IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0843003 B.C. Ltd. v Inspire Group Development Corporation,* 2024 BCSC 16

Date: 20240105
Docket: S180328
Registry: Vancouver

Between:

0843003 B.C. Ltd.

Plaintiff

And

Inspire Group Development Corporation and Terry Kin Keong Lai

Defendants

And

Terry Kin Keong Lai a.k.a. Terry Lai

Third Party

And

Paul Cheung and Terry Lai

Defendants by way of Counterclaim

Before: The Honourable Justice Walkem

Reasons for Judgment

Counsel for the Plaintiff: L.J. Marriner

Counsel for the Defendant: S. Pun
W. Zhou (Articled Student)

Place and Date of Trial/Hearing:	Vancouver, B.C. September 11-14, 2023
Place and Date of Judgment:	Vancouver, B.C. January 5, 2024

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INTRODUCTION

[1] This dispute about a commercial real estate holding has received significant consideration before the courts, including a summary trial *0843003 B.C. Ltd. v. Inspire Group Development Corporation*, 2021 BCSC 516 (“Inspire 2021”), and subsequent appeal *0843003 B.C. Ltd. v. Inspire Group Development Corporation*, 2022 BCCA 3 (“Inspire BCCA”). Related matters, both procedural and substantive, involving many of the same parties, have wound their way through the court process. (These include: *Xie v. Lai*, 2022 BCSC 495; *Xie v. Lai*, 2021 BCSC 2128; *Xie v. Lai*, 2021 BCSC 2038; *Xie v. Lai*, 2021 BCSC 1768; *Xie v. Lai*, 2021 BCSC 923; *Xie v. Lai*, 2020 BCSC 295; and, *Xie v. Lai*, 2017 BCSC 2035).

[2] This case involves multiple layers of corporate entities. Mr. Lai, who did not respond to this action, is featured prominently in many of the alleged misdeeds. Before me, the parties proceeded on the basis of affidavit evidence, with cross-examination on those affidavits. An extensive agreed statement of facts was provided (“ASF”). For the most part, the facts themselves are not in dispute.

[3] This is a derivative action in which the plaintiff seeks compensation from one of its two shareholders, namely, Inspire. It says that Inspire is bound by the actions of its previous sole director and operating mind, Mr. Lai. The plaintiff argues that Inspire, through Mr. Lai, deprived the plaintiff’s predecessors, 0843003 BC Limited (“0843”) and 0891360 BC Limited (“Holdco”), use of the units they owned, and that the plaintiff is owed occupational rent as a result of that deprivation. The plaintiff also claims compensation for increased water and sewer usage for that period. In the alternative, the plaintiff argues that Mr. Lai breached his fiduciary duty to 0843, and that Inspire is vicariously liable for this breach, given that Mr. Lai was the representative and sole director of Inspire.

[4] The original summary trial judge found that Inspire had not occupied the units. The B.C. Court of Appeal determined that this issue should be re-examined, as the summary trial judge should have considered whether Mr. Lai bound Inspire in his role as sole director and operating mind of Inspire. One of the questions remitted by

the BCCA was, if Mr. Lai was in occupation of the units, can Inspire be found to have occupied the units such that they owe occupational rent through the doctrine of corporate identification?

BACKGROUND SUMMARY

[5] Mr. Cheung agreed to enter into business with Mr. Lai by purchasing a commercial strata property at 12280-12320 Trites Road in Richmond, British Columbia (the "Trites property"). This purchase was to occur through their companies, IAG Enterprises Ltd. (IAG) for Mr. Cheung, and Inspire for Mr. Lai, by purchasing shares in 0843. 0843 would hold all of the shares of Holdco, and Holdco was to be the registered owner of the property.

[6] The Shareholders' Agreement between IAG, Inspire, and 0843 described Mr. Lai as the person in control of Inspire at Article 5.3(c). As of December 19, 2012, Inspire owned 28.17% of 0843, and IAG owned 71.83%. The Shareholders' Agreement provided that there would be two directors, one appointed by each company. Quorum for meetings was the two directors. Decisions required a majority vote and each party had a right of first refusal. Mr. Cheung was IAG's nominee and Mr. Lai was Inspire's nominee, on the 0843 Board of Directors.

[7] In 2013, Mr. Lai transferred his shares in Inspire to Inspire Group Trites Project Corporation (IGTPC), which was owned 88.7% by Mr. Tonggui Xie, and 11.3% by Mr. Lai. Mr. Xie and Mr. Lai were co-directors of IGTPC.

[8] A Joint Venture Agreement entered between Mr. Xie and Mr. Lai, provided that Mr. Xie would be paid a guaranteed return of at least 5% per annum and receive 50% of the profit from a redevelopment of the Trites property; and 25% of any profit over $10,000,000.

[9] After Mr. Xie acquired shares in Inspire, Mr. Lai continued to have authority to act on behalf of Inspire. He dealt with third parties, including Mr. Cheung. Mr. Cheung was not made aware that Mr. Xie was part of Inspire, and was unaware that Mr. Lai had transferred his shares until 2017: Inspire BCCA para. 6. Mr. Lai

remained responsible for the day-to-day management of Inspire. Mr. Xie did not remove Mr. Lai as director of IGTPC until June 6, 2016.

[10] From November 15, 2010 to June 4, 2015, Mr. Lai acted as property manager for the Trites property. There was no formal contract in place. Mr. Lai had keys for vacant units, and was responsible for collecting rents (deposited to 0843's account) and renting out vacant units. The plaintiff argues that there is no evidence that anyone else could have rented out units, or provided access to third parties.

