

SUPERIOR COURT OF JUSTICE – *ONTARIO*

ASSOCIATE JUSTICE MCGRAW:

Action: Qingdao Top Steel Industrial Co. Ltd. v. Fasteners & Fittings Inc.

Court File Numbers: CV-22-676565; CV-17-588442

Motion Heard: October 12, 2023; November 15, 2023; February 14, 2024

Additional Written Submissions Filed: April 20, 2024

Endorsement Released: August 31, 2024

Counsel:

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- C. Snider and A.J. Freedman for the Defendants in the Related Action MJKE Enterprises Inc. (“MJKE”), Michael Wang and Mekfast Company Limited (Grip Clinch, “GC”) (the “MJKE Defendants”)(aj.freedman@dentons.com)

Endorsement

Background

- [1] As set out in my previous Endorsements, there are 3 refusals motions by Qingdao, FF and the MJKE Defendants.
- [2] FF is an Ontario corporation which sells fasteners including bolts, screws, nuts and washers. Until April 7, 2022, the Defendant James Edwin Robinson was the President and principal of FF. FF hired the Defendant Michael Wang (“Michael”) in 1999 to purchase fasteners from China and Asia. Michael was eventually promoted to Vice President of Purchasing. He left FF in October 2015. FF subsequently retained Michael as a consultant through his company MJKE until May 2017.
- [3] Qingdao is an exporter of fasteners which was incorporated in China in 2004. From 2004-2017 Qingdao sourced fasteners almost exclusively to FF. DaWei “David” Laing is the General Manager of Qingdao. He is also a shareholder of Yantai Xincheng Standard Fasteners Co. Ltd. (“Yantai”), which manufactured and supplied screws to Qingdao which in turn exported them to FF. FF alleges that it had a course of conduct supply agreement with Qingdao and Yantai whereby Yantai manufactured fasteners for sale to FF through Qingdao and Qingdao exported fasteners it sourced from manufacturers in China, including Yantai, to FF (the “Supply Agreement”). The terms of the Supply Agreement included that Qingdao would sell fasteners and related packaging exclusively to FF at the lowest prevailing prices.

FF and Qingdao also entered into an arrangement whereby FF would pay on average an additional 3% on all amounts paid for shipments which were intended to defray warehouse costs in Ningbo, China.

- [4] In April 2017, FF discovered that Michael was the beneficial and de facto owner of Qingdao and Yantai. FF alleges that Michael used his control over both the purchasing and supply sides of all transactions between FF and Qingdao to carry out a fraudulent scheme to overcharge FF. FF also discovered that: Michael and his spouse YueHong “Joanna” Chang (“Joanna”) had a 94% controlling interest in Qingdao and were officers and directors of Qingdao; Michael was the Director and Legal Representative of Qingdao from August 2014 until January 24, 2017; Joanna was Executive Director of Yantai from August 2010 to March 2019; Michael and Joanna transferred their Qingdao shares to Michael’s father in January 2017 and appointed him as Executive Director and Manager. FF terminated its relationship with Michael and MJKE on May 29, 2017. FF alleges that Michael admitted to the fraudulent scheme, threatened to stop shipments to FF but initially agreed to continue shipments in the interim. At the time, FF owed approximately US\$3,900,000 to Qingdao. On September 25, 2017, after receiving a US\$340,000 pre-payment, Qingdao advised FF that it would not make any further shipments until FF paid US\$714,000 towards its outstanding receivables. FF refused and alleges that Qingdao unlawfully terminated the Supply Agreement. FF purchased over US\$104,000,000 worth of fasteners from Qingdao during Michael’s time at FF.
- [5] In July 2017, Michael purchased a controlling interest in GC, a supplier of industrial tools and construction products including nails and fasteners and a competitor of FF. Michael is an officer, director, shareholder and principal of GC. FF alleges that the MJKE Defendants carried out a second scheme using GC, a competitor of FF, by which Qingdao and Yantai sold inventory earmarked for FF to GC at pre-inflation prices which GC sold at lower prices and higher margins misusing FF’s confidential information to lure away FF’s customers. FF alleges that GC also recruited FF employees to solicit business from FF customers.
- [6] There are two actions, one each by FF and Qingdao. In FF’s action, FF alleges that Michael, MJKE and Qingdao defrauded FF and breached their fiduciary duties and duty of confidence by, among other things, overcharging above the prevailing market price and misappropriating confidential information. FF claims an accounting, disgorgement of profits and damages of more than \$15,000,000. In Qingdao’s action, Qingdao seeks an order enforcing a Judgment dated December 26, 2019 in the amount of RMB 19,122,144.50 (the “Judgment”) granted by the Qingdao Intermediate People’s Court of Shandong Province (the “PRC Court”) in an action commenced in China (the “PRC Litigation”) for FF’s unpaid shipments
- [7] After 3 telephone case conferences, the parties first attended on the motions on October 23, 2023. Initially, there were approximately 181 refusals in dispute: 85 on Qingdao’s motion; 70 on FF’s; and 26 on the MJKE Defendants’. These were reduced over time as a result of the parties’ discussions and case management. Over a full day the parties made submissions on most of the refusals at issue and significant case management was provided. However, due to the number and nature of the refusals not all submissions were completed and the motion was adjourned to a telephone case conference on November 15, 2023.

