms of the BCPNP's support of his immigration application, Myles would: (i) personally invest \$1 million in Lumenari (in two \$500,000 tranches), (ii) ensure no less than nine new jobs were created, and (iii) provide evidence of Lumenari sales having reached a minimum of \$300,000 before September 30, 2017. Mr. Wu testified that he sent the Performance Agreement to Rose who returned it to him with Myles' signature on it. Mr. Wu testified that he could not recall going through the document line-by-line with Rose but believes he probably explained it in general terms. There is no evidence it was signed by the province.
- [63] Rose agreed during cross-examination that there had been no prior discussion with Nick or Helen regarding them being required to invest a similar amount in Lumenari.
- [64] Myles testified that, in July 2016, he had a telephone conversation with the Sunfor Minority Investors regarding the Minority Investors' Loans. He testified that they told him they were content to wait for the Sunfor IPO to be completed before requiring repayment.
- [65] Lucy testified that, in approximately July 2016, she received a WeChat call from Myles during which he sounded very upset, telling her that Sichuan Energy was trying to "persecute" him.
- [66] In late August 2016, Myles, Nick, and Jack travelled to Saskatchewan and Ontario to visit greenhouse and marihuana grow operations and promote the plant-based LED lighting products Lumenari was planning to market. Nick agreed on cross-examination that the purpose of the trip was to assess the market for plant-based lighting products in Canada. Jack testified that the purpose of the trip was to view potential third-party investment. They also attended trade shows in Abbotsford, Toronto and Las Vegas. Myles testified that they were encouraged by these trips and felt that there was considerable potential for the sale of the products in Canada.

- [67] Myles testified that, in August 2016, he put together a team of lighting technicians he knew in China to identify LED lighting products that Lumenari would sell in Canada. As part of this exercise, a unique A/C exchange module manufactured by Sunfor and "smart-home" lighting products manufactured by Light & Effects were sourced. In the fall of 2016, Jack travelled to China, including to a factory in Shenzhen, and identified and purchased samples of these products to be used by Lumenari as showpieces at trade shows.
- [68] In August 2016, the Sunfor Minority Investors commenced proceedings in China against Myles and Rose for repayment of the Minority Investors' Loans. The claims totalled RMB 30 million, plus interest. Myles testified that he did not become aware of those lawsuits until December 2016. Rose testified that she became aware of the claims when Myles told her about them.
- [69] In September 2016, Jack began working on a Lumenari business plan with guidance from Myles.

Unison Trust

- [70] In August 2016, one of Myles' friends advised him of an investment opportunity involving the purchase by way of private placement of 2,000,000 units of a company called Electrameccanica Vehicles Corp. ("EVC") for \$2 million. EVC is a British Columbia company that manufactures Solo 3-wheel electric vehicles. Myles testified that he told Nick about the opportunity and that, after attending a car show and conducting due diligence, the two families agreed that they would incorporate a company to purchase the EVC shares and each would invest \$1 million in the company for that purpose.
- [71] Myles testified that, during a meeting at EVC's offices a short time later, he came to understand that, because neither he nor Rose was a permanent resident of Canada, they might not meet "eligible investor" requirements. Myles testified Nick told him, that if necessary, he would hold Myles' investment in trust for him.
- [72] Rose testified on cross-examination that, because neither she nor Myles had permanent residency status in Canada, and because Helen was a permanent resident with good English language skills and had over ten years of business experience in Canada, it made sense to make the investment through her. Helen testified that Myles asked her to make his EVC investment on his behalf because he was not a qualified investor and was trying to raise investment money for EVC. Helen testified that she agreed to do so without paying much attention to the request.
- [73] Myles and Rose denied that they had any intent to structure the investment so as to avoid their Chinese creditors.

- [74] Myles testified that, a few days later, Nick advised him that he considered an investment in EVC of \$1 million was too risky and proposed that he and Myles reduce their investment to 1,000,000 units (500,000 each) and bring in other investors to purchase the remaining 1,000,000 units.
- [75] Nick introduced Myles to Qiao and Su who, together with Su's friend, Jiang, ultimately agreed to participate in the opportunity by investing \$500,000 (25%), \$300,000 (15%), and \$200,000 (10%) respectively. Helen testified that Myles asked her not to mention to them that she had agreed to purchase shares on Myles' behalf. She testified that she did not ask Myles to explain the reason for his request. Su testified that he understood that Myles' role in the investment was limited to him acting as a promoter and "middleman" between them and EVC.
- [76] Rose testified that she relied on Helen for advice regarding how the investment should be structured in order that it would proceed without a problem.
- [77] Myles and Rose testified that the two families agreed that their respective investments in EVC would be made by Helen and Rose instead of by Nick and Myles, that the investment would be made through a corporation and that Helen would hold Rose's investment in trust for her.
- [78] On October 6, 2016, Myles, Rose and Helen met with Mr. Mao. Myles testified that they discussed the private placement plan, that it would be made through a corporate vehicle and that Helen would hold Rose's interest in trust. Mr. Mao agreed to act in respect of the corporate transactions but referred them to a securities lawyer, James Chen, to handle the securities aspects of the EVC private placement.
- [79] On October 12, 2016, Myles, Rose, and Helen met again with Mr. Mao. Myles testified that they had further discussions regarding the trust arrangement. They also met Mr. Chen for the first time. Helen testified that Mr. Chen advised that he was acting for another EVC private placement investor who had negotiated a more favourable price than \$1 per unit and suggested various strategies for their EVC negotiations.

[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.

[82] Unison was incorporated by Mr. Mao on or about October 19, 2016 as the corporate vehicle through which the EVC private placement would take place. The following share certificates were issued by Unison:

Helen

A-1

25 shares

\$500,000

Helen

A-2

25 shares

\$500,000

Qiao

A-3

25 shares

\$500,000

Su

A-4

15 shares

\$300,000

Jiang

A-5

10 shares

\$200,000

[83] On October 19, 2016, Helen and Rose attended at Mr. Mao's office because Helen had learned that documents he had prepared were ready for their signatures. Mr. Mao presented a letter dated October 18, 2016 on his letterhead addressed to each of Rose and Helen stating, in relevant part:

Dear Ms. Yang and Ms. Lu:

Re: Unison International Holdings Ltd. (the "Company")

As requested by [Helen], we enclose herewith for execution by you an Appointment and Declaration respecting the Twenty-five (25) Class A Voting Shares represented by share certificate A-2 to be held in trust by [Helen] on behalf of [Rose].

[84] Each of Helen and Rose signed the letter to acknowledge they had received Mr. Mao's recommendation that they seek independent legal advice regarding the an attached "Appointment and Declaration" ("Unison Trust Declaration") dated October 19, 2016. The Unison Trust Declaration is a comprehensive document bearing the signatures of each of Rose and Helen. It provides that Helen holds share certificate A-2 as bare trustee for and on behalf of Rose ("Unison Trust"). It also provides as follows:

Clause 1

[Rose] hereby nominates and appoints [Helen] as her nominee and bare legal trustee to acquire and hold legal and registered ownership of the Shares for and on behalf of [Rose] and [Helen] hereby covenants and declares that she holds legal and registered ownership of the Shares as bare trustee for and on behalf of [Rose]. All income or other advantages accruing in respect of the Shares shall be received and held on account of [Rose] and for the sole use, benefit and advantage of [Rose].

[]

Clause 4

[Helen] shall act in a fiduciary capacity with respect to [Rose] and shall not do any act, exercise any right or execute any document in respect of the Shares without the prior written consent of [Rose] other than holding legal ownership of the Shares as bare trustee.

[]

- [85] Mr. Mao testified that each of Helen and Rose were provided with an originally signed copy of the Unison Trust Declaration.
- [86] Also on October 19, 2016, Helen opened a bank account in the name of Unison. Rose provided Helen with a bank draft in the amount of \$500,000 which Helen deposited into her personal bank account. A memorandum attached to the bank draft contains a note in Helen's handwriting that reads:
- [Rose]'s fund Deposit to Line of Credit for investment in EVC"
- [87] Helen then transferred the sum of \$1 million from her personal bank account into the Unison bank account, together with an additional \$10,000 (1%) to cover operating expenses.
- [88] On October 20, 2016, Helen, Myles, and Rose met with EVC executives at EVC's office for the purpose of implementing Mr. Chen's negotiation strategies and obtaining a discount for the private placement units. They had a bank draft in the amount of \$1 million with them. However, EVC was not prepared to entertain their offers and insisted on a minimum investment of \$2 million.
- [89] A short time later, Qiao, Su, and Jiang deposited their respective investments of \$500,000, \$300,000 and \$200,000. They also paid an additional 1% of their investments for operating expenses.
- [90] Su testified that he had no idea that either Myles or Rose was involved in Unison as a shareholder, director, officer, or in any other capacity. He testified that he considered his investment to be a simple matter of buying shares that had inherent risk with the hope that they could be sold at a profit and did not take the matter very seriously.
- [91] On October 26, 2016, Unison completed the private placement with EVC (the "EVC Private Placement"). Helen and Rose again attended at Mr. Mao's office. Mr. Chen was also present. In the presence of Messrs. Mao and Chen, Helen signed an EVC Private Placement Subscription Agreement on behalf of Unison and each of Helen and Rose signed the accompanying Canadian Investor Questionnaire.
- [92] Myles testified that it was he who spearheaded negotiations with EVC and that his efforts resulted in EVC agreeing to issue to Unison units comprising one share and 1.66666 warrant for \$0.833333 each. Mr. Mao agreed that Myles was the primary negotiator in their dealings with EVC.
- [93] Helen testified that the successful negotiations were the result of Mr. Chen's advice and strategies and that, as between she and Myles, her participation in the negotiations was by far more significant. On cross-examination, she testified that other than having introduced the investment opportunity and attending a meeting with Mr. Mao and Mr. Chen, Myles had no involvement in the private placement negotiations. In her affidavit sworn February 1, 2021, Helen deposed that

[] 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.

Helen had no explanation for the numerous documents that were put to her evidencing Myles' extensive involvement in the negotiations.

- [94] The result of the negotiations was that Unison acquired 2,400,000 shares and 4,000,000 warrants of EVC for \$2 million. 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.
- [95] Myles testified that through his efforts during the private placement negotiations, including introducing additional prospective Chinese investors, EVC agreed to increase the number of warrants Unison would receive from 2 million to 4 million and that Unison would be entitled to an advisory position at EVC.
- [96] During both his evidence-in-chief and his cross-examination, Myles denied that the Unison Trust was entered into in order to avoid his and Rose's creditors in China. He insisted that he and Rose had assets in British Columbia in the form of property and bank accounts collectively valued at several million dollars. He testified that he had no concerns about his ability to repay the Minority Investors' Loans or had any other concerns regarding his Chinese creditors.
- [97] On November 6, 2016, Myles created a private Unison WeChat Group for the purpose of facilitating the communication of Unison/EVC-related information among Helen, Rose, Jack, Nick and Myles. Each of them participated as group members.
- [98] On November 18, 2016, Myles sent a Unison WeChat Group voicemail communication inviting Nick, Helen, Qiao, Su, Jiang, and their respective families to his home the next day "to have an interim formal shareholders' meeting and get together".
- [99] The following day, November 19, 2016, Myles and Rose hosted a meeting and dinner at their home for all of the investors in Unison. Each of Nick, Helen Qiao, Su, and Jiang attended. Myles described a meeting that took place prior to the dinner as the first shareholders' meeting. He testified that all of the shareholders thanked him for his work in negotiating the private placement transaction. The shareholders agreed that Helen would be appointed as chair of Unison's board and Myles would be appointed as Unison's CEO. Myles testified that he proposed to the meeting that, as a bonus for his hard work in putting the private placement together, he be given 2 million of the 4 million EVC warrants and declined a suggestion by Helen that he be awarded 200,000 of the additional 400,000 EVC shares that were negotiated.

- [100] Myles testified that Helen prepared a document entitled "Minutes of Shareholders' Meeting" which listed the attendees as Myles, Rose, Qiao, Su, Jiang, Helen, and Nick. She circulated the minutes to the Unison WeChat Group. Each of the attendees agreed that 2,000,000 of Unison's EVC warrants would be "gifted" to Myles in recognition of his work in putting together the private placement and that Myles had the "right to control (and dispose of) them".
- [101] Rose, Helen, Qiao, Su, and Jiang also agreed to increase their contribution towards its operating expenses from 1% to 2.5% of their respective subscription price. Each of them did so. In Rose's case, on November 24, 2016, she paid Helen \$5,000, representing her share of the \$10,000 operating expense monies that Helen has deposited earlier and, on December 5, 2016 provided Helen with a bank draft in the amount of \$7,500 payable to Unison. These monies were deposited by Helen into Unison's account.
- [102] On cross-examination, Myles denied that the additional 2 million EVC warrants had been given to him directly by EVC as consideration for introducing new investors. He rejected the suggestion put to him that there had never been a "vote" by the Unison shareholders at the November 19, 2016 meeting regarding Unison gifting those warrants to him.
- [103] Helen denied that the November 19, 2016 "get together" included a shareholders' meeting, describing it as a "casual social event" at which the EVC investment was discussed. She denied there had been any discussion during the "get together" regarding 2 million of Unison's EVC warrants being gifted to Myles for his work. Rather, she testified that Myles later told her that the warrants were a reward given to him by EVC and when she asked for proof he never provided it.
- [104] Helen testified that the Minutes of Shareholders' Meeting document was prepared by her after the fact at Myles' request and she simply wrote down everything Myles told her to write. She was unable to explain why she created a document that did not accord with what she said actually transpired and took no steps to correct what she had written after it had been posted by Myles on the Unison WeChat Group. During her September 15, 2021 examination for discovery, Helen stated that:
- I just prepared that document according to my memory; so it's not an official document",
- When that statement was put to her on cross-examination, she stated:
- I don't recall what I said at the time I don't recall that I said that.
- [105] Su testified that his understanding was that Myles and Rose were present at the November 19, 2016 meeting as the people who helped facilitate the investment in EVC. He denied agreeing to give 2 million of Unison's EVC warrants to Myles.
- [106] On November 29, 2016, Helen transferred Unison shares certificates A-3, A-4, and A-5 to Qiao, Su, and Jiang respectively such that the following has been reflected in Unison's share register ever since:

Helen

A-1

25 shares

\$500,000

Helen

A-2

25 shares

\$500,000

Qiao

A-6

25 shares

\$500,000

Su

A-7

15 shares

\$300,000

Jiang

A-8

10 shares

\$200,000

Mr. Mao testified that the reason two separate share certificates were issued to Helen was to distinguish between the shares she owned personally and those she held in trust for Rose.

a) Discounted EVC Units Trust

[107] Myles testified that, in November 2016, he learned of an opportunity to purchase an additional 500,000 units of EVC for \$181,702 from another EVC subscriber, a Chinese company called "Zongshen". The share price of approximately 36 cents was substantially less than the private placement price of 83 cents. Each unit comprised one EVC share and one warrant exercisable at a price of \$2 prior to November 21, 2021. Rose testified that she suggested to Myles that the opportunity should be shared with Nick and Helen because of their friendship with them. Myles and Rose testified that they advised Nick and Helen of the opportunity and they were enthusiastic and grateful for the chance to participate. It was

agreed that each family would purchase 250,000 units.

