

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1162719 B.C. Ltd. v. Ren*,
2024 BCSC 2028

Date: 20241106
Docket: S127616
Registry: Kelowna

Between:

1162719 B.C. Ltd.

Plaintiff

And

Yonghui Ren, Yu Tian and 1040526 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Ker

Reasons for Judgment

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Place and Date of Trial:

Kelowna, B.C.
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Place and Date of Judgment:

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November 6, 2024

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Introduction

[1] The subject matter of this proceeding relates to the purchase and sale of a dollar-store business (the “Business”), which was operated by the corporate defendant (herein referred to in these reasons as the “corporate defendant”, the “Vendor”, or “104 BC Ltd.”). Pursuant to a franchise agreement with Your Dollar Store with More Inc. (the “Franchisor” or “YDSWM”).

[2] The plaintiff and purchaser, 1162719 B.C. Ltd (“116 BC Ltd.”), is a company incorporated under the laws of British Columbia. In these reasons, I will refer to the plaintiff as either the “plaintiff”, the “Purchaser” or “116 BC Ltd.” 116 BC Ltd. is controlled by its principal, Zi Ye, its sole shareholder and director. Throughout the course of the proceedings, Zi Ye was uniformly addressed as Zi Ye. I will do so as such in these reasons for matters of consistency, though I note that in certain correspondence between parties, reproduced at subsequent parts of these reasons, Zi Ye was sometimes referred to as “Ye Zi”.

[3] The Vendor, 1040526 B.C. Ltd (“104 BC Ltd.”), is also a company incorporated under the laws of British Columbia. Yonghui Ren (known as “Ren” or “Catherine”) is its sole director and shareholder. Ren’s husband, Yu Tian (known as “Hugh”), assisted Ren in operating the Business, and took a leading role on behalf of the Vendor in arranging the sale to 116 BC Ltd. He held out to the Purchaser that he was handling all the discussions with the Franchisor concerning their requirements for the sale to 116 BC Ltd. to be approved so that the Purchaser could operate as a YDSWM franchise business.

[4] The personal defendants to this action are Yonghui Ren and Yu Tian, referred to by counsel throughout the course of the proceedings as Ren and Hugh, respectively. I will refer to them as such in the these reasons. I do not intend to imply any significance in the order of naming the personal defendants when I refer to them collectively in these reasons.

[5] The Business that the Vendor was selling to the Purchaser was located in the Piccadilly Place Mall in Salmon Arm, B.C. (the “Franchise Location”). The Vendor, 104

BC Ltd., sold the assets of the Business to the Purchaser, 116 B.C. Ltd., pursuant to a written purchase agreement (the “Asset Purchase Agreement”) for a purchase price of \$303,985. The purchase of the business assets was to include “all the property, assets and undertaking of the Business, as a going concern, on the terms and subject to the conditions provided” in the Asset Purchase Agreement. The Asset Purchase Agreement was drafted by Jie Wang, counsel for the Purchaser and Zi Ye in May 2018. Ms. Wang took instructions from Zi Ye and also participated in several communications with Hugh who was handling the sale for the defendants.

[6] The sale was originally set to close on June 12, 2018, but did not complete at that time as the Franchisor’s transfer condition was not satisfied or waived before the closing date. The Franchisor’s transfer condition, included in the Asset Purchase Agreement, had two clauses:

The Vendor would diligently take all reasonable steps to obtain, before closing, all consents and approvals necessary for the Purchaser to continue to operate the Business, including the Franchisor’s consent of assignment of the Vendor’s rights and obligations under the Franchise Agreement to the Purchaser (the “Franchise Assignment Covenant”)¹;

It was a condition of the Asset Purchase Agreement for the exclusive benefit of the Purchaser that the Purchaser would obtain the consent of the Franchisor and enter into a franchise agreement with respect to the Business before the Closing Date (the “Franchise Transfer Condition”).²

[7] Collectively, the Franchise Assignment Covenant and the Franchise Transfer Condition meant that the Vendor would obtain the necessary consents from the Franchisor to ensure that the franchise agreement was transferred to the Purchaser.

[8] Since the sale could not close on the original anticipated date, the parties (Hugh and Ren for 104 BC Ltd., Zi Ye for 116 BC Ltd.) created and executed an Addendum to the Asset Purchase Agreement (the “Addendum”) on June 28, 2018. The sale finally completed on July 3, 2018, when Ren delivered the Vendor’s Closing Certificate certifying that all the terms of the Asset Purchase Agreement were true and correct, and

¹ ASF, Ex. #1, Tab V, s. 6.4 of the Asset Purchase Agreement.

² ASF, Ex. #1, Tab V, s. 12.7 of the Asset Purchase Agreement.

that the Vendor had complied with or performed all of the terms, covenants, and conditions of that agreement.

[9] In late June 2018, leading up to the completion of the Asset Purchase Agreement and Addendum to it, there were several communications between the parties conducted largely via the WeChat messaging app. Jie Wang participated in some of these communications. At the same time, Hugh had a meeting with representatives of the Franchisor at the head office in Kelowna, B.C. These representatives made clear to Hugh what they required to approve the sale of the Business to Zi Ye and the Purchaser and to transfer the YDSWM Franchise Agreement to the Purchaser.

[10] Significantly, a confirmatory email was sent to Hugh and Ren by Joseph Schober, the Director of Marketing for the Franchisor, on June 22, 2018 at 2:36 PM that outlined what Hugh was told he had to do in order to obtain the Franchisor's "consent and approval" of the sale of the Business (the "original Joe Schober email").³ Hugh and Ren altered that email (the "altered email")⁴ and removed one of the key requirements the Franchisor specified had to be obtained in order for the Franchisor to consent to the sale of the Business and transfer the franchise agreement to the Purchaser and Zi Ye.

[11] Hugh and Ren also deleted another critical piece of information from the email to them: they were advised by the Franchisor that the sale could not complete by the end of June 2018. Hugh and Ren then forwarded the finalized version of the altered email to Zi Ye and Jie Wang who relied upon it and Hugh's assurances that all the requirements for the sale of the Business and the transfer of the Franchise Agreement had been approved in principle by the Franchisor as indicated in the email.

³ ASF, Ex. #1, Tab M.

⁴ In fact, they altered the original Joe Schober email (ASF, Ex. #1, Tab M) more than once. Sending the altered email to each other to check the tone. The initial alteration removed two or three pieces of information (Ex. #1 ASF, Tab N). A second iteration of the email changed the date of the email and restored some of the information to the email (ASF, Ex. #1, Tab P), but not all. In the end, the altered Joe Schober email was sent by Ren and Hugh to Jie Wang and Zi Ye on June 24, 2018, at 10:09 PM (ASF, Ex. #1, Tabs S & T). The date of the original email from Joe Schober was changed and two critical sentences from the original email remained deleted (ASF, Ex. #1, Tabs S & T).

[12] Mr. Schober sent Hugh and Ren a second email on June 22, 2018 at 5:01 PM wherein he summarized the discussions that he had had with Hugh and Dean Lambert, the Chief Operating Officer (the “COO”) for YDSWM, in a face-to-face meeting earlier that same afternoon. This email, addressed to Ren and Hugh, also summarized the expectations the Franchisor had of Hugh and Zi Ye in order to approve the sale and transfer the franchise agreement to the Purchaser. The contents of that email were never provided to Jie Wang or Zi Ye.

[13] The sale to the Purchaser, 116 BC Ltd., was complicated by the fact that the sole shareholder and director of the company, Zi Ye, originates from the People’s Republic of China and was living in Beijing during the discussions for and eventual purchase of the Business. She wanted to immigrate to Canada and came to understand that buying a business in Canada would be the first step in realizing her dream of obtaining a work permit that authorized her (as well as her husband, Ming Dai) to immigrate to Canada, operate her business, and gain permanent residency in this country. It was a variation on a process that Ren and her husband, Hugh, used to immigrate to Canada years earlier – by buying a business with a YDSWM franchise and incorporating it as 104 BC Ltd.

[14] Zi Ye did not immediately move to Canada upon completion of the sale. Instead, she had to wait to obtain a work permit which was not issued until June 2019. Zi Ye and her husband moved to Canada in September 2019.

[15] Between July 3, 2018, and November 2019, Ren and Hugh operated Zi Ye’s dollar store business in Salmon Arm. They received \$2,500 per month from 116 BC Ltd. to operate the YDSWM store on Zi Ye’s behalf while she waited for her work permit and later while she gained experience in running the Business after she arrived in Canada.

[16] Before and after Zi Ye formally moved to Canada, Ren and Hugh trained her in how to manage and operate the Business.⁵ Zi Ye made several visits to Salmon Arm to

⁵ In November 2018, Zi Ye was advised by her immigration consultant that her work permit application had been accepted. She came to Canada to familiarize herself with the Business. She was trained by Ren at the store in Salmon Arm. Despite being advised that her work permit application had been accepted, a work permit was not immediately issued. Zi Ye returned to Beijing in January 2019. She again travelled to

receive this training. By December 2019, Zi Ye began operating the Business on her own.

[17] Outwardly, the sale of the Business to 116 BC Ltd. appeared to go according to plan. It continued to operate as the YDSWM store in the Piccadilly Mall. However, in December 2019, approximately 17 months after the sale completed, Zi Ye learned that the Franchisor was unaware that the defendants had sold the Business to the plaintiff. Zi Ye also learned that the Franchisor had, in fact, not approved the sale and had never agreed that one of the most important assets in the Asset Purchase Agreement—the transfer of the YDSWM franchise to the Purchaser—would be approved by the Franchisor.

[18] In December 2019 and January 2020, a dispute arose between Zi Ye and the personal defendants. Zi Ye was shown an email from the YDSWM Franchise headquarters which indicated that the Franchisor was never aware that the sale between 116 BC Ltd. and 104 BC Ltd. had actually been finalized.

[19] The representatives of the Franchisor were unable to piece together what actually happened in the sale but were clear that the Franchisor (i) was unaware the sale had actually completed; (ii) never approved the sale; and, (iii) never agreed to approve Zi Ye and the Purchaser to become a franchisee for the store. It was the Franchisor's position that in order for Zi Ye to purchase the store, Hugh and Ren would have to cooperate with her as they still held the franchise agreement. However, Hugh was not in good standing as he had failed to pay royalties to the Franchisor for many months. In the end, the Franchisor was unable to transfer the YDSWM franchise agreement to 116 BC Ltd. to facilitate the sale of the business to a third-party purchaser.

Canada in May 2019 to do more training with Ren. A work permit was issued in June 2019. Zi Ye returned to Beijing to put her affairs in order and immigrated to Canada in September 2019. Upon immigrating to Canada, Zi Ye moved to Kelowna, she continued to learn from Ren and began participating in the management of the Business.

[20] In the fall of 2022, Zi Ye eventually sold the assets of the business for the sum of \$60,000. Zi Ye sold the assets of the Business, without an associated franchise agreement, to a third-party purchaser.

[21] Zi Ye contends that Ren and Hugh knowingly made false representations of fact to her and her lawyer, Jie Wang, which induced her to purchase the assets of 104 BC Ltd. In reality, the Franchisor never consented to the sale of the YDSWM assets from 104 BC Ltd. to 116 BC Ltd., nor did it consent to the transfer of 104 BC Ltd.'s Franchise Agreement to 116 BC Ltd. Zi Ye's position is that, had she known the true state of affairs, she would have never purchased the assets of 104 BC Ltd.

[22] As one would expect, the sale between the Vendor and the Purchaser did not go according to plan. The Purchaser and Zi Ye wound up receiving significantly less than what they believed they were purchasing at the time of the sale—essentially, approval in principle from the Franchisor that the franchise agreement would be transferred to the plaintiff once Zi Ye obtained a work permit and could demonstrate that she could operate the store on her own.

[23] The sale between the parties was further complicated by four other facts. **First**, at the time of the sale, Zi Ye understood no English and communicated only in Mandarin. Ren's command of English was similarly extremely limited. She too communicated almost entirely in Mandarin. Ren relied upon her husband, Hugh, to translate anything to do with her purchase of the Salmon Arm YDSWM, operation of the store, and its sale to Zi Ye. Hugh was the most fluent in English of these three individuals and was largely the face of 104 Ltd. in its dealings with the Franchisor.

[24] **Second**, while Zi Ye retained a solicitor, Jie Wang, to assist with the purchase of the Business, Ren and Hugh ended up acting for themselves. They originally had counsel but elected to proceed on their own at some point early in the negotiations of the Asset Purchase Agreement with their lawyer. The personal defendants advised Ms. Wang that their lawyer was only acting for them for the closing. Jie Wang dealt directly with Hugh in drafting the Asset Purchase Agreement.

[25] **Third**, the Business subject to the transaction in question was a franchised business. Consistent with franchise business practices, the Franchisor through its franchise agreement with the defendants, had certain conditions that had to be met in order for the YDSWM franchise to be sold or transferred to the Purchaser. Although intending to communicate with the Franchisor, the solicitor for Zi Ye and the plaintiff never did. They were actively dissuaded from doing so by the defendants.

[26] Instead, Hugh offered to obtain the necessary consents and approvals from the Franchisor. While Hugh did communicate with the Franchisor, and he conveyed some of this information to Zi Ye and Jie Wang about what was required in order to facilitate the sale of the Business, he failed to obtain the Franchisor's approval of the sale of the Business and never communicated this fact to Zi Ye and Jie Wang.

[27] Significantly, Ren and Hugh altered an email from the Franchisor to them that outlined what the Franchisor required in order for the sale to be approved and the franchise to be transferred to the plaintiff and Zi Ye. The defendants then forwarded the altered email to Zi Ye and her solicitor. The altered email removed a material condition that the Franchisor required be met to approve the sale of the business to the plaintiff. Moreover, the defendants never advised the Franchisor that they had sold the Business to the plaintiff, and so, contrary to their franchise agreement, had proceeded to enter into a sale without first obtaining the approval of the Franchisor.

[28] **Fourth**, the failure to obtain the Franchisor's approval and consent to the sale of the Business did not come to light until the relationship between Zi Ye and the personal defendants began to unravel in December 2019 after Zi Ye moved to Canada and started to participate in operating the Business. It was not until January 7, 2020, that Zi Ye learned that Hugh had failed to obtain the Franchisor's approval and consent of the sale of the Business. On that date, Hugh forwarded to Zi Ye an email from Dean Lambert, the Franchisor's COO, wherein he asked a number of questions of Hugh, including, "The purchase agreement and the Franchise agreements clearly state that franchise approval was a clear requirement, why wasn't this addressed by either party?"

[29] Zi Ye wanted to be able to operate the Salmon Arm YDSWM as a franchisee. However, for various reasons which I will address in these reasons, the Franchisor never approved of the sale of the Business to 116 BC Ltd. or the transfer of the YDSWM franchise agreement to the Purchaser. And so, the Purchaser never received the most valuable asset of the business Zi Ye contemplated it would receive in the Asset Purchase Agreement—the goodwill of 104 BC Ltd., being the franchise agreement—and the ability to operate the business in Salmon Arm as a YDSWM franchisee.

Positions of the Parties

Position of the Plaintiff

[30] In this action, the plaintiff contends the personal defendants deliberately deceived Zi Ye and the plaintiff in the purchase of the Business. The plaintiff seeks to recover the losses it sustained in purchasing the Business in Salmon Arm and claims the defendants knowingly misled the plaintiff into believing that the plaintiff's intended purchase of the defendants' dollar store business had been approved by the Franchisor and that the plaintiff would eventually receive a franchise agreement from the Franchisor.

[31] The plaintiff maintains that the defendants intended that the plaintiff act upon their representations and that the plaintiff's reliance upon the defendants' false representations induced it to entering into the Asset Purchase Agreement and completing the sale. Had the plaintiff not been deceived by the defendants' fraudulent misrepresentations in the sale of their business, it would not have purchased the corporate defendant's assets and would not have suffered the financial losses it did from operating the business and being forced to sell it at a loss. The plaintiff contends the losses sustained flowed from its reliance upon the personal defendants' fraudulent misrepresentations that induced it to purchase the Business.

[32] The plaintiff's action includes claims of fraudulent misrepresentation, negligent misrepresentation and breach of contract. The plaintiff seeks remedies in the form of damages, disgorgement, and a constructive trust or good conscience trust. The plaintiff

seeks an award of damages that, to the extent that money can, places the plaintiff in the position it would be in but for the defendants' misrepresentations.

[33] The plaintiff contends the defendants should also be ordered to disgorge the profit they have made from the artificially inflated sale price they obtained by selling the Business through their deceptions, and from using the funds obtained by their fraudulent misrepresentation to purchase a property on Trumpeter Rd. in Kelowna B.C. The plaintiff further contends that the circumstances of this case also warrant a declaration that the defendant Ren holds a portion of the Trumpeter Rd property on a constructive trust for the plaintiff.

Position of the Defendants

[34] The defendants contend the plaintiff did not rely (or reasonably rely) on any of the communications received from the personal defendants. They contend that when Zi Ye purchased the assets of 104 BC Ltd., she was aware that (i) neither she nor 116 BC Ltd. had obtained a franchise agreement with the Franchisor and (ii) that she might never obtain a franchise agreement. The defendants also contend they had no fraudulent intent in the communications they had with Zi Ye; and, if the contract of purchase and sale was breached, then Zi Ye breached the contract by failing to apply to the Franchisor to obtain the franchise rights. The defendants assert that the claims against them should be dismissed.

[35] In the alternative, the defendants contend that if damages are to be awarded against them, an award in the amount of \$120,000 is appropriate. This value represents the maximum difference between the purchase price paid for the dollar store assets and the actual value of the dollar store assets on July 3, 2018. As further clarification, this was the amount assigned to the goodwill of the Business. The parties agreed that this was the value of the franchise agreement for the YDSWM business in Salmon Arm, BC.

[36] Many of the communications between the parties were conducted largely through the messaging app WeChat and email, particularly in the days leading up to the finalization of the Addendum to the Asset Purchase Agreement and the deal closing. These communications rest at the heart of this trial. I refer specifically to their tenor; the

accuracy of the information the defendants conveyed to Zi Ye and, by extension, the plaintiff, as well as to Ms. Wang, as to Hugh's obtaining the necessary approvals from the Franchisor; and the conditions that had to be met to transfer the franchise agreement to the plaintiff. Accordingly, the credibility of the three main witnesses in this case, Zi Ye, Ren, and Hugh, is a significant issue.

[37] Counsel for the parties were able to reach a consensus on a significant portion of the background facts that provide context to what the parties were trying to achieve as well as the negotiations leading up to the purchase and sale of the YDSWM business. This consensus has provided considerable assistance to the Court in reducing some of the confusion that permeates the circumstances of this transaction. Exhibit #1 entered in this trial was an Agreed Statement of Facts ("ASF"). A large number of documents are appended as exhibits.

[38] What follows below in terms of the background facts is excerpted from the ASF and the parties' submissions addressing the facts that are not in issue. Attached as Appendix A to these Reasons is a chart outlining the parties and other relevant individuals involved in the negotiations and discussions that ground this litigation.⁶ Attached as Appendix B to these Reasons is a chronology of the events assisting in establishing the timeframe surrounding the sale.⁷

The Principles Informing the Assessment of Credibility and Reliability

[39] As credibility is the central issue in this case it is useful, before addressing the background facts and the evidence in this case, to summarize well known and oft-quoted principles from the jurisprudence that govern the assessment of the credibility and reliability of witnesses.

⁶ The chart of the parties and other relevant individuals in Appendix A is derived largely from the chart contained in the written submissions of the Plaintiff.

⁷ The chronology in Appendix B is derived largely from the chronology contained in the written submissions of the Plaintiff.

[40] In *Telford v. School District No. 42 (Maple Ridge and Pitt Meadows)*, 2018 BCSC 2165, Justice Voith, as he then was, conveniently summarized the concepts of credibility and reliability and how they are to be assessed:

[14] The distinction between reliability and credibility, each of which is relevant to the assessment of a witness's evidence, was explained in *Regina. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.):

33. Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony...

[15] More recently, in *R. v. H.C.*, 2009 ONCA 56, Justice Watt, for the court, said:

41. Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

- i. observe;
- ii. recall; and
- iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[16] In assessing a witness's credibility, the following comments from *R. v. Langlet*, 2013 BCSC 2274 are helpful:

28. The accepted factors that bear on credibility include internal consistency of a witness's testimony, consistency over time, corroboration or external consistency with other evidence, any interest the witness may have in testifying including motive to lie, whether the witness is independent, the presence or absence of an oath or affirmation, and prior criminal convictions where relevant.

...

31. I note that the consistency of a witness's testimony is an important factor in an analysis of the credibility of a witness, both internally and externally. Can the witness provide the same account at different times? Can the witness provide consistent answers as he or she is asked questions about portions of their testimony or particular aspects of it?

Similarly, is a witness's testimony externally consistent? Do aspects of the witness's testimony correspond with testimony of other witnesses (absent evidence of collusion) or other real evidence? Is the account provided by the witness a plausible one? Does it accord with common sense?

[17] Further guidance was provided in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, at para. 186, where the Court said:

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), 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*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [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 (*Faryna* at para. 356).

[18] In weighing questions of credibility, courts will also frequently rely on the guidance provided by Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) where he said, at 357:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....

[41] In essence, *Bradshaw v. Stenner*, 2010 BCSC 1398, is the 21st century recapitulation of the principles in *Faryna v. Chorny*, [1952] 2 D.L.R. 354. In *Bradshaw*, Justice Dillon, at para. 186 emphasized the following key factors that inform the assessment of a witness's credibility:

- i. The firmness of their memory;
- ii. Harmony with independent evidence that has been accepted;

- iii. Whether a witness changes their testimony between direct and cross-examination; and,
- iv. Whether the witness's testimony seems unreasonable, impossible or unlikely.

[42] In assessing credibility in the face of conflicting evidence, the Nova Scotia Supreme Court in *Novak Estate (Re)*, 2008 NSSC 283 noted the following:

[36] There are many tools for assessing credibility:

a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

b) The ability to review independent evidence that confirms or contradicts the witness' testimony.

c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1951] B.C.J. No. 152, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.

d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution (*R. v. Mah*, [2002] N.S.J. No. 349, 2002 NSCA 99, paras. 70-75).

e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.*, [2005] O.J. No. 39 (Ont. C.A.), paras. 51-56).

[37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1996] 2 S.C.R. 291 at para. 93 and *R. v. J.H.*, *supra*).

[43] I also take into consideration the observations made by Justice Griffin, as she then was, in *Fu v. Zhu*, 2018 BCSC 9, wherein caution was urged and applied because the witnesses in that case, who testified through interpreters, were from another country and culture and did not speak English. The main witnesses in this case also testified

through interpreters and so the caution noted by Griffin J. applies with equal force in this proceeding:

[39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.

[40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.

[41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.

[42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.

[44] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and the answer provided. Word choice and word order in a sentence might be an interpreter's preference. As such, I have been mindful not to reach conclusions based on the wording of a single answer. Rather, I have considered the totality and tenor of the evidence in coming to conclusions as to the facts.

[45] I also note that there was a large amount of information before the Court that assisted in considering the evidence of the three main witnesses—Zi Ye and the two personal defendants—involved in the protracted discussions that culminated in the Asset Purchase Agreement, the Addendum, and the completion of the sale on July 3, 2018. For instance, these witnesses all testified for more than one day and so I could

consider changes in demeanour during the course of testimony and whether those changes in demeanour were generally consistent or inconsistent with the testimony being truthful. Also, I could compare the demeanour of the witnesses as between each other, since they are all from a similar cultural background and required the use of interpreters. By the conclusion of the evidence, I was confident that I was able to assess credibility largely by considering internal and external consistencies in the witnesses' evidence and actions.

[46] My assessment of credibility also somewhat factored in the demeanour of the witnesses as they answered questions and the inherent probabilities of human behaviour, tempered by an attempted appreciation of cultural context. Included in the demeanour factor component of the credibility assessment was the ability and willingness of the witnesses to answer questions in cross-examination. On this point, Ren and Hugh failed abysmally. They were evasive and reticent to answer questions. They had to be reminded on a number of occasions to listen to the question and answer it. Moreover, some of the answers provided by the defendants were, respectfully, preposterous. I will elaborate when I address their evidence below.

[47] In deciding which facts are more likely than not, I have weighed competing evidence on several issues by applying the words of Mr. Justice O'Halloran in *Faryna v. Chorney* (1951), 4 W.W.R. (N.S.) 171 (B.C.S.C.), at 174:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[48] This test has been particularly helpful in determining the sequence and nature of events between Ms. Wang and Zi Ye for the Purchaser, and the defendants. The test is especially illustrative of the communications and representations made surrounding the sale of the Business to the Purchaser.

Background Facts and What is Not in Issue

[49] As the parties have outlined in their submissions, the broad framework of the facts informing the issues in this case are largely uncontested. The majority of the

evidence in relation to the alleged misrepresentations is contained within WeChat communications and emails between Zi Ye, her lawyer Jie Wang, Ren, and Hugh. These communications are largely confined to a few days in June (more specifically, between June 22 and 29, 2018) when there was a veritable flurry of frenzied communications back and forth between these four individuals. At this time, they were ardently working to complete the sale of the assets of 104 BC Ltd. to 116 BC Ltd.

[50] As noted previously, Zi Ye, Ren, and Hugh are all originally from the People's Republic of China. Mandarin is their first language. At the time of the events that give rise to this action, all three had limited comprehension of English, albeit Hugh was more fluent and capable of conversing in English than Zi Ye or Ren were.

[51] Jie Wang is a lawyer in British Columbia, called to the Bar in May 2012. Her practice as a solicitor is focused primarily in the areas of corporate law, business acquisitions, and real estate transactions. I understand Ms. Wang to be well familiar with the process of purchasing a franchise business, including the need for consents from landlords and franchisors.

The WeChat communications between the various parties

[52] The parties and Ms. Wang conducted most of their communications via the WeChat messaging app which is the most popular messaging app in China. It can be used for both voice communications and text message communications. Text messages can be typed or dictated into the app, which transcribes spoken words into text messages. All of the communications in this case were in the Mandarin dialect of the Chinese language. The time stamps in the exhibits are set to the local time in British Columbia when the communications were sent. The parties agreed to use Google translator to conduct the translations of the messages. They all admitted these translations.

[53] The relevant WeChat messages were included in the Agreed Statement of Facts (Exhibit 1) and grouped via the parties to the communications. There were four different sets of communications that were occurring, frequently within moments of each other. The WeChat communications were grouped as follows:

- Tab E contains 61 pages of the WeChat communications between Zi Ye and Hugh that occurred between June 22, 2018 at 5:09 p.m. and June 28, 2018 at 11:05 p.m.
- Tab F contains 24 pages of WeChat communications between Zi Ye and her lawyer, Jie Wang, that occurred between June 11, 2018 at 9:44 a.m. and June 29, 2018 at 10:04 p.m.
- Tab G contains 24 pages of the WeChat communications between Jie Wang and Hugh, that occurred between May 5, 2018 at 8:34 a.m. and September 18, 2018 at 10:58 a.m.
- Tab H contains 32 pages of WeChat communications between Zi Ye and Ren that occurred between June 23, 2018 at 10:39 p.m. and June 26, 2018 at 10:27 p.m.

[54] Although the communications appear to be confusing when read out of context, the witnesses all addressed in their evidence what they were endeavouring to communicate in these messages or what they understood they were being told by the sender. Save for Hugh's initial communications with Jie Wang in early May 2018, the bulk of the WeChat communications that focused on closing the sale occurred largely between June 22 and June 29, 2018.

[55] In addition to communicating via the WeChat messaging app, Zi Ye, Ren and Hugh occasionally communicated by telephone. However, no recordings of those conversations were ever made or produced. There were also a few emails exchanged between the parties that attached documents such as the landlord's consent to the lease assignment and a document from the Franchisor for Zi Ye to complete.

The Evidence

[56] I have reviewed and considered the entirety of the evidence and counsels' submission at trial in preparing these reasons. I find it useful to summarize the salient portions of the evidence as they bear on the chronology of events that unfolded in this transaction and then make findings on the issues. I have inserted some aspects of the defendants' evidence on points in the chronology of the events but reserved the bulk of

my review of aspects of their evidence to a later section in these reasons assessing credibility.

The parties' purposes and experiences of purchasing a business in Canada

[57] As a way to fast-track their desire to immigrate to Canada, Ren (in 2013) and Zi Ye (in 2018) each engaged in a process that seemingly facilitated immigration for persons willing to invest in businesses in BC. The purchase of the dollar store business in Salmon Arm was the commercial enterprise that both Ren and Zi Ye employed as their business interest to gain admission into Canada albeit under different routes.⁸

[58] The substance of the evidence makes clear that all parties used the purchase of a business in BC as their way to immigrate and gain admission to Canada. Accordingly, although the Asset Purchase Agreement and the Addendum in this case evince a commercial transaction, the purpose of the transaction for Zi Ye was not restricted entirely to a true commercial purpose. Rather, it was for her to obtain a work permit and to gain residency in Canada. While a commercial purpose to Zi Ye's transaction may well have been subordinate to her desire to gain entry to Canada, which to an extent informs the context of this dispute, it does not fully colour or dilute Ren and Hugh's actions in this dispute.

[59] It is not a stretch to conclude that the primary purpose of Ren and Hugh in purchasing the YDSWM store in Salmon Arm in 2013 was also to immigrate and gain admission to Canada. The Court is convinced that any commercial purpose was completely secondary.

[60] Furthermore, the purpose of the defendants' concerted push to close the sale of the assets at the end of June 2018 is informed by another important contextual feature:

⁸ In the case of Ren, in 2015, the program was the BC Provincial Nominee program, and she entered into a Business Succession Performance Agreement on July 9, 2015. Ren received a work permit from Citizenship and Immigration Canada on July 15, 2015. The Vendor's purchase of the business from the previous owners closed on September 8, 2015. On September 9, 2015, the Vendor entered into a Franchise Agreement with the Franchisor. The provincial program no longer existed when Zi Ye sought to immigrate. She had to go through the process of obtaining a work permit but understood that ownership of a business in Canada could expedite her entry into the country.

the personal defendants' need for Canadian funds to close on their purchase of a property on Trumpeter Rd. in Kelowna, BC.

The general background of the parties, how they met, Zi Ye's decision to purchase the Business, and the retaining of Jie Wang

[61] To reiterate, Zi Ye, Ren and Hugh are all from the People's Republic of China. Ren and Hugh were acquaintances of Zi Ye's father, Bin Ye. Bin Ye is a lawyer who previously represented Ren in a real estate dispute in China.

Zi Ye

[62] In late 2017, Zi Ye's father advised her that Ren was selling a retail store in Canada that had been in operation for a number of years. Zi Ye, who was in her late 30s at the time, was working as a television producer in China. She wanted a change in her lifestyle and to operate her own business. The companies she worked for were travel-oriented television channels. As part of her work, in 2011, she was invited by Tourism Canada to travel to Ontario and British Columbia to film and produce a series of television programs. She was struck by the beauty of the country and the friendliness of Canadian citizens. Zi Ye became enamoured of the idea of moving to Canada to live and operate her own business here.

[63] Although Zi Ye did not know the specifics of the process for immigrating to Canada, she understood in broad terms that owning a business in Canada was one way to obtain permission to do so. The opportunity to purchase a successful retail store like Ren's appealed to Zi Ye as it appeared to provide the change in lifestyle that she was seeking.

[64] Based on her father's comment about Ren selling her business in Canada, and asking his daughter if she was interested in pursuing the opportunity to buy Ren's store, a meeting was arranged. Zi Ye, her husband Ming Dai, and her parents met with Ren and Hugh at a restaurant in Beijing.

[65] According to Zi Ye, Ren and Hugh were extremely enthusiastic about their business, its retail success, and the relationship they had with the Franchisor. Hugh

assured Zi Ye that he would handle dealing with the Franchisor headquarters in order to assist her in buying the Business if that was what she wanted to do. Hugh advised that the purchase price was approximately \$300,000 which, to Zi Ye, seemed reasonable for a profitable store that had been operating for many years.

[66] Ren understood that Zi Ye was interested in immigrating to Canada and outlined to her the steps she had taken to qualify to immigrate to Canada under a program for immigrant-entrepreneurs. Ren also suggested to Zi Ye that if she bought the defendants' store in Salmon Arm, Zi Ye could qualify for the same program. Zi Ye's husband asked if Ren and Hugh could sell the business to Zi Ye. Ren explained they had obtained permission to immigrate from the Canadian government and could sell the store.

[67] Ren and Hugh recommended that Zi Ye contact their immigration consultant, Carlos Jiang, and have him assist her with the immigration process. In late 2017, Zi Ye contacted Mr. Jiang's office and spoke with his assistant, Grace. She learned that the provincial program that Ren and Hugh used to immigrate to Canada (the BC Provincial Nominee Program) no longer existed. Grace also told Zi Ye that Mr. Jiang could not help her buy the Business and that the purchase of the store could not be used to obtain permanent residency. Grace explained other options to Zi Ye, leading her to make further inquiries.

[68] In the end, Zi Ye was not comfortable with the other options that required her to deal with strangers. As Zi Ye considered Ren and Hugh to be family friends based on her father's relationship with Ren, Zi Ye preferred to purchase their business and also determined she would have a better opportunity to assess the suitability of their business than if she went through an unknown agency to find a business. Accordingly, Zi Ye determined that the best course for her was to purchase the Business from Ren and Hugh and use that to assist in obtaining a work permit so that she could immigrate to Canada.

[69] Zi Ye was clear in her evidence that after she contacted Hugh and Ren about purchasing their store, Hugh told her that he would be responsible for communicating with the Franchisor on her behalf about all matters related to her purchasing their

Business. As part of the initial instructions Hugh gave to Zi Ye, she understood from him that she needed to inspect the store, take photographs of the store, and meet with the Franchisor and Hugh when needed. Hugh explained to Zi Ye that the photographs and meeting with the Franchisor were required to prove her sincerity as to buying and operating the Business.

