

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tao v. Yin*,
2024 BCSC 2045

Date: 20241108
Docket: S2010412
Registry: Vancouver

Between:

**Junjie Tao, Executor of the Estate of
Tong Zhang aka Tony Zhang, Deceased**

Plaintiff

And

**Hang Yin, Yan Chun Yin, 1011066 B.C. Ltd.
1079770 B.C. Ltd., 1032734 B.C. Ltd., and 1085842 B.C. Ltd.**

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Plaintiff:

D.L.R. Yaverbaum
M.J. Hewitt

Counsel for the Defendants:

M. Laity

Place and Date of Hearing:

Vancouver, B.C.
June 20 and July 24, 2024

Place and Date of Judgment:

Vancouver, B.C.
November 8, 2024

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Introduction

[1] On September 1, 2023, I made an order adjourning the trial of this matter following a contested adjournment application heard on August 28 and 30, 2023 (the “Order”). Prior to the adjournment, the trial had been scheduled to commence on September 18, 2023. The defendants’ adjournment application was granted, on a number of conditions that were imposed.

[2] The entered Order reads as follows:

1. The trial of the action, currently scheduled to commence on September 18, 2023, is adjourned generally on the terms set out below.
2. The Plaintiff will take steps to re-schedule the trial on the first dates available to the parties.

3. The trial date that is to be re-scheduled by the Plaintiff following this order will be peremptory on the Defendants.
4. Until the trial date is set, the Defendants' counsel will maintain availability for a trial commencing on July 22, 2024 and for a trial commencing on January 20, 2025, if such dates remain available from the court.
5. The Defendants' three remaining applications currently filed with the court will be set down to be heard in September 2023.
6. The Defendants shall not apply to remove the certificates of pending litigation that have been filed to secure the claims advanced in this action, until the trial of this action has been heard and determined.
7. With respect to the property defined as the Buxton Property at paragraph 62 of the Notice of Civil Claim:
 - a. the Defendants shall forthwith provide a mortgage statement regarding the Buxton Property which states the current outstanding balance on the mortgage registered against the property, if such statement is in the Defendants' possession, and if not then the Defendants shall forthwith request and make best efforts to provide it to the Plaintiff as soon as possible;
 - b. the Defendants shall not dispose of, mortgage or otherwise borrow against or diminish the value of the Buxton Property until resolution of this action;
 - c. the Defendants shall maintain the Buxton Property in its current condition pending the resolution of this action;
 - d. the Defendants shall pay all mortgage payments owed or payable in respect of the Buxton Property until resolution of the action; and
 - e. the Defendants shall provide the Plaintiff's counsel with information and documents regarding whether the Buxton Property is being rented and if so provide information and documents regarding funds received as rent and their disposition.
8. With respect to the property defined as the Surrey Property at paragraph 35 of the Notice of Civil Claim:
 - a. the Defendants shall not dispose of, mortgage or otherwise borrow against or diminish the value of the Surrey Property until the trial of this action is heard and determined;
 - b. the Defendants shall forthwith provide to the Plaintiff a mortgage statement regarding the Surrey Property which states the current outstanding balance on the mortgage registered against the property;
 - c. the Defendants shall pay all mortgage payments owed or payable in respect of the Surrey Property until resolution of this action;
 - d. the Defendants shall maintain the property in its current condition pending the resolution of this action;
 - e. the Defendants may maintain business operations in the premises located on the Surrey Property, including through the operation of the

