IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shen v. Gou,*
2023 BCSC 1735

Date: 20231005
Docket: S2012646
Registry: Vancouver

Between:

Jian Ming Shen a.k.a. Jianming Shen and Jiu Yuan Li a.k.a. Jiuyuan Li

Plaintiffs

And

Hong Lin Gou a.k.a. Honglin Gou a.k.a. Anna Gou

Defendant

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiffs:	C. Wong
Counsel for the Defendant:	A. Cao
Place and Date of Trial:	Vancouver, B.C. October 31, November 1-4, 2022, and March 6-8, 2023
Place and Date of Judgment:	Vancouver, B.C. October 5, 2023

Table of Contents

Introduction

[1] The parties invested in a real estate development at 4223 Hastings Street, Burnaby, British Columbia (the "Carleton project"). The Carleton project was to be constructed by a third party, Censorio Ltd. ("Censorio"), which was owned or controlled by a Peter Censorio. The parties incorporated a company, Shares Adventure Ltd. ("SAL") which loaned $1.5 million to Censorio in two installments. The loan plus interest of 18% (12% per annum) was to be repaid in 18 months. Censorio failed to pay the amounts owing and was eventually put into receivership.

[2] The plaintiffs, Mr. Shen and Mr. Li, allege that the defendant guaranteed the obligations of Censorio to repay the principal amount of the loan plus interest and seek payment of these amounts, plus others, from the defendant. In particular, the plaintiffs rely on a written guarantee signed by the defendant on May 13, 2017 (the "Guarantee"), two days before the second installment was due. They also allege the defendant made various fraudulent misrepresentations and breached her fiduciary duties. The nature and scope of the fraudulent misrepresentations allegedly made and fiduciary duties allegedly owed shifted dramatically during the trial. By the conclusion of submissions only one misrepresentation was alleged and the fiduciary duty allegedly owed and breached was an *ad hoc* fiduciary duty based on an alleged vulnerability of the plaintiffs.

[3] The defendant denies that she guaranteed the obligations of Censorio, although she admits to signing the Guarantee on May 13, 2017. She says the Guarantee was given under duress, is not supported by valuable consideration and, in any event, that the plaintiffs do not have standing to sue on the Guarantee. The defendant also denies any fraudulent misrepresentations were made and denies the existence of an *ad hoc* fiduciary duty owed to the plaintiffs

[4] For the reasons that follow, the action by the plaintiffs is dismissed. The plaintiffs do not have standing to sue on the Guarantee and, in addition, it is invalid and unenforceable as having been made under duress and not supported by

valuable consideration. Additionally, the defendant made no fraudulent misrepresentations and did not owe an *ad hoc* fiduciary duty to the plaintiffs.

Credibility

[5] The only witnesses at the trial were the parties and they gave significantly different versions of various events. The plaintiffs say I should not believe the defendant's version of events and the defendant says I should not believe the plaintiffs' versions events. Accordingly, an assessment of the credibility and reliability of the witnesses is essential.

[6] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, where it was stated that the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[7] A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R.(D.)*, [1996] 2 S.C.R. 291 at para. 93, 1996 CanLII 207 (SCC).

[8] I have carefully considered the evidence of all of the witnesses. In doing so, I have taken into account that Mr. Shen and Mr. Li testified through interpreters and

that this can mask demeanour. I have also taken into account that Ms. Gou, who testified without an interpreter, has an adequate but not a complete grasp of the English language.

[9] Ms. Gou generally had a better recollection of events and her evidence was much more detailed than that of either Mr. Shen or Mr. Li. Her evidence, for the most part, is corroborated by the documents, and has more of the ring of truth, which is to say it was more consistent "with the probabilities affecting the case as a whole and shown to be in existence at the time". She also testified in a clear and straightforward manner and was unimpeached in cross-examination. I find Ms. Gou to generally be a credible and reliable witness.

[10] In contrast, I find Mr. Li and, especially, Mr. Shen to be less credible and reliable. Their evidence was at crucial times inconsistent, both internally and externally. They both displayed convenient lapses of memory or provided a lack of detail. At times they made outrageous allegations. In general, they both seemed unable to resist the urge to exaggerate or embellish their evidence.

[11] My more specific reasons for disbelieving Mr. Shen include:

a) He testified that Ms. Gou told him the Carleton project had no risk. This evidence, is inconsistent with the evidence of both Ms. Gou and Mr. Li. Mr. Li's evidence was that Ms. Gou told them the risk was very low, not that it was non-existent. This evidence is also unbelievable, given that Mr. Shen was a reasonably sophisticated business person.

b) He testified at one point that Ms. Gou guaranteed the project from the outset. However, he later contradicted himself in cross-examination saying that Ms. Gou gave the Guarantee only after they threatened to stop the project. Additionally, his evidence that Ms. Gou guaranteed the project from the outset is inconsistent with the signed agreement entitled "Sharing of the Profits and Risks of Investment Cooperation in Hastings and Carleton project", which

sets out that the parties will share equally in the profits and assume equally the risks and losses;

c) He repeatedly testified that Ms. Gou did not give him and Mr. Li accurate information concerning the Carleton project, however, he provided few details and there are multiple WeChat messages and emails that show Ms. Gou did keep the plaintiffs fully advised. Moreover, Mr. Li testified that Ms. Gou normally conveyed information received from Mr. Censorio;

d) His evidence of how the signed guarantee came to be, which I will address in more detail below, makes no sense, is inconsistent with parts of the evidence of Mr. Li, is not consistent with contemporaneous emails and texts, and is simply unbelievable;

e) During cross-examination, he testified that Ms. Gou had 100% say in the Carleton project and was the CEO. Both statements are patently false; and

f) During cross-examination, when asked if he received a May 12, 2017 email from Ms. Gou, in which she advised the building permit for the project had been issued and attached same to her email, he replied he was not sure. This evidence was evasive and highly improbable as he had testified to being very concerned about the delay in the project at that point in time.

[12] My more specific reasons for disbelieving Mr. Li include:

a) He was evasive about meeting with Peter Censorio prior to deciding to invest in the Carleton project;

b) In relation to the document entitled “Sharing of the Profits and Risks of Investment Cooperation in Hastings and Carleton project”, which merely sets out that the parties will share equally in the profits and losses, he testified in-chief that this implied that Ms. Gou was to guarantee the profits. This evidence was unbelievable and tailored and was inconsistent with his

evidence in cross-examination where he acknowledged that the guarantee arose later; and

c) During his examination in chief he testified that prior to the advance of the second installment, Ms. Gou came up with the idea of providing a guarantee. This is inconsistent with his evidence in cross-examination where he testified that he had not asked Ms. Gou for a guarantee and did not know she was going to prepare one.

[13] Accordingly, I generally prefer the evidence of Ms. Gou over that of Mr. Shen and Mr. Li.

Facts

[14] The parties are self-described business persons, investors or entrepreneurs. The nature and extent of their businesses, investments and experiences was not addressed in detail in the evidence but it is apparent that they all have a reasonable level of sophistication and expertise in investing. The defendant, Ms. Gou, has been a realtor since 2007 and also has a history of investing in various projects. The plaintiff, Mr. Shen is a long-time business person with a 20-year history of investments in various businesses including residential and commercial real estate projects. The plaintiff, Mr. Li, gave the least evidence of his background and expertise but he is described in the notice of civil claim as a businessman and conveyed the impression of having knowledge and experience.

