

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dacheng Realestate Development
Company Ltd. v. Hu,*
2023 BCSC 84

Date: 20230118
Docket: S2010614
Registry: Vancouver

Between:

Dacheng Realestate Development Company Ltd.

Plaintiff

And

**Wei Hu also known as Kevin Hu, Huisheng Lu also known as Hui Sheng Lu
and Lucy Lu, Zheyu Lu and Qinghui Holdings Ltd.**

Defendants

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:

P. Kressock

Counsel for the Defendants:

R. Wu
S. Xue

Place and Date of Hearing:

Vancouver, B.C.
September 27, 2022
October 21 and 28, 2022

Place and Date of Judgment:

Vancouver, B.C.
January 18, 2023

Introduction

[1] The plaintiff applies to strike certain amendments made in an amended response to civil claim filed on February 28, 2022. It says they withdraw admissions of a material fact made in the original response to civil claim filed December 3, 2020, namely that a residential property at 5739 Athlone Street, Vancouver, BC (the “Athlone Property”), registered to the defendants Wei Hu (“Mr. Hu”) and Huisheng Lu (“Ms. Lu”) (his wife), is held in trust for the plaintiff. The amendment was made on the eve of the hearing of the plaintiff’s application for an order that Mr. Hu and Ms. Lu transfer title of that property to it.

[2] The defendants deny there was an admission and say the amendments were proper. Alternatively, if the court determines there was an admission, they request leave to withdraw it. They have not formally applied for leave.

Background

Notice of Civil Claim

[3] The plaintiff was incorporated in 2009 by Zhaomin Chen (“Mr. Chen”), his then-wife Furong Liu (“Ms. Liu”) and Mr. Hu. The plaintiff says it was created for the purpose of making real estate investments using about \$10 million in capital, of which about \$9.75 million was contributed by Mr. Chen and \$250,000 by Mr. Hu.

[4] It alleges that Mr. Chen, Ms. Liu and Mr. Hu made an oral agreement (the “Investment Agreement”) that the plaintiff would use this capital to purchase real estate in the Vancouver area and hold title to the properties in its own name. It would maintain bank accounts for its activities. Mr. Hu would manage operations, including using the investment capital, managing the real estate portfolio and paying authorized expenses.

[5] The plaintiff says Mr. Hu managed its operations between 2009 and 2020. During this period, Mr. Chen was frequently in China and unavailable. Mr. Hu caused the plaintiff to use the capital, together with proceeds, gains and income

from investments (collectively, the “Dacheng Funds”) to purchase and sell numerous properties.

[6] The plaintiff alleges that, unbeknownst to Mr. Chen, Mr. Hu caused several properties to be registered in his and/or Ms. Lu’s name. He is alleged to have intermingled or diverted plaintiff opportunities to the defendant Quinghui Holdings Ltd. (“Qinghui”), a company he and Ms. Lu established. He is alleged to have charged personal and other unauthorized expenses to the plaintiff, to have made unauthorized distributions of Dacheng Funds to the defendants and to have misused Dacheng Funds in variety of ways.

[7] On October 21, 2020, the plaintiff filed a notice of civil claim (“NCC”). Throughout that document, the plaintiff refers to itself using the defined term “Dacheng”.

Response to Civil Claim

[8] On December 3, 2020, the defendants filed a response to civil claim (“Original RCC”). At the time, Mr. Drouillard was lead counsel. The plaintiff suggests there is a significant admission for purposes of this application at part 1, division 1, para. 1, where the defendants admit the facts alleged in part 1, para. 11 of the NCC, which I reproduce here:

11. Further to the foregoing, including the Investment Agreement, [Mr. Chen] and [Mr. Hu] contributed investment capital to Dacheng to fund its real estate investments. Between approximately June 2009 and June 2011, [Mr. Chen] contributed investment capital of approximately \$9.75 million and [Mr. Hu] contributed investment capital of approximately \$250,000. This investment capital, together with the proceeds, gains and income from real estate investments made with the same capital, will collectively be referred to as the “Dacheng Funds”.

[9] Defendants’ counsel responded that this was a typographical error and points to para. 2 of the Original RCC, where the facts alleged in paras. 7-15 (i.e. including para. 11) are denied (among others). This error was carried over to the Amended RCC, referenced below.

[10] Of seven current properties in issue in this action, the defendants denied that the plaintiff has a beneficial interest in six, but admitted that “Dacheng” purchased and was beneficial owner of the Athlone Property and that Mr. Hu and Ms. Lu hold it in trust. The key “admissions” for purposes of this application are in part 1, division 2, paras. 22 and 23 of the Original RCC, reproduced here:

22. In specific response to paragraph 23 of Part 1 of the notice of civil claim:

...

