

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *XY, LLC v. International Newtech
Development Incorporated*,
2015 BCSC 1524

Date: 20150828
Docket: S076862
Registry: Vancouver

Between:

XY, Inc.

Plaintiff

And

**International Newtech Development Incorporated, IND Lifetech Group Ltd.,
IND Lifetech, Inc., now known as JingJing Genetic Inc.,
IND Lifetech (U.S.A.) Incorporated, IND Lifetech (USA) Inc.,
IND Lifetech (Qingdao) Co. Ltd., IND Lifetech (Zouping) Co. Ltd.,
IND Lifetech (Beijing) Co. Ltd., IND Lifetech Co. Ltd., IND Embryontech Inc.,
Jesse Jia-Bei Zhu, Richard Remillard, Zhen Hong Liu, Shu Xi Wang,
Selen Zhou, Tang Jin, John Doe #1, John Doe #2, John Doe (Manufacturing),
and Shanghai JingJing Biotech Co. Ltd., formerly known as
Genetic (Shanghai) Ltd.**

Defendants

And:

Inguran, LLC doing business as Sexing Technologies

Defendant by Counterclaim

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for plaintiff:

Christopher S. Wilson
Geoffrey M. Bowman
Kaitlin Smiley

Counsel for the defendant Jesse Jia-Bei
Zhu:

John Shields
Andrew Morrison

Place and Dates of Hearing:

Vancouver, B.C.
March 23 - 27 & 30, 2015

Place and Date of Judgment:

Vancouver, B.C.
August 28, 2015

[1] This is a contempt application. The plaintiff alleges the defendant Jesse Jia-Bei Zhu (the “respondent” or “Mr. Zhu” or “Jesse Zhu”) is in contempt of two orders of this Court: a Sealing Order made in the course of the trial in this action on October 19, 2010, and the Order made after trial, on March 2, 2012, as varied by the Court of Appeal on July 26, 2013 (the “Order after Trial”).

[2] The trial commenced October 18, 2010 and lasted 29 days. The nature of the action was summarized in paras. 1 to 6 and 9 of the trial judgment. The judgment is found at 2012 BCSC 319.

[1] The plaintiff XY Inc. (“XY”) owns technology (and the intellectual property rights associated with the technology) that permits the separation of X (female) and Y (male) chromosomes from bovine spermatozoa. This valuable technology is used as a means of producing calves of a desired sex.

[2] The chromosomes are separated using a cytometer, a device that counts cells. The cytometers that are adapted for this purpose are called SX cytometers. These cytometers are manufactured by DakoCytomation Inc., which has a cross-licensing agreement with XY.

[3] On February 6, 2004, the plaintiff entered into a contract called a “Commercial License Agreement” (“CLA”) with the defendant IND Lifetech Inc., now known as JingJing Genetics Inc. (“JingJing”). Under the terms of the contract, JingJing acquired the right to use the plaintiff’s technology. In return, it had various obligations, including strict confidentiality, disclosure and assignment to XY of any technological developments, accurate and timely reporting of its use of XY’s technology and products, the duty to not sub-license or sub-contract, and the fundamental obligation to pay royalties.

[4] The plaintiff’s case is that JingJing and four persons, Jesse Jia-Bei Zhu, Selen Zhou, Tang Jin, and Richard Remillard, systematically deceived XY and vastly underreported the number of products they were making, selling and using.

[5] These defendants deny this. They say that when the ownership of XY changed in 2007, the new owners looked for ways to terminate the CLA.

[6] This case has been complicated by the failure on the part of the principal defendants to meet their obligations under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to provide documents. There is no dispute about the defendants’ failure in this regard. On February 18, 2011, Mr. Josephson, counsel for many of the defendants, made this candid and entirely proper concession: “I concede I can’t explain the failure to deliver documents.”

...

[9] The defendants’ failure to disclose documents has had a substantial impact on the plaintiff’s ability to prove its case. I have reached conclusions where the evidence established facts or permitted inferences to be drawn.

However, when one is left with suspicion and not proof on a balance of probabilities, a plaintiff cannot succeed.

[3] On October 19, 2010, the second day of the trial, I made an order sought by XY, sealing portions of the testimony and certain exhibits because the testimony and exhibits both contained confidential information of XY.

[4] The relevant parts of the Sealing Order provide:

1. BY CONSENT, those portions of the testimony of witnesses and any related documents and any information disclosed by or contained in such testimony and documents that are designated by the Court to be sealed (collectively, the “Sealed Material”) are protected from disclosure by the sealing order;

...

5. BY CONSENT, any party who receives or disseminates any copy of any Sealed Material, in writing or otherwise, and in whole or in part, shall be bound by the terms of this order;
6. BY CONSENT, any person who, in the course of these proceedings, receives any of the information contained in any Sealed Material shall only use that information for the purpose of prosecuting, defending, assisting counsel of record for any of the parties, or settling this proceeding and shall not make the content of any Sealed Material public or communicated to any other person.

[5] Judgment was pronounced on March 2, 2012. The plaintiff was awarded a judgment in the amount of \$8,507,891 against Jesse Zhu, and others. He (along with other defendants) was found liable in deceit and breach of confidence. A permanent injunction was granted which restrained Jesse Jia-Bei Zhu and other defendants from using Confidential Information “for any purpose or to any extent” and from “communicating, transferring, distributing, selling, publishing, leasing, licensing or in any other way or by any other means disclosing the Confidential Information to any person or for any purpose”.

[6] The injunction also ordered Jesse Jia-Bei Zhu and other defendants to deliver up to the plaintiff or its designate “any and all Confidential Information in their possession, power or control”.

[7] I determined that the SX cytometers contained specialized parts that, together with their configuration, were confidential to XY and that XY had developed detailed and confidential protocols relating to its processes and technologies.

[8] The injunction identifies eleven components of the SX cytometers and several specific XY protocols as confidential. The injunction identifies specifically the following SX components:

- (a) the PMT (photomultiplier tube controller);
 - (b) the nozzle assembly;
 - (c) the beam-shaping optics (generally referred to as the BSO);
 - (d) the detector system;
 - (e) laser beam steering towers stages and optics;
 - (f) the Summit Workstation hardware and Summit Software with Cytrack;
 - (g) the pulsed laser as configured for the SX cytometer;
- and others.

