

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

**ERNST & YOUNG INC.
in its capacity as Court Appointed Receiver
of HANFENG EVERGREEN INC.**

Plaintiff

-and-

YU XINDUO and LEI LI

Defendants

**NOTICE OF MOTION
(Motion to Strike dated June 12, 2017)**

THE DEFENDANTS, will make a motion to a Judge of the Superior Court of Justice (Commercial List) at a time and a date to be fixed by the Court, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: This motion is to be heard orally.

THE MOTION IS FOR:

1. An order striking out and dismissing the claims against the Defendant Lei Li set out in paragraphs 1 (b) (c) (ii) and 53-54 of the Plaintiff's Statement of Claim;
2. An order striking out and dismissing the claims against the Defendant Yu Xinduo set out in paragraphs 1 (a) (i) and (ii), 1 (c) (ii), 30-36, 44, and 49-52 of the Plaintiff's Statement of Claim;
3. Costs of this motion; and
4. Such further and other relief as the Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The Statement of Claim herein was issued on March 22, 2016.

2. The Defendants served a Notice of Intent to Defend on April 21, 2016.
3. Following certain interlocutory proceedings and steps, the Defendants served their Statement of Defence on January 5, 2017.
4. The Plaintiff delivered a Reply on May 30, 2017.

With respect to the Defendant Lei Li (“Li”)

5. In paragraphs 1(b) and 53-54 of the Statement of Claim, the Plaintiff has sought the following relief and has purported to advance the following causes of action against Li:

“1. The plaintiff claims:

(b) as against the Defendant, Lei Li (“Lei”):

(i) Restitution or damages, in the amount of Canadian currency sufficient to purchase RMB 630,000,000 for knowing assistance and knowing receipt;”

...

“Knowing Receipt and Knowing Assistance

53. Lei knowingly received and retained the benefits of the Loans and Dissipated Funds, which Yu wrongfully obtained.

54. In addition, or in the alternative, Lei knowingly assisted Yu to wrongfully obtain the benefits of the Loans and the Dissipated Funds. Hanfeng has suffered harm as a result of Lei’s knowing assistance and knowing receipt and is entitled to damages and/or restitution.”

6. In her Statement of Defence, Li pleaded as follows:

“19. The claims and allegations made solely against Li in paragraphs 1(b) and (c), 53 and 54 of the SOC are false and are denied by Li in their entirety. Moreover, as pleaded these paragraphs disclose no reasonable cause of action, are frivolous, vexatious and an abuse of process. As such these claims and allegations should be struck out.”

...

“89. As noted above, the Plaintiff’s claims of wrongful dissipation of Hanfeng China’s assets, conversion, unjust enrichment, and restitution have not been advanced against Li.

90. Instead, the Plaintiff contends that Li is guilty of “knowing receipt” and “knowing assistance” in respect of the allegedly Dissipated Funds and Loans. The sum total of the Plaintiff’s sparse pleading of these causes of action against Li is set out in paragraphs 53 and 54 of the SOC:

‘53. Li knowingly received and retained the benefits of the Loans and Dissipated Funds, which Yu wrongfully obtained.

54. In addition, or in the alternative, Li knowingly assisted Yu to wrongfully obtain the benefits of the Loans and the Dissipated Funds. Hanfeng has suffered

harm as a result of Li's knowing assistance and knowing receipt and is entitled to damages and/or restitution.'

91. This pleading is fatally flawed for three reasons;

(1) first, it is predicated upon an assumption that Li's co-defendant Yu misappropriated 635,000,000 RMB. As set out above, the Plaintiff has failed to plead the material facts required to substantiate any such causes of action against Yu and has admitted that its allegations that Yu took the money amount to speculative assumptions;

(2) second, the Plaintiff has failed to plead the any of the constituent elements of the torts of "knowing assistance" and "knowing receipt"; and,

(3) third, the Plaintiff has failed to plead any material facts in support of any conclusion that Li is culpable of or participated in any of the (unpleaded) constituent elements of these torts.

92. In these circumstances, the claims against Li in the SOC alleging "knowing receipt" and "knowing assistance" are nothing more than bald, conclusory allegations which disclose no cause of action, and are an abuse of process."

7. Paragraphs 93-95 of the Statement of Defence delivered by Li further pleaded as follows:

"93. Without prejudice to the above, Li states and the fact is that she has no knowledge of nor did she have any involvement in any of the alleged actions of Yu in any dissipation or wrongful taking of funds belonging to Hanfeng China. Li further pleads that both of the underlying assumptions and the allegations implicit in these claims are totally without any factual basis and should be dismissed in their entirety.