- coffeeshop business, if such operations are carried with a good faith intention of earning a profit;
- f. the Defendants shall provide the Plaintiffs counsel with information and documents regarding any profits earned from the Surrey Property and their disposition; and
 - g. this order does not prohibit the Defendants from paying reasonable amounts for business expenses, or from disposing of assets in the ordinary or proper course of business.
9. With respect to the properties defined as the West 41st Properties as defined in paragraph 25 of the Notice of Civil Claim, the Defendants are to file a copy of this order in the foreclosure proceedings, *BMO v. 1011066 B.C. Ltd. et al*, Court File No. H-230042 Vancouver Registry (the “**Foreclosure Proceeding**”) and:
- a. the Defendants shall seek the highest possible price for the sale of those properties in the Foreclosure Proceeding; and
 - b. any proceeds from the sale of the West 41st Properties claimed by the Defendants shall be paid into court and held until resolution of the action.
10. The Defendants may not deliver any further expert reports in the action, except a report that is responsive to an expert report delivered by the Plaintiff after the date of this order, or with leave of the court.
11. The Defendants shall produce to the Plaintiff any documents relevant to the matters at issue in the action that are in the possession of Chinese authorities forthwith upon being in possession of those documents and legally permitted in China to disclose them, and in any event shall make production of such documents no less than four months before trial and, if the Defendants are unable to disclose such documents by such date, they shall apply to the court to seek an extension of the deadline to produce such records, which application shall be heard prior to four months before the trial.
12. The Defendants shall make best efforts to have Hang Yin attend trial in person and shall advise the Plaintiffs counsel no less than three months prior to trial if Mr. Yin is able and intending to attend trial and if so whether such attendance will be in person or remote.
13. The defendants shall pay the Plaintiffs costs of this adjournment application not as special costs, forthwith and in any event of the cause.

[3] The plaintiff filed a notice of application on December 7, 2023, seeking a declaration that the defendants are guilty of contempt for breaching the Order, and requesting that the defendants be required to purge their contempt by providing documents and information, as well as the imposition of a fine and special costs.

The defendants filed a notice of application on June 7, 2024, applying to vary the Order and requesting certain directions regarding the Order.

[4] As the issues all related to the Order, the parties requested to appear before me. The hearing was scheduled for June 20, 2024, and proceeded on that day. There was insufficient court time, and the hearing continued on July 24, 2024.

[5] At the hearing, the order not being objected to by the plaintiff, I granted the first order sought in the defendants' notice of application, being a variation of paragraph 5 of the Order. In the Order, I had ordered that the defendants' three remaining applications, filed at the time of the Order, be set down to be heard in September 2023. That order was made because there was some urgency in those applications being heard before trial. The defendants experienced difficulties in setting the applications for hearing, so I granted their request to vary paragraph 5 to read:

The remaining three Defendants' application currently filed with the court are to be set down for the first date reasonably available for both the applicants and the respondents, with noted urgency to do so.

[6] This decision addresses the plaintiff's contempt application, and the directions sought by the defendants. In addition to their oral submissions, the parties provided full written submissions, all of which I have considered, although I do not refer to all of them in this decision.

[7] The trial of this matter is now scheduled to proceed in March 2025.

Nature of the claim

[8] In his written submission in support of his contempt application, the plaintiff provides the following summary of his claim and the defendants' response. Without making any determinations of fact or making any comment on the parties' positions, I reproduce the plaintiff's summary to provide some background to the present applications:

10. This action was commenced by Notice of Civil Claim filed on October 16, 2020. A Response to Civil Claim was filed by the defendants on

November 30, 2020. The plaintiff is the executor of the estate of Tong Zhang, aka Tony Zhang who died tragically of cancer during this lawsuit in 2022.

11. The plaintiff alleges *inter alia* that between 2015 and 2018 the defendant Hang Yin, developed a scheme to convert Mr. Zhang's funds to his own use and to closely-related parties, controlled corporate entities, and family members (the "**Scheme**"). The plaintiff alleges that in furtherance of the Scheme, Mr. Yin involved his wife, Yan Chun Liu, and his daughter, Yu Yin, in the Scheme through their active participation in the establishment of and control over British Columbia companies.

Notice of Civil Claim, paras. 9-19

12. The defendants do not deny that these investments or the projects in British Columbia occurred. They say that the investments were made by the plaintiff's father – Chun Li Zhang ("**Zhang Sr.**"). They then plead that Zhang Sr., Mr. Yin and Mrs. Liu entered into an oral agreement in late 2018 or early 2019 to terminate their business relationship and divide their assets.

Response to Civil Claim

13. The central issue in the case therefore is whether the defendants misappropriated the plaintiff's funds by diverting the monies to their own uses.

