

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tian v. Yu*,
2023 BCCA 421

Date: 20231121
Docket: CA48948

Between:

Guang Tian also known as Tim Tian

Appellant
(Defendant)

And

**Junjie Yu also known as Jun Jie Yu
also known as Jun Jie (Jack) Yu**

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Fisher
The Honourable Justice Marchand
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
March 3, 2023 (*Yu v. TNG Packaging Limited*, 2023 BCSC 329,
Vancouver Docket S1811559).

Counsel for the Appellant: D.H. Griffith

Counsel for the Respondent: D.D. Way

Place and Date of Hearing: Vancouver, British Columbia
October 31, 2023

Place and Date of Judgment: Vancouver, British Columbia
November 21, 2023

Written Reasons by:

The Honourable Justice Marchand

Concurred in by:

The Honourable Madam Justice Fisher
The Honourable Justice Skolrood

Summary:

The appellant seeks to overturn a finding that he was guilty of civil contempt. The appellant was found to have violated an interlocutory injunction order that prohibited him from posting defamatory statements about the respondent-plaintiff's lawyers and their law firm. He contends that the chambers judge erred: (1) by failing to consider whether the order was sufficiently precise and unambiguous to support a finding of contempt; (2) by finding that the statements came from email addresses or "online handles" owned or controlled by him; and (3) by dismissing the possibility that someone else might have been responsible for the statements. Held: Appeal dismissed. The order clearly prohibited the making of statements that were capable of lowering the subjects' reputations, and was therefore sufficient to support a finding of contempt. While the judge erred in finding that the appellant had admitted ownership of the email address in question, the absence of this error could not have plausibly left the judge with a reasonable doubt as to the appellant's guilt. Finally, while the judge did not explicitly cite or follow the W.(D.) formula, there is no reason to think that she lost sight of the task before her and she was ultimately satisfied beyond a reasonable doubt of the appellant's contempt.

Reasons for Judgment of the Honourable Justice Marchand:**Introduction**

[1] On August 24, 2022, Justice Macintosh granted an interlocutory injunction in favour of the respondent, Junjie Yu, to restrain the appellant, Guang Tian, from “slandering, publishing or causing to be published any defamatory statements” referencing Mr. Yu’s legal counsel and his counsel’s firm (the “Macintosh Order”). In the days immediately following Mr. Yu’s service of the Macintosh Order on Mr. Tian, the very statements that led Mr. Yu to obtain the order were anonymously published by email and in a number of online posts (the “post-Macintosh Order statements”).

[2] On August 29, 2022, Mr. Yu filed an application to find Mr. Tian in contempt of the Macintosh Order. The application was heard on September 8, 2022. On March 3, 2023, the chambers judge issued written reasons finding Mr. Tian in contempt. The judge’s reasons were not published.

[3] Mr. Tian appeals the finding of contempt. He submits that the judge erred:

1. by failing to consider whether the Macintosh Order was sufficiently precise and unambiguous to support a finding of contempt;
2. by finding that the post-Macintosh Order statements came from email addresses or “online handles” owned or controlled by him; and
3. by dismissing the possibility that his daughter or wife may have been responsible for the post-Macintosh Order statements.

[4] Although the judge misapprehended an aspect of Mr. Tian’s evidence and did not cite or follow the *W.(D.)* formula for assessing Mr. Tian’s evidence, for the reasons that follow, I would dismiss the appeal.

Background

[5] Mr. Yu and Mr. Tian are shareholders in the respondent, TNG Packaging Ltd. (“TNG”). Mr. Tian’s wife, the respondent, Yan Ping Ma, is a former director of TNG.

In the underlying litigation, Mr. Yu has brought claims against Mr. Yu, Ms. Ma and TNG, and Mr. Tian, and TNG have brought claims against Mr. Yu. The parties' dispute has been lengthy and acrimonious.

[6] At times, the parties have been self-represented. However, in July 2021, Mr. Yu retained his current counsel, David Chen of Avid Law Corporation ("Avid Law"). In June 2022, Mr. Chen, served appointments to examine Mr. Tian and Ms. Ma for discovery. Mr. Chen arranged for the discoveries to be conducted by his colleague, Darryl Way, and with the assistance of an interpreter named Amy Lee.

