
CANADA / JUDGMENT

Hua v. Tong

2015 BCSC 2442

COURT

Supreme Court of British Columbia

DECIDED

24 December 2015

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2015 BCSC 2442 Hua v. Tong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hua v. Tong,

2015 BCSC 2442

Date: 20151224

Docket: S137760

Registry: Vancouver

Between:

Muoi Kim Hua

Plaintiff

And

Kimsan Tong

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:

M. Golden

Counsel for the Defendant:

R.J. Morton

H.K. Shoker

Place and Date of Trial:

Vancouver, B.C.

June 22-25,

August 12, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2015

The Pleadings

[1] The plaintiff pleads that:

- a) In October 2012 she loaned \$400,000 to the defendant "to purchase [real] property located at 47975 Jess Road in Chilliwack";
- b) The property was sold on May 24, 2013 and the plaintiff agreed to accept the sum of \$257,191.32 from the proceeds of sale and a promissory note for \$52,808.62 payable on or before October 15, 2013 "in settlement of the plaintiff's claim for repayment of the loan";
- c) The amount owing on the note has not been paid and the plaintiff seeks judgment for it.

[2] The defendant in division one of his further amended response to civil claim admits only that the plaintiff received \$257,191.32 from the proceeds of sale of the property and that he signed the promissory note.

[3] The defendant then pleads his version of the facts as follows:

- a) He denies the plaintiff loaned him \$400,000 to purchase the property;
- b) The plaintiff "gave" [the use of this word is not meant to allege a gift] the defendant \$300,000 "towards the purchase of the property" and the plaintiff has been repaid in full.
- c) The defendant used his own money as well as the \$300,000 from the plaintiff to purchase the property;
- d) The promissory note was signed "under duress" and was not supported by consideration.

[4] In division three of the further amended response to civil claim the defendant pleads "additional facts" which are:

- a) The parties agreed orally that the defendant would purchase the property and then sell or "flip" it to the plaintiff for the payment of \$300,000 to the defendant "over the purchase price for the property";

- b) The oral agreement "was entered into on the basis that the defendant would purchase the Property initially because the plaintiff" could not borrow to purchase it herself;
- c) The plaintiff would "pay the holding costs for the Property, including the mortgage".
- d) In reliance on the oral agreement the defendant purchased the property on October 10, 2012 for the sum of \$850,000;
- e) The list price for the property was \$1,190,000 "and was a prime candidate for a 'flip'";
- f) The total required from the defendant to complete the purchase of the property was \$313,408.38.
- g) The plaintiff breached the oral agreement by failing to pay the monthly mortgage payments of \$2,279.94 and by failing to pay "the mortgage pre-payment penalty and fees, for a total of \$26,634.60" and by failing "to arrange for the transfer of [the] title to the Property from the defendant to the plaintiff in exchange for payment of an additional \$300,000 to the defendant above the defendant's purchase price for the Property";
- h) In early February 2013, the defendant listed the property for sale for \$1,279,000 and on February 19, 2013 reduced the asking price to \$1,179,000;
- i) On February 23, 2013, the defendant signed a contract of purchase and sale with Huong Thi Nguyen (who I will refer to as "Huong") and the plaintiff as purchasers for the sum of \$900,000 "including a \$90,000 non-refundable deposit".
- j) Prior to signing the contract of purchase and sale the plaintiff "arranged meetings between herself and the defendant where she brought third parties to intimidate the defendant";
- k) The deposit of \$90,000 was not paid to the plaintiff but it was agreed orally that it "would be credited to the plaintiff and [Huong] against the purchase price for the Property and paid as a deduction from the \$300,000 owed to the plaintiff by the defendant";
- l) The completion date for the sale of the property was to be March 15, 2013 but was extended first to April 20, 2013 and then to May 20, 2013;
- m) in "the early afternoon of May 22, 2013 the defendant agreed with the plaintiff's request to further extend the completion date" to May 24, 2013;
- n) in "the early afternoon of May 22, 2013, unbeknownst to the defendant the plaintiff registered a certificate of pending litigation (the "CPL") against [the] title to the property";
- o) the CPL was supported by a notice of civil claim "in a prior action" in which the plaintiff alleged she "gave the defendant \$400,000 and that the defendant held the Property in trust for the plaintiff".