[70] In March 2018, Zi Ye retained Jie Wang, a lawyer in Vancouver, BC, to incorporate 116 BC Ltd. and to assist her in the purchase of the Vendor's business. The usual process of purchasing a franchised business was explained to her including the importance of obtaining a franchise agreement at the time of the purchase of the franchised business.

[71] Zi Ye continued to speak with Hugh and Ren via WeChat through February, March and April 2018 about purchasing the Business. At that time, Hugh and Ren advised Zi Ye that they had communicated with the Franchisor about Zi Ye. She was also told by Hugh and Ren that the Franchisor wanted her to inspect the store and submit photographs to them. Zi Ye believed from this information that the Franchisor was prepared to enter into a franchise agreement with her. She made plans to travel to Canada in late April 2018.

[72] On April 9, 2018, Zi Ye and Hugh communicated by WeChat about Zi Ye coming to Canada to inspect the store. As part of the communication, Zi Ye understood from Hugh that it was possible for her to meet with the Franchisor but that it was not necessary as the Franchisor had agreed. It was up to Zi Ye as to whether she met with the Franchisor. Based on her communications with Hugh, Zi Ye expected that during her trip to Canada she would complete her inspection of the store, take the photographs that the Franchisor required, meet with the Franchisor and obtain a franchise agreement. Based on this understanding of the state of the transaction, Zi Ye told Jie Wang that she believed the purchase of the business might complete by the end of April.

[73] Zi Ye talked to Jie Wang before she came to Canada to visit the store in April and was advised by her that she would need to sign a franchise agreement. Zi Ye told Jie Wang that Hugh was dealing with the Franchisor and matters were in hand.

[74] According to Zi Ye, Jie Wang drafted a purchase agreement and emailed it to Elaine Cheung, counsel for the defendants. Jie Wang explained to Zi Ye that the purchase agreement required the consent of the landlord to give Zi Ye's company a lease for the premises where the Business was located and the agreement of the Franchisor for Zi Ye to purchasing the Business and give her a franchise agreement.

[75] Once the draft purchase agreement was sent, Zi Ye provided Jie Wang and Hugh each other's contact information on WeChat so that they could communicate directly about the terms of the purchase agreement and the steps needed to complete the transaction. Zi Ye was not a party to those communications although she was informed of some parts of the communications in her own communications with Hugh and Jie Wang.

Jie Wang

[76] In March 2018, Zi Ye retained Ms. Wang to incorporate 116 BC Ltd. for the purpose of purchasing a dollar store in Salmon Arm, BC, owned by her friends who were selling their business. Zi Ye advised Ms. Wang that she wanted to obtain a work permit and then permanent residence in Canada by buying and running the business that the defendants were selling. Zi Ye asked Ms. Wang to draft a purchase agreement. Ms. Wang was advised either by Zi Ye, Hugh or Hugh's then lawyer, Elaine Cheung, that Hugh was dealing with obtaining the consent of the Franchisor.

Yonghui Ren aka Ren

[77] Ren testified for just over five days in this trial, with just over one day in direct examination and the remainder under cross-examination. Her background establishes that she is a well-educated woman with both a bachelor and graduate degree in economics from universities in China. Prior to moving to Canada, Ren had considerable experience working in the financial/banking sector in Beijing, including for five years as the vice general manager of the institutional finance department of the China Zheshang Bank, Beijing Branch.

[78] Ren outlined the process that she and her husband, Hugh, employed to immigrate to British Columbia. In December 2013, they entered into a contract of purchase and sale and paid a deposit to purchase the YDSWM store in Salmon Arm. However, the sale did not close until September 2015. From October 2014 to May 2015, Ren's company, 104 BC Ltd., paid the previous owners an extension fee of \$2,500 per month. After paying the deposit for the business, Ren and Hugh went through an immigration consultant to commence the process for Ren to obtain a work permit. The chronology of this process is outlined in the Agreed Statement of Facts at paras. 13-25, which establishes that Ren and her company did not close on the purchase of the business until approximately two months after she received her work permit from Citizenship and Immigration Canada on July 15, 2015.

[79] The purchase of the YDSWM by 104 BC Ltd. closed on September 8, 2015, and the franchise agreement was transferred from the previous owner to the defendants the next day when Ren and Hugh signed a franchise agreement with YDSWM on September 9, 2015.

[80] Ren worked in various capacities in the store but by 2017 had restricted her role to doing the accounting and payroll with Hugh taking on all other tasks related to the store's operation.

[81] In late 2017, after the birth of her second child, Ren returned to China, accompanied by her husband and children. While in Beijing, Ren met Zi Ye over a dinner arranged by Zi Ye's father, Bin Ye. According to Ren, Bin Ye had previously asked her about the process she employed to immigrate to Canada. It was Ren's recollection that at this dinner meeting she did not really talk to Zi Ye other than casual chatting and "woman's talk".

[82] Ren recalled a second meeting with Zi Ye in February 2018 wherein the topic of the sale of Ren's store came up. Ren explained that the purchase price of \$300,000 reflected her investment in the business and that she would not earn money from the sale. Ren appeared to suggest that she was prepared to sell the business to Zi Ye because Bin Ye had asked Ren to help his daughter immigrate to Canada.

Yu Tian aka Hugh

[83] Hugh testified for just over three days in this trial, with about one day in direct examination and the remainder in cross-examination. His background establishes that he is a well-educated man with a bachelor's degree in environmental economic development from a university in China (1999) and a master's degree in environmental policy from a university in Denmark (2004). He learned to speak Russian in high school and learned to speak English before enrolling in the master's program. Before immigrating to Canada, he worked as project manager for a company in China that was building a thermal power plant.

[84] Hugh described his role with the corporate defendant as being a "helper". It was apparent from his evidence that he had an important role in the running of the store and assisting Ren in numerous tasks. Hugh explained that, insofar as the affairs of their YDSWM store were concerned, most of the time he dealt with the head office of the Franchisor.

[85] The evidence from Hugh and Ren as to how they met Zi Ye was not materially different from that of Zi Ye. Nor was their evidence in material conflict about Zi Ye's attendances in Canada prior to the closing of the sale, save for the point about whether Zi Ye received a copy of the franchise agreement from Ren. Given Zi Ye's evidence and Jie Wang's evidence about not receiving it, and Jie Wang's concerns for her client in this transaction, as well as Zi Ye's desire to follow the proper procedure, I cannot accept the evidence of Ren that she did provide a copy to Zi Ye. Had the franchise agreement been provided to Zi Ye, it would have been provided to Jie Wang, at which point it would have been immediately apparent to Jie Wang that the prior written approval of the Franchisor to the sale of the Business was required.

[86] I have no doubt that if they had seen the franchise agreement, Jie Wang and Zi Ye would have conducted themselves in an entirely different manner. They would have

contacted the Franchisor directly to determine what was required rather than relying upon Hugh's assurances about the Franchisor's consent and approval.⁹

Zi Ye's initial trips to Canada to review the YDSWM Store in Salmon Arm, BC and retaining counsel to assist with buying the Business

[87] In late April 2018, Zi Ye and her husband, Ming Dai, travelled to Canada. They visited Ren and Hugh in Salmon Arm and viewed the YDSWM business that Ren and Hugh owned and operated. Hugh and Ren also showed Zi Ye and Ming Dai the property on Trumpeter Rd. in Kelowna that the former had offered to purchase and expected to obtain occupancy in starting July 2018.

[88] The inspection of the store in Salmon Arm occurred on May 2, 2018. Ren and Hugh introduced Zi Ye and her husband to the employees as investors, not potential purchasers of the Business. Zi Ye was impressed by what she saw in terms of the set up of the store, its location, Hugh's advice that the Franchisor had training materials to show them how to run the store, and the notion that Hugh would be required by the Franchisor to train them. When the inspection concluded, a photograph was taken of Zi Ye and Ming Dai in front of the store with a store employee. Hugh said he would show the photograph to the Franchisor as an indicator of Zi Ye's sincerity in wanting to buy the store.

[89] Approximately two days after the store inspection, Ren drove Zi Ye and her husband back to Vancouver. According to Zi Ye, Hugh stayed behind to meet with the Franchisor about selling the store to her. Hugh told Zi Ye that there was no need for her to meet the Franchisor as it was up to Hugh to communicate with the Franchisor and that he was concerned Zi Ye's lack of fluency in English might leave a bad impression. Zi Ye explained that she trusted Hugh and told him to deal with the Franchisor on her behalf. During the inspection, Zi Ye did not receive any documents or papers from Ren

⁹ ASF, Ex. #1, Tab D, s. 16, p. 14. Indeed, s. 15 of the defendants' franchise agreement required that franchisees who were contemplating selling their interest in a franchise location provide the Franchisor with a right of first refusal to purchase the interest.

that pertained to the Business. She did, however, review the financial statements for the Business later in May 2018 when Jie Wang provided them to her.

[90] Before returning to China on May 7, 2018, Zi Ye met with Jie Wang on May 5 and reviewed the purchase agreement that the latter had prepared for the plaintiff's purchase of the defendants' Business. Jie Wang also explained several of the terms to Zi Ye.

The Asset Purchase Agreement

[91] The Asset Purchase Agreement drafted by Jie Wang contained the following material terms:¹⁰

(a) The Assets that the Vendor agreed to sell and the Purchaser agreed to buy included, among other things:

(i) the goodwill of the Business, including but not limited to, the right of Purchaser to represent itself as carrying on the Business in continuation and in succession to the Vendor; and

(ii) the point of sale system (the "POS System") for the Business, which was the means by which non-cash customer payments were received and deposited to the bank account for the Business.

(b) The purchase price payable by the Purchaser to the Vendor for the Assets would be \$303,985.00 (the "Price").

(c) The Vendor represented and warranted to the Purchaser the following facts, with the intent that the Purchaser would rely on them in entering into the Agreement and in concluding the Sale:

(i) Neither the execution and delivery of the Agreement nor the completion of the Sale would violate any of the terms of any covenant or restriction applicable to the Vendor or any of the Assets of the Business (the "No Default by Sale Representation");

(ii) The Vendor held all licenses required for the conduct of the Business in the ordinary course of business, and neither the execution of the Agreement nor the completion of the purchase and sale contemplated by it

¹⁰ ASF, Ex. #1, Tab V.

would give any person the right to terminate or cancel such licenses (the “No Right to Termination of Licenses Representation”);

(iii) There had not been any default in any obligation to be performed under any material contract, each of which was in good standing and in full force and effect, unamended (the “No Default of Obligations Representation”)

(the No Default by Sale Representation, the No Material Financial Change Representation, the No Right to Termination of Licenses Representation, and the No Default of Obligations Representation, collectively, the “Agreement Representations”);

(d) No certificate furnished by or on behalf of Vendor to the Purchaser at closing in respect of the representations, warranties or covenants of Vendor would contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained in the certificate not misleading (the “Accurate Certificate Covenant”);

(e) The Vendor would diligently take all reasonable steps to obtain, before closing, all consents and approvals necessary for the Purchaser to continue to operate the Business, including the Franchisor’s consent of assignment of the Vendor’s rights and obligations under the Franchise Agreement to the Purchaser (the “Franchise Assignment Covenant”)¹¹;

(f) The Vendor and Ren would jointly and severally indemnify and hold harmless the Purchaser from:

(i) any and all damage or deficiencies resulting from any misrepresentation, breach or warranty or non-fulfillment of any covenant on the part of the Vendor under the Agreement or from any misrepresentation in or omission from any certificate or other instrument furnished or to be furnished to the plaintiff under the Agreement;

(ii) any and all claims, actions, suits, demands, proceedings, assessments, judgments, costs and legal and other expenses incident to any of the foregoing (the “Vendor Indemnity”).

(g) All statements contained in any certificate delivered by or on behalf of the Vendor under the Agreement or in connection with the Sale would be deemed to be representations by the Vendor, and all representations, warranties, covenants

¹¹ ASF, Ex. #1, Tab V, s. 6.4 of the Asset Purchase Agreement.

and agreements made by the Vendor in or under the Agreement would survive closing and continue in full force and effect for the benefit of the plaintiff.

(h) The Vendor's representations and warranties in the Agreement and in any certificate delivered by or on behalf of Vendor under the Agreement or in connection with the Sale would be true at and as of closing as if such representations and warranties were made at and as of such time (the "Truth at Closing Covenant").

[92] It was a condition of the Agreement for the exclusive benefit of the Purchaser that the Purchaser would obtain the consent of the Franchisor and enter into a franchise agreement with respect to the Business before the Closing Date (the "Franchise Transfer Condition").¹² Collectively, the Franchise Assignment Covenant and the Franchise Transfer Condition were drafted to mean that the Vendor would obtain the necessary consents from the Franchisor to ensure that the franchise agreement was transferred or assigned to the Purchaser.

[93] The Asset Purchase Agreement set the closing date for the sale as June 12, 2018.

Zi Ye's evidence

[94] Zi Ye was clear in her affidavit that she knew from the start of her dealings with Hugh and Ren that the Business she was purchasing was a franchise and, as such, that it was important to obtain the Franchisor's consent to the purchase. She explained that from the outset of their discussions, Hugh was clear that he would deal with the Franchisor and make the arrangements for Zi Ye to take over the Business.

[95] This point was confirmed in WeChat communications between Jie Wang and Hugh on May 11 and 17, 2018, wherein Hugh indicated he wanted to sign the contract (the Asset Purchase Agreement) and was informed by Jie Wang that he could do so but that the deal could only complete when the landlord and Franchisor consents were obtained by him. To this effect, she stated, "Don't close the sale until you get it". Hugh indicated that he understood, replying, "I get it, so let's sign up". On May 17, he asked

¹² ASF, Ex. # 1, Tab V, s. 12.7 of the Asset Purchase Agreement.

Ms. Wang if she needed any other information as he needed to make an appointment with the landlord and the Franchisor.¹³ Zi Ye confirmed that contemporaneous with these communications with Jie Wang, Hugh also advised Zi Ye that he would obtain the consents of the landlord and the Franchisor.

Jie Wang's evidence

[96] The defendants were originally represented by a lawyer named Elaine Cheung. Ms. Wang forwarded a draft of the Asset Purchase Agreement to Ms. Cheung sometime in April 2018 for the purpose of having her make changes to the draft. Ms. Wang was advised by Ms. Cheung that she was no longer acting for the defendants and that Hugh was dealing with the Vendor's side of the sale. Ms. Wang acknowledged in cross-examination that she sent the Asset Purchase Agreement to Hugh and that neither he nor anyone else requested changes to it from the Vendors' perspective. The Asset Purchase Agreement is dated May 24, 2018.¹⁴

[97] Ms. Wang agreed in cross-examination that the purchase price was set at \$303,985. This price included (i) \$177,414 for fixed assets, (ii) \$6,571 for rent deposit, (iii) \$125,197 for inventory, and (iv) \$120,000 for goodwill. Ms. Wang did not recall receiving any complaints from Zi Ye after the sale that the assets or inventory had been improperly valued

[98] Ms. Wang's first contact with Hugh started on May 5, 2018, via the WeChat messaging app. In the first communication, made on May 10, 2018, Hugh asked Ms. Wang what to do about the consent from the landlord for the assignment of the lease, and advised that the landlord required the signed agreement before consenting to the assignment of the lease. Ms. Wang advised she had sent the agreement to Hugh's lawyer, Elaine, and that he should check with her.

[99] In response to a question from Hugh on May 11, 2018, Ms. Wang said that the contract could be signed and that the consents of the landlord and the Franchisor were part of the subjects of the contract. Ms. Wang made clear to Hugh that the "deal" could

¹³ ASF, Ex. #1, Tab G, pp. 2-3, 8.

¹⁴ ASF, Ex. #1, Tab V.

only be completed when the consents were approved. Hugh replied that he understood and was prepared to sign the contract.

[100] The next communication of significance between Ms. Wang and Hugh occurred on May 17, 2018, wherein Hugh asked if Ms. Wang needed any further documents, asked when the contract would be signed and indicated that he needed to make an appointment with the landlord and the “headquarter” [sic] (*i.e.*, the Franchisor). Ms. Wang understood that Hugh was dealing with the landlord and the Franchisor to obtain the needed consents that were part of s. 6 of the Asset Purchase Agreement – the Covenants of the Vendor – which included this term:

6.4 Procure Consents

The Vendor shall diligently take all reasonable steps required to obtain, before closing, all consents and approvals necessary for the Purchaser to continue to operate the Business, including any material contracts, the Franchisor’s consent of assignment and the consent of the assignment of the lease, if applicable.

[101] Further communications between Ms. Wang and Hugh occurred on or about May 23, 2018, focussed on s. 6.7 of the Asset Purchase Agreement and the need for the Vendor to appoint a manager to manage the Business after the sale completed. Ms. Wang directed Hugh to discuss with Zi Ye the terms of payment of the manager. Hugh responded that he did not see any problem with the agreement, that he would discuss it with his lawyer, and get it signed the next day. Ms. Wang had no further communications with Hugh after this until June 24, 2018.

[102] The Agreement was not signed immediately after these communications. Instead, Zi Ye signed the Agreement on May 30, 2018. Ms. Wang received an email from Ren on or about June 1, 2018, attaching the Asset Purchase Agreement signed by the defendants.

[103] Zi Ye and Jie Wang were unwavering in their evidence that they would not have completed the sale in this case without the terms in the Asset Purchase Agreement that required the defendants to ensure that the sale did not violate any terms of their franchise agreement with the Franchisor and that the plaintiff could rely upon what the

defendants had agreed to and represented they would do by the Asset Purchase Agreement.

The evidence of the defendants

[104] Hugh's evidence on obtaining the Franchisor's consent to the sale, changed over the arc of these proceedings. His evidence on the examination for discovery, read in by the plaintiff, established that Hugh was involved in arranging the sale of the assets to the plaintiff and understood that he was required to obtain the Franchisor's consent to the sale.

[105] At trial, Hugh agreed in cross-examination that he sent the May 17, 2018 communication to Jie Wang stating he needed to make an appointment with both the landlord and the Franchisor. He agreed that by this message he wanted Jie Wang to understand that he intended to make appointments to obtain the landlord and Franchisor consents that were the subject conditions in the Asset Purchase Agreement.

[106] In his cross-examination, Hugh then endeavoured to say that he did not understand that the Asset Purchase Agreement made him responsible for obtaining the Franchisor's consent to the sale. He was confronted with his evidence from his examination for discovery wherein he indicated he was aware of the term in the Asset Purchase Agreement that made it the Vendor's responsibility to obtain the Franchisor's consent to the sale. Hugh then conceded in cross-examination that when he told Jie Wang that he was going to make appointments with the landlord and Franchisor, he was aware of the term in the Asset Purchase Agreement that made it the Vendor's responsibility to obtain the Franchisor's consent.

[107] Hugh also vacillated on his involvement with the Franchisor. In direct examination he testified he was charged with dealing with the Franchisor, but in cross-examination he initially said that he 'only helped' but then agreed there was no difference. Hugh also acknowledged in his evidence that he told Zi Ye that he would help her get the store and that he knew Zi Ye was relying on him to deal with the Franchisor to obtain the required consent to the sale of the Business.

[108] At other points in his evidence, both in direct and cross-examination, Hugh attempted to dilute any acknowledgment of responsibility to deal with the Franchisor by stating that Jie Wang was the one responsible for the asset sale. It is significant that Jie Wang was never confronted with this suggestion when she testified. More importantly, this assertion is entirely inconsistent with the fact that Hugh dealt with and met the Franchisor, as well as Hugh's representations to Jie Wang and Zi Ye that he was dealing with the Franchisor. It is also inconsistent with Jie Wang's conduct who never contacted the Franchisor. Although she understood the usual process for the transfer of a franchise agreement to be that it occurred at the time of the closing of the sale, Hugh convinced her and Zi Ye that that was not the course in this case.

The Sale did not complete on June 12, 2018

[109] Zi Ye travelled from Beijing and arrived in Vancouver on June 11, 2018, in anticipation of the sale completing the next day. She received WeChat communications from Jie Wang advising that the necessary consents had not been obtained, that the sale would not close as the two subjects with respect to the landlord and the Franchisor consents had not been satisfied, that Ms. Wang had spoken to Elaine "of the other side" to extend the closing, and indicated that the issue of timing was up to Hugh "because he is the one who is doing this".¹⁵

[110] Although the closing date was set for June 12, 2018, the sale did not complete on that date as no consent from the landlord or the Franchisor had been obtained by the defendants. Zi Ye did meet with Jie Wang on this date. Although Ren drove her to this meeting, Zi Ye denied receiving a copy of the franchise agreement from Ren. Zi Ye met with Jie Wang and provided her with a cheque for the retainer and other documents, but she did not have a copy of the franchise agreement.¹⁶ Zi Ye was unshaken in her evidence that she never received a copy of the franchise agreement from Ren and so did not provide it to Jie Wang at this meeting.

¹⁵ ASF, Ex. #1, Tab F, pp. 1 & 4.

¹⁶ ASF, Ex. #1, Tab F, pp. 3-4.

[111] Jie Wang explained in cross-examination that she might have reviewed the franchise agreement if her client provided it to her but testified that sometimes the buyer deals directly with the Franchisor. Thus, review of a franchise agreement would be contingent upon the scope of her instructions. However, Zi Ye never dealt with the Franchisor. Jie Wang did not recall reviewing the franchise agreement and did not believe she had a copy of it on her file.

[112] On the contrary, the defendants testified that Zi Ye did receive a copy of the franchise agreement. Ren testified that she gave Zi Ye a copy of the franchise agreement the day before she met with Jie Wang. However, if this were so, given Zi Ye's repeated communications about wanting the sale to be done properly by following all procedures, Zi Ye would have provided the franchise agreement to Jie Wang. And, no doubt Jie Wang would have reviewed it and noted that the Franchisor's prior written approval of sale was required. I am also of the opinion that it is unlikely that Ren would have provided a copy of the franchise agreement to Zi Ye for the May 5, 2018 meeting with Jie Wang because at that point they were only in the early stages of drafting the Asset Purchase Agreement.

[113] In the circumstances, and in light of the numerous other inconsistencies and contradictions in the defendants' evidence that I address later in these reasons, I adopt the following approach: where the defendants' evidence on this point conflicts with that of Jie Wang and Zi Ye, I prefer the plaintiff's evidence. I find that the defendants never provided a copy of the franchise agreement to Zi Ye and that neither Zi Ye nor Jie Wang ever saw the franchise agreement before the sale completed in this case.

[114] Zi Ye returned to China on June 14, 2018, when it was clear the sale would not close as anticipated. It was Zi Ye's understanding that Hugh was still working to obtain the Franchisor's consent. Zi Ye intended to return to Canada to complete the sale once the conditions for closing the sale on the purchase of the Business had been satisfied. Jie Wang testified that a new closing date of July 3, 2018, was arranged with the assistance of Elaine Cheung, the Vendors' lawyer for the closing.

The directions to the Defendants from the Franchisor***Joseph Schober***

[115] In his evidence, Joseph Schober recalled that Hugh initially spoke to him about selling the Business sometime in early 2018.

[116] Mr. Schober outlined the Franchisor's conditions for a franchisee to sell a YDSWM store. Significantly, the Franchisor required that a new owner of a store become a franchisee at the time of the sale. Mr. Schober was clear on the following:

- i. the Franchisor must consent to the sale of a store;
- ii. the Franchisor's consent to sale of a store included approval of the purchase agreement and approval of the purchaser becoming a franchisee;
- iii. the Franchisor would not allow sales of stores to happen without the purchaser becoming a franchisee at the same time as the sale.

[117] Mr. Schober explained in his evidence that the franchise agreement, specifically at s. 16, required franchisees to obtain the prior written consent of the Franchisor to sell their business or assets.¹⁷

Preliminary discussions about a possible sale of the Defendants' YDSWM store

[118] Although he could not recall the specifics of the initial conversation, Mr. Schober testified that Hugh met with him and Dean Lambert, the COO for YDSWM, at the head office in Kelowna, not at a trade show, in early 2018. He explained that Hugh was inquiring about the process for selling the Business. Mr. Schober testified that at this meeting Hugh was reminded of the terms of his franchise agreement from September 2015 that specifically contained a clause that no sale or transfer of the franchise could occur without the Franchisor's prior written consent. Part of that process required Hugh to provide the proposed purchase agreement to the Franchisor. Mr. Schober was clear that Hugh was told at this initial meeting that for any sale of the store to occur, it required

¹⁷ ASF, Ex. #1, Tab D, s. 16, p. 14, is a copy of the defendants' franchise agreement with YDSWM.

the Franchisor's consent. Hugh was encouraged to review his franchise agreement and to retain a lawyer to assist him in understanding the terms.

[119] Hugh was also specifically advised at this initial meeting that as the defendants' store's lease only had little more than a year left on it, he had to obtain a renewal for a much longer term (ideally five years) in order for the Franchisor to continue with the sale process and authorize a new buyer to take over the Business.

[120] Mr. Schober learned from Hugh in this meeting that the buyer was a "family member from China." This raised concerns for YDSWM as a non-resident might be a flight risk that could leave suppliers and/or the Franchisor (by way of fees and royalties, respectively) unpaid. Additionally, a potential franchisee would need a good grasp of English such that they would be able to communicate with suppliers and customers. Their ability to communicate in writing and in English is one of the factors that the Franchisor considers in whether to approve a proposed purchaser/new franchisee.

[121] Mr. Schober followed up on the early 2018 meeting with Hugh in an email on May 14, 2018, at 3:51 p.m., sent to both Ren and Hugh at their store's email address. Mr. Schober was seeking information and an update on the topics discussed in the meeting earlier that year, including:

- i. Hugh contacting the landlord to renew the lease;
- ii. discussing with the landlord the possibility of "taking on an additional 800+ sq ft of space that has become available" next to their store; and
- iii. the possibility of selling the store once the lease was renewed. Mr. Schober asked for an update and urged the defendants that renewal of the lease ought to be a priority.¹⁸

[122] On May 31, 2018, at 12:29 p.m., Mr. Schober received an email from Ren, attaching the "contract" – the Asset Purchase Agreement – which showed a closing date of June 12, 2018, and included terms that required the Franchisor's approval. The

¹⁸ ASF, Ex. #1, Tab I.

contract also informed Mr. Schober that the intent of the purchase agreement was to include a transfer of the franchise agreement to the potential buyer.¹⁹

[123] On June 1, 2018, at 4:20 p.m. Mr. Schober replied to Ren's email thanking her for the copy of the purchase agreement and reminding her that he needed a copy of the landlord's acceptance of a renewal of the store's lease. He indicated that once he received that documentation, he would send the purchaser the BC Disclosure statement and then a franchise agreement and then they could move forward with the last steps to finalize the new franchisee.²⁰ He asked Ren for Zi Ye's contact information.

The events of Friday June 22, 2018

[124] Mr. Schober did not receive a response to his June 1, 2018, email until Ren emailed him on Friday June 22 at 12:48 p.m. with a copy of an executed lease assignment dated May 31, 2018, signed by the parties to this action. By this document the landlord was simply authorizing the transfer of the lease to the Purchaser. A review of the lease assignment established that the term of the lease had not been extended or renewed and that the first extended term, granted on October 2, 2014, remained set for expiry on August 31, 2019.²¹ In this email, Ren asked Mr. Schober to send her the franchise agreement as soon as possible "because the lawyer of both sides needs to close the purchase contract before the end of June."²²

[125] Upon receipt of this email, Mr. Schober spoke with Mr. Lambert. Mr. Schober testified that it was clear to him that the document forwarded by Ren was not the lease renewal/extension that the Franchisor required.

[126] Additionally, Mr. Schober indicated that the end of June deadline outlined by Ren in her June 22 email was not feasible. It did not provide sufficient time for (i) the proposed franchisee to complete a financial disclosure profile; (ii) the vetting process required by the Franchisor; and (iii) the 14-day cooling off period that the BC

¹⁹ ASF, Ex. #1, Tab J.

²⁰ ASF, Ex. #1, Tab K.

²¹ ASF, Ex. #1, Tab L.

²² Jie Wang, counsel for the Purchaser and Zi Ye, was clear in her evidence that she was only acting for the Purchaser, not the Vendor.

government required between receipt of the disclosure document and completion of any franchise agreement.

[127] The contemplated end-of-June date also failed to provide time for the defendants to conduct the required inventory count to validate the value of the inventory as between the vendor and proposed purchaser. The inventory count had to occur before completion of the sale. Mr. Schober explained that the Franchisor's approval of the transfer of the franchise agreement to a new franchisee does not occur until the transfer agreement and the new franchise documents have been sent out by the Franchisor. This does not usually occur until just before the inventory count.

[128] At 2:36 p.m. on June 22, 2018, Mr. Schober sent an email responding to Ren's earlier email (the "original Joe Schober email").²³ Mr. Schober explained that he responded quickly as the timeline that Ren was proposing was not feasible and he wanted to outline the steps that had to occur before the proposed sale between the parties could be approved by the Franchisor.

[129] The original Joe Schober email of June 22, 2018, attached a Personal Confidential Profile form for the proposed new franchisee to complete. The body of the email stated as follows:

Hi Catherine,

As per the discussion Dean and myself had with Hugh earlier this year, we will require Hugh to remain on the franchise agreement as guarantor. In addition, We indicated that due to Zi not being fluent in English and not having proven experience she can take over the business, Hugh would have to remain working at the store until such time that head office feels he can be removed from the franchise agreement and we have confidence Zi can run the business properly.

Hugh has been informed in the past of the steps that need to be followed for the transaction to take place and they still need to occur to move forward.

- Zi Ye will need to fill out our confidential personal profile (see attached) and include Canadian address (even if it is your address).
- We will need a copy of Zi's incorporation documentation as registered in Canada.
- We will require a copy of the purchase agreement between you and Zi.

²³ ASF, Ex. #1, Tab M.

- We will need to send out BC Disclosure (which will take 14days after return signature receipt on the document before the franchise agreement can be sent out.)
- We will also require proof that Zi has all the documentation and acceptance from the government to move, do business and reside in Canada.
- The lease agreement only indicates a transfer for the remainder of the term which expires in September 2019. Hugh was told that the lease had to be extended as one of the conditions for us to authorize the sale which is not present.

We are happy to move forward with adding Zi to the current franchise agreement once these conditions can be met. If Hugh needs to clarify further he is welcome to call Dean who can answer any questions. Please be aware that [t]his process will take time and cannot be fulfilled by your requested end of June deadline. We will move as efficiently as possible once we receive the required information and documentation from you.

Regards,

Joe Schober

[130] Mr. Schober explained in cross-examination that the first sentence of this email was intended to convey that Hugh and Ren would remain as franchisees, Zi Ye and her company would be added to their franchise agreement, all parties would provide personal guarantees, and both companies would provide security agreements. He conceded that the email did not state these proposals specifically.

[131] Mr. Schober testified that the first sentence in the last paragraph of this email reflected YDSWM's position that:

- i. the Franchisor would not permit Zi Ye to own the store until the Franchisor was confident that she could manage the store alone;
- ii. Zi Ye needed to spend some time working in the store for the Franchisor to gain that confidence; and,
- iii. Zi Ye could be added to the existing franchise agreement before owning the store but only if the Franchisor received and approved all the items listed in his email.

[132] Although Mr. Schober sent the email to Ren, Mr. Schober invited Hugh to respond as he was the person involved in both the face-to-face and telephone communications with the Franchisor as his facility with English was superior to Ren's

and because he normally took the lead in dealing with the Franchisor on the more important business matters.

[133] Mr. Schober testified that this email response from him informed the defendants that the June deadline could not be met, particularly as Zi Ye needed to work in the store until the Franchisor was satisfied that she was able to run the business properly. And so, Mr. Schober made clear to Hugh in his meetings with him that the Franchisor would not approve the sale of the assets to the Purchaser and Zi Ye would not receive a franchise agreement until the Franchisor was satisfied that she was able to run the business competently on her own. On the evidence of Mr. Schober, it was clear that the sale of the assets of the Business could not be separated to occur before the Purchaser became a franchisee. Rather, as far as the Franchisor was concerned, the sale of the business and the transfer of the franchise agreement had to occur at the same time, after the Franchisor approved the sale.²⁴

[134] Later, in the afternoon of June 22, 2018, Hugh attended at the YDSWM head office in Kelowna and met with Mr. Schober and Mr. Lambert. Hugh wanted to expedite the process on the transfer of the franchise to the Purchaser so that the defendants could meet the end of June deadline. Mr. Schober testified that he and Mr. Lambert clarified for Hugh the requirements he still had to fulfill and that it was not possible for the Franchisor to approve the entire transaction by the end of June. Mr. Schober was unequivocal in his testimony that he made clear to Hugh at this meeting that the approval of the transfer and a new franchise agreement had to occur at the same time. The Franchisor never suggested that an asset sale could occur first with the franchise agreement being provided later.

[135] After their meeting with Hugh concluded, Mr. Schober sent a second email (the “second Joe Schober email”) addressed to Ren and Hugh, at 5:01 p.m. on June 22,

²⁴ Dean Lambert also confirmed this point in his evidence.

2018, wherein he summarized the discussion that he and Mr. Lambert had just had with Hugh:²⁵

Hi Catherine and Hugh

As per the meeting we just had in our head office boardroom (June 22 2018) let me sum up what was discussed.