94. The Defendant Li denies that she obtained Loans or Funds fraudulently or in breach of any fiduciary duty or otherwise and/or that Li has received or retained, knowingly or at all, the benefits of the Loans or Funds as alleged in paragraph 53 of the SOC. Li puts the Plaintiff to the strictest proof thereof of these allegations. In the alternative, if Li received and retained such Loans or Funds, which is not admitted but is denied, Li had no knowledge that the Loans or Funds were obtained by Yu fraudulently or in breach of any fiduciary duty.

95. The Defendant Li denies that Yu obtained Loans or Funds fraudulently or in breach of fiduciary duty and/or that Li assisted, knowingly or otherwise, in the breach of any such duty, which is not admitted but is denied. Li further states that she had no knowledge of any fraudulent conduct or any breach of any fiduciary duty by Yu, which breach is not admitted but is denied."

8. Subsequently, the Plaintiff has not made any amendments to the Statement of Claim but has delivered a Reply dated May 30, 2017.

9. The Plaintiff's Reply does not remedy the defects in the Statement of Claim. Instead, paragraph 6 of the Reply simply states as follows:

“6. Contrary to the allegation at paragraph 14 of the Defence, Lei was a paid consultant to Hanfeng at all material times, and was the most senior management representative in the Toronto office of Hanfeng. Contrary to allegations at paragraphs 93-95 of the Statement of Defence, in addition to Yu, Lei was also a recipient and beneficiary of the Dissipated Funds.”
(underlining added)

10. As in the Statement of Claim, no material facts are pleaded to support the baldly stated conclusions, now apparently limited to the “Dissipated Funds” (but not the “Loans”), contained in the underlined portion of paragraph 6 of the Reply.
11. The Plaintiff’s pleadings quoted above do not disclose a proper cause of action because (a) they fail to allege the necessary constituent elements of the causes of actions of “knowing receipt” and “knowing assistance”, (b) they fail to comply with the applicable *Rules of Civil Procedure*, referred to in paragraph 15 below, and (c) in any event, they constitute bald, speculative conclusions unsupported by any pleading of material facts.

With respect to the Defendant Yu Xinduo (“Yu”)

12. In paragraphs 1 (a) (i) and (ii), 1 (c) (ii), 30-36, 44 and 49-52 of the Statement of Claim, the Plaintiff seeks damages and declaratory relief against Yu on the basis of allegations that Yu misappropriated funds belonging to the Plaintiff:

“1. The plaintiff claims:

(a) as against the Defendant, Yu Xinduo (“Yu”):

- (i) restitution or damages, in the amount of Canadian currency sufficient to purchase Chinese Yuan Renminbi (RMB) 630,000,000 for breach of fiduciary duties owed to Hanfeng Evergreen Inc., fraud, conversion or unjust enrichment;
- (ii) damages for breach of fiduciary duty in an amount of Canadian currency sufficient to purchase RMB 235,600,000;”

...

“1. The plaintiff claims:

(c) as against both Defendants, jointly and severally:

...

- (ii) a declaration that all monies belonging to Hanfeng Slow-Release Fertilizer Co., Ltd. and wrongfully obtained by Yu and/or held by Lei are held in a constructive trust in favour of the Plaintiff;”

...

“30. During the course of the Receivership Proceedings, Yu advised and assured the Receiver that Hanfeng China’s operations had been dormant since April 2014. However, the Receiver discovered that between August 2014 and June 2015, Hanfeng China incurred

millions of RMB in expenses, significantly more than would be expected for a nonproducing manufacturing facility (the ‘Dissipated Funds’).

31. Despite requests from the Receiver and in breach of his obligations as legal representative and orders of this Court, Yu has refused to provide the Receiver with Hanfeng China’s financial records and access to Hanfeng China’s bank accounts. As a result, the Receiver has been unable to ascertain what happened to the Dissipated Funds, but it appears that Yu has absconded with them.

32. At least RMB 27 million has been dissipated from Hanfeng China during this period and the Receiver is concerned that the amount of the Dissipated Funds continues to grow.

33. The Receiver also discovered that under the control and direction of Yu, including while the company was purportedly dormant, Hanfeng China obtained approximately RMB 600,000,000 through various loans and other agreements as follows:

- (a) RMB 170 million from the Harbin Branch of Industrial Bank Co., Ltd;
- (b) RMB 220 million from China Construction Bank;
- (c) RMB 190 million from China Merchants Bank;
- (d) RMB 20 million from the Bank of East Asia (collectively the ‘Loans’)

34. None of the Loans are reflected in the internal financial statements of Hanfeng China, and Yu has denied the existence of the Loans.

35. While the Receiver has determined based on available information that approximately RMB 600 million was borrowed by Hanfeng China under the Loans, none of the borrowed funds are (or ever have been) held by Hanfeng China. Due to Yu’s actions, the Receiver has been unable to ascertain precisely what happened to these funds, but it appears that Yu has absconded with them.