- [108] Nick would not concede that he considered this opportunity to be a good deal and denied that Helen had encouraged him to proceed with it.
- [109] On November 17, 2016, Rose gave Nick a cheque payable to Helen in the amount of \$90,851, representing Myles' contribution and Nick added his own \$90,851. Nick attended at Zongshen's offices and completed and signed the documentation required for the subscription of the 500,000 units of EVC. Nick issued a personal cheque payable to EVC in the amount of \$181,702. The subscription was accepted by EVC and it issued the share certificates and warrants in Nick's name (the "Discounted EVC Units"). The foregoing was admitted by Helen during her examination for discovery.
- [110] Myles testified that the subscription was put in Nick's name "at the last minute" ("Discounted EVC Units Trust") in order to minimize the "administrative burden" on EVC. Rose testified that the family's permanent residency status was still an issue for them. Myles and Rose denied putting the Units in Nick's name in order to hide their assets from Chinese creditors.
- [111] Nick testified that Myles asked him to put Myles' family's shares in his (Nick's) name because Myles' English was poor. Nick testified that he spoke to Helen about the request and she was strongly opposed to it because of income tax and other potential consequences. Nick testified that Myles then offered to pay him a commission of 15% of the profits after taxes and other costs and so he agreed to the Discounted EVC Units Trust without advising Helen. Myles denied agreeing to pay Nick any commission but admitted agreeing to pay all taxes payable on the sale of shares. Rose testified that she never heard any mention of a commission being payable to Nick for holding Myles' shares in his name, describing the suggestion as "ridiculous" given that it was only as a result of her and Myles' generosity that Nick and Helen were brought into the deal.
- [112] Helen admitted that 50% of the Discounted EVC Units were owned by Myles/Rose.

Events After the Trusts

- [113] On November 30, 2016, Rose transferred 11% of the Lumenari shares to Helen. No explanation for this transfer was provided by any witness.
- [114] By December 2016, Lumenari had leased and completed renovations of office space in the same building as Can-Pacific's offices in Richmond B.C. Lumenari's offices included a showroom displaying samples of both its plant-based horticultural lighting products as well as some "smart-home" lighting products it obtained from Light & Effects for sale into the North American market. Nick and Myles began receiving salaries from Lumenari of \$1,500 and \$3,000 per month respectively. Jack testified that he, Myles, and David Jones began marketing and selling the sample products.

[115] Apparently, several iterations of Lumenari's business plan were prepared. The version put in evidence is dated 2018 and stated, in part:

Executive Summary

[Lumenari] is a Canadian enterprise specializing in research, development, and manufacturing of advanced LED lighting solutions and controls for the horticulture and controlled environment agriculture (CEA) industry

Mission

Lumenari seeks to research and develop advanced LED grow light solutions for the horticultural and [Controlled Environment Agriculture] industry

It showed sales forecasts of \$200,000 in 2017 and \$750,000 in 2018. Helen denied that the business plan was shown to her, testifying that she does not understand cash flow projections. Nick testified on cross-examination that he had no understanding that this was Lumenari's business plan. When he was shown a Lumenari brochure entitled "Lumenari Horticulture Light", Nick stated that he did not participate in any of Lumenari's marketing or sales and that its business strategies were left to Myles and Jack to determine. Jack testified that the brochure was prepared by a graphic designer retained by Myles.

[116] When the business plan sales forecasts were put to Jack on cross-examination, he testified that he could not recall what portion(s) of the document he had prepared, could not recall the sales forecasts, and denied having had any involvement in the preparation of them. He stated that Lumenari's "mission" was to sell Sunfor products with a focus on the plant-based lighting industry.

[117] However, Jack admitted during his examination for discovery that he recalled seeing the sales forecasts and agreed that he "just went with the \$200,000 figure" for 2017 because he had no experience in the industry at the time.

[118] In January 2017, EVC invited Myles to become a member of its "Advisory Board". Myles testified that, in that capacity, he provided advice to EVC regarding the Chinese patent process for EVC's vehicle and ultimately introduced "seven to eight" of his Chinese colleagues who collectively invested approximately \$7 million in EVC.

[119] Also in January 2017, Sichuan Energy commenced litigation in China against Sunfor and Myles (the "Energy Action") claiming damages of RMB 485 million, alleging false and fabricated receivables had been created resulting in the value of Sunfor's shares having been inflated at the time of Sichuan Energy's share purchase in June 2015. On January 16, 2017, Sichuan Energy commenced arbitration proceedings in China seeking to set aside the June 2015 share purchase agreement in respect of Rose's Sunfor shares. Myles testified that he was unaware of this lawsuit until March 2017.

- [120] On February 12, 2017, at Helen's instance, a second formal meeting of the Unison shareholders occurred. Myles was in attendance and testified that, during the meeting, he was authorized to travel to Britain on behalf of Unison and tour a solar energy project. His expenses were paid by Unison. Helen denied that the meeting was a shareholders' meeting despite having described it as such in her WeChat Group invitation to Myles and the other shareholders.
- [121] By letter dated March 14, 2017, BCPNP (Mr. Poon) wrote to CIC advising of its approval of Myles' amended application (changing his investment entity from Zega to Lumenari) and requested an extension of his work permit for 18 months on the basis of Myles' continued implementation of his investment plan.
- [122] A Hong Kong company named Vanshen Enterprises Limited ("Vanshen Enterprises"), which is owned by Helen's younger brother, Guang Ming Lu, acted as the "middleman" between Lumenari and its Chinese suppliers. The defendants say that Myles and Rose fabricated invoices and other documents for the purpose of deceiving Canadian immigration officials into believing that Lumenari was transacting substantially more business than was actually the case. They point to an "editable" Lumenari Quotation form that Rose had requested from Jack together with an invoice dated February 28, 2017 from Vanshen Enterprises for US\$272,500, as well as an invoice dated March 15, 2017 recording a sale from Lumenari to a company named "Sanli Group PTE Ltd." which directed that payment be made to Vanshen Enterprises (collectively, the "Lighting Invoices"). The Lighting Invoices indicated that a significant number of smart-home lighting and other products had been purchased by Lumenari and sold at a profit of US\$10,300.
- [123] Each of Myles and Nick testified that he was unaware of the Lighting Invoices until they were produced in this litigation.
- [124] Rose testified that Helen maintained control over all Vanshen Enterprises documentation and that she (Rose) did not have access to any of it. She testified that, one day in mid-March 2017, she was in Lumenari's office when Helen came in and made some handwritten notations on a sheet of paper. Helen then created the Lighting Invoices and input them into Lumenari's computer accounting system. Rose testified that, at Helen's request, she noted in handwriting the then exchange rate between US and Canadian dollars (1.33) on the Lighting Invoices. She testified that she did not question Helen about them.
- [125] Helen denied having had any involvement in either document. She testified that she did not become aware of the Lighting Invoices until late April 2019 and likely made her handwritten notes at that time.
- [126] On March 17, 2017, a Chinese court issued an order freezing the assets of Myles and Rose to a maximum of RMB 38 million in respect of a claim against them by someone named Tao Hu.

[127] On March 17 and 29, 2017, Rose deposited a total of \$230,000 into Lumenari's bank account. Her evidence was that she did so in order to complete her family's BCPNP investment pledge. She then withdrew those funds from the account on April 6 and 11, 2017. She testified that she did so because it turned out that the monies were not needed by Lumenari at the time and because Su had asked Myles for a loan. The journal entries showing the withdrawals were not posted in Lumenari's accounting journal until mid-December 2017.

[128] By May 2017, it was determined that the establishment of a market for Lumenari's plant-based lighting products was going to be much more difficult than had been predicted. Sales were poor. Myles testified that he, Jack, and Nick decided to change the focus of the business to the on-line sales of smart-home lighting products.

[129] Myles testified that, because neither he nor Rose had received their Canadian permanent residency, and in order to qualify for bank financing and government subsidies, the Lumenari share structure was "adjusted" such that Helen, Nick and Jack's shareholdings were increased from 49% to 51% and Myles and Rose's shareholdings were reduced from 51% to 49%.

a) New Force Investments Group Inc.

[130] On May 18, 2017, New Force Investments Group Inc. ("New Force") was incorporated by Helen and Rose at the advice of Helen's accountant with the intention that the Discounted EVC Units would be transferred from Nick to New Force for tax planning purposes. 51% and 49% of the New Force shares were allocated to Helen and to Rose respectively. Ultimately, the transfer of the Discounted EVC Units did not take place due to EVC's disapproval of it. Rose testified that, again at this time, there was never any discussion of a commission being payable to Nick.

[131] On June 15, 2017, CIC issued a Work Permit to Myles based upon his employment status with Lumenari. The permit stipulated that it expired on March 30, 2019 and that Myles must leave Canada by that date.

[132] On June 14, 2017, Lumenari Biosciences Inc. changed its name to "Lumenari Technologies Inc.". After initially encouraging sales numbers, sales of the smart-home lighting products declined due to their complex technology, quality issues and poor customer service. On cross-examination, Jack denied that the change in name had anything to do with a change in focus from horticultural lighting products to smart-home lighting products.

[133] Conner resigned his employment with Lumenari in the summer of 2017.

b) Light & Effects Investment

[134] Myles and Rose testified that, in August 2017, Light & Effects wished to buy-back some of its outstanding shares and needed financing to do so. Myles testified that Myles, Nick, and Jack determined that, as shareholders of Light & Effects, they and Lumenari would have access to Light & Effects numerous products and patents. Myles and Rose testified that the two

families purchased a 3% interest in Light & Effects for RMB 1,061,000 (approx. C\$200,000) with Nick and Helen contributing RMB 541,110 (51%) and Myles and Rose contributing RMB 520,000 (49%) (the "Light & Effects Investment").

- [135] Nick testified that the Light & Effects Investment came about as a result of Myles suggesting that Lumenari should start selling Light & Effects' products in Canada and that they would need to be shareholders in order to do so. Nick testified that he thought it odd that they would need to be shareholders but nevertheless decided to make the investment because he continued to admire and respect Myles and because Myles told him that they would get "a certain amount of return on investment", later stating that Myles had said the return on investment would be RMB 750,000. Regardless, Nick testified that the amount of the proposed return on investment did not influence his decision to invest. Rather, his decision was based on Lumenari being able to sell Light & Effects' products. Myles denies advising that there would be a specific return on investment.
- [136] Rose testified that the two families made the Light & Effects Investment in order to assist their respective children's enterprises (Ben at Light & Effects and Jack at Lumenari). Helen testified that the purpose of the investment was assist Lumenari in becoming Light & Effects' agent in North America.
- [137] The documents presented at trial establish that Myles and Rose made their RMB 520,000 contribution through a friend in China ("Ouyang"). Myles testified that Ouyang then provided the money to Helen's younger brother in China (Guang Ming Lu). Nick testified that his and Helen's RMB 541,110 investment was also made through Guang Ming Lu.
- [138] Nick testified that Myles was very vague about what was being purchased with the investment but he did not ask for details because he trusted him.
- [139] Nick testified that Lumenari was able to sell many of its sample Sunfor products and was successful in negotiating contracts for the supply of lighting products to several projects but ultimately the sales fell through because the products were not certified in Canada. Jack and Nick testified that Lumenari began receiving smart-home lighting products produced by Light & Effects under Lumenari's brand name. However, the products were plagued by high prices and quality control problems regarding design and functionality such that sales were very poor. Jack testified that he asked Myles to provide certifications for the products but he failed to do so.

c) Ongoing Dealings among the Parties

- [140] Lucy testified that, when she was in Vancouver in August 2017, she had a private conversation with Myles during which he told her that he had instructed a Sunfor accountant to forge documents indicating that Sunfor's revenues were substantially higher than they were in reality in order to make it appear more profitable for the proposed going public transaction. She testified that he told her the fraud had been uncovered by Sichuan Energy during an audit. Myles denied that such a conversation had taken place.

- [141] In late August 2017, judgments were entered against Myles (and, in many instances, Rose) by the Chinese court in respect of the Minority Investors' Loans. Those judgments totalled RMB 42,376,165 (including 18% interest that was payable on the loans). Myles testified that he told Nick, Helen and Jack about these judgments and about his legal problems in China generally.
- [142] On August 9, 2017, Myles signed a Schedule 4A as part of his permanent resident application setting out information regarding his business ownership, business plan, assets, and net worth. Rose testified on cross-examination that she and Myles made Mr. Wu aware of the debt claims against them in China. The Schedule 4A did not disclose the existence of the EVC Private Placement, the Unison Trust, the Discounted EVC Units, the Discounted EVC Unit Trust, the Light & Effects Investment or any of the debts Myles had in China or the legal actions/judgments against him in that country. There is no evidence as to when it was submitted to CIC or whether CIC relied on it.
- [143] On August 31, 2017, Jack invested \$25,000 in Lumenari. He agreed on cross-examination that he did so knowing that Lumenari's sales "were not too great" but stated on cross-examination that "we thought the products would be received well" and during his examination for discovery that "I wanted the company to do well". He agreed that, at the time, Lumenari was nowhere near achieving the first-year projections that he asserted Myles had mentioned to him the previous year. He also agreed during his examination for discovery that he knew Lumenari would not be generating such projected revenues when he made his shareholder's loans.
- [144] On September 8, 2017, Rose reimbursed Ouyang the amount of C\$97,670 for Ouyang having advanced her (Rose's) and Myles' payment for their 49% interest in the Light & Effects Investment.
- [145] On October 16, 2017, Rose signed an "Accredited Investor Certificate" acknowledging she met the requirements of an accredited investor in Canada.
- [146] Nick testified that, in October 2017, Jack told him that Myles was pressuring him (Jack) to cover up the Lumenari quality control issues an application Lumenari was making for a government subsidy.
- [147] On November 30, 2017, Jack invested a further \$13,000 in Lumenari. He admitted that Lumenari's sales were "pretty low" at the time.
- [148] On December 20, 2017, judgment was granted against Myles and Rose by a Chinese court in respect of the Yang Loan.

