
CANADA / JUDGMENT

Kim v. Choi

2019 BCSC 437

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 437 Kim v. Choi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Choi,

2019 BCSC 437

Date: 20190326

Docket: S77677

Registry: Nanaimo

Between:

Me Hee Kim

Plaintiff

And

Ae Sun Choi

Defendant

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for the Plaintiff:

J.J. Kim

H. Han

Counsel for the Defendant:

J. Millbank

L.M. Low

Place and Date of Trial:

Nanaimo, B.C.

November 19-23, 26-30,

December 17, 19-21, 2018 and

February 6, 2019

Place and Date of Judgment:

Nanaimo, B.C.

March 26, 2019

- [1] This case highlights greed and opportunism capitalizing on the vulnerabilities of immigrants who seek residency in Canada.
- [2] Ms. Kim wanted to immigrate to Canada with her young children and free herself from an unhappy marriage. One way for Ms. Kim to enhance her application for residency was to show that she had a specialized skill that was needed by an existing Canadian business.
- [3] Ms. Choi owned the Hana Korean Restaurant ("restaurant") in Courtenay, British Columbia. The restaurant was a small and unprofitable enterprise. She operated the restaurant while waiting for the completion of her application (as an entrepreneur) for permanent residency.
- [4] Ms. Kim agreed to buy the restaurant for \$93,000 and to cover the operating expenses. Over the course of the next year, Ms. Kim paid over \$380,000 for what Ms. Choi says were inventory and operating costs.
- [5] Ms. Kim became concerned about the enormity of the expenses and questioned Ms. Choi. The result was that Ms. Choi locked the doors to the restaurant and ultimately terminated her support of Ms. Kim's residency application. Ms. Kim did not receive Canadian residency and has returned to Korea. She now seeks to recover the monies that she has paid based upon claims including unjust enrichment.
- [6] Ms. Choi argues that Ms. Kim was prepared to pay whatever it took to secure her permanent residency regardless of where the payments went. She also argues that Ms. Kim was complicit in misleading the immigration authorities and therefore the claim is barred by the doctrine of *ex turpi causa*.

- [7] Most of the payments were made in Korean Won. A rough conversion of the currencies results in 1,000 Korean Won equaling \$1. The actual damages awarded will be reflected in Korean Won and requires a conversion into Canadian dollars. However, for the purposes of a more understandable and consistent discussion of the amounts involved, I have simply referred to the payments in Canadian dollars.
- [8] I have concluded that the defendant Ms. Choi was unjustly enriched in the amount of 300,000,000 Korean Won, which shall be converted to its equivalent in Canadian dollars. I have also concluded that a portion of Ms. Choi's residence shall be impressed with a constructive trust in favour of Ms. Kim.

General Overview

- [9] Ms. Edmonds is Korean and fluent in the Korean language. She was employed by the Comox Valley School District 71 ("School District"), to recruit foreign students and assist with their location requirements. She was best friends with Ms. Choi.
- [10] Ms. Kim was recruited by Ms. Edmonds and came to Canada on a student visa with her young children. Ms. Kim concluded that the fastest way of attaining permanent residency in Canada was as a skilled worker. Ms. Kim paid Ms. Choi about \$480,000 to buy her restaurant and pay for purported operating expenses over a period of 11 months.
- [11] Ms. Choi was awaiting her permanent residency. She owned and operated the restaurant. Her husband still lived in Korea and visited on a regular basis. Ms. Choi and her daughter had bank accounts in Korea. As a result of restrictions in moving money out of South Korea, Ms. Kim made deposits into those accounts.
- [12] Brandon Kwak is an immigration consultant operating as GS Consulting. Ms. Kim retained his services. Mr. Kwak explained to Ms. Kim that the fastest way to attain permanent residency was as a skilled worker.
- [13] Mr. Lim was seeking his permanent residency. He worked at the restaurant and did some renovations.
- [14] Ms. Russell was a realtor who listed the restaurant for sale. Ms. Russell assessed the asset value of the business to be \$25,000, but listed it at \$93,000 on Ms. Choi's instructions.

Assessment of Witnesses

- [15] Central to the issues for determination are findings of fact. Those facts are found after making determinations of the credibility or reliability of the respective witnesses. The court may accept some, none or all of a witness's evidence. The assessment of a witness's testimony must be made in the context of all the evidence.
- [16] The manner of assessing testimony to determine credibility was described in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

- [17] Caution should be exercised in assessing the testimony of witnesses from other cultures or where English is a second language and the evidence is received through an interpreter. The reason for caution was explained in *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42:
- [39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.
- [40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.
- [41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.
- [42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.

- [18] The Fu caution is instructive, but it does not provide a license for a witness to lie. Simply because a witness comes from a different culture and speaks a different language does not result in a free ride in the witness box. A truthful witness is not diminished and an untruthful witness is not elevated. A truthful witness is to be believed and a liar is to be rejected.

The Witnesses

Taesoo Lim

- [19] Mr. Lim came to Canada in April 2012 to visit his sister. He began working as a part-time cook in the restaurant in October 2013. He was not permitted to work; Ms. Choi caused his salary to be paid to his niece.
- [20] Ms. Choi told Mr. Lim that she would sponsor him as a skilled worker and secure a work permit for him which would lead to permanent residency.
- [21] Mr. Lim did some renovations to the restaurant in the fall of 2013. He estimated that the total spent on renovations, including his labour and other wages, was about \$5000.
- [22] Mr. Lim met Ms. Kim in October and understood that she had taken over the restaurant. His observations of the relationship between Ms. Kim and Ms. Choi indicated that even though Ms. Kim was the owner, the real boss was Ms. Choi.
- [23] Mr. Lim received his work permit in April 2014 and began working full-time. He opened the restaurant and worked the day shift, 10:00 a.m. to 2:30 p.m., and the evening shift, 4:00 p.m. to 8:00 p.m. He worked six days per week. He was involved in changing the menu and purchasing new dishes and cookware. He estimated that the cost of those items was about \$1,500, including the printing of the new menus.
- [24] Mr. Lim closed the restaurant in the evenings. He counted the money and delivered the day's revenue to Ms. Choi. He never saw Ms. Kim deal with restaurant money.
- [25] In September 2014, Mr. Lim concluded that there were some difficulties that had arisen between Ms. Kim and Ms. Choi. He chose to assist Ms. Kim.
- [26] Ms. Choi locked the restaurant in October. Mr. Lim's work visa was cancelled and his process to secure residency was terminated. Mr. Lim returned to Korea on November 30, 2014.
- [27] Mr. Lim provided some evidence in Korea in a subsequent embezzlement complaint brought by Ms. Kim against Ms. Choi and her husband. He testified that he could not recall the details of what he had told the prosecutor.

Assessment of Mr. Lim

- [28] It is apparent that Mr. Lim has sided with Ms. Kim. Mr. Lim wished to be successful in his application for permanent residency. Ms. Choi's withdrawal of sponsorship support effectively scuttled his application.
- [29] Mr. Lim likely has some animosity toward Ms. Choi and that likely impacts the tenor of his evidence. Nonetheless, it is clear from his evidence that even though Ms. Kim was introduced as the owner of the restaurant, the actual administration of the business, including access to the cash, remained with Ms. Choi. It is also apparent that the expenses associated with the changing of the menu and the renovations likely did not exceed \$10,000.

Mee Hee Kim

- [30] Ms. Kim is 51 years of age and has returned home to Korea. She does not speak much English.
- [31] Prior to moving to Canada, Ms. Kim's work experience consisted of selling waffles and coffee in 2010. She was on title to a restaurant owned by her husband, but was not involved in the operation. Ms. Kim had no experience in operating a restaurant. Ms. Kim did not have any specialized skills.
- [32] Ms. Kim's marriage was in difficulty. Her husband was abusive when drinking. His behaviour was stressful to Ms. Kim and the children. Ms. Kim was determined to leave her husband.
- [33] Ms. Kim was introduced to Ms. Edmonds by a friend. Ms. Kim wanted to educate her children in Canada and, after meeting Ms. Edmonds, Ms. Kim successfully applied for a student permit and arrived in the Comox Valley in August 2013. Her children were then ten and five years of age.
- [34] The School District hired Ms. Choi's daughter to assist Ms. Kim with landing services that included finding rental accommodation, opening a bank account and buying a car.
- [35] In mid-August, Ms. Kim met Ms. Choi. Ms. Choi described how good life was in Canada. In early September, they went for a coffee and Ms. Kim wondered aloud as to the value of the café. Ms. Choi said that her restaurant was for sale for \$93,000 and that the business paid for housing and school expenses and there was no reason to rely on money from Korea. Ms. Choi offered to run the business since Ms. Kim was on a study permit and assured Ms. Kim that she would receive permanent residency.
- [36] Ms. Kim testified that she had no intention to buy a business and had no idea how such a transaction would occur. Ms. Kim received a surprise call from Ms. Edmonds who said that a prospective Canadian purchaser was going to buy the restaurant and that Ms. Kim needed to make a decision.

