
CANADA / JUDGMENT

Firstar Investment & Financial Co. Ltd. v. Xu

2017 BCSC 271

COURT

Supreme Court of British Columbia

DECIDED

20 February 2017

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2017 BCSC 271 Firstar Investment & Financial Co. Ltd. v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Firstar Investment & Financial Co. Ltd. v. Xu,

2017 BCSC 271

Date: 20170220

Docket: S061241

Registry: Vancouver

Between:

Firstar Investment & Financial Co. Ltd.

Plaintiff

(Judgment Creditor)

And:

Zonglin Xu and Firstar Technology Co. Ltd.

Defendants

(Judgment Debtors)

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:

A. Duchene

S. Turner

Defendants:

No appearance

Counsel for the Application Respondents, Lihong He and Avon Investments Ltd.:

T.W. Yu

P. O'Neill

C. Greenwood

Place and Dates of Trial:

Vancouver, B.C.

November 14-18 and 21-25, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2017

introduction

- [1] The plaintiff, Firststar Investment & Financial Co. Ltd. ("Firststar Investment") holds a judgment that, with interest, now exceeds \$10 million against the defendant, Firststar Technology Co. Ltd. ("Firststar Technology") and its sole shareholder, Zonglin Xu. Mr. Xu's whereabouts are unknown. Firststar Technology has no assets and has apparently been inactive for at least 10 years.
- [2] Firststar Investment now seeks to enforce its judgment against assets owned by Mr. Xu's former wife, the application respondent, Lihong (Linda) He. In particular, it applies for an order that property owned by Avon Investments Ltd. ("Avon"), a company in which Ms. He is the sole shareholder, be sold and the proceeds used to satisfy its judgment. Avon owns a 22-acre property on No. 6 Road in Richmond, B.C. as well as a property in Clearwater, B.C.
- [3] Ms. He originally owned 60% of the shares in Avon, but received the other 40% from Firststar Technology in 2005. She says that the latter transfer was part of a bona fide separation agreement, but Firststar Investment says it was a fraudulent transaction for the purpose of putting assets beyond the reach of Mr. Xu's creditors. It relies on the Fraudulent Conveyance Act, R.S.B.C 1996, c. 163. (FCA). By agreement of counsel, the FCA application was heard as a trial of an issue.

background

- [4] Mr. Xu immigrated to Canada from China in 2001 and settled in Richmond. At the time, he was chairman of a company called Xi'an Diamond Co. Ltd. ("Xi'an Diamond"), based in Xi'an, China, and listed on the Shanghai Stock Exchange. On his immigration application, he declared a net worth in excess of \$60 million.
- [5] Firstar Technology and Firstar Investment were both incorporated in British Columbia in 2001. According to corporate documents put in evidence at trial, Firstar Technology has not filed annual reports with the Registrar of Companies since 2007.
- [6] Firstar Investment was incorporated to carry on a private lending business and became involved in a real estate development project in Surrey, B.C. The shareholders were Mr. Xu, with 50% of the shares, Yin Pin (Ian) Ma, with 30%, and Dongbo Liu with 20%. Mr. Xu's shares were later transferred to Firstar Technology. Mr. Ma became the majority shareholder of Firstar Investment after he acquired Firstar Technology's shares in 2005. Mr. Xu resigned as a director on April 21, 2005.
- [7] In addition to its shares in Firstar Investment, Firstar Technology owned a warehouse in Richmond, B.C. that it sold for \$3.76 million in April 2005. Firstar Technology also owned two smaller properties that were also sold in 2005 for a total price of approximately \$390,000.
- [8] In or about June 2005, after he had gained control of Firstar Investment, Mr. Ma says he discovered that Mr. Xu had misappropriated corporate funds. In this action, which was commenced in 2006, Firstar Investment alleged that Mr. Xu misappropriated a total of \$6,432,320 between June 9, 2004 and March 17, 2005. The largest single withdrawals are alleged to have been \$4.2 million on November 15, 2004 and \$1.5 million on March 17, 2005—although the \$1.5 million cheque is actually dated May 17, 2005.
- [9] On February 22, 2008, Firstar Investment obtained default judgment for almost \$7.5 million. It is not clear to me why the amount of the judgment exceeded the amount set out in the statement of claim by approximately \$1 million, but no one seeks to go behind the judgment. The total amount of the judgement, including interest, was \$8,136,454. With post-judgment interest, it now exceeds \$10 million, and Mr. Ma testified that no more than \$40,000 has been recovered.
- [10] Ms. He and Mr. Xu were married in China in 1995. In 1999, Ms. He moved to California so the couple's second son could be born in the U.S. Mr. Xu purchased a home in Arcadia, CA that was registered in Ms. He's name. The couple also acquired a warehouse, also registered in Ms. He's name, in Irwindale, CA.