[7] During the examination for discovery of Ms. Ma on August 15, 2022, Mr. Tian took issue with the quality of Ms. Lee's translation services. That evening, Mr. Tian emailed Mr. Way to request that he "change the interpreter." On August 16, 2022, Mr. Way responded that Ms. Lee was an accredited court interpreter and associate member of the Society of Translators and Interpreters of British Columbia ("STIBC"), and that she would be attending Mr. Tian's discovery the next day.

[8] During the examination for discovery of Mr. Tian on August 17, 2022, Mr. Tian again questioned Ms. Lee's qualifications. He was disruptive and accusatory and was asked to leave. Later that day, he emailed the STIBC to verify whether Ms. Lee was a member and whether she was "a certified court interpreter (or an accredited court interpreter)". The STIBC replied that they did not have a "certified court interpreter who [was] a member...under the name of Amy Lee." The STIBC confirmed, however, that they had an associate member by that name.

[9] On August 18, 2022, Mr. Tian attended the offices of Avid Law on two occasions. He demanded that the firm "negotiate with him." He also presented a document that, roughly translated, stated:

I have been cheated badly by a black hearted (heartless) law firm. They dare to use a realtor Li XX to pretend to be a court interpreter to provide me with legal services, made me a lot of false testimonies and gave it to the court. This fraud has been working at this law firm for ten years, helping this black hearted law firm with many cases that were wrongfully decided. If there are others who were cheated like me, come and stand with me to expose them.

Hope you give me an explanation, otherwise starting next week possibly the whole Vancouver will know about this scandal.

[10] On the morning of August 19, 2022, Mr. Tian called Avid Law's office threatening that "if the problem is not solved" he would inform the media that Avid Law uses an unqualified interpreter who is a real estate agent.

[11] That afternoon, Mr. Tian left some documents at the front desk of Avid Law. The documents contained a photograph of Mr. Chen and included statements:

- that Avid Law has been using an uncertified interpreter for 10 years;
- that Mr. Chen has been practising law while suspended; and
- that questioned whether Avid Law was trustworthy.

[12] Mr. Tian left the same documents in a number of public locations throughout the office building in which Avid Law and other businesses operate.

[13] It is not in dispute that Mr. Chen was suspended by the Law Society for a two-week period in July 2022. Hearsay evidence before the chambers judge suggested that:

- Mr. Chen had not practiced during his suspension;
- the examinations for discovery of Ms. Ma and Mr. Tian were the first times that Avid Law had used the services of Ms. Lee;
- Ms. Lee had completed the Vancouver Community College Court Interpreter Certificate program in 1992;
- Ms. Lee had been interpreting for court matters for many years; and
- the Court Services Branch contracts with interpreters who are not members of the STIBC.

[14] On August 21, 2022, Mr. Tian forwarded to STIBC a copy of an affidavit sworn by Ms. Lee on August 6, 2022 in which she affirmed that she had obtained

certification from STIBC as a translator. Mr. Tian asked STIBC to confirm the contents of the affidavit.

[15] On August 22, 2022, Mr. Tian returned to the offices of Avid Law and left documents (referred to by Mr. Tian as a “pamphlet”) that contained a photograph of Mr. Chen, made a number of allegations against Mr. Chen and Avid Law, and included the following statements:

Based on the above, we say you two have misconducted yourselves as a law firm and are at risk of legal liability of being sued. [As interpreted]

So we demand, for the above problem, negotiate with you to resolve the conflict between us. [As interpreted.]

...

Avid Law Corporation has been using a [sic] uncertified interpreter who is a realtor, as its court certified interpreter for 10 years.

...

David Y. Chen, a barrister & solicitor, and a partner of Avid Law Corporation, has been suspended for misrepresentation, but has continued to practice while being suspended.

...

Is law firm of this kind still trustworthy?

...

Are you willing to work at such a law firm?

[16] Mr. Tian left copies of his pamphlet in a number of public locations in the office building where Avid Law operates.