- [37] Ms. Choi said that the sale price was "cheap". She said that the business generated \$700 to \$800 per day in sales and that all of Ms. Kim's expenses would be paid for from the restaurant's revenue.
- [38] Ms. Kim did not seek the assistance of an accountant or lawyer. She said that she trusted Ms. Choi. On September 10, 2013, the parties entered into an agreement whereby Ms. Kim was to make two payments totalling \$93,000 for the acquisition. Ms. Kim conceded that on September 10, Ms. Choi told her that the business was a bit slow and in order to receive permanent residency, there was a need to have the business run better.
- [39] Ms. Kim was adamant that had she been told that the business was losing money she would not have made the purchase. Ms. Kim was particularly trusting of Ms. Edmonds, because of her position with the School District.
- [40] After signing the agreement, Ms. Kim began working the morning shift in the kitchen. The operation of the restaurant continued to be administered by Ms. Choi.
- [41] Ms. Choi asked Ms. Kim for a further \$10,000 to pay for a secret sauce that had been developed by her daughter. Ms. Kim made the payment, but to herself, questioned the value when she realized that the secret sauce was a simple combination of soya sauce, paste and a modest collection of other ingredients.
- [42] On September 20, Ms. Choi told Ms. Kim that an immigration consultant from GS Consulting was coming to meet Ms. Kim. She signed an agreement with the consultant agreeing to pay for his services so that she would receive a working permit and ultimately permanent residency.
- [43] Ms. Kim received her work permit in March 2014 and began receiving an hourly wage equivalent to \$11 per hour.
- [44] Ms. Kim continued to make lump sum payments to Ms. Choi. Ms. Kim says that she was told by Ms. Choi that the payments were for the operation of the restaurant and to show that it was a profitable venture, which in turn would enhance the permanent residency application.
- [45] Ms. Kim transferred money to Ms. Choi and also through Ms. Choi's daughter's account. There were currency restrictions limiting the transfer of money out of Korea. Ms. Choi suggested that Ms. Kim pay money to her daughter, who had a bank account in Korea, in order to circumvent the monetary restrictions.
- [46] Ms. Choi does not take issue with \$460,000 having been paid. However, Ms. Kim says that she also paid about \$20,000 in cash to Ms. Choi, thus totalling \$480,000.
- [47] Ms. Kim agreed to pay Ms. Choi \$3,500 per month to run the restaurant. Ms. Kim continued to work in the kitchen. She did not venture into the front part of the restaurant, and had no concept as to how to operate the cash register.

- [48] On July 24, 2014, Ms. Kim sent an email to Mr. Kwak, in which she stated that it was costing her "a significant amount of money to keep the restaurant running..."
- [49] By September, Ms. Kim was concerned about the amount of money she was paying to Ms. Choi. She confided with Mr. Lim, who prepared a script for her to follow and demand business records for the restaurant.
- [50] Ms. Kim met with Ms. Choi on October 11 and asked for business records. Ms. Kim indicated that she was now going to run the restaurant. The meeting did not go well, and Ms. Choi left.
- [51] On October 12, Ms. Choi locked the doors to the restaurant and withdrew her support for Ms. Kim's residency application.
- [52] Ms. Kim continued to communicate with Mr. Kwak to see if there were options for her to continue with her residency application. Ms. Kim also communicated with Ms. Choi about a possible settlement or carrying on with the purchase of the restaurant and maintaining her residency application.
- [53] There was no satisfactory resolution for Ms. Kim, and ultimately she returned to Korea. She instructed her lawyer to file a complaint of embezzlement against Ms. Choi and her husband.
- [54] Ms. Kim acknowledged that she understood that as a skilled worker, her application for permanent residency would be approved sooner. Ms. Kim provided a resume along with two letters of support outlining her experience as a skilled worker (owner and chief cook of a restaurant). The resume and letters of support were false.
- [55] Ms. Kim acknowledged that even though Ms. Choi had promised to get her permanent residency, the Canadian government made the ultimate decision.
- [56] Ms. Kim agreed that her purpose in buying the restaurant was to help with her immigration application. Ms. Kim denied that Mr. Kwak told her that being a skilled worker was a faster way of attaining permanent residency. She said that only Ms. Choi told her that.
- [57] At her examination for discovery Ms. Kim said that she saw the sales and expense breakdown for the restaurant on only one occasion. She also said that she saw the sales and expenses "every day". Ms. Kim conceded that she used the words "every day", but indicated that it only occurred on one occasion. Ms. Kim agreed that Ms. Choi tried to teach her how to run the restaurant.
- [58] Ms. Kim acknowledged writing a letter dated September 12, 2014, that stated she had deposited monies, but those funds were not associated with Ms. Choi's daughter and were for "operating costs of Hana Korean Restaurant for the qualification for permanent residency in Canada". The letter was written at the behest of Ms. Choi.
- [59] Ms. Kim denied that she and Ms. Choi entered false sales to show that the business was in better shape in support of the permanent residency application.

Assessment of Ms. Kim

- [60] Ms. Kim was not a sophisticated witness. She had no understanding of how to operate a restaurant and nominal business acumen. She had limited life skills and depended upon others to assist her with adapting to life in Canada. Ms. Kim was seen by her fellow workers to be subservient to Ms. Choi, even though Ms. Kim was the restaurant owner.
- [61] Ms. Kim was not an impressive witness. There were times when Ms. Kim was evasive in her responses during cross-examination. For example, when questioned about the disparity in the losses being claimed in the Korean complaints and those in this action, she gave a long rambling response that was essentially a summary of her complaints about Ms. Choi.
- [62] When confronted by questions from the examination for discovery that she may have perceived to be damaging to her case, Ms. Kim tried to explain away the answers by saying that there were translation issues, nervousness and jet lag.
- [63] Ms. Kim was deceitful in her resume and the submission of supporting statements. Her representations with respect to her work history and work skills were simply untruthful. They were intended to mislead the immigration authorities.
- [64] Ms. Kim lied in order to achieve her immigration goal. Ms. Kim's evidence must be scrutinized with extra care because of her propensity to be untruthful when it might be of benefit to her.

Ae Sun Choi

- [65] Ms. Choi came to Canada in 2007 to provide her children with a Canadian education. She received a work permit and purchased a restaurant in Courtenay. Ms. Choi's two children helped out in the restaurant.
- [66] The business was not a profitable enterprise. It was a way for Ms. Choi to secure permanent residency in the entrepreneur and investor category.
- [67] Prior to September 2013, the restaurant had not generated annual revenue in excess of \$90,000. Typically, there was one server in the front of the restaurant and Ms. Choi, along with another cook, in the kitchen.
- [68] Ms. Choi decided to sell the restaurant in the summer of 2013 because her children had gone to Edmonton for schooling. Ms. Choi intended to open a smaller restaurant in Comox. She was tired and sick. Ms. Choi had reduced the operating hours and had ceased taking reservations.
- [69] Ms. Choi listed the restaurant for \$93,000. Her selling price was predicated on what she had initially paid, the improvements she had made and her description that the business was quite busy.