[11] Records kept by Mr. Lai indicate that no rent was received for the following five units during the periods listed:

> Unit 3 from April 2012 to December 2014 (except for $1,457.95 received for September 2012);
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> Unit 9 from December 2011 to December 2014;
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> Unit 17 from February 2012 to December 2014;
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> Unit 160 from May 2013 to December 2014; and
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> Unit 170 from February 2012 to December 2014.
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> [collectively, the "Five Units"]

[12] BC Hydro statements show that Units 9, 17, 160, 160A, and 170 were metered to third parties during the relevant times, and not registered to either Mr. Lai or Inspire. Unit 3 (March 2, 2012 to January 28, 2016) and Unit 100 (February 1, 2014 to March10, 2016), were metered to 0843.

[13] In early 2015, Mr. Cheung became suspicious that some units at the Trites property were not vacant, but were being used to grow marijuana. He hired a private investigator.

[14] Counsel for Mr. Cheung sent correspondence to counsel for Mr. Lai, raising the concern that the units were not vacant, and suggesting that Mr. Lai may be

collecting rent and not remitting it to 0843 or Mr. Cheung. On May 11, 2015, Ms. Ducey, counsel for Mr. Lai, responded as follows:

> Mr. Lai has been using five units at the complex for his own personal use. As an owner of the warehouse complex, he has not been paying rent nor does he have any obligation to do so.
>
> With respect to the alleged illegal operations, these units have been operated as a medical marijuana grow operation, however, it is a legal and licenced operation inspected by all related safety departments.
>
> …
>
> As our client has been the manager of the premises since the beginning of this partnership, our client views your client's attempts to have him removed as being oppressive in the circumstances.
>
> Finally, my client has asked me to raise his willingness to resolve the ongoing dispute between him and Mr. Cheung on a fair basis. He will not be bullied out of his interest in the complex by your client.
>
> In that regard, we suggest a buyout of the other's shares in the holding company…
>
> [Emphasis added.]

[15] The plaintiff asserts that Inspire's sole business office was the Trites property and that Mr. Lai was not acting in his personal capacity, independent of Inspire, in connection with the Trites property.

[16] The defendant argues that Mr. Lai was acting on his own behalf, and not in the interest of Inspire.

[17] On June 4, 2015, IAG and Inspire resolved that Mr. Cheung would act as property manager instead of Mr. Lai. At that time, Mr. Lai did not provide keys for the Five Units or Unit 100. Unit 100 was used as an administrative office for the rental of the Trites property units. The plaintiff argues that Unit 100 was used by Mr. Lai and Inspire for their own business unrelated to 0843 after Mr. Lai was no longer property manager. The plaintiff alleges deprivation of use of Unit 100 by Mr. Lai from July 2015 to sometime in 2016.

[18] When it became clear to Mr. Xie that he was not getting a return on his investment, he sought to have his investment returned. Inspire agreed with IAG to sell the Trites property. On September 23, 2015, Mr. Lai signed the Agreement to

Sell for Inspire. The Agreement to Sell included the agreement to holdback $500,000, plus a further contingency amount, until the matter of outstanding rent was settled. The outstanding rent is the subject of the dispute.

[19] It is agreed that at all material times, Mr. Lai was Inspire's nominee as director of 0843. All of Mr. Cheung's dealings on behalf of IAG with Inspire were with Mr. Lai up until the property sold in January 2016. Mr. Cheung's testimony was that he understood Mr. Lai to represent Inspire.

[20] The Inspire BCCA decision summarizes events which followed:

> [12] On July 3, 2015, Mr. Cheung's lawyer sent an email on behalf of the Registered Owner to Mr. Lai's lawyer attaching a chart setting out rent in the amount of $420,277.42 alleged to be owing in respect of the occupation of the Five Units by Mr. Lai. ... .
>
> [13] On September 23, 2015, a written agreement was purportedly entered into by Inspire and IAG (the company controlled by Mr. Cheung which owned shares in the appellant). The agreement stated that the parties had decided to sell the Strata Complex for a minimum of $14,500,000. The agreement provided for the payout of the net sale proceeds, including a sum of $500,000 to be withheld from Inspire's pro-rata share (which was defined as the "Disputed Funds"). The agreement went on to state:
>
> > The Disputed Funds represent the maximum balance of unpaid rents (the "Unpaid Rents") that IAG claims Inspire owes to [0843] for its use of units in the Properties. The Disputed Funds will remain in [0843] until such time as IAG and Inspire agree on the balance of Unpaid Rent or a decision is made by a court appointed authority as to the value of Unpaid Rents (the "Actual Unpaid Rents").
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> …
>
> [15] A sale of the Strata Complex for the price of $14,000,000 was arranged, and the sale closed on January 28, 2016. ... The sale proceeds were distributed, with the $500,000 of Disputed Funds being retained by [0843]'s lawyer.

[21] This derivative action was then commenced.

[22] The plaintiff pointed to background information deposed to by Mr. Cheung, about an agreement made on September 23, 2015, regarding the $500,000 holdback:

> 62. At that meeting, Mr. Lai and I also discussed the claim by Holdco for outstanding rent. While I had previously concluded that Inspire or Mr. Lai

> owed Holdco in excess of $500,000 for unpaid rent in relation to occupancy of the Occupied Units and unit 100 and uncollected rent in respect of unit 12, I was prepared to make a concession to Inspire and Mr. Lai that they could have one month free rent in respect of the Occupied Units and unit 100 they occupied, that Holdco would not pursue the claim on unit 12, and that Holdco would not purse a claim for mould damage due to the cultivation of marijuana. Mr. Lai agreed on behalf of Inspire to pay rent for the Occupied Units and unit 100 on completion of the sale of the Property.