- The laws of BC and Canada and our own
- Zi will provide YDSWM a completed Confidential personal profile.
- Hugh will provide YDSWM a copy of the current purchase agreement that YDSWM look over to ensure all proper terms and clauses are accounted for.
- Upon acceptance of the purchase agreement, YDSWM can send out the BC Government required Disclosure document to the new owners address. Zi will sign and return to us. As per BC Law, starting the following day after YDSWM receives the signed document back, a 14 day period will begin where there will be no contact allowed between YDSWM and Zi (this will allow Zi to study the disclosure document with their lawyer).
- Zi will be required to read the YDSWM franchise agreement (which a copy of which is enclosed in the Disclosure document) and understand and meet her obligations as defined there in.
- Hugh will also be required to provide YDSWM a letter from the landlord authorizing an option for a renewal term for the existing lease beyond Sept 2019 (the current lease end date). We suggest a 5 year extention (sic)
- Zi will provide YDSWM a copy of her incorporation papers for her numbered BC company
- YDSWM will receive a letter from Zi's lawyer indicating that Zi is following all the Canadian legal steps to move and live in Canada and be able to run a business
- Once any and all documentation and conditions are met, YDSWM will move forward with sending out a Franchise agreement. (YDSWM can provide a letter that a franchise will be sold to Zi [if specified conditions are met] for her use to provide to the government in support of her legally moving to Canada). *NOTE: Hugh will be expected to remain on the Franchise agreement until such time that YDSWM feels Zi is able to fully run the business on her own which will include a competent knowledge of English to properly be able to both communicate with YDSWM and our vendor network.

YDSWM will work with Hugh and Zi as efficiently as possible through this process.

Regards,
Joe Schober

[Underlining emphasis added.]

[136] Mr. Schober sent this second email to the defendants to emphasize what occurred in the meeting with Hugh that afternoon and to ensure that the defendants

²⁵ ASF, Ex. #1, Tab O. The Confidential personal profile referenced in the second bullet of this email was previously sent to Ren as an attachment to the original Joe Schober email earlier that same day.

were aware of the additional requirements that had to be completed before the Franchisor would approve the sale.

[137] He explained that the first bullet point, although incomplete, referenced their discussion in the meeting that the Franchisor's rules and procedure had to be followed in order for the Franchisor to execute and accept the transfer of the franchise agreement to the Purchaser. The last bullet point in the letter was included to show that the YDSWM head office was prepared to assist Zi Ye in gaining residency in Canada by providing a formal letter indicating that in the future YDSWM would assign the business to Zi Ye if she satisfied specified conditions. Mr. Schober explained that this proposed letter could be sent to the government in advance of a transfer of the business, but that letter would only be for the purpose of helping her gain residency.

[138] At the conclusion of the June 22, 2018 meeting with Hugh, there was no discussion of plans for a further meeting. There was no further meeting on June 23, 2018. Mr. Schober had no telephone call with Ren or Hugh on June 23, 2018, and no one from YDSWM sent Hugh and/or Ren an email on that date.

[139] Indeed, Mr. Schober heard nothing more from Ren and Hugh about the proposed sale and transfer after the June 22, 2018, meeting with Hugh. And, after the second Joe Schober email was sent to Ren and Hugh on June 22, 2018, at 5:01 p.m. by Mr. Schober, there was no follow-up or communication from the defendants. Mr. Schober assumed the deal had fallen through as YDSWM did not receive any of the information it had requested that Hugh provide to the Franchisor.

Dean Lambert

[140] At the material time of the events underlying this action, Dean Lambert was the Franchisor's COO. Together with Joe Schober, he met with Hugh in early 2018 at YDSWM's head office. He could not recall if Ren was present. At this meeting Hugh raised the issue of selling their Salmon Arm store. Mr. Lambert recalled, in general terms, that they discussed the process for selling the store, the approval process for transferring the franchise, and the need for Hugh to consult with a lawyer. He testified he would have told Hugh that the Franchisor needed to see the purchase agreement to

start the process. If the terms made sense, then they would move on to the disclosure process, reviewing the finances and the business plan.

[141] Mr. Lambert did not recall receiving the Asset Purchase Agreement that Ren sent to Mr. Schober and did not recall that there was a proposed completion date for June 2018. He only recalled Hugh's talk of wanting to sell the business but that he did not have specifics.

[142] Mr. Lambert had no recollection of any other meeting with Hugh and had only the most general belief as to meetings or information that Zi Ye or her lawyer Ms. Wang may have provided at some point in the overall arc of the dealings. His evidence was thin on details of specifics of any meetings with Hugh over the sale of the Business. However, he deferred to Mr. Schober's recollection for the other meetings and the details of the meetings as Mr. Schober was "more hands on" in the process of dealing with Hugh and Ren on the sale of the Business.

[143] Mr. Lambert testified that he would not have said that a lease renewal was a requirement for the Franchisor to approve the sale, rather he would have said it was a strong recommendation. However, he acknowledged the Franchisor would prefer to see that the lease issue was addressed either through a new lease agreement or a renewal of the lease. This was due to the fact that the timeline on the expiry of a lease and the time a landlord can take to approve a new tenant can take months which can affect whether a business can remain open.

The evidence of the defendants

[144] Hugh was the contact person for Joe Schober and Dean Lambert. In his evidence at trial, Hugh could not remember what Mr. Schober and Mr. Lambert had told him about the franchise agreement requirements. As well, Hugh admitted that he did not review the franchise agreement terms, specifically the terms about the requirements for a sale, stating that it was too much English for him to understand. He never asked his lawyer, Elaine Cheung, to explain these terms.

[145] Jie Wang did not tell Hugh anything about the terms, either. Of course, Hugh's implication that Jie Wang should have explained the terms of the franchise agreement to him is illogical. Ms. Wang was not his lawyer and as I have found, she never received or reviewed a copy of the franchise agreement. What is clear from Hugh's evidence is that he made absolutely no effort to ensure he understood the requirements of the franchise agreement for selling the store, notwithstanding the direction of the Franchisor that he familiarise himself with the terms of the franchise agreement and obtain legal advice.

[146] On the other hand, Hugh's evidence from his examination for discovery, read in at the trial, established that he knew the Franchisor's consent to the sale of the store was required. In the initial part of his cross-examination, Hugh agreed it was his intention to obtain the Franchisor's consent to the Sale. Later, however, he attempted to say that he understood the Franchisor's consent to be in relation to entering into a franchise agreement. Hugh's evidence on this point is both internally inconsistent and externally inconsistent with the evidence of Dean Lambert and Joe Schober. Where their evidence conflicts, I prefer the evidence of the representatives of the Franchisor.

[147] I find that Hugh in fact knew that he needed to obtain the Franchisor's consent to the sale of the Business. Indeed, his assurances to Zi Ye and Jie Wang that he was dealing with the Franchisor to obtain the Franchisor's approval of the sale clearly establishes this fact. Despite Hugh's assurances to Jie Wang and Zi Ye that he was dealing with the Franchisor and working on obtaining the Franchisor's approval of the sale, Hugh did nothing of the sort. It is apparent that he conducted the defendants' side of the sale contrary to the terms of his franchise agreement with YDSWM, contrary to the terms of the Asset Purchase Agreement, and contrary to his representations to Jie Wang and Zi Ye.

The WeChat Messaging communications between June 22 and 28, 2018

[148] After Hugh met with Joe Schober and Dean Lambert at the YDSWM head office in Kelowna on June 22, 2018, and within minutes of the second Joe Schober email being sent to Hugh and Ren at 5:18 p.m., the defendants, Zi Ye, and Jie Wang commenced communications via voicemail and text message on the WeChat

messaging app. The exhibits contain a veritable flurry of messaging communications passing between various permutations of the parties (Zi Ye and Hugh; Zi Ye and Jie Wang; Hugh and Jie Wang; Zi Ye and Ren). The messages variously occurred contemporaneously, in overlapping sequence, and sometimes after the passage of minutes or hours.

June 22, 2018

[149] The first communication was between Zi Ye and Hugh. It started on June 22, 2018, at 5:09 p.m. and then 9:15 p.m. when Hugh asked if Zi Ye had received the email from Ren that contained the landlord's consent.²⁶ At 11:39 p.m. Zi Ye responded to Hugh and indicated she had tried to reach her lawyer, but that she was not answering (it was a Friday night). In this voicemail message, Zi Ye expressed reluctance to taking risks in the purchase of the business.

[150] Zi Ye then had a telephone conversation with Hugh wherein Hugh told her that he and Ren owned the assets of their company, that the assets could be sold separately from the franchise, and that Zi Ye could change the name of the store to ZIYESTORE and the consent of the Franchisor would not be necessary. According to Zi Ye, Hugh explained to her that by proceeding in this fashion she would not have to pay the Franchisor the monthly fees and would therefore save a lot of money. Hugh also offered that he and Ren could run the Business and negotiate with suppliers.

[151] Zi Ye told Hugh she needed to consult with her husband. She did so. Thereafter, Zi Ye sent Hugh two WeChat communications at 11:29 p.m. on June 22, 2018. Zi Ye testified she was against Hugh's proposal and did not want to take risk or shortcuts.²⁷

[152] At 11:38 p.m. on June 22, 2018, Hugh responded to Zi Ye's communications with his own message indicating that he had a meeting scheduled the following day with "him", and to wait until his discussion was over.²⁸ Zi Ye understood this to mean that

²⁶ Ex. #4, Tab D, pp. 42-51. This email was sent by Ren on June 22, 2018, at 9:18 p.m. and attached the lease assignment.

²⁷ ASF, Ex. #1, Tab E, pp. 2-3.

²⁸ ASF, Ex. #1, Tab E, p. 4

Hugh was meeting with the Franchisor. She indicated to Hugh that it was important to her to have the security of a franchise agreement. When testifying, Hugh could not remember who the meeting was to be with but thought it might be the lawyer, Jie Wang. Ultimately, he could not remember if he even had a meeting on this date. As noted previously, no one from the Franchisor had any meeting with Hugh on Saturday June 23, 2018.

June 23, 2018

[153] The first communications between Ren and Zi Ye started on June 23, 2018, at 10:39 p.m. when Ren messaged Zi Ye that she had emailed the landlord's lease assignment to Zi Ye and Zi Ye confirmed she sent it to her lawyer.²⁹

June 24, 2018

[154] Zi Ye and Ren had no communications on this date.

[155] Zi Ye's next communication with Hugh was not until June 24, 2018, at 10:12 p.m. when Hugh sent her a WeChat communication advising that he had sent her and Jie Wang the Franchisor's requirements for her to operate the Business. Zi Ye checked her email and noticed that Ren had forwarded an email to her and Jie Wang. The email contained a preface in Mandarin from Ren providing an explanation about the email from Mr. Schober and then an email purporting to be sent from Joe Schober on June 23, 2018, at 2:35 p.m. to Ren's email address. Based on Hugh's telling Zi Ye on June 22 that he would be meeting with the Franchisor on June 23, Zi Ye assumed the Joe Schober email she received from Ren had been sent by Mr. Schober after meeting with Hugh that morning.

[156] The email that Ren sent to Jie Wang and Zi Ye contained an attachment, a Personal Confidential Profile from YDSWM for the proposed Purchaser (Zi Ye) to complete as sent by Joe Schober to Ren on June 22, 2018 (in the original Joe Schober

²⁹ ASF, Ex. #1, Tab H, p. 1.

email).³⁰ The introductory portion of this email from Ren contained a paragraph that she wrote in Chinese for Ms. Wang. As translated it read:

Lawyer Wang:

How are you? I have sent the consent form the landlord to Ye Zi. This email was sent to me by the DOLLAR STRORE franchise head office, and I am forwarding it to you here. According to Canadian laws, a tourist does not have the right to operate a business in Canada. The franchise head office therefore only indicated in the email their willingness to transfer my franchise rights to Ye Zi. They will issue the official CONSENT when Ye Zi has obtained a work permit and is able to legally operate a business. And then, once Ye Zi is able to independently operate the business, my franchise rights can be transferred to her.

[157] In reading the Mandarin text of the preface that Ren sent her, Zi Ye understood it to mean that while the Franchisor was willing to transfer the franchise rights to Zi Ye, they would not officially do so until she had a work permit and could operate the business.

[158] Below the Mandarin text, Ren included in this email what she held out as an email she had received from Joe Schober. Unbeknownst to Zi Ye and Ms. Wang, Ren and Hugh had altered the original Joe Schober email, removing one of the requirements that the Franchisor had conveyed to the defendants as being necessary for approval of the sale to the Purchaser and also removing a sentence that indicated that the defendants' proposed end of June deadline for completing the sale was not feasible from the Franchisor's perspective. This finding is significant to the factual matrix of the case at bar.

[159] Hugh and Ren denied changing the date of the email from June 22 to June 23, 2018. In cross-examination, Hugh endeavoured to suggest that all of the time stamps on the emails were set to the time in China, something contrary to the Agreed Statement of Facts and completely inconsistent with the chronological sequence of events. In her cross-examination, Ren professed that she was unaware that a plain text date in a forwarded email could be modified. Both explanations defy common sense and the

³⁰ ASF, Ex. #1, Tabs S and T.

reality of the situation. The only logical inference is that they did in fact alter the date so that it appeared consistent with Hugh's intimating to Zi Ye on June 22 that he was meeting with the Franchisor the next day. Mr. Schober denied any communications with Hugh after June 22. Considering Ren and Hugh's admission that they altered the original Joe Schober email, as outlined below, no other conclusion is available other than that they altered the date of the email as well.

[160] Contemporaneous with Hugh's message to Zi Ye, Hugh also messaged Jie Wang for the first time after May 23 on June 24, 2018, at 10:15 p.m. He left a WeChat voice message advising that Ren had emailed Jie Wang the Franchisor's position and asked if she had read it. Jie Wang responded on June 25, 2018, at 9:04 p.m. As outlined in the introduction to these reasons, Jie Wang and Zi Ye had no knowledge that the original Joe Schober email had been altered.

[161] At this juncture in these reasons, it is necessary to suspend my review of the chronology of the WeChat messages to address the altered Joe Schober email.

The altered Joe Schober email and the evidence addressing it

[162] The altered Joe Schober email that Ren sent to Jie Wang was dated June 23, 2018, and contained a time stamp of 14:35 GMT-07:00. It read as follows:³¹

Hi Catherine,

As per the discussion Dean and myself had with Hugh earlier this year, we will require Hugh to remain on the franchise agreement as guarantor. In addition, We indicated that due to Zi not being fluent in English and not having proven experience she can take over the business, Hugh would have to remain working at the store until such time that head office feels he can be removed from the franchise agreement and we have confidence Zi can run the business properly.

Hugh has been informed in the past of the steps that need to be followed for the transaction to take place and they still need to occur to move forward.

- Zi Ye will need to fill out our confidential personal profile (see attached) and include Canadian address (even if it is your address).
- We will need a copy of Zi's incorporation documentation as registered in Canada.
- We will require a copy of the purchase agreement between you and Zi

³¹ ASF, Ex. #1, Tab S.

- Ye.
- We will need to send out BC Disclosure (which will take 14days after return signature receipt on the document before the franchise agreement can be sent out.)
- We will also require proof that Zi has all the documentation and acceptance from the government to move, do business and reside in Canada.

We are happy to move forward with adding Zi Ye to the current franchise agreement once these conditions can be met. If You needs to clarify further he is welcome to call Dean who can answer any questions. We will move as efficiently as possible once we receive the required information and documentation from you.

Regards,
Joe Schober

[163] During his evidence, Mr. Schober was shown the email that Ren sent to Zi Ye and Ms. Wang on June 24, 2018, at 10:09 p.m. that purported to forward an email from him dated June 23, 2018 (the “altered email”).

[164] The original Joe Schober email sent to Ren by Mr. Schober was dated June 22, 2018, at 2:36:18 p.m. Mr. Schober testified he did not send the altered email to Ren. He noted that two key points had been deleted from it. First, the sixth bullet point from the original Joe Schober email of June 22, 2018, that addressed the requirement of a renewal of the lease for the Franchisor to authorize the sale had been removed. Second, the penultimate sentence of the email that the process would take time and could not be met by the end of June deadline had been removed. Finally, the second sentence in the last paragraph was altered to read “If You needs to clarify further ...” instead of “If Hugh needs to clarify further ...”

[165] In addition to disavowing writing the altered email of June 23, 2018, and sending it to Ren, Mr. Schober made clear in his evidence that the Franchisor:

- i. never received a completed personal confidential profile from Zi Ye;
- ii. never said it would not accept a personal confidential profile from Zi Ye;
- iii. never said that the sale of the assets of the business to Zi Ye was something that could be done before a franchise agreement was approved;

- iv. never was asked if 104 BC Ltd. could sell its assets without the permission of YDSWM; and,
- v. never approved the sale of 104 BC Ltd.'s assets to 116 BC Ltd. or Zi Ye.

[166] In cross-examination, Zi Yie did not agree that all the bullet points in the altered Joe Schober email were things that she understood she had to do. Rather, she understood the email was addressed to Hugh and Ren and that Hugh had to take certain steps. She acknowledged that it set out she needed to complete the Personal Confidential Profile but explained she did not do so because Hugh told her there was no point in doing so until she received a work permit. Zi Ye also explained that she understood that Hugh had already sent the purchase agreement to the Franchisor because she signed it on or about May 30, 2018. Finally, Zi Ye was fairly clear that she relied upon Hugh's instructions that the materials did not need to be provided immediately and that he would provide them to the Franchisor in the future, after she had obtained a work permit.

[167] Jie Wang was shown the original Joe Schober email of June 22, 2018, sent to Ren at 2:36 p.m. on that date. She confirmed that the altered email that Ren forwarded to her on June 24, 2018, at 9:56 p.m. did not contain: (i) the sixth bullet point addressing the lease renewal requirement before the Franchisor could authorize the sale or (ii) the second-last sentence about the process taking time such that the proposed deadline for the end of June could not be fulfilled.

[168] Ms. Wang testified that had she been aware of the bullet point about the lease renewal requirement she would have contacted both the landlord and the Franchisor and would not have consented to closing the deal. It also would have caused her to doubt Hugh's communications that the Franchisor was fine with the sale of the business assets closing first and transferring the franchise later. Jie Wang understood the second last sentence of the original Joe Schober email to mean that the sale could not happen by the end of June and thought it meant that the closing of the sale and the transfer of the franchise agreement should occur at the same time. Had Jie Wang been provided with the omitted sentence on the timing of the sale, she would have doubted what Hugh was saying and would not have agreed to the closing occurring on July 3, 2018.

[169] Ms. Wang explained that s. 5.3 of the Asset Purchase Agreement was a standard clause in such agreements. Basically, the clause was the Vendor's representation that it had not violated anything in the Asset Purchase Agreement. Delivery of the Vendor's Closing Certificate, which Ren provided on July 3, 2018, certified that everything outlined in the Asset Purchase Agreement remained true at the time of the sale closing.³²

The June 24, 2018 WeChat message communications continue

[170] After receiving the altered Joe Schober email from Ren, Zi Ye continued to have communications with Hugh on June 24, 2018, between 10:12 p.m. and 10:17 p.m., she sought to clarify if the email from Mr. Schober meant that she could buy the business and whether Hugh had bought the Business without a work permit. Hugh indicated to Zi Ye that the email meant that the Business could be transferred to her business. Hugh confirmed that he and Ren had done the same thing by purchasing their business before they obtained a work permit.³³

[171] Such a representation was in fact false. Hugh provided a complete fabrication of how the defendants acquired their business and entered into a franchise agreement. The ASF at paras. 13-25 unequivocally establishes that Hugh and Ren entered into a contract of purchase and sale with the previous operator of the YDSWM store on December 18, 2013, and paid a deposit for the business. However, the sale did not complete until weeks after Ren was issued a work permit in July 2015.

[172] The defendants paid extension fees to the previous operator between October 2014 and May 2015. Ren was not issued a work permit until July 15, 2015. The sale closed on September 8, 2015. On September 9, 2015, the defendants entered into a franchise agreement with the Franchisor. Thus, the defendants' purchase of the business and obtaining the franchise rights all occurred at the same time, and not until after a work permit had been issued.

³² ASF, Ex. #1, Tab X.

³³ ASF, Ex. #1, Tab E, pp. 5-6

[173] Hugh's representation to Zi Ye in the communications of June 24 at 10:17 p.m. were contrary to what Zi Ye had previously understood about the process of purchasing a franchise business. Zi Ye understood from her lawyer that when purchasing a franchise business, the franchisor entered into a franchise agreement with the purchaser at the time the sale concluded, not later. As Zi Ye explained in her affidavit, the process Hugh outlined in his communications seemed odd to her because it meant that her company could purchase the Business and operate it without any sort of relationship with the Franchisor. Zi Ye understood Hugh to be telling her that the plaintiff could complete the sale and operate the Business using the Franchisor's brand before Zi Ye obtained a work permit.³⁴

[174] Zi Ye decided to wait to speak to Jie Wang (who had been copied on the June 24, 2018 email from Ren) before determining whether the Joe Schober email they had received was enough for her to complete the sale.

[175] In light of the evidence of Mr. Schober about the Franchisor's process for transferring a franchise business, and the clear evidence about the actual process that the defendants followed when they purchased the business in 2015, I have no hesitation in finding that Hugh's representations to Zi Ye that he and Ren had bought their business the same way he was suggesting that Zi Ye purchase the business were clearly false in fact. In my view, they were designed to mislead Zi Ye into believing the representations were true and accurate and that she was safe to follow the same process.

June 25, 2018

[176] The communications on this date can be described in some respects as intense, chaotic, and ultimately a pressure campaign by Ren and Hugh upon Zi Ye to complete the sale. Jie Wang took a cautious approach in response because Hugh's proposal to sell the business and transfer the franchise agreement at a later date was inconsistent with her previous experience in franchise business sales and purchases.

³⁴ Affidavit #2 of Zi Ye, paras. 69-70.

[177] On the evening of June 25, Zi Ye was communicating separately with both Jie Wang and Hugh, sharing with the latter what the former was telling her. Once finished her communications with Jie Wang for the evening, Zi Ye began communicating with Ren via WeChat. It is clear from the tenor of these communications that Ren was frustrated and angry with Jie Wang's cautious approach and set upon urging Zi Ye to ignore Jie Wang's concerns and "hurry up and close the deal".

[178] On June 25, 2018, at 7:45 p.m., Hugh sent Zi Ye a WeChat message asking if Jie Wang had replied to her. He impressed upon Zi Ye that they needed to complete the sale before the end of June. Zi Ye responded at 8:14 p.m. that she had not yet heard back from Jie Wang but that she would push her for a response.³⁵ Unbeknownst to Zi Ye, at 8:03 p.m. Jie Wang had forwarded her Ren's email of June 24, 2018, with her own translation in Mandarin of the text of the altered Joe Schober email from Ren, and attaching comments.³⁶

[179] Ms. Wang testified that she reviewed the email from Ren and translated it for her client by adding Mandarin text to the email she sent to Zi Ye. Ms. Wang then forwarded the email from Ren to Zi Ye on June 25, 2018, at 8:03 p.m. and included explanations for Zi Ye that Ms. Wang wrote in Chinese characters that were then translated for the trial.³⁷

[180] Although Zi Ye had left voicemail messages for Jie Wang on WeChat on June 22, 2018, the first WeChat communication between them occurred on June 25, 2018, at 8:54 p.m. where Jie Wang instructed Zi Ye to complete the YDSWM Personal Confidential Profile.³⁸

[181] At 8:55 p.m., Zi Ye forwarded the Personal Confidential Profile form to Hugh, seeking his assistance in completing it. Hugh responded immediately, advising that the form could not be filled in at this time and for her to wait until she had obtained her work

³⁵ ASF, Ex. #1, Tab G, p. 9.

³⁶ Affidavit #2 of Zi Ye, Ex. G, also para. 72 and Ex. F; ASF, Ex. #1, Tab T.

³⁷ ASF, Ex. #1, Tab T which contains both the writing by Ms. Wang to Zi Ye and an official translation of what Ms. Wang told Zi Ye.

³⁸ ASF, Ex. #1, Tab F, p.8.

permit and the franchise.³⁹ Zi Ye responded immediately by forwarding Hugh's comments to her to Jie Wang that the profile form could not be completed at this time and it should wait until s the Franchisor gave her the franchise.⁴⁰ At 8:58 p.m. Hugh messaged Zi Ye that he would submit the documents to the Franchisor on her behalf after she obtained her work permit.⁴¹

[182] At 9:01 p.m. Zi Ye responded to Hugh that she would tell Jie Wang to "hurry up".

[183] Between 9:02 and 9:22 p.m., Jie Wang continued to express concerns and confusion to Zi Ye about the status of the process. Jie Wang stated in her messages she would contact the Franchisor the next day to obtain their view on the work permit / sale order conundrum.⁴²

[184] While communicating with Jie Wang, Zi Ye also forwarded some of Jie Wang's communications with her to Hugh between 9:01 and 9:06 p.m. That evening, Hugh responded and reiterated to Zi Ye that filling in the form was useless at this point and that the email from the Franchisor indicated that they could give Zi Ye the franchise once she had a work visa and legal status to work in Canada. Hugh advised Zi Ye that when she was able to run the business independently, they would transfer Hugh's franchise into her name. He was critical of Jie Wang for failing to understand this point. Zi Ye understood from Hugh that the email from the Franchisor was the consent that Jie Wang had sought for the Asset Purchase Agreement. However, the consent was not official at this juncture.⁴³

[185] At 9:14 p.m., after communicating with Jie Wang, Zi Ye communicated with Hugh about Jie Wang's concerns. Hugh responded that the Asset Purchase Agreement required the Franchisor's consent, and that the Joe Schober email that Ren had forwarded essentially expressed the Franchisor's agreement to her receiving the franchise on terms. Hugh also explained that the plaintiff did not need a franchise

³⁹ ASF, Ex. #1, Tab E, p. 10.

⁴⁰ ASF, Ex. #1, Tab F, p. 8.

⁴¹ ASF, Ex. #1, Tab E, p. 11.

⁴² ASF, Ex. #1, Tab F, pp. 8-14; Ex. #4, Affidavit of Zi Ye, paras. 83-85.

⁴³ ASF, Ex. #1, Tab E, pp. 12-17; Ex. #4, Affidavit of Zi Ye, paras. 79-82.

agreement in order for Zi Ye to buy the Business and obtain a work permit. This communication reassured Zi Ye that she did not need to obtain the franchise agreement immediately. She understood from Hugh that she could purchase the Business, use that to obtain a work permit, and then would later receive the franchise agreement from the Franchisor.⁴⁴

[186] Between June 25, 2018, at 8:58 p.m. and approximately 11:22 p.m. on June 26, 2018, Hugh left a series of voicemail messages for Jie Wang on the WeChat app.⁴⁵ Ms. Wang understood Hugh's messages to mean the following:

- The Franchisor would not accept any application for the transfer of the franchise agreement until a work permit was issued.
- Hugh was telling her that Zi Ye should not complete the personal confidential profile from YDSWM at this juncture.
- The Franchisor had outlined in the Joe Schober email that Zi Ye would be given the franchise rights once she met the conditions outlined in that email.
- The Franchisor would give the franchise rights to Zi Ye once she met all the requirements and that Hugh would submit all the paperwork to the Franchisor for Zi Ye once she obtained her work permit.
- The Franchisor's attitude towards the sale was that the email was giving an initial consent but that the franchise agreement would only be transferred to Zi Ye when the conditions outlined in the email were met—essentially the issuance of a work permit and proficiency in English to operate the store.

[187] In cross-examination, Ms. Wang acknowledged that her review of the Joe Schober email that Ren sent her on June 24, 2018 was in relation to the purchase and sale of the dollar store.⁴⁶ She understood the five bullet points on the second page of the email to be the Franchisor's requirements for closing the sale and approving the transfer

⁴⁴ ASF, Ex. #1, Tab E, pp. 18-20.

⁴⁵ ASF, Ex. #1, Tab G, pp. 12-19.

⁴⁶ ASF, Ex. #1, Tab S.

of the franchise. She understood that all five conditions had to be satisfied before the Franchisor would approve the sale and the transfer of the franchise agreement.

[188] Ms. Wang rejected the suggestion that during all these message exchanges she understood that the Franchisor had not approved the sale. She was firm that her impression was that the Franchisor had approved the sale of the business to occur first and that the transfer of the franchise agreement would occur later once the Franchisor's conditions that Zi Ye have a work permit and demonstrate sufficient fluency in English had been met. She agreed in cross-examination that she never provided a copy of the Asset Purchase Agreement or the incorporation documents for 116 BC Ltd. to the Franchisor.

[189] Based on the information she received from Hugh and the altered email that Ren forwarded, Ms. Wang understood that the Franchisor agreed to Zi Ye purchasing and owning the business assets and then receiving the franchise rights in the future. In essence, she testified, it was "just a matter of time" as far as Ms. Wang could discern before Zi Ye's business would receive the franchise rights: when she had a work permit and was proficient in English.

[190] In addition, Ms. Wang understood Hugh's message of June 25, 2018 at 9:17 p.m.⁴⁷ to mean that the Franchisor had consented to the sale completing and that the Franchisor would grant the franchise to the Purchaser once Zi Ye met all the conditions outlined in the email. And so, while Ms. Wang initially thought that the requirements of the Joe Schober email that she received from Ren had not been met, her understanding of this changed after receiving Hugh's WeChat messages on June 25, 2018. Ms. Wang understood from Hugh's messages that the Franchisor had consented to the sale and that they could move forward to close the deal.

[191] Jie Wang was also communicating with Zi Ye via WeChat on June 25, 2018, at approximately the same time as she was speaking with Hugh. In these conversations, Jie Wang was cautioning Zi Ye about the potential difficulty of owning the business, not

⁴⁷ ASF, Ex. #1, Tab G, p. 16.

obtaining a work permit, and not having the franchise agreement transferred to her.⁴⁸ Ms. Wang wrote Zi Ye in the chat that if she bought the business, she would not be a franchisee immediately. Instead, Hugh would have to manage the business, and she would have to work with him. This was not her advice; she was merely describing for Zi Ye what would happen in the future.

[192] On the other hand, Jie Wang also described to Zi Ye that if she did not buy the business, she would not be able to apply for a work permit. And so, Jie Wang was cautioning Zi Ye on the consequences of failing to obtain a work permit and being able to sell the store. In cross-examination, Ms. Wang was clear that it was not her idea for Hugh to run the Business after the sale completed. That information came from Hugh. He led Ms. Wang to believe that the Franchisor, whom Hugh said he was dealing with, required him to be a guarantor and run the business.

[193] Ms. Wang explained that her communications with Zi Ye at this time revolved around the conundrum of Zi Ye not obtaining the franchise until she obtained a work permit and what it might mean if she did not obtain one. Ms. Wang was trying to caution Zi Ye on proceeding. She told her client of the possible consequences in the future if she did not receive a work permit. Ms. Wang understood from Zi Ye that Hugh had told her that it did not make sense for her to complete the personal confidential profile form at that time.

[194] In the June 25, 2018, 9:17 p.m. communication discussed above, Ms. Wang told Zi Ye that she would contact the Franchisor to confirm that Zi Ye would be able to sell the store and get her money out if she was unable to obtain a work permit. If the Franchisor confirmed this condition for Ms. Wang, she thought it would be okay for Zi Ye to buy the store. The two ended their communication that night at 9:22 p.m.

[195] Ren then started to message Zi Ye several minutes later at 9:50 p.m., suggesting that Jie Wang appeared to be hindering the business transaction. Ren appealed to Zi Ye to simply state if it was her own idea to not continue with the deal. Spurred on by Ren's

⁴⁸ ASF, Ex. #1, Tab F, pp. 11-13.

comments, Zi Ye forwarded her screenshots of Zi Ye's communications with her lawyer wherein Jie Wang cautioned Zi Ye about the risks of the proposed procedure and stated she would contact the Franchisor. In cross-examination, although unwilling to admit that the tenor of her conversation expressed disapproval or criticism of Jie Wang's conduct, Ren did admit that she was dissatisfied with Jie Wang's work attitude and efficiency. She admitted that she complained, indeed forcefully so, to Zi Ye about this.⁴⁹

[196] In response, Zi Ye's communications demonstrate that she was trying to both explain why Jie Wang was behaving the way she was and to appease Ren and guarantee she understood that Zi Ye wanted to go through with the purchase.⁵⁰

[197] Ren then replied at 9:55 p.m. and intimated that the way the defendants' were proposing the sale occur—splitting the purchase of the assets, followed by obtaining a work permit and then a transfer of the franchise agreement later—was how the defendants had purchased the store back in 2013-2015.⁵¹ Zi Ye relied upon Ren's communications as confirmation that the similar process they were proposing was possible because Hugh and Ren told her that is how they proceeded in their own case. This information from Ren was consistent with what Hugh had told her as well. Zi Ye was unequivocal in her evidence that she was relying upon what Hugh and Ren were telling her was true and accurate.⁵² As noted previously, Ren and Hugh's characterization of the sequence of steps they followed when they purchased a business in 2015 was in fact false.

[198] Ren continued on in her dismissive comments about Jie Wang and told Zi Ye to have Jie Wang call the Franchisor the next day. She stressed the urgency of the situation. However, in her 10:00 p.m. message to Ren, Zi Ye summarized her discussions with Jie Wang and confirmed for Ren that she had invited Jie Wang to confirm matters with the Franchisor.⁵³

⁴⁹ ASF, Ex. #1, Tab H, pp. 1-7

⁵⁰ ASF, Ex. #1, Tab H, p. 8.

⁵¹ ASF, Ex. #1, Tab H, p. 9.

⁵² Ex. #4, Affidavit #2 of Zi Ye, para. 109.

⁵³ Ex. #4, Affidavit #2 of Zi Ye, para. 102-110; Ex. #1, Tab H, pp. 13-20.

[199] After trying to calm Ren down, Zi Ye then communicated with Hugh on WeChat at 10:08 p.m. During this communication, Zi Ye summarized (i) the communications she had had with Ren; and (ii) her conversation with her lawyer that included the fact that Jie Wang concluded that Zi Ye should proceed with the sale if she was able to sell the Business even if she did not obtain a work permit. Zi Ye also advised Hugh that Jie Wang intended to confirm this point with the Franchisor the next day.⁵⁴

[200] Hugh responded almost immediately. He condemned Jie Wang for her lack of understanding the process, pointing out that Zi Ye was only buying the Business and that this had nothing to do with the Franchisor. The WeChat communications between Hugh and Zi Ye continued between 10:08 and 11:05 p.m. They clearly establish that Hugh was fed up with Jie Wang's approach, intimating that she was the problem delaying the closing of the sale.