36. The Loans are in default and remain outstanding liabilities for Hanfeng China. Lawsuits have been filed against Hanfeng China for recovery of the defaulted loan amounts.”

...

“44. Yu breached his fiduciary duties to Hanfeng by misrepresenting the identity of the Purchaser in an attempt to secure Hanfeng China’s assets for his own personal benefit. Yu further breached his fiduciary duties by frustrating the Receiver’s efforts to protect Hanfeng China’s assets for the benefit of Hanfeng and its shareholders while simultaneously dissipating Hanfeng China’s assets for his personal gain. Hanfeng has suffered damages, the full particulars of which will be provided prior to trial, for which Yu is liable as a result of his breaches of fiduciary duty detailed herein.”

...

“Conversion

49. Yu caused Hanfeng China to spend or otherwise dissipate the Dissipated Funds, without any legitimate business purpose, thereby depriving Hanfeng of rightful possession. Yu further caused Hanfeng China to obtain the Loans, for which there was no legitimate business purpose, and absconded with the proceeds of the Loans, thereby depriving

Hanfeng of rightful possession. Yu was not entitled to the benefit of any of the Dissipated Funds or the Loans.

50. Yu's subsequent transfer or use of the Dissipated Funds and the Loans amount to a conversion of funds for which Yu is liable.

Restitution

51. Yu has wrongfully obtained the funds under the Loans and the Dissipated Funds. Yu is not entitled to these wrongfully obtained funds. The Receiver seeks restitution of all such amounts that Yu obtained.

Unjust Enrichment

52. Yu has been unjustly enriched by receipt of the funds advanced under the Loans and the Dissipated Funds, to the detriment of Hanfeng China and its sole shareholder Hanfeng. There is no juristic reason for Yu's enrichment since he has no legal or equitable right to these funds.”
(underlining added)

13. In his Statement of Defence Yu pleaded as follows:

“18. The claims and allegations made solely against Yu in paragraphs 1 (b) and (c) 30-36, 44(b), and 49-52 of the SOC are false. Yu denies any and all allegations made against him in respect of these matters. Moreover, these claims are unsupported by any pleading of material facts and constitute bare, conclusory allegations. Said allegations are, by the Plaintiff's admission, purely speculation. Moreover, as pleaded, these paragraphs constitute an abuse of process, fail to disclose any cause of action, and should be struck out.”

...

“58. The Plaintiff seeks damages of 630,000,000 RMB based upon a series of causes of action, advanced without pleading material facts, alleging that Yu is guilty of unlawfully dissipating assets belonging to Hanfeng China, and that Yu has ‘absconded’ with these assets.

59. These claims are all based upon two common assumptions, namely (i) that the assets of Hanfeng China have been improperly dissipated and (ii) that Yu has misappropriated the assets in question.

60. The Plaintiff makes these allegations in paragraphs 30-36 of the SOC, under the heading ‘Yu Dissipates Hanfeng China's Assets.’ In these paragraphs, the Plaintiff alleges two types of improper dissipation of Hanfeng China's assets.

61. First, according to the Plaintiff ‘at least 27 million’ RMB was dissipated from Hanfeng China during the period August 2014 – June 2015 in connection with unspecified expenses (defined as ‘Dissipated Funds’ in the SOC).

62. Unless this figure has been plucked out of the air, it must be comprised of specific disbursements which the Plaintiff alleges (i) were actually made and (ii) were improper. However, no facts are pleaded in the SOC to show the date, amounts, purpose or anything else about any of the expenses and related disbursement of funds which presumably comprise this lump sum claim.

63. Similarly, the Plaintiff has not pleaded any material facts supporting the conclusion that Yu had any involvement in the disbursement of any part of the 27,000,000 RMB claimed on this account.

64. Finally, the Plaintiff has not pleaded any material facts to support the allegations that Yu received any of the so-called 'Dissipated Funds' comprising the 27,000,000 RMD. Rather, the Plaintiff has acknowledged that it has been unable to ascertain what happened to the 'Dissipated Funds'. In the result, the Plaintiff's claim that Yu has stolen these funds is based upon speculation, without any supporting material facts: according to the SOC, the Plaintiff simply states that 'it appears that Yu has absconded' with the Dissipated Funds.

65. As pleaded, these claims constitute bald, conclusory allegations without any supporting material facts, constitute an abuse of process, and fail to disclose any cause of action.

66. Without prejudice to the above, Yu states and the fact is that, so far as he is aware any and all expenses incurred by Hanfeng China during whatever period is in issue were incurred by Local Management for proper purposes. Further, to the extent funds were disbursed by Hanfeng China for such expenses, this was done properly by Local Management. Yu denies any involvement in any improper expenses or disbursements by Hanfeng China.