[23] On November 1, 2015, Mr. Lai signed six leases between 0843 as lessor, and "Inspire Group Development Inc." as lessee (he signed for both parties). The leases were for the Five Units and Unit 100, and were for below market rent. There is no company with the official name "Inspire Group Development Inc." registered in Canada. The official name of Inspire is Inspire Group Development Corporation. Mr. Cheung disputes whether Mr. Lai had authority to bind the plaintiff when the leases were signed, as he had been replaced as the Trites property manager.

[24] When the Trites property sold, copies of the leases had to be provided to the new purchaser. Mr. Cheung became aware of the leases at that time. His evidence was that he was not concerned with the amounts of rent set out in the leases, as long as they did not interfere with the sale of the Trites property. The leases were assigned to the purchaser on January 28, 2016. The defendant argues that the leases establish market rent.

[25] On the sale of the Trites property, Mr. Xie received $700,000 and has also subsequently obtained separate judgments against Mr. Lai.

ISSUES

a. Did Mr. Lai occupy the Five Units and Unit 100?

b. Is Inspire liable to pay occupational rent for Mr. Lai's occupation of the Five Units under the doctrine of corporate identification?

c. In the alternative, is Inspire vicariously liable for Mr. Lai's breach of fiduciary duty to 0843?

d. If Inspire, or Mr. Lai are liable to the plaintiff, what is the appropriate quantum of occupational rent or damages?

[26] The defendant raises the preliminary issues of whether the doctrine of *res judicata* applies here, and whether the letter from Mr. Lai's legal counsel is admissible against Inspire.

Preliminary Matter-*res judicata*

[27] The defendant raises the preliminary issue of issue estoppel and *res judicata*.

[28] *Res judicata* refers to a matter having been decided or litigated in a previous proceeding, making it impermissible to again contest the issue: *Lim v. Lim*, 1999 BCCA 596 at para. 4. *Res judicata* requires both that the matter was litigated, and that the matter was decided: *Deventer v. Deventer*, 2001 BCCA 625 at para. 18. The purpose and residual discretion of the court in regards to *res judicata* was summarized in *Fournogerakis v. Barlow*, 2008 BCCA 223, as follows:

> [16] Where it applies, *res judicata* serves as an equitable estoppel. Its purpose is to ensure justice is done, prevent abuse of process, and fulfill the societal interest of finalizing litigation. The court retains a discretion to refuse to apply the principle where in special circumstances a rigid application would frustrate its purpose: *Arnold v. National Westminster Bank Plc*., [1991] 2 A.C. 93 (H.L.) at 109 111.

[29] The defendant argues that the question of whether Mr. Lai occupied the units has been decided by the summary trial judge. They argue that, in arriving at his decision, the summary trial judge considered: (1) the November 2015 Leases; (2) the May 2015 Letter; (3) the September 2015 Sales Agreement; (4) BC Hydro Records; and (5) sewer and water charges. The summary trial judge found the evidence contradictory and was unable to find the facts necessary to decide, on a balance of probabilities, if, or for how long, Mr. Lai occupied the units: Inspire 2021 at para. 49. The defendant argues that the summary trial judge's decision was final, as confirmed at Inspire BCCA para. 28, that "there is no appeal from this ruling." Reading the Inspire BCCA judgment, it is clear that this comment simply explained why it was inappropriate for the Court of Appeal to engage in a fact-finding exercise.

[30] *Res judicata* does not apply to the issue of whether Mr. Lai occupied the units. The summary trial judge found that the issue was unsuitable for summary trial on the evidence before him as he could not find the necessary facts to decide if, or for how long, Mr. Lai occupied the units: Inspire 2021 at para. 49. The summary trial judge's decision cannot be interpreted as intending to conclusively dispose of the issue, even if the evidence ultimately led before me was quite similar to the evidence led before the summary trial judge.

[31] The conclusion that *res judicata* is inapplicable is supported by the decision of the Court of Appeal, which clearly intended for this Court to consider whether Mr. Lai occupied units. Among other things, the Court of Appeal remitted the issue of whether Mr. Lai was acting in a manner that could bind Inspire, and assessment of possible damages. These two matters would have been moot if it was already determined that Mr. Lai had not occupied the units.

Preliminary Matter–Letter from Mr. Lai's Legal Counsel

[32] The plaintiff argues that the correspondence from Mr. Lai's counsel is an admission that the Five Units were occupied by Mr. Lai from the summer of 2013. The defendant argues the letter is inadmissible against Inspire.

[33] The defendant pointed out the danger of relying on the letter as evidence, including Inspire's inability to cross-examine or defend itself by calling Ms. Ducey, or to overcome the privilege Ms. Ducey owes to Mr. Lai.

[34] A corporation can be bound by an individual's admission in certain situations. An employee's statement can be admissible as evidence against an employer depending on the strength of the nexus between the given topic and the employee's duties. As articulated in *R. v. Strand Electric Ltd.,* [1969] 1 O.R. 190 at 193, 1968 CanLII 421 (C.A.):

> Statements made by an agent within the scope of [their] authority to third persons during the continuance of the agency may be received as admissions against [their] principal in litigation to which the latter is a party … [T]he admission must have been made by the agent as part of a conversation

> or other communication which [they were] authorized to have with a third party.

