

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ERNST & YOUNG INC. in its capacity as Court Appointed Receiver of
HANFENG EVERGREEN INC., Plaintiff

AND:

YU XINDUO and LEI LI, Defendants

BEFORE: Cavanagh J.

COUNSEL: *Daniel S. Murdoch and Genna Wood*, for the Plaintiff

David C. Moore and Karen M. Mitchell, for the Defendants

HEARD: September 22, 2017

ENDORSEMENT

Introduction

[1] The Plaintiff was appointed as receiver and manager of Hanfeng Evergreen Inc. (“Hanfeng”) by a 2014 court order and brings this action in that capacity on behalf of Hanfeng and creditors of Hanfeng.

[2] According to the Statement of Claim, Hanfeng, through its wholly-owned subsidiaries, was a developer and producer of value-added fertilizers in the People’s Republic of China (“China”). Hanfeng has no independent operations and exists solely as a holding company for certain operating entities located in China. Hanfeng Slow-Release Fertilizer Co., Ltd. (“Hanfeng China”) provides slow-release fertilizer products for landscaping projects and agriculture in China. Hanfeng China is a wholly-owned subsidiary of Hanfeng.

[3] In this action, the Plaintiff seeks restitution or damages to recover in excess of \$150 million from the Defendants Xinduo Yu (“Yu”) and from his wife, Lei Li (“Lei”). The Plaintiff’s claims against Yu are founded in alleged breaches of fiduciary duties, fraud, conversion and unjust enrichment. The Plaintiff’s claims against Lei are founded in alleged knowing assistance and knowing receipt. The Plaintiff claims damages and declaratory relief against both Defendants, jointly and severally, for alleged fraudulent misrepresentation.

[4] The Defendants move for an order:

- a. Striking out and dismissing the claims against Lei set out in paragraphs 1 (b) and (c) (ii) and 53-54 of the Statement of Claim and an order striking out and

dismissing the claims and allegations against Lei set out in paragraph 31 of the Plaintiff's Reply.

- b. Striking out and dismissing the claims against Yu set out in paragraphs 1 (a) (i) and (ii), 1 (c)(ii), 8, 9, 30-36, 44 and 49-52 of the Statement of Claim.

[5] The Defendants submit that the claims against them that are the subject of this motion are based on bald conclusions without any supporting facts, are an abuse of process, and fail to disclose any causes of action. The Defendants bring this motion under rule 21 of the *Rules of Civil Procedure* and they also rely upon rules 25.06 (1), 25.06 (2), 25.06 (5), 25.06 (8), 25.08, and 25.11 of the *Rules of Civil Procedure*.

[6] For the following reasons, paragraphs 1(b), 1(c)(ii) (as against Lei), 53 and 54 of the Statement of Claim are struck out, with leave granted to the Plaintiff to deliver an amended Statement of Claim. In other respects, the Defendants' motion is dismissed.

Procedural History

[7] The following is the procedural history of this action:

- a. The Statement of Claim was issued on March 22, 2016.
- b. The Defendants served a Notice of Intent to Defend dated April 21, 2016.
- c. The Defendants served a Demand for Particulars with respect to the misrepresentations alleged in the Statement of Claim on May 11, 2016 and, when this demand was served, counsel for the Defendants expressed that there would likely be other allegations in the Statement of Claim in respect of which particulars are necessary.
- d. On June 16, 2016, the Plaintiff provided a Response to the Demand for Particulars and requested the Statement of Defence by no later than June 27, 2016.
- e. On June 23, 2016 the Defendants served a notice of motion in respect of a motion for an order striking out paragraphs 7, 10, 13, 26, 29, 45 and 46 of the Statement of Claim and, in the alternative, an order directing that the Plaintiff deliver particulars in relation to these paragraphs. The motion was adjourned to allow the Plaintiff to provide particulars.
- f. On September 6, 2016 the Plaintiff served a Second Response to Demand for Particulars and requested delivery of the Defendants' Statement of Defence. The motion that had been brought did not proceed.
- g. On September 14, 2016 the Defendants served a Request to Admit with respect to certain documents listed on the Plaintiff's website with respect to Hanfeng. The Plaintiff's Response to Request to Admit was served on December 6, 2016. The Plaintiff requested delivery of the Statement of Defence within seven days.