- p) On completion of the contract of purchase and sale of the property Albert Nguyen, a Notary Public (who I will refer to as "Albert"), acted for the defendant with whom he had "discussions and meetings" on "May 23 and 24, 2013 about the CPL and the defendant's need to complete the sale";
 - q) On May 24, 2013, the defendant signed the "closing documents for the sale" at Albert's office;
 - r) On May 24, 2013, the defendant "unwillingly and without informed consent" signed the promissory note "as he felt threatened by the plaintiff" and Albert "advised him to the effect that if he did not sign he would face legal action and the sale would not complete";
 - s) "[A]s of the completion date the Notary Public [Albert] refused to hear from the defendant about whether he owed the amount claimed by the plaintiff, and the Notary Public foreclosed the option of paying the net sales proceeds into trust to enable the defendant to complete and dispute the plaintiff's claim at a later date."
 - t) On May 24, 2013, the CPL was discharged and \$257,191.32 was paid by Albert from the proceeds of sale of the property to the plaintiff's lawyer;
 - u) This payment was predicated "on the plaintiff's claim of \$400,000 less \$90,000, for a balance of \$310,000 to be paid by the defendant by way of \$257,191.32 and the promissory note for \$52,808.68". The defendant "owed the plaintiff no more than \$210,000 after the deposit credit of \$90,000";
 - v) "As of May 24, 2013, the defendant had paid the mortgage for the Property at approximately \$2,279.94 per month from October 30, 2012 through May 24, 2013 including pre-payment [of] penalty and fees, for a total of approximately \$26,634.60, less the credit the defendant received on the closing date for two months of mortgage payments of \$4,559.88, for a net total of \$26,634.60 paid by the defendant to hold the Property."
 - w) "The defendant also had other mortgages and expenses for other properties he owned as of May 24, 2013" which required monthly payments of "approximately \$5,549.02" and if the property had not sold "the defendant would face financial hardship".
- [5] In his further amended counterclaim the defendant repeats the allegations in the further amended response to civil claim and alleges that as a result of the plaintiff's breach of the oral agreement to "flip" the property to the plaintiff in exchange for a \$300,000 payment to the defendant "the defendant has suffered loss and damages [sic] of at least \$92,674.43 separate and apart from non-payment of \$300,000" pursuant to the oral agreement.
- [6] At paragraph 11 of the further amended counterclaim the defendant pleads the following:
- These damages of \$92,674.43 consist of \$300,000.00 received by the defendant from the plaintiff for the Property plus a \$4,559.88 credit, less \$257,191.32 paid to the plaintiff by the defendant, \$26,634.60 and \$23,408.39 paid by the defendant to buy and hold the Property and \$90,000 credited by the defendant to the plaintiff's benefit.

[7] As I read the foregoing paragraph, the defendant's damage claim is properly calculated to be \$87,325.57, not \$92,674.43.

[8] In her response to counterclaim the plaintiff pleads:

- a) In 2012 the defendant "approached the plaintiff to discuss investing in farm property";
- b) The defendant did not have sufficient money for such an investment and the parties discussed the plaintiff investing along with the defendant;
- c) The defendant "indicated to the plaintiff that he had located a farm property in Chilliwack at 47975 Jess Road that could be purchased for \$850,000";
- d) The defendant told the plaintiff that "he required \$400,000 to purchase the property" and they could be partners;
- e) "The Plaintiff paid the following sums to the Defendant:

October 7, 2012:

\$20,000

October 10, 2012:

\$2,100

October 12, 2012

\$50,000

October 16, 2012

\$50,000

October 19, 2012

\$50,900

October 28, 2012

\$100,000

November 10, 2012

\$50,000

November 14, 2012

\$50,000

Total: \$373,000"

- f) The plaintiff "gave \$27,000 to the Defendant to purchase blueberries";

- g) The property was purchased for \$850,000, but in about January 2013, the defendant told the Plaintiff that "the actual value of the property was \$1,200,000.00 and if the Plaintiff wanted to be a partner she had to pay a further \$200,000";
- h) The plaintiff refused to pay \$200,000 and demanded the return of the \$400,000 that she had paid to the defendant; and
- i) The property was listed for sale and sold.

The Agreed Statement of Facts

[9] An agreed statement of facts was marked as an exhibit at the trial and it reads as follows:

1. On or about October 30, 2012, the defendant purchased the property at 47975 Jess Road in Chilliwack (the "Property") in trust for the plaintiff.
2. The purchase price for the Property was \$850,000.00.
3. The list price for the Property as of August, 2012 was \$1,199,000.00.
4. The total down payment cost for the purchase of the Property was \$323,408.38.
5. To complete the purchase of the Property, the defendant granted a mortgage to TD Canada Trust in the principal amount of \$542,750.00.
6. On or about September 24, 2012, the plaintiff and the defendant attended at a nursery in Abbotsford to purchase some blueberry plants for \$27,000.00.
7. As of the completion date for the purchase of the Property by the defendant, the defendant had received \$200,000.00 non-cash from the plaintiff.
8. After the completion of the purchase on October 26, 2012, the defendant received \$100,000.00 non-cash from the plaintiff.
9. The plaintiff claimed that as of November, 2012 she gave a total of \$400,000.00 to the defendant, including \$100,000.00 cash.
10. Out of the \$100,000.00 cash the plaintiff claims to have given to the defendant, \$2,100.00 was paid by the plaintiff to a singer named Quang Duong.
11. On or about February 26, 2013, the plaintiff and the defendant signed a contract (the "Contract") for the sale of the Property from the defendant to the plaintiff and a co-buyer.
12. The original completion date for the purchase of the Property was March 15, 2013.
13. The sale price of the Property in the Contract was \$900,000.00.
14. The sale price in the Contract included a \$90,000.00 deposit.

