CITATION: Liu v. Xing, 2025 ONSC 880
COURT FILE NO.: CV-24-00725653-0000
DATE: 20250224

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SHIZHONG LIU, 1000479313 ONTARIO INC. and SHIZHONG HOLDINGS INC. and LIU FAMILY TRUST by its Trustee SHIZHONG LIU	)	*Rebecca Huang*, for the Applicants
Applicants	)	
	)	
– and –	)	
	)	
YUNSHEN XING, NAIYU CHAI, CRR CAPTIAL CAPITAL INC., MEADOWLILY DEVELOPMENT INC., CRR FOXWOOD INC., CORNERSTONE REAL ESTATE INVESTMENT LIMITED PARTNERSHIP, CRR FOXWOOD EXETER INC., and CORNERSTONE EXETER LIMITED PARTNERSHIP and FOXWOOD DEVELOPMENTS (LONDON) INC.	)	*Peter Wardle* and *Evan Rankin*, for the Respondents
Respondents	)	
	)	
	)	**HEARD:** December 19, 2024

PAPAGEORGIOU J.

Overview

[1] This dispute centres around $16 million advanced by the Applicants (including Shizhong Liu) to the Respondents, Naiyu Chai (“Mike”) and Yunshen Xing (“Oliver”), and the characterization of such advances. The Applicants say that the parties agreed that the development properties purchased with these funds would stand as security.

[2] The Applicants bring this motion for an interlocutory proprietary injunction and leave to issue a certificate of pending litigation ("CPL") over the properties in question known as the Meadowlily Property, the Buroak Property, and the Exeter Property (collectively, the “Properties”).

[3] The Respondents' position is that the money advanced by the Applicants was a loan and/or investment that did not create any property interest. They say that the Applicants are seeking to obtain execution before judgment in this matter.

[4] On September 17, 2024, Justice Centa granted an interim injunction on consent as follows:

> THIS COURT ORDERS that the Respondents shall not directly or indirectly take any steps to sell, transfer, dispose or, or place further encumbrances on the properties described in Schedule "A" hereto until the Motion is heard and determined by the Court without prejudice to the Respondents' position that the Applicants are not entitled to the relief sought.

Decision

[5] For the reasons that follow, I grant the injunction in respect of the Exeter Property and Meadowlily Property pending the hearing of the Application on its merits, which I will expedite such that it is heard within six months. I also grant an injunction in respect of Buroak, but one that will permit the Respondents to obtain financing to pay out the vendor take back mortgage.

[6] A CPL is not necessary in the circumstances, but I would have granted one based upon the test.

Issues

- Issue 1: Have the Applicants satisfied the test for an injunction?
- Issue 2: Have the Applicants satisfied the test for a CPL?

Analysis

Issue 1: Have the Applicants satisfied the test for an injunction?

[7] The well-established *RJR-MacDonald* test for an interlocutory injunction has three parts: (1) is there a serious issue to be tried; (2) would the moving party suffer irreparable harm if the injunction is not granted; and (3) does the balance of convenience favour granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General*), [1994] 1 S.C.R. 311, at p. 334.

[8] The Applicants say that they seek a proprietary injunction which is a species of recognized interlocutory injunction granted to preserve an asset in possession of the defendant: *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, 2003 CanLII 12916 (ON SC), at para. 15; Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada, 2021), at para. 2.20.

Serious Issue to be Tried

[9] Despite the serious run that the Respondents took at this issue, I agree that the Applicants have satisfied the low threshold of demonstrating a serious issue to be tried to determine whether they have a claim to an equitable mortgage in respect of the Properties and/or that the Respondents have been unjustly enriched such that the Applicants are entitled to a constructive trust over the Properties.

Equitable Mortgage

The law

[10] As set out in *Elias Markets Ltd., Re* (2006), 274 D.L.R. (4th) 166 (Ont. C.A.), at para. 65, an equitable mortgage may exist where there is a common intention of a mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention may not be strictly enforceable at common law. It is essentially founded on valuable consideration that shows the intention of the parties to create a security.

[11] An agreement in writing to provide a legal mortgage is an equitable mortgage. Cases where this has been applied involve situations where there was a want of formality in the mortgage documentation or the borrower refused to execute a mortgage: see *Elias*, at para. 58, citing *Scherer v. Price Waterhouse*, [1985] O.J. No. 881 (H.C.J.), at para. 22, where the Court of Appeal for Ontario notes that Sutherland J. carefully reviewed the law on equitable mortgages.

The Chronology

[12] There are no concluded formal written agreements that set out the totality of the parties' agreements. Rather, there are a series of communications and documents, as well as the parties' conduct, from which a court will ultimately have to ascertain whether the parties had a common intention to create mortgage security.

[13] These documents and communications are not entirely consistent with either parties' evidence. In argument, as expected, each side focused on the parts of these communications that supported their position.

[14] Up until the events that led to this Application, Shizhong and Oliver had a long-term relationship of trust. Oliver had been Shizhong's accountant for approximately 19 years. In February 2022, Oliver helped Shizhong establish the Liu Family Trust. Oliver was an original trustee of the Liu Family Trust until March 2024. At that point, Shizhong says he lost trust in Oliver and asked him to resign, which he did.

[15] Shizhong says that in early 2023, Oliver approached him about lending him and Mike money to purchase land for development in London, Ontario. He says Oliver brought him to the Properties to see them. Shizhong understood from Oliver that Mike and Oliver were friends. He says that they asked him to lend their designated companies $10 million at an annual interest rate of 12.5 % to be used towards the purchase of the Meadowlily and Buroak Properties first. Shizhong

says that he was concerned about the significant amount of money involved and asked that the loan be secured by a mortgage on the Properties and that Mike and Oliver agreed to this.

[16] Shizhong relies upon the following WeChat message May 7, 2023, as documentary corroboration for his evidence that the parties had agreed that Shizhong would have mortgage security.