- h. The Statement of Defence was delivered on January 5, 2017. At the hearing of this motion counsel for the Defendants advised that before the Statement of Defence was delivered he advised counsel for the Plaintiff that its delivery was without prejudice to the right of the Defendants to move under rule 21 for an order striking out paragraphs of the Statement of Claim and dismissing the claims in these paragraphs. In several paragraphs of the Statement of Defence, the Defendants plead that the Plaintiff's claims are unsupported by any pleadings of material facts and constitute bare, conclusory allegations that constitute an abuse of process, failed to disclose any cause of action, and should be struck out (see, for example, paragraphs 18, 19, 62-65, 69-71, 74, and 92).
- i. The Plaintiff's Reply was delivered on or about May 30, 2017.
- j. The Defendants brought this motion promptly after the Reply was delivered. The Notice of Motion in respect of this motion is dated June 12, 2017.

Timing of this Motion

[8] I raised with the Defendants' counsel during his reply submissions whether it is procedurally permissible for the Defendants to bring this motion after having already (i) brought a motion attacking other paragraphs of the Statement of Claim, and (ii) delivered a statement of defence. Counsel for the Plaintiff had not objected to my hearing this motion on its merits on the ground that the *Rules of Civil Procedure* do not prohibit a rule 21 motion after delivery of a statement of defence.

[9] Rule 21.02 requires that a motion under rule 21.01 shall be made "promptly". Here, after service of the Statement of Claim and receipt of particulars that were demanded, the Defendants moved promptly to strike out certain paragraphs of the Statement of Claim pursuant to rules 25.06 (8), 25.10, and 25.11 of the *Rules of Civil Procedure*. The Defendants did not move at that time to strike out the paragraphs of the Statement of Claim that are the subject of this motion.

[10] There is authority for the proposition that serial attacks on a pleading should be discouraged because to allow such a process would result in a multiplicity of proceedings. In *Tribar Industries Inc. v. KPMG LLP*, 2009 CarswellOnt 1235, Brown J., as he then was, wrote:

29 I dismiss this part of Mr. Chiappetta's motion for two reasons. First, the jurisprudence shows a strong aversion to multiple attacks on the same pleading. As stated in *Slan v. Beyak* (1973), 3 O.R. (2d) 295 (Ont. Master), "the general rule is that there should be one opportunity only afforded to a party to attack his opponent's pleading. Such attack should include a prayer for all remedies in the alternative so that the matter may be dealt with without a multiplicity of proceedings and thereby conform with the general rules of the Court...": see also, *Millgate Financial Corp. v. BF Realty Holdings Ltd.*, [2003] O.J. No. 1309 (Ont. S.C.J.), at para. 36.

The second reason given by Brown J. for his decision does not relate to the motion before me.

[11] In *Millgate Financial Corp. v. BF Realty Holdings Ltd.*, 2003 CarswellOnt 1243, the Defendants successfully moved to strike out certain paragraphs of the statement of claim and, later in the proceeding, moved again to strike out another paragraph of the statement of claim. The Plaintiff submitted that having initially chosen not to seek to strike out this paragraph, the Defendants should not be allowed to object to this paragraph on the ground that it has not been adequately pleaded. Cullity J. accepted this submission and, also citing *Slan v. Beyak* (1973), 3 O.R. (2d) 295, held that a second attack on the pleading should not be permitted.

[12] I agree with these authorities that multiple attacks on a pleading should not be encouraged. In this case, however, the Defendants reserved a right to do so and the Plaintiff does not object to the hearing of this motion on its merits.

[13] This motion was also brought after the Statement of Defence had been delivered. In *Schulz v. Johns*, 2014 CarswellOnt 638, Perell J. addressed the timing of a motion to strike out a statement of claim as disclosing no reasonable cause of action. Perell J. expressed his agreement with a decision of Brown J. in *Bell v. Booth Centennial Healthcare Linen Services*, [2006] O.J. No. 4646 that the practice of delivering a statement of defence and then a rule 21.01(1)(a) or (b) motion should be discouraged. Perell J. wrote that leave can be granted to bring the motion to strike the statement of claim notwithstanding that the defendant has delivered a statement of defence, and he referenced a line of authorities that suggests that leave is not necessary where the statement of defence expressly or implicitly disputes that a cause of action has been shown: *Schulz*, at para. 11.

