CITATION: Yu v. Tsang et al., 2022 ONSC 1814
COURT FILE NO.: CV-19-139586-00
DATE: 20220325

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GARY WAI YU Applicant/Respondent on Motion	Mark Klaiman, for the Applicant/Respondent on Motion
– and –	
PO YEE TSANG and 2506698 ONTARIO INC. Respondents/Moving Parties	Nelson Wan and William Murray, for the Respondents/Moving Parties
	HEARD: November 26, 2021

DAWE J.

I. Overview

[1] In 2016, Gary Wai Yu and his cousin Po Ye Tsang opened a Cantonese wonton restaurant together in Markham called Wonton Chai. Ms. Tsang's family already operated three other wonton restaurants under this same business name in other parts of the greater Toronto area. Mr. Yu, who is a United States citizen, moved to Canada to manage the new restaurant, which nearly a year later applied for authorization to hire him as a temporary foreign worker.

[2] When they decided to go into business together Ms. Tsang and Mr. Yu created a new corporation, the respondent 2506698 Ontario Ltd., that would be the owner of the new restaurant. She was issued 55% of the corporation's shares and Mr. Yu was issued the remaining 45%.

[3] In the fall of 2018 Mr. Yu and Ms. Tsang had a falling out, and in December 2018 she relieved him of his duties as the restaurant's manager. In January 2019 she convened a shareholder's meeting of 2506698 Ontario Ltd. at which she used her controlling majority to remove Mr. Yu as a director of the corporation.

[4] Mr. Yu has now brought an application naming Ms. Tsang and 2506698 Ontario Ltd. as respondents. He seeks a variety of remedial orders, including both declaratory relief and statutory remedies under the Ontario *Business Corporations Act*, R.S.O. 1990 c. B.16.

[5] One of the main remedies Mr. Yu seeks is an order compelling Ms. Tsang to buy his shares in the corporation at their fair market value as of November 2018. However, the parties disagree about how many shares Mr. Yu really owns, as well as about what these shares are worth.

[6] Mr. Yu acknowledges that when he and Ms. Tsang created the corporation in 2016, he was issued only 45% of its shares. However, he says that they had a verbal agreement that he would really hold a controlling 70% ownership stake in the restaurant, explaining that he agreed to receive only 45% of the corporation's shares on paper because Ms. Tsang misled him into believing that he could not legally be the majority shareholder because he was not a Canadian citizen.

[7] Ms. Tsang disputes that there was ever any such an agreement. She acknowledges that she and Mr. Yu had a separate agreement that he would receive 70% of the restaurant's profits, as compensation for the work he would be doing as its manager. However, she maintains that they never agreed that he would also be the *de facto* 70% owner of the corporation even though he only held 45% of its shares.

[8] The parties have also presented divergent expert opinions about the fair market value of the corporation's shares.

[9] Ms. Tsang and the respondent corporation now bring a motion seeking to have Mr. Yu's application converted to an action, arguing that the disputes in this case involve questions of credibility that require *viva voce* evidence and the other procedural mechanisms of a civil trial, such as exchanges of pleadings and discoveries.

[10] Mr. Yu resists the respondents' motion. He argues that the documentary evidence in this case is so strongly in his favour that there is no need for a trial, and that his application should be granted.

[11] I heard the application and the respondents' conversion motion together and reserved my decisions on both.

[12] As I will now explain, I have concluded that this is not a case that I can fairly determine on the existing paper record.

[13] In particular, resolving the key dispute between Mr. Yu and Ms. Tsang over how they had agreed to apportion ownership of the business requires assessing the credibility and reliability of their conflicting evidence. While I agree with Mr. Yu that there is documentary evidence that substantially undermines important aspects of Ms. Tsang's evidence, this evidence does not unambiguously contradict her position on all the key factual issues in dispute between them. Some aspects of Mr. Yu's own evidence are also problematic.

[14] Some the issues in dispute in this case might be ones that could be fairly decided without a trial, but I am not satisfied that they are readily severable from the issues where I think a trial is necessary.

[15] Accordingly, I am directing a trial of the whole application.

II. Analysis

A. The law

[16] Rule 38.10(1)(*b*) of the *Rules of Civil Procedure* permits a judge who hears an application to "order that the whole application or any issue proceed to trial". Rule 38.10(2) provides further that "where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action", subject to any directions the court makes.

[17] Rule 14.02 provides that civil proceedings "shall be by action, except where a statute or these rules provide otherwise". Among other things, Rule 14.05(3)(*h*) permits proceedings to be commenced by application "where the relief claimed … is in respect of any matter where it is unlikely there will be any material facts in dispute requiring a trial".

[18] In this case, Mr. Yu has framed his application in part as an application under the oppression remedy provision in s. 248 of the *Business Corporations Act*, which expressly permits relief under that section to be sought by way of application.

[19] However, he also seeks declarations that Ms. Tsang has "breached the terms of their agreement that [he] is 70% owner of the Respondent 2506698 Ontario Inc.", and that he "is the owner of 70% of the issued and outstanding Common Shares of 2506698".

[20] As I have already mentioned, the parties disagree about whether there was ever any such agreement, and accordingly dispute the veracity of Mr. Yu's claim that he should be treated as owning 70% of the corporation's shares even though only 45% of its shares were issued to him and the remaining 55% were issued to Ms. Tsang.

[21] As Firestone J. stated in *Przysuski v. City Optical Holdings Inc.*, 2013 ONSC 5709 at para. 12:

> While the Applicant has the *prima facie* right to choose their originating process by way of application if so authorized by the *Rules* or a statute, the court maintains the right to convert the application into an action for good reason.

[22] The main factors a court should consider when deciding whether there is a "good reason" to make an order under Rule 38.10(1)(b) are well-established in the case law. They include:

i) Whether material facts are in dispute;

ii) The presence of complex issues that require expert evidence and/or a weighing of the evidence;

iii) Whether there is a need for pleadings and discoveries; and

iv) The importance and impact of the application and of the relief sought.

See, e.g. *Fort William Indian Band v. Canada*, 2005 CanLII 19819 at para. 5 (Ont. S.C.J.), *Yorkville East Developments Inc. v. York Condominium Corporation No. 194*, 2021 ONSC 5678 at para. 35.