1029 Coffee Shop

[15] The parties met each other through an entity known as 1029 Coffee Shop Ltd. (“1029 Coffee Shop”). Although 1029 Coffee Shop is an incorporated entity, it is clear from the evidence of all parties that it is essentially a networking group of approximately 100 individuals who shared information about potential investment projects and who met periodically at its physical location. Mr. Shen testified that the shareholders of 1029 Coffee Shop meet regularly to discuss and potentially share in investment projects. Mr. Li, described 1029 Coffee Shop as a commercial club, a

platform where members could introduce projects to each other. Ms. Gou described it as a group of “elite entrepreneurs” that was established in 2014.

[16] Mr. Li, was asked during his examination in chief whether the members of 1029 Coffee Shop were expected to deal with each other in good faith. He responded “yes”. I give this evidence no weight as it was a leading question and Mr. Li did not elaborate on what he meant by this.

December 2016 Presentation

[17] It is common ground that a presentation was made to 1029 Coffee Shop members in December 2016 by an entity known as Pacific Rim and that the presenters included Ms. Gou and Peter Censorio. All of the witnesses testified to this presentation but there is a minor dispute in the evidence as to whether it was about, or referenced, the Carleton project. Mr. Shen, at one point, testified that the presentation was about the Carleton project. I reject this evidence and find that the presentation was not about, and did not reference, the Carleton project. My reasons are:

a) First, Mr. Shen contradicted himself when he also testified that it was in February or March of 2017 that he first learned of the Carleton project from Ms. Gou;

b) Second, Mr. Li also testified about the presentation and did not say the Carleton project was mentioned. In fact, he testified that he first learned of the Carleton project from Ms. Gou in February 2017;

c) Third, Ms. Gou gave relatively detailed evidence about the presentation and participants. She testified that it was about investing in real estate projects generally and about several specific projects in various locations but not the Carleton project. In fact, she testified she did not learn of the Carleton project until February 2017; and

d) Fourth, the power-point slides of the presentation were introduced into evidence and they do not include any reference to the Carleton project.

Introduction to the Carlton project

[18] Mr. Shen and Mr. Li both testified that they were introduced to the Carleton project by Ms. Gou in February, or possibly March 2017. Mr. Shen testified that Ms. Gou told him and Mr. Li that she had a very good project. He testified she said the project was so good that there was no risk and that if the project was successful, part of the profits could be donated to 1029 Coffee Shop. He also testified she told them that $1.5 million was needed for the project, that the term of the loan would be 1.5 years and that the interest rate would be 12%. He testified that they eventually decided to invest in the project and raised some of the funds required from 1029 Coffee Shop members. In cross-examination he acknowledged that before making a decision to invest, they had a meeting with Peter Censorio. He did not elaborate on that meeting.

[19] Mr. Li similarly testified that he first learned of the Carleton project from Ms. Gou in February 2017. He testified that Ms. Gou told them it was a very good project and the risk was “very low”. He testified that three of them went to have a look at the project. In cross-examination, it was put to him that before making any decision to invest in the project that the three of them had a meeting with Peter Censorio. After a long delay, he replied that he did not recall doing so. It was then put to him that he had met Peter Censorio and he replied that they did meet him once at his office but he could not recall when. He also did not recall Peter Censorio telling them about the project.

[20] Ms. Gou testified that she first learned of the Carleton project from Peter Censorio in February or March of 2017. She testified that he showed her some *pro forma* statements and took her to the project site. She said he told her the project was ready to go but was awaiting approvals. She testified that, after the meeting with Peter Censorio, she told Mr. Li and Mr. Shen about the project. She said she did this because they had approached her after the December 2016 presentation at 1029

Coffee Shop and asked her to let them know of potential investment projects. She testified that she told them she thought it was a good project and that it would take around two years to complete, information she had received from Mr. Censorio. She said that they were interested but wanted to know more. She testified that she arranged a meeting between the three of them and Peter Censorio at the end of February 2017. She testified that, at that meeting, Mr. Censorio gave them a presentation about the project which she translated for Mr. Li and Mr. Shen. She testified that Peter Censorio told them in the meeting that the project was a bit delayed but the permit would be coming soon and the project was otherwise ready to go. She said he told them that he was looking for a loan of $1.5 million with interest at 12%. He also mentioned an assignment that would provide some protection and offered some profit sharing at the completion of the project. She testified that after the meeting the three of them attended at the project site, although there was not much to see.

[21] Ms. Gou further testified that, after the meeting with Peter and the viewing of the site, the three of them had discussions on the phone and a meeting at her house on March 1, 2017. She testified that they discussed incorporating a company to be the vehicle for the investment in the Carleton project and discussed that the required funds could be raised from the members of 1029 Coffee Shop. She testified that on March 2, 2017 a message was posted on the 1029 Coffee Shop WeChat group by Mr. Li introducing the Carleton project and soliciting participation in the investment from 1029 Coffee Shop members. The WeChat message set out that $1.5 million was needed for the Carleton project, that the financing term was 18 months and that the net return would be 18%. Investments in units of $50,000 were sought from the 1029 Coffee Shop members.

[22] It is noteworthy that the March 2, 2017, WeChat message did not specify that the project was risk free and did not specify that the investments were in any way being guaranteed. To the contrary, the only security referenced in the WeChat message was that there would be “a property lock-in contract with a total value of $2 million to ensure everyone’s investment interest”.

[23] As is apparent from the foregoing, there are discrepancies in the evidence of the witnesses. I prefer the evidence of Ms. Gou over that of Mr. Shen and Mr. Li and accept her version of events as accurate. Ms. Gou gave a much more detailed version of the events up to March 2, 2017 and she was not in the least challenged on her version of events in cross-examination. Moreover, her version of events has the ring of truth. In particular, I accept and find as facts that:

a) Ms. Gou was told about the Carleton project by Mr. Censorio in February 2017;

b) Ms. Gou advised Mr. Li and Mr. Shen of the project because they had previously asked her to advise them of potential investments;

c) The three of them met with Peter Censorio in February 2017 who provided them with details of the project, including that the project was a bit delayed and a building permit had not yet been obtained. Peter Censorio also advised them that he was looking for a loan of $1.5 million at 12% for 18 months;

d) The three of them attended to view the construction site after the meeting with Peter Censorio;

e) Following the meeting with Peter Censorio and the viewing of the project site, the three of them had telephone discussions and a meeting at Ms. Gou's house where they decided to incorporate a company to use as the vehicle for the investment and to promote the project to 1029 Coffee Shop members; and

f) On March 2, 2017, Mr. Li posted a message on the 1029 Coffee Shop WeChat group soliciting funds for the Carleton project from members.

[24] I do not accept the evidence of Mr. Shen that Ms. Gou said there was "no risk" to the project. Nor do I accept the evidence of Mr. Li that she said the risk was very low. This is not reflected in any of the contemporaneous documents and is inconsistent with later documents, which I will address. Additionally, the parties are

all somewhat sophisticated investors with knowledge and experience in real estate developments. They may have wanted a project with minimal risk but they all knew there was some risk to such an investment.

Incorporation of SAL and Profit/Loss Sharing

[25] On March 3, 2017, the parties caused SAL to be incorporated, with the parties being the three named directors of the company. The shares of SAL are owned by three corporations: 100 shares are held by Gou (Group) Capital Ventures Inc. (“Gou Group”); 100 shares are held by Racom International Enterprise Ltd. (“Racom”); and 100 shares are held by 1109578 BC Ltd. (“1109”). These companies are, in turn, owned and controlled by the parties: the defendant is the director and shareholder of Gou Group; Mr. Li is the is the director and shareholder of Racom; and, Mr. Shen is the director and shareholder of 1109.