67. Yu further denies that he has improperly benefited from any disbursements on account of expenses incurred by Hanfeng China, and he denies that he has 'absconded' with any such funds, contrary to the speculative assumption contained in paragraph 31 of the SOC.

68. The second element of the Plaintiff's allegations under this heading relates to certain 'Loans' which are referred to, but not properly identified, in paragraphs 33-36 of the SOC.

69. According to paragraph 33 of the SOC, during an unspecified period of time, Hanfeng China obtained 'approximately RMB 600,000,000' through 'various loans and other agreements.' Paragraph 33 then lists 4 loans with 4 separate banks ('Loans', as defined in the SOC). However the SOC does not provide any facts relating to the dates or terms of the Loans nor does it plead any material facts relating to any alleged involvement by Yu in negotiating, arranging, accepting or otherwise participating in the Loans.

70. As in the case of the so-called 'Dissipated Funds' referred to in the SOC, the Plaintiff also pleads no material facts to support any receipt, use, or other benefit of any kind obtained by Yu in connection with the 'Loans'. Rather, as in the case of the 'Dissipated Funds', the Plaintiff states that it has been unable to ascertain precisely what happened to any proceeds derived from the Loans, but once again simply asserts that it 'appears' that 'Yu has absconded with them.'

71. The above claims are based on bald conclusions without any supporting facts, are an abuse of process, and fail to disclose any causes of action.

72. Without prejudice to the above, Yu denies that any of the Loans were improper, in the alternative denies that that he was involved in any improper Loans, and in any event denies having received any benefit, payment or use of funds as a result of any of the Loans.

73. The Plaintiff's claims against Yu for breach of fiduciary duty, conversion, unjust enrichment, and restitution are contained, respectively, in paragraphs 44, 49-50, 51 and 52 of the SOC.

74. None of these paragraphs contain any material facts to support the causes of action advanced, and all of them are based upon the same bald allegations and speculative assumptions referred to above. As such, the paragraphs of the SOC asserting these claims do not disclose any causes of action and are an abuse of process.

75. Without prejudice to the above, Yu denies that he has dissipated any of Hanfeng China's assets for his personal gain. Contrary to the SOC, Yu did not cause Hanfeng China to dissipate the unspecified 'Dissipated Funds', nor did he cause Hanfeng China to enter into any improper Loans. Yu further denies that he transferred, used, or obtained any funds or benefits of any kind whatsoever with respect to the Dissipated Funds or Loans alluded to in paragraph 49 of the SOC. Yu also pleads that he did not obtain any of the funds in issue, and was not enriched (unjustly or otherwise) to the detriment of Hanfeng China or Hanfeng.

76. Yu further denies that Hanfeng has suffered damages as a result of any breach of duty alleged against him, which breaches are not admitted but denied, and states that if Hanfeng suffered damages, they were the result of, or in the alternative were contributed to by, the acts and omissions and/or negligence of the Independent Directors, and their legal and professional advisors and by the Receiver.

77. Yu states and the fact is that all of these claims are without any factual basis and should be dismissed."

Conclusion

14. By agreement of counsel, the Statement of Defence was delivered without prejudice to the Defendants' bringing motions under Rule 21 of the *Rules of Civil Procedure* for orders striking out paragraphs and dismissing claims contained in the Statement of Claim.
15. Rules 25.06(1) and 25.06(8) of the *Rules of Civil Procedure* are applicable to the paragraphs of the Statement of Claim which the Defendants seek to strike out. These Rules state as follows:

"25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1)."

...

"(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1."

16. The Plaintiff's pleadings against the Defendant Li alleging knowing assistance and knowing receipt and against the Defendant Yu alleging fraud, theft, breach of fiduciary duty and conversion and seeking restitution and unjust enrichment based on said allegations fail to comply with the above rules and the case law applicable to the manner in which such causes of action must be pleaded. Instead, these claims are based upon speculative conclusions unsupported by any pleading of any material facts.
17. It is appropriate that the paragraphs of the Statement of Claim identified in paragraphs 1 and 2 of this Notice of Motion and the causes of action alleged therein be struck out and dismissed pursuant to Rules 1.04, 21.01(b), 21.01(3) (d), 25.06(1), 25.06(8) and 25.11 of the *Rules of Civil Procedure*.
18. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Statement of Claim, Statement of Defence, Reply, and
2. Such further and other material as counsel may advise and this Honourable Court may permit.

June 12, 2017

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Plaintiff

- and -

Yu Xinduo and Lei Li
Defendants

Court File No. CV16-11325-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings Commenced at Toronto

**NOTICE OF MOTION
(Motion to Strike dated June 12, 2017)**

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