- [149] On December 31, 2017 a document entitled "Authorization" (power of attorney) was signed by Nick giving Ben authorization to deal with Nick's shares in Light and Effects on Nick's behalf. The document was actually signed by Nick on March 12, 2019 and back-dated at Myles' request. Myles testified that the document was back-dated at Ben's request. Nick testified that the power of attorney has never been revoked by him.
- [150] On January 9, 2018, Jack invested a further \$30,000 in Lumenari.
- [151] In an email to Rose dated May 2, 2018, Lumenari's accountant raised a question about the Lighting Invoices, asking whether they were in US or Canadian dollars. Rose immediately forwarded the email to Helen. Helen responded six minutes later with a voicemail message to Rose stating (as translated) that the False Invoices were regarding "that sale" and that "we" had already converted from US to Canadian dollars. When asked to explain these words during her cross-examination, Helen asserted that her voicemail message could have been edited.
- [152] On May 15, 2018, EVC's shares were consolidated, 2 for 1. The exercise price of its warrants correspondingly doubled from \$2.00 to \$4.00 per share.
- [153] On May 25, 2018, an accountant, R. Poon CPA, finalized Lumenari's unaudited financial statements and income tax returns for the year 2017. Rose signed the documents on behalf of Lumenari. The statement of income reported sales of \$400,561 and cost of sales of \$412,095 for the year. Rose testified that she confirmed the accuracy of the sales and cost of sales numbers contained in the financial statements with Helen. Helen denied having played any role in respect of the Lumenari financial statements. She denied ever having reviewed or approved of them, stating that she "did not have the energy" to deal with them because her mother had passed away over a year earlier.
- [154] Myles admitted on cross-examination that Lumenari's sales had never been more than \$50,000 in any year. Nick confirmed that sales were minimal but testified Myles continued to be encouraged by the prospect for significant future sales.
- [155] The erroneous 2017 financial statements were submitted by Mr. Wu, Myles' and Rose's immigration consultant, to CIC in support of their immigration application.
- [156] Jack became married in June 2018 and advised Myles that he intended to move to Los Angeles to work in his new father-in-law's business there.
- [157] On August 17, 2018, again at Helen's instance, a third formal meeting of the Unison shareholders took place in anticipation of EVC's shares becoming publicly traded on the NASDAQ. Again, Myles was part of the list of shareholders invited to attend. Helen's evidence was that Myles attended the meeting as "EVC's investment consultant", not as a shareholder. Myles testified that it was determined at the meeting that Helen, Myles, and their respective families would travel to New York to participate in the celebrations.

- [158] On August 28, 2018, a Chinese court entered judgment in favour of Tao Hu against Myles, Rose and one of Myles' younger brothers, Li Zhang, for RMB 20 million plus interest.
- [159] On August 30, 2018, EVC shares began trading on the NASDAQ. The EVC Private Placement Units and the Discounted EVC Units were subject to a six-month trading hold. EVC paid the cost of Helen and Myles' attendance at the stock exchange ceremony.
- [160] Some time after EVC began publicly trading, Myles purchased, over time, an additional 100,000 shares approximately \$1 per share and later sold them for more than \$8 per share.
- [161] Jack testified that, by September 2018, Ben had asked him to stop selling the Lumenari-branded products that Light & Effects had developed and manufactured for Lumenari because they did not work in North America. He testified that Ben wanted Lumenari to begin selling Light & Effects-branded products instead. Jack testified that he became very angry and refused Ben's request. He testified that "it was then that we considered stopping our investment in Lumenari".
- [162] On September 23, 2018, Ben sent Rose a copy of the 2018 Lumenari business plan document.
- [163] On September 25, 2018, Myles signed a second Schedule 4A prepared by Mr. Wu as part of his permanent resident application setting out information regarding his business ownership, business plan, assets and net worth. That document was also submitted to CIC. It set out that Myles' Sunfor shares were worth C\$41,374,772 and his shares in Lumenari were worth between \$600,000 and \$800,000. It did not disclose the existence of the EVC Private Placement, the Unison Trust, the Discounted EVC Units, the Discounted EVC Unit Trust, the Light & Effects Investment, or any of the debts Myles had in China or the judgments against him in that country. It did not disclose that all of Myles' Sunfor shares had been pledged to the Shanghai Bank as security for a RMB150,000,000 loan. Myles agreed on cross-examination that his Lumenari shares were in fact worthless.
- [164] On November 5, 2018, Myles, Helen and their two youngest children were granted permanent residency status in Canada.
- [165] By November 2018, there were shareholders' loans owed by Lumenari to Nick, Helen, and Jack of approximately \$510,000 and to Rose of approximately \$530,000. By then Lumenari had suffered significant losses and did not have the financial ability to repay the shareholders' loans. Jack testified that he was unaware of Lumenari's financial situation until November 2018.

d) The November 12, 2018 Meeting

[166] On November 12, 2018, shortly after Jack had returned from his honeymoon, a meeting took place at Jack's home among Jack, Helen, Nick, Myles and Rose. Helen testified that she called the meeting because they had invested over \$500,000 in Lumenari and had received nothing in return. In addition, Jack had returned from Hong Kong complaining of quality issues associated with Light & Effects' products. Helen and Nick testified that they and Jack had decided to end their involvement in the management and operations of Lumenari.

[167] Rose testified that she and Myles were shocked to learn from Jack that he would be leaving Lumenari and from Nick and Helen that they no longer wished to be involved with the company and wanted to dispose of the Light & Effects Investment.

[168] Myles and Rose testified that, during the meeting, the parties decided to proceed as follows:

- a) Jack would leave Lumenari effective December 31, 2018;
- b) while Jack and Helen would continue as Lumenari shareholders, Myles would assume Lumenari's day-to-day operations and neither Jack, Nick nor Helen would have any further involvement in them;
- c) the \$300,000 additional capital that Lumenari required would be contributed by Rose by way of a shareholder loan. Neither Jack nor Helen would be required to make any further capital contributions and their percentage shareholdings would be diluted correspondingly;
- d) Shareholders' loans owed by Lumenari to Helen and Jack would be paid as a priority from Lumenari's future profits and/or future investment capital; and
- e) Myles would instruct Ben to sell the Light & Effects Investment.

[169] Each of Nick and Jack confirmed during their respective examinations for discovery and testimony that Myles stated their investment in Lumenari would be repaid from future profits earned by Lumenari. Specifically, Jack's evidence was that his family wanted to stop participating in Lumenari's operations and wanted their investment back, and that Myles and Rose responded that they would operate Lumenari themselves and "when they make the money back they would, you know, pay us back our investments", and later:

Q So [Myles] was saying that if they could turn Luminari [sic] around so that it became profitable, then Luminari [sic] would repay the shareholders loans. Is that what [Myles] was saying?

A Yes, I believe so.

Q Did [Myles] ever promise personally to repay the shareholder loans if he could not turn Luminari [sic] around?

A He did not ever say that to me.

- [170] Helen testified during her evidence-in-chief that Myles told them at the November 12, 2018 meeting that he and Rose would take over the operations of Lumenari because they were confident it would eventually succeed and would pay out Helen and Jack's shareholders' loans as a priority if Lumenari made a profit.
- [171] Rose testified that at no time during the meeting did either Nick or Helen request immediate repayment of Helen's Lumenari shareholders' loans. Her evidence was not challenged on cross-examination.
- [172] Nick confirmed during his evidence-in-chief that he had no understanding that Myles would repay the shareholders' loans personally.
- [173] Jack stopped working at Lumenari in November 2018.
- e) Trading in EVC Shares/Light & Effects Share Sale
- [174] On February 13, 2019, after the trading hold period had expired, Rose emailed Nick asking whether a trading account had been opened to hold the EVC shares "that you help hold on our behalf". Nick responded that it had been done.
- [175] Myles and Nick attended together at the TD Bank and opened a bank account and a trading account for the purpose of being able to trade the Discounted EVC Units (the "Discounted EVC Trading Account"). The accounts were opened in Nick's name. On April 4, 2019, Nick transferred the Discounted EVC Units into the Discounted EVC Trading Account.
- [176] In March 2019, Ben was able to negotiate the sale of approximately one-half of the Light & Effects Investment (1.4% of the 3% holding) for RMB 610,000. On or about April 26, 2019, the proceeds of sale ("Light & Effects Investment Proceeds") were transferred by Ben into Nick's bank account in China, pursuant to the Authorization that Nick had signed. Myles and Rose testified that, despite Nick having acknowledged that 49% of those proceeds belong to Myles and Rose, and despite numerous requests by Myles that they be paid, Nick has not done so.
- [177] On April 13, 2019, Nick and Myles together used Nick's home computer to successfully set up the Discounted EVC Trading Account such that trades of the Discounted EVC Units (or shares) could be made. Myles testified that each of them had the required access code and password so they could each trade their respective Discounted EVC Units. Nick denied giving Myles authority to trade in the account.
- [178] A similar trading account with the Royal Bank of Canada ("RBC") was opened by Helen in Unison's name for the purpose of allowing trades of its EVC shares. Helen caused Unison to transfer the EVC shares and warrants into this trading account. On April 10, 2019, at Myles' suggestion, Unison opened a new trading account at the TD Bank (the "Unison EVC Trading Account") and the Unison EVC Units were transferred into it from the RBC trading account.

[179] Myles testified that he requested of Helen that Rose's 25 shares in Unison be transferred to Rose because she was now a permanent resident of Canada. Myles testified that Helen said she would speak to Mr. Mao about preparing the necessary documentation.

[180] Commencing April 11, 2019, an email exchange took place between Helen and Mr. Mao commencing with Helen writing:

Counsel Mao, how are you!

There are 25% of the Unison shares under my name that need to be transferred to [Rose]. Please take the trouble to prepare the transfer documents []

[]

Rose will deliver the minute book to you today. She is supposed to take the position of a director

[181] Mr. Mao testified that he understood he was being instructed by Helen to prepare the necessary documentation for the share transfer to Rose and for Rose to be named as a director of Unison.

[182] On April 12, 2019, Helen posted a WeChat message to Rose stating:

I will notify the lawyer Mao to transfer your Unison shares under my name to you. Next Monday I will deliver the Minute Book. Do you want to confirm when you can go there and sign?

[183] On April 13, 2019, a fourth formal meeting of the Unison shareholders took place, again at Helen's instance. The invitation to Unison's shareholders to attend again included Myles. It was resolved during the meeting that Qiao would assume the management of Unison's trading account. Helen posted minutes of the meeting on the Unison WeChat Group.

[184] On April 15, 2019, Myles accessed the Discounted EVC Trading Account and sold 1000 shares of EVC. He sold another 1000 shares on April 22, 2019. He then re-purchased the 2000 EVC shares later the same day. He testified that he made these transactions for the purpose of testing the trading account and ensuring that he was able to make trades. He testified that he apprised Nick of the transactions. Helen agreed on her examination for discovery that Nick made her aware of these trades. Nick testified that he did not authorize Myles to make these transactions.

[185] On April 16, 2019, Mr. Mao sent an email to both Helen and Rose enclosing the following ("Unison Share Transfer Documents"):

- a) Share transfer of 25 shares from Helen to Rose;
- b) Consent Directors' Resolution authorizing the transfer;
- c) Consent to Act as a Director of Unison to be signed by Rose;

- d) Consent Directors' Resolution authorizing the increase in the number of Unison directors from 4 to 5; and
- e) Notice of Change of Directors for filing in the BC Registry.

Mr. Mao made it clear in his email that he was acting on behalf of Unison only.

[186] On April 17, 2019, Helen left a voice mail message with Rose advising that the transfer documents had been signed by Qiao and that she was attending to having them signed by the other Unison shareholders.

f) Relationship Deteriorates

[187] Shortly thereafter, friction developed between the two families and the relationship deteriorated. The evidence is unclear as to any specific event occurring at that time but it is clear that Nick and, particularly, Helen were very angry about the lack of Lumenari sales and that all of their shareholders' loan monies had been spent. Helen caused Myles and Rose to be shut out of all further communications regarding Unison. Each of the other participants in the Unison WeChat Group left the group and formed their own WeChat Group that excluded Myles and Rose.

[188] On April 23, 2019, Myles attempted to access the Discounted EVC Trading Account for the purpose of selling his 125,000 EVC shares. The trading price at that time was US\$3.36. His access was denied. Nick did not respond to Myles' numerous attempts to communicate with him about the problem. Ultimately, Nick told Myles that Helen had taken his bank card and changed the trading account's access code and was refusing to provide the new access code to him. During her examination for discovery, Helen admitted having changed the access code without Nick's consent and that she had refused to return the bank card to him. During his examination for discovery, Nick admitted that he knew the new access code but did not want to provide it to Myles.

[189] On approximately April 26, 2019, Nick received the proceeds from the sale of the Light & Effects Investment from Ben.

[190] In April 2019, David Jones resigned from Lumenari.

[191] As at May 7, 2019, Lumenari owed the following shareholders' loans:

Rose

Helen

Jack

2016

\$211,124

\$200,000

N/A

2017

\$247,597

\$140,000

38,000

2018

\$142,135

\$9,000

\$30,000

2019

\$100,800

N/A

N/A

\$701,656

\$349,000

\$68,000

[192] In addition, Helen testified that Can-Pacific had made the following loans to Lumenari:

2017: \$15,000

2018: \$83,500

Total: \$97,500

May 7, 2019 Meeting

[193] On May 7, 2019, Myles, Rose, Nick, and Helen met at Lumenari's office in an attempt to resolve the issues between and among them. Helen testified that she called the meeting because she wanted answers regarding Lumenari's financial circumstances and to why, after three years, it had not become the "wonderful" business she had thought it would be. She had concluded that Myles had lied to her about Lumenari's potential. She felt she was entitled to demand compensation for her Lumenari and Light & Effects losses.

