

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yang v. Lu*,
2025 BCSC 154

Date: 20250131
Docket: S2013500
Registry: Vancouver

Between:

Xiaoqin Yang and Ming Zhang

Plaintiffs

And

**Ping Hui Lu, Unison International Holdings Ltd., Baocheng Su,
Yong Jiu Jiang and Chang Jun Qiao**

Defendants

And

Ping Hui Lu

Plaintiff by Counterclaim

And

**Xiaoqin Yang
Ming Zhang**

Defendants by Counterclaim

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Plaintiffs and Defendants by
Counterclaim:

M. B. Funt
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Counsel for the Defendants, Unison
International Holdings Ltd., Baocheng Su,
Yong Jiu Jiang and Chang Jun Qiao:

J. J. Watson

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.
January 13-14, 2025

Place and Date of Judgment:

Vancouver, B.C.
January 31, 2025

I. INTRODUCTION

[1] This is an application to dismiss all or part of an action brought within the context of a factually and procedurally complex commercial dispute that primarily involves two married couples. The plaintiffs are one of those couples.

[2] A significant portion of the dispute was addressed by the Court further to a trial that took place in 2022. What remains are the plaintiffs' claims for breach of trust and oppression brought against a corporation and its directors. They are slated to be addressed at a second trial scheduled for June 2025. However, the corporation and three of the directors now wish to have the claims against them dismissed summarily prior to this trial.

[3] After reviewing the record before me, I am not persuaded that it would be appropriate to grant the summary relief being sought. In particular, it is not plain and obvious that the plaintiffs' remaining claims do not disclose reasonable causes of action against the applicants, or that there are no genuine issues for trial. That said, it would be of assistance to the parties and to the Court for the pleadings to be amended to reflect more clearly what will be in issue at the upcoming trial. An order to that effect will be issued. My detailed reasons for reaching these conclusions follow.

II. BACKGROUND

[4] Much of the background is set out in the many reported judgments that have been issued by the Court in this matter. The most significant is the trial judgment of Justice G.C. Weatherill indexed at *Zhang v. Zhang*, 2022 BCSC 2156 (the "Weatherill Judgment"). Also worth noting are these recent interlocutory judgments:

- (a) *Yang v. Lu*, 2024 BCSC 993 (Ross J.);
- (b) *Yang v. Lu*, 2024 BCSC 729 (Shergill J.); and
- (c) *Zhang (Re)*, 2024 BCSC 553 (Gomery J.).

[5] I will not attempt to summarize all of the details set out in these judgments. Instead, I will simply highlight those aspects which are relevant to the present application that is before me.

[6] The main protagonists are two married couples who were involved in a number of business ventures with each other. The first couple consists of Ms. Xiaoqin (Rose) Yang and her spouse Mr. Ming (Myles) Zhang. The second couple consists of Ms. Ping Hui (Helen) Lu and her spouse Mr. Guang Ning (Nick) Zhang. The male spouses have the same last name (Zhang), but are not related. For clarity, these four individuals will be referenced by their English names: (1) “Rose”; (2) “Myles”; (3) “Helen”; and (4) “Nick”. This approach has been used in previous reasons for judgment in this matter. I will do the same here, intending no disrespect. Also, when it is appropriate to reference a particular couple as a spousal unit, these shorthands will be used: (1) “Rose & Myles”; and (2) “Helen & Nick”.

[7] The business venture that underlies the issues raised in this specific application is an investment scheme in an electric car company called ElectraMeccanica Vehicles Corp. (“EVC”). Another company called Unison International Holdings Ltd. (“Unison”) was set up for the purpose of making this investment. Unison currently has three active directors: (1) Mr. Baocheng Su (“Mr. Su”); (2) Mr. Yong Jiu Jiang (“Mr. Jiang”); and (3) Mr. Chang Jun Qiao (“Mr. Qiao”). These three individuals will be referenced collectively as the “Unison Directors”. Helen was also a director of Unison but can no longer act in this capacity since her bankruptcy.

[8] The present proceeding was commenced when Rose & Myles filed a petition on December 18, 2020. Helen, Unison, and the Unison Directors were named as respondents. Rose & Myles have sought relief in relation to Unison and EVC shares and warrants based largely on trust principles, as well as corporate oppression remedies. The petition was converted into an action by court order dated April 1, 2021. This proceeding will be referenced as “the Unison Trust Action” (as was done in the Weatherill Judgment).

[9] On December 16, 2021, the Court ordered that the Unison Trust Action be tried at the same time as another action that Rose & Myles had commenced against Helen & Nick. That other action will be referenced as the “Discounted EVC Units Trust Action” (as was done in the Weatherill Judgment). However, the Court’s order also provided for a severance of a portion of the Unison Trust Action. Specifically, it effectively directed that issues relating to Helen and the Unison Directors’ conduct as Unison shareholders, including their alleged oppressive behaviour, be determined separately at a later date.

[10] The Discounted EVC Units Trust Action and the unsevered portion of the Unison Trust Action were tried over 31 days in 2022, culminating in the Weatherill Judgment dated December 9, 2022. Rose & Myles were largely successful, and are owed over six million dollars further to the judgment. Helen & Nick were subsequently assigned into bankruptcy.