- [8] By the time of the November 15 case conference, the parties had resolved more of the disputed questions. At the parties' request, I made rulings on two undertakings. With respect to the balance of the motions, it appeared that the only remaining refusals related to Qingdao's request for documentation and information with respect to the PRC Litigation over which FF asserts solicitor-client privilege. I advised counsel during the first attendance that if these refusals were not resolved, more comprehensive submissions including affidavits of Chinese law and supplementary Factums would be required. I ordered the balance of the refusals motions to proceed before me for 2 hours on a date to be scheduled in May 2024 and established a timetable for the exchange of materials.
- [9] In the interim, counsel scheduled another telephone case conference which proceeded on February 14, 2024. The parties requested that the balance of the motions including the unresolved refusals from the first attendance and those subject to FF's privilege claims proceed by way of written submissions. I ordered a timetable for the filing of written submissions. The parties have filed written submissions and indicated which refusals require rulings of the court. Approximately 91 refusals remain at issue.

The Law and Analysis

- [10] Rule 31.06 provides that a person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action. Rule 29.2.03 sets out the proportionality factors which apply to both oral and documentary discovery. Rule 1.04(1) further provides that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Further, Rule 1.04(1.1) requires the court to make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding.
- [11] Relevance, the scope of discovery and proportionality were summarized by Perell J. in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 and *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2013 ONSC 917. Discovery questions must be relevant to the issues as defined by the pleadings such that they must have probative value and adequately contribute to the determination of the truth or falsity of a material fact. Overbroad and speculative discovery and "fishing expeditions" are not permitted (*Rothmans* at paras. 129 and 154-157).
- [12] My directions and determinations on the refusals which counsel have identified require rulings from the court are set out below. Given the parties' ongoing discussions and case management by the court, in some cases the rulings are the product of agreements and interim directions. In my view, this approach, including first determining what documentation and/or information may be available and production in stages is cost-effective, efficient, proportionate and consistent with Rule 1.04(1). This is particularly true in cases like the present one with significant claims dating back 25 years with voluminous document requests.
- [13] Given the significant time which some of these steps may take due to the large amounts of documents or information sought over significant periods of time, the parties are expected

to act reasonably and with flexibility with respect to the timelines for production set out below.

Qingdao's Motion

[14] Qingdao seeks answers to approximately 31 refusals from Mr. Robinson's examination for discovery.

[15] Damages - Packaging/Labelling and Lost Profits (Refusals #1-5, 16) – Qingdao seeks all documents and evidence in support of FF's damage claims in paragraphs 26(e)(v), 26 (e)(v)(vi) and 70(b) of its Fresh As Amended Statement of Claim (the "Amended Claim"). The information requested in paragraphs 26(e)(v) and (vi) relates to the allegation that Qingdao and its predecessors unlawfully profited from the use of confidential information to overcharge for packaging and labeling services and containers. Paragraph 70(b) relates to FF's claim for US\$600,000 in lost profits due to the termination of the Supply Agreement. There is a material distinction with respect to what FF is obligated to produce at this stage of the proceedings. FF is required to produce documents in its possession or control which are relevant to its claims even if they will be referred to in an expert report. However, FF is not obligated to provide any calculations of damages or expert opinions which are to be addressed in expert reports at this stage of the litigation. This information will be disclosed prior to the pre-trial conference with FF's expert report or, if the parties agree, prior to mediation. FF shall make inquiries and advise if there are any additional documents in FF's possession or control which are relevant to these damage claims which it has not produced, and if so, FF shall produce them within 60 days. Further, to the extent to which there are documents which have already been produced which are relevant to specific damage claims, FF shall identify them within 60 days.

[16] Damages - Sale of Unpaid Products (Refusals #6-15) – Qingdao seeks information regarding FF's sale of unpaid Qingdao products to FF customers. FF has provided some information as a partial answer to an under advisement but refuses to provide more particular information, namely sale amounts during specific periods to certain customers and profits, on the basis that the information is not relevant and disproportionate. FF has provided the total amount of unpaid product sold, its profit margin and the amount of unpaid product remaining. Qingdao seeks specific information for the following customers based on documents produced or admissions made by FF: Accurate Fasteners, Advance Fasteners & Tools Ltd., Bolts Plus Inc., Whitecap, The Hillman Group Canada, Rodrix Fasteners, W.D. Packaging and Facca Fasteners Ltd. In my view, these are questions arising from information and documents produced by FF which are relevant to FF's claim for lost profits as a breakdown of sales and profits related to unpaid Qingdao products. As the information requested is comprised of the numbers and information already provided, it would not be disproportionate for FF to provide a further breakdown. FF shall, to the extent possible, provide a breakdown (or where Qingdao has calculated them, confirm the numbers) of sales and profits for each of the customers listed within 60 days.