- [70] Ms. Choi was introduced to Ms. Kim by Ms. Edmonds. Ms. Choi testified that Ms. Kim was a "crazy" woman who wanted to work and run a restaurant. Ms. Choi, Ms. Edmonds and Ms. Kim met to discuss the restaurant conveyance. Ms. Choi had contacted a number of immigration consultants and was advised that Ms. Kim could purchase the restaurant, but would not be able to work.
- [71] Ms. Choi testified that she and Ms. Kim perused the internet for a contract to use for the purchase and sale of the restaurant. After printing the contract, Ms. Edmonds was contacted to witness the agreement.
- [72] Ms. Choi was certain that she had told Mr. Kwak even before September 20 that she had sold the restaurant to Ms. Kim.
- [73] Ms. Choi recalled that at the September 20 meeting, Mr. Kwak explained the different routes to attaining permanent residency; one was to proceed as an owner and the other as an employee. As an owner, permanent residency would take between four to six years, whereas it would only take one to two years as an employee. Ms. Kim wanted to take the fastest route. Mr. Kwak explained that Ms. Choi needed to stay as a "puppet owner" - a common ruse employed for immigration purposes - and help Ms. Kim. Ms. Choi testified that she relied on Mr. Kwak's advice because he was the immigration consultant.
- [74] Ms. Choi testified that she did not tell her realtor that the restaurant had been sold, because she did not consider the sale to be complete until the balance of the proceeds had been paid in October. Ms. Choi said that she could not delist the restaurant right away, but the evidence shows that she cancelled the listing agreement on September 11.
- [75] Ms. Choi agreed to continue running the restaurant for \$3,500 per month. She said that she was only supposed to work from 9:00 a.m. to 2:30 p.m. and no weekends or evenings.
- [76] Ms. Choi testified that Mr. Kwak said the restaurant needed three full-time workers and four part-time employees, for immigration purposes. She also said that Mr. Kwak advised her to enter fake sales to match the engagement of the full-time employees (about \$10,000 per month of fake sales).
- [77] Ms. Choi said that each morning she met with Ms. Kim to give her the cash that had been earned from the day prior and they entered fake sales. She also gave Ms. Kim a sheet that outlined the real sales, fake sales and expenses. On most days they entered fake sales ranging from \$300 to \$800.
- [78] Ms. Choi stated that Ms. Kim was incapable of doing much in the restaurant and certainly not able to run the business. Ms. Choi said that when no one else was available to assist, Ms. Kim agreed to pay an additional \$4,000 per month to compensate Ms. Choi for doing all of the work and spending the hours that she had prior to selling the restaurant. That would result in a monthly salary of \$7,500.

- [79] Ms. Choi acknowledged that there was a sauce fee which she described as payment to cover marinated product stored in the freezer.
- [80] Ms. Choi maintained that after the initial purchase price, the balance of the funds paid by Ms. Kim were to reimburse her for restaurant expenses. As a result of limits on the amount of currency that could be taken out of the country, funds were paid into Ms. Choi's daughter's account and subsequently rerouted back for the benefit of Ms. Choi.
- [81] Ms. Choi's husband travelled to Canada from Korea every two to three months. He brought cash with him and also some kitchen ingredients.
- [82] On October 11, 2014, Ms. Choi met with Ms. Kim. They disagreed as to how to proceed further. On October 15 or 16, Ms. Choi fired Ms. Kim and cancelled her residency application.
- [83] At trial, Ms. Choi reviewed her credit card expenses and identified virtually all of the charges as being related to the restaurant. She had no backup documents, but testified that she was able to remember the transactions as being proper restaurant expenses.
- [84] Ms. Choi acknowledged that Ms. Kim made lump sum payments. Ms. Choi said that up until April, 2014, the payments were for expenses that Ms. Choi had paid on behalf of the restaurant. After April, Ms. Kim began to make payments for future expenses.
- [85] Ms. Choi accurately reported the sales and expenses to the restaurant's accountant before she sold the restaurant to Ms. Kim. Afterwards, Ms. Choi continued to report the sales and expenses to the accountant, but did not report the sale of the restaurant, the \$10,000 sauce fee, the lump sum payments from Ms. Kim or the additional \$4,000 per month in salary.
- [86] Typically, the restaurant's monthly expenses had ranged from \$5,000 - \$9,000. Ms. Choi referred to the statement of expenses for February 2013 and indicated that the \$9000 of expenses (including payroll) was a typical month.
- [87] Ms. Choi testified that after September 2013, there were more employees and thus additional expenses for payroll. She also testified that the menu had changed, the serving bowls were different, and the ingredients were more Korean. Ms. Choi referred to fake sales as a factor in the dramatic increase of costs.
- [88] Ms. Choi was asked how she could justify \$370,000 being "burned" over 12-13 months even without taking into account the purchase price. Ms. Choi did not dispute the reference to \$370,000, but answered that in her view the money was not wasted.
- [89] Ms. Choi's tax returns disclose the marginal nature of the business:
- a) 2010: business income of \$76,294, net income of \$7,368;
 - b) 2011: business income of \$64,288, net income of \$609;
 - c) 2012: business income of \$81,979, net income of (-\$10,963);

- [90] In 2013, the restaurant was incorporated and Ms. Choi filed her income tax showing earnings of \$13,640. In 2014, Ms. Choi showed income of \$45,389.
- [91] Ms. Choi did not receive any significant funds from any source other than Ms. Kim. Ms. Choi acknowledged that at least \$250,000 received from Ms. Kim was used to purchase her house at 2380 Idiens Way, Courtenay. Ms. Choi bought the home for \$455,000, funded partly by a \$200,000 mortgage.
- [92] Ms. Choi testified that she had all of the records to substantiate the payments made for restaurant expenses. She offered to give those documents to Ms. Kim as she was moving into her house on Idiens Way. Ms. Choi said that Ms. Kim was not interested in the documents and told her to throw them away. Ms. Choi explained that to be the reason why there were no documents to confirm the amounts paid or to confirm the nature of the morning meetings with Ms. Kim when the revenue and expenses were discussed.
- [93] Ms. Choi testified that her prior counsel only spoke English. As a result, she used an iPad and translating machine to communicate with him. Ms. Choi said that she could not get any assistance from Ms. Edmonds, since the latter was also involved in the litigation.
- [94] Ms. Choi brought an application seeking an order that Ms. Kim provide security for costs. Ms. Choi's affidavit included the following assertions:
3. On September 10, 2013, I signed a contract with the plaintiff Me Hee Kim ("Kim") for the purchase and sale of the Restaurant
 4. Kim paid me the deposit on September 10, 2013 and the balance on October 10, 2013. Upon paying the balance Kim took over the Restaurant and its operating costs, pursuant to the terms of the Contract. I stayed on to assist Kim for a salary of \$3,500.00 per month.
 5. After I received the deposit and balance Kim paid me \$10,000.00 for my know how, sauces and recipes and as well made some miscellaneous payments in support of the operation of the Restaurant as she was required to do.
 6. My daughter informs me and I believe that she received approximately 250,000.00 South Korean Won (the "250,000.00") from Kim's mother, Won Keum Ja. [My daughter] subsequently transferred those funds to me.
 7. The 250,000.00 was transferred to [Ms. Choi's daughter] on account of the Restaurant's operating costs
 11. In October 2014, Kim informed me by way of text that she was going to give up everything and return to Korea, and I believed her .
 12. I subsequently informed Global Settlement Consulting that Kim no longer worked at the Restaurant.

[95] Throughout her evidence, Ms. Choi was consistent - all of the money received after the initial purchase payment was for operational expenses.

Assessment of Ms. Choi

[96] Ms. Choi was not a credible or reliable witness.

[97] Ms. Choi was evasive. She avoided answering questions by giving lengthy diatribes that had little to do with the inquiry.

[98] It serves no useful purpose in cataloguing every instance where Ms. Choi was untruthful. A few occasions of evidence that lack truthfulness may not necessarily result in a general conclusion that a witness has been untruthful. However, where there is an overwhelming number of untruths being told and, upon a review of all the evidence, a conclusion can be reached that a witness has not been candid - and I so conclude with respect to Ms. Choi.

[99] Ms. Choi was pressed during cross-examination about Mr. Kwak's evidence regarding the September 20 meeting. Ms. Choi resorted to saying that she did not hear his evidence. She acknowledged that the interpreter was beside her, but complained that she could not hear very well. I do not accept Ms. Choi's assertion that she was unable to hear Mr. Kwak's evidence. The interpreter was seated beside Ms. Choi. It was apparent to me that the interpreter was translating and there were times that even I could hear the interpreter speaking. This was the only witness who spoke English when Ms. Choi apparently needed the translator.

[100] Ms. Choi's affidavit reveals a number of contradictions in her evidence and other factors that negatively affect her credibility.

[101] At trial, Ms. Choi testified that Ms. Kim agreed to pay her a salary of \$7,500 per month to manage the restaurant. However, in her affidavit seeking security for costs, Ms. Choi states that she stayed on to assist Ms. Kim for a salary of \$3,500 per month. Ms. Choi did not disclose a salary of \$7,500 to the restaurant accountant. Ms. Choi did not include the additional \$4,000 salary when she prepared a chart for her counterclaim; she only claimed a salary of \$3,500. I conclude that Ms. Choi has been untruthful in her testimony at trial with respect to the amount she was being paid to run the restaurant. I conclude that Ms. Choi has inflated the monthly salary in an attempt to justify her demands for additional payments from Ms. Kim.

