

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yinghe Investment (Canada) Ltd. v. CCM
Investment Group Ltd.*,
2023 BCSC 2295

Date: 20230929
Docket: S235510
Registry: Vancouver

Between:

Yinghe Investment (Canada) Ltd.

Plaintiff

And

CCM Investment Group Ltd.

Defendant

Before: The Honourable Justice Douglas

Oral Reasons for Judgment

Counsel for Plaintiff appearing by video
conference:

N. Muirhead

Counsel for Defendant appearing by
videoconference:

C.E. Chisholm

Place and Dates of Hearing:

Vancouver, B.C.
September 5–6, 2023

Place and Date of Judgment:

Vancouver, B.C.
September 29, 2023

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I. THE APPLICATION

[1] The defendant, CCM Investment Group Ltd. (“CCM”), applies to set aside a prejudgment garnishing order granted on August 4, 2023 (the “Order”), and for the return of funds paid into court pursuant to the Order. The plaintiff, Yinghe Investment (Canada) Ltd. (“Yinghe”), opposes the orders sought.

II. THE ORDER

[2] Yinghe obtained the Order from the District Registrar on an *ex parte* basis, without a hearing. In support of its application for the Order, Yinghe relied on the affidavit of its principal, Jian Sheng Chen (“Mr. Chen”), sworn August 3, 2023, and filed August 4, 2023 (the “Chen Affidavit”). Attached to the Chen Affidavit was an unfiled copy of a notice of civil claim identifying Yinghe as the intended plaintiff and CCM as the intended defendant (the “NOCC”). The NOCC was subsequently filed on August 4, 2023. On September 15, 2023, after the hearing of this application, CCM filed a response to the NOCC and a counterclaim.

[3] The Chen Affidavit comprised four paragraphs. The first identified Mr. Chen as a director of Yinghe and indicated that he had personal knowledge of the facts and matters to which he deposed, except where stated otherwise. Mr. Chen deposed as follows in the remaining three paragraphs of the Chen Affidavit:

- i. Yinghe wished to commence an action against CCM, including a claim for debt, as set out in the attached unfiled NOCC;
- ii. The amount of the “debt, claim, or demand in the cause of action” was \$1,600,000 and this sum was “justly due and owing by the intended defendant to the intended plaintiff after making all just discounts”; and
- iii. To the best of his information and belief, the Industrial and Commercial Bank of China (Canada) (“ICBC”) “is indebted, under obligation, or liable to [CCM] and the garnishee is in the jurisdiction of this court, and the indebtedness, obligation, or liability of the garnishee is not for salary or wages.”

[4] The unfiled NOCC appended to the Chen Affidavit identified the intended parties and set out a brief factual summary relating to the incorporation of CCM. It alleged that CCM was incorporated for the purpose of developing a large mixed-use

residential and commercial real estate project at 5599 Cooney Road in Richmond, BC (the “Building”), and that the Building was under construction from 2012 until 2018.

[5] The NOCC stated that “at various times from on or about September 30, 2011, Yinghe loaned money to CCM and CCM made partial repayments to Yinghe”. Yinghe alleged that the parties expressly or impliedly agreed, orally and in writing, that the amount owing by CCM to Yinghe would be secured by strata units in the Building owned by CCM.

[6] In addition to its various requests for other relief, Yinghe sought a monetary judgment in the following amounts:

- a) \$1,450,923.19 for principal and interest owing to Yinghe as of August 12, 2022; and
- b) \$1,600,000.00, on account of loans made from Yinghe to CCM after August 12, 2022.

[7] Yinghe’s counsel advised that the \$1.6 million debt (excluding garnishing fees of \$80 and costs of \$200 to commence proceedings) identified in the Order is referenced in the NOCC at paras. 14–16. Those paragraphs allege as follows:

14. Following August 12, 2022, Yinghe made the following additional loans to CCM:

Date	Amount of Loan
September 26, 2022	\$1,350,000.00
January 11, 2023	\$250,000.00
TOTAL	\$1,600,000.00

- 15. All of the loans from Yinghe to CCM were repayable on demand.
- 16. Yinghe has demanded that CCM repay the amount owing to it but CCM has neglected or refused to do so.

[8] The legal basis pleaded for the relief sought in the NOCC includes CCM’s alleged failure to pay a debt owed to Yinghe, CCM’s alleged holding of strata units in the Building for Yinghe’s benefit, and CCM’s alleged breach of trust.