Alleged breaches of the Order

[9] The plaintiff submits that the defendants have breached the Order in two respects. First, he submits that the defendants have failed to comply with paragraph 7(a) and (e) with respect to the documents and information they were required to provide regarding the Buxton Property. Second, he submits that the defendants have failed to comply with paragraph 8(b) and (f) regarding information and documents they were required to provide regarding the Surrey Property.

[10] The defendants deny breaching the Order. They say that they have provided the documents and information required under the Order. They also say that with respect to certain parts of the Order, the parties disagree about what is required, which is why they have filed their application seeking directions. They submit that given the parties do not agree about what is required, the alleged breach of those terms of the Order cannot form the basis for a finding of contempt.

Relevant events since Order was pronounced

[11] On September 11, 2023, the plaintiff provided the defendants with a draft of the Order, and asked that the defendants proceed “ASAP” with the steps required in the Order. Counsel had difficulties coming to agreement on the terms of the Order, and both sides reviewed the clerk’s notes and listened to the recording of the oral decision before settling its terms.

[12] On October 6, 2023, the plaintiff requested that the defendants advise on the status of the Buxton mortgage. Paragraph 7(a) of the Order requires the defendants to “forthwith provide a mortgage statement” regarding the Buxton Property “if such statement is in the Defendants’ possession, and if not then the Defendants shall forthwith request and make best efforts to provide it to the Plaintiff as soon as possible”.

[13] On October 18, 2023, the plaintiff wrote to the defendants advising of his view that they were in breach of the Order, and providing particulars of the breach. The plaintiff set a deadline of October 30, 2023 for compliance and advised that if it was not met he would apply to address the breach.

[14] On October 19, 2023, the defendants advised the plaintiff that “we are attending to information aspects” of the Order, and that a response was expected by the end of November, which they asserted was “not an unreasonable timeline given that the investigations required and my trial schedule that I’ve conveyed to you many times.”

[15] On November 30, 2023, the Order was finally entered.

[16] On December 5, 2023, the plaintiff wrote the defendants noting that the end of November had passed, and asserting that the defendants had not complied with the Order. The plaintiff wrote that he intended to file a contempt application, which he did on December 7, 2023.

[17] In response to the contempt application, the defendants provided the Surrey mortgage statement, required under paragraph 8(b) of the Order. They advised that Ms. Lin had requested mortgage documents for the Buxton Property, required under paragraph 7(a) of the Order, on September 1, 2023, but the bank had rejected the request because Mr. Yin was not present. The defendants advised of their position that they had complied with their obligation. They further advised that they had communicated with Mr. Yin and advised him of the issue with the bank. They further advised that Ms. Yin was attending to obtaining records with respect to the Buxton Property.

[18] On December 7 and 15, 2023, the plaintiff asked whether the defendants' counsel were prepared to accept service of the contempt application. On December 15, 2023, defendants' counsel advised they were not prepared to accept service because they viewed the contempt application as being without merit.

[19] On February 5, 2024, the plaintiff applied for an order for alternative service of the contempt application.

[20] On February 16, 2024, the defendants provided a lease and annual rent statements for the Buxton Property for 2019 to 2022, in at least partial compliance with paragraph 7(e) of the Order.

[21] On February 22, 2024, the defendants filed their response to the alternative service application, in which they relied on evidence that a partner in the defendants' counsel's law firm would be traveling to China at the end of March to meet with Mr. Yin.

[22] On March 5, 2024, Associate Judge Robertson made an order permitting alternative service by email on Hang Yin and Yun Yin. She also ordered that the contempt application was to be set for hearing no earlier than April 5, 2024.

[23] The contempt application was personally served on Ms. Liu on March 13, 2024, and by email on Hang Yin and Yun Yin on March 19, 2024.

[24] On May 17, 2024, the plaintiff wrote to the defendants seeking confirmation as to when he would receive materials in response to the contempt application. On June 6, 2024, the plaintiff provided his position to the defendants on why he was proceeding with the contempt application, identifying the outstanding breaches from the plaintiff's point of view.

[25] On June 7, 2024, the defendants filed the variation and directions application.