[14] In this case, as noted, the Defendants pleaded in several paragraphs of the Statement of Defence that the Plaintiff's claims are unsupported by any pleading of material facts and constitute bare, conclusory allegations that constitute an abuse of process, fail to disclose any cause of action, and should be struck out.

[15] I agree that the practice of delivering a statement of defence and then moving to strike out all or some paragraphs of the statement of claim should be discouraged. In the circumstances of this case, however, given the Defendants' reservation of a right to so move and their pleadings that certain allegations in the Statement of Claim are unsupported by pleadings of material facts, I address the Defendants' motion on its merits.

General Principles

[16] On a motion under rule 21.01(1)(b), the test to be applied is whether, assuming the facts pleaded are true, it is plain and obvious that a plaintiff's statement of claim discloses no reasonable cause of action. In respect of such a motion, in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, McLachlin C.J. wrote, at para. 22:

A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven [citation omitted]. No evidence is admissible on such a motion [citation omitted]. It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may

not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[17] The test is a stringent one. Only if the action is certain to fail because the pleading contains a radical defect should the relevant portions be struck out: *Hunt v. T & N plc*, 1990 CarswellBC 759 (S.C.C.) at para. 36.

[18] Rule 25.11 provides that the court may strike out or expunge all or part of a pleading on the ground that the pleading "... (b) is scandalous, frivolous or vexatious; or (c) is an abuse of the process of the court." In *Cerqueira v. Ontario*, [2010] O.J. No. 3037 Strathy J., as he then was, wrote at para. 13:

I also note the observation of Epstein J., as she then was, in *George v. Harris*, above, at para. 20:

The next step is to consider the meaning of "scandalous", "frivolous" or "vexatious". There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety.

[19] In *Carny Timber Co. v. Pabedinskas*, Strathy J., as he then was, wrote at para. 17 that "[t]he common thread of the criteria of Rule 25.11 is that the facts pleaded are irrelevant to the issues before the court, or are so prejudicial that the pleading or portion thereof should be struck in spite of their relevance." As Strathy J. wrote at para. 15, "Rule 25.11 permits the court to surgically excise all or part of the offending pleading".

[20] Rule 25.06 (1) provides that "[e]very pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, not the evidence by which those facts are to be proved." In *Spasic Estate v. Imperial Tobacco Ltd.*, 2003 CarswellOnt 707 Brennan J. wrote at para. 31 that "[i]t is vital, when undertaking a Rule 25.06 analysis, not to confuse material facts, evidence, and particulars, although the distinction can admittedly be precarious".

[21] Rule 25.06(8) provides that “[w]here 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.” The particulars must set out precisely what each allegation of such wrongful act is, and the when, what and by whom and to whom of the relevant circumstances: *Balanyk v. University of Toronto*, 1999 CanLII 14918, at para. 28.

[22] The function of particulars is to limit the generality of pleadings and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case to be made against him or her at the trial and to have such particulars of the opponent’s case as will prevent him or her from being taken by surprise: *Antonacci v. Great Atlantic & Pacific Co. of Canada Ltd.* (2000), 181 D.L.R. (4th) 577 (Ont. C.A.) at para. 34.

[23] In *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257, at para. 60, Perell J. described the role of particulars, quoting from J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Markham, LexisNexis Canada Inc., 2010) at p. 347:

In between material facts and evidence, is the concept of “particulars”. Particulars are additional details that enhance the material facts, and particulars have a role to play different from just being evidence [citation omitted]. Particulars are ordered primarily to clarify a pleading sufficiently to enable the adverse party to frame his or her answer, and their secondary purpose is to prevent surprise at trial [citation omitted]. Particulars have the effect of providing information that narrows the generality of pleadings [citation omitted]. Particulars define the issues, enable preparation for trial, prevent surprise at trial and facilitate the hearing [citations omitted]. A function of particulars to a statement of claim is to define the claim sufficiently to allow a defendant to respond intelligently to it [citations omitted].

In *Pennyfeather*, at para. 61, Perell J. wrote that particulars for pleadings are normally ordered only if: (a) they are not within the knowledge of the party demanding them; and (b) they are necessary to enable the other party to plead his or her response.

Analysis

Pleadings in Relation to Claims against Yu

[24] I first address the pleadings in the Statement of Claim that relate to claims against Yu that the Defendants seek to strike out.