(b) In or about July 2020, [Mr. Chen] contacted [Mr. Hu] and informed him that he needed money on an urgent basis and therefore requested a withdrawal of funds from Qinghui. In exchange, [Mr. Chen] agreed that the withdrawal of the funds from Qinghui would correspondingly [sic] the interest held by Dacheng in Qinghui. The following transactions were completed in accordance with [Mr. Chen]’s instructions:

(i) on or about July 16, 2020, 2635 West 43rd Avenue was sold by Qinghui to a third party, Zheyu Lu. \$305,000 of the sale proceeds was paid to Dacheng and \$45,000 was applied to the mortgage registered against **5729 Athlone Street, Vancouver, British Columbia (which property is registered in the names of [Mr. Hu] and [Ms. Lu] and held in trust for Dacheng); ...**

...

23. In specific response to paragraphs 26-27 of Part 1 of the notice of civil claim, **the defendants deny that Dacheng holds a legal or beneficial interest in any of the properties listed at paragraph 26 (with the exception of 5729 Athlone Street)**. The defendants specifically respond as follows:

...

(c) **5729 Athlone Street, Vancouver, British Columbia (the “Athlone Property”)** was purchased by Dacheng. The Athlone Property is used as a primary residence and therefore was registered to [Mr. Hu] and [Ms. Lu] which [Mr. Chen] approved of.

[bolding added]

[11] The defendants alleged there was a broader arrangement. Specifically, they said Mr. Chen and Mr. Hu entered into a “Childcare Agreement” in June or July 2009 whereby Mr. Hu agreed to move with his family into a residential property purchased by Mr. Chen at 1308 West 37th Avenue, Vancouver (the “West 37th Avenue Property”) and live with and care for Mr. Chen’s two eldest children. The terms of that agreement included:

- a) Mr. Hu would receive \$5,000 per month;
- b) He had discretion to hire assistance, such as tutors and drivers and incur expenses for extracurricular activities and tuition for Mr. Chen's children, which Mr. Chen would pay;
- c) Household expenses of Mr. Hu, his family and Mr. Chen's children would be paid by Mr. Chen; and
- d) They would incorporate a company [the plaintiff] to incur expenses and make payments under this agreement.

[12] The defendants say when Mr. Chen purchased the West 37th Avenue Property he asked Mr. Hu to register it in his name because it was to be used as a primary residence, to which Mr. Hu agreed. They say Mr. Chen and his wife did not want to register it in their own names due to unspecified business interests in China, perceived immigration issues and personal family matters. In argument, it was suggested Mr. Chen has judgment creditors in China that he was concerned about.

[13] The defendants say this arrangement continued from July 2009 until October 2012. In August 2010, a daughter of one of Mr. Chen's friends was added to the arrangement. On a later date, Mr. Hu and Ms. Lu say they helped care for a nephew of Ms. Liu, albeit he did not reside with them.

[14] The defendants pled that in addition to being used as a vehicle for real estate investments, "Dacheng" was incorporated to receive funds, incur expenses and make payments pursuant to the Childcare Agreement and for Mr. Chen's personal matters. They deny that Dacheng was supposed to hold title to properties in its own name in all cases. Mr. Hu says he and Mr. Chen agreed that certain real estate investments could be registered in the personal names of Mr. Hu and/or Ms. Lu because it was easier to obtain mortgages and purchase properties that way.

[15] At part 1, division 2, para. 18, the defendants alleged that on or about January 10, 2012, Mr. Chen and Mr. Hu entered into a written agreement which provided that:

- a) Mr. Chen was entitled to a 97.5% interest in “Dacheng”;
- b) Mr. Hu was entitled to a 2.5% interest in “Dacheng” and a 1% interest in the total assets owned by “Dacheng”; and
- c) Mr. Hu would be entitled to receive dividends from “Dacheng”.

[16] At para. 20, the defendants alleged that in about 2013, “Dacheng” had insufficient cash to purchase additional real estate, so an investor named Kim Yang contributed funds to do so. Mr. Hu and Ms. Lu incorporated Qinghui as a vehicle for those investments. Mr. Hu says he informed Mr. Chen about Qinghui, that “Dacheng” would contribute 1/3 of the purchase price of properties and Mr. Yang would contribute 2/3. Their respective interests would be proportionate to the amount each contributed. He says Mr. Chen approved this.

[17] At para. 21 and 22, the defendants alleged “Dacheng” contributed about \$3,090,000 and Mr. Yang \$7,000,000 towards Qinghui acquisitions. Mr. Chen later withdrew funds from Qinghui and agreed this would reduce Dacheng’s interest in it. The withdrawals were roughly equal to Dacheng’s contributions. Mr. Chen is alleged to have agreed Dacheng no longer had any interest in Qinghui thereafter.

[18] The defendants go on to allege Mr. Chen made various significant withdrawals from Dacheng.