[194] The meeting lasted more than two hours. It was surreptitiously recorded by Myles. An English translation of the discussions was tendered in evidence. The four main topics of discussions were:

a) Transfer of 25 Unison Shares from Helen to Rose

[195] Myles and Rose testified that Helen initially refused to sign the Unison Transfer Documents but later signed them in the presence of the other attendees. Helen testified that she signed the documents, despite feeling "unsettled" and felt she had no choice but to do so.

[196] Myles and Rose testified that, despite Helen having signed the documents, the other shareholders of Unison (Qiao, Su, and Jiang) refused to follow suit. Myles testified they stated to him that Helen had told them not to sign. Su testified that there was "no way" he was going to sign anything because of what he considered had been collusion between Myles and Helen. Helen's evidence was that Qiao, Su, and Jiang felt she was colluding with Myles and were angry with her. Su testified that he was "shocked" and very upset to learn of the trust agreement between Helen and Rose, that he had had no prior knowledge of any involvement in Unison on the part of either Myles or Rose and that he thought Helen was "scamming" us.

b) Light & Effects Investment Proceeds

[197] Nick testified it was agreed that each family would receive RMB 750,000 from the Light & Effects Investment, with he and Helen being paid from the monies already received by Nick (RMB 610,000) and with Myles taking responsibility for obtaining the balance (RMB 140,000 for Nick and Helen and RMB 750,000 for Myles and Rose) from Light & Effects.

[198] Helen's evidence on her examination for discovery was that she and Nick would be satisfied getting with a return of the principal of their Light & Effects Investment but would be happier getting RMB 750,000 but if Myles was unable to obtain such a return for them "then you're done with it".

[199] Myles testified that, during the meeting, Helen advised she had given the RMB 610,000 from the Light & Effects Investment Proceeds to her brother, Guang Ming Lu, and that all of the money was gone. Nick's evidence on his examination for discovery was that he and Helen have spent the proceeds.

[200] Nick still holds 1.25% of Light & Effects' shares in his name.

c) Lumenari Shareholders' Loans

[201] Helen informed the meeting that she wanted all of her Lumenari shareholders' loans repaid immediately. Myles and Rose reminded her of the discussions they had had during the November 12, 2018 meeting and advised her that Lumenari did not have the funds to repay shareholders' loans and that, if she insisted, Lumenari would be shut down. Myles and Rose testified that this was the first time either Helen or Nick had requested payment of these shareholders' loans. Myles indicated that, if Lumenari made profits in the future, the payment of Helen and Nick's shareholders' loans would be given priority.

[202] Each of Myles and Rose testified that there was never any discussion about Myles agreeing to personally repay Helen's shareholders' loans or that he would transfer his 125,000 Discounted EVC Units to Helen and Nick as partial payment for the shareholder loans. Helen testified that she demanded repayment of her shareholders' loans and that "I felt" Myles agreed to give us 125,000 EVC shares to compensate us for our Lumenari losses. The transcript of the recording of the meeting makes it is clear that there was never any agreement on the part of Myles and/or Rose to repay Helen's shareholders' loans. Indeed, it shows that Helen's demands were outright rejected. During her cross-examination, Helen refused to acknowledge Myles and Rose stated at the meeting that they were not going to repay Helen's loans, resorting to stating she knew Myles was trying to "defraud" and "scam" her.

d) Discounted EVC Units

[203] Helen admitted during the meeting that she had changed the trading password for the Discounted EVC Trading Account.

[204] Myles repeatedly asserted his entitlement to 50% of the Discounted EVC Units and that he would ensure that there was sufficient money in the Discounted EVC Trading Account to pay for any taxes owing on any sale of them.

[205] There was no discussion during the meeting of a commission agreement regarding the Discounted EVC Units. Nick testified on cross-examination that he said nothing because, like the trust agreement itself, there was no need to put anything in writing because "an agreement must be honoured".

After the May 7, 2019 Meeting

[206] Despite Myles' and Rose's numerous demands since May 7, 2019, Helen has not transferred the 25 Unison shares to Rose and, as set out above, took the unwavering position that Rose had no beneficial interest in them.

[207] The records indicate that Helen sold 120 Discounted EVC shares from the Discounted EVC Trading Account on May 10, 2019. However, no evidence was led explaining this transaction.

[208] On May 17, 2019, Myles asked Nick and Helen via the Lumenari WeChat Group to sell his 125,000 Discounted EVC shares he held in trust for Rose on an urgent basis. On cross-examination, Nick denied receiving this communication but nevertheless agreed that Myles asked him numerous times to sell the shares. When his examination for discovery evidence was put to him (during which he admitted receiving the communication) and he was asked whether that evidence was true, his response was "I don't recall". Helen gave evidence during her examination for discovery that she was never told that Myles wanted to sell his shares.

[209] The shares were not sold.

[210] On that same day, Helen posted on the Lumenari Group WeChat that she was requesting repayment of her Lumenari shareholders' loans. She did not assert that there was an agreement that the loans would be repaid and she made no mention of an alleged agreement whereby Myles' Discounted EVC Units would be transferred to her in partial payment of them.

[211] Myles testified that, thereafter, he met with Nick on several occasions in an effort to resolve the impasse. One such meeting was on May 28, 2019 and was recorded. A transcript of the meeting was introduced in evidence. Myles again asked that his EVC shares held in Nick's trading account be sold except for 25,000 that would be left in the account to cover taxes. There was no mention by Nick of any agreement that the 125,000 shares could be kept by Nick as compensation, or that there had been a commission agreement. Nick testified that:

If I knew the conversation was being recorded, I would have mentioned it.

[212] On June 10, 2019, in response to Rose's post on the Lumenari Group WeChat that Lumenari was out of operating funds, Helen posted that as of the November 12, 2018 meeting she and Nick had no further involvement in Lumenari. She made no mention of any agreement that her shareholders' loans would be repaid.

[213] On June 21, 2019, Helen posted the following on Lumenari's Group WeChat:

The only responsibility that I should take is the accounting fraud made to satisfy your immigration application. An audit will no doubt bring out the truth; I'm willing to take responsibility to explain it to the tax authority, BCPNP and Immigration Canada []

[214] Helen attempted to explain this post during her evidence-in-chief by stating she had only recently received the Lumenari financial statements from Rose and saw the large accounts payable and receivable recorded in the 2017 statements. She testified that, after insisting that Rose explain the entries, Rose told her that the entries were made for the purpose of preparing the "conclusion report" to the CIC. She testified that she was very upset that fake invoices had been created in Lumenari's books and that she would take the responsibility of explaining it to the authorities if there was an audit. Helen's evidence in this regard was not put to Rose on cross-examination.

[215] On June 22, 2019, Helen, Qiao, and Su purported to hold a meeting of Unison shareholders and produced a document entitled: "Minutes of Shareholders Meeting". This document described the November 19, 2016 meeting at Myles and Rose's home as a "shareholder meeting" at which Myles had been appointed Unison's CEO.

[216] On September 4, 2019, judgment was granted by the Chinese court in the Energy Action against Sunfor in the amount of RMB 68,102,400. The action was dismissed as against Myles on the basis that he had acted throughout as agent for Sunfor.

- [217] By letter dated November 20, 2019, from Myles' and Rose's counsel to Nick and Helen, demand was made for the immediate transfer of 125,000 Discounted EVC Units from Nick to Myles.
- [218] In late November 2019, Helen caused Unison to sell 60,000 EVC shares. She, Qiao, Su, and Jiang resolved to have Unison transfer an additional 780,000 EVC shares to them personally.
- [219] Also in November 2019, Helen sold 20,000 Discounted EVC shares from the Discounted EVC Trading Account.
- [220] The Discounted EVC Units Action was commenced on December 2, 2019.
- [221] In December 2019, Myles tendered his resignations as deputy chairman and director of Sunfor. His resignations were approved and accepted by Sunfor in 2021.
- [222] On December 2, 2019, Myles' and Rose's counsel sent letters to Helen and to Helen, Qiao, Su, and Jiang asserting Rose's beneficial entitlement to 25 Unison shares held by Helen and demanding that the Unison Share Transfer Documents be signed. No response was received.
- [223] On December 5, 2019, without Myles or Rose's knowledge, Helen caused Unison to transfer cash and 780,000 EVC shares to Helen, Qiao, Su, and Jiang in proportion to their respective Unison shareholding position, as follows:
- a) Helen: 420,000 shares
 - b) Qiao: 210,000 shares
 - c) Su: 86,000 shares plus \$72,663 (from the sale of 40,000 shares)
 - d) Jiang: 64,000 shares plus \$36,332 (from the sale of 20,000 shares).
- During her examination for discovery, Helen initially refused to disclose these transfers on the ground that they were "an internal operation matter".
- [224] On December 9, 2019, Mr. Mao sent an email to Helen confirmed to her that she had signed the Unison Trust Declaration.
- [225] The Unison EVC Units Action was commenced by way of Petition on December 18, 2019. It was converted to an action by order dated April 1, 2021.
- [226] In January 2020, Helen withdrew \$68,648 from the Discounted EVC Trading Account.
- [227] On March 24, 2020, defendants' counsel wrote to plaintiff's counsel advising, in relevant part:

Further, we are advised by our clients that the 125,000 [Discounted EVC Shares] which [are] the subject of the [Discounted EVC Units Trust Action], have not been disposed of and remain in the possession of [Nick]. Our clients agree not to dispose of the [Discounted EVC Shares] without a written agreement between the parties or a court order.

[228] In April 2020, Shanghai Bank obtained judgment against Myles and Rose for RMB 49,681,014 and seized Myles' remaining Sunfor shares, including those that Myles had sold and was holding in trust for Lucy.

[229] By letter dated April 17, 2020, Myles' and Roses' counsel again wrote to Helen, Qiao, Su, and Jiang enclosing the Unison Share Transfer Documents and demanding that they be signed. The letter also enclosed a draft Notice of Civil Claim. No response was received. Su testified that he considered that the matter had nothing to do with him.

[230] In April 2020, the EVC trading price was approximately US\$0.80. Myles testified that, if he had been able to sell his Discounted EVC Shares in April 2019, he would have repurchased them in April 2020.

[231] By November 2020, the trading price of EVC shares had increased to approximately \$13.60. Myles testified that he would have sold his newly purchased shares at that time and would have exercised his EVC warrants by paying the warrant price of C\$4.00.

[232] By letter dated November 25, 2020 from defendants' counsel to plaintiffs' counsel, the defendants proposed that, since the then EVC share trading price was US\$8.50, all of the Discounted EVC Units be sold. The letter stated, in relevant part:

[] it is our clients' position that the [Discounted EVC Units] should be sold in its entirety and that any tax consequences as a result [] be paid from the proceeds realized from the [sale].

[233] Rose testified that she agreed to such a sale with the proviso that the sale proceeds be put into a trust account pending resolution of the dispute but that defendants' counsel refused.

[234] On January 21, 2021, after exercising 125,000 warrants (which comprised part of the Discounted EVC Units), Nick transferred the shares to a trading account in his name at Canaccord. On February 8, 2021, Nick sold 30,000 of those shares at US\$9.37047 per share for total proceeds of US\$281,088. On March 26, 2021, Nick withdrew US\$280,000 from that account.

[235] In February 2021, Unison exercised a total of 720,000 EVC warrants. Helen received 410,000 EVC shares.

[236] On December 31, 2021, a Chinese court granted judgment in favour of Sunfor against Myles for RMB 85,915,904 plus interest.

[237] Myles has not returned to China since he left on June 12, 2016.

- [238] Rose testified that Nick and Helen's conduct in refusing to recognize the Unison EVC Trust, the Discounted EVC Units Trust and pay Myles' and Rose's portion of the sale of the Light & Effects shares has had a significantly negative impact on her life. She testified that Helen has spread rumours in her social community to the effect that "Myles is a scam artist" and that she feels betrayed and has been become emotionally and physically exhausted.
- [239] Nick testified that he still has more than 125,000 EVC shares in his trading account.
- [240] On August 6, 2021, during Helen's examination for discovery in these proceedings, the plaintiffs learned for the first time that Unison had sold 780,000 EVC shares and distributed the proceeds to Helen, Qiao, Su, and Jiang.

Credibility and Reliability

- [241] The outcome of this case will turn on the credibility of the parties. As was observed by Madam Justice Griffin, as she then was, in *Fu v. Zhu*, 2018 BCSC 9:
- [39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.
- [242] As Griffin J. cautioned in *Fu*, at paras. 40-41, the evidence in cases like this should be approached with an awareness that the nuances of the Mandarin language might be lost in translation and that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context.
- [243] Although this caution is instructive, it does not provide a licence for a witness to lie: *Kim v. Choi*, 2019 BCSC 437 at para. 18.

Myles

- [244] Myles gave his evidence during his examination in chief in a seemingly credible manner. His testimony was generally corroborated by the documentary evidence. However, his demeanour during cross-examination was anything but forthright. He obfuscated and became evasive, argumentative, and uncooperative when he perceived that the integrity of his business dealings, particularly those in China, was put to him. He was reluctant to admit the existence of significant debt obligations he and his wife had in China. He denied any knowledge of claims being made against him in China for significant sums of money until well after they had been made. WeChat communications between Myles and Mr. Chen on October 25, 2016 showed that Mr. Chen explained the definition of "qualified investor" and that Myles met the requirements. However, Myles' explanation on cross-examination as to why he and Rose nevertheless continued with the EVC investment through Helen was muddled and confused.

[245] I have no difficulty concluding that Myles is 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. I do not believe his evidence that he was unaware of the precarious nature of his financial circumstances in China when he and Rose entered into the Unison Trust, the Discounted EVC Unit Trust and the Light & Effects Investment. I do not believe his evidence that, at the time of those transactions, he was unaware of claims or potential claims against him in China in respect of the myriad of significant debts he had amassed there. I find that the debts Myles owed in China were, at least to some extent, the impetus for the Unison Trust, the Discounted EVC Unit Trust and the Light & Effects Investments being structured as they were.

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.

Helen

[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.

[253] During her examination for discovery on October 5, 2020, Helen gave the following evidence:

Q Did Unison issue 50 shares to you as consideration for the \$1 million that you advanced to it?