[26] On June 12, 2024, the defendants served an amended list of documents. It contained the mortgage statement for the Buxton Property as of January 3, 2024. No explanation was provided at that time for why it had not been provided earlier.

Legal principles with respect to contempt

[27] Rule 22-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides for the power of the court to punish for contempt, by way of fine, imprisonment or both.

[28] It is well settled that what is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: *Carey v. Laiken*, 2015 SCC 17 at paras 32–35, and 38 [Carey].

[29] The plaintiff accurately summarized *Carey* as follows in his written submission:

- (a) Contempt of court “rest[s] on the power of the court to uphold its dignity and process.... The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect” It is well established that the purpose of a contempt order is “first and foremost a declaration that a party has acted in defiance of a court order”, Paragraph 30.
- (b) Civil contempt has three elements which must be established beyond a reasonable doubt: These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases. Paragraph 32.
- (c) The first element is that the order alleged to have been breached “must state clearly and unequivocally what should and should not be done” Paragraph 33

- (d) The second element is that the party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine. Paragraph 34
- (e) The third element [is] that the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. Paragraph 35.
- (f) The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders. It is an enforcement power of last rather than first resort. Paragraph 36.

[30] As a general rule, contempt proceedings are bifurcated, with an initial phase in which liability is determined, and if the contemnor is found in contempt, a second penalty phase. This decision deals solely with the first phase.

Did the Defendants breach the Order?

Buxton Property

Evidence

[31] It will be recalled that the plaintiff submits that the defendants breached paragraph 7(a) and (e) of the Order, relating to information and documents to be provided with respect to the Buxton Property.

[32] The Buxton mortgage statement, required under paragraph 7(a), was provided in the defendants' amended list of documents, served June 12, 2024. On February 16, 2024, the defendants provided a lease and annual rent statements for the Buxton Property for 2019 to 2022, as required under paragraph 7(e). The plaintiff says that the defendants are also required to provide documents with respect to the disposition of funds received as rent.

[33] In her affidavit #5, Ms. Liu says that once she understood that it was required, she immediately attended the TD Bank in Burnaby to request a copy of the Buxton mortgage. She says that she did so on or around September 1, 2023, and was told that Hang Yin needed to attend in person to obtain that document as he was the account holder. Ms. Liu says that she telephoned the TD Bank soon after and asked if there was a way Mr. Yin could delegate that right as the account holder. She says

she was told that he could do this only by way of a power of attorney. She says that she understands “Mr. Yin explored that option, but it did not work out timing-wise because Ms. Yun Yin was not in Canada to take that on during the relevant time”. Ms. Liu does not state the basis for that understanding.

[34] The defendants also rely on Ms. Yin’s affidavit #4. She says that she took immediate and consistent steps to comply with Order. She had to coordinate with her father, Mr. Yin, on some of these efforts, “which took time since he was located in China and under monitoring”.

[35] With respect to the Buxton Property rental information, required under paragraph 7(e), Ms. Yin says that she did not have the tenancy agreement or other documents in her possession at the time the Order was made, but was eager to assist her parents in obtaining them. She says she requested information from Reezen Realty and followed up with them. She does not say when she did so. She also states her understanding that counsel emailed Reezen Realty on February 13, 2024, and she then received a response to her earlier communications later that day. She says she forwarded “it” to counsel on or around the same day, and understands that counsel disclosed “it” on February 16, 2024. Ms. Yin would appear to be referring to the Buxton lease and rental statements disclosed on February 16, 2024.

[36] The Buxton Property mortgage statement was disclosed with the defendants’ amended list of documents on June 12, 2024.

Analysis

Paragraph 7(a)

[37] The parties disagree about what was required of the defendants under paragraph 7(a) of the Order, and thus whether it stated clearly and unequivocally what must be done. For ease of reference I reproduce paragraph 7(a):

- a. the Defendants shall forthwith provide a mortgage statement regarding the Buxton Property which states the current outstanding balance on the mortgage registered against the property, if such

statement is in the Defendants' possession, and if not then the Defendants shall forthwith request and make best efforts to provide it to the Plaintiff as soon as possible;

[38] The plaintiff submits that paragraph 7(a) clearly and unambiguously states the document the defendants were required to provide, namely the Buxton Property mortgage, and that the defendants were required to provide it forthwith. The defendants submit that paragraph 7(a) only requires them to produce the Buxton mortgage statement forthwith if it is in their possession, and that if it is not they are required to request it forthwith.

