CITATION: OTT Financial Inc. v. Liu, 2023 ONSC 1789
COURT FILE NO.: CV- 18-599218-00CL
DATE: 20230322

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: OTT Financial Inc. and OTT Financial Group Corporation, Plaintiffs

AND:

Edward Liu also known as Jing Sheng Liu, Glorichs Financial Inc., Investar Glorbal Financial Group Inc. and Liyuan Qi, Defendants

BEFORE: Penny J.

COUNSEL: *Gregory Govedaris* and *Wen Wu* for the Plaintiffs

William E. Pepall and *Lucy Sun* for Liyuan Qi and Investar Global Financial Group Inc.

Jay Naster for Edward Liu and Glorichs Financial Group Inc

HEARD: March 16, 2023

REVISED ENDORSEMENT

Overview

[1] There are in substance two motions before the court. Both motions relate to document production but raise other issues as well.

[2] In the first motion, the plaintiffs seek a further and better affidavit of documents from the defendants and production of a wide array of documents related to the alleged foreign exchange business of the defendants. The plaintiffs also seek leave to amend their claim to add addition corporations associated with the defendants and related other amendments. Most of the amendments are not opposed. Within the context of this first motion, there is a “cross motion” by Ms. Qi and Investar which proposes alternatives for how to deal with production by both sides of what are said to be relevant, but highly sensitive and confidential, documents. This “cross motion” also seeks a bifurcation order requiring a determination of whether Mr. Liu misappropriated the plaintiffs’ confidential information before any other issues raised in the action are addressed.

[3] The second motion is brought by Mr. Liu and Glorichs for an order which provides for the forensic examination of five of the plaintiffs’ documents which appear to have been electronic document but for which no electronic production has been made. The

authenticity of these documents is in issue. Mr. Liu also seeks production of e-documents relating to his alleged “access” to the plaintiffs’ network in April 2020.

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Background

[4] The plaintiffs sue Mr. Liu for breach of fiduciary duty and breach of confidentiality. They sue all the defendants for conversion and misappropriation, conspiracy, passing off and trademark infringement.

[5] The plaintiffs operate in the financial services industry, providing brokerage services exchanging foreign and Canadian currency with international financial institutions for private and institutional clients.

[6] In simple terms, the plaintiffs allege that they retained Mr. Liu (who was employed by a technology development firm, Aurora Technology Development) to develop a mobile device application for use by the plaintiffs and their customers to conduct foreign exchange transactions. In order to carry out his mandate, they say, Mr. Liu was given access to all of the plaintiffs’ confidential and proprietary systems and information including customer details, financial intermediaries, pricing, marketing and customer engagement and retention strategies, and business operations manuals, etc. The plaintiffs allege that Mr. Liu misappropriated the plaintiff’s confidential information to establish his own foreign exchange business and used the plaintiffs’ confidential information to operate in competition with the plaintiffs. The plaintiffs further allege that the remaining defendants conspired together with Mr. Liu to set up and conduct this foreign exchange business, knowing it was all based on Mr. Liu’s misappropriation of the plaintiffs’ confidential information.

[7] All of these allegations are denied by the defendants.

[8] Although this action was commenced in 2018, the parties are still amending pleadings and fighting about the scope and manner of document production. No oral discovery has taken place, although there have been cross examinations in connection with these motions.

Issues

[9] There are five basic issues to be resolved:

(1) Should the defendants (or anyone else) be ordered to provide a further and better affidavit of documents?

(2) What, if any, constraints or restrictions should be put in place to protect what all parties regard as confidential information, assuming it is ordered to be produced?

(3) Should the issue of whether Mr. Liu misappropriated the plaintiffs’ confidential information be bifurcated from the other issues in the action and dealt with first as a standalone issue?

(4) Should the plaintiffs be ordered to make further electronic production of five documents whose authenticity is in issue and any further electronic records reflecting Mr. Liu's alleged access to the plaintiffs' network? If yes, what form should the order take to ensure a proper electronic forensic search is undertaken? and,

(5) Should the motion to add parties and amend the claim be granted?

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Analysis

Further Affidavit and Production

[10] The plaintiffs' list of documents which they say the defendants must produce is attached to the notice of motion as Appendix A.

[11] The parties spent most of their time in oral submissions arguing the merits of the claim and attacking the integrity and credibility of the opposing parties. Needless to say, the merits of the claims and defences play essentially no role in determining threshold questions about the relevance of documents for purposes of what must be produced. This issue must be determined on the basis of the pleadings and, to some extent, on discretionary considerations of proportionality.

[12] At the heart of the main issue in dispute in the claim and defences is the allegation that the Mr. Liu misappropriated, and all the defendants misused, the plaintiffs' confidential information to set up and operate their own foreign exchange business. A significant part of the proof (and rebuttal) of this allegation will turn on a comparison of the customer details, financial intermediaries, pricing, marketing and customer engagement and retention strategies, and business operations manuals, etc. of both businesses in the period 2016 to 2018. This was generally acknowledged by both sides in oral argument.