Application For Judgment Based On Admission

[19] Mr. Hu and Ms. Lu have resided in the Athlone Property since about 2014. They are the registered owners. As noted, the defendants initially admitted the property was held in trust for “Dacheng”.

[20] It is the plaintiff’s position that Mr. Hu and Ms. Lu were living in the property on a rent-free basis pursuant to a license to occupy, with its permission. It says it

revoked that permission in mid-2020 and wishes to sell the property so it can pay out the mortgage and settle other company obligations.

[21] On June 30, 2021, plaintiff's counsel wrote to defendants' counsel demanding Mr. Hu and Ms. Lu transfer title of the Athlone Property to it and vacate the property by August 31, 2021.

[22] On July 9, 2021, defendants' new lead counsel, Ms. Wu, wrote to plaintiff's counsel advising she had assumed conduct from Mr. Drouillard, who had departed the firm on June 30, 2021. She filed and delivered a notice of appointment or change of lawyer. She said she was in the process of getting up to speed and would respond substantively to the June 30, 2021 demand in due course.

[23] On July 22, 2021, the plaintiff repeated its demand of June 30, 2021. The defendants did not initially respond.

[24] On August 19, 2021, the demand was repeated a third time. Plaintiff's counsel warned that if a response was not received by August 23, 2021, they expected to receive instructions to apply for summary judgment in relation to the Athlone Property.

[25] On August 23, 2021, defendants' counsel responded with a denial that the Athlone Property was held in a bare trust for the plaintiff and indicated the defendants would be filing an amended response to civil claim. Counsel indicated that Mr. Hu and Ms. Lu would consent to the Athlone Property being sold, on the condition that net sale proceeds be held in trust by defendants' counsel pending agreement of the parties or court order.

[26] No amended response to civil claim was forthcoming. In submissions, counsel said this was due to the demands of her other cases at the time.

[27] On February 15, 2022, the plaintiff filed an application for summary judgment, seeking a declaration it was beneficial owner of the Athlone Property and an order that title be transferred to it. The application was based on the admission that

“Dacheng” was beneficial owner and relied on Rule 7-7(6), which provides that the court can grant judgment on admissions in a pleading. The hearing date indicated was March 4, 2022.

Amended Response to Civil Claim / Withdrawal of Admission

[28] On February 28, 2022, the defendants filed an application response and an amended response to civil claim (the “Amended RCC”) which, among other things, modified the admission of beneficial ownership. It did so by adding an allegation that there was a broader joint venture, defined as the “Dacheng Venture”, and that the Athlone Property was held in trust for it, not the plaintiff company, which was defined as “Dacheng Ltd.” in the amended pleading.

[29] “Dacheng Venture” and “Dacheng Ltd”. are defined as follows:

6. Around that time [May 2009], [Mr. Chen] and [Mr. Hu] also discussed buying, developing and selling real estate together, separate and apart from the primary residence(s). They discussed forming a joint venture, which would include various components, namely a family matters component (including the child care arrangements), a primary residence component, a real estate development component, and other business interests (including but not limited to, real estate purchased for rental purposes) as described in greater detail below under Division 3 (the “Dacheng Venture”).

7. Dacheng Real Estate Development Company Ltd. (“Dacheng Ltd.”) was incorporated as part of the Dacheng Venture, and also as the corporate vehicle with respect to real estate development projects (i.e. real estate other than the primary residences and rental properties purchased pursuant to other business interests).

[30] “Dacheng Venture Agreement” is defined as follows [amendments are underlined]:

~~17.~~ 20. In specific response to paragraph 17 of Part 1 of the notice of civil claim, the defendants state that, by agreement dated on or about January 10, 2012, [Mr. Chen] and [Mr. Hu] entered into a written agreement, drafted by [Mr. Chen], in which it was agreed:

- (a) [Mr. Chen] was entitled to a 97.5% interest in Dacheng Venture;
- (b) [Mr. Hu] was entitled to a 2.5% interest in Dacheng Venture, and a 1% interest in the total assets owned by Dacheng Venture, and excess profits as set out in the written agreement; ~~and~~
- (c) [Mr. Hu] would be entitled to receive dividends from Dacheng Venture as set out in the written agreement; and

(d) the registered share ratio of Dacheng Ltd. was subject to the agreement;

(the “Dacheng Venture Agreement”).

[31] At part 1, division 3, para. 3, it is alleged that:

3. [Mr. Chen] and [Mr. Hu] formed the Dacheng Venture, which had various components:

(a) Family matters’ component, which included the Childcare Agreement, and various family and household matters;

(b) Primary residence component, under which the properties intended to be the primary residences of the families of [Mr. Hu] and [Mr. Chen] would be held in the registered names of [Mr. Hu] and/or [Ms. Lu], but the properties would ultimately belong beneficially to the participants of the Dacheng Venture;

(c) Real estate development component, with respect to properties (other than the primary residences) which would be bought, rebuilt and/or rented while considering a rebuild, and sold for profit. [Mr. Hu] and [Mr. Chen] incorporated Dacheng Ltd. to be the corporate vehicle with respect to real estate projects (other than the primary residences); and

(d) Other business interests, including but not limited to, real estate that was purchased for rental purposes.