A Well, I myself already had 50 percent of the shares of Unison.

Q Okay. So you were holding 25 percent of the shares - were you holding one half of the shares that you had in trust for [Rose] Ms. Lu?

A Yes.

- [254] Despite that evidence as well as banking records showing that the \$500,000 Helen received from Rose on October 19, 2016 had been deposited into Helen's line of credit account shortly after she had transferred \$680,000 from that account and deposited it (together with \$330,000 from another account) to Unison's bank account, Helen asserted during her cross-examination that she had been the source of the entire \$1 million Unison investment, that Rose's \$500,000 was never used and remains available in her line of credit account to this day.
- [255] Helen's evidence that the November 19, 2016 "get together" at Myles' and Rose's home was not a formal Unison shareholders meeting was patently false, as was her evidence that what she wrote did not reflect the discussions and she only wrote what she did because Myles told her to. She also gave untruthful evidence that she had no understanding of why she told Mr. Mao in April 2019 that Rose would be a Unison director.
- [256] I also disbelieve Helen's evidence that she had no hand in Su's refusal to sign the Unison resolution authorizing the transfer to Rose of the 25 Unison shares Helen held in trust for Rose.
- [257] Helen persisted with her lies that she had not signed the Unison Trust Declaration, that her signature on the document had been forged, and that there had never been a trust agreement between her and Rose regarding Unison shares or the EVC Private Placement until day 16 of the trial, when her counsel was forced to concede in the face of overwhelming evidence that she had indeed signed the document. That evidence included:
- a) Helen's October 14, 2016 Lumenari WeChat Group post describing Rose as a "hidden investor" whose shares would be held by her;
 - b) Mr. Mao's October 18, 2016 cover letter to Helen and Rose together with the enclosed Unison Trust Declaration document, each bearing Helen's signature;
 - c) the Canadian Investor Questionnaire which was signed by both Helen and Rose;
 - d) the deposit by Helen into her personal bank account of \$500,000 from Rose followed immediately by a transfer of those funds into Unison's account;
 - e) acceptance by Helen of proportionate payments from Rose in respect of the Unison operating expenses in amounts equal to a 25% interest;
 - f) Unison's Share Register noting that Helen held two separate share certificates;
 - g) Myles' creation of the Unison WeChat Group and the subsequent communications in that forum demonstrative of Myles/Rose's ownership interest in Unison;
 - h) Helen's creation of minutes of the "shareholders' meeting" of November 19, 2016;

- i) Helen having noted the respective deposits from each of Qiao, Helen, Rose, Su and Jiang for ongoing Unison operating expenses in amounts corresponding to their respective shareholdings;
 - j) Myles having either called or being invited to participate in every Unison shareholder meeting prior to the parties' relationship deteriorating in mid-April 2019. Myles participated in the discussions during those meetings and was a party to the decision-making that took place;
 - k) Helen's email to Mr. Mao on April 11, 2019 and the transfer documents he prepared to transfer 25 shares in Unison from Helen to Rose;
 - l) Helen having signed the Unison Share Transfer Documents during the May 7, 2019 meeting; and
 - m) Mr. Mao's email to Helen dated December 9, 2019 confirming she had signed the Unison Trust Declaration and agreed to hold 25 Unison shares in trust for Rose.
- [258] Helen's attempt to explain her dishonesty by stating she had been confused because she had not been given an "accurate document to guide her" was laughable. I find that, throughout this litigation, Helen was fully aware that she was a party to the Unison Trust.
- [259] I find that Helen views herself as skilled in deception and has no need to be constrained by the facts. Like Myles, she is a person who will say anything she perceives is necessary to achieve a victory for her and her family. I have no difficulty finding that virtually everything Helen uttered during her testimony was deliberately contrived and false.
- [260] While defendants' counsel made extensive submissions during his closing argument as to why the court should find that Myles and Rose were not credible witnesses, he said nothing about the credibility of his own clients. When asked by the court about this glaring lacuna, he declined to provide an underlying rationale to his submission that his clients should be believed.
- [261] Once a witness has been shown to be deceptive in giving their evidence, that witness can no longer expect the court to consider them to be a trusted source of the truth.
- [262] In light of Helen's false testimony and demeanour as a witness, I do not accept her evidence on any matter in respect of which the evidence conflicts with the evidence of other witnesses.

Nick

- [263] During his evidence-in-chief, Nick testified in a seemingly forthright manner without embellishment or hyperbole. However, when testifying in respect of controversial issues, he often hesitated, tended to bow his head down, and seemed to answer unwillingly, clearly uncomfortable with giving what were obviously scripted answers.

[264] On cross-examination, Nick's demeanour changed markedly. He rarely, if ever, looked at plaintiff's counsel. He answered questions reluctantly and often in a terse manner. He repeatedly took refuge in statements such as "I don't have a clear recollection" and "I don't recall", even when the answers were obvious and when his examination for discovery admissions were put to him. It was apparent throughout his testimony that he feared telling the truth.

[265] I give Nick's evidence little weight.

Jack

[266] Jack's evidence was robotic and overly rehearsed. His testimony that he invested in Lumenari because Myles repeatedly told him that the company would make \$2.5 million in the first year and \$5 million in the second year was a palpably rote version of his parents' evidence and was lacking in credibility. He made his first investment in the company on August 31, 2017 after the sales in the first year were known to have been minimal at most. Despite describing himself in Lumenari's business plan as its "CEO", he denied any knowledge of its financial circumstances prior to November 2018. It defies common sense that he would not have been aware of the sales forecasts set out in Lumenari's business plan which he began working on in September 2016.

[267] He swore an affidavit in this proceeding on August 8, 2021, in which he deposed:

We [he and Nick] met [Myles] and he said that he was interested in starting a lighting business in Canada that would focus on horticultural lighting, but that as he and his wife were not Canadian citizens, they needed to team with others who were.

[]

Lumenari was the company incorporated at the suggestion of [Myles] from which to operate the lighting business he proposed.

[268] Yet, Jack denied that he understood Lumenari's business plan was to sell plant-based horticultural lighting products. He insisted that he understood throughout that Lumenari would be selling Sunfor products generally. All of the WeChat communications between Myles and Jack prior to the incorporation of Lumenari were focused entirely on horticultural lighting products, an area that Myles made clear he had not learned much about. There was no mention in any written communication of Lumenari selling Sunfor products.

[269] Jack maintained that, prior to July 2016, he was under the impression that Lumenari was a Sunfor company, yet did not explain why Lumenari's shares were owned entirely by him, Helen, and Rose. I have no difficulty concluding that Jack's evidence regarding Lumenari being incorporated to sell Sunfor products was fabricated as a means to an end: namely to claim misrepresentations were made by Myles that induced him and his parents to invest.

[270] Jack denied any knowledge of an application by Myles and Rose to immigrate to Canada, yet, he offered to help drive them to the BCPNP office on February 18, 2016. Moreover, he later stated that he and his parents "always knew Myles was in the process of immigrating to Canada".

[271] I find that Jack's evidence was plainly scripted to align Helen and Nick's theory of the case. I give it little weight.

Roger Wu

[272] It was obvious that Mr. Wu had little if any recollection of the events that were put to him. It was equally obvious that he was ill-prepared to give what little evidence he did. As a result, his testimony was confused, vague, disjointed and full of assumption, guesswork, and hearsay.

[273] Although Mr. Wu attempted to give his evidence in an honest manner, I find that it was, at best, unhelpful and unreliable.

Su

[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.

John Mao and Lucy

[275] Each of Mr. Mao and Lucy was an excellent witness who gave his or her evidence in a sincere, forthright and helpful manner. Their evidence was a breath of fresh air in an, otherwise, evidentiary sea of mendacity. I accept their evidence in its entirety.

Audio Recordings

[276] Several audio recordings of meetings between or among various of the parties were introduced in evidence by the plaintiffs. All were made surreptitiously by Myles without the defendants' knowledge. All were translated from Mandarin to English. All of the conversations are consistent with the plaintiffs' claims.

[277] The defendants submit that these recordings should be given little or no weight because they were unaware that the meeting was being recorded and hence the recordings are prejudicial to them because they may have been incomplete, or manipulated or because, knowing the conversations were being recorded, the plaintiffs had the advantage of steering the conversations as they liked: *Biehl v. Strang*, 2011 BCSC 1373 at paras 68-70; *A.M.E.R. v. P.J.R.*, 2003 BCSC 1466 at para. 16; *M.Y.T.C. v. L.H.N.*, 2019 BCSC 2454 at para. 17; *Lam v. Chiu*, 2012 BCSC 440 at para. 30.

[278] Each of Helen and Nick were cross-examined extensively on the audio recordings that they were part of. Not once did they suggest that any of them was not a reliable record of what had been uttered by them.

[279] In all of the circumstances of this case, I have no difficulty concluding that the recordings in question are accurate, trustworthy and in context. Their probative value outweighs the prejudicial effect that they have on the defendants. As a result, I find that the audio recordings are admissible and will give them the appropriate weight.

Issues

[280] For ease, I have addressed the issues raised in these actions, both the claims and counterclaims, in the following order:

Are the Trusts Alleged in these Actions Unenforceable for Uncertainty or because they were created for an Illegal or Improper purpose?

Discounted EVC Units Trust Action

a) If the Discounted EVC Units Trust is enforceable:

i. Were the defendants or any of them induced to invest in Lumenari by an actionable misrepresentation by the plaintiffs or either of them (defendants' claims for set off and counterclaims)?

ii. Was there an enforceable agreement reached between/among the parties such that the Discounted EVC Units and/or the Light & Effects Investment would be transferred to either or both of Helen and Nick?

iii. Did Nick breach the Discounted EVC Units Trust? If so, what remedy is available to Rose for Breach of Trust?

iv. Was there an agreement that Nick would received a commission of 15% on the sale of the Discounted EVC Units?

v. Do the plaintiffs or either of them have a remedy against Nick and/or Helen in respect of the Light & Effects Investment Proceeds?

- b) If the Discounted EVC Units Trust is not enforceable are the plaintiffs or either of them entitled in the alternative to damages for conversion, breach of contract and/or unjust enrichment?

Unison Action

- c) Is Rose entitled to a declaration that Helen holds 25 Unison shares in trust for her and for an Order that those shares be transferred to her?
- d) Does Helen hold 210,000 EVC shares in trust for Rose?
- e) Is Rose entitled to damages against Helen for breach of the Unison Trust, or alternatively for conversion, breach of contract and/or unjust enrichment?
- f) Did Rose fail to take reasonable steps to mitigate her loss?

Defendants' claim for Unjust Enrichment

Additional Claims by Plaintiffs

- g) Is an award of aggravated damages, punitive damages and/or special costs warranted as a result of the defendants' conduct prior to and during this litigation?

Analysis

- [281] The thrust of the defendants' case is that, because Myles and Rose were facing significant financial claims in China, they developed a scheme to immigrate to Canada to hide their assets from their Chinese creditors. The defendants say that they became the unknowing victims of the plaintiffs' scheme and were misled into participating in the investments that are the subject matter of these actions.
- [282] The defendants claim that the plaintiffs took advantage of their naivety as a means of implementing their scheme such that, not only were the plaintiffs' Chinese creditors deceived, so too was the CIC which granted their permanent resident applications on the basis of falsified information.
- [283] One difficulty I have with the defendants' position is that is based on speculation. None of the Chinese creditors or any representative of the CIC was called to testify. Another difficulty is that the deception of others is no defence to the plaintiffs' claims against the defendants.
- [284] Throughout their submissions, counsel for the defendants misstated the evidence and attempted to spin case authorities as support for propositions that they did not. In the result, the court was left with little confidence that it could rely on their submissions as representative of the facts or law.

Are the Trusts Alleged in these Actions Unenforceable for Uncertainty or because they were created for an illegal or improper purpose?

[285] A helpful and concise summary of the categories of trust is found in *Sohi v. Sohi*, 2022 BCSC 434:

[21] The law recognizes three kinds of trust. Express trusts are intentionally created by settlors. Resulting trusts arise by operation of law in the absence of an intention to confer full rights of ownership on a recipient of property. Constructive trusts are created by the court to vindicate a plaintiff's right. Any of these trusts gives rise to equitable rights for the beneficiary that may overcome the usual presumption under s. 23 of the Land Title Act, R.S.B.C. 1996, c. 250, that a certificate of title is conclusive evidence of entitlement; *Suen v. Suen*, 2013 BCCA 313 at para. 34.

[22] An express trust is one created by the intentional act of a settlor who transfers property to a trustee, enters into a binding agreement to transfer property, or declares him or herself a trustee. There are three requirements: certainty of intention to create a trust, certainty as to what property is to be held in trust ("certainty of subject matter"), and certainty as to who are the beneficiaries of the trust ("certainty of objects"); *Xu v. Hu*, 2021 BCCA 2 at paras. 12-15. In the absence of formal documentation, the court may determine whether there was certainty of intention by looking to the surrounding circumstances, including evidence of what was understood or agreed upon, and how the parties conducted themselves; *Virk v. Singh*, 2020 BCSC 225 at para. 121.

[23] For present purposes, a resulting trust is created where an owner of property transfers it to another without intending that the recipient become the owner. Legal title to the property passes to the recipient, but equitable title "results" (from the Latin *resultare*, to jump back) to the transferor; *Pecore [v. Pecore]*, 2007 SCC 17] at paras. 20 and 24.

[24] A constructive trust is a proprietary remedy, giving the plaintiff equitable title to property that it did not possess apart from the court's order. One of the circumstances in which the court will sometimes impose a constructive trust as a remedy is where the defendant has been unjustly enriched to the plaintiff's detriment, the enrichment is substantially and directly linked to property in the possession of the defendant, and a monetary remedy will not be adequate; *Kerr v. Baranow*, 2011 SCC 10 at paras. 50-53.

a) Uncertainty

[286] The defendants concede the existence of the Discounted EVC Units Trust but submit it is unenforceable because there is uncertainty as to whether Nick agreed to hold the EVC Units in trust for Myles or for Rose. The plaintiffs submit that it was always the understanding that the beneficiary of the trust was Rose.