[102] In her affidavit, Ms. Choi says that she was paid \$10,000 for her knowledge, sauces and recipes. However, at trial, she testified that the \$10,000 payment was to cover inventory and pre-prepared food. Ms. Kim has testified that the \$10,000 payment was demanded and paid for a secret sauce recipe formulated by Ms. Choi's daughter. The contradictions in Ms. Choi's version of the payment's purpose leave me with no confidence in her credibility. I prefer the evidence of Ms. Kim when she says that the \$10,000 was demanded for a purported secret sauce recipe.

- [103] In her affidavit, Ms. Choi stated that in October 2014, Ms. Kim told her that she was going to give up everything and return to Korea. Ms. Choi also swore that she subsequently informed Global Settlement Consulting that Ms. Kim was no longer employed. However, at trial, Ms. Choi testified that she had already informed Global Settlement Consulting that Ms. Kim was no longer employed.
- [104] In her affidavit, Ms. Choi identified payments from Ms. Kim of \$93,000, \$10,000, and \$250,000, totalling \$353,000. At trial, Ms. Choi took no issue with receiving payments from Ms. Kim totalling \$460,000. I conclude that Ms. Choi was untruthful in her affidavit when she identified the sum of \$250,000 being transferred to cover the restaurant's operating costs.
- [105] Ms. Choi sought to explain away the contradictions in her affidavit by suggesting that she did not understand the contents because of communication issues with counsel.
- [106] I do not accept that Ms. Choi spoke so little English that she did not understand the communications with counsel. It was apparent from her reactions in the witness box that she had a much better understanding of English than she let on. There were times when she answered before the interpreter had the opportunity of translating the question into Korean. There were times when Ms. Choi either nodded her head or shook her head as an answer to the question before the interpretation was done from English to Korean. I conclude that Ms. Choi had no difficulties in communicating with counsel and that she intended for the contents of her affidavit to be used in support of her application to secure costs from Ms. Kim.
- [107] In all of the circumstances, I am satisfied that Ms. Choi understood the contents of the affidavit and advanced her assertions in support of her application seeking security for costs. Unfortunately for Ms. Choi, the contents of her affidavit contradict her testimony at trial.
- [108] Ms. Choi purported to have a remarkable memory when she identified most charges to her credit card as being restaurant expenses. I do not accept her evidence that she was able to go back in time and identify credit card entries as being restaurant expenses. It defies common sense that Ms. Choi would be able to recall credit card entries when there were other details that she was unable to remember.
- [109] There were credit card entries for dining out at other restaurants. Ms. Choi's explanation was that this was in the course of business. I do not accept that explanation. I conclude that dining at other restaurants was done by Ms. Choi and her friends or family, strictly for personal reasons and this was simply another example of Ms. Choi attempting to justify the large sums demanded from Ms. Kim.

- [110] Throughout his cross-examination, plaintiff's counsel was unfailingly courteous and respectful. He was remarkably patient, even though many answers were not responsive to simple and straightforward questions. It cannot be said that Ms. Choi was bullied, rushed or intimidated into giving answers that were not what she intended to say. Ms. Choi's untruthful answers were deliberate; they were designed to conceal the true state of affairs, namely that she took money from Ms. Kim without justification.
- [111] I conclude that Ms. Choi chose to treat the truth with some economy. Her assertions that Ms. Kim's payments (excluding the purchase price and sauce fee) were entirely to pay for operational expenses are not believable.

Eunhee Min

- [112] Ms. Min worked as a server in the restaurant from 2012.
- [113] Ms. Min noted that Ms. Choi was the "boss", and always gave directions to Ms. Kim who followed what she was told. Ms. Kim confided in her that she was concerned about money and that the restaurant was not doing well.
- [114] Ms. Min stated that Ms. Kim never touched the cash register and did not know how to use it.

Assessment of Ms. Min

- [115] Ms. Min's evidence is to be assessed in light of her poor relationship with Ms. Choi. Ms. Min disliked Ms. Choi as a result of some issues involving tips and her failure to complete an order for dumpling soup. Nonetheless, her evidence confirmed that Ms. Choi ran the restaurant and Ms. Kim did not have access to the cash register.

Brandon Kwak

- [116] Mr. Kwak was an immigration consultant. Ms. Choi called him in 2013 and he gave her advice regarding the hiring of foreign workers. She also called him to ask whether he could process an immigration application for Ms. Kim.
- [117] At Ms. Choi's request, Mr. Kwak travelled to Courtenay on September 20, 2013. He met with Ms. Kim, Ms. Choi and Ms. Edmonds.
- [118] Mr. Kwak did not recall any discussion about Ms. Kim having purchased the business. That would have been a significant fact. A skilled worker applicant was not permitted to have more than a 10% ownership in the business.
- [119] Mr. Kwak became aware that Ms. Kim wanted to get permanent residency as fast as possible and he likely told her that the skilled worker application was the best route to follow.
- [120] Mr. Kwak noted that the restaurant had already been renovated and he did not recall recommending that a renovation was required, since that was not something needed from a skilled worker applicant.

- [121] Mr. Kwak explained that Service Canada required a labour market opinion to ascertain if a foreign worker was needed because local candidates were not suitable for a particular job. If Service Canada determined that the foreign worker had the appropriate skills that could not be filled locally, then a work permit would be issued.
- [122] The Provincial Nominee Program required proof that an employer was willing to support the worker and employ the worker permanently. If such proof was accepted, then a foreign worker could apply for permanent residency. That would be the fastest way to secure permanent residency. Any candidate required the support of the employer. If the employee was fired, then the process stopped and the foreign worker was not permitted to work for another employer.
- [123] Mr. Kwak says that at the meeting he explained that it was critical for the business to show that it was capable of supporting three workers. Mr. Kwak did not say that a large bank balance was required, since bank balances are not submitted to the authorities and financial statements are not usually disclosed. The critical documents are the T4 statements which show the employees of the business.
- [124] Mr. Kwak understood that Ms. Choi was still waiting for approval as a permanent resident. The owner of a business under the entrepreneurial category (as Ms. Choi was), still awaiting permanent residency, cannot sell the business.
- [125] Mr. Kwak testified that a T4 summary was submitted in support of the application since that set out the financial standing of the business. He explained that it would be positive for the application to show that the business was doing well and capable of supporting three workers. However, if the business already had three employees there was no reason to hire more.
- [126] In July 2014, Mr. Kwak told Ms. Kim that it was a requirement that three employees were working and that the restaurant must continue operating in order for her to secure her permanent residency. As of July 24, Mr. Kwak was aware that Ms. Kim had paid money to purchase the business and this was contrary to the skilled worker qualifications.
- [127] By October 13, Mr. Kwak was aware that there were differences between Ms. Kim and Ms. Choi. He told Ms. Kim that there was a possibility that she could secure permanent residency through the business entrepreneurial program, but that this would take a number of years. There were email exchanges between Ms. Kim and Mr. Kwak, wherein she inquired as to whether her ownership affected her application. Mr. Kwak told Ms. Kim that she could keep working in the restaurant even though ownership changed, but the business remained the same. Ms. Kim asked if her mother could own the restaurant. Mr. Kwak declined to answer the email and telephoned his client with further advice.

[128] Mr. Kwak was hoping that Ms. Kim and Ms. Choi could resolve their differences and that he could keep Ms. Kim's application alive. Eventually, he withdrew the application on October 20 after receiving advice from the Provincial Nominee Program that Ms. Choi had withdrawn her support.

Assessment of Mr. Kwak

[129] Mr. Kwak's evidence supports that of Ms. Kim with respect to the first meeting in Courtenay. Ms. Kim had not spoken to him prior to that meeting. Ms. Edmonds was involved in the meeting and continued afterwards to assist in providing relevant information in support of the foreign worker application.

[130] Mr. Kwak's evidence on critical questions that touched on ways of manoeuvring around immigration requirements causes concern. On those issues, where questions with respect to such topics as "puppet owners" were posed, Mr. Kwak had difficulty remembering, although he insisted that he had a clear recollection that he did not provide any advice that might be taken to circumvent immigration requirements. I am particularly concerned that Mr. Kwak moved from a written email to a telephone conversation when it became apparent that Ms. Kim was asking a question which invited advice that did not conform with immigration regulations.