[32] Amendments made to the paragraphs containing the admissions relating to the Athlone Property include [amendments are underlined]:

22 24 . In specific response to paragraph 23 of Part 1 of the notice of civil claim:

...

(b) In or about July 2020, [Mr. Chen] contacted [Mr. Hu] and informed him that he needed money on an urgent basis and therefore requested a withdrawal of funds from Qinghui. In exchange, [Mr. Chen] agreed that the withdrawal of the funds from Qinghui would correspondingly reduce the interest held by Dacheng Venture in Qinghui. The following transactions were completed in accordance with [Mr. Chen]’s instructions:

(i) on or about July 16, 2020, 2635 West 43rd Avenue was sold by Qinghui to a third party, Zheyu Lu. \$305,000 of the sale proceeds was paid to Dacheng and \$45,000 was applied to the mortgage registered against **5729 Athlone Street, Vancouver, British Columbia (which property is registered in the names of [Mr. Hu] and [Ms. Lu] and held in trust for Dacheng Venture)**; ...

...

~~23~~ 25. In specific response to paragraphs 26-27 of Part 1 of the notice of civil claim, **the defendants deny that Dacheng Ltd. or Dacheng Venture holds a legal or beneficial interest in any of the properties listed at paragraph 26 (with the exception of 5729 Athlone Street).** The defendants specifically respond as follows:

...

(c) **5729 Athlone Street, Vancouver, British Columbia (the “Athlone Property”) was purchased by in furtherance of the Dacheng Venture.** The Athlone Property is used as a primary residence and therefore was registered to [Mr. Hu] and [Ms. Lu] which [Mr. Chen] approved of.

[bolding is added]

[33] The defendants did not apply for leave to withdraw the admissions or seek the plaintiff’s consent to them doing so. If the foregoing amendments are sustained, they effectively derail the application for summary judgment relating to the Athlone Property.

[34] The amendments also provide that, due to various share transfers, Mr. Hu is now is registered owner of 90% of the shares in “Dacheng Ltd.” and these are held subject to the Dacheng Venture Agreement. The plaintiff’s position is that the majority of these shares now belong beneficially to Mr. Chen’s son, Guohong Chen (“Chen Jr”). Mr. Hu alleges that the company’s central securities register was modified improperly.

[35] The share register tendered in evidence shows an initial distribution of 10,000 common shares. Of these, 5,000 were issued to Mr. Chen, 4,000 to Ms. Liu and 1,000 to Mr. Hu, of which 750 are stated as being held in trust for Chen Jr and the remaining 250 (2.5% of issued shares) to Mr. Hu.

[36] On July 19, 2011, Mr. Chen transferred 1,000 of his shares to Mr. Hu in trust for Chen Jr and Ms. Liu transferred all of her 4,000 shares to Mr. Hu in trust for Chen Jr. On May 1, 2015, Mr. Chen transferred 3,000 shares to Mr. Hu in trust for Chen Jr and 1,000 shares to Chen Jr directly. Mr. Chen and Ms. Liu no longer hold any common shares in their names. Mr. Hu is shown as holding a total of 8,750 shares in trust for Chen Jr and 250 shares for his own benefit.

[37] Mr. Hu alleges that on October 20, 2020, Chen Jr purported to call an annual general meeting of the plaintiff, over his objection. Mr. Hu did not attend, but later learned he had been removed as a director and that Chen Jr. was the sole director thereafter. Mr. Hu was also removed as a signing officer on the plaintiff's bank accounts.

[38] The amendments also provide that, in addition to his monetary contribution to Dacheng Venture, Mr. Hu contributed in other ways, including by using his credit worthiness to secure mortgage financing on various properties including primary residences, his work and efforts with respect to the childcare arrangements and by managing the Dacheng Venture and Dacheng Ltd.

[39] It is notable that, despite raising detailed allegations regarding there being a Dacheng Venture which includes Dacheng Ltd., the defendants are only raising this as a defence to the plaintiff's claim. They say the plaintiff is not entitled to any proprietary remedies in respect of the properties in issue, including the Athlone Property. Mr. Hu has not filed a counterclaim and he is not seeking any remedies against the plaintiff, Mr. Chen or Chen Jr.

Legal Basis

[40] Rule 6-1 addresses amendment of pleadings:

When pleadings may be amended

(1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,

(a) once without leave of the court, at any time before service of the notice of trial, or

(b) after the notice of trial is served, only with

(i) leave of the court, or

(ii) written consent of the parties.