[11] The remaining portion of the Unison Trust Action is now scheduled for a 14-day trial starting June 16, 2025. Nick is not a party to this proceeding, and it is stayed in respect of Helen by operation of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Rose & Myles’ application to lift the stay was dismissed by Justice Shergill on April 30, 2024: *Yang v. Lu*, 2024 BCSC 729.

[12] On August 8, 2024, the present application to dismiss was filed by Unison and the Unison Directors. When appropriate, they will be referenced collectively as “the Unison Applicants”. Their application is based on Rule 9-5 (the application to strike rule) and Rule 9-6 (the application for summary judgment rule).

[13] The Unison Applicants seek an order that Rose & Myles’ fourth amended notice of civil claim (which is their most recent pleading, and will be referenced as the “4th ANOCC”) be struck or dismissed in its entirety. The Unison Applicants say that none of Rose & Myles’ claims against them are viable. In the alternative, if the Court is only persuaded that some of these claims are non-viable, then the Unison Applicants ask that the specific paragraphs relating to the unfounded claims in the 4th ANOCC be struck instead.

[14] Rose & Myles say that the Unison Applicants' application should be dismissed. While acknowledging that the 4th ANOCC has some flaws, they say it sets out viable claims and provides sufficient notice of their factual and legal basis. In the alternative, Rose & Myles ask the Court to grant them leave to file another amended notice of civil claim to remedy any deficiencies in their existing pleading. To that end, Rose & Myles have drafted a fifth amended notice of civil claim (the "Draft New ANOCC").

[15] The hearing of the application came before me in chambers on January 13 and 14, 2025. It was attended by counsel for the Unison Applicants, and by counsel for Rose & Myles. At its conclusion, I took the matter under reserve so that I could review the record and the written submissions prepared by counsel, which I found helpful.

III. THE IMPUGNED CLAIMS

[16] There is general agreement between the parties that there are three aspects to Rose & Myles' claims against the Unison Applicants that remain to be decided in the wake of the Weatherill Judgment.

[17] The first is a breach of trust claim made by Myles in relation to EVC warrants that are said to be held in trust for Myles' benefit ("Myles' EVC Warrants Claim").

[18] The second is a breach of trust claim made by Rose in relation to EVC shares and warrants that are said to be held in trust for Rose's benefit ("Rose's EVC Shares and Warrants Claim").

[19] The third is a shareholder oppression claim made by Rose pursuant to s. 227 of the British Columbia *Business Corporations Act*, SBC 2002, c. 57 [BCA] ("Rose's Oppression Remedy Claim").

[20] The factual and legal elements of these three claims as pleaded by Rose & Myles in the 4th ANOCC can be summarized as follows.

A) Myles' EVC Warrants Claim

[21] As explained by his counsel, Myles claims that he was the one who initially introduced the EVC investment opportunity to its investors, namely: Rose, Helen, Mr. Su, Mr. Jiang, and Mr. Qiao. In October 2016, they decided to incorporate Unison as a vehicle to effect this investment. They also agreed to invest a total of \$2,000,000 in Unison, which in turn would buy 2,400,000 EVC shares and 4,000,000 EVC warrants.

[22] Myles did not, however, invest personally in Unison. Instead, it was his wife Rose who invested \$500,000 in the company, although it was agreed that her investment would be made in Helen's name. In addition, Helen invested another \$500,000 of her own money in Unison. The remaining \$1,000,000 was invested by Mr. Su (\$200,000), Mr. Jiang (\$300,000), and Mr. Qiao (\$500,000). The resulting distribution of Unison's 100 shares among its registered shareholders was as follows:

- (a) Helen: 50 shares (25 of which were held in trust for Rose);
- (b) Mr. Su: 10 shares;
- (c) Mr. Jiang: 15 shares; and
- (d) Mr. Qiao: 25 shares.

[23] It was also agreed that Unison would have four "registered directors" - Helen (the president), Mr. Su, Mr. Jiang, and Mr. Qiao – and two "*de facto* directors" - Rose and Myles.

[24] On November 19, 2016, Unison's board of directors passed a resolution that 2,000,000 of Unison's 4,000,000 EVC warrants be given to Myles and that Unison hold those warrants in trust for Myles. This was done in recognition of Myles' role in introducing the EVC investment opportunity and as Unison's "company adviser". There was a subsequent reorganization of EVC involving a 2:1 reduction of its outstanding shares and warrants which effectively modified Myles' entitlement to 1,000,000 EVC warrants.

[25] However, Unison never transferred any EVC warrants to Myles. Furthermore, Unison's registered directors caused Unison to deny the authenticity of the November 19, 2016 resolution that Myles be given EVC warrants. The registered directors also caused Unison to exercise a significant number of its EVC warrants. This was done without Myles' approval, and Myles did not receive any benefits therefrom.

[26] Myles therefore claims that Unison held 1,000,000 EVC warrants in trust for him, and that Unison breached that trust. Myles claims further that the Unison Directors were also trustees of the 1,000,000 EVC warrants for Myles, and that their actions as Unison directors also constituted a breach of trust. Myles claims compensatory and punitive damages for these breaches.