15. The plaintiff and the defendant agreed that the \$90,000.00 deposit would be credited against the purchase price of \$900,000.00 and paid as a credit against the amount owed by the defendant to the plaintiff.
16. The Contract provided that the buyers would make the mortgage payments if the sale did not complete by the original completion date of March 15, 2013.
17. The completion date for the defendant's sale of the Property changed from March 15 to April 20, then from April 20 to May 20, and finally from May 20 to May 24, 2013.
18. The defendant made all of the mortgage payments for the TD mortgage for the Property from the time of completion October 26, 2012 until the completion of the sale May 24, 2013.
- [10] Unlike the allegations in the notice of civil claim in the "prior action", there is no allegation in the present action that the defendant held the property in trust for the plaintiff.

The Evidence of the Plaintiff

- [11] The plaintiff came to Vancouver from Vietnam in 1993. She testified through an interpreter. She has known the defendant for about eight years and was aware he operated a blueberry farm in Chilliwack which he told her provided a good income. They talked about going into business together growing blueberries. The plaintiff had no experience in growing blueberries. In September 2012, the defendant went with the plaintiff to a blueberry farm to buy blueberry plants. 15,000 were purchased for \$27,000. The plaintiff's evidence was unclear but in essence it is that she either loaned or "advanced" \$27,000 to the defendant to purchase the plants. The transaction was in cash.
- [12] An unsigned invoice dated September 24, 2012 for \$27,000 for blueberry plants to be shipped to "Kisan Tong" on which are written the words "sold to Garry" was introduced into evidence. On a copy of the invoice there is a notation which reads "deal is cancel". There is another note that "Hua Kim Muoi and her son pick - 4,000 plants Balance - 11,000 plants".
- [13] The plaintiff testified the defendant telephoned her on October 7, 2012 to ask for a loan of \$20,000, to which she agreed. The money was advanced in cash. This appears to have been done to assist the defendant to buy the property. On October 10, 2012, the defendant asked for \$2,100 which the plaintiff agreed to provide to him as part of the purchase price of the property. A person she recognized from several years before came to her home to collect the \$2,100.
- [14] On October 19, 2012, the defendant telephoned the plaintiff and asked for another \$50,000 towards the purchase of the property. The plaintiff testified she paid \$50,900 in cash to the defendant, and the amount of cash she had by then advanced to the defendant for the purchase of the property was \$100,000. I understand this includes the \$27,000 for blueberry plants.

- [15] The defendant told the plaintiff he had paid \$850,000 for a blueberry farm on Jess Road in Chilliwack and needed the plaintiff to advance another \$300,000 for her half interest in the farm. The plaintiff testified she transferred \$300,000 to the defendant from her bank account. No banking records of the plaintiff were put in evidence. Instead, the plaintiff provided handwritten notes of five payments totaling \$300,000 made by her to the defendant in October and November 2012.
- [16] The plaintiff testified she knew the defendant had purchased the property for \$850,000 but did not know when this happened. Her evidence is that the defendant told her he actually paid \$1,200,000 and asked her for more money for her share. She refused and the defendant later acknowledged he had paid only \$850,000.
- [17] The plaintiff testified that after the defendant said he had paid \$1,200,000 for the property she "realized" the defendant was dishonest and she asked for her money back. The defendant refused. The plaintiff then asked that her name be put on the title to the property but the defendant "delayed and delayed".
- [18] The parties then discussed selling the property. The plaintiff expected to receive \$400,000 from the proceeds of sale.
- [19] The defendant telephoned the plaintiff to request she meet with him and his lawyer. At the meeting a discussion took place about the price to sell the property. The lawyer had prepared a draft contract of purchase and sale. The purchasers shown on the contract were Huong and the plaintiff. The non-refundable deposit was \$90,000.
- [20] The plaintiff did not receive \$400,000 when the sale of the property was complete and testified she was \$52,808.68 short of the sum she expected. In May 2013 the defendant gave her a promissory note for that amount payable on or before October 15, 2013. It has not been paid.
- [21] By May 23, 2013, the plaintiff knew her lawyer Michael Golden had started a the "prior action" against the defendant and had filed a certificate of pending litigation. A letter was sent by Mr. Golden to Albert on May 23, 2013, in which Mr. Golden advised that he acted for Huong "who is the purchaser" of the property and that he also acted for the plaintiff "who is the beneficial owner of the property". Mr. Golden enclosed copies of an unfiled notice of civil claim and certificate of pending litigation.
- [22] The unfiled notice of civil claim in the prior action alleges that in September or October 2012 the plaintiff and defendant agreed to purchase the property and that the plaintiff "would supply the money which together with mortgage proceeds would be sufficient to purchase the property and the defendant would become the legal owner of the property". The plaintiff would be the beneficial owner.
- [23] In the prior action the plaintiff alleges that since October 30, 2012 when the defendant took title he had held his interest in the property in trust for the plaintiff.