- [11] Ms. He joined Mr. Xu in immigrating to Canada in 2001 but due to a delay in obtaining immigration status for their son, she also kept her home in California until 2003. That home was sold in 2003, with the proceeds invested in other California properties that Ms. He still owns.
- [12] Avon was incorporated in British Columbia in March 2002, with Ms. He owning 60% of the shares and Mr. Xu owning the balance. Mr. Xu transferred his shares to Firststar Technology in June 2003.
- [13] Avon initially had no assets, but in 2003, it acquired its Richmond property for \$1.8 million and its Clearwater property for \$210,000. The money for those purchases was supplied by Mr. Xu.
- [14] Kenneth King, an architect and planner, was retained in 2003 to draw plans for the Richmond property that included a 14-bedroom house with a six-car garage, swimming pool, tennis court and Chinese garden. Mr. King said he discussed the plans with both Mr. Xu and Ms. He. That project was halted by order of the Provincial Agricultural Land Commission in September 2004 and therefore never got beyond some site preparation work. A site services contractor later filed a builder's lien claim.
- [15] Ms. He returned permanently to California with the children in July 2004 and Mr. Xu remained in B.C. They entered into a separation agreement dated October 22, 2004, which was amended by further agreements dated March 25, 2005 and May 30, 2005. They were divorced by order in this court on April 18, 2005.
- [16] However, Ms. He testified that the marriage actually broke down in May 2001, although they initially continued to share a residence where they could both care for the children. Her evidence about separation in May 2001 is consistent with what she said in an affidavit she swore in the divorce proceeding on December 22, 2004.
- [17] In the separation agreement of October 22, 2004, Ms. He was to receive:
- a. Mr. Xu's Avon shares, with the transfer to be completed by January 31, 2005;
 - b. a Mercedes Benz 430;
 - c. a promise that Mr. Xu would purchase a house in the Vancouver area with a value of approximately \$500,000 in the name of or in trust for their eldest son, who was then nine years old;
 - d. a one-time lump-sum payment of child and spousal support in the amount of \$6,000,000.
- [18] The separation agreement further provided that each party would retain any property they owned outside Canada. In Ms. He's case, that included three real estate properties in California in which her total equity was about \$1.9 million U.S. She also held a California investment account worth about \$1.3 million U.S. In Mr. Xu's case, he retained full ownership of his interest in Xi'an Diamond, whatever value it may have had by that time.