B) Rose's EVC Shares and Warrants Claim

[27] The origin of Rose's breach of trust claim is fundamentally the same as that set out above at paras. 21-23 of these reasons. As explained by her counsel, it was agreed in October 2016 that Rose's investment in Unison would be made through Helen. Rose then gave Helen \$500,000 to purchase 25 shares in Unison. While these 25 shares were all registered in Helen's name, it was understood that Rose was their beneficial owner and that Helen would hold them in trust for Rose.

[28] In or around December 2018, Helen indicated that she wished to formally transfer to Rose the 25 Unison shares so that Rose could legally hold them in her own name. To that end, Unison's corporate solicitor was tasked by Helen in April 2019 to prepare documentation to effect a transfer of the 25 Unison shares to Rose, and to appoint Rose as the fifth registered director of Unison. This documentation was signed by Helen and Rose. The other Unison Directors either signed or were willing to sign the documentation as well.

[29] Shortly thereafter, Helen & Nick and Rose & Myles had a falling out over an unrelated business venture. Helen then refused to give effect to either the transfer of the 25 Unison shares to Rose, or to Rose's appointment as a registered Unison director. The other Unison Directors did the same, at Helen's urging. They also

subsequently denied the existence of any agreement to transfer Unison shares to Rose or to provide her with a Unison directorship.

[30] Then, in December 2019, Helen and the Unison Directors caused Unison to distribute EVC shares and cash to themselves. In January 2021, at the urging of the Unison Directors, Helen paid Unison approximately \$800,000 to enable the company to exercise 210,000 EVC warrants and acquire 210,000 EVC shares. They did all this without Rose's approval, and Rose did not receive any benefits therefrom.

[31] In the Weatherill Judgment dated December 9, 2022, the Court declared that Helen holds 25 shares in Unison in trust for Rose. The Court also found that Rose is entitled to judgment against Helen for breach of trust in the amount of \$3,737,362 plus interest.

[32] Rose now wishes to proceed with her remaining claim against Unison and the Unison Directors. Rose alleges that the Unison Directors knowingly assisted Helen in her breach of trust with respect to the 210,000 EVC shares, and the remaining EVC shares and warrants. Rose also alleges that the Unison Directors acted as trustees *de son tort* for Rose in possessing and administering her trust property. Rose claims that this property consists of Rose's direct interest in the 25 Unison shares, through which she then has an indirect interest in the EVC shares and warrants attributable to Rose based on her 25% share ownership of Unison. Rose claims compensatory and punitive damages accordingly.

C) Rose's Oppression Remedy Claim

[33] Rose also brings an oppression remedy claim against Unison and the Unison Directors in her capacity as a beneficial Unison shareholder pursuant to s. 227 of the *BCA*. As explained by her counsel, Rose's basic allegation is that the affairs of Unison were conducted and that the powers of the Unison Directors were exercised in a manner that was oppressive, prejudicial, and discriminatory to Rose.

[34] In particular, Rose says that she expected that she would become a shareholder and a director of Unison, and that she would participate in Unison's

management and decision-making. These expectations were not met in that the Unison Directors, at Helen's urging, did not approve: (1) a transfer to Rose of the 25 Unison shares held by Helen in trust for Rose; and (2) Rose's appointment as a registered director of Unison.

[35] The Unison Directors also caused Unison to distribute EVC shares and cash to themselves and Helen, including EVC shares which rightfully belonged to Rose, and then concealed this distribution from Rose. The Unison Directors further acted oppressively through the positions they have taken in this litigation, notably, the support they afforded to Helen's unfounded denial of the trust over the 25 Unison shares that Rose purchased but which were registered in Helen's name.

[36] Rose now seeks a number of oppression remedies. They include the winding up of Unison pursuant to s. 324 of the *BCA*, as well as orders restraining Unison from disposing of its property, including EVC shares and warrants, without the approval of the Court or the parties. Rose also seeks monetary compensation for the damages she suffered as a result of the oppression she experienced, payable both by Unison and the Unison Directors personally.

IV. ANALYTICAL FRAMEWORK

[37] There are two facets to the Unison Applicants' application to dismiss.

[38] The first is an application to strike based on the assertion that all or some of Rose & Myles' three claims outlined above disclose no reasonable cause of action as per Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. In *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 2, our Court of Appeal set out the applicable test for such applications in these words:

[2] It is settled law that an application made by a defendant to have a plaintiff's pleadings struck is brought on the basis that the action(s) asserted therein cannot succeed as a matter of law. The chambers judge considers only the plaintiff's pleadings, and assumes them to be true. The threshold to be met by the plaintiff is a low one; an order striking out pleadings is made only in "plain and obvious" cases. (See *A.G. of the Duchy of Lancaster v. London & North Western Railway Co.* [1892] 3 Ch. 274; *Hunt v. Carey Canada Inc.* 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959; *International Taoist*

Church of Canada v. Ching Chung Taoist Association of Hong Kong Ltd. 2011 BCCA 149 at para. 9.) Courts are enjoined not to rule out pleadings merely because the cause of action asserted is novel. If the claim is arguable, or can be amended to be so, it should be permitted to proceed: see *R. v. Imperial Tobacco Ltd.* 2011 SCC 42 at para. 21.

[39] While their notice of application also makes reference to the notion of striking claims on the basis that they are unnecessary, scandalous, frivolous, vexatious or an abuse of process (i.e., Rule 9-5(1)(b) and (d)), counsel for the Unison Applicants did not seriously press this point in his submissions. Instead, he fairly advanced his Rule 9-5 argument as a straightforward question of whether Rose & Myles' pleading adequately sets out the facts and the law in support of their three claims. As such, my application to strike analysis will be done solely under Rule 9-5(1)(a).