[131] Ms. Kim was not conversant with immigration requirements. She had a habit of leaning on others for advice. It is consistent with Ms. Kim's history that she disclosed to Mr. Kwak that she had purchased the restaurant. That is consistent with the conduct of the parties after he met with them, when Ms. Choi remained as the "puppet owner" and Ms. Kim secured the false statements to become a "skilled worker".

[132] In this dispute, there were many individuals involved in avoiding or subverting Canada's immigration requirements. I conclude that there were many hands involved in avoiding the immigration requirements.

Youn Hee Edmonds

[133] Ms. Edmonds was an employee of the School District. Her responsibilities included support for immigrant families and recruitment of foreign students.

[134] The School District received over \$12,000 in tuition from each foreign student. Ms. Edmonds was tasked with convincing the students and their families that her school district was where their education should continue.

[135] Ms. Edmonds met Ms. Kim in Korea and sold her on the notion that the Comox Valley was the ideal area for her children to receive a Canadian education.

[136] Ms. Edmonds was the closest of friends with Ms. Choi. She regarded Ms. Choi as an older sister. Ms. Edmonds dined at the restaurant several times each week.

- [137] On September 5, 2013, Ms. Edmonds and Ms. Kim went for a coffee. Ms. Kim asked how much the café would cost. She said that she needed a job and considered opening a coffee shop or business. Ms. Edmonds says that she told Ms. Kim that she had a friend who had a restaurant and was working hard - and was looking to get out of the restaurant business. Ms. Edmonds says that she told Ms. Kim not to get into the restaurant business.
- [138] Ms. Edmonds told Ms. Choi that there was a "crazy" lady (referring to Ms. Kim) who was looking to get into the restaurant business. Ms. Edmonds denied telling Ms. Kim that there was another buyer looking at the restaurant.
- [139] On September 10, Ms. Edmonds witnessed the agreement wherein Ms. Kim bought the restaurant. Ms. Edmonds said there was little discussion at the time, and no discussion at all about the restaurant being able to support Ms. Kim or with respect to her immigration status. Ms. Edmonds denied that Ms. Choi said that the restaurant was losing money.
- [140] Ms. Edmonds was also present at the meeting of September 20 when Mr. Kwak came to the restaurant and was engaged as Ms. Kim's immigration consultant. Ms. Edmonds understood that Mr. Kwak was aware that Ms. Kim had purchased the restaurant and he referred to her as the "boss". Ms. Edmonds recalled Mr. Kwak advising Ms. Kim that an application under the investor program would take longer to process.
- [141] Ms. Edmonds prepared an email dated October 21, 2014, purportedly on the instructions of Ms. Choi. Ms. Edmonds said that the email was written in English so that there would be no doubt about what Ms. Choi intended. The email, as sent to Ms. Kim, stated:

As we discussed on October 20th, please let me know what you want to do as soon as possible, a) take possession of the business, b) find another party to take possession of the business.

Assessment of Ms. Edmonds

- [142] Ms. Edmonds was clearly an advocate for Ms. Choi. They were best friends. There was no question that Ms. Edmonds had little patience for Ms. Kim's complaints or concerns.
- [143] Ms. Edmonds had a tendency to avoid questions and provide answers that were unresponsive, incorrect, and designed to portray Ms. Kim in a poor light. For example, Ms. Edmonds was asked in cross-examination about some aspects of the September 10 meeting when she witnessed the agreement for the sale of the restaurant. Ms. Edmonds acknowledged that Ms. Kim had only been in Canada for about a month and had limited English skills and few acquaintances. When asked about the circumstances surrounding Ms. Edmonds' witnessing of the agreement, Ms. Edmonds veered off into a lengthy speech about how much help Ms. Kim had needed to settle and how helpful she had been to Ms. Kim.

- [144] Ms. Edmonds was asked why she did not suggest that Ms. Kim take a step back and secure professional advice prior to purchasing the restaurant. Ms. Edmonds responded by saying that at the time, Ms. Kim was not speaking to her, Ms. Kim had left Ms. Choi's work and she did not see Ms. Kim very often. Those explanations simply make no sense. Ms. Edmonds had just finished explaining how helpful she had been and how much Ms. Kim relied upon her.
- [145] I do not accept Ms. Edmonds' explanation as to why she did not tell Ms. Kim to step back or seek professional advice. Ms. Edmonds' explanation is inconsistent with her own evidence and inconsistent with all of the other evidence.
- [146] I have further concerns regarding Ms. Edmonds' bent for advocacy. It is curious that the October 21, 2014 email would be written in English when Ms. Choi and Ms. Kim routinely communicated in Korean (both used an interpreter during their examinations for discovery and trial). Rather, I infer in these circumstances that Ms. Edmonds had a hand in drafting the email and setting it out in English with the contemplation that it might be relevant or helpful to Ms. Choi if litigation ensued.
- [147] During cross-examination, Ms. Edmonds rolled her eyes at questions that were relevant to issues of her testimonial reliability. Ms. Edmonds was evasive and prone to answering questions with questions of her own. She was defensive, impatient and argumentative. At times, she was openly contemptuous of counsel.
- [148] Ms. Edmonds was not an impressive witness. I place little weight on her evidence where it contradicts Ms. Kim.

Sue Russell

- [149] Ms. Russell was the realtor who listed the restaurant for sale. Ms. Russell was of the view that the restaurant had an asset value of \$25,000 and that a similar restaurant was valued at \$32,000. There were 14 other restaurants for sale at the time.
- [150] Ms. Russell recalled that extensive deck renovations were done in September 2012, and Ms. Choi had paid her landlord \$10,000 for the improvements.
- [151] Ms. Russell was not aware that Ms. Choi had sold the restaurant in September 2013. She only recalled that the listing was cancelled.

Assessment of Ms. Russell

- [152] Ms. Russell had no involvement with Ms. Kim. Ms. Russell's evidence was useful with respect to the asset value of the restaurant.

Christine Parks

- [153] Ms. Parks worked at the restaurant as a waitress. She worked the morning shift. She saw Ms. Choi and Ms. Kim regularly discussing and reviewing paperwork. Because of the language barrier, she did not understand what they were talking about.
- [154] Ms. Parks recalled that after Ms. Kim arrived, there were bathroom repairs and lighting replacements.
- [155] Ms. Parks said that the majority of customers paid in cash.

Assessment of Ms. Parks

- [156] In spite of the language barrier, there was some friction between Ms. Parks and Ms. Kim. Nonetheless, I accept Ms. Parks as a reliable witness.

Aya Hirai

- [157] Ms. Hirai worked the morning shift in the kitchen from 2012-2014. Ms. Choi introduced Ms. Kim to her as a co-owner. Ms. Hirai saw Ms. Choi and Ms. Kim discussing paperwork in the mornings. Ms. Hirai was not aware as to what was being discussed.
- [158] Ms. Choi calculated the tips to be distributed. There was not much direction provided by Ms. Kim.
- [159] After Ms. Kim arrived, they were changes made to the menu together with new flooring and paint.
- [160] Ms. Choi and Ms. Kim communicated with Ms. Hirai in English. Both Ms. Choi and Ms. Kim told Ms. Hirai that business was slow in the summer of 2014, and she was laid off.

Assessment of Ms. Hirai

- [161] Ms. Hirai was not aligned with either party. Her evidence was generally consistent with that of Ms. Parks. I accept Ms. Hirai as a reliable witness.

Tom Finkelstein

- [162] Mr. Finkelstein was called to the bar in 1969 and was Ms. Choi's previous counsel.
- [163] Mr. Finkelstein testified that he did not have any difficulties communicating with Ms. Choi. Mr. Finkelstein acknowledged that Ms. Choi had a limited understanding of English and, although there were some rough patches, he had no difficulties understanding what she said.
- [164] Initially, when Ms. Edmonds was a defendant (and represented by separate counsel), she accompanied Ms. Choi to Mr. Finkelstein's office. Once Ms. Edmonds was released from the action, she no longer accompanied Ms. Choi.

[165] The contents of Ms. Choi's April 29, 2016 affidavit in support of the application for security for costs was based on his file material and instructions from Ms. Choi. Mr. Finkelstein said that an interpreter was required because of the Korean exhibits. He had not met Ms. Park previously and could not recall the details involving her attendance.