> Shizhong: ... If it is not commercialized within 5 years, our company is entitled to have the title of the land transferred solely to our company while considering the actual cost, interest and principle [sic] ...
>
> Oliver: Received. Safety is number one. **The land is the collateral for the money**, I will actively engage myself in everything. I will discuss with you when doing things. [Emphasis added]

[17] The Respondents argue that to understand the concluding statements in the WeChat communication of May 7, 2023, the entire chain must be read and that it supports their evidence that their intention was that the Applicants would invest in a limited partnership. However, there is no mention of a limited partnership in this WeChat. Shizhong's evidence is that he was giving Oliver advice about how to structure the project and he does say "the above are my thoughts for your reference" which supports that. Notably, a great deal of Shizhong's communication to Oliver here discusses the significant risks inherent in this type of project at that time. He said, "There are risks existed when assessing the commercial value of this land. For one, there is an unfavourable environment for real estate development, the high bank interest rate will impact the purchase of the properties in the next one or two. Years. For two, there is a big gap between the appraised value and the market value right now." He said, "I recommend risk control on financing and profit."

[18] Following this exchange, on June 29, 2023, Shizhong directed $5 million to be used to purchase the Meadowlily Property. That purchase closed on July 7, 2023.

[19] On August 14, 2023, Shizhong directed a further $5 million to be used to purchase the Buroak Property. That purchase closed on September 25, 2023.

[20] Then on November 7, 2023, Shizhong says Oliver begged him to lend a further $6 million at 10 % interest to be used to purchase the Exeter Property, because the original investor failed to advance the funds and the matter was urgent. The WeChat conversation concluded as follows:

> **Oliver: You trust me so much already, I really appreciate it, I wouldn't forget you. I am for real.** [Emphasis added]

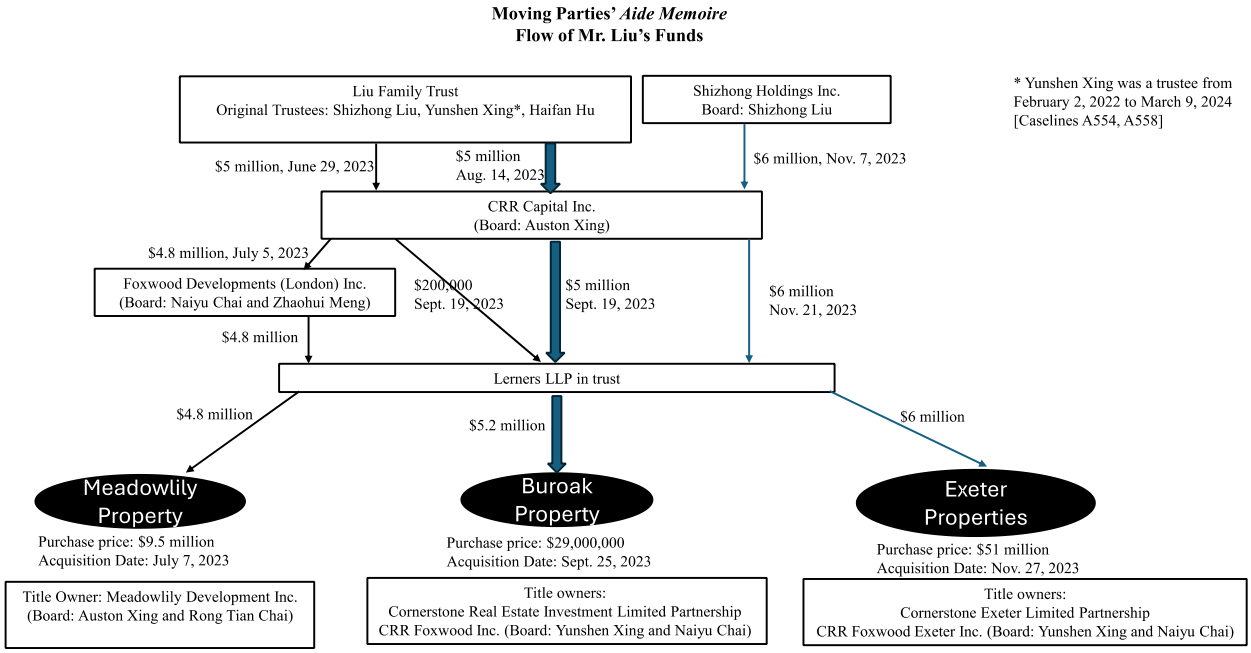
[21] However, Shizhong did ultimately provide funds for this final purchase of the Exeter Property. To provide such funds, he redeemed a GIC early, which resulted in his loss of $299,200

and a penalty charge of $300,000. Oliver and Mike agreed to pay the penalty which would be rolled into the loan.

[22] Oliver and Mike also gave Shizhong a personal guarantee to repay $6 million and accrued interest by June 30, 2024, in respect of the Exeter Property.

[23] Thus, it is undisputed that the Applicants advanced a total of $16 million dollars in three tranches between June 2023 and November 2023. The funds came from the Liu Family Trust as well as Shizhong Holdings Inc. which is a holding corporation owned by Shizhong. Notably, at this time, Oliver was still a Trustee of the Liu Family Trust and as such had fiduciary obligations to it.

[24] The following is a chart that shows the flow of funds, dates of purchase of the various properties and by which entity. There is no dispute that this chart accurately sets out the flow of funds.



[25] To summarize, what the chart and the evidence shows is that funds flowed from either the Liu Family Trust or Shizhong Holdings through various corporations that were owned or controlled by Oliver and Mike and/or their family members.

[26] There is no evidence in the record that the current registered owners of the Properties paid consideration for the Properties to the entities that completed the purchases. There are no contracts in evidence as to any agreements among Oliver and Mike and the entities who currently own the

Properties. No assignment documents have been produced. There is no evidence that the Applicants have any direct contractual relationships with the ultimate owners of the Properties.

[27] There is some contemporaneous documentary support for Oliver and Mike's position that the advances towards the Meadowlily and Buroak Properties were some form of equity investment and that the advances towards the Exeter Property was a loan:

- A draft and unsigned limited partnership agreement dated June 18, 2023, handed by Oliver to Shizhong. Shizhong says that it was given to him in English and he could not read it and asked for a copy in Chinese. An unsigned side letter agreement dated June 20, 2023. Shizhong also says this was given to him in English and he could not read it.
- An acknowledgement signed by Oliver and Mike dated December 2, 2023, where they characterize Exeter as a loan and the other two in a way that appears to suggest an equity investment.