[40] The second facet of the Unison Applicants' application is their request for summary judgment based on the assertion that all or some of Rose & Myles' three claims do not give rise to genuine issues for trial as per Rule 9-6 of the *Rules*. In *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48-49 our Court of Appeal set out the applicable test for such applications in these words:

[48] Rule 9-5 is a challenge on the pleadings. Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 1980 CanLII 493 (BC SC), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10–11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.

[49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le*,

2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8-12.

[41] Accordingly, the analytical framework for this application will be as follows.

[42] Starting with Myles' EVC Warrants Claim, I will review how it is pleaded in the 4th ANOCC and consider whether it is plain and obvious that this claim cannot succeed. If the answer to that question is yes, I will then examine whether this claim can be amended so as to be arguable. If it cannot, this claim will be struck.

[43] If it is not plain and obvious that this claim cannot succeed, I will turn to the question of whether this claim raises no genuine issue for trial. The latter question will entail consideration of the parties' evidence. If the question is answered in the affirmative, this claim will be dismissed. If the question is answered in the negative, this claim will be permitted to proceed to trial.

[44] This exercise will then be repeated sequentially in relation to Rose's EVC Shares and Warrants Claim, and lastly in relation to Rose's Oppression Remedy Claim.

V. ANALYSIS

A) Viability of Myles' EVC Warrants Claim

The Unison Applicants' Position

[45] The Unison Applicants' primary submission as to why Myles' EVC Warrants Claim is not viable is that the 4th ANOCC does not plead the necessary material facts to establish the existence of a trust.

[46] In particular, they say that the facts pled do not show any certainty of intention to impose fiduciary obligations on a trustee in relation to the warrants for Myles' benefit. They compare the ambiguous wording of the November 19, 2016 resolution relied upon by Myles with the clearer wording of the October 19, 2016 "Appointment and Declaration of Trust" which the Weatherill Judgment found to create a trust with respect to the 25 Unison shares Helen held for the benefit of Rose. They say that,

taken at its highest, the November 19, 2016 resolution simply provides for an unenforceable promise by Unison to gift warrants to Myles at a later date.

[47] The Unison Applicants also advance three supplemental arguments. First, they say that the warrants could not be the subject of a trust since they were non-transferable by virtue of the terms of the EVC warrant certificate and subscription agreement, and because of restrictions imposed by the British Columbia *Securities Act*, RSBC 1996, c. 418. Second, they say that the November 19, 2016 “resolution” was simply drawn from minutes of a shareholders’ meeting and is not a valid and binding directors’ resolution capable of creating a trust. Third, they say that even if a trust had been created in respect of the warrants, the trustee would be Unison and not the Unison Directors as no justification has been pled for piercing the corporate veil.

Rose & Myles’ Position

[48] Rose & Myles submit in response that the 4th ANOCC does set out sufficient facts to show that a trust was created in respect of the EVC warrants for Myles’ benefit on November 19, 2016, with Unison being the trustee. The pleading also sufficiently pleads facts regarding Unison’s breaches of its fiduciary duty to Myles by denying him the benefits of these warrants. Rose & Myles assert further that the Unison Directors should be personally liable for these breaches since they participated in and assisted Unison with them.

[49] With respect to the Unison Applicants’ other arguments, Rose & Myles submit that they lack merit. First, they dispute that the alleged limits on the transferability of the EVC warrants are a bar to making a trust claim in respect of the warrants, noting in particular that Unison was able to exercise the warrants for the personal benefit of the Unison Directors and therefore ought to have been able to do the same for Myles. Second, they disagree that a directors’ resolution is required to create a trust. Third, they submit that both a corporation and its directors can be liable for breaching fiduciary duties in respect of the same property.

Discussion

[50] Having reviewed the 4th ANOCC, I am not persuaded that it is plain and obvious that Myles' EVC Warrants Claim cannot succeed.

[51] To the contrary, I find that paragraphs 15-17, 29-31, 33, 35, and 38 of Part 1, when read with paragraphs 9-16, and 21-25 of Part 3, set out a sufficient factual and legal basis that, if established on the evidence, arguably could entitle Myles to one or more of the remedies he seeks at paragraphs 2-7, 16, and 31-33 of Part 2 of the 4th ANOCC.

[52] I also reject the specific arguments advanced by the Unison Applicants as to why Myles' EVC Warrants Claim is destined to fail.

[53] The legal principles that apply to a consideration of whether an express trust has been created are well known. A helpful summary was set out by our Court of Appeal in *Xu v. Hu*, 2021 BCCA 2 at paras. 12-18. Most importantly, there must be certainty of intention, certainty of subject, and certainty of object (the so-called "three certainties"), and the property must have vested in the trustee. No particular form of words is required to create a trust, although it must be clear that the donor intended the property to be subject to a trust and not simply gifted. In this case, paragraph 15 of Part 1 of the 4th ANOCC arguably sets out the necessary facts to show the three certainties, as follows:

15. The plaintiff, [Myles], introduced the EVC investment opportunity to [Rose, Helen, Mr. Su, Mr. Jiang, and Mr. Qiao] and to Unison and assisted Unison in acquiring the said EVC Units and Warrants. In recognition of those services, on or about November 19, 2016, [Rose, Helen, Mr. Su, Mr. Jiang, and Mr. Qiao] through Unison agreed to give 2,000,000 EVC warrants to [Myles] and cause Unison to hold those warrants in trust for [Myles] until they became exercisable and to then cause Unison to transfer them or the benefit of them to [Myles] on his request. Unison's Board of Directors of Unison passed a resolution as follows:

"The total investment this time is C \$2,000,000 for the purchase of 2,000,000 [2,400,000] EMV shares, and 4,000,000 share warrants (Unison).