[287] On the whole of the evidence, I find that, while the discussions regarding the creation of the Discounted EVC Units Trust were between Nick and Myles, at the time the trust was created, it was understood by Nick that the beneficiary of the trust was Rose. Nick understood throughout that Myles, as Rose's husband, was acting as her agent for all matters relating to the Discounted EVC Units and the Discounted EVC Unit Trust. There was no uncertainty and therefore the Discounted EVC Units Trust is enforceable.

b) Illegal/Improper Purpose

[288] The defendants assert that, regardless, the Unison Trust and the Discounted EVC Units Trust are unenforceable because the plaintiffs' intent in participating in them, namely to avoid their creditors in China and in furtherance of a scheme to mislead CIC, was illegal and/or for an improper purpose.

[289] In support of this proposition, the defendants rely on the decisions of various Canadian courts including:

- Maysels v. Maysels (1974), 45 D.L.R. (3d) 337, 1974 CanLII 831 (Ont. C.A.), aff'd 1975 CanLII 1209 (S.C.C.): husband who put house in wife's name to protect property against possible future creditor claims could not rely on this 'illegal purpose' to rebut presumption of gift;
- Kim v. Choi, 2020 BCCA 98: claimant not entitled to profit from immigration scheme but portion of transaction that would otherwise result in unjust enrichment unwound;
- Wang v. Wang, 2020 BCCA 15: money embezzled from China used for investment in British Columbia;
- Toohey v. Toohey, [1941] 2 D.L.R. 520, 1911 CanLII 208 (Ont. C.A.): transfer of money to brother to defeat creditors;
- Holtby v. Draper, 2017 ONCA 932: untruthful intent did not preclude recovery where there was no harm to anyone;
- Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd., 2020 BCCA 130: land purchase agreements had been deliberately structured to facilitate the commission of fraud against third party lenders;
- Wang v. Jiang, 2021 BCCA 132: transaction was tainted by illegal intent but not harm to anyone flowed from it--plaintiff allowed to benefit from increase in investment.

[290] The doctrine of ex turpi causa non oritur action prevents a party from benefitting from illegal or immoral conduct. The doctrine applies in both contract and in tort: Randhawa v. 420413 B.C. Ltd., 2009 BCCA 602 at para. 66. However, the case law is clear that a court may only bar a plaintiff's claim on the ground of immoral or illegal conduct in circumstances where failure to do so would affect the integrity of our legal system and hence contrary to public policy: Hall v. Hebert, [1993] 2 S.C.R. 159 at 185, 1993 CanLII 141; Kim at paras. 42-46; Wang at para. 51. In other words, equity will not intervene in an illegal or immoral act

unless failure to do so will defeat or frustrate the policy underlying the illegality, leading to inconsistency in the law and thereby undermining the integrity of the legal system: Kim at para. 50.

- [291] In my view, none of the authorities relied on by the defendants is applicable to the facts before me. In each of them, there was a finding that harm had been done to either a party or a third party--the relevant party did something they would not otherwise have done and/or their interests were affected by the conduct in question. There is no evidence before me of any harm having been done to anyone as a result of the creation of the Unison Trust or the Discounted EVC Units Trust. There is no evidence that any Chinese creditor or the CIC was impacted by the creation of the trusts. There is no evidence that enforcing the trusts would lead to a disproportionate or unjustly enriching result.
- [292] I reject the submission of defendants' counsel that a mere intention on the part of the plaintiffs to use the trusts as a means for hiding assets, without more, is sufficient in law for the court to exercise its discretion against enforcing the trusts. I am not aware of any authority for such a novel proposition and none was provided to me. All of the authorities relied on by defendants' counsel where the transaction was not enforced involved a finding of harm resulting from the conduct. The malfeasance in question must be tethered in some way to the plaintiff's claim, which in this case is the breach of trust by the defendants. There is no such connection in this case.
- [293] The public policy associated with attempts to avoid creditors is set out in the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 and the Fraudulent Preference Act, R.S.B.C. 1996, c. 164. Those statutes provide that a transaction made for the purpose of avoiding creditors is void and of no effect as against the injured creditor, not generally: *Stene v. Whites Caste Ventures Inc.*, 2022 BCCA 29 at paras. 49-50. In other words, the preservation of the integrity of the judicial system requires that there be a person or entity who would otherwise be harmed in some way. Such harm is absent in this case. There is no evidence that a fraud was committed. There is no evidence that any steps the plaintiff took in British Columbia was illegal or contrary to public policy in China. Although nothing the plaintiffs did was "illegal per se", at least under the laws of Canada, and while they possibly structured the investments in question in an attempt to hide assets from creditors in China, the defendants led no evidence that the plaintiffs had insufficient assets in China to pay the Chinese judgments. While the plaintiffs' intention to hide assets may not have conformed to the standards of some, on the evidence it did no harm to anyone.
- [294] On the whole of the evidence, I conclude that the defendants have failed to demonstrate on a balance of probabilities that Myles' and Rose's intent at the time of creation of the Unison Trust, the Discounted EVC Units Trust or the Light & Effects Investment was sufficiently tainted such that it had the effect of undermining the integrity of the legal system such that the trusts are unenforceable. Regardless, the conduct of the defendants throughout militates against allowing them to retain the fruits of the various trusts because they would be unjustly enriched and no actual harm has been shown to have been suffered by any

third party.

[295] The defendants' claim in this regard is based entirely on unsubstantiated speculation and is rejected. Accordingly, I find that the Unison Trust and the Discounted EVC Units Trust are enforceable.

Discounted EVC Units Trust Action

a) Were the Defendants or any of them Induced to Invest in Lumenari by an actionable misrepresentation by the plaintiffs or either of them (Defendants' Claims for Set Off and Counterclaims)?

[296] Jack, Can-Pacific Enterprises, and Helen pleaded by way of counterclaims that they were induced by fraudulent misrepresentations or negligent misrepresentations on the part of the plaintiffs to invest in Lumenari.

[297] These claims are, at best, misguided. More likely, they were part of the defendants' ongoing campaign of vengeance against the plaintiffs.

[298] The defendants submit that the following representations were made:

- a) Myles could generate approximately \$2.5 million revenue for Lumenari in the first year of business, and \$5.0 million revenue in the second year of business;
- b) after the third year of business, Lumenari would apply to be publicly traded;
- c) Myles and his China-based company had approximately 1,000 patents in China and approximately 300 international patents that would lead to sales for Lumenari;
- d) Myles had long-term business connections with and was well respected in the lighting industry in China and could get the new business specialized lighting products at a very good price that were certified to be sold in Canada;
- e) Myles and Rose would devote their full-time efforts to developing the business;
- f) Myles had specialized knowledge about the sale and manufacture of lighting products that was applicable to the Canadian market;
- g) Myles has a factory in China that manufactures lighting products that would translate to profitable sales for the proposed company as the products would be readily available for sale; and
- h) Nick and Helen would receive significant profits if they loaned money to Lumenari and invested money and time in the new lighting business with the plaintiffs.

- [299] To the extent that any of the foregoing were representations of existing fact, the defendants have failed to demonstrate that any of the facts were untrue. To the extent that any of the foregoing were representations of future intention, the defendants have failed to demonstrate that such intentions were not honestly held. None of the alleged representations has been shown to have been false.
- [300] Regardless, I have no difficulty finding that neither Helen nor Jack was induced by any actionable misrepresentation on the part of Myles at the May 3, 2016 meeting or otherwise to invest in Lumenari. At most, they were induced by Myles' dream of future profit. I find that the impetus for their investment was Nick and Jack's visit to the Sunfor facility in October 2015 together with their learning of Myles' knowledge, experience, and success in the LED lighting industry in China and of his plan to replicate his success in Canada through horticultural plant-based lighting products. Nick and Helen saw an opportunity for Jack to become involved in a novel and exciting business enterprise with great future potential. They and Jack viewed Lumenari as a "get rich quick" scheme and are now attempting to blame Myles and Rose for its failure, concocting alleged misrepresentations in the process.
- [301] Nick's evidence was that, having toured the Sunfor facility in October 2015 and seeing the research that Jack had done, his family had decided to go into the Lumenari business before the May 3, 2016 meeting had even occurred.
- [302] I find that each of Nick, Helen, and Jack were well aware when they invested in Lumenari that it was a plant-based lighting start-up company and that there were no guarantees. Indeed, Nick conceded on cross-examination that, with every investment, there is "a risk of losing everything".
- [303] Nick's and Helen's suggestion that they were unaware throughout that Myles had left Sunfor, when he was living full-time in Canada and engaged full time at Lumenari was simply not credible .
- [304] Nick's evidence was that he invested in Light & Effects because he wanted to better Lumenari's business prospects and that the amount of the proposed return on investment did not influence his investment decision.
- [305] There is no credible evidence that either Helen, Nick or Jack was misled in any way by representations made by Myles.
- [306] The defendants' counterclaims are dismissed.
- b) Was there an Enforceable Agreement reached between/among the Parties such that the Discounted EVC Units and/or the Light & Effects Investment would be transferred to either or both of Helen and Nick?

- [307] I find that there was no agreement made by any of the parties that Myles would immediately repay Helen's Lumenari shareholders' loans. It is clear from the evidence that all of the parties understood Myles and Rose were prepared to continue to operate Lumenari and that Helen's shareholders' loans would be repaid from future profits, if any. There were none.
- [308] Nick and Helen's claim that an agreement was made on May 7, 2019 pursuant to which Myles and Rose gave them the 125,000 EVC shares held under the Discounted EVC Units Trust is not borne out by the evidence and I find that it was entirely concocted. The transcript of the recording of the May 7, 2019 meeting (as interpreted) makes it clear that what was said did not constitute an offer and acceptance supported by adequate consideration. It does not come close to demonstrating an agreement was made. Myles' subsequent demands that his shares be sold together with no mention by Nick during their discussions on May 28, 2019 are inconsistent with any understanding that such an agreement had been made. Despite the plethora of WeChat emails and voicemails exchanged by the parties during the course of their dealings, there is not a single communication or document supporting the assertion by Helen or Nick that Myles agreed to allow them to keep the shares in partial payment of Helen's Lumenari shareholder loans.
- [309] The evidence presented at trial does not support a finding that the parties agreed during the May 7, 2019 meeting either that Helen and Nick would receive RMB 750,000 for their investment in Light & Effects or that they would be entitled to retain the RMB 610,000 that had been received from the sale of 1.4% of the Light & Effects shares. The transcript of the May 7, 2019 meeting is rife with inconsistency and ambiguity regarding terms and consideration, and falls far short of establishing an enforceable agreement having been made.
- [310] I have no difficulty finding that Nick agreed to hold 49% of the Light & Effects Investment in trust for Myles and Rose.
- [311] The defendants also submit they have no liability to Myles and Rose in respect of the RMB 610,000 they received from Ben's sale of the Light & Effects Investment because they obtained information during the course of this litigation, through document production and internet research Nick performed of Light & Effects shareholding on a Chinese corporate records website indicating that there was an agreement among Nick, Ben and two others to purchase a 34% interest in Light & Effects held by Sunfor and that RMB 143,338 had been paid to acquire 3% of Light & Effects shares and registered to Nick. Helen testified that she and Nick would never have made the investment had they known that the Light & Effects shares that were being purchased belonged to Sunfor.

- [312] Neither of these documents was proved in court for the truth of their contents and I am unable to make any findings in respect of them. Regardless, I find that at the time of the Light & Effects Investment, Nick and Helen were so enamored with Myles and his apparent success in China that they were prepared to make any investment he suggested they make, all for their own profit motives.
- [313] I find that Nick's and Helen's convoluted and contradictory interpretation of the May 7, 2019 conversation was manufactured by them during this litigation in an attempt to justify their conduct.
- c) Did Nick Breach the Discounted EVC Units Trust? If so, what Remedy is Available to Rose for Breach of Trust?
- [314] During his submissions, defendants' counsel conceded that Nick held 50% of the Discounted EVC Units in trust for Myles. However, I find that he in fact held those units in trust for Rose who Nick knew paid the subscription price. I also find that Nick understood that, from and after the time the subscription was made, Myles' involvement in the Discounted EVC Units Trust was on behalf of Rose.
- [315] I find that Nick breached the Discounted EVC Units Trust by failing to sell Rose's 125,000 Discounted EVC shares when Myles, on behalf of Rose, demanded that he do so on April 23, 2019 and again on May 7, 15, and 28, 2019.
- [316] The EVC share price on April 23, 2019 was US\$3.36. By April 2020, the trading price had dropped to a low of US\$0.90. It then gradually rose to a high of US\$13.60 in November 2020. Since then, with two exceptions, it has gradually declined to its current price of US\$1.29 per share. The two exceptions occurred in 2020 when the share price inexplicably spiked between (i) mid-May and mid-July, and (ii) late-October and late-November.
- [317] Between May 2019 and November 2020, Nick (or Helen on his behalf) sold 125,000 of the Discounted EVC Shares for total proceeds of US\$689,553. In December 2020, Nick withdrew US\$200,000 of these monies from his trading account.
- [318] On January 21, 2021 and thereafter, Nick (undoubtedly aided and abetted by Helen given her control of the family's finances) harvested the fruits of the parties' joint investment in EVC to the exclusion of the plaintiffs by exercising 125,000 warrants (which comprised part of the Discounted EVC Units), transferring the shares to a trading account in his name and thereafter selling 30,000 of those shares at US\$9.37047 per share for total proceeds of US\$281,088. He then withdrew US\$280,000 from the account.
- [319] The obligation of a defaulting trustee was summarized by the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 360-361, 1984 CanLII 25:

The position at common law concerning damages for breach of trust and, in particular, the difference between the principles in trust law from those applicable in tort and contract, are well summarized in the following passages from Mr. Justice Street's judgment in the Australian case of *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06:

The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.

[]

Caffrey v. Darby (1801) 6 Ves. Jun. 488; 31 E.R. 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.

[]

The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.

[]

The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract. It is on this fundamental ground that I regard the principles in *Tomkinson's case* [*Tomkinson v. First Pennsylvania Banking and Trust Co.* [1961] A.C. 1007] as distinguishable. Moreover the distinction between common-law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increases would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before. [Wilson J.'s emphasis.]

The reasoning which the House of Lords adopted in Tomkinson's case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach.

This statement of the law has been cited with approval in Underhill's Law of Trusts and Trustees (13th ed. 1979), at pp. 702-03, and was also recently adopted by Brightman L.J. in *Bartlett v. Barclays Bank Trust Co. (No. 2)*, [1980] 2 All E.R. 92 (Ch.), at p. 93: see also Waters, *Law of Trusts in Canada* (1974), at pp. 843-45.