B. The evidential record

[23] The documentary record in this case is both voluminous and poorly organized. It consists of a series of affidavits, responding affidavits, reply affidavits, and sur-reply affidavits, all with multiple documents appended as exhibits.

[24] Mr. Yu filed an initial affidavit in support of his application. Ms. Tsang then filed an affidavit in response. Mr. Yu then filed a reply affidavit, and Ms. Tsang then filed her own sur-reply affidavit. Mr. Yu then filed second and third reply affidavits. He also filed two affidavits from third parties, although one of these had previously been appended to one of his own earlier affidavits. Both parties have also filed affidavits from their experts.

[25] Mr. Yu was cross-examined on his first four affidavits in March 2020. In April 2020 he then filed a fifth affidavit in which he raised a host of new factual allegations about Ms. Tsang's conduct of the business in 2020.

[26] Ms. Tsang was not cross-examined on any of her affidavits. Moreover, her counsel take the position that Mr. Yu ought not to have been allowed to file multiple sur-reply affidavits, and that this was why they did not respond by filing additional affidavits from Ms. Tsang.

C. Do the factual disputes in this case require a trial?

[27] Mr. Yu and Ms. Tsang disagree about multiple material facts, including:

i) Whether they ever agreed that Mr. Yu would own a 70% majority stake in 2506698 Ontario Ltd., despite only being issued 45% of the corporation's shares;

ii) How much money was spent on the restaurant's start-up costs;

iii) Whether their agreement that Mr. Yu would receive 70% of the restaurant's profits was contingent on his continuing to work as the restaurant's manager;

iv) Whether Ms. Tsang knew that Mr. Yu planned to use his involvement in the business as a way of obtaining Canadian permanent residence status for himself and his family;

v) How profitable the restaurant was, and whether it took in substantial cash payments that were not recorded in its books;

vi) The value of the corporation's shares as of November 30, 2018.

[28] For the purpose of my analysis I will focus on the first two issues, which as I will explain are interconnected.

[29] If the dispute over the size of Mr. Yu's equity stake in the corporation requires a trial to fairly resolve, I do not think there will be any real efficiency gained by carving off any of the other disputed issues to be decided on the existing paper record.

1. Undisputed facts

[30] There are some factual matters about which Mr. Yu and Ms. Tsang substantially agree.

[31] It is common ground that Ms. Tsang's family had for many years owned and run three wonton restaurants in the GTA that all operated under the "Wonton Chai" brand name.

[32] Mr. Yu, who is a United States citizen, has a university degree in finance and had worked for years as a securities trader and in banking, but at some point he became involved in running his uncle and aunt's wonton restaurant in Hong Kong.

[33] In 2015, Mr. Yu and Ms. Tsang began discussing the possibility of opening a restaurant together in the GTA, and Mr. Yu gave Ms. Tsang some initial investment funds.

[34] On February 29, 2016 they incorporated a new company, 2506698 Ontario Ltd., that was to serve as the owner of their new restaurant venture. Ms. Tsang and Mr. Yu were both made directors of the corporation, and she was named president while he was named as the secretary and treasurer. One hundred Class A shares of the corporation were issued, 55 of which were registered in Ms. Tsang's name and the remaining 45 in Mr. Yu's name. Each paid nominal subscription prices of $1/share.

[35] On March 8, 2016 Mr. Yu sent Ms. Tsang a second wire transfer, which brought his total investment up to $102,944.26 in Canadian funds.

[36] The parties agree that Ms. Tsang then proceeded to pay for the rest of the new restaurant's start-up costs because Mr. Yu had no more money available that he could contribute. They also agree that the plan was for Mr. Yu to reimburse Ms. Tsang for the rest of his share of the start-up costs once the restaurant had opened and he began receiving his share of its profits.

[37] On March 18, 2016 Ms. Tsang signed a ten year lease agreement on behalf of the corporation for restaurant premises in a shopping plaza on Major Mackenzie Drive in Markham.

[38] The new restaurant opened for business in August 2016. Mr. Yu, who had moved to Ontario from New York some months earlier, worked in the restaurant as the manager and chef even though he did not yet have a Canadian work permit. Ms. Tsang and Mr. Yu had agreed that he would get 70% of the restaurant's profits. However, they disagree about whether this arrangement was contingent on his continuing to work at the restaurant.

[39] In June 2017, the corporation had an immigration consultant prepare an application for a Labour Market Impact Assessment ("LMIA"), which was an essential step before the corporation could legally hire Mr. Yu as a temporary foreign worker. The application was framed to suggest that the corporation had searched for a Canadian or permanent resident who could manage the restaurant but that no suitable person could be found. However, it seems to be undisputed that the job of managing the restaurant had always been earmarked for Mr. Yu, and that he had been doing this job ever since the restaurant first opened in August 2016 even though he did not have a Canadian work permit.

[40] Mr. Yu maintains that his long-term objective was to eventually obtain permanent residence status in Canada for himself and his family, and that Ms. Tsang knew that this was his goal. However, Ms. Tsang denies that she knew this.

[41] The corporation obtained a positive LMIA in October 2017, but Mr. Yu did not obtain a work permit. He attributes to an error on the part of his immigration consultant who he says failed to properly submit his application. The LMIA expired in April 2018, and in August 2018 the corporation submitted a new LMIA application.

[42] However, by the fall of 2018 relations had become strained between Mr. Yu and Ms. Tsang and her family. He attributes this to a dispute that he had with Ms. Tsang's father, about which he provides few details.

[43] Ms. Tsang maintains that the relationship soured in part because Mr. Yu "became unfriendly towards our family", but also because they began having disagreements about the operation of the restaurant.

[44] Mr. Yu acknowledges that he and Ms. Tsang began having business disagreements, but says they were due to actions she and her family took after their relationship had already broken down, rather than a contributing cause of the breakdown.

[45] In September 2018 the corporation withdrew its LMIA application, which effectively prevented Mr. Yu from applying for a work permit. Ms. Tsang acknowledges that she did this "because of our deteriorating relationship", and also because she was "concerned that his work permit application has been ongoing for more than two years".