[9] According to Yinghe’s counsel, \$507,728.35 has been paid into court to date pursuant to the Order.

III. FACTUAL BACKGROUND

[10] In support of its application to set aside the Order, CCM relies on the affidavit of its director, Xin Liu (“Mr. Liu”).

[11] Mr. Liu deposes that CCM has four shareholders:

- i. Yinghe, which holds 50% of the common shares of CCM and whose sole director is Mr. Chen;
- ii. Run Guo Holdings Ltd. (“Run Guo”), which holds 35% of the common shares of CCM and whose principal is Mr. Liu;
- iii. Yi Teng Investment Inc. (“Yi Teng”), which holds 10% of the common shares of CCM and whose principal is Xiao Tong Fan (“Mr. Fan”); and
- iv. Dasmart International Consulting Inc. (“Dasmart”), which holds 5% of the common shares of CCM and whose principal is Dapei Lu (“Mr. Lu”).

[12] There are multiple conflicts in the affidavit evidence of Mr. Chen and Mr. Liu filed on this application. For instance, Mr. Liu deposes that CCM currently owns 32 residential units in the Building (the “CCM Units”); Mr. Chen deposes that CCM currently owns 14 units in the Building, apart from those that he says CCM holds in trust for Yinghe.

[13] Based on these affidavits and the NOCC, it appears that the parties are embroiled in a shareholders’ dispute. They apparently contest who is the legal and/or beneficial owner of various strata units in the Building, who is entitled to collect and retain rental income from those units, who is obliged to pay ongoing costs associated with those units, whether CCM is indebted to Yinghe for unpaid shareholder loans, whether CCM waived demand for the repayment of any shareholder loans, and whether Yinghe has accounted to CCM for all credits to which CCM says it is entitled. Both parties assert that the other has come to court with unclean hands.

[14] CCM submits that a CCM annual general meeting took place on March 20, 2023 (the “AGM”). Mr. Liu deposes that Run Guo, Yi Teng, and Dasmart, the shareholders in attendance at the AGM, voted: 1) to reduce CCM’s shareholders from four to three; and 2) to elect Mr. Liu, Mr. Lu, and Mr. Fan as CCM’s directors.

[15] On June 27, 2013, Yinghe and Mr. Chen filed a petition, challenging the validity of the AGM and seeking a declaration that the resolutions passed at the AGM are ineffective (the “Petition”). The Petition is currently scheduled to proceed to a hearing on October 19 – 20, 2023.

[16] On June 27, 2023, Peter Roberts, K.C., CCM’s lawyer, wrote to Nathan Muirhead, Yinghe’s counsel, to request the return of corporate records (which CCM alleges Mr. Chen improperly removed and refuses to return). On July 7, 2023, Mr. Roberts wrote to Yinghe’s counsel again to request copies of all residential tenancy agreements for certain strata units in the Building, together with a complete accounting of all rental income collected and expenses paid by Yinghe and/or Mr. Chen in connection with those units. In his letter, Mr. Roberts specifically requested that all such rent be paid to CCM directly as he noted that there were substantial arrears in unpaid strata fees. CCM advises that, to date, those demands have not been met.

[17] On July 5, 2023, CCM apparently deactivated the entry fobs for tenants at the Building, resulting in an emergency, after-hours application by Yinghe for an order restoring tenant access to the Building.

[18] On July 7, 2023, the board of directors of CCM passed a resolution authorizing CCM to offer to sell to its existing shareholders up to 500,000 common shares for \$1.00 per share (the “Share Offer”). Mr. Liu deposes that the purpose of the Share Offer was to raise working capital to pay for current and anticipated expenditures.

[19] On July 17, 2023, Yinghe and Mr. Chen filed an injunction application to prevent CCM from proceeding with equity financing and issuing new shares. This

application was adjourned by consent after CCM accepted Yinghe's subscription for its portion of the Share Offer.

[20] The payment due date for the Share Offer was August 4, 2023. Mr. Liu deposes that on August 4, 2023:

- a) At approximately 10:00 am, CCM received a letter dated August 3, 2023 from Yinghe's lawyer demanding repayment of two alleged shareholder loans in the total amount of \$1,600,000;
- b) ICBC was served with the Order and CCM's bank account has since been frozen; and
- c) Yinghe filed certificates of pending litigation (the "CPLs") against 27 units in the Building.