[320] While the presumptive date for the assessment of damages for breach of contract is the date of the breach, there is an exception where as here, the contract is in relation to shares whose value is volatile and subject to sudden fluctuations of unpredictable amplitude: *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, [1979] 1 S.C.R. 633 at 664-665, 1978 CanLII 16 [Asamera].

[321] In *McNeil v. Fultz*, [1906] 38 S.C.R. 198 at 205, 1906 CanLII 41, the Supreme Court of Canada held that damages for breach of trust such circumstances should be calculated at the best price the shares had during the period in which they were withheld:

[] the defendant was under an obligation to account to the plaintiffs at once for that which he received as trustee for them. Treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his cestuis que trustent, he is liable to make reparation for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price obtainable []

[322] This principle was also affirmed in *Guerin* at 528:

Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee [], so also it should be presumed that the band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determining damages for breach of trust are to be contrasted with the principles applicable to determining damages for breach of contract. In contract it would have been necessary for the band to prove that it would have developed the land; in equity a presumption is made to that effect []

[323] This logic is explained in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 1368 [Waters']:

[] Why should the plaintiff have the benefit of the highest price during the relevant time where the claim is for breach of trust? The logic seems to be that the contract rules presumptively identify a particular moment as the moment of breach, and the plaintiff is speculating on his or her own account if he or she does not replace the property, at the market price, when the defendant fails to deliver. The trust, however, is a relationship that involves holding property over time. The breaching trustee has created an evidentiary difficulty as to what benefit the beneficiary would have acquired; and, because the difficulty was created by the trustee's own wrongful act, it is resolved against him or her.

[324] This principle has been applied by this Court in circumstances similar to those in these actions: *Cash v. Georgia Pacific Securities Corp.*, 1990 CanLII 1052, 1990 CarswellBC 1821 (S.C.).

[325] The evidence is clear that, on April 23, 2019, Myles (on behalf of Rose) requested that Nick sell Rose's 125,000 Discounted EVC Shares. I find that had Nick complied with that request, as he was required to do by his duty as trustee, Rose would have received US\$420,000 (125,000 x US\$3.36). The US/Canadian dollar exchange rate on April 23, 2019 was 1.3345. Accordingly, Rose would have received the Canadian dollar equivalent of \$560,490.

[326] In view of Myles' express request that the shares be sold on April 23, 2019, I decline to award damages on the basis of the highest price that EVC traded at after that date. Although I accept that the principle of remoteness is not at play in this case, I, nevertheless, am not persuaded that Myles would have used the money he would have received from the sale of his 125,000 Discounted EVC Shares to purchase more EVC shares at or near the low of their trading range.

[327] The defendants submit that Rose failed to mitigate her loss by agreeing to the sale of the Discounted EVC Units in November 2020 after receipt of the letter from Defendants' counsel dated November 25, 2020.

[328] There is a general duty to mitigate loss arising from the non-delivery of shares in a breach of contract case by going into the market and purchasing replacement shares within a reasonable time of a breach of contract: *Genesee Enterprises v. Rached*, 2001 BCSC 59 at para. 338. However, the duty to mitigate in cases involving the non-delivery of shares may also be fulfilled by pursuing litigation in circumstances where the actual replacement of shares would be unreasonable: *Genesee Enterprises* at para. 338, citing *Asamera* at 671. Further, it has been recognized that breach of trust cases are subject to the usual duty to mitigate analysis to determine whether steps were taken by the plaintiff to alleviate the loss: *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 at paras. 236-242.

[329] The defendants bear the onus of establishing the defence of a failure to mitigate: *Khan v. Bhangoo*, 2020 BCSC 2053, at paras. 75-76.

- [330] There was no indication in the November 25, 2020 letter regarding what would happen to the proceeds of sale if the Discounted EVC Units were sold. The personal history between and among the parties together with Nick and Helen's conduct in purporting to usurp to themselves the EVC units and proceeds of sale of the Light & Effects shares was such that it was reasonable for the plaintiffs to be concerned about what would happen to the proceeds if the shares were sold. Moreover, it was not reasonable to expect the plaintiffs to accept the vague proposal set out in the November 25, 2020 letter that did not set out any terms upon which the sale proceeds would be held or distributed.
- [331] Nevertheless, the defendants submit that the evidence demonstrates that the plaintiffs had ample funds with which to purchase replacement EVC shares at any time after April 23, 2019, particularly when the trading price had declined to under US\$2 per share between October 2019 and June 2020, before surging to over US\$13 in November 2020. They submit that Myles' past investment successes and self-professed insight into share market trends demonstrates he and Rose ought reasonably to have replaced the Discounted EVC Units after Nick's refusal to sell them.
- [332] When asked during his submissions as to when the plaintiffs ought to have purchased replacement EVC shares, defendants' counsel responded: "it's not 100% clear", and stated: "If Myles thinks the shares are going up, he has a responsibility to purchase". This analysis of the duty is flawed. What matters is not the plaintiff's subjective belief but rather whether, considered objectively in all the circumstances, the purchase of replacement shares ought to have occurred: *Lavallee v. Evergreen International Technology Inc.*, [1994] B.C.W.L.D. 1736 at para. 10, 1994 CanLII 1943 (S.C.).
- [333] No evidence was provided regarding whether the plaintiffs' financial circumstances were such that they had the wherewithal to purchase replacement shares after April 2019. There is no evidence that the risk of such an investment would have been low. Again, the defendants' submissions are based entirely on speculation and hindsight.
- [334] I conclude that the defendants have failed to establish that the plaintiffs failed to take reasonable steps to mitigate their loss and that, based on the evidence before me, it was unreasonable for the plaintiffs to have purchased replacement shares. Accordingly, I find that the plaintiffs satisfied their duty to mitigate by commencing this litigation.
- [335] In addition to the 125,000 EVC shares, the Discounted EVC Units also comprised 125,000 warrants exercisable at C\$4.00 each on or before November 21, 2021. Those warrants were never exercised and have now expired.
- [336] The defendants maintain that the Discounted EVC Units warrants that were exercised and sold by Nick belonged to him. He argues that the warrants belonging to Rose as part of her 125,000 Discounted EVC Units were never exercised and that the fact they have now expired does not lie at his feet. In my view, that argument is fallacious.

[337] The law respecting a trustee's subordinate interest to that of the beneficiary in a case of a mixture of value is set out in *Waters* at 1431-1432, cited in part by this court in *Chung v. Chung*, 2022 BCSC 1592:

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When a mixture of value has been created, if one contributor is a wrongdoer vis-à-vis another, then in determining what is the traceable product of a contribution, the interests of the wrongdoer are subordinated []. The beneficiary is allowed to choose whatever understanding of the transaction is best for him or her, which shows that the interests of the wrongdoing contributor are subordinated.

[338] If there is any difficulty tracing the mix of funds as the result of the trustee intermingling funds, and the evidentiary difficulties are caused by wrongdoing, the issue is to be resolved in favour of the innocent party: *Waters*, *Waters' Law of Trusts in Canada*, (2021 Online Edition, Ch. 18 "Duties of Loyalty" at 26.III); *Chung*, at para. 70.

[339] The defendants have provided no persuasive authority in support of their argument that Rose has no entitlement to the warrants that Nick exercised and sold.

[340] By virtue of Nick's breach of trust, Rose was deprived of the opportunity to exercise her 125,000 warrants in a timely manner.

[341] As set out above, and following *McNeil and Guerin*, I find that Rose is entitled to the benefit of the presumption that, but for Nick's breach of trust, she would have exercised her 125,000 EVC warrants and sold the resulting shares at the highest price they traded at between April 23, 2019 and November 21, 2021, namely, US\$13.60 on November 20, 2020. The exchange rate on that day between US dollars and Canadian dollars was 1.3086. Accordingly, the loss in respect of which Rose is entitled to be compensated is (125,000 x US\$13.60 x 1.3086CAD/USD) minus (125,000 x C\$4.00), which totals C\$1,724,620.

d) Was there an Agreement that Nick would received a Commission of 15% on the sale of the Discounted EVC Units?

[342] I am unable to find on the evidence as a whole that Nick agreed to the Discounted EVC Units Trust in consideration for a commission of 15% of the sale proceeds (net of taxes and other costs). It is inconceivable that, if there was such an agreement, it would not have been mentioned at any of the meetings during which Myles demanded that Nick sell his shares with the exception of shares sufficient to pay for taxes and costs. Nick's evidence that he would have mentioned it had he known the conversations were being recorded was absurd.

e) Do the Plaintiffs or either of them have a remedy against Nick and/or Helen in respect of the Light & Effects Investment Proceeds?

- [343] The plaintiffs submit that either an express, implied, or resulting trust was created when Nick and Myles made the Light & Effects Investment whereby Nick agreed to hold 49% of the total investment in trust for Myles.
- [344] The defendants submit that the Light & Effects Investment was made by Nick and Myles independently of each other and that the Light & Effects Investment Proceeds Nick received from Ben in April 2019 (RMB 610,000) were in respect of the sale of Nick's investment.
- [345] The admissible evidence establishes that, in August 2017, there were discussions between the two families regarding them purchasing a 3% interest in Light & Effects for RMB 1,061,000. They collectively decided to make the investment in order to assist their respective sons (Ben and Jack) in their businesses. Nick/Helen forwarded RMB 541,110 (51%) and Myles/Rose forwarded RMB 520,000 (49%) to Helen's brother in China. In April 2019, Ben deposited RMB 610,000 into Nick's bank account in China.
- [346] That evidence falls far short of establishing any form of trust was created in respect of the Light & Effects Investment. The investment monies were paid separately and there is no admissible evidence that shares in Light & Effects were issued to any of the parties in exchange. I find that the plaintiffs have failed to meet the burden upon them of establishing the existence of a trust in respect of the Light & Effects Investment.
- [347] The plaintiffs plead in the alternative that they are entitled to 49% of the Light & Effects Investment Proceeds on the basis of unjust enrichment.
- [348] To succeed, the plaintiffs must demonstrate that Nick/Helen were enriched, that they were correspondingly deprived and that there was no juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.
- [349] The defendants concede that Nick and Helen were enriched by the receipt by Nick of RMB 610,000 on April 26, 2019. Those monies were subsequently taken from Nick's account by Helen and spent.
- [350] However, the defendants deny that there was a corresponding deprivation on the part of Myles/Rose. They say the evidence does not establish that the Light & Effects Investment Proceeds belonged to anyone other than Nick. I disagree. It is clear from the evidence as a whole that the Light & Effects Investment was, and was always intended to be, a joint investment by the two families for the purchase of 3% of the company. The RMB 610,000 that was paid by Ben to Nick was clearly understood by the parties to be in respect of the sale of 1.6%, leaving a balance of 1.4%. The discussion during the May 7, 2019 meeting demonstrates that neither Nick nor Helen considered that Myles/Rose had no claim to any portion of the money. Rather, they were determined to apply Myles/Rose's 49% portion towards their Lumenari losses. I find that there was a corresponding deprivation.

- [351] I have no difficulty concluding that there was no juristic reason for Nick and Helen's enrichment. They simply viewed themselves as entitled to the money because of their Lumenari losses.
- [352] The defendants submit that, regardless, any claim the plaintiffs may have regarding the Light & Effects Investment is statute-barred because the claim in respect of it was not made until the plaintiffs' Further Amended Notice of Civil Claim was filed on April 29, 2022, more than three years after Nick received the Light & Effects Investment Proceeds. However, the running of the usual two-year limitation period for commencing an action in respect of unjust enrichment was temporarily suspended by the British Columbia Government on March 26, 2020 in response to the COVID-19 pandemic: Ministerial Order MO86/2020; Ministerial Order MO98/2020; Schedule 2 of the COVID-19 Related Measures Act, S.B.C. 2020, c. 8; and COVID-19 (Limitation Periods in Court Proceedings) Regulation, B.C. Reg. 199/2020. That suspension ended on March 25, 2021, by Order-in-Council 655/2020. Accordingly, the plaintiffs were not barred from commencing their action in respect of the Light & Effects Investment Proceeds until three years after they discovered or ought to have discovered their claim.
- [353] I find that the plaintiffs did not know and could not reasonably have known that the defendants would refuse to acknowledge their entitlement to receive 49% of the Light & Effects Investment Proceeds until the meeting on May 7, 2019. Therefore, the claim is not statute barred since it was commenced prior to May 7, 2022.
- [354] The plaintiffs are entitled to damages against Nick and Helen, jointly and severally, for unjust enrichment in the Canadian dollar equivalent of RMB 298,900, converted on May 1, 2019.
- f) If the Discounted EVC Units Trust is not enforceable, are the plaintiffs or either of them entitled in the alternative to damages for conversion, breach of contract and/or unjust enrichment?
- [355] Given my findings above, there is no need to address these alternative submissions.

Unison Action

- g) Is Rose Entitled to a Declaration that Helen holds 25 Unison shares in Trust for her and for an Order that those shares be transferred to her?
- [356] There is no longer any dispute as to the existence of the Unison Trust or that Rose was the beneficiary of that trust.
- [357] Defendants' counsel submits that "Helen did all she could to try to transfer the [Unison] shares to Rose but it was beyond her ability to do so". He submits that Helen signed the share transfer resolutions (albeit reluctantly during the May 7, 2019 meeting) and that it was the other Unison directors, not her, who thwarted the transfer.