- [24] The plaintiff acknowledges that the defendant had himself paid \$450,000 towards the purchase price of the property. No explanation has been given for the plaintiff's allegation in the notice of civil claim in the prior action that she was the sole beneficial owner of the property.
- [25] The plaintiff testified that about a week before the sale was to complete she and her son Stephen met with the defendant at a Starbucks. At the meeting the defendant told the plaintiff he was not going to pay her "a penny" from the proceeds of sale of the property.
- [26] It was suggested to the plaintiff in cross-examination that she had retained Mr. Golden on May 17, 2013 and had sought to extend the completion date until May 24, 2013 so that there would be time for Mr. Golden to start the "prior action" and to file a certificate of pending litigation for the improper purpose of putting pressure on the defendant. Further, it was suggested that the plaintiff had not told the defendant at the Starbucks meeting about the CPL because she hoped to surprise the defendant on the completion date with news of the CPL which would put further pressure on him. She denied any of those suggestions were true and denied the defendant had told her of the financial pressure he was under in meeting his various mortgage payments.
- [27] In cross-examination it was put to the plaintiff that she advanced only \$300,000 to the defendant for the purchase of the property, not \$400,000. She insisted it was \$400,000.
- [28] The plaintiff was asked if she knew that the defendant had borrowed his share of the purchase price of the property on the security of a mortgage. She agreed she learned of that after the transaction was complete.
- [29] The plaintiff was asked in cross-examination if she had agreed to reimburse the defendant for his mortgage payments incurred to purchase the property. She denied this.
- [30] The plaintiff denied that the agreement with the defendant was that he would purchase the property in his name alone and when the plaintiff was able to borrow to pay him out the title would be transferred to her and he would receive a "commission" of \$300,000.
- [31] In cross-examination the plaintiff was asked about a meeting with the defendant in a restaurant at 22nd St. and Rupert Ave. in Vancouver on December 26, 2012. The circumstances put to her were that she had repeatedly called the defendant to ask for her money back and that in about mid-December 2012, unannounced, she had gone with two other people to the defendant's home, met his wife at the front door and made a demand for the return of the money which she had advanced for the purchase of the property. It was suggested she brought along a young man so that he could give the defendant "angry looks" and had left the defendant's home, gone to the property and there had an "angry" meeting with the defendant during which she again demanded the return of her money. It was suggested to the plaintiff that the meeting at the 22nd St. and Rupert Ave. was then arranged with the defendant.

[32] The plaintiff denied the unannounced meeting at the defendant's home with "angry looks" from a young man had taken place at all.

[33] The plaintiff's niece came to the meeting on December 26, 2012. She wrote a note at the meeting in Vietnamese which in English translation reads:

I am Hua Kim Muoi. I give to Mr. Tong Kim San \$300,000.00 CDN. I suggest that Mr. Tong Kim Sam put my name in the Land Title of the 26 acre farm on 47975 Jess Road, Chilliwack, BC. Immediately after Mr. Tong Kim San sells the farm absolutely to give me back the total amount of \$300,000.00 CDN that I gave him.

[34] In cross-examination the plaintiff was asked why she had signed a note in which she acknowledged she had advanced only \$300,000 to the defendant as her share of the purchase price for the property and not \$400,000. Her answer was that although she provided \$400,000 the defendant had "forced" her to sign the note.

[35] The plaintiff's examination for discovery questions and answers about the handwritten note of December 26, 2012 were read to her as follows:

Q Did you ever ask Mr. Tong why he refused to sign this note, Exhibit 1?

A No.

Q No?

A I did not.

Q Okay.

A Because I thought that -- that he did not want to sign it, so it's not of value anymore --

Q Right.

A -- if he didn't want to sign it.

Q Right. You signed it because the note said exactly what you wanted it to say; correct?

A Yes.

[36] It was also put to the plaintiff that her brother was at the meeting on December 26, 2012 for the purpose of intimidating the defendant. She denied he was present at all. Her examination for discovery of March 3, 2015 was read to her as follows:

Q Was anyone else present at this meeting where your niece wrote out this note other than you and Mr. Tong and your niece?

A Anybody else? He came and then -- he came first and then -- and then I came. And my brother.

Q That's Ty?

A Yes. because he -- also he was arguing with my brother as well.

Q All right.

A Yes.

- [37] In cross-examination the plaintiff was asked about the invoice for \$27,000 for the purchase of blueberry plants. She denied she had purchased the plants for her own purposes and denied the defendant had negotiated the purchase for her. She also asserted she had only loaned \$27,000 to the defendant to purchase blueberry plants.
- [38] The plaintiff insisted that her handwritten notes of the dates of the payments she had made in October 2012 to the defendant towards the purchase of the property were made contemporaneously with each payment. Her evidence was that on the occasion of each payment she went to her bank and withdrew cash to provide to the defendant and at that time made a note of the amount of each payment. The plaintiff was shown an affidavit that she had made on June 4, 2014 in this action in which she listed payments made to the defendant in October and November 2012. In the affidavit she deposes that the defendant "asked me to deposit \$300,000 into his account to demonstrate to TD Canada Trust with whom he was financing the purchase of the property that he had money available for the down payment. He asked me for an additional \$73,000 in cash to pay for labourers who worked on his farm". The payments listed on the affidavit total \$373,000. The plaintiff deposes in her affidavit that she "wrote in Vietnamese in November 2012 (emphasis added) which is a record of the payments that I made to the defendant". Her affidavit goes on to say that "some of the money that I paid to the defendant was deposited into a TD Canada Trust account". Attached to the affidavit are what are said to be "receipts from TD Canada Trust for the money that I provided to the defendant". The plaintiff was not cross-examined about the "receipts".
- [39] In cross-examination it was put to the plaintiff that she had made the \$2,100 payment, referred to earlier in these reasons, to the defendant not as part of the purchase price of the property, but because she had promised the defendant that she would donate that money to some Vietnamese singers and that one of those singers, Duong Quang, had come to her house to collect the money for the donation. The plaintiff insisted that money went towards the purchase of the property.
- [40] It was suggested to the plaintiff that the \$90,000 deposit shown on the contract of purchase and sale of the property dated February 23, 2013, in which the plaintiff and Huong are shown as the purchasers, was not actually paid and thus there was no risk of losing it if the purchase and the sale failed to complete. She did not agree that the deposit was not paid.
- [41] The plaintiff also insisted that she made the monthly payments on the defendant's mortgage of the property following the postponement of the completion date.