[25] Under the heading “Yu Dissipates Hanfeng China’s Assets”, the Plaintiff alleges two types of improper dissipation of Hanfeng China’s assets. I first address the pleadings that relate to claims based upon alleged “Dissipated Funds” as that term is defined in the Statement of Claim.

[26] In paragraphs 30-32 and 49-52 of the Statement of Claim, the Plaintiff pleads:

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.

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.

51. Yu has wrongfully obtained the funds advanced 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.

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.

[27] The Defendants do not move for additional particulars of statements in the Statement of Claim. Their submission is that the claims pleaded in relation to the “Dissipated Funds” are so lacking in pleadings of material facts that they cannot stand. The Defendants do not oppose a term of the order they seek that would grant leave to the Plaintiff to amend the Statement of Claim, and they submit that the fact that the Plaintiff has, in the alternative to its main submission that the motion should be dismissed, requested such relief shows that the Plaintiff has knowledge of additional facts that could be pleaded.

[28] I do not agree that whether the Plaintiff has knowledge of additional factual details with respect to the expenses that comprise the “Dissipated Funds” or the “Loans”, which it could provide by way of an amended Statement of Claim, or through particulars, is a material consideration on this motion. The outcome of the Defendants’ motion does not depend on

whether the Plaintiff is or is not in possession of additional factual details with respect to these matters. The question before me is not whether additional particulars should be ordered (under Rule 25.10), but whether the claims that are the subject of this motion are so lacking in pleadings of material facts which, if proven, establish legally complete causes of action, that it is plain and obvious that the Statement of Claim discloses no such causes of action.

[29] The Plaintiff's claims in relation to the alleged "Dissipated Funds" are founded in causes of action for breach of fiduciary duty, fraud, conversion and unjust enrichment.

[30] A claim for breach of fiduciary duty must disclose the material facts to support the alleged fiduciary relationship, the duties owed, the breach of the duties and the damage: *Vicor Mechanical Ltd. v. Pegah Construction Ltd.*, [2009] O.J. No. 5268, at para. 12.

[31] Conversion requires the wrongful taking, using or destroying of goods inconsistent with the title of the owner. There must be a voluntary act in respect of another's goods that amounts to a usurpation of the owner's proprietary or possessory rights. The constituent elements of the tort are: a wrongful act, involving a chattel, consisting of handling, disposing or destruction of the chattel, with the intent or effect of denying the title of another person: *Vicor Mechanical*, at para. 13.

[32] A cause of action for unjust enrichment has three elements: an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of any juristic reason for the enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834 at p. 848.

[33] With respect to their motion to strike out and dismiss the claims pleaded in relation to the "Dissipated Funds", the Defendants submit:

- a. No facts are pleaded to show which expenses comprise the figure of at "least RMB 27 million", or the date, amount, purpose or other facts about any of the expenses allegedly incurred by Hanfeng China. In addition, no facts are pleaded to show any improper purpose or any other material facts to indicate how or why or which disbursements were made dishonestly.
- b. No material facts or pleaded to support the conclusion that Yu had any involvement in the expenses incurred by Hanfeng China or the disbursement of any part of the unspecified RMB 27 million.
- c. The Plaintiff admits that it "has been unable to ascertain what happened to the Dissipated Funds", but nonetheless concludes that "it appears that Yu has absconded with them". The Statement of Claim does not contain any pleading of material facts to support this "appearance".
- d. The Plaintiff has not pleaded any material facts to support the allegations that Yu absconded with, much less received, any of the so-called "Dissipated Funds" and, moreover, it is clear on the face of the Statement of Claim that the Plaintiff's claim that Yu "absconded" with these funds is a speculative conclusion.

[34] With respect to the claims pleaded in relation to the “Dissipated Funds”, the Plaintiff submits:

- a. The “specific expenses”, including their “date, amounts, purpose or other facts” that comprise the RMB 27 million of Dissipated Funds constitute evidence, not material facts. The Statement of Claim pleads that Yu advised the Receiver that Hanfeng China’s had been dormant since April 2014, that the expenses that are challenged were incurred after that date, between August 2014 and June 2015, and that the amount of such expenses is significantly more than what would be expected for a nonproducing manufacturing facility.
- b. The Statement of Claim pleads that Yu was the legal representative of Hanfeng China with responsibility for the overall activities of the company, and this is sufficient to plead Yu’s involvement in the alleged “Dissipated Funds”.
- c. The Plaintiff has pleaded that Yu converted the Dissipated Funds for his own use. The Statement of Claim pleads that Yu has refused to provide the Plaintiff with Hanfeng China’s financial records and access to Hanfeng China’s bank accounts.