[26] On March 10, 2017, the parties signed an agreement entitled “Promise Regarding Sharing the Profits and Risks of Investment Cooperation in Hastings & Carleton project” (the “Profit and Loss Sharing Agreement”). The agreed English translation is as follows:

> The financing of 1.5 million Canadian dollars for the Hastings & Carleton Project located in North Burnaby is jointly completed through the cooperation of Jianming Shen, Honglln Gou, and Jiuyuan Li, three shareholders of SHARES ADVENTURE LTD who have equal shares and rights in the company.
>
> Now the three shareholders jointly promise that they shall share the profits generated by the project equally and shall assume the risks and losses of the project equally.
>
> It’s hereby promised.

[27] I pause to note that both plaintiffs suggested in their evidence that, by this date, Ms. Gou was somehow acting as a guarantor of the investment. During his examination in chief, Mr. Li was asked why the Profit and Loss Sharing Agreement was prepared. He replied that this document was a way to imply that Ms. Gou guaranteed the profits of the project. During the examination in chief of Mr. Shen, he was asked why SAL was incorporated and what it did. He replied that it was

incorporated for the Carleton project, that it signed agreements with Censorio and that it was used to raise funds from 1029 Coffee Shop members. He additionally replied that Ms. Gou “guaranteed that”.

[28] I entirely reject any suggestion that Ms. Gou was somehow acting as a guarantor in or about March 2017. The Profit and Loss Sharing Agreement is wholly inconsistent with such a guarantee. It expressly provides that the profits, risks and losses are to be shared equally by the parties.

[29] I further note that the Profit and Loss Sharing Agreement is inconsistent with the project having no risk, as Mr. Shen testified. To the contrary, this document contemplates the existence of risk and the possibility of a loss and specifies that any such loss is to be shared equally.

The Funding of the Project

[30] Each of the parties, through corporations controlled by them, invested $100,000 each. The parties intended to raise the balance of the funds needed from 1029 Coffee Shop members but, by the conclusion of the fundraising, they were still $50,000 short. This shortfall was covered by Mr. Li who personally invested an additional $50,000. Thus:

a) Ms. Gou contributed $100,000 through her corporation;

b) Mr. Shen contributed $100,000 through his corporation; and

c) Mr. Li contributed $100,000 through his corporation and $50,000 personally.

[31] All of the funds, whether from the parties or the 1029 Coffee Shop investors, were deposited into a SAL bank account.

[32] I pause to note that there are no agreements in evidence between SAL and the various 1029 Coffee Shop investors setting out the terms and conditions upon which the individual investments were made. This is surprising given that Mr. Shen testified that he believed there were agreements.

The Assignment and Promissory Note

[33] On March 1, 2017, Censorio purportedly assigned three units in the Carleton project to SAL, as a form of security for the $1.5 million to be advanced. This was effected through a document entitled “Assignment of Units and Acknowledgement Thereof” (the “Assignment”). By this document, Censorio agreed to assign units 203, 303 and 403 to SAL or its nominee. The terms, included:

a) Censorio would be released from the assignment upon payment of the amounts outstanding to SAL;

b) If the amounts outstanding were not paid within 60 days after repayment of a first mortgagee, the titles to the assigned units were to be transferred to SAL or its nominee; and

c) The transfers of titles would be in lieu of monies owed to SAL.

[34] It is to be noted that the copy of the Assignment entered into evidence was signed by Censorio but not by SAL. Further, the Assignment referenced a schedule that purportedly outlined the amounts owing and a repayment schedule but this schedule was not included.

[35] On March 22, 2017, a promissory note in the amount of $1.5 million was executed by Peter Censorio on behalf of Censorio and as guarantor on his own behalf. The promissory note identified Censorio as the borrower, SAL as the Lender, and Peter Censorio as the guarantor. The terms of the promissory note included:

a) The Lender agreed to loan $1.5 million to Censorio in two installments, with the first installment of $700,000 to be advanced on the date of the signing of the promissory note and the second installment of $800,000 to be made on or before May 15, 2017;

b) Interest on the loan was at 18% (i.e. 12% per annum);

c) The borrower was to pay the Lender a one-time fee of $30,000 within three days of the first advance;

d) The borrower warranted and represented that the funds advanced would be used on the Carleton project; and

e) The principal amount of the loan plus interest and "Lender's profit share" was to be paid 18 months from the first advance.

[36] Clause 8 of the promissory note addressed events of default, as follows:

> 8. The following are events of default ("Events of Default") if the Borrower:
>
> (a) fails to pay any monies due to the Lender under this Note;
>
> (b) makes false or materially inaccurate representation to the Lender;
>
> (c) fails to meet, within seven calendar (7) days from the date specified therein, one or more major milestone set out in Schedule A of this Note for the development project for 28-units condominium at 4223 Hastings Street, Burnaby (the "Project") without providing a valid reason to the Lender's satisfaction for such delay:
>
> (d) commits a material breach of the terms of the Assignment Agreement (defined below);
>
> (e) becomes insolvent or bankrupt or commits an act of bankruptcy as defined under the Bankruptcy and Insolvency Act of Canada, or there is a bankruptcy petition, judgment, attachment or execution against the Borrower, or any of the Borrower's assets;
>
> (f) voluntarily or involuntarily suspends business operations and/or the Project; or
>
> (g) there occurs in the Lender's determination, any material adverse change in the assets, business or financial condition of the Borrower.
>
> Upon the occurrence of an Event of Default, at the option of the Lender, the whole of the Principal owing, accrued Interest and any applicable penalties or charges shalt immediately become due and payable.

[37] Schedule A to the promissory note set out the milestones referenced in clause 8(c):

Milestone Event	**Completion Date**
Roofing/Waterproofing	November 28, 2017
All Structural Work	February 7, 2018
All Electrical and Mechanical Works	March 18, 2018
Final Paint	March 19, 2018

[38] The plaintiffs gave relatively little evidence about the promissory note and Assignment. In contrast, Ms. Gou gave detailed evidence of these documents. She testified that the Assignment was prepared by Peter Censorio and delivered on March 1, 2017. She then forwarded the document to the plaintiffs and to a lawyer she retained, Mr. Tsao. She testified that Mr. Tsao was the lawyer for 1029 Coffee Shop and had been referred to her by the plaintiffs. She testified that there was a meeting between the parties and Mr. Tsao, who spoke Mandarin, where Mr. Tsao explained to them that the three units being assigned to SAL under the Assignment were not titled and that there was a risk. He advised that they obtain a promissory note to further secure the amount of the loan. She testified that he prepared the promissory note with the personal guarantee of Peter Censorio to provide security for the loan amount. She additionally identified emails from and to Mr. Tsao where he addressed his concerns with the Assignment and provided drafts of the promissory note.

[39] I note that the involvement and advice of the lawyer and the decision to secure the loan with a promissory note and personal guarantee of Peter Censorio all indicate that the parties knew and were aware that there was a risk to the investment, contrary to the evidence of the plaintiffs that there was no risk or low risk.

[40] Although the promissory note was not finalized and signed until March 22, 2017, the first advance of $700,000 was made by SAL to Censorio on March 13, 2017.

[41] The second payment under the promissory note of $800,000 was to be made on May 15, 2017.