The Evidence of Albert Nguyen

[42] Albert is the Notary Public who advised the defendant when the defendant asked him to consider the contract of purchase and sale dated February 23, 2014 for the sale of the property to Huong and the plaintiff. Albert asked the defendant about the \$90,000 deposit which Albert expected in the usual course would have been paid in trust to a lawyer or real estate agent. The defendant told him: "do not worry about that" and "this thing has been done".

[43] On May 23, 2013, Mr. Golden acting for the plaintiff wrote to Albert saying:

Please contact Mr. Tong and obtain his instructions regarding the following possibilities:

1 If Mr. Tong intends to dispute Ms. Hua's claim we can complete the purchase to Ms. Nguyen and hold the balance of the money after payment of the mortgage in trust pending outcome of the litigation.

2. Mr. Tong can instruct you to pay balance of sale proceeds after payment of the mortgage to Ms. Hua.

[44] When Albert received Mr. Golden's letter he telephoned the defendant to ask him to "get a lawyer". The defendant declined that advice and told Albert that he wanted to complete the sale.

[45] On May 23, 2013, Albert received another letter from Mr. Golden which reads in part:

RE: Hua v. Tong

47975 Jess Road, Chilliwack, BC V2P 6H5

Further to my letter of May 23, 2013 I am instructed by Ms. Hua that she will accept the sum of \$310,000.00 in settlement of her claim against Mr. Tong and the property. Alternatively Ms. Hua will accept whatever money is remaining from the proceeds of the sale after you payout the mortgage and your reasonable account if Mr. Tong will sign a Promissory Note for the balance of the debt.

[46] Albert testified that the defendant "just accepted this letter".

[47] On May 24, 2013, the defendant signed a payout statement for the proceeds of sale of the property in which he authorized a payment of \$257,191.32 to Michael Golden Law Corporation in trust. Albert testified that the defendant signed the promissory note on May 24, 2013 when he signed the documents to complete the conveyance of the property to the purchasers. Albert witnessed the defendant's signature on the note. Albert testified that later in 2013 the defendant asked him to negotiate a means of paying the promissory note. Albert declined to assist the defendant in that regard.

- [48] In cross-examination Albert testified he received the first of Mr. Golden's letters early in the morning of May 23, 2013, and when the defendant came to see him later in the day Albert had already received the second letter. Albert insisted that he had told the defendant to get advice from a lawyer. It was suggested to Albert that the defendant did not have enough time to get legal advice before completing the contract of purchase and sale on May 24. Albert said he did not know whether he had time or not.
- [49] It was suggested to Albert in cross-examination that he could have held the proceeds of sale in trust to allow the defendant the opportunity to obtain legal advice. Albert testified it was not his practice to hold money in trust "pending the outcome of litigation". Albert testified that he told the defendant that "something is going on that you need to deal with and I cannot continue", and that he said to the defendant: "something to the effect 'go get a lawyer'".
- [50] The defendant returned later in the same day to see Albert and offered to tell him "his whole story with Ms. Hua". Albert told the defendant that he was not interested in hearing the whole story.
- [51] Albert was subject to a R. 7-5 Pre-trial Examination of Witness, and in cross-examination at the trial the following questions and answers were read to him from the transcript of that examination:

Q He [the defendant] wanted to complete?

A Just wanted to complete.

Q Yes?

A I told him, I advised him to see a lawyer, I can no longer act for him.

Q Yes, I got that.

A Yes.

Q Yes?

A He said that he just wanted to complete, he want to pay and clear everything. And what he just wanted is to clear his name on the title, to clear his name on the mortgage, to reduce the debt, and have good credit with the bank.

Q Did Mr. Tong at that time tell you that he was having trouble making the mortgage payments?

A He said that he has some difficulties, certain difficulties, something like that. I don't recall, but he just told me that he just want his name cleared on this title, clear of the debt, to reduce the debt to the bank, and to keep a good credit with the bank. He may need some prefinancing with another property and something to do with the bank so he just want his name clear of the title and clear of everything. So he wanted to complete, he said he just want to complete now.