[201] At this point, Zi Ye thought about the communications she was having with Hugh and Ren, and because she trusted Hugh, became embarrassed by Jie Wang's approach. Hugh's communications crystalized Zi Ye's understanding that the Franchisor would give her a franchise agreement once she obtained her work permit; Hugh would run the store for her in the interim. Bearing this in mind, Zi Ye forwarded all her communications with Jie Wang to Hugh and told him that she would push Jie Wang to move the sale forward.⁵⁵

[202] Hugh indicated to Zi Ye that Ren's anger stemmed from her fear of financial trouble and wanting to get the deal completed as soon as possible. Zi Ye continued to think about what she understood Hugh to have told her. Based on his representations, Zi Ye concluded that there was no point in contacting the Franchisor as the sale of the assets had nothing to do with the Franchisor. Zi Ye messaged Hugh about this at 10:44 p.m. to explain her thinking. She sought confirmation that she had understood him correctly in that the Franchisor did not need to be involved in the sale of the Business in the future if she did not obtain a work permit. At 10:54 p.m., Hugh confirmed Zi Ye's

⁵⁴ Ex. #4, Affidavit #2 of Zi Ye, para. 111; Ex. #1, Tab, E, pp. 21-22.

⁵⁵ Ex. #4, Affidavit #2 of Zi Ye, paras. 111-114; Ex. #1, Tab, E, pp. 21-33.

understanding that the sale of the assets had nothing to do with the Franchisor. In addition, he intimated that if Jie Wang contacted the Franchisor, it might create further risks for them.⁵⁶

[203] The WeChat messaging continued. Zi Ye wanted to ensure that she understood Hugh correctly about doing the sale without a franchise agreement at the same time. Hugh replied with three WeChat communications, the first of which criticized Ms. Wang and suggested she was behaving this way in order to justify her fees. In this first message, Hugh very clearly told Zi Ye that she should instruct Jie Wang not to call the Franchisor and to “hurry up and close the deal”. The second communication related to Hugh’s advising Zi Ye that the only risk she faced was if the defendants had deceived her and either did not intend to give her the franchise or did not intend to run the business as promised. The third message was to the effect that Zi Ye should reassure Jie Wang that everything was fine because the defendants were Zi Ye’s friends.⁵⁷

[204] Although reassured by Hugh’s message, Zi Ye remained cautious. She requested further confirmation that she had understood him correctly. The two exchanged more messages on WeChat, including Zi Ye seeking confirmation from Hugh that the Joe Schober email she had received from Ren meant that she would receive the franchise rights once she met the requirements. She also wished to confirm her understanding that whether she did or did not have the franchise rights would not interfere with her ability to sell the Business in the future. Hugh responded confirming that Zi Ye understood him correctly and arguing that Jie Wang was being stubborn. Zi Ye indicated she would talk to her lawyer.⁵⁸

[205] Zi Ye’s evidence in direct examination was that following this exchange of WeChat messages with Hugh on June 25, she concluded that it was safe for 116 BC Ltd. to proceed with the purchase of the Business “as long as it was possible for me to sell the Business in the event I could not obtain a work permit and franchise.” Additionally, Zi Ye determined she would explain her understanding of the status of

⁵⁶ Ex. #4, Affidavit #2 of Zi Ye, paras. 115-118; Ex. #1, Tab, E, pp. 33-35.

⁵⁷ Ex. #4, Affidavit #2 of Zi Ye, paras. 119-123; Ex. #1, Tab, E, pp. 36-39.

⁵⁸ Ex. #4, Affidavit #2 of Zi Ye, paras. 124-126; Ex. #1, Tab, E, pp. 40-42.

things to Jie Wang, tell her not to contact the Franchisor, and confirm that she could sell the assets if things did not proceed according to plan.⁵⁹

June 26, 2028

[206] Although Ms. Wang had told Zi Ye on June 25, 2018 that she would contact the Franchisor to make certain inquiries, she did not do so.

[207] On June 26, 2018 at 9:23 a.m. Zi Ye left WeChat voice messages for Jie Wang, instructing her not to contact the Franchisor as it was not necessary. Zi Ye indicated she only needed to confirm that after she bought the store she could sell it without the management rights if need be. Zi Ye's second message, sent contemporaneously, focused on the need to get a work permit, without which she could not obtain a franchise agreement. Zi Ye indicated she wanted to proceed with the sale and that both she and the Vendors were in a hurry to do so. Six minutes later, at 9:29 a.m., Zi Ye messaged Jie Wang asking for a reply.⁶⁰

[208] In cross-examination, Zi Ye explained that the reason she instructed Jie Wang not to contact the Franchisor was based on (i) her communications with Hugh and Ren from the evening before and (ii) Hugh's suggestion that it was ridiculous for Jie Wang to contact the Franchisor because they were not concerned about the purchase of the assets. Hugh's suggestion that it would be unnecessary or even ridiculous to contact the Franchisor caused Zi Ye to think that questioning the Franchisor would be ridiculous in the circumstances. This, in turn, caused her to worry whether contacting the Franchisor might also undermine her ability to obtain a franchise agreement.

[209] At 10:31 a.m., Zi Ye messaged Ren advising that she had contacted Jie Wang but had received no response. Thereafter the two women engaged in a series of WeChat message communications. The overall tenor of Ren's messages was to express anger and frustration with what she saw as Jie Wang's obstructionist tactics and

⁵⁹ Ex. #4, Affidavit #2 of Zi Ye, para. 127.

⁶⁰ Ex. #4, Affidavit #2 of Zi Ye, paras. 128-129; ASF, Ex. #1, Tab F, pp. 15-17.

to continue to denigrate Jie Wang in her communications with Zi Ye. It would be fair to say that for her part, Zi Ye was endeavouring to calm Ren.

[210] The two women stopped speaking at approximately 11:48 a.m. when Zi Ye, located in Beijing at the time, indicated she was going to bed. About 10 hours later, Ren messaged Zi Ye asking if Jie Wang had replied. Nothing of substance was discussed in these communications and Ren's last WeChat message to Zi Ye at 10:27 p.m. directed Zi Ye to discuss matters with Hugh as she had to deal with her children.⁶¹

[211] After receiving no response to her messages to Jie Wang, Zi Ye also recommenced messaging with Hugh at 10:31 a.m. when she advised that she had contacted Jie Wang and received no reply.

[212] Between 10:31 a.m. and 10:43 a.m., Zi Ye again messaged Hugh asking how he and Ren had purchased the store. Hugh confirmed that they had gone through the same process that he was telling Zi Ye to undertake: buy the business, have the former owner operate it, obtain a work permit, and then the purchaser would run the business once able to do so. Zi Ye understood from Hugh's representations to her that once these steps were satisfied, the franchise agreement would be transferred to the plaintiff. As a result of Hugh's responses, Zi Ye became convinced that Hugh's proposal on how to purchase the Business, without franchise rights initially but with the Franchisor's agreement to have her and 116 BC Ltd. as a franchisee once she obtained a work permit, was a legitimate way to proceed.⁶²

[213] Ms. Wang did not respond to Zi Ye's morning messages until later that afternoon when she outlined the risk of closing the sale and buying the store without a franchise agreement.⁶³ In cross-examination, Ms. Wang explained that she was simply communicating to Zi Ye that she could buy the assets at this time but that there was a small possibility that she might not obtain the franchise rights in the future.

⁶¹ ASF, Ex. #1, Tab H, pp. 22-32.

⁶² Ex. #4, Affidavit #2 of Zi Ye, paras. 130-132; ASF, Ex. #1, Tab E, pp. 43-48.

⁶³ Ex. #4, Affidavit #2 of Zi Ye, paras. 133-135; ASF, Ex. #1, Tab F, p. 17.

[214] In her messages with Zi Ye on June 26, 2018, at 6:46 p.m., Ms. Wang proposed they include a repurchase clause in the contract to protect Zi Ye if she were unable to get a franchise. At 9:31 p.m. that same evening, Ms. Wang learned from Zi Ye that Hugh would not agree to this term.⁶⁴

[215] In the June 26, 2018 communications between Jie Wang and Zi Ye, Jie Wang explained that the usual process of purchasing a franchise involved the franchise agreement being transferred when the sale closes with the two events occurring at the same time. She expressed her concern to Zi Ye in this WeChat message at 10:49 p.m. on June 26, 2018:

Management rights, we used to do a lot of this business acquisition. The franchise was approved when deal was completed. This is the first time I have encountered this situation that the franchisor does not approve the franchise when the deal is closed. So I am hesitant now, because I vaguely feel that you will own this store in the future, but you have not obtained the franchise...⁶⁵

[216] At 10:53 p.m., Zi Ye shared the string of communications she had had with Jie Wang with Hugh. He responded to Zi Ye almost immediately, disagreeing with what Jie Wang was saying about the Franchisor agreeing to the transfer of a franchise agreement to a foreigner with no work permit.⁶⁶

[217] Hugh then contacted Ms. Wang through the WeChat messaging app at 10:56 p.m. to query her about the “usual process” that she had told Zi Ye about. Ms. Wang explained that the import of her message to Hugh at 11:16 p.m. was that there had been no issue of citizenship status in her previous dealings on franchise sales, and the sale of the business and transfer of the franchise agreement occurred at the same time.⁶⁷

[218] At 11:00 p.m. Hugh appealed to Zi Ye that both sides had to trust each other and Zi Ye replied that she trusted the defendants completely in their dealings with her but

⁶⁴ Ex. #4, Affidavit #2 of Zi Ye, para. 136; ASF, Ex. #1, Tab F, pp. 18-19.

⁶⁵ Ex. #4, Affidavit #2 of Zi Ye, paras. 136-137; ASF, Ex. # 1 Tab F, p. 19

⁶⁶ ASF, Ex. #1, Tab E, pp. 49-52.

⁶⁷ ASF, Ex. #1, Tab G, pp. 18-19.

was worried about the possibility and implications of not obtaining a work permit in Canada.⁶⁸

[219] Zi Ye then spoke to Hugh directly and discussed the conundrum of how Zi Ye could sell the assets of the Business in the event that she did not obtain a franchise. Zi Ye contends they came to an agreement wherein Hugh agreed to cooperate in obtaining a franchise for Zi Ye if she obtained a work permit and also to cooperate in ensuring any buyer of Zi Ye's business would obtain a franchise in the event that Zi Ye had to sell the Business if she did not obtain a work permit. According to Zi Ye, during this conversation, Hugh told her to instruct Jie Wang to write a simple agreement to reflect his suggestion about cooperation. This would conceivably allay Jie Wang's concerns and alleviate the need for Jie Wang to contact the Franchisor.⁶⁹

[220] Zi Ye also had several communications with Ms. Wang on June 26, 2018, between 10:49 p.m. and 11:17 p.m. Zi Ye advised her that she had spoken to Hugh and that they wanted to do a side agreement in a one-page document addressing the notion that Hugh would cooperate with Zi Ye in any future sale and that he would assist her in getting the franchise agreement once she obtained her work permit. Ms. Wang referred to this as a "gentlemen's agreement". Zi Ye then urged Ms. Wang to write up "a page" as soon as possible. At 11:37 p.m., Ms. Wang told her client that, while the document would not necessarily be ready the next day, it should be by the Friday. Zi Ye was also told that the Addendum should be signed first and that the deal could close following this signing.⁷⁰

[221] At 11:20 p.m. Zi Ye forwarded Jie Wang's WeChat messages about the gentlemen's agreement to Hugh. They concluded their communications for that day at 11:38 p.m.⁷¹

⁶⁸ ASF, Ex. #1, Tab E, pp. 53-56.

⁶⁹ Ex. #4, Affidavit #2 of Zi Ye, paras. 138-139.

⁷⁰ ASF, Ex. #1, Tab F, pp. 19-21; Ex. #4, Affidavit #2 of Zi Ye, paras.

⁷¹ ASF, Ex. #1, Tab E, pp. 56-60.

[222] Hugh messaged Jie Wang at 11:22 p.m. on June 26, 2018, in three separate communications. The third message from Hugh was:

Don't discuss this. Maybe you are experienced. I hope you can hand over that supplemental agreement to ZIYE for signature tomorrow. We will not affect the year-end report until the transaction is completed before the 28th, thank you.⁷²

[223] Ms. Wang explained that she understood the direction "don't discuss this" to mean for Ms. Wang not to spend any further time on this issue.

[224] The supplemental agreement to which Hugh referred in this message was the Addendum to the Asset Purchase Agreement that Ms. Wang drafted, ostensibly to protect Zi Ye. This was based on Jie Wang's understanding of Zi Ye's conversation with Hugh wherein they devised solutions to two potential scenarios: If Zi Ye was unable to obtain a work permit, Hugh would cooperate with Zi Ye to sell the store. Alternatively, if Zi Ye did receive a work permit, Hugh would help her obtain the franchise agreement.

[225] Ms. Wang testified that it was not her idea to buy the store first, have Zi Ye obtain a work permit, and then obtain the franchise agreement after the permit was issued. Hugh's WeChat messages to Ms. Wang indicate that this was his idea. Additionally, Hugh's June 26, 2018 WeChat messages to Ms. Wang made clear to her that the Franchisor had consented to the sale. Ms. Wang was firm on this point in her cross-examination and disagreed with the suggestion that she understood that the Franchisor had not consented to the purchase.

[226] By 11:38 p.m. on June 26, 2018, all parties had stopped communicating with each other.

[227] There were no communications between the parties on June 27, 2018.

June 28, 2018

[228] On Thursday June 28, 2018, at 11:05 p.m., Zi Ye messaged Hugh asking if he had received the Addendum from Jie Wang and learned he had not. She then

⁷² ASF, Ex. #1. Tab G, p. 19.

messed Jie Wang at 11:07 p.m. to ask if the supplementary agreement had been prepared. Zi Ye instructed Jie Wang to send it directly to Hugh once completed.⁷³

June 29, 2018

[229] On Friday June 29, 2018, at 8:58 a.m., Jie Wang messaged Zi Ye and directed her to check her email. At 9:08 a.m. Jie Wang messaged Hugh advising him that the Addendum had been sent to Elaine Cheung, the original counsel for the defendants. At 9:34 a.m. Jie Wang then messaged Zi Ye explaining the agreement (the Addendum) to Zi Ye. She then asked Zi Ye if she had signed the agreement and told her that completion of the sale would occur on the following Tuesday. Zi Ye responded to the communications and mentioned that business in Canada would be closed the next day for the Canada Day long weekend.

[230] At 9:56 p.m. Zi Ye notified Jie Wang that she would sign the agreement within the hour. At 10:04 p.m., Jie Wang advised that the sale would close on July 3, 2018.⁷⁴

Addendum to the Purchase Agreement – June 28, 2018

[231] The Addendum to the Asset Purchase Agreement, dated June 28, 2018, altered the Asset Purchase Agreement in the following two ways:

2. SUBSTITUTION AND AMENDMENT:

The Asset Purchase Agreement is hereby amended:

- a. by altering section 6.7 by replacing it with the following provision:

“The Vendor shall designate a manager to manage the Business on a full time basis after the Closing Date until the principal of the Purchaser has obtained a valid permit to work in Canada. The parties will negotiate the terms and conditions of such engagement prior to the Closing Date.”

- b. by adding section 6.8 as follows:

“The parties acknowledge that the Franchisor required the Vendor’s principal, Yu Tian, to continue to be a franchisee and manage the

⁷³ ASF, Ex. #1, Tab E, pp. 60-62; Tab F, p. 22.

⁷⁴ ASF, Ex. #1, Tab F, pp. 22-24; Tab G, p. 19.

Business until the Purchaser's principal obtains a work permit at which time the Franchisor will enter a Franchise Agreement with the Purchaser and its principal. The Vendor and the Covenanter⁷⁵ shall use its best effort to assist and cause Yu Tian to assist the Purchaser and its principal in entering the franchise agreement or in selling the Business or disposing of the Business if the Purchaser chooses to do so in the future."⁷⁶

The evidence addressing the Addendum to the Purchase Agreement

[232] Zi Ye's affidavit outlined that the terms of the Addendum adhered to those she had discussed with Hugh with respect to the Franchisor's process and requirements for the sale of the defendants' business to the plaintiff. These included his representations that the Franchisor required Hugh to continue to operate the Business until she received a work permit. Zi Ye explained she had relied on Hugh's representations in their discussions in her instructions to Jie Wang for drafting the Addendum.⁷⁷

[233] Zi Ye explained in her affidavit that she relied on Hugh's representations that he would deal with the Franchisor, he would obtain the Franchisor's consent on transferring the franchise agreement, and further that she determined, based on Hugh's communications, that it was not necessary for Jie Wang to communicate with the Franchisor. Given her inability to communicate in English she was grateful for Hugh's willingness to assist her and she trusted him completely.

[234] Zi Ye explained in cross-examination that her worries around selling the store centred around the possibility of not obtaining a work permit and then having to sell the store without a franchise agreement. The Addendum and the discussions with Hugh that led up to the Addendum were a result of communications that focussed on what seemed to be, in everyone's mind, a remote possibility. Although Zi Ye understood at the time the sale closed that she had not obtained a franchise agreement for 116 BC Ltd., she understood from her extensive discussions with Hugh and his representations to her,

⁷⁵ The Covenanter to the Addendum to the Asset Purchase Agreement was Yonghui Ren.

⁷⁶ ASF, Ex. 1, Tab W.

⁷⁷ Ex. #4, Affidavit #2 of Zi Ye, paras. 142-143.

that the Franchisor had approved the sale and would give her a franchise agreement once she obtained a work permit and was able to operate the store on her own.

[235] Ms. Wang explained that the Addendum's alteration of s. 6.7 of the Asset Purchase Agreement was needed as Zi Ye would not likely obtain a work permit within three months from the closing of the sale. The Addendum added s. 6.8 to the Asset Purchase Agreement to reflect what Ms. Wang understood the Franchisor to require based on the messages and communications she had with Hugh. Ms. Wang explained the Addendum to Zi Ye in the June 29, 2018 9:34 a.m. WeChat message to Zi Ye and provided her with a copy of the Addendum in the We Chat message.⁷⁸ Ms. Wang agreed in cross-examination that this was included to protect Zi Ye in case she bought the assets, the franchise agreement did not come through and she wanted to sell the assets. Ms. Wang explained that in her view the Addendum to the Asset Purchase Agreement offered more protection to Zi Ye and so it had to be signed before the deal could be closed.

[236] Ms. Wang did not send the Addendum to the Asset Purchase Agreement directly to Hugh. Rather, she advised that the document had been sent to Elaine Cheung.⁷⁹ There were no further communications between Jie Wang and Hugh after Jie Wang advised him that she had sent the document to Ms. Cheung before the sale closed on July 3, 2018.

[237] Ren as the Covenantor and principal of 104 BC Ltd. signed the Addendum to the Asset Purchase Agreement for the Vendor and Zi Ye signed it for the Purchaser.

[238] Mr. Schober testified that the following passage contained in the June 28, 2018 Addendum to the Asset Purchase Agreement was not something that came from the Franchisor:

b. by adding section 6.8 as follows:

"The parties acknowledge that the Franchisor required the Vendor's principal Yu Tian, to continue to be a franchisee and manage the Business until the

⁷⁸ ASF, Ex. #1 Tab G, pp. 22-23.

⁷⁹ ASF, Ex. #1, Tab G, p. 19; see also Ex. #4, Affidavit #2 of Zi Ye, para. 144 and Ex. H. Ms. Cheung responded on June 30, 2018.

Purchaser's principal obtains a work permit at which time the Franchisor will enter a Franchise Agreement with the Purchaser and its principal. ...⁸⁰

[239] Indeed, this clause in the Addendum to the Asset Purchase Agreement was not something that Mr. Schober received or reviewed as the defendants did not provide the Franchisor with a copy of the Addendum to the Asset Purchase Agreement. Ren only provided the Asset Purchase Agreement in her May 31, 2018 email and the lease assignment in her June 22, 2018 email. Neither of the personal defendants followed up with the Franchisor after the second Joe Schober email was sent to them on June 22, 2018.

The sale of the Business eventually completed on July 3, 2018

[240] The Purchaser acquired the assets of the Business on July 3, 2018, when the Vendor and Ren delivered a Bill of Sale and a Closing Certificate.⁸¹ To finance the purchase, the plaintiff borrowed money from Zi Ye, some of which she had obtained from her father. The loan was recorded as a shareholder loan in the adjusting journal entry for 116 BC Ltd.'s first fiscal year.⁸²

[241] The Franchisor never approved the sale and, in fact, was unaware that the sale had occurred. The fact that the sale occurred in the manner it did was clearly contrary to the terms of the defendants' franchise agreement with YDSWM. The representatives of the Franchisor were also clear in their evidence that the Franchisor would not have consented to the sale of merely the assets of the Business in this case.

The evidence addressing the completion of the sale

[242] At the time of the completion of the sale Zi Ye did not appear to understand that the store lease with the mall had to be extended (that is, renewed). She appeared to understand that prior to the sale she had signed the lease assignment and that Hugh was going to forward that to the Franchisor.

⁸⁰ Ex. #1, Tab W.

⁸¹ ASF, Ex. #1, Tabs X and Y; Ex. #4, Affidavit #2 of Zi Ye, paras. 150-151.

⁸² Ex. #4, Affidavit #2 of Zi Ye, para. 152.

[243] At no time before or after the completion of the sale did Zi Ye ask to see the franchise agreement. She was unambiguous that it was never provided to her and that Ren never gave her a copy of the franchise agreement that 104 BC Ltd. had with YDSWM either.⁸³

[244] Zi Ye forcefully outlined in her evidence that everything she understood about the process of transferring franchise rights, and the sale of a business pertaining to YDSWM, and the Franchisor's position on the sale came from her discussions with Hugh and Ren. She trusted and relied upon Hugh and Ren's representations about the requirements in proceeding with the purchase of the Business. She agreed to the Addendum and to complete the purchase of the Business because the defendants represented to her the following points as facts:

- i. The Joe Schober email that Ren had sent to her and Jie Wang indicated that the Franchisor had agreed to give her a franchise after she obtained a work permit and could run the store independently; however, until this was achieved, she had to arrange for Hugh to continue to run the Business;
- ii. The Franchisor was amenable to the Sale proceeding before she was approved as a franchisee, provided that Hugh and Ren continued to operate the Business pursuant to their franchise agreement;
- iii. The Joe Schober email was the consent that Jie Wang had sought in the Agreement; however, it was not official as it was illegal for the Franchisor to do so;
- iv. The process that Hugh and Ren had followed to acquire the YDSWM franchise in Salmon Arm was the same as the one they were telling her to follow: buy the business, have the former owner run it, obtain a work permit, then run the business yourself. To that end, Hugh and Ren advised that they had obtained the Business in June, then applied for a work permit, and only approached the Franchisor to obtain the franchise in September (all in 2015);

⁸³ Ex. #4, Affidavit #2 of Zi Ye, para. 147.

- v. The Franchisor said it was represented by a company, not the assets of the Business, and was therefore unconcerned with Ren transferring the assets to her, so long as the franchise was not also transferred; and, finally
- vi. The Franchisor would have nothing to say about her selling the assets to another purchaser, provided that Hugh continued to cooperate in running the Business.⁸⁴

[245] Additionally, Zi Ye explained that Hugh and Ren's representations to her steered her away from discovering the truth of the situation. Specifically, she did not submit the franchise application (Personal Confidential Profile document) as directed by Jie Wang because Hugh had advised her that the Franchisor would not accept the application if she did not have a work permit. Similarly, Zi Ye instructed Jie Wang not to contact the Franchisor because Hugh had advised Zi Ye that the Franchisor had no concerns about the sale of the assets, provided the Business was operated by a franchisee.⁸⁵

[246] In cross-examination, Zi Ye acknowledged that she understood that to be able to obtain a franchise she needed to provide certain information to the Franchisor. The reason she did not do so before the closing of the sale was due to Hugh's insistence that it was not necessary for her to complete the documents at the time of the closing. Rather, they should wait until after she obtained her work permit. Once that happened, Hugh would submit the documents for her.

[247] It followed that Zi Ye did not submit her work permit to the Franchisor once she received it as she understood from Hugh that he needed to supervise her until she was ready to take over the Business on her own. Zi Ye explained that she carefully followed Hugh and Ren's instructions on when the Franchisor should be contacted due to her trust in them.

[248] Zi Ye admitted that she never provided any of the documentation outlined in the altered Joe Schober email at any time after the sale closed. She inferred the following explanation from Hugh: When the sale closed, she did not need to provide the documentation as she could not obtain a franchise agreement until she had obtained her

⁸⁴ Ex. #4, Affidavit #2 of Zi Ye, paras. 148 & 192.

⁸⁵ Ex. #4, Affidavit #2 of Zi Ye, para. 149.

work permit. After the sale closed and her work permit came through, she did not provide the documents to the Franchisor as Hugh had indicated he would help her provide the documentation to the Franchisor. He never did so.

[249] Ms. Wang agreed in cross-examination that she never contacted the Franchisor nor spoke to anyone at the head office of YDSWM. When the sale closed on July 3, 2018, the Purchaser did not have a franchise agreement. However, based on the circumstances and Hugh's representations, Ms. Wang drew the conclusion that the plaintiff had been approved in principle to become a franchisee.

[250] Zi Ye never contacted Jie Wang after the sale closed to assist in applying for or obtaining the franchise rights and never asked Ms. Wang to assist in applying to become a franchisee.

The Business was operated by the defendants until November 2019

[251] After Zi Ye purchased the Business on July 3, 2018, she remained in Beijing, awaiting the immigration process and the issuance of a work permit, although she had two brief stays in Canada from November 2018 to January 2019 and again in May 2019, to start to learn how to operate the Business. A work permit was finally issued to Zi Ye in June 2019 and she moved to Canada in September 2019. As Zi Ye had no work permit when the sale closed, she made arrangements with Hugh for the defendants to continue to operate the Business for the plaintiff. Between September 2019 and November 2019, Zi Ye continued to learn how to run the Business from Ren and participated in its management.

[252] Starting from July 2018 until November 2019, Zi Ye paid the personal defendants \$2,500 per month from her personal funds to operate the Business for her, to a total of \$42,000. In addition, Zi Ye wrote cheques when requested by Ren to pay for expenses such as the annual insurance premium for the Business. Unbeknownst to Zi Ye, Ren did not transfer the business insurance to 116 BC Ltd., as the May 2019 Certificate of Insurance was issued to 104 BC Ltd.⁸⁶

⁸⁶ Ex. #4 Affidavit #2 of Zi Ye, paras. 153-155 and Tabs M-O.

[253] Zi Ye acknowledged that in July 2019 she signed a lease extension for a two year period between the store and the Piccadilly Place Mall as obtained by Hugh when he was operating the store for her.

Zi Ye started to manage the Business in November 2019

[254] By November 2019, Ren advised Zi Ye that she thought Zi Ye was ready to take over operating the Business and that there was no need for her to pay Ren any further. Shortly after starting to operate the business on her own, Zi Ye asked about having the franchise rights transferred from the defendants to her. Hugh persuaded her to wait until after the busy Christmas season, in part by suggesting she needed to continue to improve her English language skills before meeting with the Franchisor. He signaled to her that it would be better to wait to meet the Franchisor in the new year.⁸⁷

The discovery that the defendants sold the Business without obtaining the Franchisor's approval

[255] As is clear from the Asset Purchase Agreement, one of the assets the plaintiff acquired in the purchase of the Business was the point-of-sale system (the "POS System") for credit and debit card payments by customers. However, the POS System was not transferred at the time of the completion of the sale. Customer card payments continued to be deposited to the defendants' business account. Ren then paid amounts owed to others and then transferred the remaining funds to the plaintiff's bank account. Once Zi Ye took over management of the store in November 2019, she wanted to change the POS system to her bank. After discussing the matter with Ren, Zi Ye purchased an RBC POS System machine and took steps to have it installed. The plaintiff ran into difficulties and Zi Ye directed an employee to contact the Franchisor. It was at this time that the Franchisor first had any notice that there was a new owner of the Business.⁸⁸

[256] On or about December 19, 2019, the day after the Franchisor had been contacted about the difficulties in installing a new POS System, Zi Ye received a

⁸⁷ Ex. #4 Affidavit #2 of Zi Ye, para. 159.

⁸⁸ Ex. #4 Affidavit #2 of Zi Ye, paras. 160-162.

WeChat message from Hugh expressing concern that the Franchisor was going to sue them. Although Zi Ye tried to get a clear explanation from Hugh on this point, he obfuscated and said he would meet with the Franchisor. In another conversation a few days after December 19, Zi Ye said that Hugh told her had received legal advice not to contact the Franchisor in writing but only to do so orally. During this conversation, according to Zi Ye, Hugh told her that it would be better to pay a large fine to the Franchisor rather than letting the matter escalate to a lawsuit. According to Zi Ye, Hugh said he would meet with the Franchisor and that Zi Ye should wait to hear from him.⁸⁹

[257] On January 6, 2020, Zi Ye had a conversation with Hugh wherein he suggested that Zi Ye should threaten the Franchisor that she was going to change the name of the store to “Ye Zi Dollar Store” and stop paying the franchise fee. He suggested this as a strategy to have the Franchisor give her a franchise. Zi Ye was not impressed with Hugh’s suggestion but was conflicted as she wanted to join the franchise.⁹⁰

[258] Mr. Schober testified that the Franchisor only learned several months after June 2018 that 104 BC Ltd. had sold its assets to the Purchaser. This sale was never authorized by the Franchisor; a transfer fee was never received by the Franchisor; and the POS transfer fee was never paid. Although Zi Ye sought the Franchisor’s cooperation in the sale of the plaintiff’s business to another party, the Franchisor was unable to do so owing to the royalties payable to the Franchisor and invoices payable to suppliers remaining unpaid by 104 BC Ltd.

[259] Mr. Lambert explained that he learned “after-the-fact” that Hugh and Ren’s business, 104 BC Ltd., had been sold. He testified he was quite surprised as he thought Hugh understood the approval process the Franchisor required and it was clear the Franchisor had not approved the sale in this case. He believed he learned of the sale in December 2019 when a supplier called him about the matter. Mr. Lambert telephoned Hugh to inquire about what was going on and explained he was both frustrated and serious in his tone with Hugh.

⁸⁹ Ex. #4 Affidavit #2 of Zi Ye, paras. 163-164.

⁹⁰ Ex. #4 Affidavit #2 of Zi Ye, para. 165.

[260] Mr. Lambert did not recall any further communications with Hugh until he received an email from him on January 7, 2020 at 10:07 a.m. That email alluded to some sort of discussion between Mr. Lambert and Hugh but he could not recall the details of it.⁹¹ At some point Mr. Lambert received and reviewed the purchase agreement and the franchise agreement that 104 BC Ltd. had with the Franchisor.

[261] Dean Lambert replied to Hugh's email on January 7, 2018 at 2:25 p.m. and wrote:⁹²

Hi Hugh,

I went through the agreements and have a few questions:

-It appears that the current lease expired August 31st 2019? Was the lease extended?

-Where does ZI YE currently live?

-The purchase agreement and the Franchise agreements clearly state that franchise approval was a clear requirement, why wasn't this addressed by either party?

-How many hours has ZI YE worked in the store? What experience do they have so far?

-When would ZI YE be available to meet at our office?

Please get back to me on these questions.

Thank you

Dean Lambert

[262] Shortly after receiving it, Hugh forwarded the above email to Zi Ye who used Google to translate the email into Mandarin Chinese. Upon reviewing the translated email, Zi Ye concluded that Hugh had deceived her about his dealings with the Franchisor in the lead up to the completion of the sale on July 3, 2018. Upon reading the translated Lambert email, it became clear to Zi Ye that Hugh had never obtained the Franchisor's approval of the sale of the Assets or Business to Zi Ye.⁹³

[263] On January 9, 2020, Mr. Lambert received an email from Zi Ye seeking a meeting with YDSWM headquarters. Zi Ye met with Mr. Lambert on or about January 14, 2020.

⁹¹ The email from Hugh to Dean Lambert was not put to Mr. Lambert but it was part of the email chain included in Ex.4 Affidavit #2 of Zi Ye, at Tab Q.

⁹² Ex. #5, Tab 1.

⁹³ Ex.4 Affidavit #2 of Zi Ye, paras. 166-167 and Tab Q.

Zi Ye learned in this meeting that the Franchisor was unaware that she had purchased the store. At the conclusion of their discussion, he recommended that she hire a lawyer and said that the Franchisor would be hiring one as well.

[264] On January 29, 2020, Zi Ye endeavoured to have the POS System supplier affiliated with the Business, TD Bank, transfer the POS System to the plaintiff but was advised it could not be transferred as the Franchisor had not approved the ownership change for the YDSWM store.

[265] Thereafter, Zi Ye retained counsel.

[266] There were further communications between Zi Ye and the Franchisor in an effort to resolve the matter. The Franchisor suggested that she attend a trade show. However, Zi Ye felt uncomfortable about doing so as she no longer trusted Hugh and Ren. She offered to send an employee of the store instead.

[267] To her credit, Zi Ye tried to continue to operate the Business, but it always operated at a loss. This was in part due to mismanagement by Ren in ordering inventory that resulted in an oversupply, the complications of COVID-19 decimating many businesses starting in March 2020 and those due to the sale not being approved by the Franchisor. I would note that Zi Ye paid herself a management wage regardless.

The aftermath of the sale to 116 BC Ltd. and the eventual discovery of the failure to obtain a YDSWM Franchise

[268] Zi Ye acknowledged in her cross-examination that she did not complete several of the steps as outlined in the altered Joe Schober email, including not filling out the YDSWM Personal Confidential Profile form or sending the purchase agreement to the Franchisor. However, Zi Ye was steadfast in her evidence that she did not complete these steps due to her trust in Hugh and her reliance upon his continuing insistence that there was no point in submitting documents to the Franchisor until Zi Ye had a work permit. As well as the representations that Hugh and Ren made to Zi Ye, they had sent the purchase agreement to the Franchisor. Thus Zi Ye was led to believe that the

Franchisor was consenting to the sale and that she would obtain a franchise agreement once she satisfied the conditions Hugh outlined to her.