[9] The Court of Appeal modified the definition of Confidential Information on appeal. The Court clarified that the injunction excludes information generally available to the public. Otherwise the appeals were dismissed: 2013 BCCA 352.

[10] The Supreme Court of Canada dismissed the applications for leave to appeal filed by Jesse Zhu, Tang Jin and Selen Zhou: SCC Judgment Nos. 35561, 35562 and 35563.

[11] The alleged contempt consists of:

- (1) wilfully disobeying the Order after Trial, namely:
 - (a) failing to deliver up the Confidential Information as defined in the Order after Trial and improvements made possible by or because of access to XY's technology;

- (b) using the Confidential Information, directly or through those over whom Mr. Zhu exercises control;
 - (c) failing to deliver up to XY any and all Confidential Information in his possession, power or control; and
 - (d) failing to pay the judgment against him which remains due and owing;
- (2) wilfully disobeying the Sealing Order made on October 19, 2010, which consists of making use of and disclosing Confidential Information which was protected by the Sealing Order in a manner contrary to the terms of that order.

Nature of Contempt Proceedings

[12] These are civil contempt proceedings. As such they are quasi-criminal in nature. The principle of *strictissimi juris* must be applied: *Jackson v. Honey*, 2009 BCCA 112. The plaintiff must prove each constituent element of contempt beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment and Immigration)* [1990] 2 SCR 217 at 224.

[13] There are three elements to civil contempt:

- (1) the order must clearly and unequivocally state what should and should not be done;
- (2) the alleged contemnor must have had actual knowledge of the order; and
- (3) the party allegedly in contempt must have intentionally done the act prohibited by the order or intentionally failed to do the act the order compels:

See *Carey v. Laiken*, 2015 SCC 17, at paras. 31-35.

[14] In the course of the hearing in this matter it was conceded that Mr. Zhu had actual knowledge of the orders in question. Thus the issues before me are (1) whether the orders are clear and unequivocal, and (2) whether Jesse Zhu

intentionally did acts in violation of the orders and failed to do what the orders required him to do.

Background

[15] Shortly after my Reasons for Judgment were published in March 2012, XY received information that Jesse Zhu was using the plaintiff's confidential information in a laboratory that had been set up on Byrne Road in the City of Burnaby. XY's investigation disclosed that this facility was associated with a company called Canadian Topsires Selection Inc. ("CTS"). The company shared the same address and telephone number as Fraser Biomedical Inc. ("FBI"). The sole director and officer of FBI was Peter Wang, whose address was the same as the residential address of Jesse Zhu in Vancouver. CTS' sole director had the same address as Aide Diagnostic Co. Ltd. in China. Aide Diagnostic is a company owned or controlled, directly or indirectly, by Jesse Zhu.

[16] XY started a new action, *XY, LLC v. Canadian Topsires Selection Inc. et al.*, Vancouver Registry S122330.

[17] On April 2, 2012, XY obtained an Anton Piller order. The Anton Piller order was executed on April 2-4, 2012.

[18] Much of the evidence before me on this application is affidavit evidence from ex-employees who were directly involved in these events, as well as documents seized under the Anton Piller orders. There are five deponents who are former employees or associates of Jesse Zhu.

[19] Selen Zhou is a judgment debtor in this action. In the judgment after trial, I found Ms. Zhou jointly liable (with Jesse Zhu and Tan Jin) in deceit, conspiracy and breach of confidence. She deposes that she naïvely believed she did not face personal liability because she was simply an employee and following Mr. Zhu's instruction. She deposes that she now accepts that what she did was wrong.

[20] Selen Zhou entered into a settlement with XY. XY has agreed to limit the amount she must pay it. She has agreed in return to provide full and accurate information about the conduct of the defendants.

[21] Kevin Chung Li Xu, James Yang, Barry Dong Sheng Cheng and Qi (David) Fu also swore affidavits in this application. All of them are defendants in the Topsires action. All of them reached a settlement with XY. The settlement calls for full and accurate information from them about the conduct of the defendant, Jesse Zhu. In exchange, XY agreed to limit the amount of money it claims against them.

[22] All of the evidence given by these witnesses and by others is uncontradicted. The respondent chose not to adduce any evidence or to cross-examine the makers of the several affidavits filed by the plaintiff. Rather, his defence is based on alleged technical deficiencies and other shortcomings in the evidence. These will be discussed below.

The Plaintiff's Case

[23] The plaintiff's case is that the testimony of the former employees and the documents obtained in the course of the Anton Piller proceedings establish the following facts.

[24] First, Mr. Zhu directly or indirectly owns and/or controls a group of companies, the IND Group, and directs and/or controls various individuals employed by the IND Group including International Newtech Development Incorporated ("IND"), IND Embryontech Inc. ("IEI"), CTS, and Fraser Biomedical Inc. ("FBI") as well as IDI. Jesse Zhu directs and controls the decisions and conduct of the IND Group and their employees.

[25] Second, Jesse Zhu and his employees, by deceiving the Court, the trustee in bankruptcy and XY, obtained ordinary cytometers and reconfigured them back to the configuration of the three Dako SX Mo-Flo Cytometers that JingJing had licensed from XY. This included:

- (i) adapting ordinary photomultiplier tube controllers;
- (ii) using spare SX Nozzle Assemblies the IND Group had kept back from the Trustee in Bankruptcy and XY, including SX nozzles and nozzle tips, as well as manufacturing their own nozzle tips by copying XY's originals;
- (iii) using spare BSOs and manufacturing their own SX BSOs by copying XY's originals.

- (iv) reconfiguring the detector system back to the SX configuration;
- (v) reconfiguring the laser beam steering towers, stages and optics back to the SX configuration;
- (vi) using copies of the Summit Workstation hardware and Summit Software with sidetrack that they had made.
- (vii) using various pulsed lasers that they adapted and configured for the SX cytometer;
- (viii) reconfiguring the illumination chamber back to the SX configuration;
- (ix) reconfiguring the front door rail-back to the SX configuration;
- (x) reconfiguring the strobe assembly back to the SX configuration; and
- (xi) reconfiguring the pinhole strip back to the SX configuration.