[17] Payment Terms (Refusal #20) - Qingdao requests that FF produce the payment terms of its non-Chinese suppliers for its predecessor Shenzhen in 2001. Qingdao submits that this is

relevant to FF's allegations that Michael misappropriated customer information. FF advises that it has pleaded the suppliers for which confidential information was misappropriated, amended its undertakings and does not know or have any information at this time that any non-Chinese supplier payment terms were misappropriated. Accordingly, no further steps are required and this refusal may be revisited later if FF discovers any such information which it is obligated to produce.

- [18] Invoices, Sales Contracts and Purchase Orders (Refusals #21-22) – Qingdao requests all invoices, sales contracts and purchase orders from 2001 and 2002 other than for Chinese suppliers. Qingdao submits that these are relevant to FF's overpayment claims and necessary to show what prices FF paid so that Qingdao can make comparisons. In my view, this kind of disproportionate request by Qingdao and FF has been a common theme on these motions. Even where the subject matter of the request is relevant, it would be disproportionate to order production down to the granular level of purchase orders. It appears from the record and submissions that FF will be making overpayment claims for 2000-2003. Therefore, based on discussions at the motion I conclude that the first step is for FF to identify the non-Chinese suppliers at issue and what information and/or documentation is available for production so that the parties can have more informed discussions. FF shall do so within 60 days.
- [19] Product Codes (Refusals #23-24) – Qingdao seeks entire lists of product codes used by FF for products imported from Qingdao and four suppliers in Vietnam, Thailand and Taiwan from 2005-2017 in order to compare prices charged by FF's other suppliers. FF acknowledges that it used product codes and the information is available, however, there are proportionality issues given the substantial volume of information and it is not currently in a producible or usable format. FF has agreed to make inquiries and determine how this information might be organized for production. They shall do so and advise within 60 days.
- [20] Reasonable Industry Standard (Refusals #25-26) - Qingdao requests any documents which show the profit margins of FF's suppliers from Taiwan or Malaysia, Thailand and Vietnam which exported products to FF from 2007. Qingdao also requests Mr. Robinson's knowledge information or belief as to the profit margin earned by suppliers outside of China on the list in FF-16657. I am satisfied that this information is relevant to FF's allegations that Qingdao improperly inflated its prices by at least 19.5 per cent on average above the industry standard. FF shall answer these questions within 60 days.
- [21] NRM Payment Terms (Refusal #28) - Prior to the termination of its relationship with Qingdao in 2017, FF purchased products from NRM through Qingdao. After the termination, FF purchased products directly from NRM. Qingdao requests Mr. Robinson's knowledge, information and belief regarding FF's payment terms with NRM. I am satisfied that this is relevant to FF's allegations that Qingdao overcharged for products. Specifically, it will allow for a comparison of the prices charged by NRM to Qingdao as against those charged when NRM sold directly to FF and therefore will assist in proving or disproving these allegations. FF shall answer this question within 60 days.
- [22] FF Defences Related to the PRC Litigation (Refusals #30, 32, 33-37) – In its Defence, FF claims that it suffered procedural unfairness in the PRC Litigation due to the PRC Court's

denial of its application during trial for an order to obtain evidence from NRM (the “NRM Information”) and that the PRC Court compelled the parties to proceed to the second day of trial on November 5, 2019 without ruling on FF’s application. The PRC Court ultimately dismissed the application for the NRM Information in its Judgment. FF pleads that the NRM Information would have demonstrated the extent of Qingdao’s mark-ups and reduced the damages claimed by Qingdao. FF also admits in its Defence that that it received the NRM Information one year prior to the PRC trial. In Refusals 33-37, Qingdao seeks answers to the following: i.) whether Mr. Robinson gave information and documents which he received from NRM to FF’s PRC counsel before the second day of trial; ii.) if he advised FF’s PRC counsel that he had already received information about the business between NRM and Qingdao in an email exchange with NRM; iii.) if he advised FF’s PRC counsel that he already knew from his emails with NRM in 2017 and 2018 that he was told how Qingdao placed orders; iv.) if he told FF’s PRC lawyer that he had already received Qingdao’s purchase orders and the pricing information from NRM; v.) if he advised FF’s PRC counsel that he already knew NRM’s knowledge and understanding of Qingdao from NRM; and vi.) if he recalls receiving other information prior to November 5, 2019 compelling him to participate in the second of day of trial other than a Chinese FedEx package and a subpoena. FF refuses to answer these questions on the basis of solicitor-client privilege and that they are not relevant. Qingdao submits that solicitor-client privilege does not exist in China therefore FF cannot refuse on this basis. Further, Qingdao asserts that since FF admits in its Defence that it received the NRM Information one year prior to the trial, what FF did with the NRM Information is relevant because if it chose not to proffer the NRM Information to the PRC Court it would demonstrate that the NRM Information was not material evidence and therefore FF’s defence regarding due process is baseless.