[35] I do not agree with the Defendants’ submission that the pleadings in respect of the alleged “Dissipated Funds” consist of bald, conclusory allegations such that it is plain and obvious that the Statement of Claim discloses no reasonable cause of action against Yu. The Plaintiff pleads as a fact that Hanfeng China, while its operations were dormant, incurred expenses. The Plaintiff pleads as a fact that Yu caused Hanfeng China to spend or otherwise dissipate amounts used to pay for such expenses “thereby depriving Hanfeng China of rightful possession” of such amounts. The Plaintiff pleads that Yu transferred or used the “Dissipated Funds”.

[36] In my view, the factual matters in respect of which the Defendants submit that the Statement of Claim is deficient in relation to the alleged “Dissipated Funds”, specifically, the specific expenses, and the dates, amounts, purpose or other facts about such alleged expenses, are not essential facts that are required in order for the Plaintiff to plead a legally complete cause of action for breach of fiduciary duty, conversion, or unjust enrichment in respect of the alleged “Dissipated Funds”. These factual matters are additional details that would enhance the material facts that are pleaded. If pleaded, or provided separately as particulars, they would have the effect of providing information that narrows the generality of the facts pleaded in the Statement of Claim. If the Defendants had moved for particulars, these additional details would have qualified as particulars.

[37] I agree with the Plaintiff’s submission that the Plaintiff has adequately pleaded that Yu was involved with the expenses alleged to have resulted in the “Dissipated Funds” by pleading that he is the legal representative of Hanfeng China and responsible for the overall activities of Hanfeng China.

[38] In my view, assuming the facts pleaded to be true, it is not plain and obvious that the Statement of Claim discloses no reasonable cause of action against Yu for breach of fiduciary

duty, conversion, or unjust enrichment in relation to the amounts of money allegedly expended by Hanfeng China and described in the Statement of Claim as the “Dissipated Funds”.

[39] The second type of allegedly improper dissipation of the assets of Hanfeng China that is pleaded in the Statement of Claim relates to alleged “Loans” that are described in paragraphs 33-36 of the Statement of Claim. These paragraphs read:

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.

[40] In relation to these paragraphs, the Defendants submit:

- a. The Statement of Claim does not plead any facts relating to the dates, terms or purpose of the Loans. No facts are pleaded in relation to any alleged involvement by Yu in negotiating, arranging, accepting or otherwise participating in the Loans. No material facts are pleaded to support any receipt, use, or other benefit of any kind obtained by Yu in connection with the “Loans”.
- b. In paragraph 35 of the Statement of Claim, the Plaintiff admits that it has been unable to ascertain what happened to any proceeds derived from the Loans but concludes that it “appears that Yu has absconded with them”.
- c. The pleadings in relation to the “Loans” consist of bald, conclusory allegations and speculative assumptions that disclose no reasonable cause of action for breach of fiduciary duty, conversion or unjust enrichment.

[41] The Plaintiff submits that the “dates, terms or purpose” of the Loans constitute evidence, not material facts. The Statement of Claim specifies that the Hanfeng China Loans were procured after April 2014, and provides their amounts and the banks that made the loans. The Plaintiffs have pleaded that Yu is the legal representative of Hanfeng China and responsible for the overall activities of Hanfeng China, such that he would have access to Hanfeng China’s accounting records and banking records and, as a result, that particulars of the Loans would be within his knowledge. The Plaintiff has pleaded that Yu caused Hanfeng China to obtain the Loans, for which there was no legitimate business purpose, and that he absconded with the proceeds of the Loans.