[13] Having reviewed the list at Appendix A, I find that the documents listed there are relevant to the issues in dispute in this action and, to the extent they exist, should be produced by the defendants. The same types of documents of the plaintiffs, starting from 2016, must also be produced. Additional plaintiffs' documents post-2016, related to any alleged customer or revenue loss, for example, must also be produced.

[14] To the extent these documents have not already been reflected in the parties' existing affidavits of documents, new affidavits should be sworn which do reflect the existence of these documents.

Protection of Confidentiality of Both Parties

[15] The real problem the parties need to come to grips with is how the production of sensitive proprietary and commercial information can be accommodated without undue risk of competitive harm or disadvantage. The parties have been aware of the problem posed by the need to examine confidential material of both parties for years. Their efforts to resolve

this issue on any common sense basis have failed. Accordingly, it falls to the Court to determine how the parties shall manage this issue.

[16] The parties have advanced essentially three alternative ways to deal with this issue. First, as argued by the plaintiffs, the defendants should simply be required to produce all of the required documents “outright”. To the extent there are third-party privacy concerns engaged, these can be dealt with by way of a sealing order specific to personal information about those third parties, in the event material containing this information had to be filed on the public record. Otherwise, the protection afforded by the deemed undertaking rule is sufficient.

[17] Second, as argued by the defendants, a reference to a judicial officer or third-party agreed between the parties should be ordered, to analyse the business data of both sides and to determine whether there is evidence that the defendants’ foreign exchange business is based on or using data improperly taken from the plaintiffs.

[18] Third, the defendants argue, in the alternative, that if further production is ordered, the order should apply to both sides and should make detailed provision for strict, enforceable limitations on how the data produced may be used and who may have access to it.

[19] In my view, the third approach is the only appropriate way to deal with the current standoff.

[20] The plaintiffs’ approach requiring defendants’ production “outright” suffers from the assumption that the plaintiffs will be proven right in their claims and that the defendants’ concerns about confidentiality are nothing but an evasive smokescreen. This case is a long way from any determine on the merits. And, more importantly, the plaintiffs’ approach simply ignores the problem of how to protect the plaintiffs’ own confidential information, which will necessarily also have to be disclosed in order to prove the allegation that it was improperly used to develop and conduct the defendants’ foreign exchange business.

[21] The “reference” approach suffers from at least two problems. Neither party has as yet made production of the confidential-type information. There is more to the exercise of analysing the data than just comparing customer lists. Also important will be the third-party intermediaries, pricing, marketing and customer engagement and retention strategies and other specific and potentially proprietary business systems, manuals and protocols. The plaintiffs are unwilling to accept at face value that the defendants will produce all relevant information. They are not willing to leave this to the discretion of a referee. The proposal for a reference would also, in my view, in reality involve a sub-delegation of the two most important substantive issues in this litigation -- whether the evidence supports the conclusion that: a) Mr. Liu misappropriated confidential data from the plaintiffs, which was then, b) improperly used by the defendants in the operations of their foreign exchange business. It seems to me this would be an over-ambitious, to the point of inappropriate, use of the power to order a reference in the circumstances. Among other things, for example, it is highly likely that the resolution of these issues will require expert opinion evidence.

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[22] While a confidentiality order is exceptional in nature, the court has jurisdiction under s. 137(2) of the *Courts of Justice Act* to make such an order. A protective order is warranted where a party would risk serious financial harm if information is made freely available to a competitor. In such circumstances, the court must strive to strike a balance between the right to disclosure and the right of a party to protect sensitive and confidential information. I find that the risk to both sides in this case is real and substantial. I am satisfied the information required to be produced is confidential, that it is commercially sensitive, and that, as competitors, they could obtain unfair advantages and improve their competitive position through unlimited release of the relevant information. There is a public interest involved that goes beyond the narrow interests of just these parties. The deemed undertaking rule is insufficient to protect against the broad range of potential harm that could arise from disclosure in the present circumstances: *Eisses v CPL Systems*, 2008 CanLII 1946 (ONSC), at para. 5.

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[23] I find, therefore, it is appropriate that a protective order shall issue, together with the mutual order for production, to guard against the potential for misuse by either party.

[24] The order shall, among other things:

(a) require production of the information listed on Appendix A (with appropriate amendment to reflect the fact that the production obligations are reciprocal);

(b) require that the information, once produced, be kept confidential by the receiving party;

(c) prohibit the use of the information for any purpose other than the prosecution of this litigation;

(d) specifically identify the names of counsel, clients and experts who will have access to the information and prohibit its disclosure to anyone else; and

(e) require the receiving persons to establish protocols within their respective organizations to protect the confidentiality of the information and to prevent access by all non-authorized personnel. Each party shall confirm that this has been done at the time, or before, the information is exchanged.