[166] Mr. Finkelstein met with Ms. Choi before the affidavit was executed. Mr. Finkelstein asked Ms. Choi if she was able to swear to the truth of the contents of the affidavit. He was satisfied that the contents of the affidavit were Ms. Choi's statements.

Assessment of Mr. Finkelstein

[167] It is difficult to understand the explanation for having Ms. Parks attend and endorse the affidavit as if she had provided the requisite translation. It is apparent that Ms. Parks did not do any translation for the affidavit and indeed was incapable of doing so. However, that does not diminish Mr. Finkelstein's recollection of his ability to communicate with Ms. Choi.

[168] Mr. Finkelstein had done other work for Ms. Choi and had no difficulty communicating with her. He acknowledged that there were some language issues, but he was confident that he was able to understand the information being provided by Ms. Choi.

[169] Mr. Finkelstein was not shaken with respect to his testimony that the contents of the affidavit were statements made by Ms. Choi and attributable to her. I accept Mr. Finkelstein's evidence that Ms. Choi understood the contents of the affidavit and executed it under oath.

Gi Young Park

[170] Ms. Park was asked by Ms. Choi to attend at Mr. Finklestein's office to sign a document. Ms. Park did not read or translate the affidavit, but signed where the lawyer indicated she should do so.

Assessment of Ms. Park

[171] Ms. Park signed the translator's endorsement as a favour to Ms. Choi. Ms. Park did not and was not capable of providing a translation service.

The Positions

[172] There has been much testimony and much paper placed into evidence. Counsel agree on very little. However, they do agree that this case is based on factual findings.

[173] Ms. Kim argues that she was duped into paying large sums of money to support the restaurant with the anticipation of permanent residency. She maintains that the money did not go into the restaurant, but was instead used by Ms. Choi for her personal gain.

[174] Ms. Choi argues that Ms. Kim has not been truthful and her evidence should not be accepted. Ms. Choi argues that Ms. Kim would have paid and done whatever it took to secure her permanent residency.

Discussion

[175] Ms. Kim was determined to provide a better life for her children and to be away from her husband. Permanent residency in Canada was a way to satisfy her goals. She was prepared to pay for permanent residency.

[176] Ms. Kim was aware that a skilled worker application was the fastest route to achieving permanent residency. Her purchase of the restaurant provided an environment where she would be regarded as a skilled worker.

[177] I conclude that she purchased the restaurant in order to secure enhanced access for permanent residency. Therefore, the initial investment of \$93,000 was a business venture connected to Ms. Kim's desire to gain permanent residency.

[178] I conclude that Ms. Kim was aware that the immigration authorities had the final say. She understood and accepted the risk that regardless of what Ms. Choi said, the final decision lay with the hands of the proper authorities. I am satisfied that Ms. Kim was not listening or attentive to any representations that may have been made about the profitability of the restaurant. She was intent on getting the process started for permanent residency. Therefore, I am not convinced that Ms. Kim relied on representations to her detriment when she purchased the restaurant.

[179] The remainder of the funds fall into a different category. Some of the funds were properly used to run the business and to enhance its image for immigration purposes. However, it defies common sense that the business required a capital injection in excess of \$350,000 to cover expenses when there is scant evidence to support such a proposition.

[180] Ms. Choi knew that Ms. Kim was determined to provide a better life for herself and her children. She knew that Ms. Kim was intent on securing permanent residency. Ms. Choi also knew that Ms. Kim lacked life skills and was dependant on her and others. Ms. Choi knew that Ms. Kim had few friends. It was obvious to Ms. Choi that Ms. Kim was vulnerable. What may have started out as an arrangement to benefit both parties quickly turned into a predatory scheme to extract money out of Ms. Kim on the pretext that it was necessary to keep the restaurant functioning.

[181] I conclude that Ms. Choi took advantage of Ms. Kim's lack of business knowledge and simply pocketed sums of money that were not required for the business.

[182] The question remains as to how much was reasonably required to pay for business expenses, and how much was wrongfully taken by Ms. Choi.

[183] Ms. Kim's damages are based on unjust enrichment. Ms. Kim also seeks to impress Ms. Choi's house at 2380 Idiens Way with a remedial constructive trust.

[184] In *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848, the Supreme Court of Canada set out the three elements of unjust enrichment that a plaintiff must prove:

- a) an enrichment of the defendant;
- b) a corresponding deprivation of the plaintiff; and
- c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

[185] In *Moore v. Sweet*, 2018 SCC 52 at para. 35, the Court stated that the doctrine of unjust enrichment applied in circumstances where it would be "against all conscience" for the defendant to retain the benefit. The Court adopted the words of McLachlin J. (as she then was) in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 788, where she held that at "the heart of the doctrine of unjust enrichment lies the notion of restoration of a benefit which justice does not permit one to retain."

[186] There is no question that Ms. Choi was enriched. She received over \$450,000. There is no issue that Ms. Kim suffered a corresponding deprivation. Ms. Kim paid over \$450,000 to Ms. Choi.

[187] Thus, in order to succeed in a claim for unjust enrichment, Ms. Kim must satisfy the court that there is no justification in law or equity for Ms. Choi being enriched.

Was there a Juristic Reason?

[188] In *Moore* at para. 54, the Court referred to the meaning of a juristic reason as stated by Cromwell J. in *Kerr v. Baranow*, 2011 SCC 10 at para. 40:

The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case

[189] The juristic reason analysis proceeds in two stages. The first stage requires the plaintiff to show that the defendant's enrichment cannot be justified on the basis of any of the established categories, such as contract, disposition of law, a donative intent or other valid common law, equitable or statutory obligations: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44. If there is no juristic reason from one of these categories, then the plaintiff has made out a *prima facie* case, and the analysis proceeds to the next stage.

- [190] In the second stage, the burden falls on the defendant to rebut the plaintiff's prima facie case to show why the enrichment should be retained, thus providing "for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery": Garland at para. 45.
- [191] In determining whether the enrichment should be retained, the court must consider the parties' reasonable expectations and public policy: Moore at para. 58. It is on this basis that unjust enrichment is concerned with determining whether the enrichment and deprivation are unjust. In Moore at para. 55, the Court explained: "At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis".
- [192] The initial payment of \$93,000 for the purchase of the restaurant is excluded from this discussion. There would be a juristic reason for Ms. Choi to retain that money based on contract.
- [193] The balance of the funds paid were for the sauce fee and operating expenses.
- [194] I do not accept Ms. Choi's evidence that the \$10,000 identified by Ms. Kim as being the sauce fee was to pay for inventory and pre-prepared food. I accept the evidence of Ms. Kim that she was asked to pay \$10,000 for the rights to use a sauce purportedly developed by Ms. Choi's daughter. Ms. Choi's affidavit refers to a sauce fee and provides sufficient confirming evidence to support Ms. Kim's version.
- [195] Ms. Kim now complains that paying \$10,000 for a simple mixture of soy sauce, paste and other ingredients was exorbitant. She may be right. However, she made the payment and did not complain at the time. It may be that the reasons for not complaining were because of Ms. Kim's non-confrontational personality or fear of jeopardizing her relationship with Ms. Choi and thereby damaging the prospects of securing permanent residency. Regardless of the reason, I am not satisfied that Ms. Choi's enrichment from the sauce fee cannot be justified by contract. As a result, there is a juristic reason to exclude the \$10,000 from the claim falling under unjust enrichment.
- [196] The remainder of the money was paid for purported operating expenses and the purported losses.
- [197] I am satisfied that the parties intended for Ms. Kim to assume the liabilities of the restaurant after she had paid the full purchase price. Even though Ms. Choi remained as the "puppet owner", she was paid to manage the restaurant and I infer that the parties intended the profits or losses to belong to Ms. Kim.
- [198] Ms. Kim was not equipped or capable of running the restaurant. She spent her time in the kitchen. She was not able to access the cash register. Most of the sales were done by cash. Ms. Choi had access to the cash and controlled the bank accounts.