[26] Third, when the Anton Piller order was executed on April 2, 2012, XY discovered that the IND Group was sorting semen using two reconfigured SX cytometers, XY's protocols and the Summit Software, together with a third partially reconfigured SX cytometer, and seized them from the new lab on Byrne Road in Burnaby.

[27] This lab was set up using cytometers acquired from JingJing Genetic Inc.'s trustee in bankruptcy by Jesse Zhu with the assistance of Tang Jin, Selen Zhou, James Yang, Zhigang Wang and others associated with JingJing, under Mr. Zhu's direction and control. These parties deceived the trustee and the court by pursuing the purchase of the cytometers through the ostensible use of a medical supply company.

[28] Fourth, both before the Order after Trial and afterwards, Mr. Zhu has had two SX cytometers and associated parts in the IND Group's offices in Beijing and Qingdao, China. Kevin Xu reconfigured them using his knowledge of the SX configuration, having worked on JingJing's three cytometers from the beginning of JingJing's license from XY. Jesse Zhu has not returned them and has been using and copying them with XY's protocols and the Summit Software in violation of the mandatory and prohibitory injunctive relief granted in the Order after Trial.

[29] Four issues raised by the respondent will be addressed at this time:

- (1) the respondent's objection to hearsay evidence;
- (2) the respondent's submissions with respect to the translated documents;
- (3) the respondent's submissions on credibility; and
- (4) the respondent's submission that the orders lack clarity and are in fact ambiguous.

(1) Hearsay

[30] The defendants' position is that hearsay is not permitted on a contempt application. It disputes that the plaintiff is able to rely on the principled exception to the hearsay rule or, for that matter, the admissions exception to the hearsay rule.

[31] To say that hearsay evidence is excluded is an oversimplification. The rules of evidence are to be strictly enforced. The rules of evidence in both civil and criminal matters permit hearsay to be adduced in certain circumstances: the principled exception to the hearsay rule is as applicable in contempt proceedings as it is in criminal proceedings.

[32] I conclude that hearsay evidence is treated the same way in contempt proceedings as it is in criminal proceedings.

(2) Translated Documents

[33] The respondent objects to the admissibility of many documents in this case because they are translated from Chinese without proper evidence of the credentials of the translators. Counsel argues that there ought to be affidavits from the translators, attesting to their qualifications and to the accuracy of the translation.

[34] The translations were performed by professional third-party translators.

[35] Of the 139 translated documents, 88 were translated by Linda Yu and contain this statement:

I, Linda Yu, hereby certify that I have accurately and completely translated the following document from Chinese to English to the best of my skill and ability. I am a professional translator and interpreter, fluent in both the Chinese and English languages, accredited as a Court Interpreter between

English and both Cantonese and Mandarin by the Ministry of Attorney General of British Columbia.

[36] The 18 documents translated by Gai Luan Ping of Park IP Translations contains a similar statement:

I Gai Luan Ping, hereby certify that the attached translation is to the best of my knowledge and believe, a true and accurate translation from Chinese into English of the attached source email with subject line ... dated I certify that I am fluent in both Chinese and English.

The declaration is signed and dated.

[37] There are 19 documents translated by Shen Yu of Park IP Translations. They contain the following statement:

I hereby certify that I have accurately and completely translated the following document from Chinese to English to the best of my skill and ability. I am a professional translator, fluent in both the Chinese and English languages.

Shen Yu has signed and dated the declaration.

[38] There are 14 documents translated by Zhang Jidong of Park IP Translations. They contain the following statement:

I, hereby certify that I have accurately and completely translated the following document from Chinese to English to the best of my skill and ability. I am a professional translator, fluent in both the Chinese and English languages.

The declaration has been signed and dated.

[39] If this were a trial, the interpreter would be sworn: *R v. Titchener*, 2013 BCCA 64.

[40] The position of the defendant is that translators are experts and cannot give evidence without being so qualified.

[41] The question has not received a lot of judicial attention. In *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia*, [2013] 2 S.C.R. 774, the Supreme Court of Canada held the documents prepared for use in court must be in English. At para. 12 of the Supreme Court of Canada summarized the decision of the Court of Appeal as holding that “a judge presiding over civil

proceedings in British Columbia does not have a discretion to admit documentary evidence in a language other than English without a certified translation”.

[42] The reasons of the Court of Appeal (2012 BCCA 282) do not address the particular character of acceptable translations. The court did not consider or define what it meant by a translation being certified.

[43] I conclude that expert opinion is not required to prove translations. Neither the *Rules* nor the authorities require expert evidence in respect of translated documents.

[44] In *R. v. Malik*, 2005 BCSC 350, the Crown and defence each had translators who supplied translations of certain speeches. There was cross-examination in an attempt to demonstrate one to be less reliable. The court ultimately concluded that both were approximately the same, although there were some grammatical differences. There was no discussion as to whether expert evidence was necessary.

[45] In *R. v. Thompson*, 2000 CanLII 5746 (Ont. C.A.), a person testified as an expert witness regarding the translation of Jamaican patois into English. There is no analysis of the necessity to advance expert evidence.

[46] I turn to the *Rules of Court*. There is no definition in the rules for a “certified translation”.

[47] The *Rules of Court* referred to translations in eight sub-rules.

(a) Rule 78(11)(c)(i) and (ii) (concerning depositions and a letter of request). This provides that the letter of request must have attached to it a copy of the letter of request “translated into the appropriate official language of the jurisdiction where the examination is to take place” and “bearing a certificate of the translator that it is a true translation and giving the translator’s full name and address”.

(b) Rule 19 (2) (registration of a Canadian judgment). In order to register a Canadian judgment under the *Court Order Enforcement Act* a person must file a “certified English translation of the Canadian judgment if the judgment was made in a language other than English”.