The Guarantee

[42] On May 13, 2017, two days before the second advance under the promissory note was due, Ms. Gou signed the Guarantee in issue. The agreed English translation of the Guarantee is as follows:

> Guarantee
>
> In relation to the Carleton Project investment, Honglin Gou, a shareholder of SAL, personally guarantees the $1.5 million (One million five hundred thousand dollars) investment to be performed in accordance with the contract provisions. Repayments to 1029 investors will be made by installments pursuant to the contract provisions; in the event of a default, interest will be paid at double the rate, that is, 18 x 2 = 36%, on any past due amounts (referring to the time period during which any payment remains past due).

[43] The circumstances that led to the signing of this document are hotly disputed. Mr. Shen and Mr. Li testified that the project was behind schedule, which caused them to want to withhold the second payment. They said that when their concerns were raised with Ms. Gou she offered to provide a guarantee, without being asked or requested. Ms. Gou testified to an entirely different sequence of events.

[44] Mr. Shen testified that, prior to the payment of the second installment, he and Mr. Li attended at the construction site and saw no progress had been made. He testified that he and Mr. Li decided to not make the second advance because it was obvious the project would not complete on time. He testified that they discussed their concerns with Ms. Gou and she told them that there was no risk to the project and she would guarantee it. He further testified that on the day the second advance was due, Ms. Gou said that they should go to the bank and get the draft and that she would sign a guarantee there. He testified that when they arrived at the bank Ms. Gou wrote out the Guarantee and signed it. He also identified a WeChat message sent by Ms. Gou on May 13, 2017 to Mr. Li. In that message Ms. Gou wrote:

> Issued together with Old Shen this afternoon an $800K cheque from SAL to the developer (investment funds for Phase II per contract provisions); below is my personal guarantee. Thanks to Old Shen for his help in resolving the issue in time. Thank you all.

[45] The message includes a picture of the Guarantee in the original Mandarin.

[46] In cross-examination, Mr. Shen denied that he asked Ms. Gou for the Guarantee and denied that he dictated the contents of the document. He agreed, however, that he retained the original copy of the Guarantee.

[47] Mr. Li testified that on May 5, 2017, he and Mr. Shen attended at the construction site. He testified that the progress observed at the site did not match the schedule they had been provided with and they felt that the project would not complete on time. He thought the project was delayed by two months. He testified he and Mr. Shen did not want to continue with the project without a solution to this problem. He testified that he and Mr. Shen raised their concerns with Ms. Gou. He said Ms. Gou came up with the idea of providing a guarantee.

[48] In cross-examination, Mr. Li was taken to a group chat exchange between himself, Mr. Shen and Ms. Gou. In that exchange, he wrote on May 6, 2017 “Are you two’s bank drafts ready?”. He acknowledged that as of May 6, SAL was prepared to make the second advance. I note that this was after he and Mr. Shen had attended at the construction site. He further testified in cross-examination that he was not present when the Guarantee was signed and that he did not ask Ms. Gou to prepare the Guarantee. Importantly, on cross-examination, and in contradiction of his evidence in-chief, he testified that before May 13, 2017 he did not know she was going to prepare the Guarantee.

[49] Ms. Gou’s evidence differed dramatically from the plaintiffs, especially Mr. Shen.

[50] Ms. Gou testified that Mr. Shen and Mr. Li became concerned about the progress of construction at the site. She testified that, as a result, she wrote an email to Peter Censorio on May 8, 2017, advising him of the concerns and requesting an update on the progress. Mr. Censorio responded the same day advising of the work that had been done on the site and that they were still awaiting the final permits. He advised he expected to get the excavation permit within a few days. Ms. Gou testified that she provided this information to Mr. Shen and Mr. Li and they had no follow-up questions.

[51] In relation to the Guarantee, Ms. Gou testified that on May 13, 2017 she got a call from Mr. Shen asking her to meet him at the bank to obtain the bank draft for the second installment. As she was in a meeting with a client, she asked him if he and

Mr. Li could attend at the bank. He replied that Mr. Li was out of the country. She then attended at the bank and they obtained the bank draft. Once the draft was obtained, she asked Mr. Shen if he could drop it off at Censorio. He replied that he could not. She then asked him for the draft so she could take it to Censorio. She testified that he refused to give it to her. She testified that he told her he would only give her the bank draft if she provided her personal guarantee. She testified that they argued outside the bank for about 30 minutes. She testified that she was very upset and angry with Mr. Shen but eventually agreed to sign a guarantee because she did want SAL to be in breach of the promissory note. She further testified that she wrote down what Mr. Shen told her and then signed the Guarantee. She took a picture of the document she signed and gave the original to Mr. Shen. She said that this was the first time she had been asked to provide a guarantee.

[52] Ms. Gou further testified that Mr. Shen also asked her to post the Guarantee on the SAL WeChat group. She did as requested and identified her WeChat message sent on May 13, 2017. She testified that she sent the message to preserve the relationship and to save face for everyone. She said that although she felt very hurt, she said good things in the email. She testified that this was something Chinese people would understand, suggesting that it was cultural and that I might not have a proper understanding of her motivations.

[53] In cross-examination, Ms. Gou agreed that she signed the Guarantee but stated that she was forced to do so. When asked how she was forced, she replied that if she did not sign she could not make SAL’s second installment payment and it would have been in breach of contract. When asked if she understood it to be a personal guarantee, she replied she understood it to be a personal guarantee from her to SAL, as a director of SAL

[54] Although it is clear on the evidence that, by May 5, 2017, the project was delayed, as the permits had not yet been received, I do not accept the evidence of Mr. Shen and Mr. Li that the project was significantly behind the schedule or any implication from their evidence that SAL was justified in withholding the second

advance. They attended at the site on May 5, 2017. The first milestone in the schedule for the project attached to the promissory note required that the Roofing/Waterproofing be completed by November 28, 2017. This was more than five months in the future. There is no proper evidence before me suggesting that, as of early May, Censorio could not meet this milestone. Mr. Shen and Mr. Li do not have any particular expertise in construction and neither of them were in a position to draw any reasonable conclusions about the extent of the delay in the construction, or how that would impact the milestones in the promissory note.

[55] More significantly, I do not accept the evidence of Mr. Shen and Mr. Li about the genesis of the Guarantee. My reasons are threefold:

a) First, both Mr. Shen and Mr. Li testified that they determined they would not proceed with the second advance because of the delay. Ms. Gou agreed the plaintiffs were concerned about delay and she detailed the steps taken to obtain information about the delay. The contemporaneous documents, namely the WeChat messages of May 5 and 6, 2017 and the emails to and from Peter Censorio, support Ms. Gou's version of events. More specifically, those documents indicate only that a concern about delay was raised and was investigated. The contemporaneous documents do not indicate in any way that a decision was made by anyone to not make the second installment. In fact, the May 6, 2017 text from Mr. Li indicates that the second installment was going to be made, a fact which he confirmed.

b) Second, and very significantly, in cross-examination Mr. Li testified that he did not know Ms. Gou was going to provide a guarantee. This evidence is completely inconsistent with the evidence he gave in-chief and with the evidence of Mr. Shen that Ms. Gou offered the guarantee when they discussed the delay in the project.

c) Finally, it simply makes no sense that Ms. Gou would offer a personal guarantee. Why would she do so when the parties had expressly agreed to share the profits and losses on the project? No rationale explanation has

been provided for why she would provide a guarantee. Put somewhat differently, Ms. Gou's evidence has the ring of truth to it whereas the plaintiffs' version of events does not.