IV. LEGAL FRAMEWORK

[21] A prejudgment garnishing order is an extraordinary remedy and one that may have a catastrophic effect on the business and banking of a defendant: *Ocean Floors Ltd. v. Crocan Construction Limited*, 2010 BCSC 409 at para. 16.

[22] The principle object of such an order is to provide a plaintiff with security for the claim being advanced: *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 at para. 17 [*Key Insurance*]. It is an exception to the ordinary rule that there can be no execution before a determination of the parties' rights pursuant to a judgment. Prejudgment garnishing orders are therefore granted sparingly and often on terms as their consequences can be severe: *Helicraft Enterprises Ltd. v. Quasar Helicopters Ltd.*, [1986] B.C.J. No. 2863 at para. 6, 1986 CarswellBC 3788 (B.C. Co. Ct.) [*Helicraft*].

[23] Prejudgment garnishing orders are also creatures of statute. They are governed by the *Court Order Enforcement Act*, R.S.B.C.1996, c. 78 [COEA]. Section 3(2)(d) of the COEA sets out the information that is statutorily required on an application for a prejudgment garnishing order. Specifically, in an affidavit in support of the order, a person aware of the facts must state:

- (i) that an action is pending,

- (ii) the time of its commencement,
- (iii) the nature of the cause of action,
- (iv) the actual amount of the debt, claim or demand, and
- (v) that it is justly due and owing, after making all just discounts.

[24] Given the wording of s. 3(2)(d)(iv) and (v), the Court of Appeal has held that the plaintiff's claim must be for a liquidated sum: *Politeknik Metal San ve Tic A.S. v. AAE Holding Ltd.*, 2015 BCCA 318 at para. 24 [*Politeknik*].

[25] CCM denies that Yinghe has met the statutory requirements set out in sections 3(2)(d)(iii), (iv) and (v) of the *COEA*.

[26] Section 5 of the *COEA* provides, in part, as follows:

Payment by instalment

5 (1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment, and if a judgment has been entered against him or her, for payment of the judgment by instalments.

(2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment and if he or she does and a judgment has been entered, he or she must set the amounts and terms of payment of the judgment by instalments.

[27] Rule 8-5(8) of the *Supreme Court Civil Rules* [*SCCR*] provides that a court may change or set aside an order made without notice under sub-rule (6) on the application of a person affected by such an order. The court may set aside a prejudgment garnishing order pursuant to R. 8-5(8) on the basis that the requirements in s. 3(2)(d) of the *COEA* are not satisfied, or pursuant to s. 5 of the *COEA* on the basis that all or part of the garnished funds be released if the court "considers it just in all of the circumstances": *Cummings v. Chen*, 2023 BCSC 266 at para. 30 [*Cummings*].

[28] In *Politeknik* at para. 23, our Court of Appeal held that meticulous compliance with the statutory requirements in the *COEA* is required:

As a result of the unique and extraordinary nature of garnishing orders, the law has developed the requirement that there must be meticulous or strict

compliance with the statutory prerequisites for the issuance of a garnishing order. This requirement does not equate to perfect compliance, and defects in the materials for a garnishing order will not be fatal as long as there is no confusion or uncertainty as to the basis upon which the order was issued: see *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263 at para. 24.

V. ANALYSIS AND CONCLUSIONS

a. Is this a claim for a liquidated debt?

[29] In order to obtain a garnishing order before judgment, it must be manifestly clear that the amount sought is a liquidated claim: *Hastings v. O’Neill Hotels & Resorts Management Ltd.*, [1999] B.C.J. No. 432 at para. 19, 1999 CanLII 6486 (S.C.); *Politeknik* at para. 24.

[30] A claim in debt is a liquidated claim, as are certain claims for damages, if the amount of the claim is fixed and “capable of being ascertained as a mere matter of arithmetic”: *Shier v. Copper Mountain Mining Corporation*, 2023 BCSC 152 at para. 12, citing *Dhaliwal v. Bonterra Resources Inc.*, 2019 BCCA 303 at para. 29 [*Dhaliwal*] and *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78 at paras. 8–9 and 13–14.

[31] As noted by Master Muir in *Primus Electric Inc. v. Ryken Construction Inc.*, 2014 BCSC 421 at para. 43, “making a claim for a specific amount is not tantamount to making a liquidated claim”. In other words, “the pleading of a debt, obligation or liability, with a specified amount said to be owing or payable, does not necessarily mean that the plaintiff is advancing a liquidated claim”: *Dhaliwal* at para. 33.

