IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Amber Mortgage Investment Corp. v. Guo,* 2024 BCSC 1553

Date: 20240823
Docket: S244973
Registry: Vancouver

Between:

Amber Mortgage Investment Corp.

Plaintiff

And

Davidson Guo

Defendant

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:	J.M.S. Woolley J. Mansfield
Counsel for Defendant:	N.J. Muirhead J. Gray T. Ye, Articled Student
Place and Dates of Hearing:	Vancouver, B.C. July 30-31, 2024
Place and Date of Judgment:	Vancouver, B.C. August 23, 2024

Table of Contents

I. OVERVIEW

[1] This is an application brought by the Plaintiff, Amber Mortgage Investment Corp. (“Amber”), on short leave for an interlocutory injunction. Amber wants an order to restrain the Defendant, Davidson Guo, from publishing or broadcasting defamatory statements directed at the reputation of the Plaintiff and related entities, including statements concerning this litigation and other litigation, and to remove and publicly retract any existing publications from view.

[2] Amber alleges that Mr. Guo defamed it through the publication of libelous statements on two WeChat groups which had approximately 675 members combined. The allegedly defamatory statements were written in the Chinese language. The Plaintiff relies on a translation of the statements that was done by Tommy Chan, who acted as lead counsel for Amber in a related foreclosure proceeding. Mr. Chan also works at the same law firm as the counsel acting for Amber in this action.

[3] The Defendant opposes the application and says that the grounds for an interlocutory injunction have not been met because there is no reliable evidence as to the meaning of the impugned statements, and the Defendant has valid defences.

[4] The issues before me are: (1) whether the grounds for granting an interlocutory injunction have been met; and (2) whether this Court should exercise its discretion and nevertheless decline to grant the injunction.

II. BACKGROUND

[5] The basic background facts are uncontroverted.

[6] Amber is a financial institution which provides 1st and 2nd mortgage loan services to individuals and commercial borrowers. Amber is managed by another company called Amber Financial Services Corp., and has other related companies which have not been identified in these proceedings.

[7] Mr. Guo is a businessman who has been working in the real estate development business in BC for over 20 years. Mr. Guo has carried on his real estate development under the “Aimforce” brand through a variety of companies and limited partnerships.

[8] One of Mr. Guo’s companies (Aimforce Surrey Centre 1 Ltd.) owns a commercial property located on King George Boulevard in Surrey, B.C. (the “Property”). The Property is the site of a proposed 67 storey mixed use tower, and is located within the central downtown district of Surrey City Centre. Amber is the holder of a second mortgage on title to the Property. The first mortgage is held by Pacifica Mortgage Investment Corporation (“Pacifica”).

[9] Pacifica commenced a foreclosure proceeding in relation to the Property, and obtained an order nisi on April 15, 2024, with the usual six-month redemption period.

[10] On April 18, 2024, Amber and Xuefeng Wang also commenced foreclosure proceedings in relation to the Property (the “Amber Foreclosure Petition”). The Amber Foreclosure Petition was brought against the borrowers and guarantors of the loan made by Amber, and included Aimforce and Mr. Guo. Mr. Chan acted as counsel for Amber in the Amber Foreclosure Petition.

[11] On July 8, 2024, the court ordered an adjournment of the Amber Foreclosure Petition to July 22, 2024.

[12] Around July 16, 2024, an article authored by Howard Chai was published on the website “storeys.com” setting out details of the foreclosure proceedings.

[13] Around July 18, 2024, Ms. Nerissa Yan, who was counsel for Mr. Guo in the foreclosure proceedings, wrote a letter to Mr. Chan referencing the Chai article, and indicating that it had come to her attention that Amber was seeking remedies in the foreclosure proceedings for improper purposes. The primary allegation contained in Ms. Yan’s letter is that Amber was seeking potential partners or investors in the Chinese speaking community of the greater Vancouver area, to cause a “fire sale” of the property.

[14] On July 21, 2024, some messages written in the Chinese language were sent to two WeChat groups (the “First Publications”). Mr. Guo does not deny that he is the author of the statements, though he denies the accuracy of the translations relied on by the Plaintiff and denies that the impugned statements were defamatory. Nevertheless, in relation the original Chinese messages, Mr. Guo asserts “everything I have said about Amber Mortgage is true.”

[15] On July 22, 2024, Amber and Wang applied for immediate exclusive conduct of sale in Pacifica's foreclosure proceedings and for an order nisi with a one-day redemption period in its own proceedings. Both applications were granted.

[16] Following the July 22, 2024, court hearing, Amber’s counsel Mr. Woolley wrote to Ms. Yan. He demanded, amongst other things, that Mr. Guo issue a retraction of the First Publications, and cease and desist from making any further defamatory statements regarding Amber.

[17] Around July 24, 2024, some additional messages were sent on WeChat which were also concerning to Amber (the “Second Publications”). The Second Publications included a reproduction of the First Publications as well as some images of directors and officers of Amber and Mr. Chai. Mr. Guo does not deny that he is the author of the Second Publications. However, he denies the accuracy of the translations relied on by the Plaintiff and denies that the impugned statements were defamatory.