- [19] The separation agreement also provided that Mr. Xu was to retain a condominium on Moffatt Road in Richmond, B.C. that he had purchased in September 2004 ("Moffatt Road Property"), following sale of the former matrimonial home in Richmond. He also retained full ownership and control of Firstar Technology.
- [20] By March 2005, the Avon shares had still not been transferred to Ms. He. The amending separation agreement of March 25, 2005 included a provision that Mr. Xu would continue to operate Avon in the ordinary course of business until the shares were transferred, not encumber the two real properties Avon owned, pay off all outstanding company liabilities of Avon, and discharge all outstanding debts and financial encumbrances. Ms. He finally received the shares in May 2005.
- [21] However, there remained an outstanding claim of a builder's lien against Avon by the site services contractor. On April 21, 2005, Ms. He's counsel wrote to a solicitor acting for Mr. Xu, confirming that, in lieu of discharging the lien, Mr. Xu had instructed Mr. Ma (who acted as construction manager for the building project and was also a defendant in the builder's lien action) to assume conduct of the defence on behalf of Avon.
- [22] The March 25, 2005 amending separation agreement also deleted the requirement that Mr. Xu purchase a house in the Vancouver area for their young son. The second amending separation agreement, dated May 30, 2005, transferred the Moffatt Road Property, which Mr. Xu was to retain in the original separation agreement, to Ms. He. Ms. He testified that, although she had agreed to remove the requirement that Mr. Xu provide a residence, she still wanted something for her children. In acquiring the Moffatt Road Property, Ms. He had to obtain a mortgage of \$228,000 in order to discharge a prior mortgage that Mr. Xu had obtained. She sold the property in 2010 for \$510,000.
- [23] It is common ground that Ms. He never received any part of the \$6 million payment of child and spousal support referred to in the separation agreement.
- [24] There is some evidence that Mr. Xu's business in China, Xi'an Diamond, collapsed. At trial, Firstar Investment attempted to introduce details of that through translated articles from Chinese news sources, which I ruled inadmissible.
- [25] Firstar Investment also called Lisa Wu as a witness on the fourth day of trial. Ms. Wu testified that in 2004, she was working as a news announcer on a Mandarin language radio station in Vancouver and reported news from China about the collapse of Xi'an Diamond, its suspension from trading on the Shanghai Stock Exchange, and a warrant for the arrest of Mr. Xu.
- [26] Ms. Wu is not a stranger to the parties. In 2001, she had worked for the immigration consultant who assisted Mr. Xu and Ms. He with their immigration to Canada and she later worked briefly for Mr. Xu's company. Ms. He alleges that a relationship between Ms. Wu and Mr. Xu led to their separation, although Ms. Wu denies any such relationship.

[27] Ms. Wu's mother, Xiuqing Gao testified that she owned shares of Xi'an Diamond when she came to Canada in 2004 and subsequently discovered that they were unmarketable.

[28] Ms. He testified that by mid-2004, she was living in the U.S. and was unaware of any events surrounding Xi'an Diamond. Regardless of what happened to Mr. Xu's business in China, there is no dispute about the fact that Firststar Investment's judgment against him remains unsatisfied.

The relief sought

[29] In its notice of application, Firststar Investment seeks the following relief in relation to the property owned by Avon:

1. [An order that] pursuant to Section 1 of the Fraudulent Conveyance Act, RSBC 1996, c. 163 the transfer of shares in Avon Investments Ltd. from Firststar Technology Co. Ltd. to Ms. He (the ex-wife of Mr. Xu) is void and of no effect against the Judgment Creditor; or, in the alternative
2. That pursuant to Section 9 of the Fraudulent Preference Act, RSBC 1996, c. 164, an order to compel Mr. Xu, Ms. He and Avon Investments Ltd., to show cause why the property in the Kamloops Assessment Area under Parcel Identifier 013-161-407 and the property in the City of Richmond under Parcel Identifier 004-021-908 should not be sold to satisfy the present judgment;

[30] I agree with counsel for Ms. He that an order for the sale of property owned by Avon cannot be made on this application. Although Ms. He is the sole shareholder of Avon, the company remains a separate legal entity that is not a party to this application. Further, Firststar Investment does not challenge the validity of Ms. He's ownership of 60% of the shares of Avon.

[31] If it proves that Ms. He obtained the remaining 40% through a fraudulent conveyance, the most it could obtain as a result of this proceeding would be ownership of that 40% shareholding. It would then have to bring separate proceedings in its capacity as a minority shareholder in order to force the sale of Avon's assets.