[56] I find the following as facts:

a) The plaintiffs attended at the project site and, as a result of what they saw, became concerned that the project was behind schedule and might not complete on time;

b) The plaintiff's raised their concerns about delay with Ms. Gou on May 5, 2017 and she communicated their concerns to Peter Censorio who provided an update on the status of the project. The information from Peter Censorio was provided by Ms. Gou to the plaintiffs and they had no follow-up questions;

c) Prior to May 13, 2017, no decision had been made by anyone that SAL would not make the second installment payment to Censorio, which was due on May 15, 2017, a Monday;

d) Mr. Shen and Ms. Gou attended at the Bank on May 13, 2017 to obtain a bank draft for the second installment. After obtaining the bank draft, Mr. Shen refused to provide it to Ms. Gou for delivery to Censorio unless she provided a guarantee. After a 30-minute argument, Ms. Gou finally agreed to the guarantee. She did so because she believed that SAL would be in breach of its contractual obligations under the promissory note if she did not obtain the bank draft for delivery to Censorio.

e) The decision on May 13, 2017 to require Ms. Gou to provide a guarantee was made by Mr. Shen and Mr. Shen alone. Mr. Li was not then aware of Mr. Shen's intentions; and

f) The content of the Guarantee was dictated by Mr. Shen and written out in hand by Ms. Gou. She signed it and gave it to Mr. Shen who then gave her the bank draft for delivery to Censorio.

[57] In reaching these findings of facts, I have carefully considered the WeChat message Ms. Gou posted on May 13, 2017. This message seemingly supports that the meeting at the bank between her and Mr. Shen was amicable and that she willingly provided the Guarantee. However, I accept Ms. Gou's explanation that the amicable tone of the message was to preserve the relationship between the parties and so everyone could save face.

Post-Guarantee Events

[58] On September 15, 2018, the amounts owing under the promissory note became due but Censorio failed to pay. The only amount it ever paid was the one-time fee of $30,000.

[59] Notwithstanding Censorio's failure to pay, the parties agreed that they would repay the 1029 Coffee Shop investors the principal amounts they had invested and the interest that they would have earned. Ms. Gou was initially opposed to doing this but went along with the plaintiffs. The amounts repaid by the parties, or companies controlled by them, to the investors are as follows:

a) Mr. Shen - $295,025;

b) Mr. Li - $576,000; and

c) Ms. Gou - $533,800.

[60] By September 2019, the Carleton project had still not been completed. Mr. Shen and Mr. Li wanted to put a lien on the project and asked Ms. Gou to contact Peter Censorio. She did so and Peter Censorio responded in an email dated September 4, 2019, that a lien would kill the project. The parties then agreed to obtain legal advice to determine how to proceed.

[61] On February 5, 2020, an order was made appointing a receiver for Censorio.

[62] On April 25, 2020, the parties held a shareholder's meeting. This meeting is relevant for several reasons:

a) First, Peter Censorio participated in this meeting, apparently by telephone, to provide an update on the status of the Carleton project. He advised the parties that the project was expected to complete in May but he could not provide a timeline for when SAL might expect repayment. He also advised that SAL was third in seniority after two banks;

b) Second, at this meeting it was apparently agreed how any proceeds from the project would be distributed. Specifically, it was agreed that 70% of the proceeds would go to paying Mr. Li and Mr. Shen first;

c) Third, the minutes record on a separate line “to guarantee the Carleton project (Anna to guarantee)”.

[63] Ms. Gou testified to the circumstances of the April 25, 2020 meeting and her signing of the minutes. She testified that she received a telephone call at 9 p.m. from the plaintiffs asking to come to her home for a meeting. She suggested that they meet the next day but Mr. Shen insisted on meeting immediately. The meeting commenced at 10 p.m. She testified that she objected to the inclusion of words in the minutes that she was to guarantee the project but the plaintiffs insisted. She testified that she quarrelled with them and asked them to leave her home but they refused. She testified that she even threatened to call the police. She testified that she eventually signed the minutes to get them to leave her home. In cross-examination, Ms. Gou was not challenged on her evidence about the lateness of the meeting, and her having to threaten to call the police to have the plaintiffs leave. She was merely cross-examined on whether she told Mr. Li that she did not agree to being named as the guarantor. To this she replied that she told both plaintiffs, and had told them all along, that she did not agree to being guarantor. Again, I accept Ms. Gou’s evidence.

[64] On May 11, 2020, a meeting of the directors of SAL was held and a resolution was passed to the effect that legal proceedings be taken against Censorio to recover the amounts due under the promissory note. The resolution is notable because the

word “Director” was beside the signature lines for Mr. Li and Mr. Shen and the words “Director and Project Guarantor” were beside the signature line for Ms. Gou.

[65] Ms. Gou testified as to the circumstances of the May 11, 2020 meeting. She said it was held at 1029 Coffee Shop, that the resolution was prepared in advance and that they discussed how to get repayment of the loan and interest, including by commencing legal action against Peter Censorio. She testified that she signed the minutes without deleting the words “Project Guarantor” although she did not agree with the description. In cross-examination she testified that she “stressed” at the meeting that she should not be named as a guarantor but she signed it because it was in SAL’s interest. Again, I accept Ms. Gou’s evidence of this.

[66] On July 24, 2020, SAL commenced legal proceedings against Censorio and Peter Censorio.

Pleadings and Submissions of the Parties

By Plaintiffs

[67] In the notice of civil claim, the plaintiffs plead breach of contract, breach of fiduciary duty, and fraudulent misrepresentation.

[68] The claim in breach of contract is in reference to the May 13, 2017 Guarantee signed by the defendant. Put simply, the plaintiffs allege and submit that the defendant is liable to them on the Guarantee that she voluntarily and willingly signed.

[69] The claim for breach of fiduciary duty is pleaded as being based on the defendant’s position as a director and shareholder of SAL. The fiduciary duty claim is encapsulated in paras. 7 and 8 of Part 3 of the notice of civil claim as follows:

> 7. As the director and the shareholder of the Shares Adventure, the defendant owes a duty to act honestly, in good faith and in the best interest of the two plaintiffs and the Shares Adventure.
>
> 8. The defendant breached her fiduciary duty by providing misrepresentation to the plaintiffs, inducing the plaintiffs to provide investment funds to the debtors, and failing to disclose material facts to the plaintiffs that

> on contrary to the best interest of both the plaintiffs and the company Shares Adventure.

[70] I note that in submissions the plaintiffs expressly abandoned the claim for breach of fiduciary duty based on the defendant's status as a director or shareholder of SAL. The plaintiffs did, however, submit that the defendant owed them a fiduciary duty as a partner in a partnership and sought during submissions to amend the notice of civil claim to allege such a breach. The application to amend was not allowed given the late stage of the trial. The plaintiffs further in submissions argued that the defendant owed an "*ad hoc*" fiduciary which was breached. Notwithstanding such a duty was not pleaded, the plaintiffs submitted that the *ad hoc* duty arose because of their vulnerability and the defendant was required to act in their best interests.