[35] *In Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority*, 36 D.L.R. (3d) 95 at 101, 1973 CanLII 1107 (B.C.S.C.), the court said that because a "corporation can act and speak only through its agents, it should bear the burden of an admission which relates to its agent's duties" and that "a corporation acts of necessity through its agents whose acts within the scope of the agent's authority are the acts of the corporation, both for the imposition of civil and criminal liability".

[36] It is not contested that Ms. Ducey was counsel (and agent) for Mr. Lai, and thus the letter would be admissible against Mr. Lai pursuant to the party-admissions rule: *Egan v. Andrychuk*, 2022 BCCA 110 at para. 53. The letter is properly admissible against Mr. Lai for the truth of its contents.

[37] The admissibility of a statement as a vicarious admission turns on whether the declaration falls within the ambit of the subject matter of the agent's employment: *Morrison-Knudsen* at 101. The burden rests with the party who wishes to admit the statement: *MacDonald & Docherty v. R*., 2016 PECA 2 at para. 33.

[38] The defendant argues the letter should not be admissible against Inspire, as admissions are only binding as against the party who made them. They point out that the letter was written by Ms. Ducey, whom the parties agree was the lawyer and agent of Mr. Lai, but never the lawyer or agent for Inspire. However, the plaintiff sought to have the letter admitted against Mr. Lai to establish his occupation of the units, and then rely on that admission, in the second step of analysis concerning the doctrine of corporate identification.

[39] The nature of the corporate identification doctrine is such that it queries whether individual wrongdoing can be attributed to a corporation. Given that, I am satisfied that the determination of whether Mr. Lai occupied the units can be made with the letter forming part of the evidentiary basis against him. Then, the determination of whether that occupation is properly attributable to Inspire will be

made. A determination of whether the letter is admissible "as against Inspire" is unnecessary.

[40] Similarly, vicarious liability queries whether a tort was committed, and then inquires into the nature of the relationship between the tortfeasor and the potentially liable party to determine whether the imposition of vicarious liability is appropriate. The question of the letter's admissibility for vicarious liability purposes is simply whether the letter is admissible as against Mr. Lai, not whether it is admissible as against Inspire.

[41] Here, I find that since the letter is admissible against Mr. Lai, it can be considered in establishing whether or not Mr. Lai occupied the units. If occupation is established, the plaintiff's argument about whether or not Mr. Lai's occupation binds Inspire will be considered.

OCCUPATIONAL RENT

Positions of the Parties

[42] The plaintiff argues that Mr. Lai occupied the Five Units for a marijuana grow operation, either directly, or by renting them to third parties, and keeping the rent; and that Inspire should be liable for his act through the doctrine of corporate identification. In support of their assertion, the plaintiff points to: the substantial increase in use of utilities during the times they allege the Five Units were occupied, the fact that only Mr. Lai had keys for the Five Units, and that Mr. Lai was the property manager in the summer of 2013 when the Five Units began to be occupied. They also seek to rely on Mr. Lai's admission, through legal counsel, that he was using the five units at the property as a marijuana grow operation. They further argue that Inspire listed Unit 100 as its address on legal documents and refused to give the new property manager keys to that unit.

[43] The plaintiff argues that their intended use of the Five Units was to generate rental income from them. They argue that Mr. Lai occupied the Five Units by renting them out, or using them personally for a marijuana grow operation, such that they were not available to generate rental income for the plaintiff. They argue they were

unable to use Unit 100 for an administrative office (or, any other purpose) as Mr. Lai did not provide keys to that unit when he was no longer property manager.

[44] The plaintiff argues that the following facts support their claim for occupational rent: Mr. Lai's admission through counsel that the Five Units were being used for a medical marijuana grow operation, without payment of rent; and that only Mr. Lai had keys to the vacant units, and was responsible for renting the units. The plaintiff argues the significant increase in water and sewer charges supports their contention that the Five Units were occupied. The plaintiff further argues that the fact that Mr. Lai purported to sign leases to Inspire for the Five Units and Unit 100 show that he intended for Inspire to keep benefitting from use of the units, at below market value rent.

[45] The defendant argues that there is no direct evidence of occupation or what was happening with the units, including a lack of detailed evidence about who rented the units, when they rented them, and, what, if any, rents were collected on them. The defendant disputes that Inspire was in occupation of Unit 100. On cross examination, Mr. Cheung agreed that he did not recall whether Mr. Lai had said Inspire was in occupation of Unit 100.

[46] The defendant argues that the cases relied on by the plaintiff are distinguishable because they show greater *indicia* of occupation which they say are not present here. The defendant argues that there was no evidence that Inspire or Mr. Lai used the keys or entered the units; changed the locks; kept any assets at the units; attended or maintained the units; or, maintained utility accounts for the units. The defendant argues that Inspire has never produced or sold marijuana. The defendant further asserts that the leases made in November 2015, were not intended to benefit Inspire.

[47] The defendant argues that there is no proof that Mr. Lai actually occupied the Five Units. Mr. Cheung has no personal knowledge (aside from BC Hydro bills and the letter from counsel which the defendant says is inadmissible) about who actually occupied the Five Units. The defendant argues there was no evidence about the

third party rate payers to link them to Mr. Lai. The defendant claims that the fact Mr. Lai did not turn over keys to Mr. Cheung does not equate with Mr. Lai occupying the units, but could indicate that he was not in possession of the units, or the keys.