(c) Rule 19 – 3(a)(iii) (registration of foreign judgments). The application for registration of a reciprocally enforceable judgment must be supported by an affidavit which includes “a certified translation of the judgment or certificate if made in the language other than English”

(d) Rule 19 – 4(1)(a) (transfer of proceeds from foreign courts). Courts may require translation for transferred proceedings. On an application for an order that the court accept a transfer to it of a proceeding, the court may require that the applicant pay the costs incurred by the court in having the documents in the transferring Court’s file “translated into English by a person satisfactory to the court”.

(e) Rule 25 – 3(2)(h) (application for a state grant; documents to be filed in an application). A person wishing to apply for an estate grant must file for each of the documents which are not written in English, an “affidavit of translator” in form P 12.

(f) Rule 25 – 3(10) (application for an estate grant; documents to be filed in an application). An affidavit of translator in form P 12 must be filed concurrently with any document referred to in sub-rule (2) or (3) that is the subject of the translation.

(g) Rule 25 – 6(2)(h) (applications for resealing). If a foreign personal representative applies for resealing of the foreign will, certain documents must be filed. For each of the documents that are filed with the submission for resealing and that are not written in the English language, an affidavit of translator in form P 12 must be filed.

(h) Rule 25 – 6(8) (applications for resealing; filing of affidavit of translator). An affidavit of translator in form P 12 must be filed concurrently with any document referred to in sub-rule (2) that is the subject of a translation.

[48] Thus the *Rules* require affidavits for translations in the instance of applications for estate grant or resealing. But for registration of a Canadian judgment to register a foreign judgment, for letters of request or for the transfer of a foreign proceeding, there is no requirement of an affidavit. There are other

analogous situations. For example, Rule 22 – 2(7) concerns persons swearing or affirming an affidavit who do not understand English. The Rule provides:

(7) if it appears to the person before whom an affidavit is to be sworn or affirmed that the person swearing or affirming the affidavit does not understand the English language, the affidavit must be interpreted to the person swearing or affirming the affidavit by a competent interpreter who must certify on the affidavit by endorsement in Form 109 that he or she has interpreted the affidavit to the person swearing or affirming the affidavit. The endorsement in form 109 provides as follows:

1. I have a knowledge of the English and ---- languages and I am competent to interpret from one to the other.
2. I am advised by the person swearing or affirming the affidavit and believe that the person swearing or affirming the affidavit understands the ----- language.
3. Before the affidavit on which this endorsement appears was made by the person swearing or affirming the affidavit I correctly interpreted it for the person swearing or affirming the affidavit from the English language into the ----- language and the person swearing or affirming the affidavit appeared to fully understand the contents.

[49] The endorsement is not sworn by the interpreter and the endorsement proceeds on the basis of the interpreter's self-reported competency without any information that provides the court with an assessment of the interpreter's qualifications or ability.

[50] In a 2012 decision, *Sandhu v. British Columbia (Provincial Court)*, 2012 BCSC 1064, the court confirmed that the term "court certified interpreter" was a misnomer. There is a list of "certified interpreters". It is only significant in that it indicates those interpreters who currently have a contract with provincial Court services to compensate those interpreters in connection with criminal proceedings, family law proceedings in Provincial Court, traffic court cases, municipal bylaw cases and other cases by court order.

[51] It is noteworthy that prior to Mr. Zhu's response argument in February 25, 2015, no issue had been raised regarding translations. All of these documents which have been translated arise from documents disclosed by Mr. Zhu's former counsel in the Topsires action.

[52] In May 2014 XY applied in the Topsires action for relief from the implied undertaking in respect of the documents listed in the compendium. On May 27,

2014 counsel for XY and Mr. Zhu appeared before Madam Justice Fitzpatrick to hear the application for relief from the implied undertaking. Mr. Zhu consented to the order that was pronounced that day granting relief for the documents set out in Schedule A for the express purpose of this contempt application.

[53] All of this is to say that Mr. Zhu has known since May 2014 that these particular documents, as translated, would be relied upon as evidence of his contempt of court.

[54] The affiants have deposed that the translations accurately reflect the discussions, events, and steps taken.

[55] Certainly it was open to Mr. Zhu to challenge these translations. Evidence could have been adduced which challenged the translations or provided alternative translations. There is no such evidence adduced by Mr. Zhu.

[56] I conclude that in these circumstances the English translations of the documents are admissible as translations.

(3) Credibility

[57] The respondent alleges that Mr. Yang, Mr. Xu, Mr. Cheng and Mr. Fu have not provided objective evidence and that their testimony has been given in return for compensation. It must therefore be considered inaccurate and misleading. He makes the same argument with respect to the evidence of Ms. Zhou.

[58] I disagree. The settlement agreements with Mr. Zhu, Mr. Yang, Mr. Cheng, Mr. Fu and Ms. Zhou require “full and frank disclosure” and only “honest and accurate information”. As the plaintiff argues, these former employees have a strong incentive to be honest. Otherwise they risk breaching the settlement agreement. They have considerable motivation to tell the truth.

[59] I also note that Mr. Zhu chose not to cross-examine them. The respondent had the opportunity to seek to cross-examine these witnesses. The respondent chose as well not to put any contrary evidence before the Court. In these circumstances it is hardly open to the respondent to attack the credibility of these witnesses.

[60] In these circumstances the principle in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) is applicable. As Lord Herschell put it at 70:

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.

[61] The rule in *Browne v. Dunn* applies of course when counsel intends to call contradictory evidence. But the rule also applies where counsel is presenting argument regarding the credibility of a witness: *R. v. McCarroll*, 2008 ONCA 715, paras. 107-109.

4. Ambiguity

[62] Mr. Zhu argues that the Order after Trial is ambiguous. This argument is without merit. The Order lists precisely the parts and protocols that Mr. Zhu's former employees confirm they were using.

[63] A similar argument about the alleged ambiguity of the Order after Trial was made on a motion for particulars regarding "Confidential Information" in the Topsires action. Madam Justice Fitzpatrick made the following comments about the argument. Her judgment is not binding on this Court in any sense because it is based on the civil standard of proof. Nonetheless the comments are apposite:

[153] Strangely, the Applicants also argue that without XY providing these particulars, the scope of the injunction granted under the Trial Order is so unclear that they cannot know what they can or cannot do without misusing alleged Confidential Information. They allege prejudice in this respect, saying that they are faced with the choice of either ceasing to pursue their livelihood, or living under the constant threat that XY will pursue ongoing allegations that they are misusing the Confidential Information.