[71] The claim in fraudulent misrepresentation was originally based on multiple misrepresentations allegedly made by the defendant at various times. The originally pleaded misrepresentations are grouped as follows:

a) The first set of misrepresentations, which the plaintiffs call the "Initial Misrepresentations", are alleged to have been made to induce 1029 Coffee Shop members to invest in the Carleton project. The plaintiffs plead that when these "Initial Misrepresentations" were made, the defendant knew or ought to have known that the Carleton project was behind schedule, that Censorio did not have the financial resources to complete the project and that any cash advances to Censorio would not be repaid. These "Initial Misrepresentations" were pleaded to be:

    i. That Censorio had extensive experience in the construction industry and all of its projects were profitable;

    ii. That the Carleton project was expected to be substantially profitable within 18 months; and

iii. That Censorio would guarantee the return of capital to investors as well as interest and profits.

b) The second set of misrepresentations, which the plaintiffs call the "Continue[d] Misrepresentations" are pleaded to have occurred in or about May 2017, to induce the plaintiffs to make the second installment of the loan. The plaintiffs allege that when these "Continue[d] Misrepresentations" were made the defendant knew or ought to have known that Censorio would not complete the project within the timeline set out in Schedule A to the Promissory Note and that Censorio faced cashflow problems and would not repay cash advances. The "Continue[d] Misrepresentations" are pleaded to be:

i. That Censorio would complete the project and would pay the principal amount of the loan plus interest and profits;

ii. That, if the Carleton project was not profitable, Censorio group had promised to repay the loan plus interest and profits from other projects; and

iii. That the defendant would provide a personal guarantee to SAL and the plaintiffs for the obligations of Censorio under the Promissory Note.

c) The third set of misrepresentations, which the plaintiffs call the "Additional Misrepresentations", are alleged to have occurred in or about December 2018 and are alleged to have been made to induce the plaintiffs to not commence legal action against Censorio, Peter Censorio and the defendant. These misrepresentations are pleaded to be:

i. That "Censorio Ltd. and Mr. Censorio had threatened" that SAL and the plaintiffs would not be paid if SAL commenced a lawsuit;

ii. That the defendant believed Censorio would be able to pay the loan plus interest and profits from other projects; and

iii. That any payment received by SAL would go first to repayment of the plaintiffs' respective shares.

[72] At the commencement of the trial the plaintiffs sought to amend their notice of civil claim to plead negligent misrepresentation in addition to fraudulent misrepresentation. I indicated that I would consider such an application but that it might result in an adjournment of the trial. Plaintiff's counsel then advised that he would proceed with the pleading as is. Thus, there is no pleading of negligent misrepresentation and the plaintiffs made no submissions on negligent misrepresentation.

[73] Importantly, during submissions the plaintiffs abandoned the allegations in relation of all of the above pleaded misrepresentations and made arguments in relation to an alleged misrepresentation that is not specifically pleaded. More particularly, the plaintiffs now submit that the defendant's actions in signing the Guarantee, confirming the Guarantee and failing to disavow the Guarantee was a fraudulent misrepresentation that she intended to honour the Guarantee.

[74] The relief requested in the notice of civil claim includes:

a) An order that the defendant pay and indemnify SAL in the amount of $1.5 million plus interest and profit shares, all pursuant to the terms of a promissory note and Guarantee;

b) An order that interest be calculated at 24% from September 13, 2018 pursuant to the terms of the Guarantee; and

c) Damages as a result of fraudulent misrepresentation, breach of fiduciary duty and breach of contract.

[75] I note that the order sought that the defendant pay and indemnify SAL is *prima facie* a claim that should properly be brought by SAL and not the plaintiffs.

[76] Before I address the pleadings and submissions of the defendant, I wish to observe that the plaintiffs' decision to abandon the allegations in relation to the

pleaded misrepresentations was correctly made, although it should have been done much sooner. Based on the evidence I have heard, the defendant either did not make the representations pleaded, or the representations were not untrue or they were not made fraudulently. More particularly:

a) In relation to the pleaded “Initial Misrepresentations”, there is no evidence that these were false or untrue and there is no evidence that, at the time they were made, the defendant knew or ought to have known the Carleton project was behind schedule, that Censorio did not have the financial resources to complete the project or that any cash advances to Censorio would not be repaid;

b) In relation to the pleaded “Continue[d] Misrepresentations”, the evidence establishes, and I find as a fact, that the defendant honestly believed Censorio would complete the project on time and repay the loan. In fact, the evidence before me does not establish that the Carleton project was materially behind schedule at the time the “Continue[d] Misrepresentations” are pleaded to have been made. Additionally, as indicated in my findings of fact, the defendant did not represent that she would guarantee the loan;

c) In relation to the “Additional Misrepresentations” pleaded to have been made in 2018, the first representation, although made, was not false. Peter Censorio did advise the defendant that if a lien was put on the project by the plaintiffs or SAL it would kill the project and the plaintiffs would get nothing. The second additional misrepresentation (that the defendant believed Censorio would be able to pay the loan) is not supported as having been made by the evidence. The evidence merely establishes that all of the parties were hoping to get paid. Finally, in respect of the third additional misrepresentation (that any payment received by SAL would go first to repayment of the plaintiffs’ respective shares), there is no evidence that such a representation was made. Rather, at the April 25, 2020 meeting it was

agreed that 70% of any proceeds received would go to paying Mr. Li and Mr. Shen first. As no proceeds were received, none had to be distributed.

By Defendant

[77] In her response to civil claim the defendant pleads that the plaintiffs lack standing to bring the claims as set out in the notice of civil claim. The defendant says the claims being advanced are properly the claims of SAL. Additionally, the defendant pleads that the Guarantee is null and void as it was signed under duress and is unsupported by any consideration. In respect of the pleaded fraudulent misrepresentations, the defendant denies making the representations and denies they were fraudulent. In respect of the pleaded breach of fiduciary duty, the defendant acknowledges owing a fiduciary duty to SAL as a director but denies owing a fiduciary duty to the plaintiffs.

[78] In submissions, the defendant largely followed what is set out in her pleading. In particular, she submits:

a) The plaintiffs lack standing to bring the claims which properly belong to SAL;

b) The Guarantee is unenforceable as made under duress and lacking consideration;

c) There is no fiduciary duty owed by the defendant to the plaintiffs and, in particular, no *ad hoc* fiduciary duty; and

d) The plaintiffs have failed to satisfy the requirements of fraudulent misrepresentation.

Issues

[79] Although the standing of the plaintiffs to bring the various claims is raised as a separate issue, this issue is now primarily of relevance to the Guarantee and I will address it when I discuss the validity of the Guarantee.

[80] Therefore, the issues, and the order in which I will address them are:

a) Is the Guarantee valid and enforceable by the plaintiffs?

b) Did the conduct of the defendant in signing the Guarantee, when she had no intention of honouring it, constitute a fraudulent misrepresentation?

c) Did the defendant owe the plaintiffs an *ad hoc* fiduciary duty and, if so, did she breach that duty?

[81] I note that an additional issue that was argued concerns whether the plaintiffs failed to mitigate their damages. Given my findings on liability, I do not need to address damages or mitigation.

Analysis

Validity and Enforceability of the Guarantee

[82] The plaintiffs submit that on a plain reading of the Guarantee the defendant agreed to guarantee the obligations of Censorio under the promissory note, which is to say she guaranteed that Censorio would pay the principal amount loaned and the agreed interest. The plaintiffs further submit that as the majority directors of SAL, they have the right to enforce the Guarantee.

[83] The defendant concedes that the Guarantee was signed. However, she makes four broad submissions. First, she submits that the plaintiffs have no standing to enforce the Guarantee. Second, she submits that there was no consideration for the Guarantee. Third, she submits that the Guarantee was made under duress and is therefore invalid. Finally, she submits that the Guarantee was void for uncertainty, although this was not pleaded.

[84] In my view, the defendant is correct. The plaintiffs do not have standing to enforce the Guarantee. Additionally, it is invalid or void because it was given under duress and lacked valuable consideration.

Standing

[85] The defendant's first submission is that the rule from *Foss v. Harbottle*, (1843), 2 Hare 461, 67 E.R. 189 (Ch.) applies with the result that the plaintiffs do not have standing to sue the defendant on the Guarantee. In my view, the defendant is correct in this submission.