[23] In my view, these questions and the information sought by Qingdao are not relevant to the matters at issue in these proceedings. Contrary to its submissions, Qingdao is not simply requesting what FF did with the NRM Information after it was received before trial. Qingdao is seeking what communications FF had with its PRC counsel about the NRM Information. This is materially different and not probative of FF’s defence of procedural unfairness or whether the NRM Information was material evidence as Qingdao argues. What is relevant to FF’s defences of procedural unfairness is what happened during the PRC Litigation, including the application brought, the relief sought, the submissions which were made and permitted and what rulings were made by the PRC Court. In this regard, both Qingdao and FF have filed affidavits in these proceedings setting out the procedural history of the PRC Litigation and other evidence. Qingdao has cross-examined FF’s affiant, Rick Luo, one of its counsel in the PRC Litigation. Mr. Luo’s affidavit includes evidence regarding FF’s application to obtain the NRM Information, including that FF attached invoices from NRM demonstrating that Qingdao had marked up the fasteners it sold to FF and that obtaining further evidence would support this which is argues that the PRC Court ultimately ignored. Accordingly, Qingdao has received material evidence regarding FF’s procedural fairness defences and has had the opportunity to cross-examine Mr. Luo and Mr. Robinson. Qingdao also has information with respect to what comprised the NRM Information and when FF received it.

[24] Even if I had concluded that the NRM Information was relevant, I would have denied

Qingdao's requests on the basis of solicitor-client privilege. There is no dispute that the principle of solicitor-client privilege does not apply under Chinese law. As set out in the uncontroverted evidence in the affidavit/expert report of Ms. Jingping Li, a retired Chinese Judge filed by Qingdao, there is no concept of solicitor-client privilege in Chinese law and Mr. Robinson would be compelled to answer the refusals at issue in Chinese proceedings. However, the issue before me is whether FF's communications with its PRC counsel are protected by solicitor-client privilege in these Ontario proceedings. There is no suggestion or argument by Qingdao that FF or Mr. Robinson have waived privilege.

[25] I have not been referred to any case law where a party asserting solicitor-client privilege over communications with its counsel in another jurisdiction, including a jurisdiction where solicitor-client privilege does not apply, was compelled to disclose the communications. Further, Qingdao has not referred me to any case law in the context of solicitor-client law in support of its position that FF cannot invoke privilege because it is a substantive issue and therefore governed by the law of China where the activities took place. The only case I was referred to was *Hartz Canada Inc. v. Colgate Palmolive Co.*, [1988] O.J. 663 (S.C.J.) in which McKeown J. stated the following:

“8 In these days of international trade and commerce it would be inadvisable to limit the solicitor-client privilege in Ontario to members of the Law Society of Upper Canada.

9 As was stated by Mr. Justice Ormrod in *Re Duncan, Garfield v. Fay*, [1968] 2 All E.R. 395 at p. 398:

There is nothing in these judgments to suggest that either learned judge intended to limit the rule to legal advisers whose names appear on the Roll of Solicitors to the Supreme Court or who are members of the English Bar. The basis of the privilege is just as apt to cover foreign legal advisers as English lawyers, provided only that the relationship of lawyer and client subsists between them. Any other conclusion would lead to an impossible position for, if this court were required to investigate the position of such communications in foreign law, it must first determine the foreign law, but what law governs the relationship of English client and foreign lawyer, at any rate when no proceedings are in contemplation? There is no forum and, therefore, no *lex fori*. The nationality of the foreign lawyer is as irrelevant as his address for this purpose.”

[26] In *Hartz*, the court was ruling on whether the defendant should be compelled to answer questions and produce documents related to communications with its Texas counsel. While, contrary to the present case, solicitor-client privilege applied in both jurisdictions in *Hartz*, I accept the underlying principle that solicitor-client privilege is not limited to members of the Law Society of Ontario. In the absence of any other authority, I am satisfied that FF's invoking of solicitor-client privilege is proper in the circumstances and that the refusals should be upheld. This conclusion is supported by the fact that the Supreme Court has consistently emphasized the importance of solicitor-client privilege to the Canadian justice system (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 26).

[27] In Refusals 30 and 32, Qingdao requests whether FF is relying on its PRC's lawyer's instructions to prove its defence that it was compelled to participate on the second day of the PRC trial and if FF intends to rely on any advice, information or documents received from its PRC counsel to defend Qingdao's action. FF refuses on the basis of solicitor-client privilege. In my view, these questions are relevant and, unlike the refusals above, do not require FF to disclose any solicitor-client communications. Rather, Qingdao is asking, as it is entitled to do, if FF intends to rely on any advice, information or documents at trial. These questions do not call for the disclosure of any privileged communications only FF's intentions in this regard. If FF responds in the negative, then there is nothing further to discuss. If FF responds in the affirmative, then the parties will need to discuss various issues including whether FF will be waiving privilege over certain communications or documents they intend to rely on and whether any motions will be required at trial. As these issues would typically be discussed in advance of and at a pre-trial conference, FF shall advise no later than 30 days prior to the pre-trial.