[28] I note however that there are no written communications in evidence about the Applicants becoming limited partners whatsoever and no evidence that anyone sent Shizhong or the Applicants any investment package if these were intended to be investments in a limited partnership. As well, there are no signed limited partnership agreements in evidence among any of the Respondents.

[29] There is also additional contemporaneous documentary support for Shizhong's position that he made loans and expected security. In addition to the May 7, 2023, WeChat message above, on February 14, 2024, Shizhong's lawyer emailed Oliver a copy of a draft loan agreement for the securities to be deposited on the Properties. The letter said "Attached is draft loan agreement to be forwarded to your counsel for review. We appreciate that you could provide your counsel contact information as soon as possible and we can attend to mortgage registration." As well, in accordance with Shizhong's understanding, the draft loan agreement contained a provision requiring second collateral charges on the Properties in s. 5. No one responded to say this was not the deal.

[30] Shizhong gave uncontradicted evidence that following the February 14, 2024 email, he met with Oliver and Mike on February 17 and April 5, 2024, and at these meetings they did not take any issue with the draft loan agreement his lawyer sent them on February 14, 2024 which reflected the requirement for security.

[31] In or around June 2024, Shizhong again raised with Oliver and Mike the formalization of his loan agreement with security.

[32] Oliver then sent Shizhong a WeChat message dated June 10, 2024, where he states "Hello, President Liu, Happy Chinese Dragon Boat Festival. **I will get the collateral issue done as soon as possible**." [Emphasis added]

[33] Oliver further wrote to Shizhong's lawyer on July 3, 2024:

> **We are preparing for the registration of the charges** for Shizhong's funding to us (sorry for the delay), could you let us know what documents you need to prepare the **charging documents.** [Emphasis added]

[34] Notably, the word "charges" is plural and not singular, which supports the conclusion that this was in respect of all the Properties. **Notably, the above two messages from Oliver happened after Shizhong's lawyer had sent Oliver and Mike the draft loan agreement that provided for collateral charges on all of the Properties.**

[35] Between July 3 and 14, 2024, the parties then had further discussions to finalize a loan agreement and registration of mortgage security through counsel. All of this is on the record and no one takes the position that any of these communications are protected by solicitor and client privilege.

[36] The parties exchanged communications and drafts through their lawyers. The discussion began with Shizhong's position that their arrangement was that he would obtain security on all the Properties which he says was his understanding. Then the Respondents said they would only be prepared to provide a charge on the Exeter Property and they also requested they be released from personal or corporate guarantees. There were also issues discussed about possible *Planning Act* violations and the possible need for an existing lender to register a new charge and other issues.

[37] On July 31, 2024, Shizhong's counsel wrote:

> …as requested, we have reviewed your client's request to remove the guarantees and accept a charge on Exeter Road lands with our client. As we trust you can appreciate, the request is tantamount to requesting our client forego obtaining security. The LTV summary provided confirms as much. The best one can say it is better than nothing. However, our client is confident that the Borrower's wish to maintain a good borrower/lender relationship and with therefore come to the table with a more reasonable proposal consistent with the acknowledgement.
>
> We have provided you with the acknowledgement signed by the two principals behind the borrowers, Mike Chai and Oliver Xing, clearly acknowledging joint and several personal liability for the loan, the amount of the loan, interest rate and the properties in which the funds were to be invested. Based on this acknowledgement our client is currently owed accrued interest to July 31 **of $1,730,136.41** together with the principal payment due on June 30th in the amount of **$6,600,000.00** ($78,551.90 June 29/23 - Aug 14/23 on $5mm; **$1,195,355.90** on $10mm Aug 14/23 - July 31/24; **$456,229.51** on $6,600,000.00 Nov 21/23 - July 31/24). Our client is prepared to work with your clients and is not particularly interested in commencing litigation to secure repayment of the funds advanced but, he is

> more than prepared to do so and we have instructions to engage a litigator. We all know that any such litigation will no doubt be time consuming and expensive with the results being uncertain. However, we would suggest there is a strong case to be made for a certificate of pending litigation to be obtained against the subject lands. As such and with our client's patience running out, we would suggest that it is in your client's best interests to deliver a more realistic proposal and by no later than the end of next week.
>
> To further assist your clients our client is prepared to agree to defer payment of the $6.6mm principal payment which was due on June 30th for one year to June 30, 2025, and remove as guarantors Austin and Winston Xing and Rongtian Chai, who we understand are sons of the principals. As well he is prepared to limit the mortgage security to the Exeter Road lands. To this end we have amended the draft Loan agreement previously provided to you to reflect these changes, a clean and redline copy attached. Given the mortgage security is of questionable value, to expect our client to release the principals involved in this transaction is not reasonable. **We trust your clients will find this acceptable and look forward to receiving confirmation of same as well as payment of the outstanding and accrued interest in the amount as calculated above at your earliest convenience**. [Emphasis added]

[38] Further negotiations ensued and drafts were exchanged on these and other issues.

[39] On August 13, 2024, Shizhong's lawyers sent another draft which also set out additional matters in particular that he insisted on the ability to discuss the status of the projects with the planner.

[40] No amounts were paid to the Applicants of the outstanding and accrued interest as had been requested in the July 31, 2024 email from Shizhong.

[41] Then, on August 14, 2024 Shizhong retained litigation counsel who wrote at 9:54 am advising that it had been retained to bring an Application to protect Shizhong's proprietary interests in the Exeter, Buroak and Meadowlily Properties. The Respondents say they then sent a signed version of the last draft loan agreement, backdated to June 29, 2023, by email at 3:58 pm that same day. However, the actual signed agreement is not attached to the emails in the Respondents' record. The email said that it contained some amendments which were minor but it is not possible to consider this without the agreement. It also stated: "Please provide me with your comments or if acceptable, a signed copy of the loan agreement along with your confirmation that the Notice of Application is not going ahead." This statement does suggest that the parties were still negotiating and that the Respondents' lawyers did not see their conduct as acceptance of a formal offer. As well, there is no evidence that Oliver and Mike provided the outstanding interest and principal which had been requested in Shizhong's July 31, 2024 letter, and there is no evidence that they have done so even as at when the motion was argued.