- [358] I reject the defendants' submission that "Helen did all that could be reasonably expected under the circumstances and her efforts to fulfil Rose's wishes were frustrated by Unison's Articles and its directors". I find on the whole of the evidence that Helen was steadfast in her resolve not to relinquish any of the Unison shares to Rose and, while she relented and signed the transfer documentation during the May 7, 2019 meeting when she could not justify refusing, she did what was necessary to ensure that the other directors did not follow suit. If there was a modicum of desire on her part to effect the transfer, I have little doubt that it would have occurred.
- n) Does Helen hold 210,000 EVC Shares in trust for Rose?
- [359] The 210,000 EVC shares that Helen caused Unison to transfer to her are captured by the following words of the Unison Trust "any income or advantage in respect of the Shares". It is clear that Helen holds the shares in trust for Rose.
- i) Is Rose Entitled to Damages against Helen for breach of the Unison Trust, or alternatively, for conversion, breach of contract and/or Unjust Enrichment?
- [360] Whenever an express trustee acquires property by means of his or her trusteeship, or his or her control of trust property, the trustee must account for it to the beneficiary. Equity compels the trustee to hold the property on the terms of the express trust by imposing a trust obligation in favour of the beneficiary: *Waters'* at 550-551; *Pirani v. Pirani*, 2020 BCSC 974 at para. 137. A breach of trust occurs whenever a trustee's duty to act precisely within the terms of his or her trust obligations is not fulfilled: *Waters'* at 1356; *Pirani*, at para. 125. A breach of a trustee's duty of loyalty can arise in circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances: *Meng Estate v. Liem*, 2019 BCCA 127 at para. 35.
- [361] A trustee's duty of loyalty demands that in the absence of authorization, a trustee is accountable for any right, profit, or benefit acquired by reason of or by use of his or her position: *Chung* at para. 55.
- [362] Helen owed a fiduciary duty to Rose. She breached that fiduciary duty and the Unison Trust by trading some or all of the 210,000 EVC shares she held in trust for Rose without Rose's knowledge or consent. She failed to account to Rose for the proceeds of sale and secretly profited from it, preferring her own interests to those of Rose.
- [363] After receiving the 420,000 EVC shares in her account on December 5, 2019, Helen sold 548,883 of the shares for proceeds totaling US\$2,388,967.
- [364] Plainly, Helen breached the Unison Trust.
- [365] Helen breached the Unison Trust on December 5, 2019 when she caused Unison to distribute to her 420,000 EVC shares, 210,000 of which belonged to Rose. The highest price those shares traded at thereafter was US\$13.60 on November 20, 2020.

[366] Following the principles enunciated by the Supreme Court of Canada and by this Court, as set out under the heading dealing with Nick's breach of the Discounted EVC Units Trust above, I find that Rose is entitled to an award of damages against Helen assessed as follows: 210,000 shares at US\$13.60 per share = US\$2,856,000. The Canadian dollar equivalent on November 20, 2020 was US\$2,856,000 x 1.3086CAD/USD = C\$3,737,362.

j) Did the Plaintiffs Fail to Mitigate Their Damages?

[367] For the reasons set out above, I find that the defendants have failed to demonstrate that Rose failed to take reasonable steps to mitigate her loss in respect of Helen's breach of the Unison Trust.

Defendants' Alternative Claim for Unjust Enrichment

[368] I have dealt with and dismissed the claims of the defendants for set off and misrepresentation.

[369] There remains the defendants' alternative claim for unjust enrichment in respect of Helen's, Jack's and Can-Pacific Enterprises' investments in Lumenari. They submit that the plaintiffs were able to immigrate to Canada based on these investments and "in that sense" were enriched. They say that they were correspondingly deprived because their loans were not repaid and they did not earn any revenue or income from Lumenari. They say that there was no juristic reason for the plaintiffs' enrichment.

[370] These submissions are wholly without merit. It is speculation to suggest that without Lumenari the plaintiffs' work permits and eventual permanent residency status would never have been issued. Evidence regarding the basis upon which those documents were issued could have been sought from CIC but was not. The Lumenari shareholders' loans were not repaid because the business was unsuccessful. It had nothing to do with the alleged "enrichment" of the plaintiffs. Finally, to suggest that there was no juristic reason for the plaintiffs' immigration documentation is, again, based entirely on unsubstantiated speculation.

[371] The defendants' alternative claim in unjust enrichment is dismissed.

Additional Claims by Plaintiffs

k) Aggravated Damages

[372] Aggravated damages may be awarded in circumstances where a trustee's behaviour is highhanded and egregious or has caused the innocent party to suffer serious emotional distress: *Grabenheimer v. Lala*, 2019 ONSC 2811 at paras. 53-54; *Pirani v. Esmail*, 2014 ONCA 145 at paras. 66-67. The conduct must be found to have been highhanded and have aggravated the innocent party's injury, pain or anguish in a tangible way. The conduct must have resulted in "a serious and prolonged disruption that transcends ordinary emotional upset or distress": *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25 at para. 32.

[373] Although counsel for the plaintiffs sought an award of aggravated damages, during his submissions he conceded that they would not be warranted in the event the breach of trust damages were awarded.

[374] Accordingly, I decline to consider an award of aggravated damages.

l) Punitive Damages

[375] Punitive damages are imposed for purposes of retribution, denunciation and deterrence. They are only awarded in circumstances where the compensatory damages are insufficient to express the court's repugnance at the misconduct in question. Although in most cases an independently actionable wrong is a precondition for a punitive damages award, it is not the case for breach of a fiduciary duty where the fiduciary's actions are purposefully repugnant to the beneficiary's interests: *Mulligan v. Stephenson*, 2016 BCSC 1941 at paras. 139-141.

[376] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the following factors for assessing the blameworthiness of a party's conduct were identified, at para. 113:

- a) whether the misconduct was planned and deliberate;
- b) the intent and motive of the party;
- c) whether the party persisted in the outrageous conduct over a lengthy period of time;
- d) whether the party concealed or attempted to cover up his/her misconduct;
- e) the party's awareness that what he or she was doing was wrong;
- f) whether the party profited from the misconduct; and
- g) whether the interest violated by the misconduct was known to be deeply personal or irreplaceable.

[377] Counsel for the defendants submitted that Helen "should not be punished for doing what she thought was protecting herself and requiring the plaintiffs to prove their case".

[378] It is true that a plaintiff must prove his or her claim. But having weaved through and considered the evidence as a whole, I find that each of the foregoing *Whiten* factors is applicable in this case. The defendants' conduct was planned and deliberate. I am left with little doubt that the defendants' conduct was motivated by Helen, and to a lesser extent Nick, being unhappy about the money they lost in their investment in Lumenari. I find that Helen decided she would exact retribution by denying the trusts and usurping to herself and her family the EVC shares and warrants held by Unison and Nick as well as the Light & Effects Investment proceeds. She fabricated claims, agreements and evidence as a means of doing so. The defendants persisted in their contrived and contemptuous conduct, attempting to justify it throughout this litigation. They profited at the plaintiff's expense.

- [379] In my view, the defendants' conduct is precisely that which an award of punitive damages is designed to condemn. Such an award is appropriate in this case.
- [380] Following Whiten at paras. 114-126, any award of punitive damages must be proportionate to:
- a) the degree of vulnerability of the innocent party;
 - b) the harm or potential harm directed specifically at the plaintiff;
 - c) the need for deterrence;
 - d) other penalties, both civil and criminal, which have been or are likely to be inflicted on the wrongdoer for the same misconduct; and
 - e) the advantage wrongfully gained by the wrongdoer from the misconduct.
- [381] The monies and loss of opportunity that the defendants took from the plaintiffs were significant, in the millions of dollars. The harm was directed specifically at the plaintiffs. Other than the restitutionary award I have made in this case in an attempt to restore the plaintiffs to the position they would have been in had the defendants' misconduct not occurred, the defendants face no other penalties for their conduct. There is a need to send a message that, if you choose to behave in that fashion, there will be consequences.
- [382] I award punitive damages in the amount of \$100,000.
- m) Accounting and Tracing Order
- [383] I agree with counsel for the plaintiffs that an accounting of all of the monies derived by Helen and Nick from the sale of EVC shares, including by Unison, is warranted, whether from the Unison Trust or the Discounted EVC Units Trust. There will be an order to that effect.
- [384] The plaintiffs are also entitled to a tracing order together with such ancillary orders as required to carry it out.
- n) Mareva Injunction
- [385] The plaintiffs seek a post-judgment Mareva Injunction to restrain the defendants from dissipating assets. They say that the risk of such dissipation is not a pre-condition to such a remedy--rather they say that proof of substantial concealment and dishonesty is sufficient: *Netolitzky v. Barclay*, 2002 BCSC 1098 at para. 29. They submit that the risk of dissipation should be inferred from the defendants' pervasive obstruction, dishonesty and concealment throughout.
- [386] I am not persuaded that the remedy of a Mareva Injunction is warranted. There is no evidence to suggest that there is a risk that the defendants will remove their assets from the jurisdiction.

[387] However, I am persuaded that a freezing order is warranted to preserve the remaining EVC shares and funds in Helen's, Nick's and Unison's respective trading accounts. There will be an order accordingly.

o) Special Costs

[388] Special costs are not awarded simply because a witness was untruthful. Something more is required, such as evidence of a motive to mislead the court by, for example, fabricating evidence or defending an action on the basis of facts known to be untrue: *Pacific Wagondepot Ltd. v. Hudson West Development Ltd.*, 2017 BCSC 1993 at para. 8. As was recently stated by this court in *Palmer v. Pozniak*, 2022 BCSC 513 at paras. 12-13:

[12] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Justice Gropper provided a comprehensive overview of the legal principles for awarding special costs at para 73:

[73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[13] I will emphasize the first point, which is that the court must exercise restraint in awarding special costs. Justice Gropper held that it is the exceptional element of something more that brings the law of special costs into focus. In *Yeomans v. Buttar*, 2021 BCSC 1394 [Yeomans], at para 14, Justice Kent held similarly in a motor vehicle action that special costs awards require exceptional circumstances, and the court will generally exercise restraint in that regard.

[389] As set out in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, special costs may be awarded where a party:

- a) pursues a meritless claim and is reckless with regard to the truth;
- b) makes improper allegations of fraud, conspiracy, fraudulent misrepresentation or breach of fiduciary duty;
- c) has displayed reckless indifference by not recognizing early on that his claim is manifestly deficient;
- d) made the resolution of an issue far more difficult than it should have been;
- e) presents a case so weak that it is bound to fail, and continues to pursue his meritless claim after it is drawn to his attention that the claim is without merit;
- f) brings a claim for an improper motive;
- g) maintains unfounded allegations of fraud or dishonesty; and
- h) pursues claims frivolously or without foundation.

[390] The contemptuous conduct of Helen and Nick continued unabated after these actions were commenced. Rather than concede the obvious, they maintained that Myles acted throughout as a mere representative of EVC whose task it was to find EVC investors, knowing full well that he initiated the Unison investment and was instrumental in the EVC private placement by it. They point to Myles having introduced some friends of his to EVC and five of them having made investments prior to EVC becoming publicly traded. They also point to Myles having been invited by EVC to become a member of its "Advisory Board" in a document dated May 17, 2016, well before Myles testified he became aware of EVC.

[391] It is common for people who are aware, as Myles was, of what they consider to be a good investment opportunity to advise others of the opportunity. I accept Myles' evidence that, although he signed the EVC Advisory Board invitation dated May 17, 2016, the date of the document is incorrect. I find that on the whole of the evidence, it is more likely than not that the document was mis-dated and was signed on May 17, 2017, not 2016.

[392] The evidence is overwhelming that, from the outset of the EVC Private Placement, the parties understood that Rose would own 25 shares in Unison and that Helen would hold those shares in trust for her.

[393] Helen actively concealed that she had caused Unison to transfer 420,000 EVC shares to her on December 5, 2019 for no consideration, despite several court orders requiring that she fully disclose the trading and transfer records.

[394] During this litigation Helen swore an Affidavit on February 1, 2021 in which she deposed that:

- a) Myles and Rose were not "founders" of Unison and were not shareholders of Unison, beneficial or legal;
- b) There was no agreement that Rose would buy or receive shares in Unison or that she would be involved in the decision making of Unison;
- c) There was no discussion between Helen and either Myles or Rose about her holding shares of Unison in trust for Rose;
- d) Neither Myles nor Rose attended directors' meetings for Unison and did not participate in the decision making of Unison;
- e) Helen never attended meetings with Myles and/or Rose in the context of a shareholders meeting or directors meeting of Unison and that neither Myles nor Rose was a director or shareholder of Unison;
- f) Myles did not engage in any services to negotiate a lower private placement price or better deal terms between Unison and EVC with regard to shares, warrants, units or otherwise; and
- g) Helen did not draft the minutes of the November 19, 2016 meeting of Unison shareholders.

Each of those statements was a lie.

[395] When asked to explain Helen's conduct, defendants counsel simply stated that, by the time the litigation had commenced, Helen was "committed and doubled down--it was a bad mistake".

[396] Although I have found that Myles was untruthful regarding the intent in creating the Unison Trust and the Discounted EVC Units Trust, and while there was late production of documents by the plaintiffs (albeit with no prejudice to the defendants because they merely produced documents they had found in a WeChat group controlled by Helen that were incriminating of Helen) that conduct pales in comparison to the defendants' conduct throughout these proceedings.

[397] Applying the factors laid out in Mayer, I find that special costs are warranted in this case. The plaintiffs are entitled to special costs of these proceedings.

Conclusion

[398] Rose is entitled to a declaration that Helen holds 25 shares in Unison in trust for Rose.

[399] Rose is entitled to judgment against Helen for breach of the Unison Trust in the amount of C\$3,737,362, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 from November 20, 2020 to the date of this judgment.

[400] Rose is entitled to judgment against Nick for breach of the Discounted EVC Units Trust in the total amount of C\$2,285,110, together with interest pursuant to the Court Order Interest Act from May 1, 2019 to the date of this judgment.

- [401] The plaintiffs are entitled to damages against Nick and Helen, jointly and severally, for unjust enrichment in respect of the Light & Effects Investment in the Canadian dollar equivalent of RMB 298,900, converted on May 1, 2019, together with interest pursuant to the Court Order Interest Act from May 1, 2019 to the date of this judgment.
- [402] The plaintiffs are entitled to an order requiring Helen and Nick to account for the monies they have received from the sale by either of them or by Unison of EVC shares, together with a tracing order and such ancillary orders as required to carry out the accounting and tracing orders.
- [403] There will be an order freezing all trading accounts of Helen, Nick and Unison that contain EVC shares or the proceeds from the sale of EVC shares.
- [404] The plaintiffs are entitled to an award of punitive damages against each of the defendants, jointly and severally, in the amount of \$100,000.
- [405] The counterclaims are dismissed.
- [406] The plaintiffs are entitled to an award of special costs of these proceedings.
- [407] Counsel have liberty to schedule a further hearing before me if these Reasons for Judgment have failed to deal with any issue or require clarification.

"G.C. Weatherill J."

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Prepared on 29 October 2026 · Esheria