[46] Mr. Yu and Ms. Tsang's disagreements about running the restaurant continued to escalate and their relationship deteriorated further. In December 2018 Ms. Tsang told Mr. Yu that she was removing him from his position as the restaurant's manager and taking over his duties herself. In January 2019 she convened a meeting of the shareholders of the corporation – namely, herself and Mr. Yu – and used her majority control to remove Mr. Yu as a director. During this meeting Mr. Yu objected and took the position that he really

owned 70% of the corporation's shares, but Ms. Tsang denied this and would not give effect to his objections.

2. Disputed facts

a) The share ownership issue

[47] Mr. Yu agrees that he was only issued 45% of 2506698 Ontario Ltd.'s shares when the company was first incorporated, and that no shares ever changed hands afterwards. However, he maintains that he and Ms. Tsang had a verbal agreement that he would really own 70% of the new corporation and that she would only own a 30% stake.

[48] According to Mr. Yu, he agreed to receive only 45% of the shares on paper because Ms. Tang told him, incorrectly, that because he was not a Canadian citizen he could not legally be the majority shareholder.

[49] Mr. Yu acknowledges that the agreement that he would own 70% of the corporation was never formally put in writing. He explains that because he trusted Ms. Tsang he did not think it was necessary to do this, for him to obtain legal advice about the arrangement.

[50] For her part, Ms. Tsang denies that she ever told Mr. Yu that he could not be the majority shareholder because he was not a Canadian citizen. She also denies that they ever agreed that Mr. Yu would be the *de facto* owner of 70% of the business. Rather, Ms. Tsang's position is that at some point she and Mr. Yu met to discuss various alternatives for how ownership of the new restaurant would be divided between them. She acknowledges that a 70-30% split was one of the options they discussed, but says that Mr. Yu ultimately decided that he would take only a 45% ownership stake.

[51] As I will discuss further below, a key item of documentary evidence in relation to the share ownership issue is a sheet of paper in Ms. Tsang's handwriting, in which she appears to set out what Mr. Yu's share of the initial investment cost would be if he were responsible for paying 70% of this amount. The total initial investment cost is stated in this document to be $315,489.66, such that 70% of this amount would be $220,842.76.

[52] However, Mr. Yu and Ms. Tsang have presented conflicting explanations about when this document was written and what it signifies.

b) Other disputed issues

[53] As noted above, Mr. Yu and Ms. Tsang disagree about the extent to which their disputes over running the restaurant in the fall and winter of 2018 were a contributing cause of the rift between them, rather than a symptom of it. They also disagree about the specific details of their business disagreements.

[54] For instance, Mr. Yu and Ms. Tsang disagree about why Ms. Tsang and her family decided in September 2018 that the restaurant would stop making its own wontons and would instead start buying them from the Tsang family's other "Wonton Chai" restaurants.

[55] Mr. Yu portrays this as a decision that Ms. Tsang and her family made in order to shift profits to the other restaurants, which they entirely owned. However, Ms. Tsang maintains that it was made in response to Mr. Yu's unilateral decision to begin making smaller wontons with different ingredients as a cost-cutting measure, which Ms. Tsang and her family feared would undermine the reputation of the "Wonton Chai" brand.

[56] Mr. Yu also asserts that the restaurant did much of its business in cash, and that cash receipts and payments were kept off the corporation's official books. However, he maintains that Ms. Tsang kept accurate handwritten financial accounts that she used to distribute the profits between them, which was also mainly done in cash. Ms. Tsang has not squarely responded to these latter allegations, although she appears to be taking the position that the corporation's books are accurate.

[57] The parties have each retained experts who provide widely disparate share price valuations, using different methodologies, with Mr. Yu's expert putting the corporation's total value in the $1.1 to $1.2 million range, while Ms. Tsang's expert valuing it in the range of only $400,000 to $500,000. The main underlying source of the experts' disagreement seems to be their reliance on different inputs: Ms. Tsang's expert has relied on the corporation's official accounts, while Mr. Yu's expert relies on Ms. Tsang's handwritten ledgers, which Mr. Yu alleges record extensive cash transactions that never made their way into the corporation's formal accounts.

3. Can the share ownership dispute be fairly resolved on the existing paper record?

[58] On behalf of Mr. Yu, Mr. Klaiman contends that the documentary record so strongly supports his client's position on the question of share ownership that there is no need for a trial to resolve this disputed issue.

[59] He acknowledges that Mr. Yu and Ms. Tsang have each given contradictory evidence about how they agreed to divide ownership of the business between them. However, he argues that certain documents in Ms. Tsang's handwriting support inferences that inexorably lead to the conclusion that she is lying, and that Mr. Yu is being truthful.

[60] As Myers J. noted in *RNC Corp. v. Johnstone,* 2020 ONSC 7751 at paras. 15-16:

> In some cases, there is a strong documentary record that belies or overwhelms a party's subjective evidence and claims. Some witnesses' testimony just defy common sense. See*: Faryna v. Chorny*, [1951] B.C.J. No. 152, [1951] 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, 1951 CanLII 252 (C.A.). Credibility issues can be more readily resolved in those cases.
>
> Where credibility is in issue and, especially, where the evidence of two or more witnesses is in opposition, absent a clear and definitive contemporaneous documentary record or a Perry Mason out of court cross-examination, the motion is sounding more like a trial.

[61] The question I must consider is whether the documentary evidence in this case is so overwhelming that I can fairly determine the dispute between Mr. Yu and Ms. Tsang over share ownership without the advantage of having seen either of them testify, and without Ms. Tsang having even been cross-examined.

a) The critical documents

[62] There are five critical documents on which Mr. Klaiman's argument hinges.

[63] The first is the sheet of paper mentioned earlier, on which Ms. Tsang wrote out figures that appear to set out how much more money Mr. Yu still needed to contribute to bring his total share of the start-up costs to 70%, on the basis that the total initial investment amount was $315,489.40.

[64] The sheet shows that 70% of this amount is $220,842.58. Once the $102,944.26 Mr. Yu had already given Ms. Tsang as his initial investment is subtracted from this figure, the contribution amount he still owed is $117,898.32.