Among them, 2,000,000 share warrants are gifted to [Myles] for his position as the company adviser, they do not belong to Unison company, and [Myles] has the right to control (and dispose) them.

[emphasis added, not in original]

[54] In so finding, I acknowledge that the evidence ultimately led at trial may demonstrate that the November 19, 2016 resolution amounted to nothing more than an “imperfect gift”, as the Unison Applicants’ submit. However, it is by no means plain and obvious that Myles’ assertion that a trust was created instead is bound to be rejected.

[55] Similarly, I do not accept that any of the Unison Applicants’ other criticisms of how Myles’ EVC Warrants Claim has been pled meet the high threshold of demonstrating that it plainly and obviously must fail.

[56] In particular, counsel for the Unison Applicants did not identify any clear jurisprudential or legislative authority for the propositions that non-transferable warrants cannot be the subject of a trust, or that directors’ resolutions are a pre-condition for trusts to be created by corporations. In the absence of such authority, I am not prepared to dismiss Myles’ EVC Warrants Claim on a pleadings motion. And while I acknowledge that our Court of Appeal indicated in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 71 that it is not acceptable to plead undifferentiated allegations against a corporation and its directors and employees, that is not what Rose & Myles have done in the 4th ANOCC. Rather, I accept that the pleading adequately delineates the impugned conduct of Unison and the Unison Directors and the different bases for their alleged liability to Myles in respect of the EVC warrants to survive an application to strike.

[57] In sum, the Unison Applicants’ challenge to Myles’ EVC Warrants Claim based on Rule 9-5 will be dismissed.

[58] I turn now to the question of whether summary judgment should be granted in favour of the Unison Applicants with respect to Myles’ EVC Warrants Claim because it raises no genuine issue for trial. In order to answer that question, I must first consider whether the Unison Applicants have adduced evidence that gives a

complete answer to the claim. Only if this evidence demonstrates that the claim has no chance of success can summary judgment be granted.

[59] I note first that this is another aspect of this application which was not pressed in argument by the Unison Applicants. While they filed six supporting affidavits, I was not directed to any of them specifically by counsel for the Unison Applicants. I also note that only one of their affidavits – that of Mr. Jiang sworn back on February 1, 2021 - was actually made by a party to this litigation. The other five affidavits were all made by paralegals employed by the law firm that represents the Unison Applicants. They only contain hearsay evidence, mostly in the form of documentary exhibits. The same can be said of the four affidavits that were filed in response, all of which were made by legal assistants employed by the law firm that represents Rose & Myles.

[60] I have nevertheless reviewed all of the affidavits. However, none of them, including the affidavit of Mr. Jiang made four years ago and prior to the Weatherill Judgment, read individually or collectively, demonstrate that Myles' EVC Warrants Claim is bound to be dismissed. At best, Mr. Jiang makes the following vague assertion at paragraph 16 of his affidavit:

16. In response to paragraph 17 of the Yang Affidavit and in response to paragraphs 20 and 41 of the Zhang Affidavit, at no time did Unison promise, gift, or transfer any money, warrants, shares or units from or in Unison or EVC to [Myles].

[61] Such a basic bald denial by Mr. Jiang without any further particulars falls far short of showing that Myles' EVC Warrants Claim must fail. This is especially the case when the other Unison Directors – Mr. Su and Mr. Qiao – did not see fit to tender their own affidavits for this application.

[62] Accordingly, I will not grant summary judgment in favour of the Unison Applicants in respect of Myles' EVC Warrants Claim either.

B) Viability of Rose's EVC Shares and Warrants Claim

The Unison Applicants' Position

[63] The Unison Applicants argue that Rose's EVC Shares and Warrants Claim is not viable because the 4th ANOCC does not properly plead its basis in fact and in law.

[64] In particular, they note that the Unison Applicants are third parties to the trust that was found by the Weatherill Judgment to exist in respect of the 25 Unison shares held by Helen as trustee for the benefit of Rose. As per the Supreme Court of Canada's decision in *Air Canada v. M & L Travel Ltd.*, [1993] 3 SCR 787 [*"Air Canada"*] at 809-810, there are two bases upon which a stranger to a trust can be held liable as a constructive trustee for breach of trust: (1) as a trustee *de son tort*; and (2) through knowing participation in a breach of trust. Furthermore, there are two sub-sets to knowing participation: (1) knowing assistance; and (2) knowing receipt.

[65] The Unison Applicants submit that while the 4th ANOCC pleads that they are all "trustees *de son tort*", it does not plead the necessary elements to establish that particular basis for constructive trust liability. In particular, there is no allegation that the Unison Directors took possession of the trust property, a necessary precondition for a finding of liability against a trustee *de son tort*.