[154] In my view, the argument concerning the scope of the injunction has no merit. The Order After Trial was granted in early March 2012, some two and a half years ago. When the injunction was granted in accordance with the Order After Trial, Zhu did not make any application to clarify the definition of Confidential Information. Nor were any such submissions made to the Court of Appeal in terms of the clarity of the Confidential Information as specifically defined in the Order After Trial. The Applicants cite *International Tools Ltd. v. Kollar*, [1968] 67 D.L.R. (2d) 386 (Ont. C.A.)

where an injunction was upheld restraining the defendants from using trade secrets and was limited in scope to the precise secret and the duration of the injunction was limited to the period that the trade secret remained a secret. It is noteworthy here that, for years now, Zhu has had no difficulty in understanding the scope of the injunction in terms of what was Confidential Information and what the injunction entailed in terms of his future activities.

[155] Zhu controlled JingJing and was the person in charge of the other individuals (Zhou and Tang) who were found at trial in the Original Action to have misused the Confidential Information. Zhu owns and/or controls the corporate applicants, CTS and FBI, and the other individual Applicants are employees of CTS or FBI. Zhu advancing this argument now – “I don’t know what is ‘Confidential Information’” – by way of his new companies (CTS and FBI) and his employees involved is nothing short of disingenuous.

[156] It would be anomalous indeed if a party, who took absolutely no issue with the clarity of an injunction granted some years ago concerning the definition of Confidential Information, could now somehow indirectly (through newly formed corporations and former employees who are now employees of those new corporations) argue that the terms of that definition were unclear for the purposes of supporting a particulars application.

[64] There is no ambiguity in the Order after Trial. XY is not attempting to imply terms into the Order.

The Evidence

[65] The conduct of Mr. Zhu that XY says is in breach of the orders had its origin in events preceding the trial and the pronouncement of the orders.

[66] In 2004 XY entered into a contract, the Commercial License Agreement, with IND Lifetech Inc., later known as JingJing Genetics Inc. XY’s case against the defendants was that JingJing and four persons, Jesse Zhu, Tang Jin, Selen Zhou and Richard Remillard systematically deceived XY and vastly underreported the number of products they were making and selling, thereby depriving XY of the substantial royalties.

[67] Those claims of the plaintiff were upheld at trial: 2012 BCSC 319.

[68] The evidence in this contempt application establishes that Jesse Zhu (and some other defendants) were taking various steps to use XY’s confidential information both before and after the trial.

[69] Kevin Xu was the lead engineer and director of research and development for the IND Group both in Canada and in China. He worked for them from 2006 until 2014.

[70] He deposed that Mr. Zhu instructed him to copy XY's SX BSO, SX nozzle and SX nozzle tip.

[71] Mr. Xu began "as early as 2008" working on a project to copy the SX nozzle tip. He sent several damaged copies of used SX nozzle tips to manufacturers in China. His purpose was to find out if anyone could determine the material used to make the tips.

[72] James Yang deposed that he was a consultant or employee for several of the corporate defendants. He worked in this capacity from 1999 until he was let go in 2014.

[73] He deposed that Jesse Zhu "owned or controlled" nine companies: International Newtech Development Incorporated ("IND"); IND Embryontech Inc. ("IEI"); CTS; Fraser Biomedical Inc. ("FBI"); Ai De Diagnostic Co. Ltd. (also known as Aide Diagnostic) ("AI DE"); Aide Modern Bovine Industry (China) Limited Company; Qing Dao Cell Project Company; Aide Biofarm; and Fu Tong Hua.

[74] The first four of those companies are in Canada. The other five are in China. Mr. Yang deposed that Mr. Zhu "directs the activities" of these companies and that the decisions and conduct of the IND Group were "...under his direction, control and approval".

[75] In March 2010, Mr. Yang deposed, he was instructed by Mr. Zhu to find a new business location. IND had been operating on Annacis Island. His instructions were to find premises that were not on Annacis Island.

[76] Mr. Yang found premises on Byrne Road in Burnaby. The premises were leased in the name of Fraser Biomedical Inc. or FBI.

[77] In August 2010, JingJing filed for bankruptcy. The trustee in bankruptcy took possession of JingJing's three SX cytometers.

[78] XY made arrangements to inspect the three SX cytometers being held on behalf of the trustee in bankruptcy in the IND warehouse.

[79] On September 30, 2010, Thomas Gilligan, a representative of XY, inspected the three SX cytometers and noted that parts were missing. On October 1, 2010, counsel for XY wrote to the trustee in bankruptcy and the defendant's counsel asking about seven specific parts: an SX nozzle assembly, four extra tips and two BSOs.

[80] Mr. Yang deposed that IND management discussed a "reasonable explanation" that might be given about the missing parts. Tang Jin suggested the explanation of "normal wear and tear". Another employee noted "it is logical that such parts have been thrown away. XY should know this". Eventually, an email was sent to the trustee that states:

All the parts mentioned had damaged [sic] or worn out since those machines had been used since 2004.

[81] The suggestion was made that the trustee look for the nozzles "harder and more carefully".

[82] The email was nonsense. IND had the missing parts and intended to use them to continue sorting semen.

[83] In October 2010 Mr. Yang was instructed by Mr. Zhu to incorporate 0893979 B.C. Ltd., which later became Canadian Topsires Selection Inc. Mr. Yang and his associates then arranged for the purchase of the three cytometers from the Trustee in Bankruptcy. They were careful not to disclose to XY who the purchaser was. They used a medical supply company, Technoterm Integrated Services Ltd. ("Technoterm"), as a "go-between"... "in order to hide our intentions from XY".