[269] Zi Ye was steadfast in her evidence in direct and cross-examination that but for the defendants' repeated representations about the Franchisor agreeing to the sale and that Zi Ye could become a franchisee once she had a work permit and was able to manage the store on her own, she would not have caused her company, 116 BC Ltd., to purchase the assets and business from the defendants.

[270] Zi Ye was unequivocal in her evidence that she would not have had her company complete the purchase of the defendants' assets and business if she had known:

- i. that the Franchisor was unaware that the sale was occurring;
- ii. that the Franchisor had not approved the sale;
- iii. that the Franchisor had not agreed in principle to have Zi Ye become a franchisee and give her company a franchise (once she met the requirements of obtaining a work permit and demonstrating a facility with English such that she could run the store on her own); and,
- iv. that the process that Hugh and Ren were urging her to follow in terms of buying the business (buy the business before receiving a work permit and before the Franchisor transferred the franchise agreement to her) was not the same process that they had followed when they purchased the YDSWM store in Salmon Arm.

[271] Although Zi Ye tried to operate the Business to the best of her ability after the discovery that the Franchisor had not approved the sale of the defendants' business, it operated at a loss every year that she owned it.

[272] The only expense the plaintiff incurred before the sale closed was a \$220.84 fee for the printing of company cheques. In the end, the financial losses 116 BC Ltd.

suffered due to proceeding with the purchase of the assets of 104 BC Ltd., as set out in the materials, was \$469,260.⁹⁴

The sale of 116 BC Ltd.'s business after the failure to obtain a YDSWM Franchise

[273] It was apparent from Mr. Lambert's evidence that he was frustrated with both sides of the transaction for having engaged in a sale and process without the Franchisor's approval. The parties' rogue actions complicated the Franchisor's ability to consent to the sale. Moreover, the Franchisor was unable to retroactively provide Zi Ye with a franchise agreement as it did not receive the cooperation it needed from both parties. Complicating the whole process was the COVID-19 pandemic where everyone was struggling to survive and maintain their businesses.

[274] In July 2022, Mr. Lambert engaged in email communications with counsel for the plaintiff in an effort to resolve the matter so that the plaintiff could sell the store, but the tenor of those communications established that, in light of the circumstances, a resolution could not be reached. At the time, the issue of outstanding royalties due from Hugh and Ren and payment of suppliers' invoices impeded the franchise transfer from occurring. Hugh and Ren finally paid the outstanding royalties to the Franchisor in October 2022.

[275] In her affidavit, Zi Ye outlined her efforts to maintain and operate the business after taking over its management in late-2019 and thereafter when the Franchisor became aware of the sale and eventually would not agree to grant Zi Ye a franchise agreement. In the end, Zi Ye sold the assets of the store without a franchise agreement for \$60,000 on October 11, 2022. There was a holdback of \$10,000.00 due to Zi Ye on the sale and as of the time of swearing her affidavit she still had not received the balance of those sale proceeds.⁹⁵

⁹⁴ Ex.4 Affidavit #2 of Zi Ye, paras. 193-202 and attached exhibits of the plaintiff's financial statements, general ledger spreadsheets and adjusting journal entries.

⁹⁵ Ex.4 Affidavit #2 of Zi Ye, paras. 172-186.

The purchase of the Trumpeter Rd. property by Ren and Hugh

[276] There is a further significant feature to the overall dealings in explaining the defendants' urgency to close the sale of the Business. On March 25, 2018, prior to the drafting of the Asset Purchase Agreement, Ren, as buyer, entered into a residential contract to purchase a home on Trumpeter Rd., in Kelowna BC for \$1,040,000.

[277] On April 6, 2018, Ren removed all subject conditions in favour of the purchaser on the Trumpeter Rd. property and paid a deposit of \$50,000. The original completion date on the purchase of Trumpeter Rd. was July 27, 2018.

[278] Ren and Hugh had a number of bank accounts – six Canadian bank accounts (including one corporate account for 104 BC Ltd.) and four Chinese bank accounts that they used to pool their funds to come up with the money they intended to use as a down payment at the time the purchase of Trumpeter Rd was to close. Money from the Chinese bank accounts could only be transferred in limited amounts so as to comply with currency exchange and removal restrictions imposed by the Chinese government.

[279] On July 6, 2018, before the proceeds from the sale of 104 BC Ltd.'s assets were deposited to its corporate account, it had a balance of \$6,325.82. And, before the proceeds from the sale of 104 BC Ltd.'s assets were deposited, the total value of Ren's Canadian Bank accounts (including 104 BC Ltd.'s corporate account) was \$164,460.18 and \$34,937.21 (USD) as accessible funds to complete the closing of the Trumpeter Rd. purchase. However, Ren required \$398,082.98 to complete the closing.

[280] On July 6, 2018, the plaintiff's cheque for \$271,996.61, representing the proceeds of the purchase of 104's BC Ltd.'s assets, was then deposited to 104 BC Ltd.'s BMO corporate account.

[281] On July 9, 2018, the balance on Ren's BMO Savings account before any deposits or transfers were made to it was \$85,798.35.

[282] On July 9, 2018, a cheque for \$270,000, drawn on 104 BC Ltd.'s BMO corporate account was deposited to Ren's BMO Savings account. On that same date, \$80,000

was transferred from another BMO account held by Ren and deposited in her BMO Savings account.

[283] On July 24, 2018, the completion date on the Trumpeter Rd. purchase was extended to August 8, 2018.

[284] On July 26, 2018, Ren transferred \$398,082.98 from her personal BMO Savings Account, where the pooled funds for the purchase of the property were being held, to her solicitor's account. She did so to gather the funds needed to complete the closing on the Trumpeter Rd. purchase.

[285] Immediately before the closing on Trumpeter Rd. was completed, the balances of the Canadian bank accounts that Ren and Hugh could access for the closing were as follows:

| Account | Balance |
|--------------------------|---------------------|
| 104Co BMO Account | \$3,075.10 |
| Ren RBC 101 Account | \$3,928.42 |
| Ren RBC 492 Account | \$-3.92 |
| Ren BMO Chequing Account | \$10,667.41 |
| Ren BMO USD Account | \$14,937.21 |
| Ren BMO Savings Account | \$435,798.35 |
| Total | \$461,402.97 |

[286] It was clear from Ren's cross-examination that without the proceeds from the sale of 104 BC Ltd.'s assets, Ren and Hugh had insufficient funds available to them from their Canadian bank accounts to complete the purchase of the Trumpeter Rd. home. Indeed, deducting the \$270,000 proceeds received from 116 BC Ltd. for the sale of 104 BC Ltd., from the total balance of Canadian funds available to Ren and Hugh at the time of the closing of the Trumpeter Rd. purchase, reveals that they only had about \$191,000 in their Canadian accounts. In other words, they were more than \$200,000 short of the amount they needed to complete the purchase of Trumpeter Rd. This fact greatly

informs the circumstances and the assessment of the evidence. It makes it abundantly clear that Hugh and Ren needed the proceeds of the sale of their company's assets to the plaintiff in order to complete their purchase of the Trumpeter Rd. property.

Findings in respect of the credibility of the witnesses

[287] The principles governing the assessment of credibility and reliability I reviewed earlier in these reasons have guided my assessment of the witness testimony in this case.

Evidence from the Plaintiff's case

The evidence of Joe Schober and Dean Lambert

[288] The credibility and evidence of the two witnesses from the Franchisor were largely uncontradicted and unchallenged. Mr. Schober and Mr. Lambert were disinterested witnesses endeavouring to assist the Court in understanding what was required for a business to become a YDSWM franchise, as well as what was required for a YDSWM business to be sold and a purchaser of the business to become a franchisee. They also outlined, as best they could, their recollection of the events wherein Hugh approached the Franchisor about selling 104 BC Ltd. and the discussions they had with him first in the spring of 2018 and later in June 2018. I accept their evidence as credible.

[289] The only area where Mr. Schober and Mr. Lambert appeared to diverge was on the need for a renewal of the lease for the store being a criterion of the Franchisor to approve the sale. While Mr. Lambert was of the view that a renewal was a good idea, he recalled it not being a pre-requisite. Mr. Schober, on the other hand, was clear in his evidence that it was a requirement. In light of the fact that Mr. Schober was more "hands on" in the Franchisor's dealings with Hugh on the issue of selling 104 BC Ltd., and was the individual who wrote the June 22, 2018 email to Ren specifically stating that a renewal was required, I accept Mr. Schober's characterization of the requirement of a renewal of the lease as what was conveyed to Hugh in his dealings with the Franchisor when he raised the possibility of selling 104 BC Ltd.

The evidence of Jie Wang

[290] Insofar as the evidence of Jie Wang is concerned, counsel for the defendants concedes she was truthful, save for one material point. They argue that it is unbelievable that Jie Wang initially understood the altered email to mean that the asset purchase agreement had not been approved by the Franchisor, but that Hugh tricked her into understanding that they had. Respectfully, I disagree. When her evidence is considered in the context of the WeChat communications that she exchanged with Hugh between June 25, 2018, at 8:58 p.m. and June 26, 2018, at 11:22 p.m., and the vociferous nature of Hugh's answers and directions, it is completely conceivable that this was her understanding. I accept her evidence that she was misled into believing that the Franchisor had approved the asset purchase agreement based on Hugh's repeated false representations.

[291] Jie Wang's decision to follow Zi Ye's instruction to not contact the Franchisor and to not question Hugh's insistence that the way they were proposing to proceed (buy the business first and have the franchise agreement transferred later, contrary to her own professional experience in conducting purchases of franchised businesses) is perplexing. And while it may constitute conduct worthy of review in another forum, it is not actionable within these proceedings.

[292] The fact of the matter remains that Jie Wang followed her client's instructions not to contact the Franchisor. Zi Ye based these instructions on Hugh and Ren's false representations to her about the method by which they purchased the business, that the Franchisor had approved the sale, and that the Franchisor would transfer the franchise agreement to Zi Ye in the future upon satisfying certain conditions. Hugh and Ren misled Zi Ye on this front vis-à-vis two methods: the altered Joe Schober email indicating what was required for approval of the sale and Hugh's assurances that the Franchisor had consented to the Asset Purchase Agreement and sale of 104 BC Ltd.'s assets to the plaintiff.

[293] I caution myself with respect to assessing the credibility and reliability of the three main protagonists in this case, Zi Ye, Ren and Hugh. There were significant language

barriers between all three witnesses and counsel. In particular, there were a number of instances during the cross-examinations of Zi Ye and Ren when it was obvious that they did not initially understand the questions being asked of them.

The evidence of Zi Ye

[294] It is true that Zi Ye was initially seemingly non-responsive to questions put to her in cross-examination. With the consent of counsel for the defendants', plaintiff's counsel was permitted to speak to Zi Ye to discuss the proper manner of answering questions in cross-examination. After this, there was a marked improvement in her responsiveness. Although counsel for the defendants suggests that she eventually became non-responsive again, that was not the impression left with the Court. Importantly, Zi Ye remained unshaken on many significant aspects of the events that ground this action. Moreover, her evidence is externally consistent with many other facets of the evidence, including the communications between the parties in their WeChat exchanges as well as the evidence of Jie Wang.

Evidence from the Defendants' case

[295] While I have included some of the defendants' evidence above in constructing the chronology of events, I have elected to summarize some of the more concerning aspects of the defendants' evidence in this case in this section of the reasons, rather than contrasting their evidence with that of Zi Ye and Jie Wang. I do so because I have concluded that the full magnitude of the inconsistencies in their evidence is better understood by setting them out in this manner.

The evidence of Yonghui Ren aka Ren

[296] As outlined previously, Ren testified for just over five days in this trial,

[297] The gist of Ren's evidence in direct examination concerning the closing of the sale at the end of June 2018 largely indicated that Hugh was taking care of most everything to do with the transaction. Ren provided the context that she was busy caring for their children and Hugh had a better understanding of English than she did.

[298] Ren testified that the main purpose for selling the Business to Zi Ye was to assist Zi Ye in her immigration prospects.

[299] Ren appeared to limit her role in this case to largely having forwarded materials to the Franchisor (the Asset Purchase Agreement and the Landlord's Consent to the Assignment of the Lease) and emphasized her limited fluency and literacy in English. Indeed, she testified that she had little understanding of the contents of some of the emails sent to her by the Franchisor, including the original Joe Schober email of June 22, 2018, from 2:36 p.m.

[300] Ren also acknowledged that she forwarded the email from Joe Schober to Hugh within minutes of receiving it.⁹⁶ She explained she talked to Hugh about the email that evening and asked him to read it and to tell Zi Ye what it was about. Ren said her plan was to forward the email to Jie Wang because it had the contact information for the Franchisor listed at the bottom. She imagined that Jie Wang would contact the Franchisor, who could give a better explanation about the details than Ren could.

[301] On June 23, 2018, at 4:26 p.m., Ren forwarded the Joe Schober email from her Gmail account to her Chinese qq.com account.⁹⁷ She did this to avoid her emails to Zi Ye being blocked by firewalls set up by the Chinese government. She acknowledged deleting sections from the Joe Schober email and explained she did so per Hugh's direction and what she understood to be Zi Ye and Hugh's discussions about the content of the original email.

[302] Ren initially explained in direct examination that she deleted the sixth bullet in the original Joe Schober email (the requirement of a lease renewal for the Franchisor to authorize the sale) because the lease agreement had been satisfied, she had sent it to the Franchisor in her June 22, 2018 email at 12:48 p.m., and that she told "them" the Franchisor had already received it.⁹⁸

⁹⁶ ASF, Ex. #1, Tab N.

⁹⁷ ASF, Ex. #1, Tab P.

⁹⁸ ASF, Ex. #1, Tab L.

[303] Ren then modified her answer and provided that this aspect of the original Joe Schober email was deleted as a result of her discussion with Hugh and his with Zi Ye. After these respective discussions, the pair collectively decided to delete it on the conclusion that it was unnecessary.

[304] On Sunday June 24, 2018, at 9:28 p.m., Ren again emailed an altered version of the Joe Schober email from her Gmail account to her qq.com account. The first paragraph of the original email was placed back into the email; the sixth bullet point about the lease renewal remained deleted; and, the second last sentence from the original email addressing the end of June deadline was freshly deleted.⁹⁹ Ren testified she made these alterations at Hugh's behest following his discussion with Zi Ye. She also explained that she sent the email from her Gmail account to her qq.com to facilitate making these changes and to send the email to Zi Ye at her qq.com account. This step would ensure Zi Ye received the email while in Beijing.

[305] On Sunday June 24, 2018, at 9:56 p.m., Ren sent another version of the altered Joe Schober email to herself, this time making one further alteration to it by changing the second last sentence from "If Hugh" to "If You".¹⁰⁰ Ren explained she made this change because she wanted Jie Wang to contact the Franchisor to obtain detailed information from them. Eighteen minutes later, Ren forwarded the final version of the altered Joe Schober email to both Jie Wang and Zi Ye.¹⁰¹

[306] Ren testified that at the time of the last alteration she also made it clear to Zi Ye via WeChat that she had sent the email to Jie Wang. She claims she impressed on Zi Ye that Jie Wang should contact the Franchisor directly. I can find no such messages within the WeChat communications between Ren and Zi Ye. Indeed, there are no WeChat communications between them at all on June 24, 2018. Rather there is a communication on June 23, 2018, at 10:39 p.m. wherein Ren advised she had sent the landlord agreement to Zi Ye's qq.com email and asked if she had sent it to her lawyer.

⁹⁹ ASF, Ex. #1, Tab Q.

¹⁰⁰ ASF, Ex. #1, Tab R.

¹⁰¹ ASF, Ex. #1, Tabs S & T.

[307] The next WeChat communication between the pair was on June 25, 2018 at 9:50 p.m. at which time Ren started her campaign of denigrating Jie Wang’s capabilities.¹⁰² After a series of messages back and forth on this topic, Ren then suggested to Zi Ye that her lawyer could inquire with Joe the following day, and that Jie Wang could contact the Franchisor.¹⁰³ From my reading, these communications evince anything but encouragement for Zi Ye to have her lawyer contact the Franchisor. Rather, Ren wrote a screed against the lawyer steeped in the vein of “If you don’t believe us, Jie Wang can contact the Franchisor”, though quickly so as to resolve the matter by the end of June.

[308] I do not propose to review the entirety of the remainder of Ren’s direct evidence or detail her evidence in cross-examination. Regrettably, I am compelled to conclude that Ren was a completely untrustworthy—even mendacious—witness. Throughout her cross-examination, Ren had to be reminded to listen to and answer the question posed. Her evidence and explanations, largely during cross-examination, were non-responsive, evasive, confusing and contradictory. Indeed, her overall demeanour throughout her evidence, particularly in cross-examination, was that of an imperious and hostile witness.

[309] Ren contradicted herself between direct and cross-examination and between her evidence given on her examination for discovery. Some of the more salient features and inconsistencies in Ren’s evidence demonstrate why the Court cannot place any weight on her evidence. Indeed, I find that most of Ren’s evidence was contrived as an effort to mislead the Court on what truly occurred in this transaction.

[310] **First**, in cross-examination, when it was suggested to Ren that the sale of their business to Zi Ye and her company was an important matter for their family in May and June 2018, Ren was at pains to downplay the significance of the sale. She testified as follows:

Q. During May and June 2018, the sale of your store to Zi Ye was an important thing for you and Hugh.

¹⁰² ASF, Ex. #1, Tab H, p. 1.

¹⁰³ ASF, Ex. #1, Tab H, pp. 17, 20 & 21.

A. Mostly Hugh put his effort on this matter. I was mainly focusing on looking after the two children and the family.

Q. But the matter of the sale of your store to Zi Ye was an important thing for your family in May and June 2018.

A. It is a thing. However, not in a rush. I – it was me who asked Hugh to assist her with her immigration.

Q. And I didn't meant to suggest urgency. I'm just saying the sale of your store to Zi Ye was something that was important to you and Hugh.

A. Not a very important matter. It was a matter.

Q. But it was an important matter.

A. I did not -- I do not think it was important.

Q. Your evidence is that the sale of the store operated by you and your husband as your livelihood for approximately \$300,000 was not an important thing.

A. That's correct. At the time my net worth was over three million Canadian dollars, so 300,000 was not an important matter for me.

[311] Ren would have the Court believe the following with respect to the sale of her business to Zi Ye: (i) she was selling her business for altruistic reasons (to help a woman she barely knew immigrate to Canada); (ii) the sale was a matter of little significance to her; and (iii) that \$300,000 was not an important sum of money considering her professed net worth. In light of the established shortfall in Canadian funds to purchase the Trumpeter Rd. property without the proceeds of the sale of 104 BC Ltd.'s assets to the plaintiff, Ren's evidence on these points defies credulity.

[312] **Second**, Ren testified that she provided a copy of the franchise agreement to Zi Ye to give to Jie Wang in their June meeting. Zi Ye denied she received it and Jie Wang had no recollection of seeing it or having it in her file. The meeting between Zi Ye and Jie Wang occurred on June 12, 2018. However, in an email to Joe Schober on June 22, 2018 at 12:48 p.m. wherein Ren forwarded the landlord's consent to the assignment of the lease to the Franchisor, Ren asked for a copy of the franchise agreement and advised that the lawyer needed to close the purchase contract before the end of June.

[313] On its face, Ren's request of Joe Schober in her June 22, 2018 email to undercuts the veracity of her assertion that she provided a copy of the franchise agreement to Zi Ye earlier in the month. The matter becomes more confusing still when I consider Ren's testimony that she intended to refer to consent, not agreement, in the email. Ren posits she intended to convey her desire to have the Franchisor's consent—or anything in writing at all from the Franchisor—indicating its consent to the sale consistent with what Hugh had been told verbally in an earlier meeting with the Franchisor. Within the context of all her evidence, Ren's explanation strongly strikes a chord of contrivance.

[314] **Third**, Ren's evidence as to how the alterations to the original Joe Schober email came about was inconsistent as between what she testified to at trial and the evidence she provided on her examination for discovery. At trial, it was Ren's evidence that when she went to bed on Friday evening, June 22, 2018, she could hear Hugh talking to Zi Ye but could not hear what they were talking about.

[315] Ren testified that she asked Hugh to explain the Joe Schober email to Zi Ye. After he did so, Hugh instructed Ren to delete the sixth bullet point in the email (about the lease renewal) when she forwarded the email from her Gmail account to her qq.com account in the afternoon of June 23, 2018.¹⁰⁴

[316] Ren testified that Hugh also directed her to delete the section about the process taking time and could not be fulfilled by the end of June deadline when she again forwarded the Joe Schober email from her Gmail account to her qq.com account on June 24, 2018.¹⁰⁵

[317] Ren also testified that Hugh reviewed what she wrote in the Mandarin text included in the forwarded altered Joe Schober email that was sent to Jie Wang on June 24, 2018 at 10:09 p.m. and agreed with the contents of it.¹⁰⁶

¹⁰⁴ ASF, Ex. #1, Tab P.

¹⁰⁵ ASF, Ex. #1, Tab Q.

¹⁰⁶ ASF, Ex. #1, Tab S.

[318] In contrast, during her examination for discovery, Ren testified that she talked to Zi Ye and that Zi Ye instructed her to make these changes to the email. And, Ren's evidence on her examination for discovery was that Hugh did not assist her in composing the message written in Mandarin for Jie Wang. She did so herself.

[319] Aside from the direct contradiction between these two accounts, Ren's suggestion that Zi Ye told her to make the changes is nonsense. Neither of the two women had a sufficient command of English at the time such that Ren could understand the Joe Schober email and translate it into Mandarin for Zi Ye. Similarly, in light of Zi Ye's statements to Hugh about doing things properly and her evidence on that point, it seems contrived to suggest that Zi Ye would have fully understood what Ren was telling her, let alone instruct Ren to remove certain passages from the email.

[320] **Fourth**, Ren provided inconsistent versions as to whether Hugh was present when she forwarded the altered Joe Schober email to Jie Wang and Zi Ye on Sunday June 24, 2108. At trial she maintained he was present. However, in her examination for discovery evidence Ren testified that Hugh asked her a number of times if she had forwarded the Joe Schober email to Jie Wang and Zi Ye. Ren told Hugh she would do so on the Monday and said she in fact did do so on the Monday.

[321] The overall tenor of Ren's evidence on this topic, and the accompanying inconsistencies in her evidence about the altered Joe Schober email, has a far more concerning complexion to it: The various versions proffered by Ren seem to be an effort to dilute the force of the personal defendants' actions. In fact, both personal defendants altered the Joe Schober email to remove two key pieces of information to ensure Jie Wang and Zi Ye would not become aware of the Franchisor's lack of approval of the sale nor of the Franchisor's clear statement that the defendants' end-of-June deadline for completion was not feasible. I am equally perturbed by the misleading nature of the altered email itself and of Ren's evidence aimed at adulterating the gravity of the defendants' misconduct in carrying out the alterations.

[322] **Fifth**, Ren endeavoured to explain in her evidence that the reason she changed "Hugh" to "You" at the bottom of the altered Joe Schober was to convey to Jie Wang that

she should contact the Franchisor directly to confirm the steps required for the Franchisor to consent to the transfer of the Franchise Agreement.

[323] Respectfully, such an explanation is absurd—the body of the email is addressed to Catherine, Ren’s English language name. By substituting “You” for “Hugh”, the letter to Catherine from Joe Schober would read as an invitation to Catherine to contact the Franchisor, not one to Jie Wang. Had the defendants wanted to convey to Jie Wang that she should contact the Franchisor directly, it would have been easier for Ren to say so in her Mandarin text at the top of the forwarded email. She did not do that. And, as the overall course of the communications between June 24 and June 26, 2018, clearly establishes, the defendants did not want Jie Wang to contact the Franchisor. If they had urged Zi Ye to have Jie Wang contact the Franchisor directly and Jie Wang did so, then the defendants’ false representations of fact to Jie Wang and Zi Ye about the Franchisor’s consent to the sale and agreeing to give Zi Ye a franchise in the future if she met certain conditions would have been revealed. The sale most likely would have collapsed at that point.

[324] **Sixth**, in cross-examination, counsel led Ren through her WeChat messages with Zi Ye brimming with numerous criticisms of Jie Wang’s abilities. She disagreed with such a characterization of her messages. Ren claimed she was simply expressing dissatisfaction with Jie Wang’s work and letting off steam due to her anger at the situation. She explained that she was dissatisfied with Jie Wang’s work attitude and capability though denied that her complaints were designed to call Jie Wang’s ability to assist Zi Ye into question. Part of the exchange in cross-examination on this topic illuminates this discrepancy:

Q. And turning to page 15, the next WeChat message with a translation is one that you sent -- sent to Zi Ye.

A. Yes.

Q. And you begin that message by saying [as read in]:

I think Wang lawyer, Wang Jie, firstly there is a chance that she don't understand English.

And in saying these words, you intended to criticize Jie Wang as possibly not understanding the English language.

A. That's right. Still a complaint with -- against her.

Q. And you continued this message by saying [as read in]:

And secondly, it is possible that she is not intellectually capable.

And in saying these words, you intended to criticize Jie Wang as possibly not being intellectually capable.

A. It's still a complaint. I thought that she lacked work capability.

Q. And you reiterated these criticisms of Jie Wang at the end of your message when you said [as read in]:

I think Wang Jie first does not know English, second, she does not know contract law.

A. That's right, the same. I was very dissatisfied with her work attitude and capability.

Q. And, in saying these things to Zi Ye, you intended to question Jie Wang's ability to assist Zi Ye.

A. Not as complicated as you thought. As a woman, I complain everything. I like to make complaints for things I'm not happy with. I do not intend to lead other to do anything.

Q. You agree, though, that the substance of your complaint questions the ability of Jie Wang to assist Zi Ye, correct?

A. I was not questioning that. I was only letting go -- letting off steam of my thoughts. Among friends, I think it's normal to express one's thoughts.

...

Q. Below that message is a time stamp that is June 25th, 2018, 10:06 p.m. The next message is on page 20, correct?

A. Yes.

Q. That message is from you.

A. Yes.

Q. This message from you starts with [as read in]:

Okay, I got it. It's easier for us to communicate directly. Add a fucking Jie Wang in the middle. I want to scold her, she's chattering, she doesn't answer calls, she doesn't reply to WeChat, I hate such people.

A. Yes. It was my expression to her for my dissatisfaction toward her, and to Chinese, she did not show the basic respect to a compatriot. Furthermore, she was more rude to us. So therefore, I was very dissatisfied with her. Of course, I would have said a lot of things that not nice to hear.

Q. In this message, you intended to communicate that it was easier for Zi Ye to communicate directly with you and Hugh, and you also intended to communicate that Jie Wang was a source of problems.

A. Your understanding like that, I think is to complicate a simple matter. It's just a woman showing dissatisfaction towards someone in terms of work attitude and work ability. I was -- complained with another girlfriend of hers. However, you have compiled it into a story that was premeditated deeply.

Q. In sending this message, you intended to discourage Zi Ye from having Jie Wang involved in the sale process.

A. At that time, Zi Ye has already paid Wang Jie \$8,000, so are you saying that I just, with two sentences, I have expressed she would stop hiring Wang Jie? A complaint expressed among two friends, you think has such a big impact, would she give up the \$8,000?

[325] Ren's answers in this line of questioning came across as her concerted effort to underplay her denigration of Jie Wang by casting it simply as an example of a woman complaining or a complaint expressed between two friends. I would not accede to this characterization. When I consider the messages globally and within the overall context of the dealings between the parties, the only available and clear inference is that Ren was engaged in a campaign of criticism designed to undermine Zi Ye's trust in her lawyer. Her protestations that she was merely complaining due to her nature as a woman or as among friends ring completely hollow.

[326] **Finally**, Ren appeared to endeavour to mislead the Court on the import of a facet of her examination for discovery evidence pertaining to the altered Joe Schober email. This point is of considerable significance to her overall credibility.

[327] To begin with, Ren acknowledged that, notwithstanding agreeing at her examination for discovery that she would do her best to answer the questions and would say if she was uncertain about something, she testified that she provided an incorrect answer about when she forwarded the altered Joe Schober email to Jie Wang. Ren claimed at her examination for discovery that she did not send it until Monday, June 25. She provided the explanation there that she did this after her husband asked her if she had done so.

[328] Ren admitted this was incorrect at trial. Her explanation here was that it was a mistake due to her poor memory of the timing. To contrast with this assertion, it should be noted that she provided a detailed recollection of when she forwarded the email to Jie Wang and the circumstances surrounding the act. Respectfully, Ren's explanation for the inconsistency between her examination for discovery evidence (where she said she sent the email during the day of June 25, 2018) and her trial evidence (where she indicated she sent the email the evening of June 24, 2018) is completely incredible. I come to this conclusion given the details Ren provided in her answers and the stark change to them in her trial evidence.

[329] The cross-examination of Ren on her examination for discovery evidence pertaining to the altered Joe Schober email encompasses approximately 14 pages of trial transcript. To be frank, Ren's evidence at trial is more than confusing. I say this even accounting for the fact that the evidence was provided through an interpreter and Ren's facility with the English language is limited. Notwithstanding, her evidence has the appearance of a dishonest witness prepared to make up her answers when challenged on an inconsistency.

[330] Perhaps more fundamentally, in her cross-examination on May 5, 2023, Ren initially agreed that when she arrived at her examination for discovery on April 28, 2011, she did not expect that she would be asked about what happened with the Joe Schober email and how she sent it to Jie Wang.

[331] Ren then modified her evidence and suggested she had thought about it, she knew when she received it, and that she sent it to Jie Wang, but that she did not really

think about what she did or what happened. As counsel struggled to have Ren answer his question, Ren changed her answer again. She stated that she sent emails from her “sent” inbox to her counsel at the examination for discovery (distinct from her counsel at trial) but did not carefully review them for the timestamps.

[332] Counsel again tried to have Ren answer the question and the following exchange occurred:

Q. I don't think that answered my question. I just asked you if on April 28, 2021, or perhaps the day before, April 27, 2021, you tried to remember what happened at and around the time you sent the Joe Schober email to Jie Wang?

A. No.

Q. So as I understand what you're telling this court now, the evidence you gave in response to my questions 419, 420, was evidence of what you recalled just in that moment, because you were not prepared to answer detailed questions about sending the Joe Schober email to Jie Wang?

A. So yes, because I did not know what the judge was going to ask me, so -- and also I believe that the answer to be given to those questions should be something that I could think of at the time, on spot, not planned and -- not planned answers. That's why I did not have a clear reflection about the time and made a small mistake.

Q. And so is the same true of your other answers about the Joe Schober email, that -- pardon me, I'll restart that question. Is the same thing true about your answers to the other questions I asked you on April 28, 2021, about you forwarding the Joe Schober email to Jie Wang?

A. Yes. I recall at the time that I received the headquarters email, and then I typed and modified the email, and then I sent it to Jie Wang at the time she went to the office or prior she went to the office. I only remember generally what had happened, but I did not remember what happened at each minute.

Q. I just wanted to confirm that the other -- that the answers you gave to other questions I asked about the Joe Schober email on April 28, 2021, were not planned, like you say your answers to questions 419 and 420 were not planned?

A. Yes, those were all my answers that I tried my -- answers that I gave at the time when I tried my best.

...

Q. When I examined you for discovery on April 28, 2021, you knew I had examined Hugh for discovery the day before, April 27, 2021, correct?

A. Should be.

- Q. And after I finished examining Hugh on April 27, 2021, and before I began examining you for discovery on April 28, 2021, Hugh asked you some questions?
- A. I cannot recall.
- Q. Do you recall if Hugh asked you questions about the events at issue in this case in that time period?
- A. I asked him what you were asked. He said, "Just about those things."
- Q. Did Hugh tell you that I had asked him questions about the Joe Schober email and your email forwarding that email to Jie Wang?
- A. It seems that he mentioned the email headquarters sent to me, but I cannot recall exactly what he said.
- Q. Do you recall if you planned, with Hugh, what you were going to say about forwarding the Joe Schober email if I asked you questions about it at your discovery?
- A. We did not plan that. I said whatever was asked tomorrow, then I would just state my answers.
- Q. So you deny that when you came to your examination for discovery on April 28, 2021, you were ready to tell me what you planned to say about forwarding the Joe Schober email the first time I showed you that email on your discovery?
- A. Hugh asked me -- what Hugh asked me was we had the email headquarters sent me, because I had a bunch of email exchanges with the -- Joe Schober and headquarters. So my plan was, whatever Mr. Robinson was going to ask me, I would just give him a straight answer. There's nothing for me to hide.
- ...
- Q. ... When you came to your examination for discovery on April 28, 2021, you were ready to tell me what you planned to say about forwarding the Joe Schober email the first time I showed you that email on your discovery?
- A. No, I did not.

[333] When asked about her answer to question 349 from her examination for discovery (as read in by counsel at trial), Ren indicated that she had forgotten some of the details but that her husband Hugh had talked to her the day before her examination. She then took time to recall all the emails.¹⁰⁷ Ren subsequently denied the suggestion in cross-examination at trial that Hugh had told Ren what to say on her examination for discovery. She then testified that seeing the email and its respective modification (now

¹⁰⁷ Part of Hugh's examination for discovery was conducted on April 27, 2021. Part of Ren's examination for discovery was conducted the next day, April 28, 2021.

in Ex. #1 at Tab S) at the examination for discovery refreshed her memory. The cross-examination at trial continued on this issue:

Q Oh. So the answers you gave on question 349 and 350 reflect the memory you had when I examined you for discovery on April 28, 2021?

A. That was because when Hugh returned he told me Mr. Robinson would ask about the emails from the headquarter and the emails we forwarded. He said we need to spend some time to think about what had happened at the time. So at the examination I carefully read that email. So I remembered I changed that email. And then I remembered why I changed the email.