- [199] I accept that Ms. Choi and Ms. Kim discussed paperwork most mornings. However, none of the other employees were able to shed any light on what was being discussed.
- [200] I accept Ms. Choi's evidence that she prepared a summary of revenue and expenses for Ms. Kim to review. However, I have no confidence in the accuracy of the summaries prepared by Ms. Choi. Based on all of the evidence, I infer that Ms. Choi presented revenue and expenses that were skewed in order to elicit funds from Ms. Kim. The financial statements and the banking records simply do not support Ms. Choi's version of revenue and expenses. I, therefore, conclude that whatever documents she reviewed with Ms. Kim were not accurate and meant to be misleading.
- [201] I do not believe Ms. Choi when she says that she offered the documents to Ms. Kim and, upon refusal, threw them in a dumpster. Based on my assessment of Ms. Choi, I infer that she discarded the documents because they did not set out the true state of income and expenses.
- [202] The question remains as to what funds were transferred to Ms. Choi to pay the legitimate expenses and cover the business losses.
- [203] Ms. Choi says that the bank records show that \$123,000 was transferred into the restaurant account from her personal account. Ms. Choi argues that this amount was mainly as a result of additional salaries after Ms. Kim bought the restaurant.
- [204] Ms. Choi argues that she incurred an additional \$26,000 on her personal credit card to pay for restaurant-related expenses.
- [205] Ms. Choi argues that the costs of renovations, payments made for the landlord's expenses, supplies from Korea, new dishes, menus, a snow cone machine, cash gifts and other expenses incurred by Ms. Choi must be credited to her. She also claims her added salary of \$4,000 per month totalling \$56,000 and \$15,000 cash that she gave Ms. Kim were from the till.
- [206] Ms. Choi concedes that she is unable to account for all of the funds transferred to her, but asks this court to accept her contention that whatever was paid by Ms. Kim was used in the business.
- [207] Ms. Kim counters with the argument that the inquiry can best be answered by following the money. I agree.
- [208] Even though the complications of cash blur the analysis somewhat, the payments and transfers into Ms. Choi's or her daughter's accounts and subsequently rerouted to Ms. Choi are instructive. Ms. Kim had funds transferred into her daughter's account and almost immediately those funds were transferred out to Ms. Choi. Ms. Choi cannot deny receiving the money. Indeed, Ms. Choi does not take issue with receiving \$460,000 - that sum is verified by the bank records.

- [209] Ms. Kim says that she paid an additional \$21,800 in cash; which Ms. Choi denies. However, during her testimony, Ms. Choi admitted to receiving \$5,000 cash in September 2014 - this was a concession to a cash payment that had not been made previously. I, therefore, infer that there were cash payments made and as evidenced by cash withdrawals from Ms. Kim's account. I assess those cash payments to be \$20,000.
- [210] As a result, I assess the total amount paid by Ms. Kim to be \$480,000. From that amount is deducted \$103,000 (being the purchase price and sauce fee), leaving \$377,000 as purported operating losses. It defies common sense that the restaurant generated such a loss.
- [211] There was an increase in salaries after September. In accordance with the advice from Mr. Kwak, the restaurant needed three full-time employees. The single largest increase in salaries was the \$3,500 monthly salary to Ms. Choi (prior to selling the restaurant, Ms. Choi had not taken a salary). The financial statements show that salaries caused the increase in expenses. The restaurant losses were increased by \$40,000 and Ms. Kim argues that the increase is in direct proportion to the salary increase. Thus, it is suggested that the actual loss that required reimbursement to Ms. Choi is that amount.
- [212] There is a danger in slavishly following the financial records and statements. The payments by customers in cash, the control of cash by Ms. Choi and cash payments to employees and other workers prevents an accurate or reliable calculation.
- [213] It is to be emphasized that this is not an exercise in forensic accounting. This is an assessment of damages.
- [214] Ms. Choi argues that the sum of \$123,000, as transferred into her account, was to pay for the salaries. I do not accept that argument. The salaries did not increase by more than \$40,000 over the prior years' comparative numbers. Adding in some cash payments, I conclude that the salaries likely increased the payroll expense by \$50,000.
- [215] There were some renovations done and changes to the menu. There were acquisitions of dishes, a snow cone machine and additional Korean ingredients. There may have been some restaurant expenses paid through Ms. Choi's personal credit card. I assess the value of those items to be \$20,000.
- [216] Ms. Choi has introduced fake sales as a factor to take into account when determining the actual operating losses. Ms. Choi has said there were about \$10,000 in fake sales per month. That simply defies logic. If Ms. Choi's assertion of fake sales was accepted, then taking into account the credit card revenue, the result would be that the restaurant was actually generating negative sales - that is an untenable position for Ms. Choi to take.
- [217] I do not believe Ms. Choi when she says that there were regular entries of fake sales. I conclude that she has fabricated the evidence of fake sales in order to try and explain the amounts of money extracted from Ms. Kim.

- [218] In coming to an assessment of the operating loss, I will round off the numbers to take into account some of the uncertainty surrounding the amount of cash exchanged. I, therefore, assess the operating loss from September 2013 to October 2014 to be \$75,000, thus making the deprivation to Ms. Kim in the sum of \$302,000.
- [219] There is no juristic reason for Ms. Kim to have been deprived of that amount.
- [220] Ms. Kim would not have a claim if she had paid that amount to pursue permanent residency and had her application denied. However, that is not what occurred.
- [221] Ms. Choi told Ms. Kim that the money was for restaurant expenses. Most of the money was not used for those expenses. Instead, it was diverted by Ms. Choi for her own use.
- [222] Ms. Kim has established a prima facie case for unjust enrichment. The burden now shifts to Ms. Choi to demonstrate that the enrichment should be retained.
- [223] The reasonable expectations of the parties, when the sale of the restaurant occurred, was that Ms. Choi would continue on as the "puppet owner", but the financial obligations to operate the restaurant became the responsibility of Ms. Kim. Those reasonable expectations were breached by Ms. Choi when she retained funds that were not required for the restaurant operation. Therefore, Ms. Choi cannot rely on this aspect of the second stage analysis to justify her enrichment.
- [224] Ms. Choi argues that Ms. Kim sought to subvert the immigration process by submitting false statements and being an undisclosed owner when applying as a skilled worker. Ms. Choi points to ss. 127 and 128 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, which make it an offence for any person to directly or indirectly misrepresent or withhold material facts related to immigration.
- [225] Ms. Choi's public policy argument is based on the principles that a person seeking an equitable remedy must come with "clean hands" and any recovery of loss be denied because of the doctrine of *ex turpi causa*. In particular, Ms. Choi argues:

that restitutionary relief should be denied on the basis of public policy. If Me Hee Kim is granted judgment in this case, the Court is telling those who embark on illegal schemes that the Courts will grant assistance to those who are not successful in their illegal immigration scheme. Further, such a ruling would place pressure on those participating to see the schemes through to fruition, at risk of being sued.

Closely related to "clean hands" is the doctrine of *ex turpi causa non oritur action* which means "no cause of action will arise from a base cause". The law presumptively will not lend its assistance to a person who is tainted by illegality

- [226] Traditionally, *ex turpi causa* had been applied rigidly. However, that approach has been relaxed and the public policy analysis now requires a balancing test. That is not to say that the court will lightly provide relief for an aggrieved party to an illegal agreement.

[227] In *J.T.L. v. R.G.L.*, 2010 BCSC 1233 at paras. 113-16, Mr. Justice Harvey reviewed the rationale for *ex turpi causa* and stated that the doctrine rested on the need to preserve the integrity of the judicial system. Harvey J. posed the practical question as to "whether it be manifestly unacceptable to fair-minded or right-thinking people that a court should lend assistance to the plaintiff who has defied the law": *Mandzuk v. Vieira*, [1983] B.C.J. No. 1476 at para. 17 (S.C.). At para. 116, Harvey J. decided that *ex turpi causa* was:

justified where allowing the plaintiff's claim would introduced inconsistency into the fabric of the law either by permitting the plaintiff to permit from illegal or wrongful act or evade the penalty prescribed by criminal law: *Hall v. Hebert*, [1993] 2 S.C.R. 159; *British Columbia v. Zastowny*, 2008 SCC 4.

[228] In *Daemore v. Von Windheim*, 2011 BCSC 1523, Voith J. refused to grant restitution where one party had secured an unjust windfall acquired through illegal activity.

[229] The facts in *Daemore* are rather unique. The parties were married and had for years engaged in criminal activities. The wife had specialized in credit card fraud, mortgage fraud and money laundering, whereas the husband preferred to involve himself in prostitution and drug trafficking. Voith J. decided that even if there was a windfall or unjust enrichment, those considerations did not outweigh the parties' unlawful conduct. The court was referred to a number of other cases from Canada, Austria and England where concerns about windfalls or unjust enrichment caused the courts to refuse to invoke *ex turpi causa* as a complete defence. Voith J., at para. 75, concluded that those cases "only serve to establish that concerns about windfalls or unjust enrichment may override a court's concern about illegality, not that they need to do so".