[18] On July 25, 2024, Amber filed a Notice of Civil Claim (“NOCC”) alleging that Mr. Guo had defamed it through messages that were sent to numerous people on WeChat. The statements are alleged to have been made on or around July 21, 2024, and July 24, 2024.

[19] Also on July 25, 2024, the Plaintiff obtained short leave at a contested hearing, for this interlocutory injunction application to be heard on July 30, 2024. The short leave order required the Plaintiff to serve the Notice of Application and affidavits on the Defendant by noon on July 26, 2024.

[20] By virtue of the short leave order, the Defendant had only 1 clear business day notice of this application. The court order did not require the Plaintiff to serve the NOCC on the Defendant, though a "courtesy" copy was provided by Plaintiff's Counsel to Defence Counsel along with the application material. Notably, Defence Counsel was not asked to accept service of the NOCC on behalf of their client, nor have they accepted such service. Not surprisingly, Mr. Guo has not filed any response to civil claim in this action.

[21] This Notice of Application was filed on July 26, 2024, and was supported by Affidavit #1 of Ngai Ho made July 26, 2024 ("Ho Affidavit"). Mr. Ho is a director of Amber. The Notice of Application does not refer to Affidavit #1 of Mr. Chan made July 25, 2024 ("Chan Affidavit 1"), which sets out the translations relied on by the plaintiff, though I understand that Chan Affidavit 1 was provided to counsel for the Defendant at some point prior to this hearing.

[22] During the midst of the Plaintiff's submissions on July 30, 2024, counsel for the Plaintiff filed a second affidavit from Mr. Chan made on July 25, 2024 ("Chan Affidavit 2"). Chan Affidavit 2 was provided to address some weaknesses in Chan Affidavit 1 which became apparent during the course of the hearing. The admissibility of portions of both of Mr. Chan's affidavits is at issue, and addressed later in these Reasons.

[23] The defendant's responding material to this notice of application was filed on July 30, 2024. The materials include Affidavit #1 of Mr. Guo made July 30, 2024 ("Guo Affidavit") and Affidavit #1 of Tina Ye made July 30, 2024 ("Ye Affidavit"). Ms. Ye is an articled student in the Defendant's Counsel's office.

III. LEGAL FRAMEWORK

[24] The parties agree on the basic law that governs the granting of interlocutory injunctions in defamation proceedings. This was most recently articulated by the Court of Appeal in *Yu v. 16 Pet Food & Supplies Inc.,* 2023 BCCA 397, at paras. 71-73 as follows:

> [71] I would formulate the test as follows:
>
> 1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury finding otherwise would be considered perverse. To do so, the applicant must establish that:
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> a. the impugned words refer to them, have been published, and would tend to lower their reputation in the eyes of a reasonable observer; and
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> b. it is beyond doubt that any defence raised by the respondent is not sustainable.
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> 2. If the first element has been made out, the court should ask itself whether there is any reason to decline to exercise its discretion in favour of restraining the respondent's speech pending trial.
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> [72] The second aspect of the test should take account of the full context before the court. Without intending to provide an exhaustive list of considerations, at the second stage, the court can consider factors such as the credibility of the impugned words, the existing reputation of the applicant, whether the applicant will suffer irreparable harm and whether the respondent is likely to continue to publish the impugned words.
>
> [73] If the impugned words are not credible, the applicant already has a deservedly poor reputation, an award of damages will suffice and/or the respondent is unlikely to continue to publish the impugned words, the court should normally decline to make an interlocutory order. Such an order would typically be either of little value or unnecessary.

[25] The end result is that applications for interlocutory injunctions in defamation proceedings are treated differently than other interlocutory injunction applications. This is because they raise the competing public interest of freedom of speech, which "ought not to be stifled in advance of trial on the merits except in the very clearest of cases": *Gant v. Berube*, 2013 BCSC 1721, at para. 16.

IV. ARE THE IMPUGNED WORDS MANIFESTLY DEFAMATORY?

[26] Defamation can occur through written form or oral expressions. These are referred to as libel and slander, respectively: *Wilson v. Switlo*, 2011 BCSC 1287 at para. 132, aff'd 2013 BCCA 471.

[27] In this case, the allegations relate to written expressions.

[28] To prove a claim in defamation, the plaintiff must establish on a balance of probability that: (a) the impugned words were defamatory; (b) the words referred to

the plaintiff; and (c) the words were published (i.e. communicated) to at least one person other than the plaintiff: *Grant v. Torstar Corp*., 2009 SCC 61 at para. 28.

[29] Once defamation is established, falsity and damage are presumed, and the onus shifts to the defendant to establish a defence: *Grant* at para. 28.

[30] Determining if a statement is defamatory involves a two-step analysis. First, the court considers whether as a matter of law, the statement is capable of carrying a defamatory meaning. Second, the court determines whether the statement is defamatory in fact. The test is an objective one. It contemplates what a "reasonable and right-thinking person" would understand from the words, rather than a person "with an overly fragile sensibility": *Wilson* at para. 137-138.

[31] In *Weaver v. Corcoran*, 2017 BCCA 160 at para. 71, quoting *Lawson v. Baines,* 2012 BCCA 117 at para. 13*,* the Court noted that there are three ways in which words can convey a defamatory meaning:

a) if the literal meaning of the words complained of are defamatory;

b) if the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or

c) if the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).