[42] I do not agree with the Defendants’ submission that the Plaintiff’s pleadings in respect of the alleged “Loans” consist of bald, conclusory allegations, such that the Statement of Claim discloses no reasonable cause of action against Yu. The Plaintiff pleads as a fact that Hanfeng China, while it was under the control and direction of Yu, including while it was purportedly dormant, obtained approximately RMB 600,000 through various loans and other agreements. The identities of the lenders in respect of four loans are pleaded as facts. The amount of each of the four loans is pleaded as a fact. The Plaintiff pleads as a fact that none of the borrowed funds are (or have ever been) held by Hanfeng China. Although in paragraph 35 the Plaintiff pleads that “it appears that Yu has absconded with” the borrowed funds, this must be read together with paragraph 49 where the Plaintiff pleads as a fact that Yu “absconded with the proceeds of the Loans ...”. By so pleading, the Plaintiff has alleged that Yu took for himself the proceeds of the Loans to Hanfeng China. This is a factual assertion and not, as the Defendants submit, a speculative conclusion.

[43] I regard the dates, terms, or purpose of the Loans to be additional details that would enhance the material facts that have been pleaded and, if particulars had been requested, such details would qualify as particulars. However, assuming that the facts pleaded in the Statement of Claim are true, it is not plain and obvious that the Statement of Claim discloses no reasonable cause of action against Yu for breach of fiduciary duty, conversion or unjust enrichment in respect of the “Loans”.

Pleadings in Relation to Claims against Lei

[44] The Defendants submit that the Plaintiff has failed to plead the required elements of the “knowing assistance” and “knowing receipt” causes of action against Lei.

[45] In respect of these claims, the Statement of Claim reads:

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;
 - (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;

46. Lei fraudulently misrepresented the identity of the Purchaser and actively concealed material facts about the true identity of the Purchaser and Yu's relationship to the Purchaser, all with intent to induce Hanfeng to enter into the Share Transfer Agreement, thereby injuring Hanfeng or knowing that injury was likely.

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 Li's knowing assistance and knowing receipt and is entitled to damages and/or restitution.

[46] In addition, the Plaintiff has provided details that enhance the facts pleaded by delivery of two responses to demands for particulars.

[47] The constituent elements of the tort of knowing assistance in breach of fiduciary duty are:

- a. The existence of a fiduciary duty;
- b. The fiduciary breached its duty fraudulently and dishonestly;
- c. A stranger to the fiduciary relationship had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct (the stranger's knowledge of the misconduct must be actual (as opposed to constructive), which includes wilful blindness to the breach or recklessness in the failure to recognize the breach); and
- d. The stranger participated in or assisted the fiduciary's fraudulent and dishonest conduct.

See *Harris v. Leikin Group Inc.*, 2011 ONCA 790, at para. 8.

[48] The Defendants submit that the Plaintiff has admitted that it has no actual knowledge of a defendant's breach of trust and, therefore, a claim based on knowing assistance is untenable. The Defendants rely upon paragraphs 31 and 34 of the Statement of Claim in support of this submission. The Defendants also submit that the Plaintiff has pleaded bald, conclusory statements of the elements of the cause of action unsupported by necessary pleadings of material facts.

[49] The Plaintiff submits that:

- a. The Statement of Claim pleads in paragraphs 4 and 37 that a fiduciary duty was owed by Yu to Hanfeng China as he was a member of its Board and as its legal representative.
- b. The Statement of Claim pleads in paragraph 44 that Yu breached his fiduciary duties by (i) fraudulently misrepresenting the identity of a potential purchaser of Hanfeng China in an attempt to secure Hanfeng China's assets for his own personal benefit, and (ii) frustrating the Plaintiff's efforts to protect Hanfeng China's assets while dissipating them for his personal gain.
- c. The second response to the Defendants' demand for particulars includes the factual statement that Lei knew Yu was a director of Hanfeng as a result of her attendance at Board meetings.
- d. The Plaintiff has pleaded at paragraph 46 of the Statement of Claim Lei's participation in Yu's alleged breach of fiduciary duty by misrepresenting the identity of the potential purchaser, alleging that Lei fraudulently misrepresented the identity of the Purchaser and actively concealed material facts about the true identity of the Purchaser and Yu's relationship to the Purchaser. The Plaintiff pleads that these representations were made with the intent to induce Hanfeng to enter into the Share Transfer Agreement and that Lei knowingly assisted Yu to wrongfully obtain the benefits of the Loans and Dissipated Funds.