[86] The rule from *Foss v. Harbottle* is concisely set out by Justice Hunter in *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd*., 2017 BCCA 405 at para. 27 [*EY Holdings*], citing *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 1997 CanLII 345 (SCC).

> [27] A convenient statement of the rule in *Foss v. Harbottle* and the underlying rationale for the rule can be found in the Supreme Court of Canada judgment in *Hercules Management Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165 at para. 59:
>
> > The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd.* (No. 2), [1982] 1 All E.R. 354, at p. 367, as follows:
> >
> > > The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting.…

[87] In *Roussy v. Savage*, 2019 BCSC 1669, at paras. 268-270 [*Roussy*], Justice Watchuk summarized the rule as follows:

> [268] It is well-established law that a shareholder may not sue for a wrong done to a company: *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61 at para. 4 [*Robak*]. This is known as the rule in *Foss v. Harbottle*. This rule operates as an important corollary of the principle that a corporation

> constitutes a separate legal entity from its shareholders. Just as a shareholder cannot be sued for the wrongs of the corporation, neither can they sue for the wrongs done to it.
>
> [269] According to this rule, a shareholder may only make a claim in their personal capacity where they demonstrate that they have both an "independent relationship" with the wrongdoer in question and have suffered an "independent loss" separate from any loss suffered by the company: *Robak* at para. 38.
>
> [270] There are many rationales for this rule. The rule prevents double recovery by the company and its shareholders for wrongs done to the company alone. In addition, the rule "bars recovery by one or some shareholders of losses caused by wrongs done to the company, at the expense of creditors and other shareholders of the company": *Robak* at para. 37.

[88] In essence, the rule in *Foss v. Harbottle* prevents a shareholder or director of a company from bringing legal proceedings which properly belong to the company. The effect of the rule has been abrogated somewhat by legislation, such as ss. 232-233 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which allows a shareholder or director to bring a derivative action in the name of the company. But such action must be with leave of the court and must be in the name of and on behalf of the company. The plaintiffs did not obtain leave to bring a derivative action and this action is, of course, not in the name of the company, SAL.

[89] The rule from *Foss v. Harbottle* applies because the plaintiffs are asserting an obligation owed to SAL. This is clear from para. 23 of Part 1 of the notice of civil claim where the plaintiffs plead that the defendant guaranteed to repay the capital of the $1.5 million and the interest under the promissory note and from para. 1(a) of Part 3 of the notice of civil claim where the plaintiffs seek an order that the defendant pay and indemnify SAL. Additionally, in submissions before me, plaintiffs' counsel submitted that the Guarantee was in respect of Censorio's obligations under the promissory note. The obligation of Censorio under the promissory note was to pay SAL the amounts owing under the promissory note, not the plaintiffs.

[90] Thus, on the plaintiffs' own pleading and its interpretation of the Guarantee, and assuming the Guarantee is otherwise valid, any cause of action belongs to SAL,

not the plaintiffs. It follows that the plaintiffs do not have standing to bring the claim against the defendant on the Guarantee.

[91] Before concluding on this point, I note that there is an alternative interpretation of the Guarantee that was not relied on by the plaintiffs and that the parties did not fully address in their submissions. The alternative interpretation arises from the second sentence of the Guarantee, which reads “Repayments to 1029 investors will be made by installments pursuant to the contract provisions”.
The alternative interpretation is that the defendant was guaranteeing the payment by SAL to the 1029 Coffee Shop investors. This alternative interpretation, was not fully argued but, in any event, would not assist the plaintiffs in relation to standing. This is so because, on this interpretation, the defendant’s obligation was to repay SAL or the 1029 Coffee Shop investors, and it is SAL or those investors that had the right to enforce the Guarantee, not the plaintiffs. The plaintiffs have not pleaded or provided me with any legal theory that would allow them to prosecute an action on behalf of the 1029 Coffee Shop investors.

[92] Accordingly, the plaintiffs do not have standing to sue on the Guarantee.

No Consideration

[93] The second main submission of the defendant is that the Guarantee is not supported by valuable consideration.

[94] The law is clear that a guarantee not under seal, as is the case here, must be supported by consideration for it to be valid and enforceable.

[95] In *Ashley Equities Ltd. v. Vernon Sight & Sound Ltd*., [1993] B.C.J. No. 450, 1993 CanLII 1516 (BC SC), Justice Cowan addressed the requirement for a guarantee to be supported by consideration noting that consideration was required, although the benefit of that consideration need not necessarily flow to the guarantor and the court will not inquire into the sufficiency of the consideration. He wrote:

> Thus, while a guarantee not under seal is merely a simple contract which must be supported by valuable consideration, the performance of, or

> forbearance from, some act may be construed as consideration sufficient to support a simple contract.
>
> It was held in *Royal Bank v. Kiska*, supra, and *Noren Investments Ltd. v. Brownie's Franchises Ltd. (1986)*, 1986 CanLII 853 (BC SC), 9 B.C.L.R. (2d) 225 (B.C.S.C.) that a guarantee is enforceable against a guarantor even though the benefit of the consideration does not run to the guarantor.
>
> It has also been held in *Majestic Heating Products Ltd. v. Lapco Sheet Metal Ltd.* and Fry (1991), 112 A.R. 155 (Alta. Q.B.), that "the least spark of consideration will be sufficient" to bind the guarantor and that "the consideration in support of a guarantee need not be of a value apparently equal to that of the guarantee." …
>
> The courts will not inquire into the value of the consideration given.

[96] Similar propositions were stated by Justice Silverman in *CIT Financial Ltd. v Lambert et al*, 2005 BCSC 1779 at para. 32, and by Justice Cullen in *Wilburn Properties Inc. v. Silver Peak Resources Ltd*., 2001 BCSC 1084 [*Wilburn*]. In *Wilburn*, Cullen J. wrote:

> [95] That leaves the question of whether Watson's personal guarantee was signed in exchange for a valid and existing consideration and hence is enforceable. The general rule is that a guarantee not under seal for a debt already incurred is invalid unless there is some further consideration flowing from the creditor. In *Niagara Structural Steel Ltd. v. Bellows* (1964), 1964 CanLII 312 (ON SC), 46 D.L.R. (2d) 705 (Ont. H.C.) the court held that an unsealed guarantee is unenforceable for want of consideration if it is merely based upon a past or existing debt. The creditor must provide some further consideration for such guarantee, such as a binding agreement to extend further credit or supply goods, an undertaking to forbear or actual forbearance (pp. 709-710). Obtaining adequate security for the existing debt and the hope of further supply or credit was invalid consideration for the guarantee in dispute in that case (p. 711).

[97] Although the plaintiffs submit that the Guarantee is supported by consideration, they have wholly failed to identify what that consideration was or to whom it flowed. When pressed as to the nature of the consideration, plaintiffs' counsel said the consideration was the continuation of the project. More specifically, he submitted that, if the Guarantee had not been provided by Ms. Gou, the plaintiffs would not have made the second installment. This is not valid consideration supporting the Guarantee because SAL had an existing legal obligation to provide the second installment of the loan. SAL could only avoid paying the second installment if Censorio was in default of the terms of the promissory note. Despite

the plaintiffs' concerns about delay in the project, the first milestone event under the promissory note was November 28, 2017, more than 6.5 months in the future. As of May 13, 2017, Censorio was not in breach of the terms of the promissory note and SAL was obliged to make the second installment.

[98] Thus, I agree with the defendant that the Guarantee is invalid for lack of valuable consideration.