[52] The following was also read to Albert:

Q All right.

Now, before, to go back to my question, before Mr. Tong signed the promissory note, did he ever say anything to you about whether he did in fact owe Ms. Hua \$310,000?

A I don't recall that he ever admit to me the business deal or any amount that he and other parties, because he, he's, he offered to tell me the whole story behind that and I said, I, I remind him that I don't want to be involved with those kind of things.

[53] Albert testified that his answers on his pre-trial examination were true and denied that the defendant had told him that the claim by the plaintiff against the defendant for \$400,000 "was wrong".

[54] Albert testified that he told the defendant that to complete the sale of the property the defendant had to sign the sale documents, one of which was the promissory note, and they discussed how to make the amount payable on the note "as small as possible". Albert testified further that when he presented the draft promissory note to the defendant he "just wanted to change the due date on the note". Albert's transcript from his pretrial examination was put to him as follows:

Q He wanted the sale to complete was the number one motivation that he expressed to you at the time that he signed all of the sale documents; is that correct?

A He wanted the sale to complete in order to get him out of title, to get him keep the good credit with the bank, and getting the reduction, yeah, that just what he want.

The Evidence of Hien Ngoc Nguyen

[55] Ms. Nguyen is the niece of the plaintiff. The plaintiff and Ms. Nguyen went shopping on December 26, 2012 and Ms. Nguyen was not aware that the plaintiff intended to meet with the defendant. The meeting took place in a restaurant. Ms. Nguyen testified that the plaintiff asked the defendant if he was going to sell the farm. At that point Ms. Nguyen was paying little attention to the conversation. Then both the plaintiff and the defendant told her to write a note. The plaintiff asked her to write that she had paid \$400,000 to the defendant, but the defendant disagreed. Ms. Nguyen wrote \$300,000 on the note. When the defendant was asked to sign the note he refused and became angry and left the meeting.

[56] In cross-examination Ms. Nguyen testified that the defendant during the meeting "agreed he owed the plaintiff \$400,000 but he wanted to pay \$100,000 of that sum separately because it had been paid to him in cash".

[57] Ms. Nguyen denied the plaintiff's brother was present at the meeting.

The Evidence of Hoa Huynh

- [58] This witness is the defendant's wife. The plaintiff came to a farm where the defendant and his wife then lived. The farmhouse is surrounded by a fence with a gate which requires an access code. The plaintiff appeared to have climbed over the fence or gate and then gone to the door and rung the bell. She arrived with another woman and the man. Their arrival was not expected. They appeared to be angry. The plaintiff's wife walked away and called her husband and had no further dealings with the plaintiff and the two other people.

The Evidence of Sarbjit Randhawa

- [59] Mr. Randhawa operates a nursery farm for blueberry and cedar plants. He often goes by the name of "Garry". The defendant has purchased blueberry plants from him from time to time.
- [60] Mr. Randhawa was shown the invoice dated September 24, 2012 for \$27,000. He recognized his wife's hand writing. He recalled the plaintiff and defendant came to his nursery and told him that they wanted to buy blueberry plants. They spoke in their "own" language and the defendant translated.
- [61] The defendant bargained over the price for the plants with Mr. Randhawa. He was willing to pay \$1.80 each. After that discussion the defendant "walked away" and then came back to Mr. Randhawa. The defendant gave Mr. Randhawa two bundles of cash of \$5,000 each. At that time the plaintiff was standing by her car. The defendant told Mr. Randhawa that the plants would be picked up in November. The invoice was given to the defendant. Mr. Randhawa did not speak to the plaintiff throughout these dealings.
- [62] The blueberry plants were not all collected in November and after some considerable time Mr. Randhawa told the defendant "the deal is off". Sometime after that the plaintiff arrived and picked up 4,000 plants from Mr. Randhawa's nursery. Mr. Randhawa's wife made a note on the invoice which reads "deal is cancelled" and "Hua Kim Muoi and her son pick - 4,000 plants Balance - 11,000 plants".
- [63] In cross-examination, Mr. Randhawa agreed he had not met the plaintiff on any previous occasion and it was the defendant who told him her name. Mr. Randhawa put the defendant's name on the receipt because it was he who had given him the cash.
- [64] When the 4,000 plants were picked up Mr. Randhawa saw them being loaded onto a truck. This was in November. The defendant came to see Mr. Randhawa in December and said he would pick up the rest of the plants the next year. He came back seven or eight months later and told Mr. Randhawa that he had had "an argument" and wanted a copy of the invoice for the plants. Mr. Randhawa never received the balance of the payment of \$17,000 on the invoice.

The Evidence of Peter To

[65] Mr. To's professional name as a singer is Duong Quang. He was asked by the defendant to go to an address in Vancouver to collect \$2,000 or \$3,000. He was not certain of the amount. There he met a woman who he recognized from years before when they worked together in a restaurant. He did not know her name. From her he received the money and later gave it to a person in Vietnam.