Fasteners & Fittings' Motion

[28] FF seeks answers to approximately 56 refusals from the examinations of Michael and David.

[29] Qingdao's Purchase and Sale History (Refusals #1-3, 9-11) – FF seeks all purchase orders, sales contracts, invoices, bills of lading and packing slips for all shipments that Qingdao made to all of its other customers and all exports to all other customers from 1999 to the present, and the same documents for all fasteners that Qingdao purchased from manufacturers in China that they sourced and exported to other customers from 1999 to the present and specifically for fasteners which Qingdao sourced for GC. FF also requests the same documents for all fasteners that Qingdao sourced to export after 2017 for customers other than GC. FF submits that this documentation is relevant to its allegations regarding Qingdao's fraudulent scheme and to compare prices Qingdao charged to other customers with those charged to FF. These are significant, broad requests which raise genuine concerns about proportionality. I am satisfied that some of the documentation requested is relevant. However, consistent with my comments above, to order production of all documentation for all sales for over 20 years down to the granular level of bills of lading and packing slips would be disproportionate and unnecessary in the circumstances. FF's submission that the nature of the alleged fraud and the history of dishonesty justifies such a comprehensive production does not support the production requested. At the same time, I do not accept Qingdao's arguments that the documents are not relevant or that the entire request is disproportionate. This calls for a reasonable, proportionate production not an all or nothing result. There must be a balance between FF's right to discovery and Qingdao's right to not be overburdened by overly onerous, disproportionate requests. It is also a consideration that the first claim in FF's prayer for relief is an accounting of all profits, revenues, income and other benefits. Therefore, documents may be ordered by the court at trial as part of an accounting.

[30] Qingdao states that it did not sell the same fasteners to all customers, including GC. As discussed during the motion, since FF is requesting the documents for comparison purposes

then the first step to properly narrowing these refusals is to determine what documentation is available for the same fasteners which Qingdao sold to FF. Counsel have advised that some sales documentation regarding GC has already been produced, Qingdao shall advise what documentation is available with respect to the same fasteners sold to both FF and other customers only within 60 days. Once this has been completed, further discussions shall take place regarding a reasonable documentary production.

- [31] Qingdao's Suppliers (Refusals #6-7) – FF requests that Qingdao advise who all of its suppliers were whether or not the products that Qingdao sourced went to FF for the period 2004 to the present. Similar to Refusals #1-3, 9-11 above, I am satisfied that Qingdao should make best efforts to advise who its suppliers were for this period but only for the same products which were shipped to FF.
- [32] Qingdao's Quotes (Refusal #41) – FF seeks all of the quotes that Qingdao obtained from its suppliers after receiving inquiries from FF from 2004 to 2017. This request covers quotes for 13 years and over US\$104,000,000 in business. In my view, this request is disproportionate and not feasible. A more reasonable approach would be to consider the production of a sample for the relevant period. However, Qingdao currently does not know what is available. The first step is for Qingdao to determine what quotes are available. Once this is done, the parties shall discuss production.
- [33] Michael's Bank Accounts and Bank Statements (Refusal #3) – FF requests that the MJKE Defendants identify each bank account that Michael had in Canada from 2004-2017 and produce monthly statements for each account. Qingdao claims that it requires the statements to determine if Michael received profits as a result of the alleged fraudulent scheme. While any such transactions are relevant, this is an overly broad, disproportionate request which would require the production of a significant amount of documentation dating back 20 years. FF has not attempted to narrow its request to payments only from Qingdao or by time period. Bank statements must also be redacted for confidentiality so that only relevant transactions are shown. Given the breadth of the request, it is unknown what records are available. The MJKE Defendants shall determine what records are available and advise within 60 days so that the parties can discuss what will be produced.
- [34] Grip Clinch Financial Statements (Refusal #25)– The MJKE Defendants have produced GC's financial statements from 2018-2022 (up to August 31, 2022) under Rule 34.12(2). FF seeks additional financial statements after August 31, 2022 on the basis that they are relevant to its disgorgement claims. The MJKE Defendants refuse because FF sold its business in April 2022 and FF has not advised if it is seeking damages arising from the sale of the business. FF continues to reserve its rights in this regard. I cannot properly consider this request until FF advises if it is claiming damages arising from the sale of its business. This request is adjourned and can be reconsidered once FF advises if it is claiming these damages.
- [35] Grip Clinch Tax Returns (Refusal #26) – FF seeks all of GC's tax returns from 2017 to the present on the basis that they are relevant to FF's disgorgement and unlawful gains claims arising from the alleged schemes. While I am satisfied that the information is relevant, the date range for the returns should mirror the financial statements have been produced,

namely for the 2018-2022 period. MJKE's counsel has agreed to review GC's Notices of Assessment and consider production on a counsel's eyes only basis. Counsel shall then discuss.