[42] The Respondents indicate that they believe this loan agreement signed by Mike and Oliver is a binding agreement, although they also conceded when this was argued that I need not consider

and decide whether it was on this motion. In any event, it is not possible to consider whether this was a binding agreement in the context of this motion because the parties have not set out the various loan agreements that were exchanged with the emails that would show what the drafts were and whether Oliver and Mike signed the latest draft or some other version. Although there is an agreement signed by Oliver and Mike in the Applicants' record, again, it is not clear whether this was the last draft. As well, Shizhong was not asked any questions on these negotiations or this alleged agreement or this issue at all when cross examined.

[43] As well, there was no argument on any relevant contractual principles of offer and acceptance and whether a draft agreement signed by one party can be enforceable without the other party signing. There was no argument as to whether sending a draft agreement can be considered an offer, and if so, whether the email from Shizhong's counsel on August 14, 2024, constituted an implicit revocation of any such offer. The Respondents did not address Oliver and Mike's failure to repay the outstanding interest which was significant at that time and which Shizhong requested in his July 31, 2024 email as part of his proposal that he might accept security over Exeter only.

[44] Shizhong's counsel argued that in the absence of Oliver and Mike making payments that are outstanding, they were not acting in good faith.

[45] The most that I can conclude is that there is a triable issue as to whether or not this constituted a binding legal agreement.

Overall Assessment

[46] Despite the disagreement over how the investments started, Oliver and Mike agree that at some point the parties agreed to treat the advances as loans.

[47] There is conflicting evidence before me on whether the parties agreed that Shizhong would receive mortgage security on all of the Properties in the context of the close relationship among the parties that resulted in there being no formal executed agreement.

[48] On this record, there are a number of possible outcomes in this matter which include the following:

- That the parties had a common intention at the outset in 2023 that the Applicants would have mortgage security in respect of any Properties purchased using the Applicants' funds. This is when the money flowed.

- That the parties failed to arrive at an agreement in 2023 as to security, but in early 2024 they agreed that the Applicants would have mortgage security over all the Properties. Or, they did not have such a common intention at that time.

- That the parties' ultimate agreement is reflected in the loan agreement signed by the Respondents on August 14, 2024, such that the Applicants would have mortgage security over the Exeter Property only. Here, if the parties had concluded a legally binding agreement, then in my view, even if there had been a different understanding at the time of the advance or at any time, then the Applicants would not be able to establish either unjust enrichment or that they are entitled to an equitable mortgage with respect to Buroak and Meadowlily. But as I have said, the Respondents have not put forward the evidence or argument required to prove that this loan agreement is a binding legal agreement.

[49] On this record, I find that the Applicants have established a triable issue as to whether they will be entitled to an equitable mortgage based upon their common intention over all of the Properties.

[50] In making this finding I reject the Respondents argument that the communications referencing **collateral** are unclear because they do not reference the particular properties in question or the terms of the loans. They rely upon the decision of Brown J. as he then was in *Emmott v. Edmonds*, 2010 ONSC 4185, which is not an injunction decision but a decision on the merits. Brown did not find an equitable mortgage because there was a lack of certainty as to the essential terms which included the interest rate and the term: para 65. In that case, the written loan agreement specified that the terms of any second mortgage were to be negotiated.

[51] With respect, the entire course of conduct of the parties was with respect to the Properties in question and at the end of the day, since there is no formal executed agreement, their conduct and communications is what the court will use to make an objective determination as to what their common intention was. It is at least arguable that when they referenced **collateral**, they were referencing any and all Properties purchased using the Applicants' funds. It is unclear what else they could have been talking about.

[52] With respect to the term and interest rate, in Oliver's affidavit he references a five-year term locked in at 12.5 % regarding the advances made for the Meadowlily and Buroak Properties. Although this is with reference to his position that this was an investment, the term and interest rate is set out therein even if the characterization of the advance is different, and there is no dispute from the Applicants as to the interest rate or the term. There is also no dispute that the $6 million advance in respect of Exeter had a 10 % interest rate and was due on June 24, 2024. It is reasonable to assume that the term of any mortgage security would be the same as the terms of the advances.

[53] I also reject the Respondents' argument that the claim must fail because there is no written agreement upon which the action is brought or some memorandum or note thereof in writing signed by the party: *John v. Millar*, 2011 ONSC 3861.

[54] I first note that this requirement of an equitable mortgage was not set out in the Court of Appeal decision in *Elias.* The parties agree that this reference in *John v. Miller* must have been in respect of the *Statute of Frauds*, R.S.O. 1990, c. S. 19, s. 4, which provides that no action can be brought in respect of any interest in land unless the agreement upon which the action is brought or

some memorandum or note thereof is in writing and signed by party giving the interest in the land. There is no other rationale provided in the decision.

[55] I note that s. 10 of the *Statute of Frauds* specifically carves out "lands or tenements by which a trust or confidence arises ***or results by implication or construction of law***…" [Emphasis added]. In that regard, the *Statute of Frauds* does not apply to resulting trusts even though resulting trusts are also determined based upon the common intention of the parties similar to equitable mortgages. It is unclear to me why there would be a requirement for a memorandum in writing for an equitable mortgage which arises by implication of law, but not for a resulting trust.

[56] Second, *John v. Millar* is distinguishable. The parties in that case had been involved in the purchase of a piece of property held by a shelf corporation. They both held 50 % of the shares in the shelf company. One of the parties contributed approximately $500,000. There was a dispute over the treatment of this contribution. The party who contributed the money said he advanced the money to purchase the property while the other party said that he invested in the shelf company. The balance of the purchase price came from a mortgage in the name of the shelf company and was guaranteed by the party who did not contribute the $500,000.

[57] The party who contributed the funds brought a motion for a CPL arguing that the amount owed to him was to form an equitable mortgage on the property. This was on the basis that the other party advised that his contribution was to be recognized as an "advance from shareholder" on the financial statements. There was no loan document and no reference to any document or communication granting any interest in the land, as there is here in the various WeChat communications.