[25] If the parties are unable to agree on the specific terms of the order, they shall arrange a brief case conference to discuss the issue, having first submitted a blacklined draft order highlighting the issues of controversy. Similarly, the parties shall establish a timetable for completion of production of these records. If no agreement can be reached, the parties shall arrange a case conference and a timetable will be imposed for them.

Bifurcation

[26] The defendants also argue that efficiency and proportionality strongly support the idea that the threshold question of whether Mr. Liu actually had access to and took any confidential

information from the plaintiffs should be dealt with first, as a standalone issue. The plaintiffs are opposed to this approach.

[27] Rule 6.1.01 provides that it is only with the consent of the parties that the court may order separate hearings on one or more issues in a proceeding: *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788.

[28] There being no consent, no order can be made.

Electronic Production of the Five Documents/ Form of Order

[29] The defendants' motion for electronic production and forensic examination involves two elements: 1) five documents (the Documents) which the defendants say have arisen out of suspicious circumstances. These Documents, while appearing to have been electronically generated, have been provided in hard copy only; and, 2) any electronic records reflecting Mr. Liu's alleged access to the plaintiffs' network.

The Five Documents

[30] The five Documents are as follows. The first Document is a PDF of a memo dated April 20, 2016 purportedly "From: IT"17 "To: Carl", the subject being "Access & download OTT forex system for Edward Liu". The memo reports on Mr. Liu's request to download the plaintiffs' foreign exchange system and to gain access to the database and seeks Mr. Carl Cai's approval for this access. Carl Cai is one of the senior employees responsible for the plaintiffs' business and this litigation.

[31] The second Document is a PDF of a Memorandum dated April 25, 2016 purportedly "From: IT" "To: Carl", the subject being "Report of Edward Liu working progress". In the document, IT reports that Mr. Liu has been given access and downloaded the plaintiffs' systems. Mr. Cai admits that both Documents were electronically generated. He cannot say whether they were sent to him by email or not.

[32] The third, fourth and fifth Documents are dated March 27, 2018, March 30, 2018 and April 5, 2018 respectively. Each is purportedly authored by a named employee (Tana, Coco and Ke respectively) and reports on communications with plaintiffs' customers who indicated they had been contacted by Mr. Liu about foreign exchange business transactions.

[33] It is the first two of these Documents which have generated the real controversy.

[34] As noted earlier, the plaintiffs allege that, under a contract with Aurora Technology Development, Mr. Liu was provided with confidential information regarding the plaintiff's foreign exchange business in order to develop a mobile application for the plaintiffs. No particulars of how or when Mr. Liu obtained this access were pleaded (and, specifically, no reference was made in the claim to the first two Documents). Mr. Liu's statement of defence denies ever having been provided with access to the plaintiffs' network or to any confidential information.

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[35] Mr. Cai swore two affidavits of documents in 2020. Neither affidavit makes any reference to the first two Documents. These Documents surfaced for the first time in a third affidavit of documents provided in June 2022.

[36] Mr. Cai says he filed hard copies of the first two Documents years ago and forgot about them when swearing his document affidavits in 2020. When he rediscovered them, he produced them. The defendants asked for copies of the electronic "originals" as defined by the Rules. Mr. Cai says he looked but couldn't find them. Among other things, he says, everyone at OTT has been issued new personal computers since then.

[37] The provenance of the first two Documents has reasonably been put in issue. They were produced four years after the fact. No reference to them is made in the claim or in Mr Cai's first two affidavits of documents. The allegation of Mr. Liu's misappropriation of the plaintiffs' confidential information is a critical and threshold fact – yet the first two Documents represent the *only* documentary evidence that Mr. Liu ever requested access, was granted access or in fact obtained access to the plaintiffs' confidential information.

[38] I find the defendants have raised a legitimate concern over the authenticity of the first two Documents. I find Mr. Cai's attempts to explain why there are no "electronic" originals is weak and insufficient. It may well be that he is right, but the current explanation is inadequate. For example, while Mr. Cai has said there was a renewal of employees' personal computers, this does not explain why a search was not conducted, or was unsuccessful, of the plaintiffs' backup servers (which one would normally expect the plaintiffs to have). I find that the plaintiffs are required to produce electronic "originals" of these two Documents, if they exist. I find that the plaintiffs have not satisfied the burden of showing electronic originals do not exist.