[50] I have already addressed the adequacy of the Statement of Claim in respect of the causes of action pleaded against Yu in relation to the alleged "Dissipated Funds" and the alleged "Loans", and I concluded that these causes of action were adequately pleaded. I do not agree with the Defendants' submission that the Plaintiff has made an admission, through its pleading, that it has no actual knowledge of Yu's breach of fiduciary duty. The Plaintiff's pleading in paragraph 31 of the Statement of Claim that it "has been unable to ascertain what happened to the Dissipated Funds" must be read with the factual assertions in paragraphs 32, 49 and 50 of the Statement of the Statement of Claim where the Plaintiff pleads that at least RMB 27 million has been dissipated from Hanfeng China during the period of time between August 2014 and June 2015, that Yu caused Hanfeng China to "spend or otherwise dissipate the Dissipated Funds", and that Yu transferred or used the Dissipated Funds.

[51] The Plaintiff pleads as a fact that Yu is a member of the Board of Hanfeng China and its legal representative and, based upon these factual pleadings, the Plaintiff pleads that Yu owed a fiduciary duty to Hanfeng China. The Plaintiff pleads that Yu (i) fraudulently misrepresented the identity of a potential purchaser of Hanfeng China with the intent to induce Hanfeng to enter into a share transfer agreement, and (ii) frustrated the Plaintiff's efforts to protect Hanfeng China's assets while dissipating them for his personal gain. Based upon these factual pleadings, the Plaintiff pleads that Yu breached his fiduciary duties. These paragraphs are adequate pleadings of material facts that, if proven, would establish the first two elements of the cause of action of knowing assistance.

[52] I agree that the Plaintiff has provided particulars to enhance the pleadings of Lei's knowledge that Yu owed fiduciary duties to Hanfeng China through paragraphs 4 (d), (e), (h), (k), and (n) of its Second Response to Particulars in which the Plaintiff provided particulars of Lei's attendances with Yu at Board meetings of Hanfeng China through which, the Plaintiff submits, it may be inferred that Lei knew that Yu was a director of Hanfeng. Pursuant to Rule 25.06(8), knowledge of an allegation of breach of trust may be alleged as a fact without pleading the circumstances from which it is to be inferred. The pleadings in the Statement of Claim supported by the particulars provided are adequate pleadings of the third constituent element of the cause of action of knowing assistance.

[53] The fourth constituent element of the tort of knowing assistance is that the stranger participated in or assisted the fiduciary's fraudulent and dishonest conduct.

[54] The Plaintiff has not pleaded that Lei is liable for the tort of knowing assistance in relation to Yu's alleged breach of fiduciary duty in respect of the claims related to the identity of the proposed purchaser of Hanfeng China. The cause of action against Lei as pleaded in paragraph 46 of the Statement of Claim is for fraudulent misrepresentation, and this claim has not been attacked on this motion.

[55] In respect of the claims against Lei for knowing assistance related to the "Dissipated Funds" and the "Loans", the Plaintiff pleads only that Lei "knowingly assisted Yu to wrongfully obtain the benefits of the Loans and the Dissipated Funds". The Plaintiff does not allege that Lei caused Hanfeng China to dissipate the "Dissipated Funds", or that she took for herself the proceeds of the "Loans". The Plaintiff's bare allegation that Lei "knowingly assisted Yu to wrongfully obtain the benefits of the Loans and the Dissipated Funds", without pleading the actions that she took to so assist him, does not allow the Defendants to evaluate whether such acts qualify as assistance.

[56] In my view, this pleading in paragraph 54 of the Statement of Claim constitutes a bare allegation that does not meet the minimum level of material fact disclosure required by rule 25.06(1) and should be struck out as scandalous under rule 25.11.

[57] In *Pradhan v. Bank of Montreal*, 2012 ONSC 2229, Horkins J. identified the constituent elements of the tort of knowing receipt and wrote, at para. 142:

Knowing receipt arises in circumstances where the third party has received trust monies for his or her personal benefit. A series of Supreme Court of Canada cases have confirmed the essential elements of a knowing receipt cause of action. To succeed, the plaintiff must prove the following:

- (1) That the property received was subject to a trust in favour of the plaintiff [citation omitted].
- (2) That the property was taken from the plaintiff in breach of the trust. It does not matter if the breach of the trust was fraudulent [citations omitted].

(3) That the defendant had knowledge of facts sufficient to put a reasonable person on notice or inquiry of the breach of trust (constructive knowledge) [citation omitted].