[17] Later that afternoon, Avid Law sent an email to Mr. Tian advising that any further attendance at its offices or building premises would be considered trespass. Mr. Tian responded by sending an email to Mr. Chen questioning Avid Law’s ability to restrict his freedom to enter public spaces and asking: “Can you restrict my freedom to disclose all these facts to the public?”

[18] The same day, an employee of the STIBC replied to Mr. Tian’s August 21 email confirming that Ms. Lee was an associate member but was “NOT a certified translator or interpreter.” (Emphasis in original.) The STIBC employee expressed concern that Ms. Lee had “lied” in her affidavit when she stated that she had

“obtained certification (...) from the [STIBC] as a certified translator”. The STIBC employee indicated that she had “escalated the case internally”.

[19] That evening, Mr. Tian sent an email to Mr. Chen and others at Avid Law titled “Attention to: All Law Firms and Lawyers in BC” that said:

Amy Lee has been working as a certified translator and a certified court interpreter in BC for more than ten years.

It has been verified by the Society of Translators and Interpreters of British Columbia (STIBC) that Amy Lee has never obtained any certification from STIBC, nor is a certified translator or a certified court interpreter as purported. The STIBC is currently conducting an internal investigation against Amy Lee.

It was also found that Amy Lee has mainly provided translation/interpretation services for a law firm named Avid Law Corporation (formerly known as CNS Law Corporation) located in Richmond, BC in the past ten years.

Avid Law Corporation and its lawyers have been representing Amy Lee as a certified translator and a certified court interpreter, and have engaged Amy Lee to provide translation and interpretation of a large number of legal files (written or oral) in the past ten years.

It is concerning that numerous legal documents handled by Amy Lee would have no legal effect. It is also appalling that numerous documents handled by Amy Lee that have been filed in court and used by judges as evidence, may have misled the court, thus may have serious legal consequences.

We have also found that Lawyer David Y. Chen, a partner of Avid Law Corporation, has been suspended from the Law Society of BC for making false or misleading representation, but he has continued to practice during the suspension.

We hope that the law firms, lawyers, litigants or other parties who may have been adversely affected by the above-mentioned issues could get in touch with us as soon as possible, and we will provide you with the corresponding evidence.

[20] On August 23, 2022, a lawyer with Avid Law observed Mr. Tian in its office building. He left more copies of the pamphlet in various public locations throughout the building.

[21] On August 24, 2022, Mr. Yu brought his application, with short leave, and obtained the Macintosh Order. Mr. Tian did not appear at the hearing. The order prohibited Mr. Tian from:

1. trespassing on the premises of Avid Law; and

2. "slandering, publishing or causing to be published any defamatory statements directly or indirectly referencing Avid Law Corporation..., its partners, including David Chen..., and its employees."

[22] Following service of the order on Mr. Tian, a number of statements concerning Avid Law, Mr. Chen and Ms. Lee were published in a variety of ways. These statements were described by the judge at para. 12 of her reasons for judgment:

- 1) On August 25 an email to TCCBC, the Taiwanese Chamber of Commerce of which Mr. Chen is a director, stating that Mr. Chen "has a very poor reputation among lawyers and has been investigated by the Law Society many times". The plaintiff says that both of these statements are untrue. The president of the TCCBC sent a screenshot of the email to Mr. Chen;
- 2) Between August 24 and 26 a number of postings on Vansky.com, a lifestyle website for Chinese immigrants in Vancouver warning readers that:
 - i. "Avid has been using an uncertified interpreter for the past 10 years."
 - ii. Ms. Lee is "just a realtor".
 - iii. "There could be a lot of translations which might have misled the court into making wrong decisions."
 - iv. "The consequences could be too grave to contemplate!"
 - v. David Chen had his licence suspended "for making false statements", and other postings to this effect;
- 3) On August 25, a posting on Van People, a popular website with online forums for Chinese communities in the lower mainland, stating that David Chen had been suspended by the Law Society for fraudulent practices and posing the question: "Do you dare to hire such kind of lawyer?";
- 4) On August 25 a similar posting on Yorkbbs.ca, a website and popular forum for Chinese communities in Toronto; and
- 5) Between August 24 to 26 numerous postings on Xianhongshu, a popular social media platform used by Chinese in China and abroad, including Vancouver. Some of the postings include:
 - i. "the translator used by Avid for over 10 years is not certified and is being investigated for fraud";
 - ii. "David Chen's licence was suspended for fraudulent practice and he continued to practice."