[39] In my view, paragraph 7(a) is clear and unambiguous. The defendants were required to provide the Buxton mortgage forthwith if it was in their possession. If it was not, they were to request it forthwith, and make their best efforts to provide it as soon as possible. Although both "forthwith" and "as soon as possible" were used, in context they mean the same thing – as the defendants did not have the mortgage statement in their possession, they were required to forthwith request it and make their best efforts to provide it as soon as possible.

[40] On the evidence before me, I find that the defendants did forthwith request the Buxton mortgage by Ms. Liu going to the TD Bank and making the request. She was unable to obtain it as Mr. Yin's presence, or him executing a power of attorney, were required by the Bank to provide it.

[41] I find that the defendants did not make best efforts to provide the Buxton mortgage to the defendants forthwith or as soon as possible. The defendants' evidence is decidedly lacking with respect to the efforts they made after Ms. Liu was told that Mr. Yin needed to go to the Bank personally or execute a power of attorney. Ms. Liu's evidence that she "understand[s] Mr. Yin explored that option, but it did not work out timing-wise because Ms. Yu Yin was not in Canada to take that on during the relevant time" does not describe what attempts the defendants made to obtain the mortgage or when they took them. Ms. Yu Yin does not address this issue in her affidavit #4.

[42] The defendants did eventually, on June 12, 2024, produce a copy of the Buxton mortgage as at January 3, 2024. Mr. Yin says in his 6th affidavit, made June 17, 2024, that he executed a power of attorney appointing his daughter, Ms. Yin, with power of attorney in early December 2023. He says that “the timing did not work out as Yu Yin was travelling for a few months during the relevant period”. He states his understanding that other efforts were made on his behalf, and TD ultimately agreed to an authorization in narrower form, drafted by the defendants’ counsel. He signed the authorization on or around May 15, 2024 and understands that the authorization was then provided to TD to obtain the Buxton mortgage statement.

[43] In my view, the defendants did not make best efforts to provide the plaintiff with the Buxton mortgage statement forthwith or as soon as possible. In particular, no real explanation is provided for why “the timing did not work out as Yu Yin was travelling for a few months during the relevant period” after Mr. Yin signed the power of attorney in December 2023. Nor is any explanation provided as to why counsel for the defendants could not have drafted and Mr. Yin signed an authorization in narrower form earlier than May 15, 2024. The defendants ultimately provided the Buxton mortgage statement, but their efforts to obtain and disclose it were dilatory and not consistent with the requirements of paragraph 7(a) of the Order.

[44] The defendants raise an issue with respect to the timing of Mr. Yin’s knowledge of the Order. Mr. Yin says in his 6th affidavit that the Order “was fully explained to me in late November/early December 2023, when a lawyer at the office of counsel for the Defendants met me in person in China. Otherwise, our communications at that time were not free and open.”

[45] I accept that Mr. Yin’s circumstances in China in the fall of 2023 may have limited his counsel’s ability to communicate with him at that time. However, knowledge can be established where the putative contemnor has counsel leading up to and in the execution of the Order: *Axion Ventures Inc. v. Bonner*, 2023 BCSC 313, at para. 16, citing *Derencinovic v. 7 West Homes Ltd.*, 2021 BCSC 1707 at para. 41. Ms. Liu clearly had actual knowledge of the Order upon its pronouncement, given her visit to the TD Bank immediately thereafter. Similarly, Ms. Yin says that she took immediate

steps to comply with the Order, so she must have had knowledge of the Order. I am satisfied that the knowledge element of contempt has been made out.

[46] I am also satisfied that the defendants intentionally failed to comply with paragraph 7(a) of the Order. *Carey* at paras. 35 and 38 reaffirms that the intention element is established upon proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor had notice. The defendants' conduct in failing to make best efforts to provide the Buxton mortgage to the plaintiff forthwith meet this standard.