[36] Qingdao's Corporate and Financial Records (Refusals #12-15) – FF requests all of Qingdao's financial records (including audited financial statements) from 2004 to the present and to the extent to which there are no audited financial statements, all monthly, quarterly and annual financial statements whether prepared in house or by external accounts together with balance sheets, statements of income, profit distribution statements and general ledgers. If audited financial statements were prepared, I am satisfied that they are relevant to FF's claims particularly with respect to disgorgement and if available they should be produced for the period 2004 to the present. However, if they are not available, then consideration of a proportionate approach is required to ensure that the process does not become unmanageable. For example, the production of all general ledgers would be disproportionate. Qingdao shall advise if financial statements are available within 30 days and if so, they shall be produced. If they are not available, then Qingdao shall first advise what documents are available and the parties shall discuss what will be produced. Redactions may be necessary with respect to confidential information.

[37] Qingdao's Bank Accounts and Bank Statements (Refusals #16-20, 28-29) – FF seeks all monthly and yearly bank statements for Qingdao's China Merchants Bank account (the "CMB Account") from 2004 to the present; to advise if it used any other accounts to make distribution or dividend payments to its shareholders from 2004-2018 and to produce all monthly and yearly statements from 2004-present for any additional bank accounts, including any with the Bank of China and two other bank accounts identified in Qingdao's productions (as detailed in Refusals 28-29). Qingdao has confirmed that it used the CMB Account and that no dividend or distribution payments would have been made from any other accounts. I am satisfied that records with respect to the CMB Account are relevant. However, some of these requests are overly broad and disproportionate. The first step is for Qingdao to determine what records are available for the CMB Account, particularly how far back they are available. This is the primary account for production given that it was used for distributions and dividends. Qingdao shall also advise and confirm the existence of any additional accounts, confirm if they were used for dividends or distributions, or what they were otherwise used for within 60 days. The parties shall then have discussions with respect to what will be produced. As with all bank statements, any information which is confidential or unrelated to the subject payments may be redacted.

[38] Michael's Lap Top (Refusal #12)- FF requests that Michael's personal lap top be produced for inspection pursuant to a protocol to be agreed by the parties. The MJKE Defendants do not agree and I am not satisfied that the court should order this extraordinary remedy without further information and full legal submissions. FF alleges that Michael misappropriated confidential information, however, it appears that FF has not yet advised what information or documentation it alleges he misappropriated. The MJKE Defendants have confirmed that Michael preserved documentation on his personal laptop, however, are unable to confirm if his laptop was searched in preparing their Affidavit of Documents. The MJKE Defendants submit that FF has not agreed to produce Michael's work computer for

inspection or advised what documents it has located on his work computer. In my view, confirmation is required as to what searches were completed on both his personal and work computers to determine what relevant documents are available and what, if any, have been produced. There will inevitably be overlap. In order to move these issues forward, the MJKE Defendants shall advise if Michael's personal lap top was searched when preparing their Affidavit of Documents; FF shall advise if Michael's work computer was searched when it prepared its Affidavit of Document and what confidential information/documents they are alleging he misappropriated (to the extent to which they have not done so). To the extent to which the personal and work computers were searched, the parties shall advise regarding the nature of the searches (including search terms) and what documents have been produced, all within 30 days. After this, the parties can then discuss what, if anything further needs to be searched on Michael's computers, and how it will be done particularly if nothing has been done to date. The court can assist with establishing a protocol and the retention of an independent third party to conduct searches if necessary.

- [39] Grip Clinch Information (Refusals #16-19) – FF requests that the MJKE Defendants advise what percentage of the sales of threaded fasteners were for GC after August 31, 2017, to advise if Top Metal became a supplier for GC and if there were other suppliers in China during this period after the acquisition of GC. FF also requests that the MJKE Defendants identify all suppliers that supplied GC that FF would have previously sourced materials from after the acquisition and to advise what manufacturers GC sourced materials from for the period from April 2018 to the present. I am satisfied that the information regarding the percentage of sales of threaded fasteners for GC after August 31, 2017 is relevant to FF's allegations regarding a the scheme involving GC. The MJKE Defendants shall provide this information within 30 days. While I agree that whether Top Metal was a supplier is relevant, I reject that the information regarding GC's suppliers is relevant, particularly based on the pleadings. It does not need to be produced.
- [40] Grip Clinch Customer Lists (Refusals #20, 22 and 24) – FF requests a list of GC's customers at the time that Michael acquired GC, a list of GC's customers who purchased threaded fasteners at the time Michael acquired GC and a list of GC's customers who were added to the list from April 2018 to the present. The MJKE Defendants submit that they have already provided all information regarding customers which FF alleges were taken by Michael for GC. I agree with the MJKE Defendants that FF should know what customers it is alleging were taken whether it was from reduced business or losing the customer entirely. Producing the entire lists is overbroad, unnecessary and would result in the disclosure of confidential customer information. If FF alleges that any additional customers not already identified were taken, it shall advise the MJKE Defendants and the MJKE Defendants who shall provide the necessary information from the customer lists within 30 days.
- [41] True Might Investment Company (Refusals #5-11, 15) – FF seeks the name of Michael's contact at True Might Investment Company ("TMIC"); to advise if the investor behind TMIC helped him acquire his interest in Ardaven and was the same investor who helped Ardaven purchase the property at 11 Carlson Street in October 2015; to advise if the non-resident director for 194321 Ontario Inc., Yuesheng Liu is the investor behind TMIC and if he is the same investor who helped Michael acquire a majority interest in GC; and to advise of the