The Defendant's Evidence

- [66] The defendant is a blueberry farmer in Chilliwack. He grew up in Cambodia but also speaks Vietnamese. He met the plaintiff in 2010 when she came to his "old farm" to buy blueberries. The plaintiff told the defendant that she had a farm near 100 Mile House and asked if he would come to her farm to see if she could grow blueberries there. She suggested they be partners. It appears nothing came of these discussions.
- [67] In 2012, the plaintiff told the defendant that she was looking for a farm and she wanted to rent a barn. The defendant spoke to a real estate agent named Hanne Selby about a barn to rent. He was told about a farm for sale on Jess Road. The defendant told the plaintiff about that property. The plaintiff wanted the defendant to buy the property quickly. She asked if the defendant could be on the title to buy it for her and "when everything goes well" she would pay him and when the title was transferred to her he would receive a \$300,000 "commission". She also asked the defendant to look for a place where she could buy blueberry plants.
- [68] In September 2012, the defendant went with the plaintiff to help the plaintiff to buy blueberry plants. He made an appointment to meet her at Mr. Randhawa's nursery. The defendant spoke to Mr. Randhawa about buying the plants. The defendant told the plaintiff the agreed price of \$1.80 for each plant and she gave him \$10,000 cash towards the purchase which the defendant then gave to Mr. Randhawa. An invoice was given to the defendant showing the total cost of \$27,000 and he gave it to the plaintiff.
- [69] The plaintiff agreed that when the defendant purchased the property she would pay all expenses including the mortgage. The title to the property would be transferred to the plaintiff three or four months after it was acquired by the defendant.
- [70] The plaintiff was to transfer \$200,000 into the defendant's account on the day the purchase of the property by the defendant was completed. That was done, although in lesser amounts over a period of time, and after completion she transferred a further \$100,000.
- [71] The defendant testified he put \$323,000 of his own money towards the purchase. He expected to receive a \$23,000 "credit" for the extra money he put in beyond the \$300,000 which the plaintiff had provided to him. This did not happen because the plaintiff changed her mind and wanted all of her money back.

- [72] The defendant was by then in a difficult position financially. The plaintiff suggested the defendant sell the property to her for \$850,000 and no commission would be paid. No agreement was reached and the plaintiff threatened to sue the defendant for the return of her money. The defendant also threatened to sue her. The plaintiff threatened to kill the defendant.
- [73] The plaintiff came "suddenly" one evening to the defendant's home with another woman and a young man. They were met by the defendant's wife. The defendant came to the front of the house to help his wife. The young man was very angry and what he said to the defendant was "really mean".
- [74] The young man who had come with the plaintiff "kind of ordered" the defendant to pay back the plaintiff or to sell the property. The defendant tried to "soothe things".
- [75] A meeting was arranged at a restaurant in December 2012 to "try to solve the problem". The plaintiff proposed they go to a lawyer or notary and put the plaintiff's name on the title. The defendant agreed. The plaintiff came to the meeting in the restaurant with a young woman. The defendant asked the young woman to write on a piece of paper that the defendant agreed to put the plaintiff's name on the title. The plaintiff also wanted the return of \$300,000. The plaintiff's niece wrote a note referring to the \$300,000. The plaintiff signed the paper. The defendant refused to sign because he believed the note was not an accurate description of their agreement. The defendant testified that he did not become angry at the meeting, but said he needed to "think about it" before signing the note.
- [76] The defendant's evidence was that when the plaintiff agreed to purchase the Jess Road property it was listed for sale at \$1,200,000 but "luckily" he made a good deal for only \$850,000. The plaintiff agreed to pay a "commission" of \$300,000.
- [77] The defendant testified the plaintiff did not pay the disputed \$2,100 to him. It was a donation to a Vietnamese singer named Duong Quang. The reason for the donation was that in August the defendant had opened a live music show at which the plaintiff sponsored singers, but did not pay the money. The defendant later insisted to the plaintiff that she must pay the donation money to Duong Quang. He gave the plaintiff's address to Duong Quang so that he could collect the donation.
- [78] In 2012 and 2013 the defendant was pressed by the plaintiff to sell the property and she kept "pushing" the defendant to lower the price. She repeatedly telephoned the defendant and he "could not stand it". The defendant signed the contract of purchase and sale in February 2013 for only \$900,000 because he just wanted "to get rid of it". Between the initial date set for completion of the purchase and sale, which was October of 2012, and the actual date of completion in May of 2013, the defendant made the monthly mortgage payments instead of the plaintiff who had agreed that she would make them. No evidence was given of the precise amount of the payments and no documents were provided in that regard.