Law

[48] In the past, a party claiming occupational rent needed to show that they were "ousted" from the property. The current law in B.C. acknowledges that occupational rent can flow from deprivation of use. An ouster is no longer required. Occupational rent is considered on a case-by-case basis, following a contextual analysis of the equities between the parties.

[49] In *Wang v Jiang*, 2021 BCCA 132, the Court of Appeal confirmed that deprivation of the right of use, or possession to the exclusion of the landlord, will, in most cases, be tantamount to occupation. See also: *McFarlen v. McFarlen*, 2017 BCSC 1737 at para. 20. In *Chung v. Chung*, 2022 BCSC 1592, an award of occupational rent was made where the defendant was found to have been enriched by using the property rent-free, and the plaintiff deprived of the rental income that they would have been entitled to as part owner of the property.

[50] The courts have considered varied *indicia* of occupation, including: changing locks, keeping assets at a property, residing at a property, maintaining a property, and operating a tenant business at a property: *Crate Marine Sales Limited (Re)*, 2016 ONCA 433; *Chung*; *White House Guest Home Ltd. v British Columbia*, 1999 CanLII 5331 (B.C.S.C.). Justice Sharma, in *Petrie v. Lindsay*, 2019 BCSC 371, at para. 136, noted that occupational rent is an equitable claim and often features in an overall balancing of equities between parties, and that "[e]ven in that context, it is an exceptional remedy that should only be used cautiously and only to achieve a just and equitable result."

[51] The quantum of occupational rent is determined based on the market value for rent of the property: *Reagh Estate (Re)*, 2021 BCSC 1807 at para. 21.

Analysis

[52] The plaintiff asks this Court to draw inferences based on circumstantial evidence. The Court of Appeal recently commented on that exercise in *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd*., 2023 BCCA 70 as follows:

> [172] A factual inference is a conclusion as to the existence of further facts that may, not must, be drawn from a proven fact or group of proven facts: David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2021) at 126; *R. v. Munoz* (2006), 86 O.R. (3d) 134, 2006 CanLII 3269 (Ont. S.C.J.) at para. 24 and note 9. "[A] judge must rely on logic, common sense and experience, taking into account the totality of the evidence, when deciding whether to draw an inference": *Rain Coast Water Corp*. at para. 69, citing *R. v. Calnen*, 2019 SCC 6 at para. 112. If there is no evidentiary basis for an invited inference, that is, if the inference does not flow logically and reasonably from established facts, the inference cannot be drawn: *J.P*. at para. 341, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 209, 1995 CanLII 3498 (Ont. C.A.). Doing so would amount to speculation or conjecture: *J.P*. at paras. 339–341; *Rain Coast Water Corp*. at para. 69.

[53] I find, based on a balance of probabilities, that Mr. Lai occupied the Five Units. He did this either by using or renting out the units for marijuana grow operations, and collecting and keeping the rent. In coming to this conclusion, I rely upon the evidence of Mr. Lai's withholding the keys, the increased utilities corroborating that marijuana grow operations were operated; and also Mr. Cheung's evidence about those units, including about how the $500,000 holdback amount was reached. I have found the letter from Ms. Ducey admissible against Mr. Lai, and in my opinion, it supports the finding that Mr. Lai occupied the units. Nonetheless, I would have found Mr. Lai occupied the units even without considering the letter. As a result, the Five Units were not available to produce rental income for the plaintiff. The deprivation of use is tantamount to occupation.

[54] Regarding Unit 100, I find that Mr. Lai had been using Unit 100 as office space for Inspire (even if for limited purposes), and potentially other personal purposes while he was office manager. Unit 100 was also used as an administrative office for rentals at the Trites property. When he was no longer building manager,

Mr. Lai did not provide keys to the unit, and from that point onward find that this constitutes occupation by Mr. Lai.

DOCTRINE OF CORPORATE IDENTIFICATION

[55] Having found Mr. Lai occupied the Five Units and Unit 100 for the relevant periods, I turn to the issue of corporate identification, and whether Inspire can be found liable to pay occupational rent for Mr. Lai's occupation of the units.

Positions of the Parties

[56] I now turn to the question of whether Inspire is liable for Mr. Lai's occupation of the Five Units under the doctrine of corporate identification.

[57] The plaintiff argues that the evidence demonstrates Inspire's willingness to be bound by Mr. Lai's actions. The plaintiff suggests that Mr. Lai, on behalf of Inspire, acknowledged that Inspire had to account for use of the Five Units and Unit 100. They argue that Mr. Lai, on behalf of Inspire, agreed that $500,000, plus another contingency amount, would be held back from the sale price to settle any outstanding rent.

[58] The plaintiff asserts that the doctrine of corporate identification applies even when the operating mind acts primarily for a personal purpose, if the company could derive some incidental benefit from the act. They argue that is the case here.

[59] The plaintiff argues that the corporate identification doctrine should be applied to Mr. Lai's occupation of the Five Units and Unit 100 because Mr. Lai was the sole directing mind of Inspire responsible for its day-to-day management. No one else had decision-making power, or acted, on behalf of Inspire. Mr. Lai acted as Inspire's nominee as director for 0843 and identified himself as Inspire, or as an owner of Inspire. They argue that Mr. Lai's actions were not in total fraud of Inspire.