[32] Instead, determining whether a notice of civil claim advances a liquidated claim, in whole or in part, requires an individualized assessment. As stated by the Court of Appeal in *Dhaliwal* at para. 34, that assessment will necessarily be informed by:

[...] the context of the dispute between the parties; the terms of any agreement said to ground the debt, obligation or liability; possible acknowledgements of debt and/or part-performance by the defendant; and the pleadings. [Citation omitted.]

[33] Looking behind a plaintiff's quantification of the amount said to be due and owing to determine whether the action actually advances a liquidated claim is necessary given the extraordinary nature of a prejudgment garnishing order: *Dhaliwal* at para. 36. An important question to ask as part of the liquidated claim analysis is "What is the true nature of the plaintiff's claim?": *Dhaliwal* at para. 37.

[34] Where there are multiple causes of action alleged in a statement of claim, the plaintiff must specify which cause of action provides the basis for the garnishing order to make clear that the sum claimed is a liquidated amount: *Knowland v. C.E.L. Indust. Ltd.* (1988), 32 B.C.L.R. (2d) 381, 1988 CanLII 3221 at para. 17 (S.C.) [*Knowland*]; *Jefferies v. American Cumo Mining Corporation*, 2013 BCSC 1150 at para. 22.

[35] CCM denies that there is a clear path from Yinghe's allegations in the NOCC to the \$1.6 million figure in the Order. It notes the absence of any material facts set out in the Chen Affidavit or pleaded in the NOCC about when, how, and by whom the demand for repayment of the alleged \$1.6 million loan was made. The NOCC does not specify when service of any demand for repayment was effective. It is therefore unclear whether or not CCM had notice of the demand for repayment before Yinghe obtained the Order. Neither the Chen Affidavit nor the NOCC sets out the precise terms of the alleged \$1.6 million loan.

[36] The NOCC alleges that Yinghe loaned various other amounts to CCM which are not referenced in the Order. It is unclear how the \$1.6 million debt relates to the other alleged loans and causes of action pleaded in the NOCC. While, on its face, the \$1.6 million debt referenced in the Order appears to be a liquidated claim, this is less clear when considered in the context of the parties' overall dispute.

b. Did Yinghe disclose all material facts in applying for the Order?

[37] CCM denies that Yinghe's materials filed in support of the Order met either the standard of full and frank disclosure or the requirements in s. 3(2)(d) of the COEA.

[38] The duty of disclosure on a party seeking an *ex parte* garnishing order is “a very high one”, notwithstanding that the form of the affidavit is “statutorily prescribed”: *Opus Consulting Group Ltd. v. Ardenton Capital Corporation*, 2019 BCSC 1847 at para. 9 [*Opus*]; *Key Insurance* at para. 45.

[39] In *Opus*, Justice Mayer found that this broader duty of disclosure required the plaintiff to disclose to the registrar the fact that the defendant “took the position that it had paid the relevant invoices pursuant to wire transfer instructions received via an Opus email account”: *Opus* at para. 10. His comments are instructive:

[11] Section 3(2) of the *Court Order Enforcement Act* requires that the affiant filing an affidavit in support of a prejudgment garnishment order set out the facts establishing that the debt is justly due and owing. In my view the question of whether \$186,200.36 was paid as a result of a potential breach of Opus’s email system was relevant and material to the question of whether the funds sought to be garnished were justly due and owing. It goes to the heart of the question of whether there is a debt at all. As was found by the BC Court of Appeal in *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342, the party seeking a prejudgment garnishment order has a broad duty to disclosure [of] information which is relevant and material to the prescribed contents of the affidavit. The full context of the criteria must be presented to the registrar or judge on an application for a garnishment order.

[...]

[13] The evidence submitted on this application makes it clear that prior to commencing this action, Opus was aware that there was, at a minimum, a dispute with respect to whether or not its email system had been hacked by fraudsters and that this hack resulted in the issuance of the fraudulent second set of wire transfer instructions. I consider that this information should have been disclosed to the registrar and that the failure to do so constitutes a breach of the content requirements for affidavits in support of a garnishing order set out in s. 3(2) of the *Court Order Enforcement Act*.