[58] Third, there is a triable issue as to whether the electronic communications here could satisfy the test for a memorandum or note in writing. Recently courts have held that electronic communications in other contexts can satisfy the requirement for a memorandum in writing, particularly where there is no dispute as to the authenticity of the communications. And in this case there is no dispute on this point.

[59] For example, s. 13 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, provides that an acknowledgement in writing will renew the commencement of the limitation period from the time of the acknowledgement but the acknowledgement must be in writing and signed by the person. This is similar language to the *Statute of Frauds*. Courts in the following cases have held that text messages could satisfy the in-writing requirement: *The Maher Organization Ltd. v. HCI Mercantile Inc*., 2022 ONSC 3585, at para. 26; *1475182 Ontario Inc. o/a Edges Contracting v. Ghotbi et al.*, 2021 ONSC 3477, 155 O.R. (3d) 272, at paras. 47-49; and *Lee v. Chang*, 2024 ONSC 580, at para. 160.

[60] Given that the *Statute of Frauds* and the *Limitations Act, 2002*, were enacted by the Ontario government, s. 4 should be given an interpretation consistent with the interpretation the caselaw has given s. 13(10) of the *Limitations Act, 2002*: see also *Golden Ocean Group Ltd. v. Salgaocar Mining Industries PVT Ltd*., [2012] EWCA Civ 265, at paras. 21-22 and 31-34, where the English

Court of Appeal held that a sequence of emails sufficed to meet the writing requirement under the English Statute of Frauds.

[61] The Respondents sought to argue that for the electronic communications to provide the required memorandum for the purpose of the *Statute of Frauds*, it must comply with the *Electronic Commerce Act, 2000*, S.O. 2000, c. 17. The Respondents may ultimately succeed on this argument, but none of the above cases held that this was required in order to satisfy the in-writing requirement where there were electronic communications, and in my view, that is sufficient to establish a triable issue.

[62] There are a number of WeChat communications that could satisfy the requirement for a signed memorandum in writing:

- There is the May 7, 2023, WeChat from Oliver where he states: "**The land is the collateral for the money."**

- There is the June 10, 2024, text from Oliver where he states: **"I will get the collateral issue done as soon as possible."**

- There is the July 3, 2024, email which occurred after all the advances where Oliver says, **"We are preparing the registration for the charges."**

[63] And I emphasize again, that the June 10, 2024, and July 3, 2024 texts occurred after Shizhong's lawyers had sent the loan agreement that reflected security on all the Properties.

[64] Fourth, and as I raised with the parties at the hearing, the moneys were actually advanced in this case and so there is arguably part performance of the alleged oral agreement pursuant to which security would be advanced. Part performance is an exception to the *Statute of Frauds*.

Unjust enrichment

[65] In *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 37, the Supreme Court of Canada affirmed that an unjust enrichment claim has three elements: (1) enrichment; (2) corresponding deprivation; and (3) absence of juristic reason for recipient's retention of the enrichment.

[66] The Applicants have demonstrated an arguable case that they advanced funds to Mike and Oliver, and that the parties agreed or had a common intention that the Applicants would have a security interest in the Properties.

[67] Instead, Shizhong advanced the money to Oliver and Mike who directed it through multiple layers of companies to corporations controlled by them or their family members and they have not provided any security.

[68] There is no evidence that the ultimate owners of the Property have paid any consideration for the Properties. Therefore, there has arguably been a benefit to them.

[69] There has been a corresponding deprivation because if Shizhong is to be believed, he only agreed to advance funds on the basis that he would have collateral which he never received. The Properties can be mortgaged fully and he would have no recourse against them. He would be left with a judgment against Oliver and Mike, but he would not have the valuable security that he says he bargained for.

[70] The Respondents argue that whatever contract the parties entered into is the juristic reason for the enrichment. In that regard, courts have held that a contract can be a juristic reason for an enrichment and deprivation because it reflects the parties' autonomy and the fact that they can order their affairs by contract: see *Ciccocioppo Design/Build v. Gruppuso*, 2017 ONSC 2012, 76 C.L.R. (4th) 293, where the court stated that equity steps in when an injustice arises without a remedy. Since a party who entered into a contract can seek to remedy that injustice by bringing an action for breach of contract, that party has a legal remedy and equity need not assist.

[71] Here there is no claim for breach of contract.

[72] Even if there had been a concurrent claim in contract, in *1153765 B.C. Ltd. v. Dann*, 2024 BCSC 2148, at para. 23, the court noted that there are two kinds of cases where unjust enrichment can be pleaded concurrent with breach of contract: where a benefit is conferred beyond the scope of the negotiated terms of a contract or where some issue in relation to the validity or enforceability of the contract in question is raised.

[73] There is a triable issue as to whether these exceptions apply in this case. If Shizhong is to be believed, he was supposed to obtain security in exchange for the advance of funds and didn't; therefore, Oliver and Mike received something beyond the negotiated terms, they received the money without delivering the security. Then Oliver and Mike moved the Properties through layers of entities out of the Applicants' reach.

[74] Further, it is not possible to bring a breach of contract action seeking specific performance against Oliver and Mike because they no longer own the Properties. It is not possible to bring a breach of contract action for specific performance against the rest of the Respondents because the Applicants have no contract with them. Thus, an action for breach of contract will not remedy the situation and there is a triable issue as to whether equity should assist.

[75] If Shizhong is to be believed re the parties' common intention, the only method of remedying the situation is through unjust enrichment or an equitable mortgage. (I will explain further in the section on irreparable harm why a monetary judgment against Oliver and Mike would not remedy the situation. It would not provide the Applicants with the security they bargained for and a monetary judgment without security is simply not the same thing as a monetary judgment with security.)

[76] The Respondents also question the validity of the alleged agreement to provide mortgage security on the basis that there is no concluded agreement in writing. This is one of their main arguments in respect of why an equitable mortgage is not possible and a legal mortgage is also not possible in this case.

[77] I also reject the argument that unjust enrichment could not apply here because the parties who have been enriched have received this enrichment not directly from the Applicants, but indirectly through Oliver and Mike. In that regard, the Respondents rely upon *Palmer v. Teva Canada Limited*, 2024 ONCA 2020, 98 C.C.L.T. (4th) 9, at para. 99, where the court concluded that a claim for unjust enrichment was doomed to fail because any benefit the defendants received was indirect and the law of unjust enrichment does not permit recovery of incidental collateral benefits.