[65] The second and third documents are the sheets that Ms. Tsang says she presented to Mr. Yu at the same time showing how much he would owe if his ownership percentage share was either 60% or 45%, based on the same total initial investment amount figure of $315,489.40.

[66] Mr. Yu's position is that Ms. Tsang is lying about when she prepared these latter documents. He contends that she only wrote them after the fact in an attempt to explain away the 70-30% sheet, which he maintains is genuine.

[67] The fourth document is a similar sheet that Ms. Tsang says she prepared on August 17, 2016, setting out what Mr. Yu had to pay under a 45%-55% ownership split, which she says was by that time what they had agreed on. However, the numbers in this document are based on a substantially higher initial investment amount of $493,364.12.

[68] The fifth key document is a handwritten ledger that Mr. Yu maintains is a record Ms. Tsang kept of the monthly payments he made to clear his debt to her.

[69] This document has the heading "Yu ✓ Tsang" and three columns: (i) a list of months from October 2016 to October 2017; (ii) a list of figures ranging between 4,000 and 13,900, with the figure 10,000 appearing the most frequently, eight times; and (iii) a descending list of numbers that starts at 113,900 and ends at zero, in which the number in each row represents the total that remains once the number in the middle column is subtracted from the right-column total in the row above for the previous month.

(1) Mr. Yu's evidence about these documents

[70] Mr. Yu maintains that he saw the 70-30% split sheet for the first time on November 7, 2016, when Ms. Tsang sent him an image of the document as a WhatsApp text message. However, he maintains that it reflects the agreement they had reached more than a year

earlier, in which he had agreed to contribute 70% of the business's start-up costs in exchange for receiving a 70% ownership share. Mr. Yu has not said exactly when he and Ms. Tsang reached this agreement, but his position is that they did so at some point before he first moved to Canada in October 2015.

[71] When he was cross-examined on his first four affidavits, Mr. Yu testified that when he and Ms. Tsang attended the office of Sunny S.F. Wong, the accountant who had prepared the incorporation documents and who later prepared the corporation's financial statements, he did not tell Mr. Wong that he was going to be the *de facto* majority shareholder of the restaurant corporation, explaining:

> Because that was between me and Jenny [Ms. Tsang], not between me and Sunny. I don't even know if Sunny knows it.

[72] Mr. Yu agrees that apart from his initial $102,944.26 investment, Ms. Tsang paid for all of the rest of the business's start-up costs up front. However, he maintains that they had agreed to treat her overpayments as an interest-free loan to him which he then repaid over the next year out of his profits from running the restaurant, as shown on the "Yu ✓ Tsang" ledger. He interprets this document as showing that his debt had been $117,900 when he began paying it off in October 2016, and that after a year it had been paid down to zero.

[73] Mr. Yu also disputes Ms. Tsang's claims that the total investment amount was actually more than $315,489.40, as I will discuss later.

(2) Ms. Tsang's evidence in response

[74] Ms. Tsang explains that the sheet of paper showing a 70-30% ownership split was one of three different sheets that she prepared for discussion purposes when she and Mr. Yu met in person "[b]efore finalizing the terms of our partnership". She does not say when this meeting took place, but states that their agreement was not finalized until some point after she signed the lease for the restaurant premises, which she did on March 18, 2016.

[75] According to Ms. Tsang, during this meeting she gave Mr. Yu the three different sheets, all of which she has put in evidence. One set out how much he would have to contribute if the ownership split between them was 70-30%, and the others show what his contribution amounts would be if the ownership split between them was either 60-40% or 45-55%. According to Ms. Tsang, "Gary [Yu] picked the proposal in which he would own 45% of the shares and be responsible for 45% of the initial investment."

[76] Ms. Tsang maintains that she later sent Mr. Yu the November 7, 2016 WhatsApp message with an image of the sheet showing the 70-30% split because Mr. Yu:

> … suddenly gave me a call and requested that I forward the written proposal with a 70-30 split to him via text message. He did not request that I forward the other two handwritten proposals.

[77] Ms. Tsang also maintains that the total initial investment amount turned out to be considerably higher than the $315,489.40 figure that is shown on these three sheets.

[78] In her first affidavit, dated July 18, 2019, Ms. Tsang states that the total investment amount was actually $493,364.12, and that she accordingly prepared a new sheet of paper on August 17, 2016 showing both this revised figure and a new calculation of what Mr. Yu had to pay under the 45%-55% ownership split, which she says they had by that time agreed to.

[79] This document shows Mr. Yu's total contribution amount as $222,014.03, and his resulting debt to Ms. Tsang once the money he had already provided was subtracted as $119,069.77. The calculations on this sheet have some minor arithmetic errors.[1]

[80] Although Ms. Tsang describes this sheet in her affidavit as being "dated August 17, 2016", it does not have any date visible on its face. I will nevertheless refer to it as the "August 17, 2016 sheet" to distinguish it from the other three sheets.

[81] However, in her November 8, 2019 supplemental affidavit, Ms. Tsang gives a different figure for the total investment amount, maintaining that it was actually $455,732.37. She provides a chart with attached receipts.

[82] The largest single item in Ms. Tsang's list of expenses is a $269,872 payment to a company named AC Project that was hired to renovate the rented premises. Ms. Tsang appends a quotation from AC Project for this amount, on which is a handwritten list indicating that $169,870 was paid in cash and the remainder by three cheques.

(3) Mr. Yu's evidence in reply

[83] Mr. Yu challenges Ms. Tsang's claims about the actual total investment amount in several different ways.

[84] First, he tenders an affidavit from Ms. Tsang's former husband, Benny Yuen, who states that when he and Ms. Tsang opened a different Wonton Chai restaurant in Mississauga in 2012 their total start-up costs were less than $250,000. In response, Ms. Tsang challenges the reliability of Benny Yuen's evidence on the grounds that they separated on bad terms, and also contends that there were differences between the two restaurants that make the Mississauga restaurant a poor comparator.