[66] At the same time, the Unison Applicants acknowledge that they could potentially face liability through the "knowing assistance" branch of the "knowing participation" basis for being a constructive trustee as identified in *Air Canada*. However, the Unison Applicants say that the 4th ANOCC does not set out with sufficient precision the factual basis for such a claim, and that it therefore ought to be struck.

Rose & Myles' Position

[67] At the hearing, counsel for Rose & Myles clarified that their primary position is that the Unison Directors should be held liable for knowingly assisting Helen in

breaching the trust obligations she owed to Rose. Their alternative position is that the Unison Directors acted as trustees *de son tort* in possessing and administering the trust property. They acknowledge that the 4th Amended NOCC does not plead the latter in the alternative, and that the pleading conflates the concepts of constructive trustee liability based on “trustees *de son tort*” and “knowing assistance”.

[68] Rose & Myles nevertheless insist that an adequate factual foundation has been pled in the 4th ANOCC in support of Rose’s EVC Shares and Warrants Claim. They also propose that the confusing manner in which the underlying law is pleaded can be addressed through an amendment along the lines of what is set out in Rose & Myles’ Draft New ANOCC.

Discussion

[69] I find that it is not plain and obvious that Rose’s EVC Shares and Warrants Claim cannot succeed.

[70] In my view, the factual basis for the claim is adequately set out at paragraphs 17, 20, 25 to 28, 32, 35, and 38 of Part 1 of the 4th ANOCC. They are fairly and concisely summarized in counsel for Rose & Myles’ written submissions as follows:

- (a) The [Unison Directors] routinely cast their votes as directors or shareholders of Unison in the manner recommended by Helen (para. 17).
- (b) The [Unison Directors] received a consent resolution prepared by Mr. Mao [Unison’s corporate solicitor] to transfer the shares to Rose (para. 20).
- (c) The [Unison Directors], contrary to Rose’s expectations, declined to approve the transfer of shares to Rose and her appointment as a director (para. 25).
- (d) The [Unison Directors], after receiving a request in writing from counsel requesting the shares be transferred, without the knowledge or consent of the plaintiffs, caused Unison to distribute the EVC shares and cash to them personally, including the transfer of Rose’s shares to Helen and actively concealed the said distribution (paras. 26-27).
- (e) Failure of the [Unison Directors] to respond to a second written request to transfer Rose the shares (para. 28).
- (f) By denying the beneficial ownership of Rose to the Unison Shares and denying her right to participate in the decision making process, the [Unison

Directors] became trustees *de son tort* for her indirect interest in 25% of the shares and warrants (para. 32).

(g) The [Unison Directors] caused Unison to deny ownership to Rose (para. 35).

(h) The [Unison Directors] concealed that Helen had put money back into Unison to exercise warrants in order to rebuy Rose's shares, all while denying the trust to the court. This was only discovered after the trial (para. 38).

[71] On the other hand, the legal basis for the claim is confusingly pled in the 4th ANOCC. While I accept that Rose & Myles intended to claim primarily that the Unison Applicants are liable as constructive trustees for knowingly assisting Helen with breaching her trust obligations to Rose, or alternatively as trustees *de son tort*, the alternative nature of the claim is not stated in the pleading. That said, it would elevate form over substance to sanction this deficiency by dismissing the claim in its entirety, as the Unison Applicants request me to do. Instead, I am of the view that this can be addressed by permitting Rose & Myles to effect amendments essentially as proposed in their Draft New ANOCC. The specifics of how that ought to be done will be discussed in the conclusion to these reasons.

[72] I turn now to the Unison Applicants' request for a summary judgment dismissing Rose's EVC Shares and Warrants Claim. For fundamentally the same reasons as are set out above at paragraphs 58-62, I find that there is no valid basis for such a judgment. In particular, the only affidavit made personally by a Unison Director – that of Mr. Jiang – is silent on the extent to which he or the other Unison Directors were involved in Helen's breach of trust obligations to Rose as found in the Weatherill Judgment.

[73] In sum, the Unison Applicants' challenge to Rose's EVC Shares and Warrants Claim based on Rules 9-5 and 9-6 will be dismissed.

C) Viability of Rose's Oppression Remedy Claim

The Unison Applicants' Position

[74] The Unison Applicants submit that Rose's Oppression Remedy Claim is not viable because the 4th ANOCC provides insufficient particulars with respect to her reasonable expectations.

[75] In addition, the Unison Applicants take issue with Rose's allegation at paragraph 9 of Part 1 of the 4th ANOCC to the effect that Rose & Myles expected that one or both of them would become shareholders in Unison. They say that such an allegation cannot be accepted when the purpose of structuring Rose's investment in Unison by placing it in Helen's name was to hide it from Rose & Myles' creditors in China.

Rose & Myles' Position

[76] Rose & Myles assert to the contrary that the particulars of Rose's Oppression Remedy Claim are clearly set out in the 4th ANOCC.

[77] Rose & Myles also disagree that the claim should be dismissed because of their alleged motivation for initially placing Rose's Unison investment in Helen's name. Rose & Myles say that this is simply a factual assertion made by the Unison Applicants which Rose & Myles dispute. As such, it cannot be considered by the Court on this application.