[47] The three elements of contempt have been made out with respect to paragraph 7(a) of the Order. I will consider whether to exercise my discretion not to make a finding of contempt at the conclusion of this decision.

Paragraph 7(e)

[48] For ease of reference I will reproduce paragraph 7(e) of the Order:

- e. the Defendants shall provide the Plaintiff's counsel with information and documents regarding whether the Buxton Property is being rented and if so provide information and documents regarding funds received as rent and their disposition.

[49] The defendants produced the Buxton lease and rental reports on February 16, 2024. The plaintiff complains that this was more than five months after the Order was pronounced. The plaintiff further submits that the defendants have not produced documents regarding the disposition of funds received as rent.

[50] It is notable that paragraph 7(e) of the Order, unlike paragraph 7(a), did not require the defendants to take steps forthwith or as soon as possible. Certainly the defendants did not act with any dispatch to obtain the lease and rental statements. However, given the absence of any time period within which these documents were required to be provided, in contrast to the Buxton mortgage, I do not find the defendants in contempt for having provided them in February 2024.

[51] I turn to the part of paragraph 7(e), requiring the defendants to provide information and documents regarding funds received as rent and their disposition.

Little information and no documents have been provided by the defendants to the plaintiff regarding the disposition of such funds. In correspondence between counsel, counsel for the defendants advised counsel for the plaintiff that the rental income received is being disposed of into Ms. Yin's bank account. In my view, this is not sufficient to constitute compliance with this part of paragraph 7(e). The defendants are required to provide further information and all documents related to what Ms. Yin has done with the rental income from Buxton, and they must do so as soon as possible. I find, however, that the language of paragraph 7(e) is not sufficiently clear and unambiguous about what information and documents were to be provided to warrant the failure to provide such information and documents resulting in a contempt citation.

Surrey Property

Evidence

[52] It will be recalled that the plaintiff submits that the defendants breached paragraph 8(b) and (f) of the Order, relating to providing the Surrey Property mortgage statement and information and documents regarding profits earned from the Surrey Property and their disposition. The defendants disclosed the Surrey Property mortgage statement on or about December 7, 2023. The defendants have not disclosed any information relating to profits from the Surrey Property.

[53] In her affidavit #4, Ms. Yin says that as soon as she was able to access the mortgage statement for the Surrey Property, she provided it to counsel and understands that it was produced to the plaintiff soon after. Ms. Yin does not say when these things occurred, or how she was able to access the mortgage statement for the Surrey Property. So far as information about profits from the Surrey Property are concerned, Ms. Yin says that she has been working to turn the coffee shop on the Surrey Property into a profitable business, but that has not yet occurred. She says she is optimistic it will in future.

Analysis

Paragraph 8(b)

[54] Paragraph 8(b) is clear and unambiguous. It required the defendants to forthwith provide the Surrey mortgage statement. They provided it on December 7, 2023, some three months after the Order was pronounced. No explanation has been provided in the evidence for the delay in providing it, although counsel submits that it was not in the defendants' possession at the time the Order was pronounced, that Ms. Yin made efforts to get it from the bank, she then travelled to China before she could finish those efforts, and immediately upon her return accessed the mortgage and provided it to counsel. That explanation ought to have been, but was not, included in Ms. Yin's affidavit. Regardless of the lack of evidence to substantiate that explanation, it is not sufficient to explain the three-month delay in providing the Surrey mortgage.

[55] I find that the three elements of contempt have been made out in connection with paragraph 8(b) of the Order. Again, I will return at the end of my analysis to whether to exercise my discretion not to make a finding of contempt in relation to the provision of the Surrey mortgage.

Paragraph 8(f)

[56] Paragraph 8(f) of the Order is clear and unambiguous. It requires the defendants to provide information and documents regarding any profits earned from the Surrey Property and their disposition. The defendants have not provided any information and documents about any profits, which they say is because there has been no profit. The defendants say that they have produced bank records and tax returns in this matter, but that on reviewing their lists of documents, their counsel has realized that some records that would show there has been no profit have not been produced due to inadvertence on counsels' part. They have since produced some records and say they are prepared to produce bank records showing funds from the numbered company being deposited into Ms. Yin's bank account.