[41] Rule 7-7(5) addresses withdrawal of an admissions made in a pleading:

Withdrawal of admission

(5) A party is not entitled to withdraw

- (a) an admission made in response to a notice to admit,
- (b) a deemed admission under subrule (2), or
- (c) an admission made in a pleading, petition or response to petition except by consent or with leave of the court.

[underlining added]

[42] Rule 7-7(5)(c) contemplates an admission deliberately made by the party pleading it as a concession to his opponent, and it must be clear from the words used that a concession has been made: see *British Columbia Ferry Corp. v. T&N, p/lc*, [1993] B.C.J. No. 1827, 31 C.P.C. (3d) 379 (S.C.) at paras. 13 and 14:

13 The type of admission contemplated in the rule is an admission which would benefit the defendant in its defence of the case remaining after the amendment. Further, the admission contemplated by the rule must be a deliberate concession made by the plaintiff for the benefit of the defendant.

14 In that pleadings should contain statements of fact, in one sense every pleading is an admission where it contains a statement of fact. But that is not the type of admission contemplated by Rule 31(5). The rule contemplates an admission deliberately made by the party pleading it as a concession to its opponent. No particular form of words need be given but the concession must be clear.

[43] The test for withdrawal of an admission was summarized by Master Horn in *Hamilton v. Ahmed*, [1999] B.C.J. No. 311 (S.C.) [*“Hamilton”*], as whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact. When applying that test, all of the circumstances should be taken into account. He set out six such circumstances, which were subsequently re-framed by the court of appeal in *Sidhu v. Hothi*, 2014 BCCA 510 [*Sidhu*] at para. 25 as follows:

- a) whether the admission was made inadvertently, hastily, or without knowledge of the facts;
- b) whether the "fact" admitted was or was not within the knowledge of the party making the admission;
- c) where the admission is one of fact, whether it is or may be untrue;
- d) whether and to what extent the withdrawal of the admission would prejudice a party; and
- e) whether there has been delay in the application to withdraw the admission and any reason offered for such delay.

[44] The discretion to grant leave to withdraw an admission is broad and unfettered, subject to the discretion being exercised judicially. The court is required to balance the prejudice which would flow from either refusing or granting leave. See *Nagra v. Cruz*, 2016 BCSC 2469, aff'd 2017 BCSC 347, at para. 5.

[45] Where a deemed admission has been caused by a failure on the part of counsel and party cannot be faulted for the oversight, an order permitting withdrawal normally follows, while allowing the other party costs and accommodations. See *Piso v. Thompson*, 2010 BCSC 1746 at paras. 23 and 25.

Plaintiff's Position

[46] The plaintiff argues that the requirement to obtain consent or leave to withdraw an admission is not merely a technical requirement, it is a substantive requirement and a condition precedent to a party's ability to do so. They say the purported withdrawal of admissions in this instance is a nullity and should be struck out.

[47] It says that the admission that Mr. Hu and Ms. Lu hold the Athlone Property in trust for the plaintiff was an informed and deliberate concession. It was made about two years after the dispute first arose. Mr. Hu was managing the plaintiff's affairs at the relevant times and resided in the Athlone Property, so the facts were within his knowledge. They say it is inconceivable that he made a factual error or made the concession unintentionally.

[48] The defendants having failed to seek leave prior to purporting to withdraw the admission and having failed to apply since the plaintiff raised objections to the amended response to civil claim, the relevant amendments should be struck out. Even if the defendants had applied for leave, they say it would not have been granted. The amendments withdrawing the admissions do not raise a triable issue. The introduction of the Dacheng Venture concept is vague and confusing as to what type of joint venture it alleged to be (corporate, partnership or contractual joint venture) and who the parties to it are. They do not specify who purchased the Athlone Property; they only allege the beneficial owner is the joint venture. They

argue that a corporate joint venture is manifest in the incorporation of an entity for that purpose. A partnership or contractual joint interest do not result in a distinct legal entity that is able to hold real property.

Defendants' Position

[49] Mr. Hu tendered affidavit evidence alleging Mr. Chen used the Mandarin term “big plate” when originally describing his idea for a venture that would benefit both families. That term roughly translates to “big plan” or “big venture”. The “big plate” that Mr. Hu ultimately agreed to included all of the components referenced in the Amended RCC as comprising the Dacheng Venture.

[50] The defendants deny the Athlone Property is an asset of the plaintiff. They deny the funds used to pay the \$1,850,000 purchase price came from the plaintiff, but rather from proceeds of sale of another former “primary residence”, the “Marine Drive Property”, plus proceeds of a HSBC mortgage obtained by Mr. Hu and Ms. Lu and registered on title to the Athlone Property.