Discussion

[78] I am not persuaded that it is plain and obvious that the 4th ANOCC fails to set out a reasonable cause of action in respect of Rose's Oppression Remedy Claim.

[79] As a preliminary observation, I note that s. 227(1) of the *BCA* provides that an oppression remedy may be sought by both legal and beneficial owners of company shares. Therefore, the fact that Rose was never a registered shareholder of Unison is not bar to this claim.

[80] The Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 effectively held that a party seeking an oppression remedy must establish the following:

- (a) the party's subjective expectations as a shareholder;
- (b) the reasonableness of those expectations;
- (c) that those reasonable expectations were breached; and
- (d) that a remedy should be granted to address the oppression.

[81] In my view, paragraphs 7-10, 12, 13, 18, 20, 22, 23, 25 to 28, 32, 36 to 38, and 44-45 of Part 1, when read with paragraphs 1- 8 and 34- 35 of Part 3, set out a sufficient factual and legal basis that, if established on the evidence, arguably could entitle Rose to one or more of the oppression remedies she seeks at paragraphs 17-23 of Part 2 of the 4th ANOCC.

[82] In particular, I accept that paragraph 9 of Part 1 of the 4th ANOCC sets out Rose's allegedly reasonable expectations by reference to the concept of the "Founders' Expectations", with Rose being defined as one of the "Founders" of Unison at paragraph 8. The text of paragraph 9 of the 4th ANOCC is as follows:

9. It was the expectation at that time of all Founders that each would become shareholders of Unison including [Rose] and or [Myles] and each would become directors of Unison including [Rose] or [Myles], on her behalf, and each would participate in the management decisions of Unison (the "Founders' Expectations").

[83] I also agree with counsel for Rose & Myles that the Unison Applicants cannot impugn Rose's Oppression Remedy Claim by disputing the veracity or reasonableness of Rose's stated expectation that she would become a Unison shareholder because she allegedly wanted to hide her participation from creditors. There is no assertion to this effect in the 4th ANOCC. It is therefore irrelevant to the Rule 9-5 analysis.

[84] Accordingly, the application to strike Rose's Oppression Remedy Claim will be dismissed.

[85] Lastly, I turn to the Unison Applicants' application for summary judgment in respect of Rose's Oppression Remedy Claim.

[86] Once again, as explained above at paras. 58-62, I am not persuaded that such a judgment can be issued on the limited direct evidence that is before me.

[87] In particular, I reiterate that the only Unison Director who tendered an affidavit is Mr. Jiang. It contains very little information about how Unison's corporate affairs were conducted, and does not comprehensively address the allegations in Rose's Oppression Remedy Claim. Notably, it does not support the Unison Applicants' assertion that Rose could not reasonably expect to become a Unison shareholder when she wanted to conceal her investment in the company.

[88] Indeed, the only portions of Mr. Jiang's affidavit that appear to be of some relevance to assessing the viability of Rose's Oppression Remedy Claim are the following:

7. In response to paragraphs 8, 15, and 18 of the Yang Affidavit and in response to paragraphs 8, 9, 10, 18, 20, 24 of the Zhang Affidavit, [Rose] and [Myles] were not "founders" of Unison and were not shareholders of Unison – beneficial or legal.

8. In response to paragraphs 8, 9 and 10 of the Zhang Affidavit, to my knowledge, there was no agreement that [Rose] would buy or receive shares in Unison or that she would be involved in the decision making of Unison.

[89] In my view, however, these basic denials without any further particulars do not show that the claim raises no genuine issue for trial, or that it is somehow bound to be dismissed in its entirety. This is especially the case when they are not corroborated by the other Unison Directors who are parties to this litigation.

[90] In sum, no summary judgment will be issued in respect of Rose's Oppression Remedy Claim either.

D) Conclusion and Next Steps

[91] I therefore conclude that the Unison Applicants' Rule 9-5 and 9-6 application must be dismissed. The issues raised in Myles' EVC Warrants Claim, Rose's EVC

Share and Warrants Claim, and Rose's Oppression Remedy Claim are to be determined at the parties' trial scheduled to commence on June 16, 2025.

[92] While Rose & Myles' claims have withstood this application, I am nevertheless concerned with the current state of the pleadings. In their written representations, counsel for Rose & Myles fairly and candidly describe the problem in these words:

93. [Rose & Myles] acknowledge that the 4th ANOCC has some flaws. This is a complex case that was initially commenced as a petition, converted to an action at the request of the defendants (supported by [the Unison Applicants]), severed and then tried in conjunction with a separate matter. It has had multiple sets of different counsel. The nature of the proceedings and the discovery of the truth, including both after trial and even after the 4th ANOCC was filed has led to a difficult to read claim. However, there can be no doubt that [the Unison Applicants] know the allegations being made against them and that it would be unjust to dismiss this claim on the basis of the pleadings.

[93] I agree with this assessment. The 4th ANOCC is not an example of model pleading. It is lengthy, repetitive, and difficult to follow - particularly with its many portions that are either underlined or struck out. Its Part 1 (Statement of Facts) contains pleadings of law, and its Part 3 (Legal Basis) contains pleadings of fact. No less than 35 declarations and orders are requested in its Part 2 (Relief Sought). However, it is apparent that some of this relief has already been granted in the Weatherill Judgment, and other aspects are no longer being pursued by Rose & Myles for various reasons including, presumably, Helen's non-participation by reason of her bankruptcy.