[57] I agree with the defendants that documents showing the absence of a profit are not clearly required by paragraph 8(f) of the Order. There is no basis for a finding of contempt in regards to paragraph 8(f).

Should I exercise my discretion not to cite the Defendants for contempt?

[58] I have found the three elements of contempt made out with respect to the defendants' failure to comply with paragraphs 7(a) and 8(b) of the Order. As held by the Court in *Carey* at paras. 36–37, the contempt power is discretionary and its routine use to obtain compliance with court orders is discouraged. It is an enforcement power of last rather than first resort. Where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the court entertaining the motion retains discretion to decline to make a finding of contempt where it would work an injustice in the circumstances of the case.

[59] I have already canvassed the evidence regarding the defendants' efforts to comply with paragraphs 7(a) and 8(b) of the Order. It is decidedly lacking. The Order was clear and unambiguous about what the defendants were required to do, the defendants knew what they were required to do, and they failed to do it. They provided the Surrey Mortgage on December 7, 2023 and they provided the Buxton Mortgage statement on June 12, 2024. The Order was pronounced September 1, 2023, and required that they provide those documents as soon as possible, in the case of the Buxton Mortgage, and forthwith, in the case of the Surrey Mortgage. The defendants failed to comply.

[60] I am not persuaded that it would work an injustice in the circumstances of this case to make a finding a contempt. I declare that the defendants were in contempt of paragraphs 7(a) and 8(b) of the Order.

Next Steps

[61] The defendants have now provided the documents required under paragraphs 7(a) and 8(b) of the Order.

[62] The plaintiff seeks special costs of its application, as well as the alternative service application, forthwith and in any event of the cause, and a hearing on sanction.

[63] The mortgages have now been produced, thereby effectively purging the defendants' contempt, as was requested in the plaintiff's application. The parties are to contact Supreme Court Scheduling within 30 days of the date of this decision to schedule a 30-minute appearance before me to determine how the remaining aspects of the plaintiff's application are to be addressed. For example, do the parties wish to proceed with written submissions, or is a further oral hearing required?

Are any further Directions or Variations of the Order required as requested by the Defendants?

[64] I have already addressed the variation of the Order sought by the defendants with respect to setting the defendants' applications down for hearing and need not consider it further.

[65] The defendants seek clarification as to whether paragraph 3 of the Order, which provided that the trial was to be rescheduled by the plaintiff on the first date available to all parties, included the prospective defendant by counterclaim, Chunli Zhang (Mr. Zhang Sr.). They submit that the plaintiff set a date for trial knowing that counsel for Mr. Zhang Sr. was not available. The plaintiff submits that he set the trial date. He submits that Rule 12-1(7) governs when a party objects to the trial date. He submits that no application has been made to object to the scheduled trial dates.

[66] In my view, no clarification is required from me with respect to paragraph 3. The trial dates have been set. If counsel for Mr. Zhang Sr. is unavailable on the trial dates set, that could be raised before the court when the application to add him as a defendant is heard, or Mr. Zhang Sr. could apply for an adjournment. There is nothing for this court on this application to clarify.

[67] The defendants seek direction that the orders pertaining to the foreclosure proceedings do not apply in the context of an application for an order absolute, as

opposed to the context of a sale process that was applicable at the time the Order was made. Paragraph 9 of the Order required the defendants to file a copy of the Order in the foreclosure proceedings, and to seek the highest possible price for the sale of the West 41st Properties, and to seek to have the proceeds paid into court. The defendants submit that these terms do not apply in the current context, which is that the creditor is seeking to take possession of the West 41st Properties.

[68] In my view, no further direction is required. If there is a sale, the defendants must do as directed. If there is not, this term simply does not apply.

[69] The defendants sought clarification regarding their obligations regarding the Buxton property mortgage statement. For the reasons given in respect of the contempt application regarding paragraph 7(a), no clarification is required.

“L.M. Lyster J.”

LYSTER J.