Q. And so one of the changes to the email, the Joe Schober email that you describe in these responses, is that you crossed out the part about the purchase not being closed by the end of June, correct?

A. Yes, Hugh told me that.

Q. But in your evidence, the answer to question 350, you said, "So she said just don't tell my lawyer about this."

A. Yes, Hugh told me that.

Q. But in your answer you did not say that Hugh told you that?

A. Because Hugh -- Hugh is my husband. We are family. He was the one who was in charge of handling this matter and I trusted him. I was the owner of this business, so I believed what he said. So that would represent our position.

THE INTERPRETER: Sorry, the interpreter wants to just do a modification.

A. So what he said I believed those were correct, and that represents our position.

Q. And after you gave the answer, "So she said just don't tell my lawyer about this," you continue:

So I could understand at that time how like, for her anxiousness at this stage of applying for immigration and so therefore I crossed out that line, that term as well.

A I guess when Hugh asked me to make the change, I ask him why those changes, why I need to - sorry - why change it this way. He told me because Zi Ye was in a rush and she wanted to immigrate. And then I also remembered when we immigrated we encountered the same problems; because of the change of immigration policy there was a delay. So as a person who experience such a delay I could feel for her. So I agree and I deleted it.

Q. You agree that in your answer you say first that Zi Ye said, "Just don't tell my lawyer about this," and then after you said, "So therefore I crossed out that line, that term as well." And I'll ask you, by writing that you intended to communicate to me that you had decided to cross out that term because Zi Ye had said, "Just don't tell my lawyer"?

A. Yes. No matter who asked me, any emails sent out through me would represent my thoughts. So any modification I made prior to that I would ask the reason. So Hugh told me everything. I thought it was reasonable.

THE INTERPRETER: Sorry, the interpreter needs to clarify the pronoun.

A. So I make the modification to that line is according to this thought.

Q. In your answer to question to 350, you said, "I told Zi that the headquarters, they would take -- it will take time before that completed the purchase." You said that to Zi?

A. Yes, just as I said earlier, I gave the authorization, a full authorization to Hugh to handle this matter on behalf of me. So whatever the discussion Hugh had reserve, that represents what I thought.

Q. And so do I take it that every place you used the word "I" in your answers on examination for discovery, it was possible that you meant you yourself or you might have meant Hugh?

A. I think the most accurate expression would be me, because we're the same family representing the same "we".

[334] The cross-examination of Ren on her use of the term "I" in her examination for discovery evidence continued a bit further. Regrettably, Ren's explanations did not provide any clarification. Ren seems to want to have the Court believe that when she answered "I" in these questions on her examination for discovery, she meant alternately "Hugh", "we", "I" and/or sometimes both "Hugh" and "I" within the same answer.

[335] Ren's efforts to explain these various inconsistencies lead me to the regrettable conclusion that she was incapable of providing truthful or accurate testimony about the substance of the matter or what her state of mind was at the time of the examination for discovery. In addition, as it seems apparent that Hugh and Ren discussed Hugh's evidence from the day before, I cannot exclude the possibility that when Ren testified at the examination for discovery on April 28, 2021, she may well have concocted a story that falsely implicated Zi Ye as a participant in the alteration of the Joe Schober email.

[336] Owing to the findings enumerated above, I am unable to rely upon any aspect of Ren's evidence as to what she was trying to achieve in having this sale close and the discussions that she claims to have had with Zi Ye. I reject her evidence outright. She was a completely untrustworthy witness.

The evidence of Yu Tian aka Hugh

[337] As outlined previously, Hugh testified for approximately three days in this trial, with about one day in direct examination and the remainder in cross-examination.

[338] Respectfully, Hugh was also an untrustworthy witness who appeared to concoct explanations on the fly as he testified. He contradicted himself between direct and cross-examination and between the evidence he gave on examination for discovery and at trial. Some of the more salient features in his evidence and the inconsistencies therein serve to demonstrate why the Court cannot place any weight on his evidence. Indeed, I find that he contrived most of his evidence in an effort to mislead the Court on what actually occurred in this transaction.

[339] **First**, in his evidence, Hugh acknowledged that they did not have a lawyer to assist them in the sale of 104 BC Ltd. He said that the defendants did have a lawyer, Elaine Cheung, but then explained that the reason they did not continue with her for the closing was because once Zi Yi retained Jie Wang, she told them they did not need to find a lawyer as it was too expensive and, as they were friends, there was no cause for worry. I note this proposition was never put to Zi Ye and it appears to fly in the face of the evidence of Jie Wang that the defendants had a lawyer initially involved in the drafting of the Asset Purchase Agreement but who was then reduced to a limited role in the completing the closing. I reject Hugh's evidence that it was Zi Ye's idea that they not retain a lawyer.

[340] **Second**, Hugh was aware of the emails between Joe Schober and Ren in late May and mid June 2018, wherein the Asset Purchase Agreement was sent to the Franchisor and the landlord's consent to the lease assignment was sent to the Franchisor. In his evidence, Hugh appeared to think that a lease assignment and a lease renewal were the same thing. However, Hugh also understood from the original

Joe Schober email of June 22, 2018, that the six bullet points included in it were the steps or requirements that the Franchisor needed to be done to approve the sale, including the Franchisor's requirement that Hugh remain on the franchise agreement as a guarantor and that he was to obtain a lease renewal from the landlord.

[341] Hugh also suggested in his evidence that Mr. Schober was mistaken when he outlined that the Franchisor required a lease renewal in his June 1 and June 22, 2018 emails to Ren. With respect, this is a manufactured explanation entirely inconsistent with Joe Schober's evidence and the documentary evidence.

[342] Ren sent Mr. Schober the asset purchase agreement on May 31, 2018. Mr. Schober replied in an email of June 1, 2018, with "[o]nce the Landlord accepts the renewal on the lease (which you can forward me as well) we will send the purchaser BC disclosure followed by a Franchise agreement etc. and we can move forward with all the last steps in finalizing the new Franchisee".

[343] Hugh testified that he thought that Mr. Schober was mistaken and what he was really asking for was the landlord's consent to assign the lease. Hugh explained that his belief in this regard was based on the fact that the renewal was not due until September 2019. Again, Hugh's belief and his suggestion that Mr. Schober was mistaken are not credible. Mr. Schober could not have been clearer in his dealings with the defendants, instructing them to obtain a renewal of the lease for the sale to be approved. It was obvious that an assignment of the lease was not sufficient.

[344] On June 22, 2018, at 12:48 p.m. Ren sent Mr. Schober an email attaching the landlord's consent to assign the lease. Mr. Schober quickly responded to this email with the original Joe Schober email, including the last bullet point which said "the lease agreement only indicates a transfer for the remainder of the term which expires in September 2019. Hugh was told that the lease had to be extended as one of the conditions for us to authorize the sale which is not present."

[345] In cross-examination, Hugh acknowledged reading this bullet point. He agreed that when he read the phrase, "Hugh was told that the lease had to be extended as one

of the conditions for us to authorize the sale which is not present,” he thought this referred to the consent to assignment. He then denied understanding that the consent to assignment did not satisfy the requirement for extending the lease (“It is satisfied”). When pressed further, Hugh took refuge in ignorance: “It was not clear to me at the time, I thought they just needed consent from the landlord.” When pressed again, Hugh answered that he “didn’t pay attention to it.”

[346] As counsel for the plaintiff accurately noted, these answers are evasive, particularly when assessed against another significant fact: Hugh went to the Franchisor’s office on June 22, 2018, after Joe Schober sent his original 2:39 p.m. email to Ren, to discuss the Franchisor’s requirements enumerated in that email. Joe Schober summarized this meeting in his second email of June 22, 2018, at 5:01 p.m. This email contained a summary of the Franchisor’s meeting with Hugh. As Mr. Schober explained, it establishes that the lease renewal issue was modified slightly to simply require a letter from the landlord agreeing to a renewal.

[347] The evidence incontrovertibly establishes that the lease renewal requirement was discussed at the June 22, 2018 meeting between Hugh and the Franchisor representatives. There is only one reasonable inference from the circumstances: Hugh’s professed ignorance of the meaning of a lease renewal versus an assignment when he deleted reference to the need for a lease renewal from the original Joe Schober email is completely insincere.

[348] **Third**, and more concerning in terms of inconsistencies and outright fabrications, I consider Hugh’s explanations for the alterations to the original Joe Schober email. Hugh acknowledged that he and Ren altered the original Joe Schober email and subsequently forwarded it to Zi Ye and Jie Wang. However, Hugh offered contradictory explanations as to the reason for doing so. At one point in his direct examination, Hugh suggested that Zi Ye did not want some of the information to go her lawyer because the lawyer was too slow, picky, and inefficient in processing the transaction.

[349] Indeed, Hugh would have the Court believe that Zi Ye was involved in deleting information from the original Joe Schober email. Specifically, in direct examination when

asked why the second last sentence about the process taking time and as such could not be completed by the end of June deadline that the defendants had outlined was removed, Hugh testified that Zi Ye wanted it removed so that her lawyer would not see it as it would slow the process down and delay the closing of the sale. I note this was never put to Zi Ye when she was cross-examined. I reject this evidence out of hand. It is an apparent attempt to shift the blame to Zi Ye. It is also completely inconsistent with Zi Ye's evidence about her communications with Hugh at the time—she wanted to make sure the process was done properly.

[350] More significantly, Hugh's explanation for the deletion diverges completely from the one provided at his examination for discovery in April 2021, extracts of which were read in at trial. There, Hugh said he did not know why the sentence about the proposed end of June deadline being unattainable was missing. He also said he could not remember if the last sentence was deleted; and, when asked specifically if he recalled deleting this sentence, he said he had "no idea about it".

[351] To go further, Hugh explained in his direct examination that the bullet point about the lease renewal requirement was removed from the original Joe Schober email because the defendants believed the landlord's consent to the assignment of the lease was an agreement to renew the lease when the current lease expired. In Hugh's view, because the landlord's consent to the assignment of the lease was obtained, the defendants did not need to include the information in the Joe Schober email about the renewal when forwarding it to Zi Ye and Jie Wang.

[352] This explanation is preposterous. The two emails from Joe Schober on June 22, 2018, to Ren and Hugh made it abundantly clear that the lease assignment was insufficient, that Hugh needed to obtain a letter from the landlord authorizing an option to renew the lease, and that Hugh was to provide that letter to the Franchisor. The representatives of the Franchisor also discussed this requirement with Hugh in an in-person meeting in the afternoon of June 22, 2018. Notwithstanding the representatives' reminders about this requirement to secure the Franchisor's approval of the sale, Hugh failed to obtain a renewal of the lease before closing on the sale of the Business.

[353] Hugh also appeared to suggest in his direct examination that he spoke with Zi Ye about this, explained to her that he had already obtained the requirement, and that Zi Ye told him to delete the bullet point before sending it to Jie Wang. I note this was never put to Zi Ye.

[354] More significantly, Hugh's evidence at trial about the deletion of the sixth bullet point was different than the answers he provided at his examination for discovery. When asked at his examination for discovery why the lease renewal bullet point was deleted, he explained that Joe Schober had sent him an email on June 23, 2018 without that point in it because Mr. Schober realized that it was an error that it was included. Hugh explained in his examination for discovery that Mr. Schober realized the Franchisor had already obtained the landlord's consent to assign the lease from Ren the day before and that satisfied the Landlord's requirement. However, Mr. Schober was clear in his evidence that there were no communications after June 22, 2018. He was equally clear that the Franchisor required a lease renewal, not an assignment, to approve the sale.

[355] Hugh's evidence at trial about these two deletions (*i.e.* the sixth bullet point about renewal of the lease for the Franchisor to approve the sale and the second last sentence wherein Mr. Schober made it clear that the proposed June deadline could not be met) deviated entirely from what he testified to at his examination for discovery. These inconsistencies are not menial—to the contrary, they are very concerning. As counsel for the plaintiff properly contends, the entire narrative that Hugh provided at trial about:

- i. reviewing the original Joe Schober email with Zi Ye;
- ii. explaining the lease renewal bullet point to her;
- iii. removing the lease renewal bullet point at Zi Ye's suggestion; and
- iv. deleting the sentence about the process not being able to be completed by the June deadline at Zi Ye's request, for the purpose of concealing it from Jie Wang

was a fabrication seemingly intended to shift the blame to Zi Ye. Hugh's explanation at his examination for discovery that Mr. Schober sent him an email on June 23, 2018,

suggesting that an assignment was sufficient also appears to be a categorical invention in the circumstances.

[356] The evidence unequivocally established that Hugh and Ren worked in concert to alter the Joe Schober email. They sent it back and forth with proposed modifications. The first forwarding of the email between them did not change the date of the email. However, once they started modifying the email (there were two iterations), the date was changed to June 23, 2018. I have no doubt they did this to leave Zi Ye and Jie Wang with the impression that Hugh had in fact met with the Franchisor that morning.¹⁰⁸

[357] The above three examples (and particularly the effort to deceive the Court as to why matters were deleted from the original Joe Schober email), are, in my view, more than sufficient to reject Hugh's evidence completely. That being said, there are other facets to Hugh's evidence that confirm why I cannot rely on anything he said in his evidence. I outline them below.

[358] **First**, Hugh changed his evidence between direct and cross-examination on the "meeting tomorrow morning" comment in his June 22, 2018, WeChat communication with Zi Ye. The message, sent on June 22, 2018, at 11:38 p.m. (and therefore after his mid-afternoon meeting with Dean Lambert and Joe Schober at the Franchisor's head-office) included the following: "OK, tomorrow morning. I had an appointment with him tomorrow morning to talk about it. Okay, wait until my discussion is over tomorrow morning."

[359] In direct examination, Hugh testified that he thought he meant he had a meeting with Jie Wang the next morning. He then could not recall having an appointment with anyone on June 23, 2018.¹⁰⁹ I note that Jie Wang's practice was in Richmond not Salmon Arm, B.C. In cross-examination, Hugh's evidence changed, and he testified that he believed this message referred to a meeting on Friday. He could not recall who the meeting was with but believed to his best recollection that the meeting was with the

¹⁰⁸ ASF, Ex, #1, Tabs M, N, P, Q.

¹⁰⁹ As pointed out in the plaintiff's closing submissions, the use of the male pronoun is not probative here. Hugh's message was in Mandarin, which does not have gendered pronouns.

Franchisor. This explanation, while inconsistent with the explanation in direct examination, is also troubling. Hugh appears to be relying on a meeting that had already occurred while simultaneously suggesting it was yet to occur.

[360] He also implied that the time must be Beijing time on the message as people did not work on the Saturday. He then suggested that this WeChat message on June 22, 2018, about the landlord's consent was actually Beijing time, not BC Time. If that were correct, then the message about Zi Ye receiving the landlord's consent from Ren would have occurred the day before Ren sent it to Joe Schober, indicating she had just received it.¹¹⁰

[361] In cross-examination, after counsel tried to orient Hugh to the times in some of the messages and emails, he disagreed with paragraph 27 of the Agreed Statement of Fact that set out that the times emails were sent were in BC time. Hugh contended that some, including the email with the altered Joe Schober email were actually listed in Beijing time. His evidence on this point was evasive and confusing. It defied logic.

[362] **Second**, Hugh also explained that the last portion of the original Joe Schober email was altered from "If Hugh needs to clarify further he is welcome..." to "If You needs to clarify further he is welcome ..." in order to have Jie Wang contact the Franchisor directly. Such an explanation is nonsense. I do not accept it. The email itself, which Ren and Hugh forwarded to Jie Wang, was directed to Ren, not the plaintiff and its counsel.

[363] Moreover, Ren's preface to the altered Joe Schober email, as contained in the translation of the Mandarin text that Ren included for Jie Wang, held out that the Franchisor was only indicating in the email a willingness to consent to transfer the franchise rights to Zi Ye. An official consent would only be issued once a work permit had been obtained and Zi Ye was able to operate the store independently. Ren held out that it was at this time that the franchise rights could be transferred to Zi Ye. There was

¹¹⁰ ASF, Ex. #1, Tab E, pp. 1-4; Tab L.

nothing in the forwarded altered Joe Schober email that would have conveyed to Jie Wang a need to contact the Franchisor.

[364] Only her own due diligence would have caused Jie Wang to contact the Franchisor. Jie Wang's explanation to Zi Ye of the forwarded altered Joe Schober email made it clear that she intended to contact the Franchisor. Jie Wang was transparent about this in her evidence. She did not contact the Franchisor because of the instructions Zi Ye gave her on June 26, 2018. But those instructions came about only after the intense pressure campaign Hugh and Ren exerted on Zi Ye in the WeChat communications of June 24-26, 2018 to have her believe it was not necessary, and perhaps even risky, to contact the Franchisor.

[365] **Third**, when asked about his understanding of the Addendum, Hugh explained that they did not negotiate the terms of it. Rather Jie Wang drafted it and told them it was to protect her client. Hugh explained that he understood that the Addendum made the defendants responsible to help the plaintiff obtain the franchise agreement later. He appeared to intimate that he understood that the business assets and the franchise could not be separated in a sale and suggested that it was Zi Ye's idea to simply buy the assets in order to obtain a work permit. Moreover, he suggested that separating the assets from the franchise agreement created a way for Zi Ye not to have to pay royalty fees every month to the Franchisor. Not only do Hugh's repeated WeChat message communications with both Zi Ye and Jie Wang in the June 24-26, 2018 period contradict this assertion, this was never put to Zi Ye. I reject this explanation completely.

[366] This line of evidence is a further example of Hugh's efforts to have the Court believe that it was Zi Ye's idea and desire to proceed with the asset purchase first and then obtain the franchise agreement later, after she obtained a work permit. The documentary evidence (in particular, the WeChat communications and the evidence of Jie Wang addressing the usual process and Zi Ye's assertions about wanting to do things properly) is overwhelmingly to the contrary. It is evident that it was Hugh's idea to split the sale into an asset transfer and then eventually the transfer of the franchise agreement. The idea was Hugh and Ren's solution to close the sale of 104 BC Ltd.'s

assets to 116 BC Ltd. as soon as possible so that they could then have sufficient funds to close on the purchase of Trumpeter Rd.

[367] As has become obvious, there were considerable and significant inconsistencies both within Hugh's evidence and contrasted with the directions he received from Joe Schober in what was required for the Franchisor to approve the sale of the Business. I am unable to rely upon any aspect of Hugh's evidence in relation to how this transaction was to occur. I reject his evidence on the points of contention within this litigation. He was a completely untrustworthy witness.

Conclusion on credibility of the primary witnesses

[368] Both personal defendants provided defensive and contradictory evidence, especially in cross-examination. Each was unable to straightforwardly answer questions. They were at pains to offer explanations making little sense in relation to the findings established through the messages, emails, and documents tendered in this trial. I am thoroughly convinced that Hugh and Ren were incredible, unreliable witnesses.

[369] On the other hand, Zi Ye testified in a forthright manner and endeavoured to answer the questions and suggestions in a relatively calm and non-combative, manner. Although some of her responses to questions posed by counsel appeared to not directly answer the question, I detected no exaggeration or minimization in her evidence. She was not contradicted in any material way. Her evidence was both internally and externally consistent and confirmed in material respects through the WeChat messaging app communications, the documentary evidence, and the evidence of Jie Wang. I find that Zi Ye was a credible and reliable witness.

Findings from the Evidence

[370] Given my conclusions on the credibility of the three primary witnesses, I make my findings on the evidence thusly: Where the evidence of Zi Ye and the communications and documents surrounding the dealings and transaction conflicts with that of Ren and Hugh, I prefer the evidence of Zi Ye on behalf of the plaintiff and her largely unvarnished account of the events leading up to her purchasing the defendants' business. After

having considered the totality of the evidence, the testimony of the various witnesses and the submissions of counsel I have reached the following findings of fact. These findings are critical to assessing the causes of action advanced by the plaintiff and contested by the defendants.

[371] It is clear from all of the communications and evidence that Zi Ye's purpose in buying the assets of 104 BC Ltd. for her company, the plaintiff 116 BC Ltd., was to carve a viable path forward to obtaining a work permit so that she and her family could immigrate to Canada and start a new life running her own business, just like the defendants Ren and Hugh had done in 2013-2015. Zi Ye was anxious to move the sale along so that the immigration process could begin. Her communications with Jie Wang in their WeChat messages confirm this intention conclusively. However, Zi Ye's various communications with Hugh and Jie Wie make it clear that she also wanted to ensure that things were done properly, in accordance with the Franchisor's requirements.

[372] By virtue of the relationship established between Hugh and Zi Ye in their discussions about the purchase of the Business, Zi Ye completely trusted that Hugh was providing her with true and accurate information. She believed he was in fact dealing with the Franchisor to obtain the necessary approvals for the sale and transfer of the franchise agreement to her company. I accept her evidence on this point.

[373] It is equally clear that Ren and Hugh wished to have the sale close by the end of June 2018. Their communications, which I would characterize as a concerted pressure campaign exerted upon Zi Ye between June 24, 2018 and June 26, 2018, to close the sale as quickly as possible, unequivocally establish that fact. They clearly needed the sale to close in order to have sufficient funds to complete their purchase of the Trumpeter Rd. property. Without the funds from the sale of 104 BC Ltd.'s assets to 116 BC Ltd., the ability of the personal defendants to access Canadian funds left them short of the necessary funds (\$398,082.98) required to complete the purchase of Trumpeter Rd.

[374] Based on the topics discussed in Hugh's meetings with Dean Lambert and Joe Schober in the spring of 2018 and again on June 22, 2018, and in the confirmation

emails from the Franchisor, I have no hesitation in concluding that Hugh fully knew that he needed to obtain the Franchisor's prior approval of the sale. His failure to obtain that approval and his knowledge of that fact, coupled with his failure to advise Zi Ye and Jie Wang of the lack of the Franchisor's approval and his failure to be honest and transparent about the state of affairs surrounding the sale of the Business all support my conclusion that Hugh was operating with full knowledge that the representations he was making to Zi Ye and Jie Wang (and thereby the plaintiff) were in fact false when he made them. Moreover, Hugh intended that the plaintiff through Zi Ye and Jie Wang to act on his representations.

[375] I also conclude that the defendants never provided a copy of the franchise agreement to Zi Ye or Jie Wang. I accept that neither of them saw the defendants' franchise agreement before the sale closed.

[376] The evidence also clearly establishes that Hugh agreed to obtain the Franchisor's consent to the sale and that he represented to Zi Ye and Jie Wang that he was dealing with the Franchisor to obtain the necessary consents. The evidence also establishes that Zi Ye and Jie Wang relied upon his representations that he would communicate with the Franchisor and obtain the Franchisor's consent. The evidence unequivocally establishes that Hugh did nothing of the sort. He did not obtain the Franchisor's prior written consent to the sale, he did not obtain a renewal of the lease prior to the sale closing, and he did nothing about obtaining a consent in principle to a transfer of the franchise agreement to the plaintiff at a later date. Indeed, he did nothing to communicate with the Franchisor after the June 22, 2018 meeting with Mr. Schober and Mr. Lambert and did not respond to Mr. Schober's second email summarizing the meeting that Hugh had with the representatives of the Franchisor earlier that afternoon.

[377] The Court can come to no other conclusion than that Hugh and Ren jointly altered the Joe Schober email to deceive Zi Ye and Jie Wang on the material point about the Franchisor's conditions for approving the sale of the Business. They deliberately removed the bullet point about the need for a lease renewal in order for the Franchisor to approve the sale in part because they knew that a renewal of the lease could not be obtained by the hoped for closing date at the end of June. They deliberately

deleted the sentence about the Franchisor's statement that the end of June deadline for completing everything related to the sale and approval of it by the Franchisor was not feasible because they knew that this too would jeopardize the closing date targeted for the end of June. The defendants also deliberately altered the date of the altered email to make it appear that the altered email had been sent after Hugh's purported June 23, 2018 morning meeting with the Franchisor.

[378] Of course, that meeting never occurred but by altering the date, it at least provided the defendants with something to show Zi Ye and Jie Wang that Hugh was pursuing obtaining the Franchisor's consent. More insidious than just deliberately misleading Zi Ye and her counsel on these points is the fact that if the original Joe Schober email had been sent to Zi Ye and Jie Wang it would have become apparent to Jie Wang, and likely Zi Ye too, that Hugh had been misleading them about what the Franchisor required and what Hugh had been telling them he had been doing with the Franchisor. Such a realization by Zi Ye and her counsel could well have caused Zi Ye and the plaintiff to refuse to complete the sale based on the defendants' deceptions. Either conclusion, delay in the sale or no sale, would have likely jeopardized Ren's ability to close on the sale of the Trumpeter Rd. property.

[379] The communications between Zi Ye and Hugh and Ren in the June 24 to 29, 2018, time frame, make clear that Hugh and Ren

- i. Wanted the sale to close as quickly as possible;
- ii. Falsely and knowingly misrepresented to Zi Ye and Jie Wang the sequence and steps they took in purchasing the Business in 2013-2015;
- iii. Engaged in an insidious campaign of questioning the competency of Jie Wang and her ability to properly assist in the transaction with the intention of undermining Zi Ye's trust in her counsel; and,
- iv. Engaged in a concerted pressure campaign to have Zi Ye either ignore Jie Wang's advice or have her instruct Jie Wang not to contact the Franchisor.

[380] While Zi Ye may also have been in a hurry to complete the purchase in order to start her immigration process, and on at least two occasions told Jie Wang to hurry, she also made clear to Hugh in their WeChat communications that she wanted to make sure that the purchase was completed properly. Moreover, Zi Ye's directions to Jie Wang to "hurry" were informed by the pressure she was receiving from Hugh and Ren to "hurry up and close the sale".

The Communications Contained Material Misrepresentations

[381] There are two emails (both related to the altered Joe Schober email) and at least 10 WeChat communications pivotal to the process of inducing Zi Ye to have her company purchase the assets of 104 BC Ltd. They contain significant misrepresentations which establish actual knowledge on the part of Hugh and Ren as to the falsity of their representations. They also make clear Hugh and Ren's intention for Zi Ye and the plaintiff act on these representations. In the end, Zi Ye did act on the collective representations, assurances and pressure of the personal defendants. She did so to the detriment of the plaintiff.

[382] Counsel for the parties have grouped what they describe as the critical WeChat messaging communications that go to the heart of this transaction. I will address each in turn:

1. ***Tian-Zi Altered Email Misrepresentation (June 24, 2018, 10:12 p.m., Hugh and Zi Ye)***¹¹¹

[383] Hugh wrote: "Yezi, I just send you an email to you and Attorney Wang. It is the description of the chain headquarters about your right to operate it, please check it."

[384] Hugh agreed in cross-examination that his reference to "the description of the chain headquarters" was included because he wanted Zi Ye to understand that the Altered Joe Schober email was what the Franchisor had said as to what was required to obtain a franchise agreement.

¹¹¹ ASF, Ex. #1, Tab E, p. 5.

[385] Hugh also sent a similar representation one minute later to Jie Wang in a WeChat message that held out the Altered Joe Schober email as an explanation from the Franchisor as to how do the transaction (the sale).

[386] Collectively, these two communications, when considered in the context of the rest of the evidence, and in particular the requirements explained by Joe Schober in his evidence, constitute an intentional, deliberate misrepresentation by Hugh wherein he held out that the Altered Joe Schober email was a genuine statement from the Franchisor. I conclude that Hugh knew that the content of the email he had sent to Jie Wang and Zi Ye was different than the original Joe Schober email and he knew that when he sent the altered email it falsely misrepresented the Franchisor's requirements. Hugh intended for Zi Ye and Jie Wang to rely and act on this false information.

2. *Tian-Wang Altered Email Misrepresentation Message (June 24, 2018, 10:15 p.m., Hugh and Jie Wang)*¹¹²

[387] Hugh wrote: "My wife just sent you an email. It is an explanation about how to make the transaction from head office." Similar to the point above on the Tian-Zi altered email misrepresentation, the fact that two material points had been deleted from the original Joe Schober definitively establishes that the defendants knew that this was false and intended for Jie Wang to act on this false information.

3. *Tian-Zi Acquisition Process String (June 24, 2018, 10:17 to 10:49 p.m., Hugh and Zi Ye)*¹¹³

[388] In a series of WeChat message communications between Hugh and Zi Ye on June 24, 2018. In response to Zi Ye's question, "Did you also buy the business without the work visa at the time?", Hugh wrote: "Yes, also the head office gave us the right to operate after the work visa."

[389] This string of communications by Hugh set out for Zi Ye that he and Ren had purchased the business assets, then obtained a work permit and later received the franchise agreement in the same manner as was being proposed to Zi Ye (buy the

¹¹² ASF, Ex. #1, Tab G p. 12.

¹¹³ ASF, Ex. #1, Tab E, p. 4.

business assets, obtain a work permit and eventually obtain a franchise agreement). To this end Hugh had to know this factual representation was false when he made it. He led Zi Ye to understand that the defendants had purchased the assets and the business before Ren obtained her work permit. Hugh prevaricated on this point in an apparent effort to distance himself from what the communications clearly establish: Ren had bought the Business before she had obtained her work permit. The Agreed Statement of Facts categorically establishes that the defendants closed the sale when they purchased the business approximately two months after Ren had been granted a work permit.

[390] Hugh endeavoured to explain that he thought the sale had completed before the work permit was granted because they had paid the funds to their lawyer in June and so he thought they had bought the store then. This explanation rings hollow. Hugh conceded that he knew that the sales from the store did not come to the defendants until September 2015, after the franchise agreement was transferred to them (which occurred one day after the sale wherein the defendants purchased the business from the previous owner closed).

4. Tian-Zi Form Message (June 25, 2018 p.m., 8:55 p.m., Hugh and Zi Ye)¹¹⁴

[391] At 8:54 p.m. on June 25, 2018, Jie Wang emailed the Franchisor's Personal Confidential Profile form to Zi Ye and instructed her to complete it.¹¹⁵ One minute later, Zi Ye forwarded the document to Hugh and asked him to help her complete it. Hugh replied: "This can't be filled out right now. There is a lot of information that you need to fill in after you get your work visa. You don't have an address or anything to fill in right now. This is something that you can fill in when the head office gives you that franchise."

[392] It was clear from the Joe Schober email that the lack of address for Zi Ye was not a problem for the Franchisor as Mr. Schober wrote that she could use the defendants' address. And so, Hugh's representation to Zi Ye that one of the reasons she could not complete the form was due to the fact that she had no address was in fact false. On cross-examination, Hugh conceded that Zi Ye could have filled out the form, save for a

¹¹⁴ ASF, Ex. #1, Tab E, p. 10.

¹¹⁵ ASF, Ex. #1, Tab F, p. 8.

Canadian address and so his representation to Zi Ye that there was a lot of information that she needed to fill in after she obtained her work permit was false. Hugh explained that he did not want Zi Ye to use his address on the form, saying that this was his right. This position is at odds with the overall effect he sought to cultivate in his evidence, portraying himself as Zi Ye's friend, willing to do anything to help her in this transaction.

[393] Accordingly, it is abundantly clear that Hugh knew that the Franchisor required Zi Ye to complete the Personal Confidential Profile form. By this series of communications Hugh not only falsely held out that it was impossible for Zi Ye to complete the Personal Confidential Profile form the Franchisor required, he knew that he was misrepresenting this fact to Zi Ye. The only logical inference from this string of communications by Hugh, telling Zi Ye she could not complete it, is that Hugh deliberately misled Zi Ye about completing the form because he knew that if had she done so and the form was submitted to the Franchisor, it would have complicated—indeed frustrated—the sale from completing before the end of June 2018.

5. *Tian-Wang Application Message (June 25, 2018 at 8:58 p.m., Hugh and Jie Wang)*¹¹⁶

[394] Contemporaneous to the above communication with Zi Ye, Hugh messaged Jie Wang advising: “We will submit all of the documents on behalf of Ms. Zi Ye after she gets the work permit. There is no point in doing it now. Without having a legal work permit, the headquarters will not accept any applications.” In light of the finding above in respect of the form message, it is clear that Hugh knowingly made this false representation to Jie Wang, to ensure that the form was not completed and submitted to the Franchisor. This communication also makes it clear that Hugh was holding himself out as the person charged with obtaining the approvals from the Franchisor as he would submit the paperwork to the Franchisor on Zi Ye's behalf.

¹¹⁶ ASF, Ex. #1, Tab G p. 12.

6. *Tian-Zi Operating Message (June 25, 2018, 9:06 p.m., Hugh and Zi Ye)*¹¹⁷

[395] During the back-and-forth communications between Hugh and Zi Ye on June 25, 2018, where Hugh was denigrating Jie Wang's purported lack of knowledge about the process, and his clear direction to Zi Ye that she not complete the Personal Confidential Profile form, Hugh left a voice mail message at 9:06 p.m.: "That email from headquarters now, I don't know if she translated it for you. The email is indicating that they can give ZIYE the franchise. But first you have to have a work visa. You have to have legal status to run a business here. Secondly you are not good at English now and ask Tian Yu to continue running the business for you. Then what, when you are able to run your own business independently, transfer Tian Yu's franchise into your name. That's, that's a, how to say it. This is a letter of consent requested by Wang's lawyer, only it's not official."

[396] Hugh agreed in cross-examination that the wording of this was meant to convey that the Franchisor required that Hugh run the store for Zi Ye after she purchased the assets but before the franchise agreement was transferred to Zi Ye. He also intended that Zi Ye and Jie Wang treat the altered Joe Schober email as indicative of the Franchisor's consent to the sale of the Business as required by the Asset Purchase Agreement, although it was not an official consent.

[397] However, the reality of Hugh's communications with the Franchisor was that they had proposed that Zi Ye be added to the defendants franchise agreement and work with the defendants while they still owned the business. The evidence of Joe Schober and Dean Lambert, together with the two Joe Schober emails of June 22, 2018, make it abundantly clear that Hugh was instructed and aware that the assets of the business could not be sold separately from transferring the franchise agreement. Moreover, the original Joe Schober email made it clear that the Franchisor had not approved or consented to the sale of the Business as the lease renewal remained outstanding.