[32] Where defamation is advanced on the basis of alleged criminal conduct, the accusation does not need to specify a particular offence or describe the crime in a precise or technically correct way – it is sufficient that the words convey the *idea* that a person is guilty of acts constituting a crime: *Wilson* at para. 142, citing R.E. Brown, *The Law of Defamation in Canada*, 2nd ed. (loose-leaf updated 2011, release 1) ("*Brown*") at 4-163 and 4-164.

[33] Defamation can also be established on the basis of words that allege illegal activity, but not specifically criminal behaviour. Consequently, allegations that the person acted illegally, is crooked, or a "racketeer", or that an organization is

"fraudulent" or a "ripoff", may be sufficient to establish defamation: *Wilson* at para. 143, citing *Brown* at 4-236 and 4-237.

[34] Where there could be a number of non-defamatory interpretations, it is unreasonable to seize upon the only bad one to give the words a defamatory meaning: *Lawson* at para. 57.

[35] Although truth is a defence to defamation, uttering a falsehood does not mean that defamation has been proven. Words are considered defamatory where they "tend to lower the plaintiff's reputation in the eyes of a reasonable person": *Grant* at para. 28.

A. The Impugned Words

[36] As noted, all of the impugned words were written in Chinese. The Plaintiff provides evidence of their meaning from the Chan and Ho Affidavits.

[37] The Defendant objects to the admissibility of these affidavits for the purposes of establishing the meaning of the impugned words, on the grounds that neither of the "translators" are impartial: Mr. Chan is counsel for the Plaintiff, and Mr. Ho is director of the Plaintiff.

[38] The Chan Affidavit 1 is seven paragraphs long and attaches various documents and communications between the parties. The Defendant only objects to parts of the affidavit related to paragraph 4, which states as follows:

> 4. I have reviewed screenshots of WeChat posts in Chinese purportedly sent by Davidson Guo. I have translated these messages into English to the best of my abilities, as it is noted that these posts contain Chinese idioms, which I have interpreted in quotations, as opposed to a direct transliteration. Attached hereto and marked as **Exhibit "E"** to this my Affidavit [*sic*] is a true copy of the screenshots that I reviewed. Attached hereto and marked as **Exhibit "F"** to this my Affidavit is a true copy of my translation into the English language.

[39] The Defendant argues that the translation contained at Exhibit "F" does not meet the requirements for threshold reliability, and thus is inadmissible in this proceeding. I agree.

[40] In *G&G Education Development Corporation v. Langley Flying School, Inc*., 2018 BCSC 1796, the plaintiff tried to rely on a translation which was done by its principal shareholder and nominee, Ms. Gong. In finding that the translation was inadmissible, Justice Kelleher noted that a "translation must come from a trained or certified translator who has no interest in the outcome of the proceedings": at para. 57, citing *Luu v. Wang*, 2011 BCSC 1201 at para. 13.

[41] In *Luu*, Justice Burnyeat considered the admissibility of an affidavit which was interpreted to the Mandarin speaking affiant by his daughter. The "interpreter" was also the spouse/ex-spouse of the defendant. The affidavit contained the interpreter's endorsement in Form 109, indicating that the daughter had knowledge of English and Mandarin, and was competent to interpret the document. Nevertheless, Justice Burnyeat refused to admit the affidavit into evidence, on the grounds that:

a) The criteria set out in *R. v. Tran*, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC) for interpretation applies to civil proceedings, such that a translation must be impartial, objective, and unbiased.

b) The Court and the parties are entitled to unbiased and accurate interpretation.

c) There are legitimate reasons to doubt the objectivity of the interpreter in this case.

[42] Consequently, Justice Burnyeat required the affiant to swear a new affidavit endorsed by a certified interpreter.

[43] Mr. Chan's Affidavit 1 suffers from two problems.

[44] First, there is no statement in the affidavit which indicates that Mr. Chan is competent to translate a document from Chinese into English. While there is no reason to doubt Mr. Chan's assertion at para. 2 of his Affidavit 1 that he is "fluent in both English and Chinese", there is a material difference between fluency in speaking or reading a language, versus competency to translate a document.

Nothing in Mr. Chan's Affidavit 1 supports that he has the necessary competency to provide a reliable and accurate translation of the impugned statements.

[45] Second, even if I accept that Mr. Chan was competent to provide an accurate translation, he lacks the objectivity that is necessary for a reliable interpretation. Mr. Chan is the Plaintiff's counsel. While he may be an officer of the Court, that is not sufficient to overcome the reasonable apprehension of bias that is created by his relationship to the Plaintiff.

[46] In *Victoria and District Cricket Association v. West Coast Cricket Organization,* 2024 BCSC 65, I noted the following in regards to the competing duties that a lawyer has to his client and to the court.

a) A lawyer has a duty of loyalty to their client and is obliged to act in their client's best interests: at para. 104, citing *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at para. 19.

b) The duty of loyalty includes a duty of commitment to the client's cause throughout the action: at para. 108, citing *R. v. Neil*, 2002 SCC 70 at para. 19.

c) The concern arises when there is a conflict of interest between a lawyer's "obligation of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible": at para. 110, citing *Hazelwood v. Schlotter,* 2022 ABKB 739 at para. 60.