investor behind his acquisition of Ardaven in September/October 2015 and GC in 2017 if it is not Yuesheng Liu. In my view, these questions are not relevant and there is no underlying basis for these questions at this time. FF submits that Michael's contact at TMIC, who FF characterizes as a "mystery investor", is an individual who might reasonably be expected to have knowledge of the transactions or occurrences at issue under Rule 31.06(2). However, it is not apparent at this stage of the proceedings and on the current record that this is the case. There is no allegation that TMIC, Mr. Liu or anyone else related to TMIC or any other investors participated in the alleged fraudulent schemes including those involving GC. There is also no basis in the record to conclude that an investor in a company which was allegedly part of a scheme to compete with FF is relevant or to otherwise ground such a request. There must be something more than the fact that TMIC invested in GC and this has not been established or provided. It is also important to note that FF is not simply seeking information about TMIC as a corporation, but the individuals or principals behind TMIC. This is another step beyond and more remote than TMIC itself. This may be another production request which is the subject of the accounting claimed by FF. However, this may not preclude a Rule 30.10 motion with respect to TMIC for the production of relevant non-party records assuming the same records are not available from the MJKE Defendants.

[42] GC Rebate Arrangement (Refusals #21, 26-27) – FF requests whether GC had a rebate arrangement with any other customers. FF also asks Qingdao to identify each of the bank accounts used by Qingdao or Mr. Liang to deposit payments that FF made towards the rebates and commissions or from which warehouse expenses were paid together with all monthly and annual statements for these accounts. In light of the allegations and positions taken with respect to the warehouse expenses and rebate arrangement, I am satisfied that whether GC had a rebate arrangement is probative of the issues with respect to the rebate arrangements with Qingdao. The MJKE Defendants shall provide an answer within 30 days. With respect to the bank statements, given the overlap, this shall be addressed in the context of the other bank statements set out above.

[43] Warehouse Amounts (Refusals #30-31) - FF requests whether Mr. Liang agrees that each of the amounts which were listed as paid to Michael in the spreadsheet located at Tab 45 of Qingdao's, productions were not paid and should be added back to the balance owing to Mr. Robinson for rebates and commissions (Refusal 30). FF also requests production of all bank accounts and statements reflecting the warehouse expenses paid by Qingdao as reflected in all of the warehouse expense spreadsheets that have been produced. Qingdao has confirmed that Mr. Liang's response is that he does not know. This is a complete response. With respect to the warehouse expenses, Qingdao has acknowledged that the amount is \$1,300,000. Qingdao shall review the documents already produced and any which will be produced as a result of these motions and identify any supporting documents for the spreadsheet within 60 days.

[44] Rebate Payments (Refusals #33-39) – FF seeks the account number, branch and address of Qingdao's HSBC account in Hong Kong; all bank records whether Mr. Liang's or Qingdao's that reflect the \$100,000 that was apparently withdrawn by Ms. Zhu from her account and paid to Mr. Robinson; to ask Michael to produce the bank statements that are associated with the transaction at page 10 of Tab 61 of Qingdao's productions; production of

all bank records either Mr. Liang's or Qingdao's that reflect any amounts paid to Ms. Chang with respect to the transaction on page 16 of Tab 61 of Qingdao's productions; production of all bank records, whether Mr. Liang's or Qingdao's that reflect any amounts that Qingdao paid to Ms. Chang with respect to the transaction on page 20 of Tab 61 of Qingdao's productions; for every payment that was made to Mr. Robinson or his family members in respect of the rebate/commissions that are in Tab 61 of Qingdao's productions, to produce the bank records of either Mr. Liang or of Qingdao that relate to those records; to produce the bank statements and other records reflecting the transaction on page 25 of Tab 61 of Qingdao's productions, Account Number 400-424719-833. Based on the discussions with counsel and submissions at the motion, it appears that, at least in the interim, all of these questions require further discussion and clarification between counsel for various reasons, including whether the amounts, information and/or clarifications sought by FF are set out in documents already produced.