[84] The trial commenced on October 18, 2010. The Sealing Order was made the next day. Counsel for the defendant made the following representation to me:

My clients had last week informed me that their position on the missing parts was that, a number of the parts had been discarded and broken or no longer operating. Their position is that none of the missing parts had been taken by them or used for any purpose, improper or otherwise. I wanted to record this fact this afternoon and now, albeit belatedly, so that there's no suggestion that later, to my clients, that their position is a recent invention. With your permission I will raise this matter with His Lordship, Mr. Justice Kelleher, tomorrow in the same manner as I am doing by this email.

[85] After the Sealing Order was made, Mike Evans of XY testified about XY's confidential information. The defendants, including Jesse Zhu, left the courtroom to avoid hearing the confidential information. Defence counsel confirmed that he would "ensure that they have no access to this information" but asked that Kevin (Chung Li) Xu be permitted to remain in the court to assist counsel with technical aspects of Mr. Evans' testimony.

So, My Lord, in the context of that order, I'd now like it noted that my clients will be leaving the courtroom. The only person who will remain, at least from our side, is Mr. Kevin Chung Li Xu and Mr. Xu is a former employee of JingJing prior to its demise. He now works for a company called Fraser Biomedical Inc., which is no ownership connection at all to any of the IND companies. They make - they raise mice and they use mice fluid for medical resources and medical device purposes. And so IND, the various components of the IND diagnostic company or group of companies, IND Pharmaceuticals, purchase the mice fluid from Fraser Biomedical Inc., and there was a connection since then; at one point they were in the same building, but there is no ownership or other connection to IND. He is, however, a former employee of IND but is no longer an employee of IND.

[86] There is no suggestion that counsel was aware that these representations were inaccurate.

[87] I then said this in court:

THE COURT: Yes. Kevin Chung Li Xu is going to be hearing evidence that is confidential, and he is instructed not to disclose any of the confidential information to any person who is not present here, and so on that basis, the parties who are - the parties or persons or future witnesses who are leaving the courtroom for this purpose are - cannot expect to speak to him about this matter.

[88] Shortly after listening to the sealed testimony, Kevin Xu was involved in retrofitting ordinary cytometers purchased by Technoterm back to SX cytometers.

[89] In December 2010, the three SX cytometers were sold by the trustee to Technoterm, an entity used by IND. Before the sale was completed, XY attended in order to strip the cytometers of the confidential parts and their configuration.

[90] Selen Zhou and Mr. Zhu were determined to learn exactly what modifications were being made. That is because they wished to retrofit the cytometers in order to restore them to their SX configuration.

[91] They learned that IND would not be permitted to observe the conversion. On December 16, 2010, Tang Jin sent an email to Kevin Xu: "You have to make a

record of the location and model of each part of the machine so we will know which parts are replaced by XY.” This message forwarded an email from Jessie Zhu:

Even if not being on the scene, it would be very easy to know what they have changed. Xiao TANG [Tang Jin] please inform our department guys to be ready, to be familiarized with the equipment for one last time, wait till after the refitting has been completed, then inspect carefully again, to duplicate the refitting process specifically.

[92] Mr. Xu deposed that he made “a detailed record, with photographs, of JingJing’s three SX cytometers before XY’s technician removed the SX components and reconfigured the cytometers for ordinary (non-sperm-sorting) operation in December 2010.” He said that he “took photos of all the parts and position of every aspect of the SX cytometers”.

[93] On December 30, 2010 Mr. Xu sent an email to Jesse Zhu to confirm that he had done a “detailed analysis”. He listed the parts that have been changed by XY’s technician. Following the trial judgment, the record and detailed analysis have not been delivered to XY.

[94] Even the delivery of the cytometers from the trustee to the supposed purchaser, Technoterm, was surrounded by deceit. Mr. Yang deposed:

I was there with Michael Wong, the representative of the trustee in bankruptcy, on the night the three cytometers were to be shipped from storage at the IND Group building in Delta to Technoterm. To avoid detection we pretended to ship them out, but the truck just did a circle and came back after Mr. Wong had left. We later moved the three machines to the Byrne Road location.

[95] Mr. Xu then purchased two used cytometers from Biosurplus, an equipment supplier in California.

[96] Once the cytometers were relocated to FBI’s premises, the process of retrofitting began using in part, XY’s own parts. Mr. Xu deposed as follows:

On December 30, 2010, I reported to Jesse Zhu and Jin Tang to set out the changes made by XY when stripping its confidential information. I ultimately did restore the cytometers to their SX configuration (as close as I could do) using XY’s BSOs, nozzles, and nozzle tips. Jin Tang gave me those parts after the cytometers were purchased through Technoterm. I didn’t expect XY to change the PMT and controller card. We spent a long time trying to source replica PMT and controller cards, without success. We used the spare SX BSOs, nozzles and tips, initially. Later we worked

directly with manufacturers in China to copy XY's BSOs and tips , and attempted to copy the nozzles, too.

[97] Mr. Xu deposed that he was in charge of retrofitting the three cytometers that had been obtained from the trustee in bankruptcy and the two new cytometers from Biosurplus. His task was to make them into SX Cytometers for semen sorting.

[98] Mr. Xu deposed as follows:

Shortly after we obtained the cytometers from the trustee in bankruptcy, Jin Tang gave me a supply of XY's SX parts. To the best of my recollection there were 5 complete sets of XY's SX BSOs, SX nozzles, and SX nozzle tips. I did not know that the IND Group had retained these parts after the bankruptcy until I received them from Jin Tang.

[99] Mr. Xu's evidence is that they had a list of the XY parts that had been obtained over the years from authorized and unauthorized sources together with some of the parts' serial numbers.

[100] Mr. Xu's evidence is further:

I understand that the SX parts Jin Tang gave me are among the various SX parts listed in paragraph (a) of the Appendix A to the Order after Trial ("XY Parts"). I understand the Order specifically includes a nozzle assembly (which I understand is the SX nozzle and SX tip), the SX BSO, and pulsed lasers configured for the SX cytometers.

[101] He explained that the SX BSOs, SX nozzles and SX nozzle tips were needed to make ordinary cytometers function as SX cytometers for semen sorting. His evidence is that if he had not had the supply of XY parts (SX BSOs, SX nozzles and SX nozzle tips) he does not know how he would have retrofitted the ordinary cytometers for semen sorting. He said that it may not have been possible to do.