[78] To understand this statement the facts of the case are important. *Palmer* was a class action brought against pharmaceutical companies in respect of drugs that they said put class members at a higher risk for certain diseases. Patients would not purchase these products directly from the manufacturers but from retailers, and the argument was that the manufacturer had been unjustly enriched.

[79] The case before me is not analogous because there is a non-arm's length relationship between Oliver and Mike and the parties through whom the monies and Properties flowed. The allegation here, for which there is sufficient support to raise a triable issue, is that Oliver and Mike have in fact benefited by structuring these transactions in the way they did to Shizhong's detriment. That is, they now indirectly own and control the entities that own the Properties. With respect to the other Respondents, there is no evidence before me that the other Respondents, who now own the Properties, contributed anything for them and so there is a triable issue as to whether they have been unjustly enriched.

[80] I also do not find the case *Central Welding v. HPN et al.*, 2024 ONSC 1141 determinative. In that case a subcontractor sued the general contractor, surety and owner in respect of moneys that the general contractor had failed to pay for the purchase of structural steel for the project. The owner would not certify substantial performance and the subcontractor refused to pay the holdback to the subcontractor. On a motion to strike, the court held that the subcontractor had no cause of action against the owner because the caselaw has held that a contract between an owner and a general contractor is the juristic reason for the owner's enrichment in circumstances where the subcontractor seeks to claim for unjust enrichment against the owner for improvements: at para. 33. It also found that the contract between the contractor and subcontractor was a juristic reason to strike out the subcontractors claim against the owner. In that regard, the reasonable expectations were that the subcontractor would be paid by the contractor, not the owner.

[81] The Respondents have produced no contracts between Oliver and Mike and the parties through whom they flowed the funds to purchase the Properties. The evidence raises a triable issue as to whether these are non-arm's length parties. This case is simply nothing like *Central Welding*, which is a particular case about the construction industry, where there were contracts between

arm's length parties. A court in this case could find that the reasonable expectations of the parties was that the Applicants would have a security interest in the Properties even if there were never any concluded agreements.

[82] Thus, in my view, there is a triable issue as to whether or not the contracts the parties entered could constitute a juristic reason for the enrichment.

Purchase Money Security Interest

[83] I need not consider this as I have found a triable issue in respect of the unjust enrichment and equitable mortgage claim.

Irreparable Harm

[84] The onus is on the Moving Parties to place sufficient financial and other evidence before the court showing that irreparable harm will result if an injunction is not granted. Evidence of irreparable harm must be "clear and not speculative": *U.S. Steel Canada Inc. (Re)*, 2023 ONCA 569, at para. 27. Absent "clear evidence that irreparable harm will result, an interlocutory injunction should not issue": *2158124 Ontario Inc. v. Pitton*, 2017 ONSC 411, at para. 48.

[85] The Applicants say that they will suffer irreparable harm because they have lost security that they could enforce. They say the Respondents have already encumbered the Properties and will be able to encumber them further and that they are so indebted on this project with personal guarantees that they will be unable to repay the loans.

[86] They rely on Justice Sharpe's commentary in *Injunctions and Specific Performance*, at para. 2.12, where he writes that in a commercial case the inability of the defendant to pay damages is an important factor in considering whether there is irreparable harm: see also *RJR-MacDonald*, at p. 341, where the court stated that irreparable harm is a harm which "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

[87] Although the Respondents argue that the claim of irreparable harm is speculative, the Applicants point out that Oliver and Mike have already defaulted on the $6 million loan which came due on June 30, 2024, and that they have each personally guaranteed another $59 million in debt to other lenders. They have failed to pay outstanding accrued interest.

[88] In *306440 Ontario Ltd. v. 782127 Ontario Ltd*, 2014 ONCA 548 at para 24 the Court of Appeal considered the nature of a trust claim and noted that because a constructive trust is a proprietary remedy, it carries with it benefits that do not attach to personal remedies. See also *Sirius Concrete Inc*. (Re), 2022 ONCA 524 at para 14.

[89] Some courts have held that a plaintiff will suffer irreparable harm if defendants are not restrained from dealing with a property where the claim involves a proprietary trust claim:

Transmaris Farms Ltd. v. Sieber, 30 C.P.C. (4th) 369 (Ont. Gen. Div.), at para. 73; *HarbourEdge Mortgage Investment Corp v. Community Trust Company*, 2016 ONSC 448, 16 E.T.R. (4th) 124, at paras. 57 and 73; and *Exponents Canada Inc. v. Sharma*, 2014 ONSC 7097, at para. 51.

[90] In my view, this is similar to the loss of security if an injunction is not granted. The loss of mortgage security is irreparable because the whole point of obtaining security is that the lender is not simply a judgment creditor at the end of the day. Recall that at the outset, in his May 7, 2023 WeChat, Shizhong was expressing great concern about the risks of this project and apparently to assuage his concerns Oliver said, "the land is the collateral."

[91] A monetary judgment is simply not the same as a monetary judgment coupled with the ability to enforce that judgment on a piece of land that is not fully encumbered. Damages are not an adequate remedy because a damage award might never be paid. The potential for an unsecured damage award is no substitute for registered security.

[92] I do not agree that the case *1954294 Ontario Ltd. v. Crocco*, 2022 ONSC 5279 is analogous. That was a motion for a stay pending appeal of a refusal to grant an injunction. The issue did not involve a lender alleging that it had been promised security.

Balance of Convenience

[93] The third part of the *RJR-MacDonald* test, the balance of convenience, requires the court to consider the relative impact upon the parties of granting or withholding the injunction.

[94] The Respondents argue that they purchased these Properties for development purposes. The existence of a proprietary injunction on these Properties will hamper their ability to develop them, and if existing mortgages go into default, the value of the projects will be lost.

[95] However, the Respondents have provided no evidence that shows that these Properties are remotely close to power of sale. There is no evidence that they have been unable to pay the mortgages on a monthly basis in the past or that they cannot do so in the future. Indeed, part of the Respondents' case is their assertion that they are quite wealthy and as such, the Applicants should not be concerned about their ability to repay the Applicants. If that is the case, then it is hard to accept that they do not have the money to pay the carrying costs pending the hearing of this Application on a final basis.