Duress

[99] The requirements for a successful defence of duress are summarized by Justice Edelmann in *Coughlin v. Lopehandia*, 2022 BCSC 1873, as follows:

> [15] To succeed in a defence of duress, the defendants must establish that (1) a party threatened them; (2) the threats were wrongful - i.e., unfair, excessive or made in a coercive manner; and (3) the wrongful threat(s) overrode the plaintiff's will to the point that the plaintiff had no other choice, or in other words, the wrongful act vitiated the plaintiff's consent and free will (*Bell v. Levy*, 2011 BCCA 417).
>
> [16] Other factors to consider in order to determine whether a party entered a contract voluntarily include: (1) did the party protest; (2) was an alternate course open to the party when it chose to enter the contract - e.g., an adequate legal remedy; (3) did the party seek independent advice; and (4) after entering the contract, did the party take legal steps to avoid it. (see *Song Woon Enterprises Ltd. v. 762138 B.C. Ltd*., 2014 BCSC 967 at paras. 109-110)

[100] In my view the test is met and the Guarantee is invalidated by duress.

[101] I have found as a fact that the Guarantee arose as the defendant testified, which satisfies the first two criteria. On May 13, 2017, Mr. Shen suddenly and without any prior notice, refused to give the defendant the bank draft to deliver to Censorio unless she signed the Guarantee. This was a threat and it was wrongful because Mr. Shen did not have the authority to make the demand of the defendant. SAL had a legal obligation to pay the second installment to Censorio and the directors of SAL had not passed a resolution or otherwise taken a decision to not pay the second installment. Mr. Shen was acting entirely alone, and without authority, in making this demand of the defendant.

[102] The third requirement is whether the defendant's consent was vitiated. In my view it was. The defendant's evidence, which I have accepted, is that she argued with Mr. Shen for about 30 minutes outside the bank. This was an immediate protest. Additionally, given Mr. Shen's intransigence, she had no alternative but to sign the Guarantee. If she had not done so, he would not have given her the bank draft and SAL would have been in breach of its contract with Censorio. She quite properly considered that it was her duty as a director of SAL to avoid such a result. Finally, the defendant did not have independent legal advice and did not have the opportunity to obtain such advice. May 13, 2017 was a Saturday and the second installment was due on May 15, 2017, the following Monday.

[103] The plaintiffs rely heavily on the minutes of the April 25, and May 11, 2020 meetings as evidence that the defendant acknowledged the existence of the Guarantee and did not dispute it. However, I have set out above the circumstances of those meetings and have accepted the defendant's evidence of what transpired and why. I find as a fact that she repeatedly told the plaintiffs she did not agree to being described as having guaranteed or being a guarantor of the project.

[104] Accordingly, the Guarantee is also invalid on the grounds of duress.

Void for Uncertainty

[105] The final grounds relied upon by the defendant as invalidating the Guarantee is that it is void for uncertainty. I do not intend to address this argument as it was not pleaded and, given my findings on standing, lack of consideration and duress, it is not necessary.

Fraudulent Misrepresentation

[106] The four elements of civil fraud are: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at para. 21.

[107] Civil fraud carries a high standard of proof and each of the elements of fraud must be proven with clear and convincing evidence: *Anderson v. British Columbia Securities Commission*, 2004 BCCA 7, at para. 29.

[108] As I have indicated, the claim in fraudulent misrepresentation was originally pleaded as being based on multiple misrepresentations allegedly made by the defendant at various times. However, during submissions the plaintiffs abandoned the allegations in relation of all of the pleaded misrepresentations but submitted that the defendant's actions in signing the Guarantee, confirming the Guarantee in the April 25, and May 11, 2020 meetings and failing to disavow the Guarantee was a fraudulent misrepresentation that she intended to honour the Guarantee.

[109] Given my findings of fact and the holding that the Guarantee is invalid and unenforceable, this submission is completely untenable. The defendant objected to signing the Guarantee at the outset, advised the plaintiffs that she did not agree with the Guarantee and, at both the April 25, and May 11, 2020 meetings, she advised them that she did not agree to being named as a guarantor. She made no misrepresentations concerning the Guarantee and certainly no fraudulent misrepresentations.

Ad hoc Fiduciary Duty

[110] As I have noted, the plaintiffs initially based their claim for breach of fiduciary duty on the defendant's status as a director or shareholder of SAL. They correctly abandoned this during submissions as it was untenable at law. Instead, the plaintiffs submitted that the defendant owed the plaintiffs an *ad hoc* fiduciary duty which was breached.

[111] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, the Supreme Court of Canada recognized that the relationships giving rise to fiduciary duties were not confined to those that had been historically recognized and that *ad hoc* fiduciary relationships could be established on a case by case basis. At para. 36, the requirements necessary to establish an *ad hoc* fiduciary duty were said to be: (1) the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiary

or beneficiaries; (2) a defined person or class of persons is vulnerable to a fiduciary's control; and (3) a legal interest or a substantial practical interest of the beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[112] The plaintiffs submit that they meet the test for the recognition of an *ad hoc* fiduciary duty. I disagree.

[113] First, the plaintiffs have wholly failed to show any undertaking on the part of the defendant to act in the best interests of the plaintiffs. She had a fiduciary duty to SAL by virtue of her position as a director but she never undertook to act in the best interests of the plaintiffs and there is no evidence suggesting that she did.

[114] Second, an essential, but not a sufficient, requirement for the imposition of an *ad hoc* fiduciary duty is that the persons to who the duty is owed be "vulnerable" to alleged fiduciary's control. By no stretch can it be said that Mr. Li and Mr. Shen were in a position of vulnerability *vis a vis* the defendant. The parties, through their respective corporations, were equal shareholders in SAL and were all on the board of directors of SAL. The defendant did not have theoretical or practical control of SAL. To the contrary, it was Mr. Li and Mr. Shen who together could have exercised control over SAL.

[115] The plaintiffs submit that there are several factors that give rise to vulnerability on their part. These are:

a) They did not know Peter Censorio whereas the defendant did through her prior business dealings;

b) They did not have proficiency in the English language and relied on the defendant to translate and to provide them with relevant information; and

c) The defendant did not inform them of material facts, such as the receivership of Censorio.

[116] In my view none of the above factors, individually or collectively, establish that the plaintiffs were in a position of vulnerability *vis a vis* the defendant.

[117] Although the defendant had prior business dealings with Censorio and Peter Censorio, the plaintiffs were aware of this from the beginning and there is nothing in the evidence to suggest that this prior relationship rendered the plaintiffs vulnerable or had any bearing whatsoever on the matters at issue in this action.

[118] It is true that the defendant was more proficient in English than the plaintiffs, but there is absolutely no evidence to suggest that she did not properly interpret or convey information to the plaintiffs. The evidence indicates that the defendant conveyed all relevant information to the plaintiffs. The plaintiffs have not pointed to any material information that the defendant hid from or did not convey to them. The only specific piece of information they addressed in their submissions was the receivership of Censorio which occurred on February 5, 2020. The receivership was long after Censorio defaulted on the promissory note and, in any event, I accept the defendant's evidence that she told them of the receivership when she learned of it.

[119] The suggestion that the plaintiffs were in a position of vulnerability and that an *ad hoc* fiduciary duty is owed to them by the defendant is completely devoid of merit.

Conclusion and Disposition

[120] Accordingly, the action is dismissed in its entirety.

[121] The parties have leave to request to appear before me to address costs. If neither party makes such a request within 21 days, the costs of this proceeding are awarded to the defendant.

"Giaschi J."