[32] In relation to the Moffatt Road Property, the notice of application seeks:

3. That pursuant to Sections 7 and 9 of the Fraudulent Preference Act, RSBC 1996, c. 164, an order permitting the Judgment Creditors to recover from Ms. He the proceeds of the sale of the property in the New Westminster Area under Parcel Identifier 025-764-799;

[33] No reference to this tracing remedy was made in argument, nor was Ms. He asked to say what she did with the proceeds of sale of the Moffatt Road Property after she sold it in 2010.

issue

[34] Accordingly, the principal issue is whether the assets transferred from Mr. Xu to Ms. He under the separation agreements, namely the 40% of the shares in Avon and the Moffatt Road Property, was a fraudulent conveyance.

the law

[35] The FCA reads, in its entirety:

Fraudulent conveyance to avoid debt or duty of others

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,
 - (b) a bond,
 - (c) a proceeding, or
 - (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[36] Where there is a fraudulent conveyance under the FCA, the practical remedy is found in ss. 7 and 9 of the Fraudulent Preference Act, R.S.B.C. 1996, c. 164, which read:

Following proceeds of property fraudulently transferred

7 In the case of a disposition of any property which in law is invalid against creditors, if the person to whom the disposition was made has disposed of, realized or collected all or some of the property, the money or other proceeds or the value of it may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the disposition was made.

Setting aside fraudulent conveyances

9 (1) If

- (a) a judgment creditor alleges that the debtor or person who has to pay has made a conveyance or other disposition of any of that person's land, which conveyance or other disposition is void, as being made to defeat, hinder, delay, prejudice or defraud creditors, or

- (b) a creditor or assignee for the benefit of creditors alleges that a disposition is void under sections 2 to 6,

it is not necessary to institute an action to set aside the disposition.

- (2) In the circumstances described in subsection (1), an application may be made to the Supreme Court by the judgment or other creditor or assignee or person entitled to the money, calling on the judgment debtor or person who is to pay, and the person to whom the conveyance or other disposition has been made or who has acquired any interest under it, to show cause

- (a) why the land, or a competent part of it, should not be sold to realize the amount payable under the judgment, or

- (b) why the disposition or payment should not be set aside and the property returned or otherwise dealt with as the court may direct.

- (3) In an application under this section, a judgment creditor may claim to be entitled to register the judgment against

- (a) the land in respect of which the application is made, or

- (b) the judgment debtor's or another person's interest in the land.

[37] The test for fraudulent conveyances was summarized by Madam Justice Baker in *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.*, [1995] B.C.J. No. 1814 (S.C.) at paras. 25-27:

[25] In essence, a fraudulent conveyance is a transfer of an interest in property which is made with the intention, and which has the effect, of hindering or impairing the right of a creditor or other person to satisfy a claim against the transferor. It is not necessary for the person seeking relief to show that the transferor was insolvent at the time the transfer was made, and the applicant need not establish that he or she was a creditor, an unsecured creditor, at the time the transfer was made: *Re Skinner* (1960), 27 D.L.R. (2d) 74 (B.C.S.C.).

[26] All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others: *Canadian Imperial Bank of Commerce v. Ash* (1964), 47 D.L.R. (2d) 620 (B.C.S.C.); *Canadian Imperial Bank of Commerce v. Boukalis* (1987), 1987 CanLII 2694 (BC CA), 11 B.C.L.R. (2d) 190 (C.A.).

[27] Fraudulent intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding the transaction. Where some consideration has flowed from the transferee to the transferor, the court may consider the adequacy of the consideration in relation to the issue of intent, since a transfer at an undervalue raises suspicions about motive. Inadequate consideration may be considered to be a badge of fraud.