[Emphasis in original.]

[23] On August 26, 2022, Mr. Tian emailed Mr. Chen saying, in part:

- “It is unclear to me as to the particulars of the ‘Defamatory Statements’ so I am unclear what purported statements I need to be enjoined from making”;
- “The disputes between you...and us arise from you using an uncertified interpreter at the examination for discovery on August 15 and 17, 2022, and you refused to change the interpreter when we questioned the qualification...and you forced us to proceed without a qualified interpreter”;
- “You have received many complaints since you became a lawyer over the past years...”;
- “I am reluctant to see that your reputation and career are in jeopardy as a young lawyer”.

[24] As noted above, Mr. Yu filed his application to find Mr. Tian in contempt of the Macintosh Order on August 29, 2022.

The Judge’s Reasons

[25] Before the chambers judge, Mr. Tian submitted that Mr. Yu’s application should be dismissed because: (1) it was based on hearsay; (2) the Macintosh Order was not clear; (3) the statements at issue were not defamatory; and (4) there was no proof that Mr. Tian authored the statements.

[26] The judge succinctly dismissed these arguments and found Mr. Tian to be in contempt. I reproduce the judge’s analysis in full:

[21] Regarding Mr. Tian’s argument that this court cannot make a finding of contempt because the evidence upon which this application is based, I disagree. Mr. Tian admits that he distributed the documents prior to the Macintosh Order and that all impugned communications after the order came from his email address. He further attests that he did not publish any more statements after the Macintosh Order. In determining the issue I must decide whether Mr. Tian was responsible for publishing the defamatory statements after the Macintosh Order and whether the published statements are defamatory. That determination rests on the published words and Mr. Tian’s admissions and evidence; not on hearsay.

[22] I also reject Mr. Tian's argument that the statements are not defamatory. While there is some truth to the comments, they go further with comments clearly intended to damage the reputations of Ms. Lee and Mr. Chen.

[23] The Macintosh Order came right on the heels of the documents Mr. Tian was distributing. I am satisfied that it was abundantly clear to him what "Defamatory Statements" were. Why else would he have suddenly stopped distributing his printed missives?

[24] I do not accept that Mr. Tian's daughter was responsible for the emails and postings following the Macintosh Order. It defies common sense. The complaints are the same. The publications before and after the Macintosh Order include striking similarities – as demonstrated by my emphasis above, and they include the same photograph of Mr. Chen that Mr. Tian used in his "pamphlets". The writer of the emails/postings states that Avid has been using the interpreter for 10 years. Mr. Tian says he was told that.

[25] Of significance, according to the evidence before me, which I accept as trustworthy and reliable, the interpreter has only been used once by Avid – during the examinations for discovery of Mr. Tian and his wife. They are the only people that have any reason to tie this interpreter to Avid, and therefore are the only people that would have a complaint against her and Avid.

[26] Although Mr. Tian states that his daughter created these postings, there is no affidavit from her.

[27] Having regard to the evidence as a whole, I am satisfied beyond a reasonable doubt that Mr. Tian is guilty of contempt of the Macintosh Order.

Analysis

Legal Principles Regarding Civil Contempt

[27] The legal principles regarding civil contempt were not in dispute before the chambers judge and are not in dispute on appeal. The leading case is *Carey v. Laiken*, 2015 SCC 17. At paras. 30–36, Justice Cromwell, for the Court, summarized the principles, in part, as follows:

[30] 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".

[31] With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive". However, one purpose of sentencing for civil contempt is punishment for breaching a court order. Courts sometimes impose substantial fines to match the gravity

of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct.

[32] 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.