[96] Additionally, the Respondents' concerns are not the same for all the Properties.

Exeter

[97] The vendor take back mortgage has a five-year term. The current interest rate is 1.5 % and the annual payments are $671,822.00 which is $55,985.00 per month. The Respondents provided no other details of the monthly carrying charges.

[98] The Respondents have not yet begun any development of the Exeter Property although it is zoned for residential development. They say that their intention is to complete the necessary studies to have a development plan approved over the next several years. They do not cite any particular concerns with respect to an injunction over the Exeter Property. They do not cite any proposed financing that will be affected.

[99] Additionally, the Respondents submitted during the argument that they believe the loan agreement they signed in August 2024 is a binding agreement. This agreement gives the Applicants security on Exeter. It is hard to see how the balance of convenience could favour the Respondents when it is their position in the lawsuit that the parties had an agreement that the Applicant would have mortgage security on Exeter, which would essentially be up to the maximum of what the Respondents say Exeter is currently worth including the other mortgages on title. It would be difficult to obtain additional mortgage financing in that case in any event.

[100] I find that the balance of convenience favours the Applicants because of the undertaking as to damages and the evidence before me that the Applicants have $20 million in assets which is more. I will also be expediting this hearing so that it is heard within 6 months. The Respondents' own plans do not involve developing Exeter within six months. This would mean that the mortgage payments the Respondents would have made from the date of Centa J.'s order to this injunction would be approximately $671,822 which is well within Shizhong's means to pay.

[101] Even if the Respondents win the Application their undertaking is sufficient to reimburse the Respondents for carrying charges during the period of the injunction, if they are able to prove that such damages were caused by the injunction. If the Applicants do not pay any damages assessed, there is no dispute that the Applicants are owed $6,000,000 in respect of what the parties now agree was a loan, and this is now in default. Therefore, there is an argument that the Respondents could set off any damages assessed pursuant to the Applicants' undertaking against the $6,000,000, subject to arguments about the mutuality of the parties.

[102] Therefore, the balance of convenience favours the Applicants with respect to the injunction in respect of the Exeter Property.

Buroak

[103] The Respondents did not articulate the details of their current carrying charges on the Buroak Property but the vendor take back mortgage has a 5 % interest rate such that the annual interest is $1,160,000 or $96,666 per month.

[104] They have not yet begun development in earnest. The Respondents intend to only complete servicing of the site and then sell subdivided lots to third party builders who will construct the residential units. They are awaiting final approval from the City of London for the engineering design and there is no information as to when this is expected.

[105] They say they have secured financing from Cameron Stephens to service the property and pay off the vendor take back mortgage in the amount of $30,000,000. This commitment expired on September 6, 2024, and states that if a fully executed copy is not accepted and delivered by that day, it shall be null and void. It was signed by the borrowers on September 25, 2024, after it had expired and after this Application was commenced. There is no evidence that the deadline was extended by the lender.

[106] Nevertheless, the vendor take back mortgage will be up on March 25, 2025. Thus, an injunction here would prevent the Respondents from obtaining new financing to pay out the mortgage and put them in default.

[107] Therefore, the balance of convenience favours the Respondents here to some extent but I can craft the injunction to remedy this issue. The injunction I will issue here is that pending the hearing of the Application, the Respondents will be able to negotiate and complete financing that would take out the vendor take back mortgage, but no more than that amount. The Applicants' assets are sufficient to cover the possible damages on this record which may include the additional interest charges which would be approximately $1,160,000 from the date of Centa J.'s order.

Meadowlily

[108] There are three charges on the Property: one in the amount of $5,422,500.00, another in the amount of $8,477,500.00, and a third in the amount of $5,500,000.00. These were used to pay off a pre-existing mortgage, fund the cost of servicing the Meadowlily Property and to secure the issuance of a subdivision bond by the City of London. These mortgages have not been produced. The amount of the monthly mortgage payments, the interest rate, and the monthly carrying costs are unknown.

[109] If the Application is heard within six months, assuming an interest rate of 10 % applied to the two mortgages (which is generous), the total interest from the time of Centa J.'s order would be approximately $2,082,000 which is within the Applicants' means to pay if the Respondents win the Application and a court found that granting the injunction caused these additional carrying charges because of delay.

[110] I turn to the impact on the Project and the delay. Oliver says that significant development work has already been done. They are ready to begin pre-construction sales of residential units. Services for the Property are complete and a vacant condominium plan has been registered. They plan to build 36 houses and 52 townhouses.

[111] They provided evidence of a term sheet they received dated March 4, 2024, for construction financing in the amount of $20,430,000.00 which they say is conditional on registration of mortgage security against title. They say that they could not proceed with the financing or further development because of this proceeding.

[112] The Applicants point out that the term sheet they provided as corroboration of this indicates that it was open for acceptance up until March 13, 2024, after which it was null and void. The term sheet in the record is not signed by the borrower nor any of the guarantors listed. Mike testified he did not sign it. Both Auston and Rong Tian Chai, who are directors of Meadowlily Development Inc., the legal owner and listed as guarantors, were unaware of the term sheet. Oliver's evidence when cross examined was that this document is the final version in their possession and it is unsigned as noted. There is no evidence of any communications with the purported lender after the expiry of the term sheet or that it was ever extended. As well, there was not yet any proceeding against the Respondents until August 2024, so the Applicants' proceeding could not have prevented the Respondents from signing this within the time period required.

[113] In my view, the only thing that the Respondents have established is that there will potentially be carrying costs thrown away as well as delay in their plans. While they argue that the injunction will imperil their development plans, they have not provided sufficient evidence to support that conclusion. They are only at the stage of selling pre-construction units. It is not clear on this record that they need the construction financing at this stage for this purpose. It is not clear when they plan to start construction.

[114] On the other hand, if the injunction does not issue then the Respondents will further mortgage the Meadowlily Property and if the Applicants win their case, they will nevertheless be subordinated to any lender who has priority.