[51] Mr. Hu alleges that in June 2020, Mr. Chen told him he wished to liquidate the Dacheng Venture. Mr. Hu’s response was that he wanted to sell the Athlone Property. He subsequently made specific proposals regarding its sale in mid 2021.

[52] Mr. Hu says due to Mr. Chen’s denial of the existence of the Dacheng Venture and the assets it owns, he intends to start a separate action seeking a declaration regarding the existence of the Dacheng Venture and assets owned by it, and seek a court ordered liquidation, including sale of the Althone Property.

[53] The defendants allege that in 2020, Mr. Chen told Mr. Hu that some of his family members had Chinese court judgments against them and if they returned to China, they would be detained and forced to pay them. Chen Jr did not have this problem. The defendants speculate Mr. Chen is denying the existence of the Dacheng Venture, trying to have the Athlone Property transferred to the plaintiff and is changing the plaintiff’s central securities register because he wants to frustrate his creditors.

[54] The defendants argue that “Dacheng” was not a defined term in the Original RCC. The Amended RCC demonstrates Mr. Hu and Ms. Lu do not concede that the plaintiff is beneficial owner of the Athlone Property. The only admitted facts are paras. 2, 3, 5 and 11 of part 1 of the notice civil claim, none of which relate to beneficial ownership of the Athlone Property. The amendments set out the complex background of the venture, which goes well beyond the plaintiff. They also say that corporate records and documents of the plaintiff reflect that its assets included real estate, but did not reference the Athlone Property. I pause to note this point is in dispute, as there are conflicting translations of some relevant documents.

[55] The defendants argue that none of the amendments made constitute a withdrawal of an admission. Alternatively, if the court determines they do constitute withdrawal of an admission, they defendants request leave to withdraw the admission.

[56] The defendants say there is a triable issue as to the beneficial ownership of the Athlone Property and it is in the interests of justice that this be determined on the merits and not disposed of by an admission of fact.

Analysis

[57] There are extensive references in the pleadings to Mr. Chen and agreements he is alleged to have made with Mr. Hu. Mr. Chen is not a party in this action.

[58] Under the plaintiff’s version of events, it is the corporate vehicle through which Mr. Chen and Mr. Hu carried out the Investment Agreement and through which Dacheng Funds flowed. In this action, the plaintiff seeks to recover properties that it says were acquired with Dacheng Funds and remedies for alleged breach of fiduciary duty, mismanagement and misappropriation of funds and corporate opportunities by Mr. Hu and the other defendants.

[59] Certain properties which were used as primary residences were registered in Mr. Hu and Ms. Lu’s names but funds to acquire and maintain them came from or were reimbursed by the plaintiff.

[60] The defendants' version in the Original RCC also references the Investment Agreement, but expanded on this to refer to the Childcare Agreement and Mr. Hu and Ms. Lu holding certain properties used as primary residences in their own name. They do not appear to take serious issue with the source of funds to purchase those properties and pay various expenses. They did not initially refer to the arrangement as a joint venture. The plaintiff was the corporate vehicle through which Dacheng Funds flowed for property acquisitions payment of expenses. The defendants allege Mr. Chen was aware of and approved what was done and that he had withdrawn various substantial sums from "Dacheng".

[61] Defendants' counsel argued that "Dacheng" was not a defined term in the Original RCC and that it did not refer to the plaintiff, but rather a broader venture between Mr. Chen and Mr. Hu. With respect, I disagree.

[62] In the NCC, the plaintiff defined itself as "Dacheng". The Original RCC responded to it. There are several points in the latter document which clearly indicate that "Dacheng" referred to a specific body corporate. These include:

- a) Part 1, division 2, para. 12 – at (a) the defendants deny Dacheng was incorporated only as a vehicle for real estate investments; at (b) they say Dacheng was also incorporated to receive funds, incur expenses, and make payments pursuant to the Childcare Agreement, and for Mr. Chen's personal matters not related to business or investment; and (c) say that Mr. Chen intermingled his personal finances with the finances of Dacheng.
- b) Part 1, division 2, para. 13 – at (a) Mr. Hu states that in addition to being used as a vehicle for real estate investment, Dacheng was incorporated to receive funds, incur expenses and make payments pursuant to the Childcare Agreement, and for Mr. Chen's personal matters not related to business or investment; and (b) Mr. Hu denies Dacheng was supposed to hold title to properties in its own name in all cases.

- c) Part 1, division 3, para. 1 – states that since the incorporation of Dacheng, Mr. Chen withdrew the various amounts from it, [dates and amounts are not detailed here].
- d) Part 3, Legal Basis – para. 3 states that Dacheng is not entitled to proprietary remedies in respect of the Dacheng Properties because Dacheng has no legal or beneficial interest in them, for the reasons set out.