[45] Warehouse Payments (Refusals #21 and 24) – FF requests the records of all payments made for the inventory being stored in the Ningbo warehouse in September 2017 including purchase orders and invoices and the types and volume of fasteners that were being stored. Michael advised on discovery that all of the product ordered by FF which it did not pay for and which the factory manufactured were stored in the Ningbo warehouse. I am satisfied that this information is relevant to the parties' claims and defences and given the specified time period there do not appear to be proportionality issues however I cannot draw any conclusions without knowing what records are available and Qingdao is uncertain what documents exist or are available for this inventory. Qingdao shall determine what documents are available and advise within 60 days.

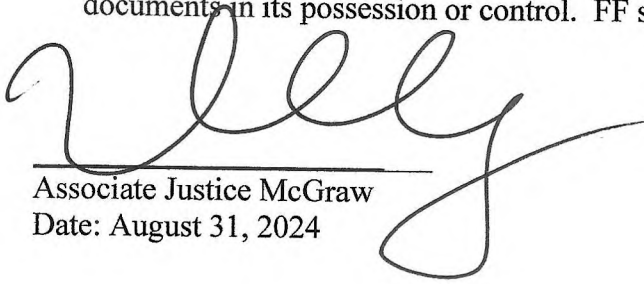
[46] Top Metal (Refusals #13-14, 17) - FF requests confirmation whether Joanna is the Supervisor of Top Metal, a company which was incorporated in January 2016 and for which she is listed as a Supervisor in its corporate records. FF also seeks all sales contracts, invoices, purchase orders, bills of lading and all documents reflecting all purchases made by GC of fasteners from Top Metal and confirmation as to whether Top Metal began to supply GC with fasteners after Qingdao stopped supplying FF in September 2017. Although Top Metal is not referred to specifically in the pleadings, it was discovered later in these proceedings and the pleadings refer to the establishment of trading companies in China as part of the alleged fraudulent scheme. Given Joanna's admitted involvement with other corporate entities in this litigation, I am satisfied that the MJKE Defendants should confirm if she was a supervisor of Top Metal and whether Top Metal supplied GC within 30 days. However, as with many of FF's document requests, its request for all of the documentation listed is overbroad and disproportionate. The documentation for a certain period after September 2017 whenever Top Metal began supplying GC, if it did so, is relevant, however, not down to the level of bills of lading and purchase orders. The parties shall discuss a more reasonable, proportionate production of documents, perhaps a summary, once the first questions are answered and based on what documents are actually available.

MJKE Defendants' Motion

[47] Most of the refusals sought by the MJKE Defendants have been resolved. They request

answers to 4 remaining refusals.

- [48] Supplier Profit Margins (Refusals #6-7)- The MJKE Defendants request any documents to show what the profit margins were for suppliers in Taiwan, Malaysia, Thailand and Vietnam who exported products to FF from 2007-2015. They also request Mr. Robinson's knowledge, information and belief regarding the profit margins earned by suppliers outside of China on the list at FF-1665. I agree with the MJKE Defendants that the documents, to the extent to which they exist, are relevant to FF's allegations that Qingdao overcharged as compared to the lowest prevailing price and industry standard profit margins. Similarly, Mr. Robinson's knowledge, information or belief is also relevant. The comparison to what suppliers charged and their profit margins is probative of these issues and FF shall produce any such documents and answer the question posed to Mr. Robinson within 60 days.
- [49] Steel and Zinc Prices (Refusal #11)- The MJKE Defendants seek any documents that FF intends to rely on related to the allegations at paragraph 40 of its Amended Claim including that prices of steel and zinc increased by over 30 per cent to 40 per cent from June-December 2017 resulting in a corresponding increase of 25-30 per cent in the price of fasteners. FF refuses on the basis that this information will be the subject of an expert's report. As discussed above, the fact that FF intends to deliver an expert report which addresses this subject does not defer or eliminate the requirement for FF to produce relevant documents currently in its possession or control. The documents are relevant to FF's claim for damages as a result of the termination of the Supply Agreement given the timing of the price increase. While the expert report will be delivered in accordance with the Rules, there is a distinction between an expert's opinion and analysis and any relevant documents, in a party's possession or control which must be produced with their affidavit of documents or as they are located even if they are to be the subject of an expert report. FF shall produce any such documents within 30 days.
- [50] Traders (Refusal #12) – The MJKE Defendants seek the identity of the other traders who FF purchased replacement product from other than Januoch as referred to in paragraph 70(a) of the Amended Claim. FF again refuses on the basis that the particulars will be provided with its expert report. Similar to my conclusions above, this information is relevant to FF's claims for damages as a result of the termination of the Supply Agreement. While this information may be included in an expert report, FF is required to produce relevant documents in its possession or control. FF shall produce this information within 30 days.



Associate Justice McGraw
Date: August 31, 2024