[102] Mr. Xu's evidence is that he was able to partially retrofit some of the cytometers as SX cytometers. He did so by replacing the ordinary BSO nozzle and tip with XY's SX BSOs, SX nozzles and SX tips. He went on to depose:

I was surprised that XY had changed the PMT, sensor, and the signal gain card within the PMT controller when they reconfigured the cytometers. This presented a difficulty which prevented me from being able to complete the retrofit of the cytometers to fully functional SX cytometers capable of sorting semen.

For approximately a year we attempted to source replacements for the sensor and signal gain card from the XY SX cytometers. My plan was to

find a commercial supply and purchase the sensors and signal gain cards. If I could not get a steady supplier I intended to obtain a sample and find a manufacturer in China to make additional copies.

We were not able to obtain any of the XY SX sensors or signal gain cards. Suppliers of those parts made specific inquiries to find out who was trying to buy them and made it clear that they would only sell them to XY licensees. We were worried that XY would discover our plan.

After attempting to find the SX sensors and signal gain card for about a year Jesse Zhu instructed me to find another way. I abandoned the search for the XY SX sensors and instead tried to find a coordinated set of PMT, sensor and signal that would permit semen sorting with the cytometers as outfitted with XY's SX BSOs, SX nozzles, and SX nozzle tips. After about 6 months I was able to make the cytometers function using a different PMT, sensor and signal gain card.

I, along with other technicians, reconfigured several of the five cytometers to SX cytometers using the records we had made, our collective knowledge of the SX cytometers (particularly my own knowledge as I was the primary technician who had been responsible for maintaining the SX cytometers ILL had acquired from XY), and the XY Parts (including the SX BSOs, SX nozzles, and SX nozzle tips) we had kept.

[103] A meeting was held on February 15, 2011. Jesse Zhu met with a group that included Kevin Xu to divide the work "between the Chinese and Canadian teams". The minutes of the meeting are in evidence. At that meeting, Mr. Zhu gave Mr. Xu a deadline of the end of May 2011 for restoring the cytometers to their SX configuration.

[104] The trial judgment was published on March 2, 2012. The set of parts on the existing machines were not delivered to XY as required by the Order after Trial judgment. There was no record of the work done by the people at the meeting that was delivered to XY.

[105] Mr. Xu further deposed that he received a copy of an email from Yuan Hui of IND to Jesse Zhu. There was concern that "the US company" was looking for misuse of XY technology.

[106] Mr. Xu then emailed Tang Jin:

Well it seems American imperialism is very cunning, suggest to make an imitation one, I will send pictures to Yuan Hui and let Guo Hai Sen to find them.

[107] He received this reply from Jesse Zhu:

The law is strong, but the outlaws are 10 times stronger.

[108] On October 13, 2011, there was a breakthrough of a kind. There was an exchange of email between Kevin Xu and Tang Jin, copied to Mr. Zhu. The subject line is “Tip’s” material. Kevin Xu wrote:

After making carefully enquires, the material used for the tip is [redacted for confidentiality] ... This proves that the leader’s original assumption about the material was completely correct.

[109] Tang Jin’s reply, in relevant part, reads:

Today Chun Li found the Jiang Su Wu Xi manufacturer for tip processing. How should we proceed with making contact? This manufacturer has direct contact with Dako. To discuss processing directly [with them], it would be very likely that XY would soon learn about the information.

[110] On October 19, 2011 Jimmy Liang wrote to Jesse Zhu: “We did the drawings last time based only on a tentative idea. Xiao Ju says there is no problem with drawing; the key was not seeing the real thing.”

[111] No drawings relating to tips were delivered to XY following the trial judgment.

[112] Mr. Xu’s evidence is that by April 2, 2012 two cytometers were operating at Byrne Road and a third was still being reconfigured. By that time they had sent the two other cytometers to China. Mr. Xu deposed that he had reconfigured them as SX cytometers using XY parts, with the help of Qi (David) Fu and others. He went on to say:

I, with help from others including Ju Rong Jiang and Jimmy Liang and Yuan Hui, (all three are IND Group employees from Aide Diagnostic in China) arranged for XY Parts to be analyzed and copied in China so that the IND Group would have a continuous supply of the XY Parts. I discuss the copying of the XY Parts further below.

[113] He also used Summit Software of XY to operate the cytometers for semen sorting. His evidence is that the IND Group’s IT Department had a copy of a hard drive with Summit Software on it, which hard drive would be copied in its entirety to the computer controlling one of the retrofitted SX cytometers. According to Mr. Xu the IND Group has continuously used this Summit Software to operate the SX cytometer used to sort semen at the office of “Jesse Zhu’s Aide Diagnostic company in China (141 Zhu Zhou Road in Qingdao)”.

[114] The Anton Piller order was issued by this Court on April 2, 2012. The search and seizure began on the same day.

[115] Mike Evans of XY attended at Byrne Road on April 2, 2012. He was with Geoff Bowman, XY's lawyer, and John Singleton, Q.C., the independent supervising solicitor, when the search and seizure pursuant to the Anton Piller order took place.

[116] Mr. Evans deposed that when they entered the building he saw that there were three MoFlo sorters. Two of the machines were operating. He deposed that they were actually sorting sperm by sex, using XY's confidential information.

[117] The execution of the Anton Piller order appears to have brought to an end the sorting of semen by Jesse Zhu in Canada. It continued to occur after that time in China. Mr. Xu deposed that Mr. Zhu has at least two and possibly three cytometers in China that are SX-configured. One is in the IND office in Qingdao. Two cytometers were shipped from Canada to China. Mr. Xu deposes that he reconfigured the two cytometers that were shipped to China from Canada. He witnessed the sorting of semen in the Qingdao office.

[118] Qi (David) Fu, another former IND Group employee or contractor, deposed that in 2010 Tang Jin instructed him to go to China to install and debug cytometers.

[119] In December 2010 he spent three weeks in China. He brought with him two of XY's SX nozzles and SX BSOs. He said that XY's nozzle tips were already in China.