[33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done". This requirement of clarity ensures that a party will not be found in contempt where an order is unclear...

[34] The second element is that the party alleged to have breached the order must have had actual knowledge of it...

[35] Finally, 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...

[36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court order. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect". As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments. Rather, it should be used "cautiously and with great restraint". It is an enforcement power of last rather than first resort.

[Citations omitted.]

[28] On the issue of clarity, a person accused of contempt is entitled to the most favourable interpretation of the order at issue: *Hansen v. Savignac*, 2011 BCCA 307 at para. 13 citing *Hama v. Werbes*, 2000 BCCA 367.

[29] On the issue of intent, an applicant does not need to establish beyond a reasonable doubt that a person accused of contempt intended to disobey the court order at issue. Rather, "all that is required... 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* at para. 38; see also *Langford (City) v. dos Reis*, 2016 BCCA 201 at para. 24.

Did the judge err by failing to consider whether the Macintosh Order was sufficiently precise and unambiguous to support a finding of contempt?

[30] Mr. Tian submits that the chambers judge erred by failing to consider whether the Macintosh Order was sufficiently precise and unambiguous to support a finding of contempt. He says she erred by instead considering whether Mr. Tian subjectively understood the order. Further, he submits that the word “defamatory” is ambiguous in the sense that it has common and legal meanings that differ. Finally, he submits that, while the post-Macintosh Order statements were disparaging, there was insufficient evidence to establish they were false. In other words, he submits that there was insufficient evidence to establish that they were “defamatory” in the legal sense of the word.

[31] In addressing Mr. Tian’s submission that the Macintosh Order was unclear because it did not specify what the “defamatory statements” consisted of, the judge held:

[23] The Macintosh Order came right on the heels of the documents Mr. Tian was distributing. I am satisfied that it was abundantly clear to him what “Defamatory Statements” were. Why else would he have suddenly stopped distributing his printed missives?

[32] As can be seen, the judge’s reasons on the first element of civil contempt are rather spare. However, trial reasons are to be read functionally and contextually. That means they must be read as a whole and in the context of the live issues at trial, informed by the positions of the parties. Trial reasons are not to be finely parsed in search for error: *R. v. G.F.*, 2021 SCC 20 at para. 69; *R. v. Pastro*, 2021 BCCA 149 at para. 53. Further, where trial reasons are ambiguous, interpretations that are consistent with a correct application of the law are to be preferred: *G.F.* at paras. 78–79.

[33] Earlier in her reasons, the judge correctly identified that Mr. Yu had to prove the three elements of civil contempt beyond a reasonable doubt. She explicitly stated that the order had to “clearly and unequivocally [state] what should have been done”. She also knew that Mr. Tian contended that the word “defamatory” was

ambiguous. In this light, when the judge stated that the meaning of the order was “abundantly clear” to Mr. Tian, she must be taken to have concluded that, objectively, the order was “clear and unequivocal”. To my mind, the real issue is whether the word “defamatory” as used in the Macintosh Order was impermissibly vague.

[34] In some cases, injunctions that prohibit the defendant from making any defamatory statements about the plaintiff may be vague because they do not make clear whether the defendant is prohibited from making statements that merely disparage the plaintiff or ones that satisfy all of the elements of the tort of defamation and cannot be saved by any of the defences: *Yu v. 16 Pet Food & Supplies Inc.*, 2023 BCCA 397 at para. 86.

[35] However, in other cases, injunctions prohibiting the publication of “defamatory” or “defaming” comments have been held not to prohibit the tort of defamation but rather the making of statements “which reasonable or right-thinking members of society would understand as lowering the reputation of the person about whom they are made”: *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation*, 2023 BCCA 298 at paras. 33–38. See also *R. v. Dhillon*, 2019 BCCA 373 at paras. 42–45.

[36] In my view, the order at issue in this case cannot be meaningfully distinguished from those at issue in *Delane Industry* and *Dhillon*. None of the orders “carve[d] out an exception for truth or any other defence that might be available to a claim in tort for defamation”: *Delane Industry* at para. 38. Rather, the orders were clearly related “to the nature or quality of the statements in issue”: *Delane Industry* at para. 37.