[85] In his second reply affidavit Mr. Yu also takes issue with seven specific items that Ms. Tsang included in her November 8, 2019 supplemental affidavit, where she calculates the

[1] 45% of the stated $493,364.12 total investment amount shown would be $222,013.85, not $222,014.03, as shown on the sheet. In addition, once Mr. Yu's initial investment of $102,944.26 is subtracted from the $222,013.85, the result should be $119,069.59, not the $119,069.67 figure shown.

total investment amount as $455,732.37. Mr. Yu's revised calculations would reduce the total investment amount to $343,463.67.

[86] In his third reply affidavit Mr. Yu goes further and challenges Ms. Tsang's claim that the corporation paid $269,872 to AC Project for its renovation work. He appends what he says is a final invoice from AC Project that shows the total paid as only $134,187.50, all of which was paid by cheque. He also appends an email from AC Project's owner denying that he ever received any cash payments for the renovation work.

[87] Although Mr. Yu does not provide a revised calculation, when his claims in his third reply affidavit are combined with the objections he makes in his second reply affidavit, his position appears to be that the actual total investment amount was only $207,779.17.

b) Mr. Yu's construction of the documentary evidence

[88] For Mr. Yu, Mr. Klaiman argues that various inferences can be drawn from these documents that support his client's position and undermine Ms. Tsang's evidence.

[89] With respect to the three sheets Ms. Tsang presents that show three different percentage ownership splits, he submits that it can be inferred that only the one with the 70-30% split is authentic, and that the other two must have been prepared by Ms. Tsang later, both to justify her claim that she and Mr. Yu had agreed on a 45%-55% split and to explain away the existence of the document that shows a 70-30% ownership split.

[90] Mr. Klaiman argues further that the "Yu ✓ Tsang" document shows that Mr. Yu began making monthly payments to Ms. Tsang in around October 2016, which was around the same time that she sent him the early November 2016 WhatsApp message with an image of the 70-30% split sheet. He notes further that the "Yu ✓ Tsang" document shows that Mr. Yu ultimately paid her $117,900. This amount is nearly identical to the $117,898.32 debt amount shown on the 70-30% split sheet.

[91] He points out that the $315,489.40 figure that is used as the total investment amount on all three of these sheets is too precise to be a hypothetical number that Ms. Tsang made up merely for discussion purposes at an early stage of her business discussions with Mr. Yu. He contends that the $315,489.40 figure must represent the actual start-up costs as they were known at the time that the 70-30% split document was prepared.

[92] Mr. Klaiman argues further that it can be inferred that Ms. Tsang probably prepared the 70-30% split document around the same time that she sent an image of it to Mr. Yu by WhatsApp in early November 2016. This matches the timeline in the "Yu ✓ Tsang" document, showing that Mr. Yu started to make payments to pay down his debt in October 2016.

[93] Mr. Klaiman contends this construction of the documentary record supports Mr. Yu's claim that Ms. Tsang had previously agreed that they would split ownership of the new business and the initial investment costs on a 70-30% basis, with him taking the larger share.

c) Analysis

(1) Does the evidence disprove Ms. Tsang's explanation for the 70-30% sheet?

[94] I find Mr. Klaiman's arguments compelling, but only up to a point.

[95] I agree with him that the $315,489.40 figure shown on the three sheets is too precise to be one Ms. Tsang simply made up for discussion purposes. If she had merely been inventing numbers to approximate how much Mr. Yu would have to pay under various different ownership splits, I agree that it is much more likely that she would have used round numbers.

[96] Accordingly, I think that it can be reasonably inferred that the three documents were not created as early as February or March 2016, but must have been prepared at some later date, when at least some part of the business's actual start-up costs were already known or precisely estimated.

[97] However, I am not prepared to take the next inferential step that Mr. Klaiman urges and conclude from this that Ms. Tsang's explanation about how, when and why she created the three ownership split sheets can necessarily be rejected as false.

[98] Importantly, Ms. Tsang does not say specifically when she created these three documents, other than that it was some time before she and Mr. Yu "finaliz[ed] the terms of [their] partnership".

[99] Ms. Tsang says further that they only finalized their arrangement at some point after she had signed the lease on behalf of the corporation, which she did on March 18, 2016. She states further that the document she says she prepared on August 17, 2016, showing how much Mr. Yu would owe on a 45-55% ownership split if the initial start-up costs were $493,364.12, "contain[s] the finalized details of the partnership between Gary and I".

[100] Putting all of this together, Ms. Tsang's position seems to be that she and Mr. Yu did not make a final decision about how they would divide ownership of their new business until some point in the spring or summer of 2016, or more specifically between March 18 and August 17, 2016.

[101] In my view, it is at least conceivable that this is true, and that Ms. Tsang really did make Mr. Yu three proposals for him to choose between at a time when they knew that $315,489.40 had already been spent or would be spent on start-up costs.

[102] I agree with Mr. Klaiman that one would ordinarily expect partners in a business venture to decide something as fundamental as how they mean to divide ownership of the business between them at an early stage of their planning. As he put it in his oral argument:

> [I]t doesn't make commercial sense that they would have … not agreed on their percentage ownership up front.

[103] However, the business arrangements between Ms. Tsang and Mr. Yu were unusual in at least two respects. First, they both agree that the plan always was for Ms. Tsang to pay for most of the start-up costs initially, with Mr. Yu contributing only the $102,944.26 that he provided as his initial investment, and for him to then repay her the rest of his share over time.

[104] Ms. Tsang also portrays herself as essentially indifferent as to how they divided up ownership of the business, maintaining that she presented Mr. Yu with several different options and let him choose the one that he preferred.

[105] In these circumstances, since the amount Ms. Tsang would have to pay up front in start-up costs would remain the same no matter how the question of ownership was ultimately resolved, I do not think I can rule out the possibility that she and Mr. Yu deferred settling this issue until some point in the spring or summer of 2016, after their preparation for opening the restaurant was well under way. It is conceivable that by the time they agreed on the ownership split the $315,489.40 initial expense figure was already known.

[106] Second, it is clear on both Mr. Yu and Mr. Tsang's accounts that they each did some other things that make little "commercial sense".

[107] For instance, Mr. Yu maintains that even though he and Ms. Tsang had agreed that he would really own 70% of the business, he agreed to receive only 45% of the shares of the corporation. A businessperson exercising ordinary commercial sense would presumably have insisted that the agreement that he really owned a 70% stake in the business to be memorialized in writing somewhere.