[47] The translations themselves reveal how Mr. Chan may be conflicted by the duty to his client. At para. 4 of his Affidavit 1, Mr. Chan notes that the original posts that he has translated into English, "contain Chinese idioms" which he has interpreted rather than providing a "direct transliteration". Idioms are groups of words that have a meaning which is not deductible from the individual words. It is not uncommon for people who all speak the same language to interpret a particular idiom in different ways. Given Mr. Chan's duty of loyalty to his client, it is not a

stretch to conclude that Mr. Chan's interpretation of a Chinese idiom may have been done, consciously or unconsciously, in a way that provides a translation which is the most favourable to his client.

[48] It is also likely that Mr. Chan's personal knowledge of this case has seeped into the translation, thereby rendering it unreliable. For example, Mr. Chan averred that he has used the word "fire" when interpreting the word "short" in the context of a sale; thereby proffering the translation "fire sale" rather than the alternative translation "short sale". His decision to do that may have been impacted by the July 18, 2024, letter from Ms. Yan, where she uses the words "fire sale". It is possible that an independent translator who did not have personal knowledge of the case may have preferred "short sale" as being a more accurate translation or may have even used different words to translate that particular portion of text. Given the difference between the meaning of a "fire sale" and a "short sale", the decision of which words to use could have a material impact on the meaning of the text.

[49] Putting aside for a moment, concerns regarding its admissibility, Mr. Chan's Affidavit 2 also reveals the danger that arises if his translation is admitted into evidence. Mr. Chan avers as follows:

> 7. As stated in my first Affidavit, the posts contain various Chinese idioms, which I used quotations to indicate my interpretation, as opposed to a direct transliteration. As an example, the user name: "If someone infringes upon me, then I will return the favour tenfold!" could be interpreted differently as "If someone attacks me, then I will return the favour tenfold!" (my emphasis), but the meaning would be the same.
>
> 8. The posts also contain various Chinese figures of speech, all of which I have translated to adhere to the original wording as closely as possible. In some instances, I used square brackets [ ] to further clarify the meaning from Chinese to English. For instance, at p. 18 of Mr. Ho's affidavit, I use "that's why they are short [fire] selling your project!!". This is because a "fire sale" in English is figurative, as are the two Chinese characters that were used. The two Chinese characters are a term used in investment, and would be transliterated "to create emptiness", but the meaning is "short selling".
>
> [emphasis in original]

[50] It is evident from the above that Mr. Chan has used a certain amount of discretion in deciding what words to use when translating a particular phrase – and that this discretion has been exercised based on his intimate knowledge of the case. Given the importance attached to words in a defamation proceeding, and the conflicting duties that Mr. Chan has to the court and to his client, I find that it would be dangerous to accept Mr. Chan's translations into evidence in order to support the injunctive relief that is being sought.

[51] I have considered the prejudice to the Plaintiff in excluding the translations done by Mr. Chan. This must be weighed against the prejudice to the Defendant of granting an interlocutory injunction in a defamation proceeding where the threshold reliability of the translated words is seriously brought into question.

[52] Further, I find that any prejudice to the Plaintiff is his own creation. The Plaintiff chose to tender a translation prepared by his own lawyer, rather than obtaining an independent translation from a certified translator.

[53] Mr. Chan's assertion in his Affidavit 2 that their law firm was not able to obtain certified translations in time for this hearing, is countered by the Ye Affidavit, which indicates that at least one qualified interpreter was available in the week leading up to the hearing, "to translate documents from Chinese to English on short notice with a 24-hour turnaround". However, no-one from Plaintiff's Counsel's law firm contacted the translator.

[54] Further, even if I accept that there was insufficient time for the Plaintiff to get an independent translation prior to this hearing, this crisis was created solely by the Plaintiff. There was no reason why the Plaintiff could not have scheduled this hearing for the following week, which would have allowed him sufficient time to obtain a proper translation. After hearing the submissions of the parties and reading their materials, I am not swayed that there was the requisite degree of urgency to the matter such that it had to be brought on short notice.

[55] I return then to admissibility of Mr. Chan's Affidavit 2. This affidavit was presented to the Court in the midst of Plaintiff's counsel's submissions. It was prepared to ostensibly address concerns raised by the Court as to weaknesses in the Plaintiff's evidence such as:

a) the lack of evidence as to the source of certain translations referred to by the Plaintiff in the Ho Affidavit – Mr. Chan now avers that the translations referred to in the Ho Affidavit were all done by Mr. Chan;

b) the lack of evidence as to why a certified translation was not obtained – Mr. Chan now avers that they were not able to obtain certified translations in time due to the "urgent nature of this matter"; and

c) concerns about the translation of certain words and phrases – see Chan Affidavit 2 at paras. 7 and 8 (excerpted at para. 49 above), which attempts to explain away the concerns.