[37] In my view, the Macintosh Order clearly prohibited the making of statements that were capable of lowering the reputation of Avid Law and Mr. Chen in the eyes of reasonable members of society. Like *Delane Industry* and *Dhillon*, whether the statements at issue could be justified as being true was irrelevant. I would therefore not accede to this ground of appeal.

Did the judge err in finding that the post-Macintosh Order statements came from email addresses or “online handles” owned or controlled by Mr. Tian?

[38] Mr. Tian submits that the judge erred in concluding that the post-Macintosh Order statements came from email addresses or online handles owned or controlled by him in two ways. First, he says the judge misapprehended that he had admitted ownership of the email addresses and online handles. Second, he says the judge failed to consider the possibility that other persons may have been responsible for authoring the statements.

[39] In *R. v. Osinde*, 2021 BCCA 124, this Court comprehensively reviewed the law related to the misapprehension of evidence. I can do no better than quote the relevant passages from Justice Frankel’s judgment:

[17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes “as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction”: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence “may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence”: *Morrissey* at 218.

[18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge’s reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.

[19] Although a trial judge is uniquely positioned to make credibility assessments, where those assessments are based on misapprehensions of evidence and played a critical role in reaching a conviction, the assessments and the verdict will be insupportable: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. This is so even when the evidence adduced at the trial was capable of supporting a conviction: *Lohrer* at para. 1.

[20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: “[t]he plain language or the thrust of the reasons must disclose an actual mistake”: *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56–57, 59, 61–62. If so, then the

reasoning that led to a conviction is based on “unsteady ground”: *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge’s reasoning process.

[Emphasis added.]

[40] Here, the chambers judge found at para. 21 that Mr. Tian admitted that “all impugned communications after the order came from his email address”. I agree with Mr. Tian that this finding was not supported by the record.

[41] First, only the August 25, 2022 communication to the Taiwanese Chamber of Commerce came from an email address. Second, Mr. Tian did not admit that that email address was his and it did not match the email address Mr. Tian used in any other email communication that was before the chambers judge. Third, the balance of the statements at issue were in the form of online posts that were associated with various “online handles” and not email addresses. Finally, Mr. Tian did not admit ownership or control of any of the online handles associated with the posts.

[42] While the judge appears to have misapprehended the evidence concerning whether Mr. Tian admitted that all post-Macintosh Order communications came from his email address, it is not clear whether her misapprehension was material, played an essential role in her reasoning or resulted in a miscarriage of justice. That is because: (1) immediately after incorrectly stating that Mr. Tian admitted that the impugned communications came from his email address, she correctly stated that he denied publishing any statements after the MacIntosh Order; and (2) she then set out cogent reasons for concluding that it was Mr. Tian who had published the statements at issue.

[43] As noted in *Osinde*, in determining whether a material misapprehension resulted in a miscarriage of justice, “an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt”: at para. 20. In my view, the answer to that question turns, in part, on Mr. Tian’s argument that the judge failed to consider the possibility that other persons, including his wife or daughter, may have been responsible for the post-Macintosh Order statements.

[44] In support of this latter argument, Mr. Tian notes that there was no direct evidence that he owned or controlled the email address and/or online handles responsible for the email to the Taiwanese Chamber of Commerce and the post-Macintosh Order statements. The evidence identifying him as the culprit was entirely circumstantial.

[45] Mr. Tian relies on the leading criminal law case of *R. v. Villaroman*, 2016 SCC 33. In that case, at paras. 35–38, the Court held that:

- In circumstantial cases, the basic question is whether the circumstantial evidence viewed logically and in light of human experience is reasonably capable of supporting an inference other than the guilt of the accused.
- Inferences consistent with innocence do not have to arise from proven facts. They may also arise from the absence of evidence.
- When assessing circumstantial evidence, the trier of fact must consider plausible theories and reasonable possibilities other than guilt.
- While plausible theories and reasonable possibilities cannot be based on speculation, an alternative theory to guilt is not speculative simply because it arises from a lack of evidence.
- Finally, the Crown is not required to negate every possible alternative theory to guilt no matter how irrational or fanciful.