[108] For her part, Ms. Tsang agreed to have 45% of the shares of the corporation issued to Mr. Yu in February 2016, even though it is undisputed that at that point he had only invested $63,600. There is also no evidence from either of them that she ever had their agreement that he would repay her the rest of his share of the start-up costs that she had paid for up front put in writing.

[109] Mr. Yu explains that he did not insist on a written agreement because he trusted his cousin, Ms. Tsang. She appears to have similarly trusted Mr. Yu to repay his debt to her without any written guarantee that he would do so.

[110] In these circumstances, I do not think it is a fatal objection to Ms. Tsang's position that on her account she and Mr. Yu only finalized their ownership share agreement later than one would expect them to have done if they had both been commercially sensible businesspeople.

(2) <u>What were the true start-up costs?</u>

[111] Mr. Klaiman's argument that the 70-30% split document is authentic hinges on the fact that the amount that it shows Mr. Yu owing to Ms. Tsang – namely, $117,898.32 – is very close to the amount that the "Yu ✓ Tsang" document shows him later paying her, namely, $117,900.

[112] Conversely, on the 45-55% split sheet Mr. Yu's debt is calculated as only $39,025.97.

[113] The force of this argument depends on the assumption that the amount shown on both sheets as the initial investment amount, namely $315,489.40, is accurate.

[114] To this end, Mr. Klaiman challenges the veracity of Ms. Tsang's claim that the start-up costs for the restaurant grew to be over $400,000.

[115] As noted above, Ms. Tsang has provided two different figures for the true initial investment amount. On the calculation sheet that she says she prepared on August 17, 2016, she uses a figure of $493,364.12. However, in her November 8, 2019 affidavit she attempts to justify a different amount that is some $40,000 lower, namely, $455,732.37.

[116] I agree with Mr. Klaiman that there are good reasons to be sceptical both about the authenticity of the alleged August 17, 2016 sheet and the accuracy of the $493,364.12 total investment amount that is used in this document:

i) The August 17, 2016 worksheet shows Mr. Yu owing Ms. Tsang $119,069.77. This is very close to the amount he is showed owing on the 70-30% split sheet – $117,898.32 – based on a lower total investment amount of $315,489.40. It would be a remarkable coincidence for the restaurant's start-up costs to have increased by an amount that happens to make Mr. Yu's debt on a 45-55% split so close to the amount he is showed owing on the 70-30% split sheet;

ii) Ms. Tsang does not explain why, if Mr. Yu really owed her $119,069.77, the "Yu ✓ Tsang" document shows him paying her only $117,900;

iii) Ms. Tsang does not try to justify the $493,364.12 initial investment figure that she uses on the August 17, 2016 sheet. To the contrary, in her November 8, 2019 affidavit she only attempts to justify a lower initial investment figure of $455,732.37. If this latter figure is correct, Mr. Yu's debt to her would have been only $102,135.31. This makes it even more difficult to understand why the "Yu ✓ Tsang" document seems to show Mr. Yu paying Ms. Tsang $117,900. As I will discuss later, I am also satisfied for other reasons that even the $455,732.37 figure is inflated;

iv) As I have already discussed, I think it is reasonable to infer that the $315,489.40 figure that Ms. Tsang used on the 70-30% sheet and the other 60-40% and 45-55% sheets reflects what she believed the true start-up costs to be at the time she prepared these worksheets, which on her account she did at some point between March and August 2016. Ms. Tsang has not explained how or why the start-up costs then increased to nearly $500,000 by August 17, 2016, or to more than $450,000 if her November 8, 2019 affidavit is credited.

[117] For all of these reasons, I agree with Mr. Klaiman that a strong inference can be drawn that Ms. Tsang reverse-engineered the purported August 17, 2016 document after the fact, and that she invented the $493,364.12 total investment amount figure that is used in this document in order to justify why Mr. Yu had paid her $117,900, as shown on the "Yu ✓ Tsang" sheet.

[118] Moreover, I am also satisfied that even the lower $455,732.37 figure that Ms. Tsang puts forward in her November 8, 2019 affidavit is itself artificially inflated. It includes the $39,344.36 that Mr. Yu apparently contributed as part of his initial investment, treating it as if it were a start-up cost for the business. Ms. Tsang provides no explanation for why this makes any sense.

[119] Subtracting this latter amount would reduce the total investment amount to $416,388.01. If Mr. Yu was supposed to contribute 45% of this figure, his share would be $187,374.61. Once his $102,944.26 contribution is subtracted, this would have left him with only $84,430.34 to repay Ms. Tsang. If this is correct, it is even more difficult to understand why he would have then paid her nearly $118,000 over the next year, as shown on the "Yu ✓ Tsang" ledger.

[120] In addition, Ms. Tsang's explanation about why she sent Mr. Yu the 70-30% calculation sheet by WhatsApp in November 2016 is very difficult to credit, if by this time the total investment cost had really ballooned to an amount that was over $400,000.

[121] I am prepared to entertain the possibility that Mr. Yu might have asked to see the 70-30% sheet in November 2016 because he was considering renegotiating their deal and buying a larger share of the business. He had at that point only just started repaying Ms. Tsang his share of the money she had spent on the business up front, so renegotiating the ownership split would have simply meant that he would have a larger debt to repay. It also makes some sense that Mr. Yu might have been interested in increasing his investment after he had been running the restaurant for several months and had seen that it was doing well.

[122] However, the calculations on the 70-30% sheet assumed a total investment amount of only $315,489.40. If the actual investment amount had really grown to over $400,000 by August 2016, it makes very little sense that Ms. Tsang would have simply sent Mr. Yu the sheet showing what were now badly outdated calculations without also reminding him that the total investment cost was now much higher than the amount shown on this sheet, such that his debt under a 70-30% split would also be larger.

d) Problems with Mr. Yu's evidence and position

[123] For all of these reasons, I agree with Mr. Klaiman that Ms. Tsang's evidence about the restaurant's actual start-up costs should be viewed with considerable suspicion.