[40] In applying for a garnishing order, as with applications made without notice generally, the applicant must disclose all facts known to the applicant that are material to the exercise of the court’s discretion to grant the order: *Shier* at para. 15, citing *Key Insurance* at paras. 38–73 and *Politeknik* at paras. 30–33. The facts that must be disclosed are limited to those that are relevant and material to the statutory criteria permitting prejudgment garnishment under the *COEA*: *Shier* at para. 15, citing *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342 at paras. 45–51.

[41] A garnishing order obtained without notice to the defendant should not be sustained if the facts set out in the supporting affidavit as to the cause of action against a defendant (or in a notice of civil claim attached to the affidavit) are misleading or otherwise fail to disclose all material facts with respect to the cause of action: *Politeknik* at para. 30; *Cummings* at paras. 33 and 53.

[42] Material facts are those which, if known to the court, might affect the outcome of the application: *Key Insurance* at paras 40 and 46; *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 33. A failure to make such a disclosure can itself cause the contents of an affidavit to be misleading and inaccurate: *Key Insurance* at para. 46.

[43] The full context to the parties' dispute is not clearly set out in either the Chen Affidavit or the NOCC. Based on the July 7, 2023 letter from CCM's lawyer to Yinghe's counsel, Yinghe would, at a minimum, have been aware that there was a dispute between the parties regarding who was entitled to rental income for units in the Building. Yinghe would also have known that CCM took the position that it was entitled to all rental income collected by Yinghe in relation to the CCM Units.

[44] Yinghe denies that it was in a position to calculate the amount of any setoff claim by CCM on August 3, 2023, when Mr. Chen swore the Chen Affidavit. However, Yinghe did not disclose to the Registrar that CCM had demanded payment of all rental income from the CCM Units and an accounting for all rental income collected by Yinghe. I conclude that, as in *Opus*, this information was relevant and material to the question of whether the funds sought to be garnished were justly due and owing, and goes "to the heart of the question of whether there is a debt at all": *Opus* at para. 11. In my view, if disclosed, this information could have affected the outcome of Yinghe's application for the Order.

[45] The NOCC alleges that Yinghe had made a demand for repayment of the alleged \$1.6 million debt owed by CCM, and that CCM had either neglected or refused this demand. However, on the evidence before me, Yinghe's demand for repayment was made on August 3, 2023 by letter from its lawyer, the same day the

Chen Affidavit was sworn in support of the Order. CCM denies that it received notice of Yinghe's demand for repayment before August 4, 2023.

[46] The timing of Yinghe's demand for repayment relative to its application for the Order was not disclosed in either the Chen Affidavit or the NOCC. In my view, this information was relevant and material to the question of whether the amount sought to be garnished is justly due and owing. I conclude that the disclosure of this information might have affected the outcome of Yinghe's application for the Order. Ultimately, I am not persuaded that Yinghe met the high duty of disclosure required on an *ex parte* application for a prejudgment garnishing order.

c. Did Yinghe account for all "just discounts"?

[47] Section 3(2)(d)(v) of the *COEA* requires a plaintiff to recognize and make adjustment for "all just discounts". This has been defined as a liquidated claim advanced by way of "set-off or counterclaim": *Key Insurance* at para. 17, citing *Eaglecrest Explorations Ltd. v. Consolidated Madison Holdings Ltd.* (1995), 14 B.C.L.R. (3d) 336 at para. 19 (S.C. Chambers) [*Eaglecrest Explorations*].

[48] If the defendant alleges a liquidated claim by way of set-off or counterclaim, and provides evidence which, if ultimately accepted at trial, will establish that some or at least some part of it is due to the defendant, that will be sufficient to set aside the plaintiff's garnishing order unless the plaintiff has taken it into account and given an allowance for it: *Key Insurance* at para. 17. An error in failing to adjust for all just discounts results in the garnishing order being set aside in its entirety: *Key Insurance* at para. 17.

[49] As a matter of principle and by definition, if a defendant raises a claim which is liquidated in nature and which properly forms the basis of a set-off or counterclaim, it can constitute a just discount and it should properly be considered by a plaintiff who is aware of the defendant's claim: *Key Insurance* at para. 24.

[50] While the court can consider the apparent strength of the parties' respective cases, the issues raised are not to be determined: *Key Insurance* at para. 17, citing

Min-en Laboratories Ltd. v. Westley Mines Ltd. (1983), 57 B.C.L.R. 259 at 260 (C.A.).