[46] Mr. Tian submits that, contrary to these principles, the judge either did not consider or gave no reasons for rejecting the possibility that others may have been responsible. Respectfully, I disagree.

[47] Reading the judge's reasons functionally, contextually and as a whole, it is clear that the judge based her decision on the following:

- The parties' dispute had been lengthy and acrimonious.

- During the examinations for discovery, Mr. Tian became upset and disruptive to the point that he subsequently prepared a document with disparaging comments about Avid Law, Mr. Chen and Ms. Lee, threatened to share that information with the media “if the problem [was] not solved” and then published and distributed documents with disparaging comments about Avid Law and Mr. Chen on more than one occasion.
- There was a close temporal connection between Mr. Tian publishing and distributing his “pamphlets”, the granting and service of the Macintosh Order, Mr. Tian’s discontinuance of distributing his “printed missives”, the email to the Taiwanese Chamber of Commerce and the various online posts.
- There were “striking similarities” between Mr. Tian’s printed materials and the email to the Taiwanese Chamber of Commerce and the online posts. The judge highlighted that the email and posts cumulatively repeated all of the disparaging allegations in Mr. Tian’s written materials and even included:
 - the same photograph of Mr. Chen that Mr. Tian used in his “pamphlets”; and
 - information that Mr. Tian said had been shared with him that Avid Law had been using Ms. Lee for ten years.
- In these circumstances, it “defie[d] common sense” that Mr. Tian’s daughter was responsible “for the emails and postings following the Macintosh Order.”
- Having accepted that Avid Law had not previously used Ms. Lee as an interpreter, only Mr. Tian and Ms. Ma had any reason to tie Ms. Lee to Avid Law and only they “would have a complaint against her and Avid.”

[48] I agree with Mr. Tian that some of these factors do not point exclusively to him. As he points out, others had access to the disparaging information in the post-Macintosh Order statements precisely because he had published this same information prior to the order having been made.

[49] However, Mr. Tian is the only person to whom each and every one of the factors identified by the judge points. Most importantly, he is the only person who became so upset that he threatened to publish disparaging information about Avid Law, Mr. Chen and Ms. Lee and then did so. Further, the only evidence suggesting that anyone else may have been involved was Mr. Tian's rather meek assertion that he "learned" that his daughter had made "several postings of her own regarding Mr. David Chen." Notably, he did not assert that she had made the posts at issue.

[50] Clearly, the judge considered Mr. Tian's theory that his daughter had published the post-Macintosh Order statements to be unreasonable and gave logical reasons for reaching that conclusion. The judge was not obliged to consider the speculative, unsupported and implausible theory that Mr. Tian's wife, Ms. Ma, or some unknown third party had done so. In particular, there was no reason for the judge to believe that Ms. Ma was so upset that she published the post-Macintosh Order statements and just happened to do so immediately after Mr. Tian had been served with the order. There was simply nothing in the record to suggest that Ms. Ma or any other person was involved.

[51] After excising the judge's misapprehension regarding Mr. Tian's purported admission, the constellation of factors identified by the judge cumulatively point directly and exclusively to him. The judge's misapprehension could not plausibly have left her with a reasonable doubt. I would therefore not accede to this ground of appeal.

Did the judge err in dismissing the possibility that Mr. Tian's daughter or wife may have been responsible for the post-Macintosh Order statements?

[52] Mr. Tian submits that the judge erred in dismissing the possibility that his daughter or wife may have been responsible for the post-Macintosh Order statements for three reasons. First, he submits that the judge committed a palpable and overriding error of fact when she inferred that Mr. Tian and not his daughter was responsible for the statements at issue. Second, he submits that the judge erred in law by drawing an adverse inference against him for failing to adduce evidence from

his daughter. Third, he submits that Mr. Tian erred in law by failing to apply the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[53] Mr. Tian's first argument is a repeat of his argument regarding the circumstantial nature of the evidence against him, which I have addressed above.