(4) That the defendant received the trust property and applied the property for its own use and benefit [citation omitted].

[58] In respect of the cause of action pleaded against Lei for knowing receipt, the Defendants submit that the Statement of Claim does not adequately plead Lei's receipt of trust property for her own use and benefit and that paragraphs 53 and 54 of the Statement of Claim do not include sufficient pleadings of material facts to meet the minimum level of factual disclosure required by rule 25.06 (1).

[59] The Plaintiff submits that (i) it has pleaded at paragraph 53 of the Statement of Claim that Lei received the benefit of Hanfeng China's property, and (ii) that the property is subject to a trust is a legal consequence of Yu's breach of fiduciary duty.

[60] In my view, the pleading that "Lei knowingly received and retained the benefits of the Loans and Dissipated Funds, which Yu wrongfully obtained" is a bare allegation that does not meet the minimum level of material fact disclosure required by rule 25.06 (1). There are no allegations of acts by Lei to receive and retain the benefits of the amounts in question that, allegedly, Yu wrongfully obtained. The Statement of Claim does not contain pleadings of material facts that would allow the Defendants to evaluate whether, based upon the facts pleaded, Lei did, in fact, receive and retain the benefit of the "Dissipated Funds" and the "Loans". Paragraph 53 of the Statement of Claim should be struck out as a bare and, therefore, scandalous pleading pursuant to rule 25.11.

[61] When paragraphs 53 and 54 of the Statement of Claim are struck out pursuant to rule 25.11, it is plain and obvious that the Statement of Claim discloses no reasonable cause of action against Lei for knowing assistance or knowing receipt, or for a constructive trust remedy for monies belonging to Hanfeng China and wrongfully held by Lei, and that paragraphs 1(b) and 1(c)(ii) (as against Lei) must be struck out under rule 21.01(1)(b).

[62] The Defendants also move to strike out paragraph 31 of the Plaintiff's Reply pleading. In paragraph 31, the Plaintiff pleads, with respect to Lei:

However, the Receiver has been precluded from preserving, liquidating or realizing on the assets of Hanfeng China as a result of Yu and Lei's failure to cooperate with the Receiver's requests regarding access to and the administration of Hanfeng China, as described herein.

[63] The Defendants submit that (i) this pleading contains no material facts to support the claim against Lei, (ii) this claim is improperly made in a reply pleading, and (iii) this allegation is bare and should be struck out pursuant to rule 25.11.

[64] The Plaintiff submits that paragraph 31 of the Reply does not make a claim against Lei but only responds to the Defendants' allegations in paragraph 101 of the Statement of Defence

that the Plaintiff failed to mitigate its damages. The Plaintiff submits that, therefore, paragraph 31 of the Reply is a proper pleading.

[65] The pleading at paragraph 101 of the Statement of Defence that the Plaintiff failed to take reasonable steps to implement a liquidation of the assets of Hanfeng China and thereby failed to mitigate its damages is made by both Defendants. I agree with the Plaintiff's submission that paragraph 31 of the Reply is not a claim against Lei, but is properly a pleading in reply to paragraph 101 of the Statement of Defence. I would not strike out this paragraph of the Reply.

[66] The Defendants do not oppose a term of an order striking out portions of the Statement of Claim that the Plaintiff be granted leave to deliver an amended Statement of Claim. In the circumstances, I grant leave to the Plaintiff to deliver an amended Statement of Claim within 30 days of the release of this decision.

Disposition

[67] For the foregoing reasons:

- a. Paragraphs 1(b), 1(c)(ii) (as against Lei), 53, and 54 of the Statement of Claim are struck out.
- b. The Plaintiff is granted leave to deliver an amended Statement of Claim within 30 days.
- c. The Defendants' motion is otherwise dismissed.

[68] I encourage the parties to resolve the costs of this motion. If they are unable to do so, the Defendants may make brief written submissions within 20 days. The Plaintiff may make brief written submissions within 15 days of receipt of the Defendants' submissions. If so advised, the Defendants may make very brief reply submissions within 5 days of receipt of the Plaintiff's submissions.

A handwritten signature in black ink, appearing to read 'Cavanagh J.', is written over a horizontal line.

Cavanagh J.

Date: October 3, 2017