[39] To resolve this issue, the plaintiffs are ordered to retain a recognized, independent IT expert in digital forensic examination to search the plaintiffs' electronic records for evidence of the two Documents. The plaintiffs shall provide to the IT expert a copy of this Endorsement along with whatever other background and other information the IT expert deems necessary in order to perform their mandate. The IT expert is to prepare a report which shall be provided to the parties and to the Court. The IT expert's report will document the efforts undertaken to locate the Documents, whether the IT expert was provided with all the information and access he or she required to perform their mandate (or, if not, whether the IT consultant was satisfied with the reasons or explanations for why the information or access was not provided) and the IT expert's conclusion on whether "original" electronic copies are available, where and in what circumstances they were found and, if they were not found, why. If electronic versions of the two Documents are found, the IT expert shall determine and report on, if possible, when and by whom these Documents were created and to whom, and how, they were transmitted to others. The work of the IT expert shall be at the plaintiffs' expense, without prejudice to the plaintiffs' right to seek the costs of this retainer in the cause. It is the expectation of the Court that the retainer of the IT expert be confirmed to all parties within 30 days and that the IT expert's mandate be concluded, and his or her report be delivered, within a further 60 days, if reasonably possible.

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<u>The Request for Production of Electronic Records Reflecting Mr. Liu's Alleged "Access" to the Plaintiffs' Network</u>

[40] The second Document states that Mr. Liu "downloaded OTT Forex System and OTT CRM system" and had "full access" to specified information "through the API interface". By the dating of the first and second Documents, it is to be presumed that the alleged downloading and access took place between April 20 and April 25, 2016.

[41] Mr. Liu requested inspection of:

(i) "the user account and password used by" Mr. Liu to obtain this downloading and access, including when it was created, who had access to it, what permissions were granted and any VPN log showing domain access by this user account; and

(ii) "the login report showing the date and time" Mr. Liu logged in to the plaintiffs' network.

[42] The plaintiffs declined to respond to this request on the basis that it was premature and disproportionate.

[43] Leaving aside the technicalities of whether this was an appropriate use of the request to admit under Rule 30.04, the production of these electronic documents is, I find, obviously required. They are relevant to the central disputed issue of fact in this litigation. They are e-documents of the type one would normally expect to find in any organization handling confidential customer and other sensitive data. There is a very narrow time frame to be reviewed. The requirement to look for and, if they exist, produce these documents is entirely proportional. They must be produced; that requires a concerted effort to locate them. If, following a concerted effort, they cannot be found, there must be an explanation.

[44] I therefore order the plaintiffs to produce these e-records, if they exist. If they cannot be found, a representative of the plaintiffs with specific knowledge of the plaintiffs' data and information systems (such as a chief information officer or head of IT) must explain what searches were undertaken and, if possible, why these e-records cannot be found. It is the Court's expectation that these steps be taken, and the plaintiffs' response to the defendants be given, within 45 days.

[45] I recognize that Mr. Liu has asked that this task too be assigned to the independent IT expert discussed above in relation to the first two Documents. However, that is a situation where a search has already been undertaken, and where an inadequate explanation has been proferred for why the Documents could not be produced. Here, no such effort has yet been undertaken. Whether further steps are necessary can only be determined once the steps ordered in the previous paragraph have been completed.

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The Motion to Amend the Claim

[46] By the time of oral argument, most issues on the motion to amend had been resolved. The defendants are consenting to most of the amendments and the plaintiffs are withdrawing one of the contested amendments relating to the addition of a claim for oppression.

[47] Ms. Qi still objects to the addition of 1875647 Ontario Ltd. as a party, on the basis that this company ceased to do business before Ms. Qi engaged in foreign exchange business with Mr. Liu. That may be so, but the timeframes have at least the potential to overlap. Leave to amend to add 187 is granted. The added defendants, of course, may plead all available defences.

[48] The defendants also object to the addition of the plaintiffs' plea that the Court "pierce the corporate veil", on the basis that the individual defendants are already parties and are pleaded to have joint and several liability with the corporate defendants. As no coherent explanation was given for how piercing the corporate veil in these circumstances would add anything, I would deny the motion to add that plea by way of amendment. Since piercing the corporate veil is not a cause of action, but is really a form of remedy, the plaintiffs may renew this request once all the evidence is available if, indeed, it becomes apparent that anything actually turns on it.

Other Matters

[49] Finally, the parties agreed to a consent order that the plaintiffs are permitted to examine the defendants in total for discovery up to 21 hours. It is so ordered.

Costs

[50] The parties agreed that the costs should be in the cause fixed in the amount of $10,000 for each motion but subject to the discretion of the trial judge on costs. In my view, there was divided success on the first motion relating to further document production and the terms and conditions. I award no costs of that motion. On the second motion relating to the challenged Documents and e-records of Mr. Liu's alleged "access", Mr. Liu was the successful party. I would award Mr. Liu costs of that motion fixed in the amount of $10,000 in the cause, subject to the discretion of the trial judge.

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Penny J.

Date: March 22, 2023.

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