[54] In support of his second argument, Mr. Tian relies on *R. v. Durrive*, 2005 BCCA 487. In that case, this Court allowed a criminal conviction appeal on the basis that the trial judge erred by relying on the fact that the accused had not tried to contact a witness to give evidence at trial. The Court reasoned:

[25] A comment to the effect that if the accused was innocent he would have called a particular witness was found to be error in *R. v. Rooke* (1988), 40 C.C.C. (3d) 484 (B.C.C.A.). There, at 518 Mr. Justice Esson, referring to *R. v. Koffman* and *Hirschler* (1985), 20 C.C.C. (3d) 232 (Ont. C.A.), delineated the caution that must be used in taking any adverse conclusion from the failure to call a witness, and confirmed that an instruction which suggests that there is an onus upon the defence to produce corroborative evidence of the testimony of the accused is in error.

...

[27] On the evidence before the trial judge, the [witness] appears not to have been known by Mr. Durrive except casually. The comment on Mr. Durrive's attitude to the absence of this witness appears, on the record, to be speculation, and ignores the role of counsel in marshalling the case for the accused. Lastly, as I have indicated, the comment suggests that Mr. Durrive should have been concerned to prove his innocence, which was not his obligation and not the task of his counsel. These considerations lead me to conclude that the wrong turn taken on a matter central to the trial judge's assessment of Mr. Durrive's credibility, and thus to his application of *W.(D.)*, fatally undermines the verdict.

[55] There is no dispute that the onus was on Mr. Yu to prove Mr. Tian's civil contempt beyond a reasonable doubt. There was no onus on Mr. Tian to prove his "innocence". But Mr. Tian's second argument fails because, unlike *Durrive*, the chambers judge did not draw an adverse inference against him for failing to adduce evidence from an apparently important witness, his daughter. Instead, the judge simply noted that there was no affidavit from her. The judge did not state that there was an onus on Mr. Tian to adduce evidence from any source or that she was relying on the absence of evidence from Mr. Tian's daughter to find him less

credible. The judge had to make her decision on the record before her and, for better or worse, that record did not include an affidavit from Mr. Tian's daughter.

[56] Finally, in support of his third argument, Mr. Tian relies on *Transportation Lease Systems Inc. v. Viridi*, 2010 BCCA 347. In that case, this Court held that the well-known principles from *W.(D.)* apply in the context of civil contempt proceedings:

[63] Although contempt is a quasi-criminal, as opposed to criminal, offence, it does involve the application of the criminal burden of proof. This being so, it is important to keep in mind that even when a trier-of-fact in a criminal prosecution has rejected the evidence of an accused, that evidence may still raise a reasonable doubt. The leading case in this regard is *R. v. W.(D.)*, [1991] 1 S.C.R. 742, wherein Mr. Justice Cory provided the following example of how a jury should be instructed with respect to an accused's credibility (at 758):

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[Emphasis in original.]

[57] The chambers judge did not mention *W.(D.)* in her reasons, nor did she follow its suggested formula for assessing the credibility of an accused person. But, she was not invited by counsel to consider *W.(D.)*, nor was she required to do so. The paramount question before her was whether, on the whole of the evidence, she was left with a reasonable doubt that Mr. Tian was guilty of civil contempt: *R. v. Vuradin*, 2013 SCC 38 at para. 21. On a fair reading of her reasons for judgment, there is no reason to think the judge lost sight of the basic task she identified for herself, particularly in light of the succinct but cogent reasons she provided and her express conclusion that “[h]aving regard to the evidence as a whole,” she was satisfied beyond a reasonable doubt of Mr. Tian's contempt.

[58] I would therefore not accede to this ground of appeal.

Disposition

[59] The contempt application in this case proceeded very quickly after the post-Macintosh Order statements were posted. While there is no question that seeking an order for civil contempt is a last rather than first resort, there is no basis on which this Court can interfere with the judge’s exercise of her discretionary power to find Mr. Tian in contempt.

[60] For all of these reasons, I would dismiss the appeal.

“The Honourable Justice Marchand”

I AGREE:

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Justice Skolrood”