¹¹⁷ ASF, Ex. #1, Tab E, p. 17.

[398] Given the level of subterfuge and pressure evident in Hugh's communications at this point with Zi Ye, I can reach no other conclusion than that he intentionally and falsely misrepresented in this communication that the Franchisor had provided its consent to the sale as outlined in the altered Joe Schober email and that the Franchisor had asked Hugh to operate the plaintiff's business.

7. Tian-Wang Consent Message (June 25, 2018, 9:11 p.m., Hugh and Jie Wang)¹¹⁸

[399] In the midst of his messages with Zi Ye, Hugh was also leaving voice mail messages for Jie Wang, including this one at 9:11 p.m. on June 25, 2018: "Now the dollar store headquarters can only provide this email at this point, telling us Zi Ye could obtain the franchise right if she meets all requirements. The headquarter won't provide any formal document. It is illegal for them to do so as visitor in Canada cannot manage the business." It is apparent that in this portion of his messages with Jie Wang that Hugh was holding the altered Joe Schober email out as the Franchisor's consent to the Sale and intimating that Zi Ye would receive the franchise agreement in the future once the other requirements were met.

[400] As with the Tian-Zi operating message addressed immediately above, Hugh falsely, and with full knowledge of the falsity of his representation, held out that the Franchisor had consented to the sale of the business and that Zi Ye could obtain the franchise rights in the future, provided she met the Franchisor's requirements. Also in this communication string, Hugh reiterated that the form (Personal Confidential Profile form) should not be completed at this juncture in the transaction process, something that was clearly false, Hugh knew it to be false, and intended that Jie Wang and Zi Ye act upon his false representations.

8. Ren-Zi Acquisition Process Message (June 25, 2018, 9:55 p.m., Ren and Zi Ye)¹¹⁹

[401] In addition to her June 25, 2018, WeChat messaging communications with Hugh, Zi Ye was also receiving WeChat messaging voice mails from Ren. Among the

¹¹⁸ ASF, Ex. #1, Tab G, p. 14.

¹¹⁹ ASF, Ex. #1, Tab H, p. 9.

messages received was the following from Ren: “In addition, the headquarters said that according to the law of Canada, the laws of BC and the laws of Franchise, you do not have a legal visa to work here. So, they can’t give you “franchise”. He can’t give you a franchise until the state allows you to work here. We were the same then. We handed over the business in June, and we handed over the business in June. Then apply for work visa. I only went to the headquarters in September to get the franchise.” During Ren’s cross-examination doubt about the accuracy of this translation arose. The interpreter provided a literal translation of the Chinese characters of the above message as follows:

And also, that is he, he said according to China's law, there's a law, also friendship law you don't have the -- the legal to come here to work visa. Therefore, they cannot if you be franchise until you have the state's permission for you to work here. He cannot then give you the right to operate. We at that time was also we at that time handed over the business in June. September, June handed over the business. Then apply for work visa. September then to go to headquarters to get the franchise.

[402] Ren was unable to recall in cross-examination whether her inclusion of September was a slip of the tongue. Ren testified that her comments about handing over the business in June and then applying for a work permit were a mistake and that it was actually the other way around and that the business was handed over in September after she obtained her work permit (in July).

[403] In cross-examination, Ren was not prepared to concede that she knew in 2018 that she obtained her work permit first and then purchased the business after that in September 2015. However, Ren’s explanation in her evidence of the steps undertaken to acquire the business back in 2015 is inconsistent with her position that she did not really understand what had happened. Ren was able to outline the process, including the previous owners’ offer to continue to run the store in July and August 2015 to earn more money in those months and that the amendment to their purchase agreement (from July 2015) provided that the defendants would wait until their return to Canada (in September 2015) for the hand over of inventory to occur.

[404] It cannot be forgotten that the Agreed Statement of Facts establishes that the defendants did not purchase the business from the previous owner until September 2015, weeks after Ren had obtained her work permit. The purchase of the business and the transfer of the franchise agreement to the defendants occurred within one day of the sale completing.

[405] When Ren was making her statement to Zi Ye in this conversation that the process was the same for her (acquiring the Business before receiving a work permit), Ren was not telling Zi Ye the truth; she knew at the time she made those statement that they were false. In 2015, the defendants only purchased the business after Ren had obtained a work permit, not before.

[406] Accordingly, I find that Ren knowingly and intentionally misled Zi Ye on the acquisition process that the defendants had employed when they purchased the business in 2015. I have no doubt she made these comments in order to try and assure Zi Ye that what the defendants were telling her about their acquisition process was accurate in order to have Zi Ye rely and act upon this information and to ensure that the sale of the defendants' business to the plaintiff would close by the end of June 2018.

9. Ren-Zi Franchisor Non-Objection Message (June 25, 2018, 10:00 p.m.)¹²⁰

[407] Five minutes later in this communication process, Ren left a voice message denigrating Jie Wang's intellectual abilities. She went on to say: "The contract is written as an asset purchase agreement. It means your company bought the assets of my company. Your company is still my company and my company is still my company. The headquarters said it was represented by the company, not the assets. It means that one of my family's things I sold to you, the head office doesn't care."

[408] By this message Ren was telling Zi Ye that the Franchisor had no interest in or objection to the Assets of the Business being sold. She admitted in cross-examination that this message was inaccurate. Respectfully, it was more than inaccurate. It was, in fact, completely false. Ren tried to explain in her evidence that she did not carefully

¹²⁰ ASF, Ex. #1, Tab H, p. 15.

review the franchise agreement and was unaware of the details of it. She also blamed her understanding of the situation on her accountant. I am unconvinced by this explanation.

[409] The evidence from Mr. Schober and Mr. Lambert was clear – the Franchisor cared a lot about their franchisees selling their stores. Sections 15 and 16 of the defendants’ franchise agreement make this concern explicitly clear insofar as what was permitted and what was required. Ren signed the franchise agreement when she purchased the business and the franchise rights were transferred to the defendants in September 2015.

[410] While Ren professed that she did not fully understand Joe Schober’s emails about the requirements and the Franchisor’s consent to the sale, her participation in the surgical alteration of the original Joe Schober email establishes the contrary. By removing the bullet point about the need for a lease renewal, not an assignment, and the phrase “one of the conditions for use to authorize the sale which is not present” Ren did in fact know and understand that the Franchisor’s approval was required for the sale of the Business. On that account, Ren’s representation to Zi Ye in this message about the Franchisor lack of interest or concern about the sale of the assets was false and made recklessly in the circumstances.

10. *Second Tian-Zi Acquisition Process String (June 26, 2018, 10:31 a.m., Tian and Zi Ye)*¹²¹

[411] Approximately 12 hours later in this flurry of WeChat messaging communications, Hugh left a series of short messages in response to several questions from Zi Ye at 10:31 a.m. on June 26, 2018 that included a number of representations that were false. For clarity the relevant extract of the string is as follows:

June 26, 2018 10:31 AM

ZIYE: I've WeChat and emailed and spoken to lawyer Wang, no reply so far.

TIAN: Oh, wait for it.

¹²¹ ASF, Ex. #1, Tab E, p. 43.

ZIYE: At the time you bought the business, was it this cumbersome? Or was it all the same, the same process?

ZIYE: You applied for the franchise at that time also after you had obtained a work visa?

TIAN: Of course it wasn't as cumbersome.

TIAN: Yes

TIAN: It's an asset sale and the chain HQ has nothing to do with it.

ZIYE: So you bought this store? The franchise has it?

TIAN: It is not allowed to operate without a work visa.

ZIYE: (Voice message, 15") What I am asking is did you then come over to Canada and then apply for a work visa and then get a franchise after you had a work visa? Was that the same process? Or did you just get a work visa and then come to Canada?

TIAN: Just hiring the original owner to run the business for a while.

ZIYE: (Voice message, 1") oh

TIAN: It's the same process for everybody.

TIAN: Buy the business, get a work visa, run it.

[Emphasis added.]

[412] The effect of this string of Hugh's representation to Zi Ye was that the defendants had engaged in a similar sequence of steps to acquire the business from the previous owners. Hugh well knew he was falsely representing that the Franchisor had no interest in or objection to the assets being sold to the plaintiff before the plaintiff became a franchisee because Hugh had been told the contrary in his meetings with the Franchisor. Moreover, the defendants' franchise agreement, which was he directed to review and to obtain legal advice about the process, made it clear that the Franchisor had a strong interest in and would have objected to the assets being sold before the plaintiff became a franchisee. When the defendants purchased the business in 2015, they were assisted by a lawyer; Hugh admitted that at the time he did not know what was involved in an asset sale. His failure to familiarize himself with the process or obtain

legal advice on the franchise agreement establishes, at minimum, that he was reckless in his false statements about the Franchisor's lack of interest in the sale.

[413] In the context of the communications that were occurring at this time, I find that that when Hugh provided the above information to Zi Ye about the defendants' acquisition process in 2015 and the Franchisor's lack of interest in the asset sale, he well knew these statements were false. Hugh intended for Zi Ye and the plaintiff to act upon his false representations.

Governing Legal Principles

[414] The legal principles grounding the various causes of action were not in dispute. Rather the application of the principles to the circumstances of this case and the facts as found by the Court was where the plaintiff and defendants parted company.

[415] I will now address the principles that govern the main causes of action. I will address the principles of remedy once I have determined what causes of action the plaintiff has established on the civil standard.

Fraudulent Misrepresentation

[416] To succeed in a claim for fraudulent misrepresentation, the plaintiff must establish that:

- i. the defendant made a representation of fact to the plaintiffs;
- ii. the representation was false in fact;
- iii. the defendant knew that the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
- iv. the defendant intended for the plaintiffs to act on the representation; and
- v. the plaintiffs were induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment: *Ban v. Keleher*,

2017 BCSC 1132, at para. 16 and *Wang v. Shao*, 2019 BCCA 130, at para 24.¹²²

[417] As Justice Dorgan noted in *Ban*, at para. 19:

[19] The standard of proof is proof on a balance of probabilities, having due regard to the seriousness of the allegation of deceit (*Van Beek*, at para. 43). In this respect, Mackenzie J.A. makes the following remarks in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 29:

Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

Negligent Misrepresentation

[418] As the decisions in *Ban*, at para. 31, and *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, at para. 121 citing *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, make clear, in order for a plaintiff to succeed in a claim of negligent misrepresentation, they must establish the following elements on a balance of probabilities:

- (a) there must be a duty of care based on a “special relationship” between the representor and the representee;
- (b) the representation in question must be untrue, inaccurate, or misleading;
- (c) the representor must have acted negligently in making said misrepresentation;
- (d) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (e) the reliance must have been detrimental to the representee in the sense that damages resulted.

¹²² In *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at para. 21, the Supreme Court set out four elements to the tort of civil fraud: (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.

Breach of Contract

[419] In this action, the plaintiff contends, in the alternative, that the defendants have committed a repudiatory breach of contract. The law on repudiatory breach was addressed in *Kuo v. Kuo*, 2016 BCSC 767¹²³:

[31] The leading case on repudiation of a contract remains *Guarantee Trust Co.* at para. 40, where the court said that repudiation occurs when a party to the contract, either by words or conduct, displays an intention not to be bound by the contract. (See also *ASEAN Technology Partners Inc. v. National Research Council*, 2007 BCSC 1539 at para. 109, aff'd 2009 BCCA 126).

[32] The remedy for repudiation depends on the response of the non-repudiating party. The non-repudiating party has two options: (1) treat the contract as still in force and sue for damages or performance or both, or (2) accept the repudiation, terminate the contract, and discharge the parties from future obligations.

[33] The challenging aspect is determining what actions and conduct are tantamount to repudiation. Courts have continually emphasized that this is a fact-driven task by looking at the parties' words and conduct.

[34] In *Guarantee Trust Co.* the court, after discussing the difference between rescission and repudiation, went on to state when a "misrepresentation" can lead to the rescission of a contract. The court said that one needs to look at whether the breach is "substantial" or "goes to the root of" the agreement -- or what is often also described as a material breach (at para. 44). The decision is not directly on point with the facts of this case as it deals with rescission, repudiation, and misrepresentation; however, the discussion is useful in the analysis here.

[35] The plaintiff submits that the breach has to be something that frustrates the whole contract. If it does, then the injured party can treat the contract as ended; but if the contract is not totally frustrated, then the innocent party can only receive damages. For this proposition, the plaintiff relies on *Poole v. Tomenson Saunders Whitehead Ltd.*, [1987] 6 W.W.R. 273 (B.C.C.A.):

The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract -- thereby entitling the innocent party to be relieved from future performance.
[emphasis added]

This statement has been accepted numerous times by the courts of this province and was approved recently by our Court of Appeal in cases dealing with fundamental

¹²³ Affirmed in *Kuo v. Kuo*, 2017 BCCA 245.

breach: *Quinlan v. University of British Columbia*, 2009 BCCA 248; *Gulstan v. Aldred*, 2011 BCCA 147.

[Emphasis in original.]

[420] In *Bhullar v. Dhanani*, 2008 BCSC 1202, at para. 27, Justice Gerow stated that the question to be answered for whether there has been a fundamental breach of the contract is as follows:

...does the breach go to the root of the contract such that it makes further commercial performance of the contract impossible? In other words, has the failure of one party to perform his contractual obligation destroyed the commercial purpose of the contract? The breach must be so severe as to deprive the innocent party of substantially the whole benefit which the parties intended should be obtained from the contract: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada* (2007), 65 B.C.L.R. (4th) 1 (C.A.) at ¶ 89-92; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at pp. 499-500.

[421] Insofar as the measure of damages is concerned in such circumstances, Gerow J. concluded that the innocent party (there, the defendants) were entitled to be returned to their pre-contractual position, writing:

[42] As noted in S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Book, 2005) at ¶ 629:

The innocent party in the case of a repudiatory breach may seek to recover damages not according to the ordinary measure of the value of expected performance but according to the measure of the out-of-pocket loss. That is, the party may say not: “put me in the position I would have been in if you had performed”, but: “put me in the position I was in before the contract was made”. The choice of the latter rather than the former measure of damages is often referred to as “rescission” but quite clearly it is a different choice altogether from the others mentioned above. The innocent party on receiving notice of the repudiation may choose, first, to stop performance rather than to perform and seek damages, secondly, to sue at once rather than to wait for the date fixed for performance, and thirdly, to seek damages measured by the loss rather than by the expectation.

[422] With the foregoing principles in mind, I turn to their application to the case at bar.

Analysis

[423] By now it should be clear that I have rejected the evidence of the defendants. They were thoroughly unreliable witnesses. Their evidence was not credible.

[424] The questions to resolve in this case are the following: whether the misrepresentations made by the defendants to the plaintiff amount to fraudulent misrepresentations, negligent misrepresentations or breach of contract; and, if one of the causes of action is established, the amount and form of damages the plaintiff should receive in the circumstances.

[425] For the reasons that follow, I am satisfied that the plaintiff has met the high bar of proving fraudulent misrepresentation.

The defendants knowingly engaged in a concerted series of deceptive representations that collectively constitute fraudulent misrepresentation

[426] As is apparent from the findings of fact set out previously, coupled with my disbelief of much of the defendants' evidence, I have concluded: (i) the defendants made numerous misrepresentations of fact to the plaintiff; (ii) the representations they made were in fact false; (iii) the defendants knew that the representations were false when they were made, or made the false representations recklessly; (iv) the defendants intended for the plaintiff to act on the representations; and, (v) the plaintiff was induced to enter into the contract in reliance upon the false representations of the defendants and thereby suffered significant financial detriment.

[427] More specifically, the false representations of fact that the defendants knowingly, or recklessly, made to the plaintiff with the intention of having the plaintiff rely upon, and act on, included:

- i. Hugh and Ren's intentional deception in altering the original Joe Schober email and holding it out as the Franchisor's approval of the sale and a consent in principle to transferring the franchise agreement to the plaintiff.
- ii. Hugh's repeated representations that the Franchisor had approved the sale of the business to the plaintiff (and by necessary implication that the Franchisor was aware that the sale was actually going to complete);
- iii. Hugh's representations that he was dealing with the Franchisor to obtain its approval of the sale of the Business and its consent in principle to transfer the franchise agreement to the plaintiff when in fact he was doing nothing to advance the Franchisor's approval of either of these points;

- iv. Hugh and Ren's representations that the Franchisor was prepared to grant the plaintiff a franchise agreement once Zi Ye had a work permit and was able to operate the YDSWM store independently without Hugh's assistance;
- v. Hugh and Ren's representations that they had engaged in the same acquisition process when they set out to purchase the YDSWM store in Salmon Arm between 2013 and 2015 as they were urging the plaintiff to engage in to close the sale by the end of June 2018; and,
- vi. Hugh and Ren's representations that the sale of the Business assets to the plaintiff were of no concern to the Franchisor.

[428] I find that the combined effect of the 10 WeChat message previously reviewed at paras. 381-413 of these reasons, particularly when considered in the context of the overall tenor of the WeChat messaging communications and the altered email, was that Hugh and Ren intended to and did successfully deceive Zi Ye and Jie Wang into fallaciously believing the following:

- a. the Franchisor had no interest in and did not object to
 - i. the sale of the assets occurring before the plaintiff applied to the Franchisor for a franchise agreement and was approved as a franchisee;
 - ii. the plaintiff owning the assets and carrying on the Business without a franchise agreement while the franchise agreement continued between the Franchisor and the defendants;
- b. the Franchisor had approved the sale of the Business to the plaintiff;
- c. the Franchisor had in principle approved transferring the franchise agreement to Zi Ye (and the plaintiff) and would do so once certain conditions were met (Zi Ye had obtained a work permit and she was sufficiently fluent in English to be able to operate the Business on her own);
- d. the defendants purchased the business from the previous owners, then Ren obtained her work permit and after that received a franchise agreement with the Franchisor; and,
- e. the plaintiff could safely proceed with the purchase of the Business before applying for or obtaining a franchise agreement from the Franchisor.

[429] In addition to their numerous false factual misrepresentations outlined above, Hugh and Ren engaged in a concerted effort to have Zi Ye discourage Jie Wang from contacting the Franchisor, denigrating Jie Wang's abilities and suggesting that Jie Wang's contacting the Franchisor was not necessary in the circumstances. The WeChat messages on their own establish this point unequivocally. The evidence of Hugh and Ren did nothing to undermine this point.

[430] From the foregoing facts coupled with the clear trust that Zi Ye had placed in Hugh, the campaign questioning Jie Wang's competency, and the pressure campaign to have Zi Ye instruct Jie Wang not to contact the Franchisor – the totality of the circumstances coalesce to support the following and only logical inferences available on the evidence:

- i. Hugh and Ren wanted the sale to complete as soon as possible and definitely by the end of June so that they could close on their purchase of Trumpeter Rd.;
- ii. Hugh and Ren knew the Franchisor had told them that the sale could not complete in the time frame that they wanted it to – the end of June 2018 – and they removed that information from the original Joe Schober email with the intent of hiding that fact from Zi Ye and Jie Wang and having them rely and act upon the email as presented in its altered form;
- iii. Hugh and Ren knew the Franchisor had not approved the sale of the Business and they removed that information along with the requirement for a lease renewal, not an assignment, from the original Joe Schober email with the intent of hiding that fact from Zi Ye and Jie Wang and having them rely and act upon the email as presented in its altered form;
- iv. Hugh and Ren knew the Franchisor had not approved the Purchaser to become a franchisee; and,
- v. Hugh and Ren knew that if Jie Wang contacted the Franchisor, then the four previous points would become known, the proposed sale would likely have collapsed, and they would have been unable to sell the Business to the Purchaser.

[431] Accordingly, I find that Ren and Hugh knowingly, deliberately, and fraudulently misled Zi Ye and in turn the plaintiff, as well as Jie Wang, on a number of material points

that were critical to informing Zi Ye and Jie Wang on how they should proceed with completing the sale, including:

- i. Hugh suggesting to Zi Ye that she could simply buy the store;
- ii. The process of obtaining their franchise agreement in 2015: Hugh and Ren led Zi Ye to believe that they obtained their franchise agreement after they had obtained their work permits and well after they bought the store. In fact, their offer to purchase was extended from 2013 to September 2015 until after Ren obtained her work permit in July 2015. The transfer of the franchise agreement occurred one day after the completion of the sale, in other words, the purchase of the business and the transfer of the franchise agreement occurred at the same time and all after the work permit had been issued;
- iii. By agreeing to the Addendum to the Purchase Agreement at clause 2 which added in section 6.8 to the Asset Purchase Agreement. This provision was:

The parties acknowledge that the Franchisor required the Vendor's principal, Yu Tian, to continue to be a franchisee and manage the Business until the Purchaser's principal obtains a work permit at which time the Franchisor will enter a Franchise Agreement with the Purchaser and its principal.

[Emphasis added]

- Hugh either knew (or, at the very least, was reckless) that this provision was patently false and unattainable as he had had no contact with the Franchisor after his June 22, 2018, meeting with Joe Schober and Dean Lambert. Further, Hugh in fact knew that the Franchisor had not yet approved the sale or consented to transferring the franchise agreement to Zi Ye and 116 BC Ltd. Indeed, on the undisputed evidence of Joe Schober, the Franchisor was not aware of the sale, had not approved it, and had no further communications with Hugh after sending him the two June 22, 2018 emails from Joe Schober before the sale completed;
- iv. By forwarding the lease assignment to Zi Ye and Jie Wang and maintaining this was the landlord's consent and was sufficient for the Franchisor when in fact Hugh (and Ren) had been told by Joe Schober on at least two occasions that the Franchisor required an extension of the lease (preferably for a five year period) not just an assignment;
 - v. By deliberately altering the original Joe Schober email deleting two significant points: (i) that the Franchisor required an extension of the lease (a renewal)

- “as one of the conditions for us to authorize the sale” and (ii) the Franchisor’s clear direction that its process requirements would take time such that the sale could not complete by the defendants’ requested end of June 2018 deadline;
- vi. By altering the date of the Joe Schober email such that it appeared that it was generated after Hugh had met with the Franchisor on June 23, 2018 – a meeting that never occurred;
 - vii. By repeatedly advising Zi Ye and Jie Wang that Hugh was working with the Franchisor to obtain the necessary approvals for Zi Ye to buy the Business and obtain a franchise agreement when in fact Hugh appears to have done almost nothing to actually advance the approval process; and,
 - viii. By actively dissuading both Zi Ye and Jie Wang from contacting the Franchisor when Jie Wang appeared to be starting to do what the altered Joe Schober email required – having her client complete the Personal Confidential Profile form to send to the Franchisor.

[432] When the push to complete the sale with the plaintiff in June 2018 is considered in the context of Ren’s purchase of the Trumpeter Rd. property, the reason for the concerted push by Hugh and Ren to complete the sale with the plaintiff quickly is easily inferred and obvious. They had insufficient Canadian funds to complete the purchase of the Trumpeter Rd. property and needed the proceeds of the sale in order to do so. Had the Franchisor been contacted by Jie Wang and she learned the truth that the Franchisor’s conditions to approve the sale had not been met and that the sale could not be approved by Hugh’s end of June deadline, the deal most likely would have collapsed. Hugh and Ren’s deceit would have been uncovered and they would have been unable to complete the purchase of Trumpeter Rd.

[433] The only conclusion I can reach on this evidence is that the defendants deliberately deleted the lease renewal bullet point and the end of June deadline point from the email because they knew they could not obtain a lease renewal in their desired timeframe and that if the Franchisor’s point about the end of June deadline became known and the sale delayed, their purchase of Trumpeter Rd. would likely be in jeopardy. By doing so they knowingly intended for Zi Ye and Jie Wang to rely and act upon these false representations.

[434] Finally, I have no hesitation in concluding based on the totality of the evidence, including the thoroughly incredible, unreliable and contradictory evidence from the defendants, and the facts that I have found, that Hugh and Ren made their various false representations to Zi Ye (as well as Hugh's false representations to Jie Wang) intending that Zi Ye would rely on them in deciding to complete the sale and have 116 BC Ltd. purchase the assets of 104 BC Ltd. as quickly as possible.

[435] "Fraudulent intent" is comprised of two elements: (1) knowledge of the falsity of the representation (or, equivalently, without belief in its truth, or recklessness disregard for its truth) and (2) having the purpose of inducing the representee to act.

[436] I have already found that the defendants knew of the falsity of their numerous representations to Zi Ye and Jie Wang. Insofar as the latter point is concerned, it is abundantly clear from the totality of the circumstances that the defendants' purpose in engaging in this line of false representations, and indeed their entire course of conduct in this transaction, was done for the purpose of having Zi Ye, on behalf of the plaintiff, and Jie Wang as the plaintiff's counsel, act upon the defendants' knowingly false representations as if they were true and accurate.

[437] As a result of the repeated and ongoing false representations that Hugh and Ren knowingly made, Zi Ye and Jie Wang were induced to proceed with the purchase of Business by completing the contract of the Asset Purchase Agreement and Addendum. The act of completing the sale was based on their reliance upon the defendants' numerous false representations about the process and the Franchisor's purported approval of the sale of the Business and its consent in principle to transfer the franchise agreement. In light of Zi Ye's repeated assertions about wanting to do the sale properly (and not wanting to take shortcuts) and Jie Wang's initial concern that what Hugh was suggesting on how to complete the sale did not conform with the usual process she was familiar with, as well as Hugh and Ren's campaign to have Zi Ye instruct Jie Wang not to contact the Franchisor, the only reasonable inference is that Hugh and Ren made their knowingly false representations with the purpose of having the plaintiff act upon them. Zi Ye and Jie Wang clearly relied upon the defendants' false representations and were induced to act upon them.

[438] Moreover, Zi Ye and Jie Wang were clear in their evidence, which I have accepted, that had they seen the original Joe Schober email and understood the true state of affairs, they would not have closed and completed the purchase of the defendants' Business.

[439] While Jie Wang appears to have done her client a disservice in not following through on her initial intention of contacting the Franchisor as outlined in her communication of June 25, 2018, the fact of the matter remains that Jie Wang relied upon Hugh's false representations and advised Zi Ye accordingly, to the detriment of the plaintiff's interests.

[440] Zi Ye remained firm in her account of how she completely trusted Hugh and the information and guidance he provided. She remained unshaken on the point that had she known the Franchisor was unaware of the sale, had not approved it and had not agreed in principle that the plaintiff would receive a franchise once Zi Ye received a work permit and was able to operate the business on her own, she would not have instructed Jie Wang to complete the sale on July 3, 2018. Zi Ye was unequivocal in her contention that she had been misled by Hugh and that but for his false representations she would not have facilitated the plaintiff's purchase of 104 BC Ltd.'s assets and would not have engaged with the defendants in buying their store. I accept her evidence on this point and conclude that but for the fraudulent misrepresentations made by Hugh and Ren, coupled with their unrelenting pressure campaign on Zi Ye and their disparagement of Jie Wang's abilities in the WeChat communications between June 24 and June 29, 2018, Zi Ye would not have instructed Jie Wang to not contact the Franchisor on June 25, 2018, and would not have had the plaintiff purchase the assets of 104 BC Ltd.

[441] Indeed, had Zi Ye and Jie Wang not been fraudulently misled by Hugh, that is, had they known the true state of affairs, I conclude this sale would never have completed. And so, I conclude that the defendants' in the numerous knowingly false representations that they made, intended for the plaintiff to act upon them and induced Zi Ye on behalf of 116 BC Ltd. to enter into the contract in reliance upon the false representations. The plaintiff suffered a significant detriment as a result.

[442] In light of my finding that the defendants' conduct in this case constitutes fraudulent misrepresentation, it is not necessary to address the alternate theories of liability advanced in this action.

Joint liability for joint tortfeasors

[443] The defendants made no submissions on the plaintiff's issue of joint liability for joint tortfeasors. It is trite to say that tortfeasors who act in "concert" to further a wrongful act are joint tortfeasors, and deceitful conduct engaged in by one can be ascribed to another: *Osborne v. Pavlick*, 2000 BCCA 120 at para. 23.

[444] In the case at bar, Ren and Hugh agreed on the common course of selling the assets of their business. They knowingly made a number of false representations to the plaintiff to further negotiations of the sale with the intention of deceiving the plaintiff and having the plaintiff act on the false representations. While Hugh was the main protagonist in the communications with Zi Ye and Jie Wang, Ren clearly established in her evidence that Hugh was acting at her behest. As a result of the defendants' overall deceptive conduct and fraudulent misrepresentations, the plaintiff relied upon the defendants' representations and was induced to complete the sale on the basis of the false facts that the defendants held out as accurate.

[445] The evidence establishes that Hugh and Ren were both aware of each other's communications with Zi Ye between June 24 and June 29. And, as I have found, those communications included a concerted effort to have Zi Ye dissuade Jie Wang from contacting the Franchisor. The communications traded on the trust and friendship they had established with Zi Ye and were designed to induce Zi Ye into accepting the defendants' false representations. Zi Ye, on behalf of the plaintiff, relied upon their false representations and was induced to complete the sale agreement with the defendants, resulting in significant detriment to the plaintiff. I conclude Hugh and Ren are liable to the plaintiff as joint tortfeasors.

What is the appropriate measure of damages that the plaintiff ought to receive?

Positions of the Parties

[446] The defendants contend that the appropriate measure of damages in this case ought to be capped at \$120,000 representing the amount paid for the goodwill of the Business that the plaintiff did not receive. In essence they contend that the plaintiff's losses must be measured as of the date of the transaction by comparing the price paid and the value obtained as at that date.

[447] They further contend that consequential damages should not be recoverable because the losses arising from the operation of the business are unrelated to the fraudulent misrepresentations made by the defendants. In the alternative, the defendants contend that if the Court is inclined to include consequential damages to 116 BC Ltd., the amount ought not to exceed \$205,000 which reflects the loss of \$120,000 for the goodwill, and adjusted consequential losses suffered by removing legal fees, management fees paid to Zi Ye, and the plaintiff's write down of assets.

[448] The plaintiff contends that it should be restored to the position it would have been in had it not closed on the purchase of the defendants' assets on July 3, 2018, and that the measure of damages must include consequential damages. In total, the plaintiff seeks damages in the amount of \$511,260 which reflects both restoring the plaintiff to the position it would have been in had it not entered into the purchase agreement and the losses it suffered as a result of trying to operate the business and the capital losses sustained in the sale of the Business without a franchise to the defendants' friend in December 2022.

Legal principles governing the assessment of damages for fraudulent misrepresentation

[449] The measure of damages for the tort of fraudulent misrepresentation is the reliance measure typical of tort damages. This measure attempts to recreate for a plaintiff the situation that would have existed without the tort having occurred. In B. MacDougall, *Misrepresentation* (Markham: LexisNexis Canada, 2016) ("MacDougall")

the author cites *Renault UK Ltd. v. Fleetpro Technical Services Ltd.* [2007] EWHC 2541 (QB), at para. 141, for this statement:

The measure of damages in a case of fraud is essentially that sum of money which is necessary to put the claimant, so far as money can, in the position in which he would have been if the misrepresentation had not been made to him, or, to put it another way, he is entitled to recover all of the loss suffered as a result of acting on the fraudulent inducement to his detriment.

[450] As a result, a plaintiff's damages are assessed as the difference between the plaintiff's current financial position (*i.e.*, the "post fraud" position) and the financial position it would be in if there had been no fraud (*i.e.*, the "no fraud" position).

[451] Applying these positions to the case at bar, the matter may be summarized as follows:

- a. The "no fraud" position is one where the plaintiff would have a slightly negative financial position. It borrowed money for modest startup costs and to complete the purchase from the defendants. Had it not completed the purchase, it would have had all of the purchase money, and spent only a small amount of what it borrowed on startup costs.
- b. In the "post fraud" position, the plaintiff has suffered accumulated losses from operating a money-losing business and the capital loss of selling the non-franchised dollar store business.

[452] The jurisprudence makes clear that a person who makes fraudulent misrepresentations to the detriment of another party is liable for all damages flowing directly therefrom: *Wiebe v Gunderson*, 2004 BCCA 456 at para. 11 citing *Doyle v Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158 (C.A.). Accordingly, this means damages for fraudulent misrepresentation can include consequential damages: *Kuhnke v. Karner*, 2022 BCCA 399 at para. 73, citing *C.R.F. Holdings Ltd.* at para. 24; *Wiebe v. Gunderson*, 2003 BCSC 1282 at paras. 227–233; *Froese v. Sharif*, 2020 BCSC 1914 at para. 210.

[453] In *Wiebe* at para. 11, Justice Newbury, writing for the majority, quoted with approval from the decision of Lord Denning, M.R. in *Doyle v. Olby (Ironmongers) Ltd.* and noted that the approach in *Doyle* had been adopted by the British Columbia Court of

Appeal and appeared to be the prevailing trend in the Canadian jurisprudence: *Wiebe* at paras. 11 and 40.

[454] In *Doyle*, the defendant fraudulently induced the plaintiff to purchase a business. On appeal the damages recovered at trial were increased to compensate the plaintiff for further losses incurred in attempting to run the business. Lord Denning held that the court should construe the rules of mitigation and remoteness against a fraudulent defendant generously. He went on at p. 167 to say:

The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:

I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.

All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation; for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.

[455] In this case, the plaintiff contends that consequential damages include compensation for its losses in attempting to operate the business until it was finally sold in December 2022 and the capital losses suffered on the sale of the Business without a franchise.

Application of the principles to the case at bar

[456] The plaintiff was incorporated on May 3, 2018, for the purpose of acquiring the franchised dollar store business at issue in this case. That purchase was funded with money provided to the company by way of a shareholder loan. It follows that immediately before the purchase, the value of the company (shareholder's equity) was zero (*i.e.*, cash loaned into the company equaled the liability to the shareholder), less the expenses incurred prior to the completion of the Sale.