[56] The Chan Affidavit 2 was tendered contrary to the direction of the Court that no further affidavit material should be filed by the Plaintiff. Nevertheless, the Defendant's Counsel does not object to its admissibility insofar as the affidavit is used to assert that all of the translations that Mr. Ho relies on were done by Mr. Chan, or that translation of certain idioms or figures of speech can be challenging. I will admit the Chan Affidavit 2 for those limited purposes. To the extent that the Chan Affidavit 2 is relied on by the Plaintiff's Counsel for other purposes, I find that it is inadmissible as it was filed late in the proceeding, against the express direction of the Court, and without giving the Defendant's Counsel any time to properly respond.

[57] I turn finally to the Ho Affidavit. The objectionable portion of that affidavit is as follows:

> 32. I understand that Tommy M. Chan, who like myself, is fluent in English and Chinese, prepared the Chinese to English translations in Exhibits D, I, L, M, and O, which I have reviewed and confirm they are true and accurate to the best of my knowledge. I acknowledge that those translations are not certified, but am still relying on those translations given the urgent nature of this matter. Amber will obtain certified translations of the Chinese publications as soon as practicable.

[58] Mr. Ho's "verification" as to the accuracy of the translations prepared by Mr. Chan, suffers from the same problem as Mr. Chan's assertions. They are inherently unreliable given that they are made by the Plaintiff in this defamation proceeding.

[59] In summary, I am not satisfied that the translator of the impugned statements is: (a) unbiased, objective and impartial; and (b) competent to translate the impugned documents from the Chinese language to the English language.

[60] As such, I conclude that all of the Chinese to English translations which are attached to the Chan Affidavits 1 and 2, and the Ho Affidavit, fail to meet the threshold test for admissibility. Consequently, these translations are inadmissible.

[61] This then leaves the Court with the only evidence of the impugned words, being tendered in Chinese through exhibits attached to the various affidavits.

[62] In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42 ("*Conseil scolaire francophone"*), the Court was faced with an application to have exhibits to affidavits written in French introduced into evidence.

[63] The respondent objected to the admission of the exhibits without accompanying English translations, on the grounds that this was contrary to an old English statute received into the colonial law of B.C. (the "*1713 Act*"), as well as Rule 22-3 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009. The former requires court "proceedings" in B.C. to be in English, and the latter for any "document prepared for use in court" to be in English: *Conseil scolaire francophone*, at para. 26, 58.

[64] The chambers judge denied the application, and the B.C. Court of Appeal dismissed the appeal. On a subsequent appeal, the Supreme Court of Canada also dismissed the case.

[65] Justice Wagner (as he then was), writing for the majority, held that the *1731 Act* remained in force and had not been modified by any subsequent legislation. It applied to not only the language of court documents, but also to judgments, orders, trials and evidence: *Conseil scolaire francophone*, at paras. 51-54.[1]

[66] Further, the majority in *Conseil scolaire francophone* held that Rule 22-3 limits the court's inherent jurisdiction to admit documents in languages other than English. If a party wants to rely on the content of the exhibits, rather than just their existence or authenticity, the exhibits must be in English. Only those documents whose nature renders compliance with the rule impracticable can be admitted: *Conseil scolaire francophone*, at para. 63.

[67] In the result, the Court in *Conseil scolaire francophone* held that there was nothing inherent in the voluminous French documents that would render translation into English impracticable. Consequently, the documents were not admitted: *Conseil scolaire francophone*, at para. 62.

[68] In *Laflamme v. Beauparlant*, 2024 BCSC 1008, Justice Wolfe followed the *Conseil scolaire francophone* decision, and held that portions of the record which consisted of untranslated French materials were inadmissible: at paras. 15-16.

[69] In the absence of the English translations (which I have ruled inadmissible), I find that the Chinese language exhibits attached to the Chan Affidavits 1 and 2 and the Ho Affidavit are inadmissible.

[70] My finding that the translations and original source documents in Chinese are inadmissible, wholly disposes of this application, as there is no evidence as to the words that were written by Mr. Guo which purportedly defame the Plaintiff.

[71] However, for the sake of completion, I will consider the rest of the test in *Yu*.

[1] I note that criminal proceedings in B.C. are permitted in the French language. However, such exceptions do not impact this case, as the exhibits at issue are in the Chinese language.

B. Are the Impugned Words Manifestly Defamatory?

[72] I pause here to note that the following discussion deals with only the main arguments advanced by the parties. Given the length of the impugned texts, the extensive submissions made by counsel, and my concerns about the NOCC addressed below, it is not possible for me to individually address every alleged defamatory statement or argument that was made. Suffice it to say that I have reviewed all of the documents, and carefully considered all of the arguments advanced by counsel, in coming to my conclusions.

[73] Even if I was to find that Mr. Chan's translations of the impugned words were admissible and were accurate, which I do not, the evidence falls short of establishing that the impugned words are manifestly defamatory.

[74] To establish that the impugned words are "manifestly defamatory such that a jury finding otherwise would be considered perverse", the applicant must show that:

a) the impugned words refer to them, have been published, and would tend to lower their reputation in the eyes of a reasonable observer; and

b) it is beyond doubt that any defence raised by the respondent is not sustainable.

