

CANADA / JUDGMENT

Hallam v. Shen

2002 BCSC 589

COURT

Supreme Court of British Columbia

DECIDED

18 June 2002

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2002BCSC0589

Citation:	Hallam v. Shen
Date:	20020618 2002 BCSC 589
Docket:	S005096 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	ROBERT L. HALLAM PLAINTIFF
AND:	DR. JIAN Z. SHEN DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACZKO

Counsel for Plaintiff:

P.J. Sullivan

Counsel for Defendant:

P.O. Green

Dates and Place of Trial:

March 21 and 22, 2002

Vancouver, B.C.

- [1] This is an action on a promissory note.
- [2] The defendant, Mr. Shen, and a Mr. Tan convinced the plaintiff to invest in a business venture which involved building a fertilizer plant in China.
- [3] By agreement, the plaintiff would invest US \$200,000, Mr. Tan would invest US \$200,000, and Mr. Shen would invest US \$100,000.
- [4] The plaintiff put up his money, but Tan and Shen were not able to produce their share.
- [5] The plaintiff loaned each of them US \$100,000. The defendant claimed that he had Chinese money, called R M B, located in China.
- [6] Chinese regulations require that any foreign money that is to be invested in China must be deposited in a Chinese account and verified by a government official.
- [7] The plan was that the US \$100,000 loan to Tan and the US \$100,000 loan to Shen would be deposited in a Chinese bank, but it was not to be spent on the project. The US \$200,000 loan money was to remain in a Chinese bank, and only the plaintiff's original US \$200,000 investment in the project and the R M B money would be used for the project. The US \$200,000 loan to Tan and Shen would be repaid once the Chinese officials had verified the money.
- [8] The plant was built. In the interim, the money loaned to Tan and Shen has disappeared. Both the plaintiff and the defendant claim that they do not know what happened to it.
- [9] The demand promissory note was signed on December 22, 1999 in the amount of US \$100,000 with interest at 6 percent.
- [10] The plaintiff demanded payment of the loan on June 25, 2000 payable by July 25, 2000.
- [11] On July 25, Shen made a payment of US \$10,000.
- [12] The plaintiff's solicitor sent a demand letter for full payment on July 31, 2000.
- [13] The defendant and Tan replied in a joint letter on August 11, 2000, acknowledging the debt and proposing a plan for payment.
- [14] The plaintiff has taken a default judgment against Tan.
- [15] No payments have been made by the defendant since that letter. The defendant argued that the promissory note does not qualify as a bill of exchange because it contained a condition that the loan funds were to be held on deposit until they were needed for repayment. The Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 176 provides as follows:

176.(1) A promissory note is an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.

- (2) An instrument in the form of a note payable to the maker's order is not a note within the meaning of this section, unless it is endorsed by the maker.
- [16] I agree with the defence argument that this is not a bill of exchange because of the qualification contained in it. The document is, however, evidence of a loan having been made, and the defendant acknowledges that he received the US \$100,000.
- [17] The second argument made by the defence was that the plaintiff was in breach of contract because it was his responsibility to ensure that the loan monies were retained in a Chinese bank until repayment was required. The plaintiff failed to do that, and the money was lost through no fault of the defendant.
- [18] I reject the defendant's argument. There was nothing in the contract that required the plaintiff to safeguard the funds. There is no suggestion that the plaintiff received the money from the Chinese bank or that he was engaged in any wrongdoing with regard to those funds. There was no condition attached to the loan which would absolve the defendant from the requirement to repay the loan if the money were lost by reason of some third party perpetrating a fraud, which appears to be what happened here.
- [19] It is clear from the evidence that the plaintiff put the condition in the promissory note in an effort to protect the funds. The mere fact that that attempt was unsuccessful does not absolve the defendant of the debt.
- [20] The third argument of the defendant is that the loss of the money frustrated the contract because the defendant could not subsequently repay the money. The plaintiff promised to lend and the defendant promised to repay a sum of money. The loss of the money did not prevent the defendant from repaying the loan. The mere fact that the defendant does not have the funds does not mean the contract was frustrated. I find that there was no frustration.
- [21] The plaintiff claims damages and punitive damages for fraudulent misrepresentation. The basis of the claim is that the defendant agreed to deposit the equivalent of US \$100,000 in Chinese R M B in a Chinese bank. The plaintiff says that the agreement was that the money was supposed to be the defendant's money whereas the money deposited was money that the defendant had borrowed. I do not think that the contract was specific enough to prevent the defendant from borrowing money to be deposited. The defendant said he thought it was his money once he borrowed it and it was none of the plaintiff's concern where he got it. I do not think the defendant was being fraudulent by depositing borrowed money and I deny the claim for fraudulent misrepresentation.
- [22] I find the defendant, Jian Shen, liable for the balance owing plus interest, which has been calculated by counsel in the amount of US \$102,689.12.
- [23] Costs are to follow the event.

"F. Maczko, J."

The Honourable Mr. Justice F. Maczko

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Prepared on 29 October 2026 · Esheria