[60] The plaintiff submits Mr. Lai's actions were at least partially designed to benefit Inspire, and points out that Unit 100 was listed as Inspire's address in some instances. The plaintiff argues that in entering the November 2015 leases, Mr. Lai intended to name Inspire so as to preserve Inspire's ability to use the Five Units and

Unit 100 after the sale of the Trites property, at a below market rent. They point out that Mr. Lai was the sole director of Inspire, and that the company benefitted from his signing the lease.

[61] The defendant asserts that the plaintiff fails to met the evidentiary burden of the corporate identification doctrine. The defendant argues that Mr. Lai's occupation of the Five Units and Unit 100, lies outside the scope of his authority because his authority was limited to his role of holding shares within 0843. Inspire argues that it suffered alongside the plaintiff. Mr. Lai's occupation of the Five Units was in total fraud of the company because Inspire, as a shareholder of the plaintiff's company, also lost out on rental income paid out via dividends. The defendant argues that the wrongful act of Mr. Lai was in no way for the benefit of Inspire. Lastly, the defendant asserts that there is no social purpose to hold it accountable for Mr. Lai's actions, as there was no benefit to Inspire, and the plaintiff was in a better position to stop Mr. Lai's actions.

[62] The defendant points out, and I agree, that the existence of the hold back is not an agreement that any rent is owed, but rather an agreement that there is a dispute about potential amounts owed that the parties agreed to address later.

Law

[63] The corporate identification doctrine recognizes that corporations can only act through persons, and holds that the actions or knowledge of a person who controls a corporation may be legally ascribed to the corporation itself. The Court of Appeal, in *Austeville Properties Ltd. v. Josan*, 2019 BCCA 416, gave this helpful overview:

> [33] A corporation is a legal abstraction. Although a separate legal person from those who own or control its operation, it can only act through natural persons as it has no mind or body of its own. The corporate identification doctrine is a means by which the acts and mental states of natural persons may be attributed to a corporation for a particular purpose in particular circumstances. A doctrine of "judicial necessity", its principles and application are grounded in social policy: *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63 at paras. 97–104.
>
> [34] In *Canadian Dredge*, the Supreme Court of Canada dealt with issues of corporate criminal liability. The central question for determination was who

> should bear the responsibility for criminal acts committed by the directing mind of a corporation. In answering that question, the Court established the authoritative test for the corporate identification doctrine which applies in both the criminal and civil context in Canada. It held that for a wrongful act to be attributed to a corporation the wrongdoer must be a directing mind of the corporation and the wrongful act must have been done within the scope of his or her authority, namely, within the sector of corporate operation assigned to the wrongdoer. However, where the act is totally in fraud of the company or was not by design or result at least partly for the benefit of the company, the wrongdoer's act cannot be attributed to the corporation under the corporate identification doctrine: *Canadian Dredge* at p. 713: *Livent Inc*. at para. 100.
>
> [Emphasis added.]

[64] The test for corporate identification was set out in *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63, and requires two conditions to be met:

> [100] … (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation (pp. 681-82 and 712-13).

See also *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 at para. 66.

[65] In some instances, corporate identity is severed, in favor of holding directing mind(s) liable, where it is found that their actions were by design or result for their own benefit, and not that of the corporation. The distinction between acts that are "by design or result" beneficial to the directing mind(s), versus the corporation is not always clear. Corporate identity is not usually severed where the corporation benefited as a result of the acts even if the operating mind(s) benefited separately as well.

[66] In *Austeville Properties*, Ms. Nandha, one of two directing minds for the business, conspired to have someone commit arson at the corporate premises. Before her death, she stated that her reasons were to rid herself of the responsibility of managing the restaurant, and create more free time to spend with her children. She was found to have acted entirely for personal purposes, despite the possibility

that her conduct could have benefited the business. There was no evidence before the court that the lease was in fact terminated after the fire. The Court of Appeal, at para. 50, found that she had "committed the wrongful acts in question for her own personal purposes and did not design or carry them out to benefit the company, which received no proven benefit as a result of the arson." The Court of Appeal upheld the lower court's decision to sever corporate identification. The directing mind's actions and energies were deemed to be in such contradiction to the corporation that her actions and intent were attributed to her alone, and not the corporate entity.

[67] The corporate identification doctrine is not a stand-alone principle. Rather, it is a means by which acts may be attributed to a corporation for a particular purpose or defence. Courts have directed that it should be analyzed independently for separate defences: *Deloitte* at para. 97. The Supreme Court of Canada in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd*., 2019 SCC 30, observed that courts maintain the discretion to refrain from applying the doctrine where they find it would not be in the public interest to do so, despite the criteria in *Canadian Dredge* being met.

Analysis

[68] The corporate identification doctrine applies where: (1) the action was taken by the directing mind of the corporation; (2) was within the scope of their authority and carrying out assigned functions within the corporation; (3) was not totally in fraud of the corporation; and, (4) was by design, or result, partly for the benefit of the corporation.

[69] I find that the application of the corporate identification doctrine breaks down on the questions of whether the actions taken by Mr. Lai in occupying the units were by design or result partly for the benefit of Inspire.

[70] I find this situation to be similar to that in *Austeville Properties*. Mr. Lai's occupation of the units did not provide a benefit to Inspire, either by design or result. Inspire, as a shareholder of 0843, would have received payments from 0843 for the

rental income earned if Mr. Lai did not occupy the Five Units. Inspire itself lost money as a result of Mr. Lai's occupation of the units. On the evidence presented, I cannot find that the leases were of benefit to Inspire. Mr. Lai was occupying the units, Inspire did not benefit from that occupation. I find that the act of occupation cannot be attributed to Inspire under the corporate identification doctrine.