[124] Moreover, my concerns about the veracity of her evidence on this point casts doubt on her credibility generally. Indeed, it is a reasonably available inference that Ms. Tsang has actively tried to mislead the court by preparing false documents and presenting them in her sworn affidavits as something other than what they really are.

[125] However, it does not automatically follow from this that Mr. Yu's evidence about the start-up costs or the other disputed matters is itself credible or reliable, or that resolving the disputes between him and Ms. Tsang over the share ownership and other issues can be fairly and accurately done on the existing paper record.

[126] For one thing, one of the key assumptions on which Mr. Klaiman's argument in support of the authenticity of the 70-30% split document is that the $315,489.40 figure that this document uses as the initial investment expense is correct.

[127] Mr. Klaiman argues that because this document is acknowledged to be in Ms. Tsang's handwriting, it can be treated as an admission by her that the figure is accurate.

[128] The problem with this argument, in my view, is that Mr. Yu's own evidence in his reply affidavits is that the $315,489.40 figure is not accurate. As discussed above, in his second reply affidavit he contends that the correct amount should be $343,463.67. In his third reply affidavit he argues that an additional $135,684.50 should be deducted, which would lower the total to $207,779.17.

[129] It is not apparent to me that Mr. Yu can properly claim that Ms. Tsang's supposed admission puts the true start-up costs amount beyond dispute when he is actively disputing this very issue by giving evidence that the true start up costs amount was different.

[130] I am not persuaded that the dispute between the parties over the actual initial investment amount is one that I can fairly resolve on the existing evidential record, having regard to the following factors:

i) Mr. Yu's own affidavit evidence is that the initial investment amount was different from the amount shown in the 70-30% document;

ii) Most of Mr. Yu's challenges to the $455,732.37 figure that Ms. Tsang puts forward in her November 8, 2019 affidavit depend on his own credibility. Moreover, some of his claims are implausible on their face. For instance, he maintains that the vendor who sold the restaurant a walk-in cooler reduced the price from $13,600 to only $2,000, and that the company that was hired to do most of the renovation work, AC Project, somehow managed to complete the project for less than half the price it had quoted in its detailed estimate, thereby saving the restaurant approximately $170,000;

iii) A strong inference can be drawn that the invoice Mr. Yu presents from AC Project is a false document that was prepared to conceal the fact that Ms. Tsang had paid nearly $170,000 in cash for the renovation work. As the restaurant manager and part owner of the company, it can reasonably be inferred that Mr. Yu probably knew what arrangements were made to pay AC Project. It would accordingly be open to a trier of fact to conclude that Mr. Yu has also tried to deceive the court by presenting a document that he knows to be false as if it were true;

iv) Mr. Yu's own admitted conduct raises some other concerns about his credibility. Among other things, it would be open to a trier of fact to conclude that he worked illegally in Canada for several years; that he was behind a scheme to have the corporation falsely claim that it had made efforts to recruit a Canadian or permanent resident to fill his job; that he evaded tax by taking his payments from the corporation in cash; and that he participated in a scheme by the restaurant to falsify its books by concealing its cash transactions. While similar findings of fact are available in relation to Ms. Tsang, it would be open to a trier of fact to conclude that neither is a credible witness;

v) In general, courts tend to look askance at claims by litigants that they have secret verbal agreements that give them greater rights than they appear to have on paper: see, *e.g.*, *Samad v. Samad*, 2008 CanLII 31424.

[131] For all of these reasons, I am not satisfied that the share ownership dispute in this case can be properly characterized as one that does not ultimately turn on questions of credibility. I think that a trier of fact who hears *viva voce* evidence will be significantly better positioned to resolve the dispute between Mr. Yu and Ms. Tsang than I am on the existing paper record.

[132] As Justice Brown of the Ontario Court of Appeal observed in Cook v. Joyce, 2017 ONCA 49 at para. 92:

> The more important credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a paper record. As Benotto J.A. wrote in *Trotter Estate*, 2014 ONCA 841, 122 O.R. (3d) 625, at para. 55, "[i]t is not always a simple task to assess credibility on a written record. If it cannot be done, that should be a sign that oral evidence or a trial is required."

4. Other relevant factors

a) The conflicting expert reports

[133] For the respondents, Mr. Wan placed considerable emphasis on the fact that the parties have filed conflicting expert reports in which their respective experts reach very different conclusions about the value of the corporation that owns the restaurant.

[134] As mentioned earlier, Mr. Yu's expert puts the valuation of the total shares in the $1.1 to $1.2 million range, while Ms. Tsang's expert puts the value in the range of $400,000 to $500,000.

[135] While I agree that "the presence of complex issues that require expert evidence" is a recognized factor that can favour converting an application to an action, I do not think there is a hard-and-fast rule that any case involving expert evidence necessarily requires a trial

for that reason alone. It all depends on the nature of the expert evidence and the reasons for the experts' conflicting opinions.

[136] In this case, the experts are business valuators who performed mathematical calculations based on information they were provided by the party who retained them. Unlike experts in some other fields who are asked to give opinion evidence, they show their work. This makes it easier for a court to determine why they have reached different conclusions by studying their reports and going through their arithmetic.

[137] For this reason, I do not think this factor weighs very heavily in favour of a trial in this case. If I were not satisfied that a trial is required for other reasons, I would not be inclined to convert the application to an action based solely on the existence of the conflicting expert reports. Given the nature of these reports, I do not think that it is essential that the experts be subjected to *viva voce* cross-examination.

[138] That said, the main reason for the experts' divergent opinions in this case seems to be that Mr. Yu's expert relied on Ms. Tsang's handwritten ledgers, while Ms. Tsang's expert relied on the official corporate accounts. Mr. Yu's contention that the handwritten ledgers are accurate and that the corporation's accounts were falsified to conceal the restaurant's substantial unreported cash business would seem to raise questions of credibility that will be easier to resolve at a trial. Given my conclusion that a trial is needed to fairly resolve the ownership split dispute, I do not have to decide whether a trial would be necessary to resolve the dispute over the restaurant's true profitability.

b) The importance and impact of the application and of the relief sought

[139] Mr. Yu, who contends that he really owns 70% of the corporation's shares, takes the position that these shares may be worth as much as $820,000. Ms. Tsang, who maintains that Mr. Yu only owns 45% of the shares, takes the position that they may be worth as little as $180,000.