[51] CCM denies that Yinghe made “all just discounts” in its application materials filed in support of the Order. CCM alleges that Yinghe has misappropriated rental income and sales proceeds for three units in the Building and has now advanced these claims in its counterclaim filed September 15, 2023. Yinghe denies that it was aware of any such claims by CCM. Counsel for CCM submits that CCM had no opportunity to formalise any such demands before Yinghe obtained the Order. Yinghe’s counsel demanded repayment of the alleged \$1.6 million debt on August 3, 2023. CCM denies it had notice of Yinghe’s demand for repayment before August 4, 2023, the date Yinghe obtained the Order.

[52] Yinghe disputes CCM’s set-off claims for the alleged misappropriation of rental income and the proceeds of sale for units in the Building. I address each in turn.

[53] Before the Order was granted, CCM had requested copies of residential tenancy agreements for units in the Building and for an accounting of any and all rental income that Yinghe had received for those units. CCM submits that it requires this information and documentation in order to calculate its liquidated claim in set-off as against any amounts CCM owes to Yinghe.

[54] On Mr. Liu’s evidence, CCM has received monthly rent payments (or post-dated cheques) for only two of the CCM Units (Units 203 and 207) since the March 2023 AGM. According to Mr. Liu, CCM has had no access to the CCM Units because Mr. Chen and Yinghe have refused to return the keys and fobs for them to CCM. CCM denies that it holds the CCM Units for the benefit of Mr. Chen and/or Yinghe.

[55] CCM submits that any rents that Mr. Chen and/or Yinghe have been collecting from the CCM Units belong to CCM and are properly set off against any amounts CCM allegedly owes to Yinghe. On Mr. Liu’s evidence, CCM has had to

pay costs associated with the CCM Units (including unpaid strata fees and fines), despite not receiving this rental income. He deposes that the strata corporation for the Building has threatened to lien the CCM Units if outstanding fees and fines are not paid.

[56] Mr. Chen denies that CCM has been required to pay any costs associated with the strata units in the Building that he says CCM holds in trust for Yinghe. He deposes that he paid property taxes owed for these units on July 4, 2023, and that he will pay the necessary strata fees, once he receives confirmation from CCM that he can do so.

[57] CCM also alleges that Yinghe misappropriated sale proceeds for three units in the Building. On Mr. Liu's evidence, CCM previously owned three units (Units 910, 1206, and 1311) in the Building, before they were sold to third party purchasers in February and July 2022. The sellers' statements of adjustments from the sale of these three units are in evidence. Mr. Liu deposes that, after CCM received proceeds for the sale of Units 910, 1206, and 1311, Mr. Chen transferred these proceeds to Yinghe, without notice to CCM's other shareholders. Based on the sellers' statements of adjustment in evidence, the total of these proceeds was \$1,968,975.17. On its face, this amount exceeds the \$1.6 million debt alleged in the NOCC and referenced in the Order.

[58] According to Mr. Chen, Units 910, 1206, and 1311 were sold and sale proceeds distributed to Yinghe in accordance with a unanimous shareholders' agreement. CCM disputes the validity of this alleged agreement, noting that it bears the signature of Mr. Chen only.

[59] The issues in the parties' shareholder dispute are not before me on this application. However, it is open to me to consider the apparent strength of the parties' positions: *Key Insurance* at para. 17. I conclude on the evidence before me that CCM has an arguable defence in set-off to Yinghe's claim for unpaid loans in the amount of \$1.6 million.

[60] As noted by Justice Voith in *Key Insurance* at para. 61, the severity of a prejudgement garnishing order as a remedy, and its potentially dramatic negative consequences “strongly militate in favour of early and full disclosure of evidence or information which, if known to the court, would prevent the order from being made.” I conclude that, at a minimum, Yinghe ought to have disclosed on its application for the Order that CCM asserted it was entitled to receipt of, and a full accounting for, all rental income that Yinghe had received for strata units in the Building.

d. Is the Order just in all the circumstances? (COEA, s. 5)

[61] Section 5(2) of the *COEA* provides the court with a discretion to set aside a garnishing order if it causes undue hardship, is an abuse, unnecessary, or unjust in the circumstances: *Webster v. Webster*, [1979] B.C.J. No. 918 at para. 21, 1979 CanLII 744 (C.A.); *0904329 B.C. Ltd. (Pacific Timber) v All American Forest Products Inc.*, 2018 BCSC 774 para. 12 [*Pacific Timber*].