[63] I am satisfied that the portions of part 1, division 2, paras. 22 and 23 of the Original RCC reproduced at para. 10 above, do constitute a formal admission that:

- a) The plaintiff purchased the Athlone Property;
- b) The plaintiff holds a beneficial interest in the Athlone Property; and
- c) The Athlone Property, registered in the name of Mr. Hu and Ms. Lu, is held in trust for the plaintiff.

[64] As these are admissions of material facts, the defendants cannot withdraw them except with the plaintiff's consent or with leave of the court, as per rule 7-7(5).

[65] The defendants did not seek or receive consent and they did not apply for leave of the court before filing the Amended RCC. They also have not filed an application after the fact to correct this oversight. They did include a request for leave as an alternative argument in their application response to this application. The defendants should have filed a cross-application seeking leave. For purposes of this analysis, I will proceed with an analysis as though they had.

[66] I now consider the factors identified in *Hamilton* and *Sidhu*.

Was the admission made inadvertently, hastily, or without knowledge of the facts?

[67] The defendants have not tendered evidence indicating the admissions were made inadvertently, hastily or without knowledge of the facts. Mr. Hu was a party to the alleged arrangement with Mr. Chen and he was managing the plaintiff's

operations between 2009 and 2020. He was involved in the acquisition of the Athlone Property. The defendants, Mr. Hu in particular, clearly had knowledge of the facts relating to the admissions.

[68] No evidence was tendered by the lawyer responsible for filing the Original RCC which suggests it was prepared in haste or contained inadvertent errors. It referenced all the same “components” the defendants now assert comprise the “Dacheng Venture”. The only real difference in the Amended RCC is that the arrangement between Mr. Chen and Mr. Hu has been re-characterized in a way that moves the Athlone Property away from the plaintiff and into some other part of the “Dacheng Venture”. Given the timing of this amendment, it appears to have been motivated primarily by a desire to fend off the summary judgment application and tie up the Athlone Property, in circumstances where the plaintiff would not agree to hold net sale proceeds in trust. It was not based on new information or evidence becoming available after the Original RCC was filed.

Was the "fact" admitted within the knowledge of the party making the admission?

[69] The facts admitted were within the knowledge of Mr. Hu and Ms. Lu, who are the persons on whose behalf the admissions were made.

Where the admission is one of fact, whether it is or may be untrue?

[70] The admission is predominantly one of fact. The new characterization of the arrangement as the “Dacheng Venture” and evidence the defendants have tendered does not persuade me that the admission is or may be untrue.

[71] In the Original RCC at para. 17 it says Mr. Chen was entitled to 97.5% of “Dacheng” and Mr. Hu to 2.5%, plus a 1% interest in the total assets owned by “Dacheng”, plus dividends from Dacheng.

[72] In the Amended RCC at para. 20 it says Mr. Chen was entitled to 97.5% of “Dacheng Venture” and Mr. Hu to 2.5%, plus a 1% interest in the total assets owned by “Dacheng Venture”, plus dividends from “Dacheng Venture” as set out in a written

agreement. It also asserts that the registered ratio of “Dacheng Ltd.” was subject to the agreement. I presume this is a reference to shareholding in the plaintiff.

[73] Whether the Athlone Property belongs to the plaintiff or is held by Mr. Hu and Ms. Lu in trust for “Dacheng Venture”, Mr. Hu’s interest in it remains the same. The amendment simply prevents a transfer of the Athlone Property to the plaintiff, who has made clear it intends to sell it and deal with the net sale proceeds.

[74] The defendants have also proposed that the Athlone Property be sold. The difference is that they want net sale proceeds frozen pending resolution of the accounting issues Mr. Hu is raising with Mr. Chen and Chen Jr, neither of whom are parties to the action.

[75] In Mr. Hu’s Affidavit #1, he testifies at para. 13 that the funds for the purchase of the Athlone Property did not come from funds belonging from the plaintiff. Rather, about \$800,000 to \$900,000 came from net proceeds of sale of the Marine Drive Property and the remainder from a mortgage he and his wife obtained from HSBC and which is registered on title to the Athlone Property.

[76] At para. 16, Mr. Hu says payments for the mortgage and property expenses were generally made from one or more joint accounts that he and his wife hold in trust for “Dacheng Venture”, not the plaintiff. As of October 2020, when this action was started, there was \$45,000 in these accounts. After the funds ran out, he and his wife contributed personal funds, but he does specify dates or amounts.

[77] Mr. Hu goes on to say that, to the extent any payments came out of an account in the plaintiff’s name, they were made on behalf of “Dacheng Venture” or were paid from funds which belong to “Dacheng Venture”. Mr. Hu’s denial that funds to purchase and service the Athlone Property came from the plaintiff thus appears to be based principally on the belated re-characterization of the Hu-Chen arrangement.