[emphasis added]

- [38] In *Botham Holdings Ltd. (Trustee of) v. Braydon Investments Ltd.*, 2009 BCCA 521, the Court of Appeal said at para. 65 that dishonest intent is not necessary to void a transaction under s. 1 of the FCA. *Botham* was a case in which the transferor and transferee were both corporations controlled by the same individual.
- [39] Whether a transaction was intended to defeat creditors is a question of fact, but the court may consider certain indicia or "badges of fraud". *Frimer v. Lercher*, [1984] B.C.J. No. 728 (S.C.) at para. 12 lists those indicia as follows:
- (1) The state of the debtor's financial affairs at the time of the transaction, including his income, assets and debts;
 - (2) The relationship between the parties to the transfer;
 - (3) The effect of the disposition on the assets of the debtor, i.e. whether the transfer effectively divests the debtor of a substantial portion or all of his assets;
 - (4) Evidence of haste in making the disposition;
 - (5) The timing of the transfer relative to notice of debts or claims against the debtor;
 - (6) Whether the transferee gave valuable consideration for the transfer.
- [40] The court in *Frimer* added at para. 13:
- [13] It is established that where suspicion touches a transaction made between near relatives, the burden of establishing the bona fides of the transaction shifts from the plaintiff to the parties to the transaction. Furthermore, in these circumstances the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can safely be acted upon without corroboration. These rules, which are rules of practice rather than of absolute law, are well established: *Koop v. Smith* (1915), 51 S.C.R. 554, 8 W.W.R. 1203, 25 D.L.R. 355, per Duff, J. at p. 558; *Tempo Building Supplies Ltd. et al v. Pitura et al.*, [(1979), 33 C.B.R. 23], at pp. 31 and 32.
- [41] Where there is good consideration for the transfer, the transferee's knowledge of the transferor's intent to delay, hinder or defraud creditors does not void the transaction unless the transferee is proved to be privy to the fraud: *Gresham v. Gresham (Trustee of)*, [1993] B.C.J. No. 393(C.A.) at para. 13; *MGM Grand Hotel Inc. v. Liu*, [1997] B.C.J. No. 2528 (S.C.) at para. 8.
- [42] The settlement of a matrimonial dispute may constitute good consideration under s. 2 of the FCA: *MGM Grand* at para. 8.

analysis

- [43] There is no direct evidence about Mr. Xu's intention or his financial circumstances when he signed the separation agreement in October 2004. He appears to have run into financial difficulties in China at some point, but the evidence does not permit any conclusion as to what the precise situation was on the date he signed the separation agreement.
- [44] Firstar Technology did not begin liquidating its assets in B.C. until the spring of 2005. Most of the funds taken from Firstar Investment that are the subject of its judgment were withdrawn after October 2004, but its claim included about \$600,000 withdrawn in June and July of 2004. It can, therefore, be inferred that, as of the date Mr. Xu signed the separation agreement, he knew that Firstar Investment was a creditor or potential creditor, although he was also a director of Firstar Investment at the time.
- [45] In *Liu v. Wang*, 2009 BCSC 1792, the creditor sought to set aside the conveyance of a judgment debtor's interest in the matrimonial home to his wife. The transfer was in accordance with a divorce order that stated the transfer to be in full satisfaction of all property claims. At the time of the conveyance, the wife had specific knowledge that the husband was being pursued by creditors.
- [46] Mr. Justice Schultes in *Liu* held at para. 44 that the wife was "completely estranged" from the husband at the time of the impugned transaction, and further stated at paras. 45-46:
- [45] This absence of any basis to infer that the transferred property could ever benefit Mr. Wang again is a key distinguishing feature from the cases relied on by the plaintiff. In each of those decisions, there was evidence of some type of continuing relationship between the transferor and the transferee, such that the court could infer that the transferor continued to benefit in some way from what had been transferred.
- [46] As I have found, that is not the case here and I think Mr. Wang would have to have been absurdly bloody-minded to put the property permanently beyond his own reach, for the benefit of a spouse from whom he was estranged, just to frustrate his creditors.
- [47] Similarly, there is no evidence of any meaningful relationship between Mr. Xu and Ms. He after Ms. He moved to California in mid-2004. I recognize that Ms. He signed a single document in 2007 pursuant to an earlier power of attorney, but in my view, that does not amount to a meaningful "relationship" in the sense that Schultes J. used the term in *Liu*.
- [48] Even if Mr. Xu was intending to defeat his creditors, Firstar Investment must prove that he did not receive valuable consideration for the assets he transferred in the separation agreement. If there was valuable consideration, Firstar Investment must show that Ms. He was actually a party to carrying out Mr. Xu's fraudulent intention: *Gresham* at para. 13; *MGM Grand* at para. 8.