VICARIOUS LIABILITY

[71] The plaintiff argued that Mr. Lai owed a fiduciary duty to 0843 (per s. 142(1)(a) of the *Business Corporations Act*, S.B.C. 2022, c. 57). I accept that Mr. Lai owed a fiduciary duty to 0843. This proposition appeared to be uncontroversial between the parties, and was one of the facts pleaded by Mr. Xie, and accepted by the court, in *Xie v. Lai*, 2022 BCSC 495, as outlined below.

[72] The 2022 BCSC 495 judgment at para. 22 (j) states that the following facts, as pleaded in the plaintiff's ANOCC are deemed admitted by Mr. Lai:

> At all material times, Mr. Lai was a director of 0843003 B.C. Ltd […] and as such owed a fiduciary obligation to those companies, including an obligation not to misappropriate funds belonging to the plaintiffs for himself, or any other person.

[73] I accept that Mr. Lai breached his fiduciary duties to 0843, through acts such as: his failure to disclose the use of Five Units; false representations that they were vacant; failure to pay rent received from third parties or owing to 0843 and Holdco with respect to the use of the Five Units; and in occupying and using Unit 100 for his personal benefit.

Positions of the Parties

[74] The plaintiff argues that it is appropriate to impose vicarious liability on Inspire for Mr. Lai's breach. They argue that Inspire nominated Mr. Lai to act as director of 0843, and that Mr. Lai was only in a position to breach his fiduciary duty to 0843 as a result of being appointed as a director by Inspire. They argue that Inspire ought therefore to be found vicariously liable for Mr. Lai's actions, and that Inspire caused

the loss though the appointment and subsequent lack of oversight of Mr. Lai, and should therefore bear the cost of their actions rather than 0843.

[75] The plaintiff relies on *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at paras. 105 and 107, to argue that the vicarious liability principle applies where the wrong is so connected with the business that the party alleged to be vicariously liable "introduced the risk of the wrong that befell" the injured party. They argue it applies when a corporation cannot "disentangle" the wrongful act from its business and hold that the tortfeasor was "on a frolic of [their] own."

[76] The defendant points out that *Strother* considered the *Partnership Act,* R.S.B.C. 1996, c. 348. They argue that *Strother* should not be read as to impose vicarious liability whenever a fiduciary duty is breached.

[77] The plaintiff argues that the defendant, having appointed or otherwise left Mr. Lai to represent Inspire and act as director of 0843, showed an irresponsibility to the consequences of their actions, or lack of actions. The plaintiff argues that Inspire should be vicariously liable for damage that Mr. Lai caused to the plaintiff in the course of his free reign in representing himself as Inspire and as director of 0843, absent any control or oversight by Inspire which placed him in, or allowed him to continue within, that position of power.

[78] The plaintiff alleges that Mr. Lai was left to represent Inspire and act as director of 0843, and was essentially unmonitored in that capacity. The plaintiff argues, in effect, that Inspire should bear the consequences of the risk and obligation of deterrence for Mr. Lai's behaviour (per *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 37).

[79] The defendant points out there is no legal authority for finding vicarious liability in a similar circumstance.

[80] The defendant argues that in appointing Mr. Lai as a director, they are not responsible for his activities as a property manager, and that they did not have any power to assign any tasks to Mr. Lai in his capacity as property manager. 0843

ultimately made Mr. Lai property manager. The defendant argues that there is no legal authority to hold an appointing entity responsible for the actions of a person they appoint as a director.

Law

[81] Vicarious liability describes the situation where the law holds one person responsible for the misconduct of another (the tortfeasor) because of their relationship: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* 2001 SCC 59 at para. 2. The most common category of relationship giving rise to vicarious liability is the relationship between employer and employee, although the principal-agent relationship is another category. The principal-agent relationship includes, for the purposes of vicarious liability, the relationship between a corporation and its director or directing mind: *Austeville Properties* at para. 54. The categories of relationships are not closed: *Austeville Properties* at para. 51.

[82] The Supreme Court of Canada in *Bazley*, outlined reasons for imposing vicarious liability, in the context of an employer and employee relationship, as follows:

> [41] … Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence.
>
> [Emphasis in original.]

[83] *Bazley*, at para. 37, emphasized: "The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

[84] A finding of vicarious liability flows from the questions of who created the risk, and whether there is a significant connection between the creation or enhancement of a risk, and the wrong that accrued. Vicarious liability can flow even if the wrong is unrelated to the employer's (or principal's) desires as per *Bazley* and *Strother*.

[85] In *Austeville Properties* at para. 61, the Court of Appeal strongly cautioned against imposing vicarious liability for an agent's unauthorized, unforeseeable and illegal acts from which the principal received no benefit.

[86] Categories of situations where vicarious liability may be found are not closed, but rather depend on a contextual analysis of "the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions": *Bazley* at para. 36. Vicarious liability has been found in the employer and employee context, the principal and agent context, and the employer and independent contractor context (in exceptional circumstances as per *Sagaz Industries* at para. 57). Vicarious liability is also established by statute in other contexts, such as the partnership context in *Strother,* or, where the owner of a motor vehicle loans their vehicle to a third party.