[75] In his affidavit, Mr. Guo does not deny that he wrote the Chinese language messages that are at the center of this litigation. However, Mr. Guo denies the accuracy of the English translations, and specifically denies making some of the statements asserted, including that Mr. Chai is affiliated with Amber, or that Amber was being investigated by any government organization, including the BC Securities Commission or any Chinese government body. Assuming the translated text is correct for a moment, a review of the translated text indicates that it is possible that Mr. Guo will be able to succeed in establishing that the plain meaning of the words does not support the allegations made against him. I find this specifically in relation to the assertions regarding Mr. Chai's affiliations and the alleged investigation. certain alleged statements were not said by him.

[76] Regarding the words that Mr. Guo does not deny saying, Mr. Guo avers that he cannot read English, and that his evidence is based exclusively on the Chinese language documents rather than the English translations.

[77] On the assumption that the English translations are correct, and that Mr. Guo did make the statements that are attributed to him in the English translations, I am satisfied that some, but not all, of those statements would tend to lower the reputation of the Plaintiff in the eyes of a reasonable observer. Additionally, on these assumptions, I find the statements refer to Amber and have been published. Potentially defamatory words include phrases such as: “they will be bankrupted immediately if there are no new funds” and “70% of Amber’s loans are in significant trouble”.

[78] However, the applicant has failed to establish that it is beyond doubt that any defence raised by Mr. Guo in relation to these impugned words, is not sustainable.

1. Deficiency in Pleadings

[79] Mr. Guo’s first defence is that the pleadings in this case are deficient and cannot sustain an action for defamation. Consequently, the NOCC ought to be struck. It is his intention to bring an application under Rule 9-5(1)(a) to strike the pleading once the NOCC has been served on him.

[80] Rule 3-1 (2) sets out the requirements for a NOCC. Additional requirements for pleadings in defamation cases are set out at Rule 3-7(21), which provides:

Particulars in libel or slander

(21) In an action for libel or slander,

(a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense…

[81] It is an established principle that in defamation proceedings, the plaintiff must set out the exact words complained of, unless they can become only known to the

plaintiff after examination for discovery: *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 at para. 107.

[82] It is evident from the pleading that the exact words complained of have not been set out. The plaintiff pleads the following in support of its defamation claims:

> 9. On or about July 21, 2024, through a number of private and group messages on the messaging and social media platform WeChat, Guo falsely and maliciously published or caused to be published the following defamatory statements, directly or by innuendo, concerning the plaintiff and its business:
>
> a) Amber is in severe financial difficulties, and almost bankrupt;
>
> b) those who have invested with Amber stand to recover only 5-10% of their principal investment;
>
> c) Amber is working to deceive investors;
>
> d) Amber acted maliciously (*i.e.* for the purpose of causing harm to others) in its business dealings with respect to the Property, and was motivated by jealousy of its partners' financial successes;
>
> e) Amber is working in concert with real estate reporters to disseminate information with an aim to harm the Borrowers and Guarantors;
>
> f) Amber intends to sell the Property at an improvidently low price through the foreclosure process, at the expense of small investors in the Property; and
>
> g) Amber's directors and officers intend to purchase the Property through the foreclosure process, for their friends' personal benefit
>
> (the "**First Publications**"). Guo also stated in the First Publications that he intends, imminently, to make further statements about Amber by way of eight prepared videos and two English-speaking reporters.
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> …
>
> 12. In spite of the letter from Amber's lawyer, on July 24, 2024, through further messages on WeChat, Guo falsely and maliciously published or caused to be published the following defamatory statements, directly or by innuendo, concerning the plaintiff and its business:
>
> a) Amber acted maliciously in its business dealings with respect to the Property;
>
> b) Amber intends to sell the Property at an improvidently low price;
>
> c) Amber is working in concert with real estate reporters to disseminate information with an aim to harm the Borrowers and Guarantors; and

d) Howard Chai, a reporter, is the fifth boss of Amber

(the "**Second Publication**"). The Second publication included photographs of the directors and officers of Amber.

[83] In this case, the words were already known to the plaintiff when the NOCC was filed. Nevertheless, the pleading only sets out conclusory statements as to the meaning of those words, rather than setting out the exact words complained of.

[84] Further, as noted by the Court in *Christian Advocacy Society of Greater Vancouver* at para. 108 citing *Cooper v. Hennan*, 2005 ABQB 709 at para. 18:

> The material facts in a defamation suit must include the publication made by each defendant, the words published by that defendant, which plaintiff was defamed by the publication, the time and place of the publication, the manner of the publication, and to whom the publication was made. It is not sufficient to name multiple defendants in a paragraph of the pleading unless all of the defendants committed the alleged conduct. If such is the case then the pleading should so state.

[85] The plaintiff does not include the exact words used or to whom the statements set out in the First Publications and the Second Publications were made. Instead, the plaintiff pleads only that Mr. Guo “falsely and maliciously published or caused to be published… the defamatory statements, directly or by innuendo…”. Where the defamatory statements are alleged to have been made by innuendo, the plaintiff must provide particulars of the facts and matters on which the plaintiff relies to support that claim: Rule 3-7(21). That is also absent in this pleading.

[86] Consequently, I am satisfied that the Defendant’s proposed application to strike all or part of the NOCC is not bound to fail. If the application to strike the NOCC in its entirety is successful, this would provide a complete defence to the defamation claim.