[457] The statements from the plaintiff's only bank account show that the only expense incurred prior to the completion of the Sale was a charge of \$220.84 for printing cheques. Accordingly, the plaintiff's negative \$220.84 financial startup cost prior to completion of the sale is the plaintiff's "no fraud" position. To state it differently, if the plaintiff had not been deceived, it would have repaid the shareholder loans, transacted no business, and had a nominally negative value.

[458] The statement of the plaintiff's financial position at December 1, 2022 reflects its sale of the dollar store business to an arm's-length third party and shows that the financial position of the plaintiff at that date was negative \$569,072.

[459] The comparative statement of income establishes that this negative value is approximately equal to the company's aggregate net income (loss) since it purchased the Business. Those losses comprise the following: (i) operating losses (funded by additional shareholder loans); (ii) the loss on the sale of the business (partly reflected in advance by a write-down of goodwill recorded after it was determined that the plaintiff had no legal right to operate as a YDSWM), and (iii) legal fees paid for this litigation. Removing the legal fees incurred after 2020 (\$99,591) results in a deficit of \$469,481, which when compared to the "no fraud" position results in a loss of \$469,260.

[460] In addition to this loss Zi Ye paid Hugh \$42,000 to Hugh to manage the store between July 2018 and November 2019. The \$42,000 paid is properly characterized as a consequential loss. Accordingly, the total loss sustained by the plaintiff as a result of reliance upon the defendants' fraudulent misrepresentation is \$511,260.

[461] The defence assertion that the damages ought to be limited \$120,000 being simply the loss as between the price paid and the value obtained as of the date of the transaction is inconsistent with the observations of Justice Newbury in *Wiebe* at para. 1 and the observations of Lord Steyn in *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, [1996] 4 All E.R. 769, [1996] H.L.J. No. 38 quoted therein. After reviewing two English Court of Appeal decisions that appear to support the defendant's position in this case, Lord Steyn went on to confirm in *Smith New Court* that the orthodox and settled rule that the plaintiff is entitled to all losses directly flowing from

the transaction caused by the deceit did not require revision. In other words, it was not necessary in an action for deceit for the judge, after having ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed to had the deceit not occurred.

[462] The position of the defendants is also inconsistent with the conclusion and results in *Bakerview Trout Farm (1983) Ltd. v. Petgus Holding Ltd.*, 1996 CanLII 2900 (BCSC) where Justice Williamson calculated damages in a case that involved fraudulent misrepresentations made to the plaintiff in its purchase of a Smitty's Pancake House franchise.

[463] In *Bakerview*, Williamson J. calculated the damages as the difference between the price the plaintiffs paid at the time of the purchase of the franchise and the price they sold the business for (wherein it was no longer a franchise), plus payments made for a chattel mortgage, costs of equipment repair, and some of the costs associated with borrowing to cover income loss. The latter point, the claim for lost income, was found to be encompassed within the general principle of damages for fraudulent misrepresentation being that the plaintiff is to be put in the position, insofar as possible, to that which it would have been in had the misrepresentation not been made: *Bakerview*, para. 45. However, in *Bakerview*, Williamson J. concluded that not all of the lost income had been shown to be borrowed because of the circumstances surrounding the purchase and operation of the restaurant and that amount was discounted in recognition of the contingencies which may have impacted upon that income in any event.

[464] In the end, notwithstanding the submissions of the defence, I conclude that the appropriate measure of damages in this case is for the plaintiff to be restored to the position it would have been in had it not closed on the purchase of the defendants' assets on July 3, 2018. Included in this measure of damages are the consequential damages flowing directly therefrom as enumerated above.

Disgorgement and Imposition of a Constructive Trust as Remedies for Fraudulent Misrepresentation

[465] A further issue arises on the measure of damages, however. Having found the defendants conduct amounted to fraudulent misrepresentation, the plaintiff contends that the first and preferred remedy that the Court should consider instead of an award of general damages is an order that the defendants disgorge the profits made as a result of the fraudulent conduct. Specifically, the plaintiff contends that disgorgement ought to cover two facets:

- i. The \$120,000 profit realized from the sale in respect of the amount attributed to goodwill in the Asset Purchase Agreement; and
- ii. The difference between the price paid by Ren for the Trumpeter Rd. property and the current market value of the property, to be determined by a reference.

[466] In addition, the plaintiff seeks a declaration that the defendant Ren hold the Trumpeter Road property on a constructive trust for the benefit of the plaintiff to the extent of \$270,000 representing the proceeds of the sale that are traceable into that property. This value of the property being held on constructive trust would partly satisfy a judgment for disgorgement or an award of general damages.

[467] I turn to those issues now.

Position of the Plaintiff

[468] I have found that the plaintiff has established that the defendants engaged in fraudulent misrepresentations that induced Zi Ye and the plaintiff to complete the Asset Purchase Agreement and buy the Business from the defendants and that the personal defendants used \$270,000.00 of the proceeds from that sale to contribute to the down payment on the Trumpeter Rd. property. Counsel for the plaintiff contends that an order for disgorgement is necessary to deprive the defendants of the profit they obtained as a result of their deceit. Counsel also seeks a finding of a good conscience trust or remedial constructive trust as against the Trumpeter Rd. property pursuant to the principles enumerated in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

[469] Counsel for the plaintiff provided calculations with respect to the two types of profit enjoyed by the defendants as a result of their deceitful conduct: (i) the profit on the gain in value on the Trumpeter Rd. property which they were able to purchase as a result of their deception and use of the proceeds of the sale of the Business (\$270,000) and (ii) the profit obtained by the inflated price for the purchase of the Business (calculated to be \$152,537).¹²⁴

[470] Counsel for the plaintiff contends that a disgorgement order should not be limited to only the amount that was improperly used to facilitate the purchase of the property and apportion that amount against the whole profit. In essence, the plaintiff argues the defendants ought not to be able to obtain any profit over the purchase price of the property as it was their misrepresentation and deception that enabled them to have the funds to complete the purchase of the Trumpeter Rd. property.

[471] The purchase price for the Trumpeter Rd. property in July 2018 was \$1,040,000. The BC Assessment value of the property at the time of trial was \$1,548,000 and so the personal defendants had realized \$508,000 appreciation in the value of the property. Accordingly, the plaintiff contends all profit on the property, that is the entirety of the increased value of the property above the purchase price should be disgorged. Additionally, the plaintiff argues \$152,537 must be ordered paid to the plaintiff for the profit obtained by the inflated purchase price of the Business. Moreover, the plaintiff asserts that for the benefit of their deceit, the defendants must be ordered to pay the plaintiff a minimum of \$660,537 (representing \$508,000 profit in the appreciated value of the property + \$152,537 profit through the inflated price of the Business). Counsel for the plaintiff describes this as the “disgorgement floor”.

¹²⁴ Counsel for the plaintiff outlined the profit obtained by the inflated price for the Business at paras. 444-448 of his written submissions. In short, the profit obtained by the defendants on the sale of the Business to the plaintiff is said to be the difference between the \$172,497.00 the plaintiff paid for the Business (excluding inventory), and the \$19,960.00 (excluding inventory) the plaintiff received on the sale of the Business in December 2022, resulting in a \$152,537.00 profit by the defendants on the sale of the Business to the plaintiff.

[472] In the end, counsel for the plaintiff argued that the plaintiff has proved damages of \$511,260 (as addressed above) and that a further \$84,000 ought to be ordered as against the defendants in order to reach the disgorgement floor of \$660,537.

Position of the Defendants

[473] In contrast, the defendants argue that disgorgement and a constructive trust are inappropriate awards. They contend that disgorgement is an exceptional form of relief that should not be granted. Rather, the appropriate remedy is a damages award calculated in accordance with the principles enumerated in *Wiebe* – essentially the difference between the price paid for the assets, less the actual value of the assets at the time of sale plus consequential damages.

[474] The defendants also assert that a good conscience trust or constructive trust is an inappropriate remedy in the circumstances. They argue this position on two bases: that the four criteria enumerated in *Soulos* are not satisfied in this case and because an award of damages more than adequately compensates the plaintiff in the unique circumstances of this case.

[475] The defendants also advance an alternative argument that if disgorgement were to be ordered, it should be an “apportioned disgorgement” confined to the proportionate share of the increase in value of the Trumpeter Rd. property vis-à-vis the profit of \$120,000 for the goodwill of the business at the time of sale. This value represents approximately 12% of the value of the Trumpeter Rd. property at the time it was purchased.

[476] Both parties plead that if disgorgement is ordered (either for the full profit or apportioned disgorgement), the matter would need to be referred to the Registrar for calculating the difference between the purchase price of Trumpeter Rd. (\$1,040,000) and its current market value.

Legal principles governing whether to order disgorgement for fraudulent misrepresentation and whether to find a constructive trust

Disgorgement

[477] The exceptional nature of disgorgement, as a “gains-based” remedy, was addressed by the Supreme Court of Canada in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [*Atlantic Lottery*]. It is not referable to or dependant upon the plaintiff’s loss. Rather, it is a remedy focused entirely on disgorging the defendant’s profit from the conduct that is the subject of the plaintiff’s claim: *Atlantic Lottery* at paras. 23-24, 32.

[478] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, the Supreme Court explained that the disgorgement remedy serves both a prophylactic (namely, deterrent) purpose and a restitutionary purpose:

74. This Court has repeatedly stated that “[e]quitable remedies are always subject to the discretion of the court”. (internal citations omitted) In *Neil*, the Court stated emphatically: “It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy” (para. 36).

75. Monarch seeks “disgorgement” of profit earned by Strother and Davis. Such a remedy may be directed to either or both of two equitable purposes. Firstly, is a prophylactic purpose, aptly described as appropriating for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.

(*Chan v. Zacharia* (1984), 154 C.L.R. 178, per Deane J., at p. 198)

76. The second potential purpose is *restitutionary*, i.e. to restore to the beneficiary profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. ...

77. The concept of the *prophylactic* purpose is well summarized in the Davis factum as follows:

[W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]

Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not

pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[Italic emphasis in original.]

[479] Although *Strother* was a breach of fiduciary duty case, disgorgement, an equitable remedy, is also available in cases of fraud. Like breach of fiduciary duty, fraud is conduct that the law condemns strongly and disgorgement serves the same ‘prophylactic purpose’ for fraud as it does for breach of fiduciary duty.

[480] In *Dhillon v. Dhillon*, 2005 BCSC 1903, Justice Pitfield explained that damages, where the defendants had used forged powers of attorney to affect the sale of a property owned by the plaintiff, were to be assessed in a manner that deprived the defendants of the profit derived from the fraud, stating:

[42] In a case such as this which is a case of civil fraud, damages must be assessed in a manner that deprives the defendants of the profits of the fraud. I refer in that regard to the case of *Lennox Industries Canada Limited v. Canada*, [1987] F.C.J. No. 2, reported also at 34 D.L.R. (4th) at 297. There Madam Justice Reed said that stolen property was recoverable as were the fruits derived therefrom. The text provides as follows:

Not only is the stolen property recovered, but any fruits derived therefrom are recoverable as well: D.W.M Waters, *Law of Trusts in Canada* (Toronto, 1974), pages 339 and 340; *Bank Belge* case, *supra*.

This is clearly so with respect to profits derived from misappropriated trust funds and it is equally so with respect to profits derived from the use of stolen monies. To hold otherwise would be to require a thief to return the principal amount of the funds stolen but allow him or her to keep profits derived from the use of those funds. It is also clear that when misappropriated funds or the proceeds therefrom are mixed with the wrongdoer’s own funds and monies are withdrawn from that mixed funds, the wrongdoer will be deemed to have withdrawn his own funds first (the first out principle): In *Re Hallets Estate* (1878), 13 Ch. D. 696 (C.A.), esp. at page 727. In *Re Oatway*, [1903] 2 Ch. 356, esp. at page 360. These principles are the basis of the plaintiff’s claim in the present case.

[43] In relation to the house, the objective is satisfied by an award of damages equal to the funds derived from the sale that were diverted for personal purposes, and a finding of constructive trust in respect of the residence to which the remaining funds derived from the sale were ultimately applied as established by the evidence and my findings of fact.

[481] The plaintiff relies on the decision in *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853 [*Extreme Venture*] as authority for the proposition that

apportioned disgorgement is not the appropriate way to proceed. *Extreme Venture* was a case of breach of fiduciary duty, wherein two of the defendants were also managing directors of the general partner of the plaintiff and other entities, who hid their involvement in negotiating and preparing an offer to purchase the plaintiff by a third party. As a result of their subterfuge in what was really an insider trading situation, they received millions of dollars. The trial judge made an apportioned disgorgement order. The Ontario Court of Appeal described the case as a narrative of corporate malfeasance, avarice, and deceit in the technology sector: *Extreme Venture* at para. 1.

[482] On their cross-appeal in *Extreme Venture* the plaintiffs contended the trial judge erred in principle by making such an order because a prophylactic disgorgement order is aimed not at what the beneficiaries lost but rather at what the wrongdoers gained. In essence, the plaintiff argued that the apportioned disgorgement order awarded by the trial judge left the wrongdoers no worse off than if they had never breached the fiduciary duties in the first place. Consequently, deterrence was not achieved by the award. The Court of Appeal agreed that the disgorgement order made by the trial judge failed to serve a deterrent purpose and ordered disgorgement of all the profits made on the sale of the equity of one of the subsidiary companies.

[483] In finding that that the disgorgement order was imposed to serve a prophylactic or deterrent purpose in the case, Justice Hourigan, writing for the Court, went on to observe:

[113] In the circumstances, the trial judge was obliged to fashion a remedy that would have a deterrent impact. I agree with counsel for the Respondents that simply ordering the Appellants to pay the Respondents what they would otherwise have been entitled to receive serves as no disincentive. A party considering breaching a fiduciary duty could reasonably look at the trial judge's decision and conclude that in a worst-case scenario, they would only be forced to pay over to the aggrieved beneficiary what the beneficiary was always owed, thereby profiting from the breach of their fiduciary duties.

[114] The Appellants' reliance on *Olson* and *Rochweg* is also misplaced. In those cases, which were decided under the *Partnership Act*, R.S.O. 1990, c. P.5, the courts did not impose disgorgement orders for a prophylactic purpose; they were made for restitutionary purposes. Thus, these authorities are of no assistance to the court in this case where the trial judge chose to make the order for a prophylactic purpose. Similarly, the Appellants' argument about the Respondents receiving a windfall fails because, in the case of a prophylactic disgorgement

order, the focus of the inquiry is not the beneficiary's loss but the gain of the faithless fiduciary. This is so even if there is a potential windfall to the beneficiary: *Strother*, at para. 77.

[115] The question that remains is whether, in fashioning a prophylactic disgorgement order, the court is required to order disgorgement of all ill-gotten gains or whether it can make an order that achieves its deterrent purposes but does not require full disgorgement. When this issue was put to counsel for the Respondents, she took the position that the jurisprudence appears to call for full disgorgement. On the other hand, counsel for the Appellants took no position on this issue. In other words, they offered no assistance to the court regarding a sum short of full disgorgement that would meet the deterrent purpose.

[116] There may well be circumstances where it would be inequitable to order a faithless fiduciary to disgorge all profits. Equity seeks what is fair and what is fair should be determined with flexibility, not by means of hard and fast rules. For that reason, I would not endorse an inflexible rule that full disgorgement of all profits must be ordered in all cases, but nor would I speculate on the sorts of reasons that may justify something less than full disgorgement. I note that Australian courts have grappled with the circumstances in which full disgorgement ought to be made and whether there should be a rebuttable presumption that full disgorgement is appropriate: see e.g. *Warman International Ltd v. Dwyer*, [1995] HCA 18, at paras. 33-35. I decline to decide these questions today, as counsel for the Appellants failed to address either point.

[117] There is nothing to suggest that a partial disgorgement order should be made in the case at bar. Certainly, counsel for the Appellants did not argue for such an order nor did he offer any suggested amount for such an award in response to questions from the court. In these circumstances, an order of disgorgement of all profits – \$29.5 million (U.S.) – is in my view appropriate.

[Emphasis added.]

[484] At this juncture, I note that the Ontario Court of Appeal's reasoning in *Extreme Venture* does not appear to have been adopted in this province. And, respectfully, the circumstances of that case are unique. They involve a particularly insidious form of deceit that, if not subject to significant prophylactic and deterrent measures, could well undermine the confidence of the larger markets: insider trading in the tech sector, a particular sphere of the market that involves enormous sums of money. Total disgorgement of the profits obtained would appear to have been the only remedy available to ensure complete and utter deterrence for an otherwise exceedingly lucrative form of fraudulent misrepresentation and breach of fiduciary duty. Moreover, as Hourigan J.A. noted in his reasons at para. 116, the Court was not endorsing an inflexible rule that full disgorgement of all profits must be ordered in all cases. As he

summarized pithily, “Equity seeks what is fair and what is fair should be determined with flexibility, not by means of hard and fast rules”.

[485] In contrast, in *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448, the parties were involved in a dispute over the misappropriation of funds that were invested in a hotel development. An equity interest in the hotel (and the limited partnerships) was obtained through the utilization of funds wrongfully appropriated from a third party, the respondent Nor Sham U.S., the subsidiary of the respondent Ruwenzori. At trial, instead of pursuing a monetary award of damages, the respondents elected to advance a proprietary claim to the hotel assets. The trial judge made such an award. The defendants appealed.

[486] One of the issues on appeal was whether was it appropriate for the judge to grant a proprietary remedy against assets acquired through the use of the Nor Sham U.S. funds since these assets were purchased from a mixed fund and not solely by employing Nor Sham U.S. funds. The appellants argued that because the assets were purchased out of a mixed fund, a proprietary remedy ought not to be available in law to the respondents. Justice Hall, writing for the Court on this point, disagreed, noting that:

[41] ... It would be a reproach to justice if in these circumstances the wronged respondents could not obtain such a remedy as was ordered by the trial judge. To allow the appellants to profit from their own wrongdoing by receiving any increase in the asset value of the Canadian hotel property purchased with the funds of Nor Sham U.S. would seem a strange result to say the least.

[487] Justice Hall went on to endorse the notion that a proportional proprietary interest was available to the Court:

[44] Thus, the circumstance that it may not have been exclusively funds of Nor Sham U.S. that funded the purchase of the Canadian hotel property is no bar to awarding a proprietary remedy to the respondents. I see no principled reason why a person whose monies were in part used to buy an asset cannot obtain a proportional proprietary interest in the asset. In my opinion, Pitfield J. was entitled to make the award he did. I would go further and say that indeed he was almost obligated to make such an order on the facts of this case, for to refuse such an order would amount to allowing wrongdoers to profit from their wrongful conduct, a result a court of equity could not countenance.

[488] As the Court of Appeal explained more recently in *Li v. Li*, 2021 BCCA 39:

[48] This Court recognized in *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448, that wrongfully obtained funds traced to the purchase of real property, in whole or in part, entitle the plaintiff to an equitable claim in proportional ownership (at para. 28). To hold otherwise would constitute a “reproach to justice”, allowing the wrongdoer to “profit from their own wrongdoing by receiving any increase in the asset value” (at para. 41). See also *British Columbia Teachers’ Credit Union v. Betterly* (1975), 1975 CanLII 1032 (BC SC), 61 D.L.R. (3d) 755 (B.C.S.C.) (a conversion case) and the discussion in *Dhillon v. Dhillon*, 2006 BCCA 524 at paras. 85–93.

[489] I conclude that the jurisprudence in British Columbia supports the notion of a proportional interest, not the entirety of any potential gain in the property value above the purchase price, as an appropriate way to deal with disgorgement, depending on the circumstances of the case.

Application of the principles to the case at bar

[490] Insofar as resorting to disgorgement of the profits in this case is concerned, I am not inclined to make such an order for the reasons outlined below.

[491] While I have found that the plaintiff established the tort of fraudulent misrepresentation, I am not entirely satisfied that the deceitful conduct the defendants engaged in here was the type of deceit wherein the defendants were seeking to fully profit from their conduct in a manner similar to that exhibited by the tortfeasors in *Extreme Ventures* or *Ruwenzori*.

[492] Rather, I am of the view that the deceitful conduct of the defendants in this case was primarily motivated by their need to close the sale as quickly as possible so that they would have sufficient Canadian funds to close on the purchase of the Trumpeter Rd. property. The defendants’ conduct in continuing to run and manage the store from July 2018 until November 2109 militates against a conclusion that they were solely intent upon profiting from the sale of the store.

[493] I have no doubt that when the defendants realized they would be unable to close the sale by the end of June 2018 if they adhered to the Franchisor’s requirements, they simply opted to charge ahead quickly, without the benefit of legal advice, and without taking any reasonable steps to ensure they fully complied with what was required of

them (e.g., review of the franchise agreement to ensure they complied with the terms in ss. 15 and 16 of that contract; and actually obtaining the Franchisor's approval of the sale). In my view, although they knew their representations were in fact false when they made them and they intended for the plaintiff to rely and act upon their representations, this was a clumsy, unsophisticated case of fraudulent misrepresentation that would inevitably be daylighted at some point.

[494] The plaintiff's argument that disgorgement ought to be the preferred remedy instead of damages might make sense if the Court was inclined to order total disgorgement – that is the entirety of the profit realized in the appreciation of the value of the property since it was purchased instead of apportioned disgorgement. But in my view that could result in an overreach in the unique circumstances of this case, depending upon the final sale price. The purchase price of Trumpeter Rd. was \$1,040,000. While there is no appraised value before this Court, the BC Assessment value of the property at the time of trial was \$1,548,000. Hypothetically, the full profit above the purchase price would be \$508,000 or higher if the property were sold for an amount in excess of the BC Assessment value.

[495] If disgorgement were to be ordered in this case, I would be inclined to limit it to an apportioned disgorgement order reflecting the percentage of the profit gained by the use of the \$270,400 proceeds from 116 BC Ltd. purchase of 104 BC Ltd.'s assets in the purchase of the Trumpeter Rd. property. The purchase price of Trumpeter Rd. was \$1,040,000 and the amount of \$270,400 represents approximately 26% of the purchase price of the Trumpeter Rd. property. Theoretically, based on the figures outlined in the preceding paragraph addressing the potential amount if a full disgorgement order was made, 26% of the full profit above the purchase price would only be \$132,080, a grossly inadequate sum to return the plaintiff to the position it would have been had the fraudulent misrepresentations not been occasioned and the Business not purchased.

[496] In light of the abovementioned unsophisticated circumstances of this case, I decline to make an order for disgorgement. Full disgorgement represents a potential overreach in the circumstances and apportioned disgorgement potentially fails to put the plaintiff in the position it is entitled to be returned to if it had not closed on the sale.

Good conscience constructive trust

[497] The parties are *ad idem* on the principles that pertain to the “good conscience” constructive trust. *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 is the seminal authority. In *Soulos*, the Supreme Court was dealing with a real estate transaction wherein a real estate broker entered into negotiations to purchase a commercial building on behalf of his client. The vendor rejected the offer made and tendered a counteroffer. The real estate broker rejected the counteroffer but “signed it back”. The vendor advised the real estate broker of the amount it would accept. However, instead of conveying this information to his client, the real estate broker arranged for his wife to purchase the property, which was then transferred to the real estate broker and his wife as joint tenants.

[498] The real estate broker’s client brought an action against the real estate broker to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one’s banker’s landlord was a source of prestige in his community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by the real estate broker. The trial judge found that the real estate broker had breached a duty of loyalty to his client, but held that a constructive trust was not an appropriate remedy because the real estate broker had not been “enriched”. A majority of the Ontario Court of Appeal reversed the judgment and ordered that the property be conveyed to the plaintiff subject to appropriate adjustments. A majority of the Supreme Court of Canada dismissed the real estate broker’s appeal.

[499] Justice McLachlin (as she then was), writing for the majority, explained that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships: *Soulos* at para.17.

[500] McLachlin J. went on to note that while Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging the constructive trust from Canadian law in other circumstances where its availability has long been recognized, writing:

[43] I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

[Emphasis added.]

[501] McLachlin J. went on to note that four conditions must be satisfied in order to impose a constructive trust for wrongful conduct (e.g. fraudulent conduct):

[45] ...This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows, ed., *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.¹²⁵

¹²⁵ See also *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, at paras. 144-146 wherein the court reiterated these principles.

[502] More recently in *Nouhi v. Pourtaghi*, 2019 BCSC 794, Justice Matthews distilled the criteria for the imposition of a remedial constructive trust as follows:

[26] A party seeking either type of constructive trust must satisfy two criteria, in addition to the cause of action or circumstances on which the remedial or substantive constructive trust is based. The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: *BNSF* at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is inadequate, insufficient or inappropriate in the circumstances: *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 92; *Li v Li*, 2017 BCSC 1312 at para. 227.

Application of the principles to the case at bar

[503] Insofar as the claim for the imposition of a good conscience constructive trust over the Trumpeter Rd. property is concerned, the defendants concede that if fraud is established (as it has been), they were likely under an equitable obligation to the plaintiff. That concession is properly made and so the first condition outlined in *Soulos* and *Professional Institute of the Public Service of Canada* has been satisfied. The defendants contend that the remaining criteria from *Soulos* are not applicable in the circumstances of this case, they have not been satisfied, and a constructive trust ought not to be imposed.

[504] In addition to establishing the nexus between the defendants' fraudulent misrepresentations and the purchase of the Trumpeter Rd. property (by using the proceeds obtained from their misrepresentations to complete the purchase of the property) the plaintiff maintains that it has satisfied all of the criteria for the imposition of a constructive trust by advancing the following chain of reasoning:

- a. The defendants ought to be required to disgorge all of the profit they made through use of the ill-gotten sale proceeds to purchase Trumpeter Road;
- b. The amount of that profit can only be ascertained when Trumpeter Road is sold;
- c. Any order that would assess the profit on an appraisal that is nearly certain to be different than the eventual sale price risks unfairness to both parties;

- d. Accordingly, a monetary award in relation to disgorgement is inappropriate;
- e. Instead, the Court should declare a constructive trust over the Trumpeter Road property in the plaintiff's favour to the extent of that property's value at the time of sale less the \$1,040,000 price the defendants paid for it.

[505] While there plainly is a nexus between the funds obtained by the defendants' deceitful conduct (the fraudulent misrepresentations) and the purchase of the Trumpeter Rd. property (the asset), it did not result from deemed or actual agency activities. Unlike the real estate broker in *Soulos*, the defendants in the case at bar were not acting in any professional capacity or in an agency capacity for the plaintiff. Furthermore, the funds that the defendants received from the plaintiff had nothing to do with agency activities. Rather, the defendants received these funds as part of an unrelated commercial transaction with the plaintiff. The plaintiff has failed to establish that all the criteria enumerated in *Soulos* have been met in this case.

[506] Finally, in my view, the plaintiff would be adequately compensated by an award of damages in this case. Accordingly, a constructive trust is not an appropriate remedy in the circumstances of this case.

Conclusion

[507] I find the plaintiff has established that the defendants engaged in a series of fraudulent misrepresentations that induced the plaintiff to purchase the assets of the defendants' Business.

[508] I find the plaintiff is duly entitled to an award of \$511,260 as general damages from the defendants for their fraudulent misrepresentations that induced the plaintiff into purchasing the assets of 104 BC Ltd. The defendants as joint tortfeasors are jointly and severally liable to the plaintiff for these damages.

[509] Finally, there is the issue of costs. Unless there are matters of which I am unaware which may require further submissions, the plaintiff, having achieved substantial success in this case, is entitled to its assessed costs and disbursements in accordance with Appendix B, Scale B of the *Supreme Court Civil Rules*, B.C. Reg.

168/2009. If a hearing is required, then within 45 days of the release of this judgment the parties shall attend to reserving a hearing date through Supreme Court Scheduling. If a hearing date is arranged, the parties shall file written submissions on the matter, not exceeding 15 pages in length,¹²⁶ as well as any authorities, no later than 14 days before any such hearing.

“Ker J.”

¹²⁶ In addition to not exceeding 15 pages in length, the written submissions must be double spaced and in a font size no less than 12 point.

APPENDIX 'A'**PARTIES AND OTHER RELEVANT INDIVIDUALS**

| Legal Name | Also Known As or Referred to As | Role |
|-----------------------------|--|--|
| 1162719 B.C. Ltd. | 719 B.C. Ltd. | Plaintiff and Purchaser |
| Zi Ye | | Shareholder and Director of 719 B.C. Ltd. |
| Jie WANG | | Solicitor Retained by 719 B.C. Ltd. |
| 1040526 B.C. Ltd. | 526 B.C. Ltd. | Defendant and Vendor |
| Yonghui REN | Catherine or Ren | Defendant, and Shareholder and Director of 526 B.C. Ltd. |
| Yu TIAN | Hugh | Defendant, and Spouse of Yonghui Ren |
| Joe SCHOBER | Joe | Director of Marketing and Sales at YDSM |
| Raymond Dean LAMBERT | Dean | Former Chief Operating Officer at YDSWM |
| Steven LEWIS | | Licensed Realtor retained by 719 B.C. Ltd. |

APPENDIX 'B'**CHRONOLOGY**

| Date | Event |
|-----------------------|---|
| 2013 12 18 | 104526 B.C. Ltd. And Cassevan Enterprises Ltd. (the previous owner of the business in the Piccadilly Mall) enter into contract of purchase and sale for the dollar store business (the "Cassevan Contract") |
| 2013 12 25 | 1040526 B.C. Ltd. paid to Cassevan Enterprises Ltd. a deposit pursuant to the Cassevan Contract. |
| 2014 10 to 2015 05 | 1040526 B.C. Ltd. paid to Cassevan Enterprises Ltd. a monthly extension fee. |
| 2015 07 09 | Ren enters into a Business Succession Performance Agreement under the British Columbia Provincial Nominee program. |
| 2015 07 14 | 1040526 B.C. Ltd. and Cassevan Enterprises Ltd. enter into an amendment to the Cassevan Contract. |
| 2015 07 15 | Citizenship and Immigration Canada issues Ren work permit. |
| 2015 09 08 | 1040526 B.C. Ltd. and Cassevan Enterprises Ltd. complete the Cassevan Contract. |
| 2015 09 09 | 1040526 B.C. Ltd. and Your Dollar Store With More enter into a franchise agreement. |
| 2018 03 25 | Ren, as buyer, enters into a contract of purchase and sale for 461 Trumpeter Road, Kelowna, British Columbia (the "Trumpeter Rd. Contract"). |
| 2018 04 06 | Ren removes all subject conditions in her favour from the Trumpeter Contract. |
| 2018 05 30 | 1162719 B.C. Ltd., 1040526 B.C. Ltd., and Ren enter into a contract of purchase and sale for the dollar-store business (the "Asset Purchase Agreement"). |

| | |
|---------------------------|---|
| 2018 06 12 | Original date for closing of the Asset Purchase Agreement passes without purchaser's subject conditions having been satisfied. |
| 2018 06 22 | Emails exchanged between Joe Schober and Ren in which Ren sends Landlord Consent to Assignment of Lease, Joe Schober replies (the "Joe Schober Email"), and Joe Schober summarizes afternoon meeting between himself, Dean Lambert and Hugh |
| 2018 06 23 | Joe Schober Email forwarded with changes from Ren's gmail.com address to Ren's qq.com address |
| 2018 06 24 | Joe Schober Email twice forwarded with changes from Ren's gmail.com address to Ren's qq.com address; the latter version is forwarded to Jie Wang with a copy to Zi Ye, WeChat discussion between Hugh and Zi Ye ensues late this evening. |
| 2018 06 24 -2018 06 26 | WeChat discussion among Hugh and Zi Ye, Ren and Zi Ye, Hugh and Jie Wang, and Jie Wang and Zi Ye |
| 2018 06 28 | 1162719 B.C. Ltd., 1040526 B.C. Ltd., and Ren enter into an addendum to the Asset Purchase Agreement. |
| 2018 07 03 | 1040526 B.C. Ltd. and Ren deliver to 1162719 B.C. Ltd. a closing certificate. |
| 2018 07 03 | 1162719 B.C. Ltd., 1040526 B.C. Ltd., and Ren complete the Asset Purchase Agreement. Hugh and Ren operate the store for the plaintiff until November 2019. |
| 2018 07 03 | 1040526 B.C. Ltd. delivers to 1162719 B.C. Ltd. a bill of sale. |
| 2018 07 06 | Proceeds from the completion of the Assess Purchase Agreement deposited to 1040526 B.C. Ltd. Bank of Montreal (BMO) corporate account. |
| 2018 07 09 | Cheque no. 996 in the amount of \$270,000 drawn on 1040526 B.C. Ltd.'s BMO corporate account deposited to Ren's BMO savings account. |
| 2018 07 09 | \$80,000 transferred from one of Ren's Royal Bank of Canada bank account to Ren's BMO savings account. |

| | |
|--------------------------|---|
| 2018 07 24 | The completion date for the Trumpeter Rd. Contract is extended from July 27, 2018 to August 8, 2018. |
| 2018 07 26 | Funds in the amount of \$398,082.98 transferred from Ren's BMO savings account to the account of Ren's solicitor as funds required to complete the closing of the Trumpeter Rd. Contract. |
| 2019 06 01 | Zi Ye obtains Canadian work permit |
| 2019 09 01 | Zi Ye and husband move to British Columbia, Zi Ye continues training with Ren at the YDSWM store in Salmon Arm. |
| 2019 11 01 | Zi Ye stops paying the defendants a management fee for operating the store for 116 BC Ltd. |
| 2019 12 18 | Zi Ye first learns that the Franchisor was unaware of 116 BC Ltd.'s purchase of the defendants YDSWM business |
| 2020 01 07 | Hugh forwards an email from the Franchisor to Zi Ye that confirms the Franchisor's lack of awareness of the sale and lack of approval of the sale of the Business to the plaintiff. |
| 2020 01 09 | Zi Ye contacts Dean Lambert at YDSWM to set up a meeting to discuss the issue |
| 2020 01 to 2022 10 11 | Zi Ye endeavours to operate the Business and to find a resolution with the Franchisor over the lack of a franchise agreement |
| 2022 10 11 | Zi Ye sells the Business to a third party without a franchise agreement for \$60,000 |