[115] With respect to whether any of the mortgages on any of the Properties could go into default in the interim, the Respondents have not provided any evidence that they could not continue to service the existing mortgages for the next six months. They were already under an injunction as of September 2024 and if they had had difficulty meeting mortgage payments, I expect there would have been some evidence of this.

[116] As well, Oliver and Mike personally guaranteed all of the mortgages and Mike indicated when cross examined that his personal net worth exceeds $75 million.

[117] Neither Oliver nor Mike or any of the Respondents have proffered any evidence that they cannot pay the ongoing carrying costs and mortgages. If such a risk exists and is real, the Respondents should have put forward evidence of this.

[118] Therefore, balancing all factors, the balance of convenience favours the Applicants because I will be expediting this to be heard in six months such that on this record, the impact is some delay and additional carrying charges which the Respondents can pay. And as I have said, if the Respondents win the Application, they can claim the additional carrying costs were caused by the injunction, and the Applicants have assets to satisfy the known carrying charges during the injunction, if those are found to be damages.

Additional Arguments Raised by the Respondents

[119] I reject the Respondents' argument that the Applicants cannot succeed because they have not claimed a permanent injunction in the Notice of Application: *TriDelta Investment Counsel Inc. v. GTA-Mixed-Use*, 2022 ONSC 6106, at paras. 47-48, appeal dismissed, 2024 ONCA 746. In their factum, the Applicants sought an amendment in this regard, which I grant pursuant to r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides that an amendment will be granted on just terms at any stage of a proceeding "unless prejudice would result that could not be compensated for by costs or an adjournment." The Respondents did not provide any basis for denial of the amendment. Notably, the Respondents also consented to the Centa J. injunction despite the absence of this pleading which they could have raised at that time. It is unclear what the prejudice is other than the possibility of a successful claim which is not the kind of prejudice that this caselaw references.

[120] I also reject their argument that an injunction cannot be ordered because the Applicants' claim is in essence a claim for specific performance of an agreement and this relief has not been pleaded. They say that even if this had been pleaded, there is no possible way that the Applicants could ever obtain an order for specific performance because orders for specific performance should not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available: *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52, at para 69. They say the Applicants have not led any evidence to raise a triable issue in this regard.

[121] The Respondents must take the Application and the causes of action pleaded as they are. There is no claim for enforcement of a contract or specific performance of it. They have asserted an equitable mortgage and unjust enrichment. Just because the parties' intentions and reasonable expectations are relevant to these causes of action, it does not mean that they are claiming specific performance of a contract. Parties are permitted to plead their cases based upon causes of action that they choose. I note that equitable mortgages are imposed at trial (as are resulting trusts). Courts do not refuse to impose them on the basis that they are like orders for specific performance. The whole point of equity is that it can step in, in appropriate circumstances, where the application of strict legal rights will work an injustice.

[122] As noted by the Court of Appeal for Ontario in *Elias*, at para. 64:

> The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that "equity looks on that as done which ought to be done". Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law.

Issue 2: Have the Applicants satisfied the test for a CPL?

[123] In the event I am wrong about the injunction, I would nevertheless grant a CPL over the Properties.

[124] The usual test for granting leave to register a CPL is well established in the relevant jurisprudence. It requires the determination of whether there is a triable issue in respect of the moving party's claim to an interest in the property: *Abu-Saud v. Abu-Saud*, 2023 ONSC 6199 at para 17(c); *Saggi v. Grillone*, 2020 ONSC 4140 at para 62.

[125] Even if a triable issue is established, the Court must take into account equitable factors and the balance of convenience.

Triable Issue

[126] For the reasons I already set out above, I find that there is a triable issue in respect of the Applicants' claim to a security interest in Meadowlily and Buroak.

Equitable Considerations/Balance of Convenience.

[127] There are a number of usual equitable considerations taken into account commonly referred to as the *Dhunna Factors*. These typically include whether the plaintiff is a shell corporation, whether the land is unique, the intent of the parties in acquiring the land, whether there is an alternate claim for damages, the ease or difficulty in calculating damages, whether damages would be a satisfactory remedy, the presence or absence of a willing purchaser. These factors developed in the context of cases where a plaintiff seeks recovery of a piece of property for itself, for example cases involving a failed real estate transaction.

[128] In my view, the uniqueness of the land is not relevant as the Applicants do not seek it for themselves. Rather, they seek a security interest/equitable mortgage. The existence of a willing purchaser is also not relevant. There is no claim for damages and in my view, damages would not be sufficient to stand in place of the nature of the claim here which is the loss of mortgage security. The Applicants are not shelf corporations and provided adequate evidence of assets that could be used to satisfy their undertaking as to damages if the Respondents win and they prove that carrying costs during the period of the CPL were caused by the CPL.

[129] As well, for the same reasons as set out above, the balance of convenience would favour a CPL.

Conclusion

[130] Thus, I grant the injunction with respect to Exeter and Meadowlily and a more limited injunction against Buroak such that the Respondents may negotiate financing to take out the

existing vendor take back mortgage. The Application shall be expedited and heard within six months. The parties may arrange a case conference with me to schedule this and they may also consider whether this could proceed by way of summary trial.

[131] The parties are encouraged to resolve costs. If they cannot, they can make submissions as follows: the Applicants within 5 days and the Respondents within 5 days thereafter.

Papageorgiou J.

Released: February 24, 2025

CITATION: Liu v. Xing, 2025 ONSC 880
COURT FILE NO.: CV-24-00725653-0000
DATE: 20250224

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHIZHONG LIU, 1000479313 ONTARIO INC. and SHIZHONG HOLDINGS INC. and LIU FAMILY TRUST by its Trustee SHIZHONG LIU

Applicants

– and –

YUNSHEN XING, NAIYU CHAI, CRR CAPTIAL CAPITAL INC., MEADOWLILY DEVELOPMENT INC., CRR FOXWOOD INC., CORNERSTONE REAL ESTATE INVESTMENT LIMITED PARTNERSHIP, CRR FOXWOOD EXETER INC., and CORNERSTONE EXETER LIMITED PARTNERSHIP and FOXWOOD DEVELOPMENTS (LONDON) INC.

Respondents

REASONS FOR JUDGMENT

Papageorgiou J.

Released: February 24, 2025