- [79] The defendant's evidence was that the \$90,000 deposit referred to in the contract for the purchase and sale of the property to the plaintiff and Huong was not actually paid. The plaintiff agreed the \$90,000 would be deducted from the \$300,000 the plaintiff had contributed to the purchase of the property.
- [80] The plaintiff was prepared to agree to these arrangements because he was "very afraid" of what would happen if he did not agree. He could not afford to continue to carry the monthly mortgage payments. With the mortgage on the Jess Road property as well as the debt against his house and two other farms he was paying close to \$8,000 each month.
- [81] On May 23, 2013 Albert, the Notary Public, telephoned the defendant to say that there was a problem because the plaintiff intended to sue him regarding the property. The defendant decided to go to Albert's office but before doing so he called the plaintiff and asked to meet at Starbucks. She agreed. At the Starbucks meeting, the plaintiff told the defendant that if he did not sign the sale documents her lawyer would "confiscate" all his assets. The plaintiff attended the Starbucks meeting along with two men. The plaintiff insisted they then go to meet with Albert. Albert told the defendant he had to sign the sale documents and told him the amount of money that "had to go to Ms. Hua". The defendant agreed to what Albert was telling him because he "was really sad and really worried" about his ability to pay his mortgages if the deal did not complete. Albert told the defendant to come back the next day to sign the documents. On May 24, Albert showed the defendant a document "about the amount of deduction" from the sale proceeds to go to the plaintiff and gave him "the debt notice" of about \$52,000 to pay the plaintiff. The defendant did not believe the calculation was accurate. He refused to sign the "debt notice". Albert said to the defendant that if he did not sign, "everything had to go to court". The defendant asked Albert to postpone these dealings until December. That was not pursued, and eventually the defendant signed the promissory note because otherwise "the deal would not complete" leaving him in a financially precarious position.

Findings of Fact

- [82] I find the plaintiff's evidence in a number of respects to be neither honest nor reliable. Where her evidence differs from that of the defendant I prefer the defendant's evidence.
- [83] I find that the blueberry plants purchased from Mr. Randhawa were for the plaintiff, not the defendant. I accept she paid the \$10,000 deposit. The defendant is not responsible for the balance of \$17,000.
- [84] I find that the plaintiff's notes of the money she advanced to the defendant to purchase the property were not made contemporaneously with each advance, as she testified they were. The notes were made later for the purpose of creating "evidence" and I have no confidence in their reliability.

- [85] I do not accept the plaintiff's evidence that she did not attempt to intimidate the defendant by making a number of threats herself or through others. I accept the evidence of the defendant and his wife on the events at their home.
- [86] I accept the defendant's evidence on the events surrounding the meeting and the note made by the plaintiff's niece on December 26, 2012. The plaintiff's evidence at trial that she wanted \$400,000 to be written on the note is inconsistent with her evidence on her examination for discovery that she wanted the note to say \$300,000.
- [87] I believe the evidence of the defendant that he owed only \$300,000 to the plaintiff at the time of the sale of the property to the plaintiff and Huong, and I accept that the \$90,000 deposit was to be deducted. That it was to be deducted is an agreed fact. What is not agreed is that it was to be deducted from \$300,000 advanced to the defendant to purchase the property, not \$400,000. I find it was \$300,000.
- [88] I accept that the promissory note signed by the plaintiff did not evidence a debt that he owed to the plaintiff. He became frightened by the threats and the risk of financial ruin if he did not sign.
- [89] The actual amount owing by the defendant to the plaintiff on the completion of the sale of the property to Huong and the plaintiff was \$210,000. The plaintiff received \$257,191.32. She was overpaid by \$47,191.32.
- [90] I also find that the defendant, contrary to the agreement between the parties when the Jess Road property was purchased, made payments on the mortgage on the Jess Road property over a number of months. No written records have been provided to support the amount of the payments. Doing the best I can on the inadequate evidence before me I find the payments were \$16,000.
- [91] I accept that the plaintiff instructed her lawyer to start the "prior action" against the defendant as an intimidation tactic to gain an advantage at the time when the closing of the sale to her of the property was to take place. The prior action was instituted in a manner which imposed severe time constraints on the defendant and took advantage of the financial pressures under which he laboured, of which I find the plaintiff was aware. These findings are not a criticism of Mr. Golden who acted on instructions that he was entitled to accept.
- [92] I find the \$2,100 was not advanced to the defendant to assist in the purchase of the property. It was a donation as the defendant described.
- [93] I find the plaintiff throughout these transactions intended to use the defendant's borrowing capacity, and unfortunately his gullibility, to persuade him to purchase a blueberry farm which, through a process of intimidation and resulting fear engendered in the defendant, the plaintiff would ultimately hope to own. One effect has been that the defendant executed a promissory note for which there was no consideration. I need not make a finding of "duress". The promissory note is unenforceable because it did not represent an actual debt.

- [94] The transactions between the parties were largely in cash. No banking records were offered as evidence at the trial. The written records of the transactions in the possession of either the plaintiff or defendant are unreliable as proof.
- [95] If people choose to conduct substantial transactions involving real estate in cash without adequate written records, because for some reason it suits their purposes at the time, they ought not later be surprised if there are insurmountable problems of proof when the disputes about those transactions are taken to court.

Conclusion

- [96] In the result, I find the promissory note is unenforceable. The plaintiff's action is dismissed. I find the defendant is entitled to an award of damages of \$63,191.32, which is made up of the overpayment by the defendant to the plaintiff of \$47,191.32 and \$16,000 in mortgage payments which he paid but which were the plaintiff's obligation. I am not satisfied the balance of the counterclaim has been proven. The defendant is entitled to his costs on Scale B.

"Affleck J."

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