[94] What is also problematic is that there has been no amended response to civil claim filed in answer to the 4th ANOCC dated June 1, 2023. Rather, the remaining defendants' (i.e., the Unison Applicants') last pleading is the Third Amended Response to Civil Claim filed August 16, 2022, prior to the Weatherill Judgment.

[95] This is not acceptable. The current state of the pleadings will undoubtedly cause confusion and difficulties for the parties and for the Court – especially the judge who is ultimately assigned to preside over the trial of this matter in June 2025.

[96] To remedy the situation, I will order that the plaintiffs - Rose & Myles - prepare and file a further amended notice of civil claim that sets out clearly the actual parameters of the three remaining claims that they are advancing against the remaining active defendants – Unison, Mr. Su, Mr. Jiang, and Mr. Qiao.

[97] In preparing this amended pleading, counsel for Rose & Myles are encouraged to draft a fresh pleading unconstrained by the stylistic and cosmetic word choices and organization of the 4th ANOCC in order to improve its readability. To that end, counsel for Rose & Myles need not follow precisely the Draft New ANOCC that was presented before me in chambers, although there are portions of it (e.g., the significantly revised Part 3 Legal Basis section) that they may wish to use. However, Rose & Myles are not to make substantive changes so as to further expand or modify the three remaining claims (i.e., Myles’ EVC Warrants Claim, Rose’s EVC Shares and Warrants Claim, and Rose’s Oppression Remedy Claim) beyond the scope of how these claims were described and explained to me at the hearing of this application. Rose & Myles are also not permitted to advance any new claims at this late stage. Should there be issues in this regard, I will make myself available to address them.

[98] In addition, I will order that the new amended notice of civil claim be prepared in two versions: (1) a “standard amended pleading” with strikeouts and underlining as prescribed by Rule 6-1(3); and (2) a “clean amended pleading” which only sets out the full text of the revised pleading, without any underlined new wording or struck out former wording. Both versions are to be served and filed with the Court.

[99] Rose & Myles shall have 14 days from the date of this judgment to serve and file this fresh “fifth amended notice of civil claim”.

[100] If the defendants Unison, Mr. Su, Mr. Jiang, and Mr. Qiao have concerns regarding the propriety of the fifth amended notice of civil claim – especially should it contain an apparent attempt to expand the three remaining claims or to add new ones – these defendants will be at liberty to bring an application to strike before me to challenge the revised pleading. To that end only, I will seize myself of this matter.

Such an application must be brought within 7 days of service of the fifth amended notice of civil claim.

[101] If no application to strike is brought, the defendants Unison, Mr. Su, Mr. Jiang and Mr. Qiao shall serve and file a fresh amended response to civil claim. Their deadline for doing so will be 14 days from service of the fifth amended notice of civil claim. Their fresh amended response to civil claim must also be prepared in both a “standard amended pleading” version and a “clean amended pleading” version as defined above, and it will be titled the “fourth amended response to civil claim”.

VI. DISPOSITION

[102] For the reasons set out above, I issue this order:

1. The application of the defendants Unison, Mr. Su, Mr. Jiang, and Mr. Qiao brought by notice of application filed August 8, 2024 is dismissed, with costs in the cause.

2. Within 14 days of this order, the plaintiffs Rose and Myles shall serve and file a fresh “fifth amended notice of civil of claim” that sets out Myles’ EVC Warrants Claim, Rose’s EVC Shares and Warrants Claim, and Rose’s Oppression Remedy Claim (the “Three Remaining Claims”) against the defendants Unison, Mr. Su, Mr. Jiang, and Mr. Qiao, in two versions:

(a) a “standard amended pleading” with strikeouts and underlining as prescribed by Rule 6-1(3) to reflect changes in the fifth amended notice of claim as compared to the fourth amended notice of civil claim filed June 1, 2023; and

(b) a “clean amended pleading” without any Rule 6-1(3) strikeouts or underlining so as to set out only the full text of the fifth amended notice of civil claim.

3. Within 7 days of service of the fifth amended notice of civil claim, the defendants Unison, Mr. Su, Mr. Jiang, and Mr. Qiao are at liberty to bring an application to strike the fifth amended notice of civil claim, if the defendants

are of the view that the Three Remaining Claims are pleaded in a manner that is substantively broader in scope than how they were pleaded in the fourth amended notice of civil claim.

4. If an application is made further to paragraph 3 of this order, it shall be presented before Justice Brongers.

5. If no application is made further to paragraph 3 of this order, the defendants Unison, Mr. Su, Mr. Jiang, and Mr. Qiao shall serve and file a fresh “fourth amended response to civil claim” within 14 days of service of the fifth amended notice of civil claim, in two versions:

(a) a “standard amended pleading” with strikeouts and underlining as prescribed by Rule 6-1(3) to reflect changes in the fourth amended response to civil claim as compared to the third amended response to civil claim filed August 16, 2022; and

(b) a “clean amended pleading” without any Rule 6-1(3) strikeouts or underlining so as to set out only the full text of the fourth amended response to civil claim.

6. With the exception of any application brought further to paragraph 3 of this order, Justice Brongers is not seized of this matter.

“Brongers J.”