[87] In *Harris Victoria Chrysler Dodge Jeep Ram Ltd. v. Ward,* 2023 BCCA 478, the Court of Appeal considered whether an owner could be found vicariously responsible for loaning a vehicle to someone who drove it unsafely and caused injury to a third party. The case involved an interpretation of s. 86(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, which holds an owner is liable for the actions of a person they loan their vehicle to. The Court of Appeal considered that the purpose of the vicarious liability provision was to avoid an owner from escaping liability by giving conditional consents when loaning out a vehicle. At para. 78, the Court quoted *Morrison v. Cormier Vegetation Control Ltd.,* [1997] 3 W.W.R. 153, 1996 CanLII 2627 (B.C.C.A.) for the concept as follows:

> It is apparent the legislature has imposed a heavy burden on those who have within their power the control of motor vehicles. In the language of the old authorities the mischief aimed at is the perceived irresponsibility of owners in their control of the possession of motor vehicles. The reason for legislative intervention may be traced, in part at least, to the appalling consequences of reckless use of motor vehicles. Irresponsibility on the part of those who may deny or confer possession of motor vehicles may be seen as he reason for the legislative initiative. The legislation in question must be regarded as remedial. [At para. 24; emphasis added.]

[88] Given that the *Harris Victoria Chrysler* case interprets a statutory provision imposing vicarious liability, it is of limited utility here. However, it outlines a possibility for how the concept of responsibility for a principle's appointment of an agent may be tracked in the concept of vicarious liability. It is a similar approach that the plaintiff asks this Court to take here.

[89] The plaintiff argued that the concept of vicarious liability found in the realm of partnerships and employee/employer relationships, should apply where a parent company appoints a director. No authority was cited where a parent company was held vicariously liable for the actions of their appointee as director of a corporation.

Analysis

[90] Mr. Lai was an agent for Inspire in his capacity as director of Inspire, and for 0843 in his capacity as director for 0843. He was also an agent for 0843 when acting in his capacity as property manager for the Trites property. The tort in question involves Mr. Lai's breaches of fiduciary duty to 0843 in his capacity as director for 0843.

[91] Mr. Lai was put in a position to breach his fiduciary duty to 0843 through being appointed as a director of 0843 by Inspire pursuant to the Shareholders' Agreement between Inspire and IAG. When this agreement was made, Mr. Lai was the sole shareholder of Inspire. He was the only individual through whom Inspire acted, or could act, for the relevant time, as Inspire's sole director. He had sole discretion to put himself in a position of power with respect to 0843 as its director.

[92] When Mr. Lai was no longer the sole shareholder, no attempt was made to notify other parties about the change, or to check or monitor his exercise of powers in the capacity of his appointment.

[93] I accept that third parties dealing with Mr. Lai would be entitled to rely on Mr. Lai's authority to act on Inspire's behalf as its sole director. Inspire had no business other than its involvement in the Trites property.

[94] In assessing this matter it is necessary to consider the policy purposes underlying the imposition of vicarious liability, namely, the question of who is fairly charged with the management and minimization of risk. The plaintiff claims that Inspire should bear the responsibility of Mr. Lai's actions because Inspire's other shareholder did not take any actions to prevent wrongdoing. The plaintiff argues that IAG took the following steps to prevent 0843's losses: When Mr. Cheung learned that the Five Units may be used as a marijuana grow operation, he hired a private investigator and replaced Mr. Lai as property manager.

[95] The plaintiff argues that Mr. Xie took no steps to limit Mr. Lai's authority as director of Inspire, or any steps to manage Inspire. Mr. Xie left the governance of Inspire, and everything related to 0843, to Mr. Lai. The plaintiff further argues that Mr. Xie did not monitor Inspire's activities or appear to have any interest in the business at the Property, which allowed Mr. Lai to act to deprive 0843 of the use of units at the Property.

[96] I find it particularly compelling that Mr. Lai was appointed as a director of 0843 by Inspire at a time when he was also the sole director and sole shareholder of Inspire; that Inspire's only business was the Trites property, and that IAG took preventative steps whereas Inspire did not.

[97] On the whole, I am satisfied that Inspire was the appropriate party to take steps to mitigate the risk of Mr. Lai's wrongdoing. I agree with the plaintiff's submissions that the lack of oversight or steps taken by Inspire were inadequate to address the risk of Mr. Lai's wrongdoing, which unfortunately materialized.

[98] In my view the policy goals of fair compensation and deterrence that underlie the doctrine of vicarious liability have been met in this case.

[99] I nonetheless find that legal authority indicates that vicarious liability is simply unavailable to impose on a company for the fiduciary breaches of their nominee as director for another company. I have not been pointed to any cases in which vicarious liability has been imposed, aside from the employer-employee context, the

principal-agent context, the employer-independent contractor context (in exceptional circumstances), and some other contexts based in statute. Our Court of Appeal's direction in *Austeville Properties* indicated that it would be an unwarranted extension of the doctrine of vicarious liability to impose it for an agent's unauthorized, unforeseeable and illegal acts from which the principal received no benefit. That concern with the unwarranted extension of the doctrine is equally applicable to the present case.

CONCLUSION

[100] I find Mr. Lai occupied the Five Units and Unit 100 at the relevant times. The plaintiff did not pursue arguments about the personal liability of Mr. Lai. I find it would not be appropriate to quantify the damages as against Mr. Lai for his occupation. I dismiss the plaintiff's application to have Mr. Lai's occupation apply to Inspire under the doctrine of corporate identification. I dismiss the plaintiff's application to find Inspire vicariously liable for Mr. Lai's breach of his fiduciary duty to 0843.

[101] If parties cannot agree on costs, they are free to apply to make further argument before me within 60 days of this decision.

"A. Walkem J."