[78] The Marine Drive Property, 1850 SW Marine Drive, Vancouver, is pled as having been registered in Mr. Hu and Ms. Lu’s names and used as a primary residence for Mr. Hu’s family and Mr. Chen’s family. Mr. Hu pleads that Mr. Chen

and Ms. Liu refused to register properties in their personal names. There is no suggestion that funds for purchasing this property came from somewhere other than Dacheng Funds. Proceeds from its sale would also qualify as Dacheng Funds.

[79] Further, at para. 24 of the amended response to civil claim, it is alleged sale proceeds from the sale of a Qinghui property were paid out, \$305,000 to the plaintiff and \$45,000 paid on the HSBC mortgage for the Athlone Property. These also appear to qualify as Dacheng Funds.

[80] The evidence and allegations that the defendants put forward to justify the impugned amendments largely turn on the introduction of the “Dacheng Venture” concept to override most of the “Dacheng” references in the Original RCC. This is simply re-characterization rather than a new claim or new facts.

Whether and to what extent the withdrawal of the admission would prejudice a party?

[81] It appears that withdrawal of the admissions would cause some prejudice the plaintiff. The plaintiff has spent time and legal resources pursuing transfer of the property, including preparation of the summary judgment application.

[82] As mentioned, the amendments appear to be intended to prevent the plaintiff from dealing with Athlone Property. Mr. Hu and Ms. Lu are agreeable to selling it, but want net proceeds frozen. In argument, it was suggested net sale proceeds could exceed \$4,000,000. Even on his own account, Mr. Hu’s share of the Dacheng Venture is around 3.5%. Tying up \$4,000,000 indefinitely would be disproportionate and prejudicial.

[83] It is also relevant that the issues Mr. Hu has raised will not actually be resolved in this action as it is currently pled. Despite being aware of his issues since at least mid 2020, Mr. Hu has not taken steps to pursue them, such as filing a counterclaim or starting a separate action against Mr. Chen or Chen Jr. Until he gets on with doing so, his issues will not be resolved.

Whether there has been delay in applying to withdraw the admission and any reason offered for such delay

[84] As noted, the defendants have not formally applied to withdraw the admissions.

[85] The admissions were made when the Original RCC was filed on December 3, 2020. The first “with prejudice” demand for transfer of the Athlone Property based on the admissions was made on or about June 30, 2021. On August 23, 2021, defendants’ counsel denied the Athlone Property was held in a bare trust for the plaintiff and said they would file an amended pleading to clarify matters. On January 20, 2022, plaintiff’s counsel advised they would be filing a summary judgment application and canvassed dates for a hearing. On January 26, 2022, counsel agreed to March 4, 2022 as the hearing date. On February 15, 2022, plaintiff’s counsel served the summary judgment application. The defendants did not file and deliver the Amended RCC until late on February 28, 2022, without seeking leave to withdraw admissions. Defendants’ counsel was clearly aware leave may be required. No explanation has been offered for the failure to apply.

[86] There has been substantial unexplained delay since the admissions were squarely brought to the defendants’ attention.

Conclusion

[87] I have concluded that the excerpts from part 1, division 2, paras. 22 and 23 of the Original RCC set out in para. 10 above are admissions. The defendants cannot withdraw them without either the plaintiff’s consent or leave of the court.

[88] Even treating the request in the defendants’ application response as a request for leave to withdraw the admissions, I have concluded that the impugned amendments are simply a re-characterization of the alleged arrangements between Mr. Chen and Mr. Lu as described in the Original RCC. The amendment was an attempt to avoid summary judgment and prevent a transfer of the Athlone Property to the plaintiff. The impugned amendments do not raise a triable issue as between

the plaintiff and any of the defendants which, in the interests of justice, ought to be determined on the merits rather than being disposed of by an admission of fact.

[89] The plaintiff's application is granted. The following amendments in the Amended RCC are struck:

a) Part 1, division 2, para. 24 (b)(i) (previously para. 22(b)(i)), as to:

... 5729 Athlone Street, Vancouver, British Columbia (which property is registered in the names of Hu and Lu and held in trust for Dacheng Venture;

b) Part 1, division 2, para. 25 and 25(c) (previously paras. 23 and 23(c)) as to:

In specific response to paragraphs 26-27 of Part 1 of the notice of civil claim, the defendants deny that Dacheng Ltd. or Dacheng Venture holds a legal or beneficial interest in any of the properties listed at paragraph 26 (with the exception of 5729 Athlone Street). ...

...

(c) 5729 Athlone Street, Vancouver, British Columbia (the "Athlone Property") was purchased by in furtherance of the Dacheng Venture. The Athlone Property is used as a primary residence and therefore was registered to Hu and Lu which Chen Sr. approved of.

[90] The plaintiff has been successful and is entitled to costs of this application from the defendants in any event of the cause.

"Master Bilawich"