[62] A defendant bears the onus of establishing a lack of necessity and must demonstrate that there is little or no chance of a “dry judgment”: *Pacific Timber* at para. 13, citing *Eaglecrest Explorations*.

[63] Mr. Liu deposes that, while CCM no longer requires the same level of funding to operate as it did during the construction phase of the Building, it needs funds to pay ongoing taxes and other bills, including costs related to the CCM Units. On his evidence, the strata corporation for the Building has threatened to lien the CCM Units if outstanding fees are not paid. Based on correspondence in evidence from David Barrett, Assistant Controller, Rancho Group, to Mr. Liu, unpaid strata fees for the Building for September 2023 total \$116,217.72. While not in evidence, counsel for CCM advised that the Building property manager has expressed concern that it might be unable to fund the renewal of insurance on the Building due later this month.

[64] CCM also submits that the timing of the Order is of concern. It notes that Yinghe obtained the Order after CCM secured working capital through equity financing in July 2023, funds that are now subject to the Order.

[65] CCM denies there is any suggestion that a judgment in favour of Yinghe would go unsatisfied after trial. Mr. Liu deposes that none of the CCM Units is subject to any mortgages or other financial charges. Yinghe has filed CPLs on 27 of the CCM Units.

[66] Mr. Chen deposes that seven of the CCM Units are designated as “below market rate rental” units. He references a shareholders’ resolution from a March 4, 2019 meeting, more than four years ago, suggesting that, as “condo market sales prices have softened, [...] most [of CCM’s unsold units] are not likely to sell anytime soon due to their irregular shapes, exposures and unfavorable floor locations”. Mr. Chen expresses his concern that a judgment in this action in Yinghe’s favour would go unsatisfied.

[67] Mr. Chen denies that Yinghe has received any rental income that is owed to CCM. He deposes that CCM has refused to complete the sale of 10 of the units that he alleges CCM holds in trust for Yinghe. He suggests that this failure could result in “huge losses” and that he is concerned the damages to which Yinghe might be entitled in this action will exceed CCM’s ability to pay.

[68] In my view, the comments of Justice Drossos in *Helicraft Enterprises* at para. 16 are analogous. As in *Helicraft Enterprises*:

- a) the defendant here is currently deprived of the garnisheed funds and the trial of this action will not be heard for some time;
- b) entitlement to the garnisheed funds has yet to be determined;
- c) the materials before me fail to show that CCM is insolvent or may dispose of or abscond with assets, such that the plaintiff will end up with a judgment of little value;
- d) the parties have had a business relationship for a considerable period of time and there is no indication that the defendant intends to cease its operation and not continue its business;
- e) the fact that the defendant’s bank, the garnishee, makes no priority claim to the funds would seem to indicate that the defendant was not in debt to its bank for financing with the usual security commitments;

- f) there is evidence that the defendant will not only suffer hardship, but its business may be jeopardized by having its working capital curtailed by the garnishment proceedings; and
- g) in the circumstances, the garnishing order is unnecessary.

[69] I adopt the comments of Voith J. in *Key Insurance* at para. 36, which in my view are equally applicable here:

There are then a number of factors which have caused me to conclude that it is just in all the circumstances to set aside the Garnishing Orders. These factors include the actual and potential harm being caused to T. Clarke Insurance by the Garnishing Orders and the risk to the plaintiff of its claim remaining unsatisfied in the event it obtains judgment. T. Clarke Insurance is solvent, there is no evidence it intends to cease doing business and the plaintiff's claim is further secured by the covenants of each of Ms. and Mr. Clarke. In addition, while I do not comment on the strengths of the parties' respective cases, I do consider that the defendants have raised issues of substance.

[70] Even if I had not found that Yinghe failed to meet its duty of full and frank disclosure, I would have set aside the Order pursuant to s. 5(2) of the *COEA* on the basis that it would be just in all the circumstances of this case to do so. I conclude on the evidence before me that:

- a) CCM has an arguable defence in set-off to Yinghe's claim for payment in the amount of \$1.6 million;
- b) the Order is causing CCM hardship and interfering with its ability to meet its financial obligations as they come due;
- c) Yinghe has security in the form of the CPLs; and
- d) the Order is therefore unnecessary.

VI. DISPOSITION

[71] For these reasons, I allow the application and set aside the Order. CCM is entitled to an order for the payment out of the funds paid into court pursuant to the Order, and for its costs of this application.

“Douglas J.”