- [49] Firststar Investment argues the timing of the separation agreement is highly suspicious in that it coincides with the demise of Mr. Xu's business in China. It further argues that there is no evidence of genuine negotiation leading to the separation agreement. There were no appraisals of assets and no financial statements were prepared. The separation agreement was prepared by Ms. He's lawyer and there is no evidence that Mr. Xu was represented by a lawyer in negotiating it. The separation agreement was apparently read and translated to Mr. Xu by a lawyer in the same office as Ms. He's lawyer. However, his signature on the first amending separation agreement was witnessed by his own solicitor. No documents from either lawyer's file were put into evidence.
- [50] Firststar Investment says Ms. He's assertion that she and Mr. Xu separated in May 2001 is not credible. Counsel for Firststar Investment says that the alleged separation date is inconsistent with the fact she became the majority shareholder in Avon when it was incorporated 10 months later. Ms. He says her receipt of shares was a way in which Mr. Xu could provide her with more money, which she had asked him for. She also testified that Mr. Xu was originally to hold his Avon shares in trust for the children, although there was no trust agreement to that effect.
- [51] Firststar Investment argues that the existence of the plans for a house in which Ms. He and Mr. Xu planned to live on the Richmond property and Ms. He's involvement in creating those plans is also inconsistent with separation. Ms. He says they intended the new house to be one in which they could continue living separate and apart while remaining with the children.
- [52] As a matter of law, continued residence under the same roof for some period of time is not necessarily inconsistent with separation. This court frequently hears evidence of such arrangements in family law cases and s. 3(4)(a) of the Family Law Act, S.B.C. 2011, c. 25 now specifically recognizes that spouses may be separated despite continuing to live in the same residence.
- [53] Firststar Investment also argues that the fact Ms. He sold her house in California in 2003 is inconsistent with her being separated from Mr. Xu. Why, Firststar Investment asks, would she give up her residence in California and move to B.C. if the couple was really separated?
- [54] However, the separation was formally accepted and recognized by this court when it made a divorce order in 2005, albeit in an uncontested proceeding. Whatever the situation was between 2001 and 2004, the evidence is clear that Ms. He and Mr. Xu were in fact separated when they signed the separation agreement on October 22, 2004. Ms. He had returned to California in July of that year and signed the separation agreement and the subsequent amending agreements before a California notary. She remarried in California after this court granted the divorce in 2005.

- [55] As noted, the only evidence of contact between Ms. He and Mr. Xu after 2005 is that in April 2007, Ms. He signed a document as Mr. Xu's attorney, releasing a mortgage that Mr. Xu held on a property in Vancouver. Mr. Xu had signed a British Columbia power of attorney in 2000 and a California one in October 2004. Ms. He said that when Mr. Xu contacted her and asked her to sign the power of attorney, she agreed to do so in the hope that she would receive some of the spousal and child support money he still owed her.
- [56] Firstar Investment argues that the effect of the separation agreements was to transfer virtually all of Mr. Xu's Canadian and American assets to Ms. He, while leaving nothing for Mr. Xu or his creditors.
- [57] However, that is not what the evidence shows the situation to have been at the time. In the separation agreement, Ms. He waived any claim to a share of Mr. Xu's interest in Firstar Technology. At that time, Firstar Technology still owned 50% of Firstar Investment, which obviously had sufficient assets or cash flow to enable Mr. Xu to subsequently withdraw more than \$5 million. Firstar Technology also owned the three real estate properties in B.C. that it did not sell until 2005. When those properties were sold, the total sale price was more than \$4 million and there is no evidence of their value being any less than that as of the date of the separation agreement.
- [58] Firstar Investment argues that the assets Ms. He received amounted to everything that would have been considered family assets under the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], which was in force at the time. Firstar Investment says this included the Avon shares, the real property Ms. He owned in California and, after the second amending separation agreement, the Moffatt Road Property.
- [59] Firstar Investment says the fact that Ms. He waived any claim to an interest in Firstar Technology and the valuable assets it still held does not amount to consideration because she had no legal claim to those assets.
- [60] Under the FRA, each spouse was entitled to an interest in family assets, which were defined to include, in s. 58(3)(e):
- (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.
- [61] Firstar Investment relies on s. 59 of the FRA, which reads:
- 59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.
- (2) In section 58 (3)(e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