[87] In the event that the NOCC is not struck, Mr. Guo intends to rely on the defences of truth/justification, fair comment and responsible communication and qualified privilege.

2. Justification

[88] In his Affidavit at para. 6, Mr. Guo asserts that every factual statement he made about Amber is true; he made all of his statements in good faith; every opinion he expressed about Amber is a fair opinion that he honestly holds based on the facts; and his statements are made as a fair response to Ambers' attack on Mr. Guo and his companies.

[89] The defence of justification will succeed if the defendant proves the truth of the statement. This does not mean that each and every word must be proven to be true. Nor is the defendant required to prove the literal truth of every word. At issue is whether the substance of the allegation or "the sting of the charge" is true. Where the gist or the sting of the charge is proven to be true, any minor inaccuracies will not defeat the defence. Conversely, if the overall impression of the publication is false, the defence fails even if some or even all of the literal words are proven to be true: *Cimolai v. Hall*, 2005 BCSC 31 at paras. 171-173, aff'd 2007 BCCA 225.

[90] Amber asserts that the defence of justification cannot succeed because statements such as Amber being in severe financial difficulty, are false. To that end, Amber has provided an unaudited balance sheet from June 2024 to support that the "total amount of assets of Amber far exceed the total amount of liabilities" with "equity in the amount of $116,040,076.17". Further, it relies on an unaudited profit and loss statement which indicates that gross profit less expenses was $934,859.69 for June 2024. This evidence is intended to show that Amber is in a secure financial position.

[91] However, the allegations regarding Amber's financial health are not completely refuted by the financial documents relied on by Amber. I say this for the following reasons:

a) Despite Mr. Ho's evidence at para. 23 of his Affidavit that Amber undergoes independent audits "most recently by KPMG LLP", only the unaudited balance sheet and profit and loss statement for June 2024 were provided. Audited financial statements can provide more complete and

accurate information from which more reliable inferences could be made about the financial status of the company. They include explanatory notes that help contextualize and explain the financial data that is reported.

b) The balance sheet indicates what amounts are owed to Amber; it does not address whether any loans are in distress or will be uncollectible in whole or in part. This may be important as the $134 million in assets from which the $116 million in equity is derived, appears to be various forms of receivables and mortgage loans. A substantial portion of these are mortgage loans categorized as “non-current assets”.

c) The financial documents do not provide important and relevant information such as: how many of the mortgages or loans are performing; are the mortgages or loans adequately secured; are the mortgages or loans being paid on time; have any reserves been set aside for non-performing loans; what right do shareholders have to redeem the equity and at what rate; and whether the accounting is done on an accrual or cash basis.

[92] Thus, despite the financial evidence provided to the Court thus far, it is possible that the Defendant could still show that Amber is in severe financial difficulty.

[93] The possibility that Amber is in significant financial trouble is also given some credence by the Notice of Application itself which suggests that Amber has been put into a dire financial situation and its entire existence may be under threat. At para. 9(c) under Legal Basis, the Plaintiff asserts that:

> (c) since the publication of the defendant’s statements, shareholders of the applicant have requested redemption of their shares, and there is concern that this will effectively create a situation akin to a bank run for the plaintiff should more shareholders request redemption of their shares, potentially causing irreparable harm to the plaintiff;
>
> (d) damages alone will be insufficient if further harm to Amber’s reputation occurs should Guo continue to publish defamatory statements as this may threaten Amber’s entire existence…

[94] The above assertions, which are made to support an emergency short notice interlocutory injunction, could be seen to undermine the credibility of Amber's other assertion that it is not in financial trouble. The timeline of if/when the financial threat arose is impossible to assess without further financial documentation – it may be that the fiscal concerns of Amber pre-dated the alleged defamatory statements, rather than being caused by them.

[95] Further, Mr. Ho's evidence at para. 28 of his Affidavit – that there has been a recent increase in redemption requests from its shareholders – could also indicate that the company is in financial trouble. While it is Mr. Ho's contention that these redemption requests came immediately following the First and Second Publications, that does not mean that these "increased" requests are due to the publications. Correlation does not always mean causation. If the redemption requests are due to other causes, that could provide more support that the company is in financial trouble.

[96] In *Yu*, some of the impugned statements related to meat being refrozen after having thawed during a power outage. The Court was provided affidavit evidence from the plaintiff that no meat thawed during the power outage. Despite this, and the fact that there was no evidence from the defendant to establish otherwise, the Court held that it could not be said "beyond doubt" that no meat had thawed during the power outage and was then refrozen: *Yu* at para. 80.

[97] In my view, the Applicant has failed to establish that it is impossible for the defence of justification to succeed. I say this despite the evidence provided by the Plaintiff. In my view, that evidence does not entirely remove the possibility that the statements attributed to Mr. Guo regarding the company's financial health, are true.

[98] I come to a similar conclusion regarding the other alleged defamatory statements that are purported to have been made by Mr. Guo.

3. Fair Comment, Responsible Communication, and Qualified Privilege

[99] It is also possible that Mr. Guo will succeed in the other defences raised, such as fair comment, responsible communication and qualified privilege.