[120] Mr. Fu deposed that he returned to China in June 2012. He was there for approximately 10 days on that occasion. He observed that the cytometer that was running in the Qingdao office had the same SX nozzle and SX BSO that he had installed in 2010.

[121] Mr. Xu further deposes that Mr. Zhu also has a cytometer in his office in Beijing. This is one of the two cytometers that Mr. Zhu reconfigured to the SX configuration and shipped from Canada to China.

[122] According to Mr. Xu, as recently as October 2014, when Mr. Xu was laid off, Mr. Zhu and his companies continued to operate the two cytometers in China.

[123] The evidence that Mr. Zhu caused the copying of XY's SX BSO, SX nozzle and SX nozzle tips is overwhelming. Mr. Fu testified that on Mr. Zhu's instructions, he and others arranged to bring in an SX nozzle and SX tip to a manufacturer in China so that it could be precisely measured and the manufacturer could confirm its ability to copy it. The manufacturer was successful and the IND group received and used copies of the SX nozzle tip from this manufacturer. Mr. Fu's evidence is that Mr. Zhu also instructed him to find a manufacturer to copy the SX BSOs. Mr. Fu was successful. Copies of SX BSOs were made by Wang Yun Qian, the owner of a manufacturing company. Mr. Fu deposed that he gave them Mr. Qian a sample of XY's SX BSO on the instructions of Mr. Zhu. In this way the IND Group received and made use of copies of the SX BSO.

[124] Mr. Fu testified as well that he was instructed by Mr. Zhu to find a manufacturer to copy the SX nozzles. He was not able to do so. There is no evidence of a non-hearsay nature as to whether Mr. Zhu has succeeded.

[125] The evidence provided in the affidavits of James Yang, Kevin Xu, Barry Cheng, David Fu and Selen Zhou establish that before and after the Order after Trial the defendants under Jesse Zhu's leadership and direction completely ignored JingJing's contractual obligation to XY. Not only did they vastly under-report their use of XY's licence and thereby deprive it of substantial royalties; at all times they were copying XY's confidential information.

[126] Until the Order after Trial this action was a breach of contract and constituted deceit and breach of confidence, as the judgment found.

[127] Once the Order after Trial was entered, the activity if anything intensified. Many of the steps they took are in breach of the Order. Again it is a pattern of deceit.

[128] The evidence is overwhelming that Mr. Zhu is in contempt of the Order after Trial by:

- (a) failing to deliver up the Confidential Information as defined in the Order after Trial and improvements made possible by or because of

access to XY's technology;

- (b) using the Confidential Information, directly or through those over whom Mr. Zhu exercises control;
- (c) failing to deliver up to XY any and all Confidential Information in his possession, power or control.

[129] In fact, I have examined the affidavit evidence of the deponents listed above quite apart from the voluminous translated emails that were obtained in the execution of the Anton Piller order. There is more than sufficient evidence apart from the emails. The evidence of the deponents is uncontradicted. None of the deponents was cross-examined with respect to their evidence.

[130] I turn to the fourth allegation respecting the Order after Trial, that Mr. Zhu failed to pay the judgment against him which remains due and owing.

[131] There are four elements that must be proven to establish contempt of court for non-payment:

- that the debtor had notice of the order;
- that he or she did not comply with the order;
- that the noncompliance was "wilful", that is, deliberate as opposed to accidental or intentional; and
- that the debtor was in fact capable of complying with the order, that is, that he or she had the means to make the required payment or some portion of it.

[132] The terms of the Order after Trial are clear.

[133] There is no dispute that Mr. Zhu was aware of the judgment. He actively participated in the trial and appealed the order. The appeal was largely unsuccessful. Mr. Zhu's failure to comply with the order was deliberate. It was wilful because it was not accidental or unintentional. That can be inferred from all the circumstances, including extensive efforts to reorganize his assets to avoid execution by XY.

[134] Mr. Zhu has not paid any part of the judgment.

[135] Impecuniosity is an excuse for non-compliance with an order for payment of money. If the alleged contemnor adduces evidence that raises a reasonable doubt about his or her capacity to pay, there will be no finding of contempt: *Luft v. Ball*, 2013 BCSC 81.

[136] What are the circumstances here? Mr. Zhu owned property. He has been actively employed through his various companies. He has actively engaged in litigation with XY. He has arranged his assets both prior to and subsequent to the judgment with the effect that XY has been unable to execute.

[137] Mr. Zhu admitted on cross-examination during the trial of this matter that the “curious” sale of the shares of JingJing to Chinese residents was done “to avoid liability in this litigation”.

[138] Selen Zhou deposed that she had several meetings in 2011 and 2012 with Jesse Zhu, Tang Jin and Shuli Wong regarding organizing personal and company assets to avoid execution in case of a judgment in favour of XY.

[139] Specifically, the day after the trial judgment was pronounced, Jesse Zhu wrote an email to Ms. Zhou. This email, dated March 3, 2012, directed her to transfer his overseas assets into holding companies. These companies do not appear on their face to be related to Mr. Zhu.

[140] I infer from all these facts that Mr. Zhu has the ability to make some payment toward the judgment debt.

[141] Mr. Zhu has led no evidence that raises a reasonable doubt about his ability to pay.

[142] Mr. Zhu is in contempt of the Order after Trial for non-payment of the judgment.

Breach of the Sealing Order

[143] XY’s case is that Jesse Zhu was expressly aware that Kevin Xu applied for a patent in China based on the sealed evidence at trial.

[144] The evidence does not go that far. Mr. Xu deposed that Jesse Zhu instructed him to rely on the information he heard in court to write a patent summary for the IND Group.

[145] However, Mr. Xu did not carry out this instruction. He deposed that in any event, based on his experience in working with the cytometers, he was already aware of the facts that Mr. Gilligan testified about.

[146] The evidence does not establish that Jesse Zhu is in contempt of the Sealing Order.

Conclusion

[147] The evidence establishes beyond a reasonable doubt that Jesse Zhu is in contempt of the Order after Trial.

[148] The matter should now be set down for sentencing.

“Kelleher J.”