- [62] It particularly argues that the assets in Firststar Technology would have been considered business assets under s. 59(1) of the FRA and it is unlikely that Ms. He would have had a substantial claim to them in a contested divorce.
- [63] Ms. He was not a shareholder of Firststar Technology, which was incorporated in March 2001--about two months before the date she says they effectively separated. There is no evidence as to the source of the funds that Mr. Xu injected into that company and the extent to which they may have come from other assets he owned during the marriage, such as his business in China.
- [64] There is, however, evidence in the form of cancelled cheques, that in 2001 and 2002, Mr. Xu advanced more than \$4 million to Firststar Investment from a joint account he held with Ms. He. As said above, Mr. Xu's shares in Firststar Investment were at some point transferred to Firststar Technology.
- [65] At the time Firststar Technology was incorporated, Ms. He and Mr. Xu had been married for six years, during which time two children had been born. A spouse's role in child rearing or household management was routinely recognized as an indirect contribution under s. 59(2) of the FRA. In *Elsom v. Elsom*, [1983] B.C.J. No. 28 (C.A.), the Court of Appeal said at para. 5:

A business asset in the name of one spouse is not a family asset unless the other spouse makes a direct or indirect contribution to it. If the spouse has been effective as a wife and mother it is to be inferred that savings have accrued to the benefit of her husband because he has not had to arrange for and pay someone else to provide those services. Those savings are assumed to have advanced the business interests of the husband because more time and money may be devoted to the business. In that sense, there is a nexus between the role of an effective wife and mother and the acquisition or operation of the husband's business. But there will be cases where there is, in fact, no such connection. Such cases may be rare.

[emphasis added]

- [66] The evidence before me does not permit any conclusion as to whether or not Ms. He was "effective as a wife and mother" during her relatively short marriage to Mr. Xu, the extent to which Mr. Xu's wealth increased during the marriage, or whether Mr. Xu had any basis on which to rebut an inference of indirect contribution.
- [67] Although the FRA provided for equal sharing of family assets, s. 65 gave the court discretion to re-apportion assets on the basis of fairness. There is no evidence on which I can say whether a court, on finding indirect contribution, would have awarded Ms. He something less than a one-half interest in Firststar Technology.
- [68] All that can be said is that when Ms. He signed the separation agreement, she had at least a prima facie claim to share in the assets held by Firststar Technology. I find that her waiver of that claim amounted to valuable consideration for the assets she received in the separation agreement and its amendments.

[69] Having found valuable consideration, I also find that there is no evidence that Ms. He was privy to a scheme to delay, hinder or defraud creditors. Even if it can be assumed that Mr. Xu, at the date of the first separation agreement, planned to misappropriate more money from Firststar Investment and planned to dispose of all assets of Firststar Technology, there is no evidence that Ms. He, who was by then living in California, knew of or was involved in those plans.

[70] I find that Firststar Investment has failed to prove a fraudulent conveyance and the application must be dismissed with costs.

N. Smith J.

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