[100] The defence of fair comment is available where a person expresses their opinion on a matter of public interest. In *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 28, Justice Binnie endorsed the following test of fair comment:

a) The comment must be on a matter of public interest;

b) The comment must be based on fact;

c) The comment, though it can include inferences of fact, must be recognisable as comment;

d) The comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?

e) Even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendants was [subjectively] actuated by express malice.

[emphasis in original deleted]

[101] There is some basis to support the contention that the matters raised in the impugned publications were a matter of public interest. At least some segment of the community has an interest in how a financial institution or lender deals with borrowers. Similar to the justification analysis, I am unconvinced beyond doubt that the comments were not based in fact in the sense that they may be true, an expression of opinion on a known set of facts, and the recipient was in a position to assess or evaluate the comment. For instance, the factual foundation appears to include various statistics about the financial status of Amber. Mr. Guo's evidence is that every opinion expressed about Amber Mortgage is a fair opinion based on true facts. In addition, the cases establish that the notion of “comment” is generously interpreted and I am not convinced beyond doubt that the impugned publications would fall outside this category, or that a person could not express such comment based on the factual foundation.

[102] I turn to the defence of responsible communication. This defence is available to "anyone who publishes material of public interest in any medium": *Grant* at para. 96. Responsible communication is established in a two-part test which was set out by the Court in *Grant* at para. 98:

> a) First, the publication must be on a matter of public interest.
>
> b) Second, the defendant must show that publication was responsible in that he or she was diligent in trying to verify the allegations having regard to all of the relevant circumstances.

[103] The first part of the "responsible communication" test is satisfied by showing that some segment of the community would have a genuine interest in receiving information on the subject: *Grant* at para. 102.

[104] Based on *Grant* at paras. 110-126, the factors which are relevant to the second part of the responsible communication test include:

> a) The seriousness of the allegation;
>
> b) The public importance of the matter;
>
> c) The urgency of the matter;
>
> d) The status and reliability of the source;
>
> e) Whether the plaintiffs side of the story was sought and accurately reported;
>
> f) Whether inclusion of the defamatory statement was justifiable; and
>
> g) Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
>
> h) Any other relevant circumstances.

[105] It is feasible that the Defendant will be able to meet the test for responsible communication. Without going through all the factors, I note again that it possible that the publication is on a matter of public interest. Secondly, I am not convinced that the Defendant was not diligent in trying to verify the allegations. Mr. Guo's evidence is that the publication is based on true facts; he made diligent efforts to verify the information; and he sought Ambers side of the story which was accurately reported, including by meeting with an employee on July 19, 2024 to discuss the

matters, speaking by phone to a director the following day, and contacting the reporter Mr. Chai.

[106] I turn finally to qualified privilege. Qualified privilege is available as a defence where a person has "an interest or a duty, legal, social, moral or personal" to impart the information to the person to whom it is made, and the recipient has a corresponding interest or duty to receive it: *Bent v. Platnick*, 2020 SCC 23 at para. 121. The defence attaches to the occasion on which the communication was made, rather than the communication itself: *Bent* at para. 121. Where the defendant proves the two corresponding duties or interests, then words that are false and defamatory may nevertheless be defensible. However, the privilege is *qualified* in the sense that it can be defeated. The defence is defeated if the dominant motive for the statement was malice, or where the scope of the occasion of privilege was exceeded: *Lee-Sheriff v. Christman*, 2022 BCSC 1914 at para. 107, aff'd 2023 BCCA 363.

[107] The Plaintiff has not shown that the defence of qualified privilege is unsustainable beyond doubt. Mr. Guo has provided evidence that he is an active member of his community and he has been involved in the real estate industry for two decades. He may be able to establish a duty or interest to impart the information, which related to the real estate industry, to the recipients in the WeChat groups. There is very little evidence on the identities of the recipients in these groups, but the translation indicates that the publications are directed at current or future investors, such as by saying "Amber wants to save a few major investors and that's why they are short [fire] selling <u>your</u> project" (my emphasis). As such, Mr. Guo may have an interest in sharing the publications, and there may be a corresponding interest by the recipients to receive the information. On the current evidence, the Plaintiff has not established beyond doubt that the statements were made out of malice or exceeded the potential scope of qualified privilege, and as such the defence of qualified privilege may be available.

[108] Similar to the defence of justification, I am satisfied that the defences of fair comment, responsible communication, and qualified privilege, are not beyond a doubt bound to fail.

4. Conclusion

[109] It bears repeating that as this is an interlocutory injunction application, the defences need not be proven. Rather, the applicant bears the burden of satisfying the court that it is beyond doubt that the defences will fail. If the applicant is unable to do so, the court will not issue the injunction.

[110] I find that the Applicant has failed to discharge the high onus of establishing that Mr. Guo's defences will fail beyond doubt.

[111] Consequently, this application fails on the first stage of the *Yu* test.

[112] In the result, it is not necessary for me to consider the second stage of the *Yu* test, i.e. whether there is a reason to decline to exercise the Court's discretion to grant the injunction.

V. ORDER MADE

[113] The application for an interlocutory injunction is dismissed.

[114] As the Defendant was wholly successful in the application, he is entitled to his costs.

"Shergill J."