[140] In short, this ultimately seems to be a dispute over approximately $640,000, at most. By civil law standards this may not be an enormous amount of money, but it is nevertheless one that most ordinary people would consider substantial.

[141] It is in both parties' interest, as well as the interests of the administration of justice, for their dispute to be resolved as quickly and cheaply as possible, but only so long as this can be done fairly and accurately.

c) Avoiding a "trial in a box"

[142] As noted above, the case law recognizes that one relevant consideration when deciding whether to convert an application to an action is "whether there is a need for pleadings and discoveries".

[143] Pleadings and discoveries can help focus attention on the real issues in dispute. However, they are not necessarily the only way to do this. In some cases a well-organized application record may be sufficient.

[144] The problem in this case is that what Mr. Yu is asking me to do would effectively amount to conducting a "trial in a box". This disparaging phrase is most often used in the context of summary judgment motions, but I think it applies equally here.

[145] If I were to try to resolve all of the disputes between the parties based on the existing evidential record, I would have to wade through nearly a thousand pages of documents that have been spread out over 12 different affidavits. I would also have to do so in large part without much assistance from the parties' lawyers. Both counsel made very helpful submissions to me during the hearing of the application and motion, but they were under significant time constraints and neither were able to address all of the disputed issues. Likewise, I was not able to ask them all the questions that I might have wanted to ask, some of which have only occurred to me later.

[146] I think the comments that Myers J. made when declining to grant summary judgment in *RNC Corp. v. Johnstone*, *supra*, are apposite here, even though the facts of this case are very different. At para. 4 of his reasons, he defined "the dreaded 'trial in a box'" as a case where a judge:

> …is asked to make findings on some or all the same facts and evidence as would be before the trial judge – but with no trial. The judge hears a few hours of submissions at a high level of abstraction. He or she is then left to wade through the banker's box(es) of material to make detailed findings on contested evidence without having heard the detailed evidence led by counsel and contextualized by the trial narrative unfolding over several days.

[147] He noted further at para. 17:

> The concept of the beneficial "trial narrative" that is mentioned in some pre-*Hryniak* case law is an elusive one. We know that simply hearing witnesses live and observing their demeanour is not a very important determinant of credibility any longer. However, where a judge is required to make detailed findings on contested evidence of years of human conduct, the process of counsel leading evidence through live witnesses over several days gives order and context to the complexities and nuances of the interactions. It is not fairly replicated by the judge rooting through decontextualized boxes on his or her own, in chambers, after a quick motion hearing at 30,000 feet.

[148] In this case, even after hearing counsels' helpful submissions about the evidence relating to the share ownership issue, it has taken me considerable out-of-court time to understand the evidential record well enough to satisfy myself that I cannot fairly decide this issue without hearing *viva voce* evidence. If I had concluded otherwise, I would have had to go

on to consider the other issues raised by Mr. Yu's application, many of which also involve conflicting evidence and questions of credibility.

[149] An application may seem on its face like a more expeditious way of proceeding than a trial, and in some cases it will be. However, in other cases the efficiency is illusory. Forcing an application judge to grapple with evidence and decide factual disputes without seeing witnesses testify, without the benefit of having the evidence presented in a structured way by counsel, and without having a full opportunity to ask them clarifying questions, will sometimes be neither efficient nor conducive to a fair and just outcome.

[150] I think this case falls into the second group. I am not satisfied that the disputes between Mr. Yu and the respondents can be fairly and accurately resolved without a trial.

III. Disposition

[151] In the result, I am directing under Rule 38.10(1)(*b*) of the *Rules of Civil Procedure* that the whole application proceed to trial, and that the proceeding be "treated as an action".

[152] In different circumstances I would seize myself of this case and direct that any trial of it take place before me, since I have now spent considerable time familiarizing myself with the existing evidential record. All other things being equal, it would be better for this time to be put to good use.

[153] However, I found it necessary when addressing Mr. Klaiman's arguments to reach conclusions about some of the disputed factual issues, and to make some negative comments about both Ms. Tsang and Mr. Yu's evidence and credibility.

[154] I think that if I were to now hear either of them give evidence at trial, there would at least be the appearance that I can no longer approach their testimony with an open mind. Regrettably, I think this makes it necessary for any trial of this matter to be heard by a different judge.

[155] It nevertheless remains my responsibility under Rule 38.10(*b*) to "give such directions as are just" about how this matter should proceed as an action.

[156] Ms. Tsang and 2506698 Ontario Ltd. request that I make an order directing:

i) that cross-examinations already conducted of affiants who have delivered affidavits in connection with the application shall form part of the examinations for discovery;

ii) that the parties shall exchange pleadings;

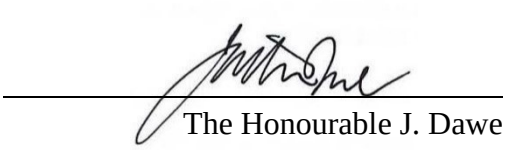
iii) that the parties shall serve affidavits of documents;

iv) that the parties shall schedule additional examinations for discovery; and

v) that the parties shall proceed to mediation in accordance with a timetable to be set by them or ordered by the court.

[157] I cannot properly make these or any other directions about how the case should now proceed without input from Mr. Yu. If counsel cannot agree on what directions I should make, they should contact my judicial assistant and arrange a teleconference call with me on a mutually acceptable date, and I will resolve any disagreements.

[158] I would also encourage counsel to try to agree on costs. If they are unable to do so, they may each file written submissions of no longer than two pages to accompany their bills of costs. Ms. Tsang and 2506698 Ontario Ltd.'s costs submissions should be filed within two weeks of the date of release of these reasons, and Mr. Yu's responding submissions two weeks later. All costs submissions may be served electronically and should be filed by email *via* my judicial assistant.



The Honourable J. Dawe

Released: March 25, 2022

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GARY WAI YU

Applicant/Respondent on Motion

– and –

PO YEE TSANG and 2506698 ONTARIO INC.

Respondents/Moving Parties

REASONS FOR JUDGMENT

Dawe J.

Released: March 25, 2022