[230] The comments in *Daemore* are helpful in confirming the modern approach of providing some discretion as to whether the doctrine of *ex turpi causa* should be invoked. That discretion depends on the particular circumstances. It underscores how fact specific these cases are. The facts in *Daemore* were far more egregious than those involving Ms. Kim and Ms. Choi.

[231] The balancing exercise to maintain statutory policy against the desire to prevent a windfall or unjust enrichment was illustrated in *Tsoi v. Lai*, 2012 BCSC 1082, where Bowden J. decided that the concerns of a windfall or unjust enrichment overrode his concern about illegality.

[232] In *Tsoi*, the plaintiff sought to recover monies that he had advanced to the defendant, who operated a mah-jong business and illegally loaned money to his gamblers at exorbitant interest rates. The mah-jong business was illegal under the Criminal Code.

[233] Mr. Lai sought to avoid repaying the loan on the basis that his business was illegal and therefore the court should not enforce payment. Bowden J. found that the plaintiff was aware that Mr. Lai used the loaned money for an illegal purpose. The issue was whether the court should enforce an agreement made to assist the defendant in his illegal enterprise. At

para. 9, Bowden J. noted that the doctrine of illegality can be divided into two categories: common-law illegality, where the agreement is contrary to public policy, and statutory illegality, where the agreement is contrary to statute. He concluded that the loan contract fell into the former category:

The plaintiff knew that the loan was to be used for an immoral purpose, namely lending to the customers of the defendant in his mah-jong business. According to Fridman at 376, "[o]nly if ... there is knowledge and actual or presumed intention to promote an immoral act or immoral conduct, then the contract will be invalid as against public policy." I find that the plaintiff entered into the agreement with the actual or presumed intent that the funds should be applied by the defendant to an illegal purpose. Even though the loan agreement on its face was not illegal, in the sense of being contrary to the criminal law, the plaintiff knew that the loan was to be used for an illegal purpose. Therefore, in my view, the loan agreement is an illegal contract.

[234] The facts at bar fall into the former category, not the latter. The agreement to fund the operating expenses of the restaurant was not per se in breach of a statutory provision. However, Ms. Kim and Ms. Choi knew that the purpose of the agreement was to avoid immigration requirements. I adopt the reasoning in Tsoi and conclude that even though the agreement to fund the operating expenses was not by itself illegal, because Ms. Kim and Ms. Choi knew that the purpose behind the agreement was to circumvent immigration rules, the agreement was an illegal contract.

[235] There are exceptions to relieve a plaintiff of the consequences of an illegal agreement. One of those exceptions is where the plaintiff was less at fault than the defendant: Tsoi at para. 13.

[236] I find that Ms. Kim was less at fault.

[237] Ms. Kim was unsophisticated and lacking life skills. She depended on others for advice and guidance. She looked to Ms. Choi and Ms. Choi's daughter, Ms. Edmonds, and Mr. Kwak for advice. She had few, if any, friends or associates to turn to at the time the agreement was made. Ms. Choi knew that she was a "puppet owner" and was prepared to take advantage of the illegal arrangement. Ms. Choi was far more sophisticated than Ms. Kim and had the upper hand throughout their relationship.

[238] Ms. Choi benefited directly from the funds paid by Ms. Kim. She was able to use the funds for her personal use and to acquire a residence. Ms. Choi was able to secure her permanent residency while being party to the illegal scheme.

[239] Ms. Choi asks this court to note that she brought an end to Ms. Kim's immigration application. However, the reality is that the arrangement was only brought to an end when Ms. Kim demanded an accounting of the money she had paid and after Ms. Choi had exhausted Ms. Kim's resources.

- [240] The result is that Ms. Choi has her permanent residency and the benefit of Ms. Kim's money. Ms. Kim has been deprived of her money and will face the scrutiny of her dishonesty if she chooses to apply again for migration to Canada.
- [241] If Ms. Choi is permitted to keep the money, she will enjoy an unjustified windfall. That would be the result even if Ms. Choi and Ms. Kim were equally at fault. In these circumstances, barring Ms. Kim's claim on the basis of *ex turpi causa* would be unjust.
- [242] Ms. Choi has referred to *Buda v. Plyplatis*, [2004] O.J. No. 5175 (S.C.J.), as authority which should guide this court to decide in her favour. *Buda* was a case involving investors in a Ponzi scheme that garnered no return. The claim was dismissed on the basis that the plaintiffs were aware that the investment was illegal and *ex turpi causa* and, therefore, barred recovery.
- [243] The facts in *Buda* were very different from the case at bar. In *Buda*, the plaintiffs had a degree of sophistication far beyond that of Ms. Kim. While *Buda* would be of assistance in some cases, the facts are so distinguishable that I decline to agree that it mandates a denial of Ms. Kim's claim.
- [244] Although not binding, the comments of the United Kingdom Supreme Court in *Patel v. Mirza*, [2016] UKSC 42, are persuasive as they relate to the modern approach to *ex turpi causa*. The Court paid considerable deference to the comments of McLachlin J. (as she then was) in *Hall v. Hebert*, [1993] 2 S.C.R. 159, and concurred with the following principles:
- a) The power to refuse relief where illegality is involved is a limited one;
 - b) The power to refuse relief is justified where the plaintiff is allowed to profit from the illegal or wrongful act; and
 - c) Damages may be awarded as compensation for a personal injury, but not for the illegal act - no part of the award can be said to be profit or the windfall from the illegal act;
- See: *Patel* at paras. 55, 191; *Hall* at 179-80.
- [245] *Hall* was a tort case. However, at 176, McLachlin J. observed that "the law must aspire to be a unified institution, the parts of which - contract, tort, the criminal law - must be in essential harmony".
- [246] In *Patel*, the plaintiff had advanced money to the defendant for the purpose of betting on shares using insider information that the defendant expected to receive. The agreement to use insider information amounted to a conspiracy between the parties to commit the statutory offence of insider trading. The information failed to materialize, but the defendant kept the money. The plaintiff sued in contract and unjust enrichment. The issue was whether the illegal contract prevented the plaintiff from recovering his money.
- [247] The Court ruled that the parties should be placed back into the position as if no contract had been entered into. Mr. Patel was awarded judgment.

- [248] It is noteworthy that the cases do not endorse a profit or windfall being included in the repayment of funds advanced. Ms. Kim will not realize a profit or windfall, but merely a return of some of her money.
- [249] If Ms. Choi is permitted to keep funds for which she has no legal or equitable claim, then she, as a party and active participant in a scheme to deceive the immigration authorities, would realize a profit or windfall. That would result in the court lending assistance to a full participant in an illegal act. If that was permitted, the result would be, as stated in Moore, "against all conscience".
- [250] My view of the applicability of the clean hands doctrine is similar. In *Caduff v. Hrasko*, 2005 BCCA 516 at para. 7, the Court of Appeal noted that it is open for a trial judge to make an award in unjust enrichment despite a lack of clean hands where the plaintiff's hands, while "not spotless", are cleaner than those of the defendant's. That aptly describes the circumstances in this case: Ms. Kim's hands are not spotless, but they are much cleaner than Ms. Choi's.
- [251] I, therefore, conclude that Ms. Choi was unjustly enriched in the amount of \$302,000, which I have rounded off to 300,000,000 Korean Won.

Constructive Trust

- [252] A constructive trust may be imposed as a proprietary remedy for unjust enrichment. If a plaintiff can establish that a monetary award is insufficient and there is a link between the plaintiff and the subject property, a remedial constructive trust will impress the property. The constructive trust will be limited to the plaintiff's proportionate contribution to the acquisition of the property: Moore at paras. 90-91.
- [253] Before a remedial constructive trust may be imposed, there must be an equitable basis for doing so. Unjust enrichment provides such a basis: Moore at paras. 32-35
- [254] Ms. Choi earned little, if any, income from the restaurant prior to Ms. Kim's arrival. The restaurant did not see a remarkable improvement after Ms. Kim returned to Korea. Ms. Choi had said that she had no other significant source of income other than the monies being advanced by Ms. Kim. As a result, I am satisfied that a monetary judgment will likely be insufficient.
- [255] There is a direct connection between the funds advanced by Ms. Kim and the Idiens Way property. Ms. Choi admitted that at least \$250,000 of money received from Ms. Kim went into the purchase of the home. Ms. Choi's mortgage paid for \$200,000 of the purchase price. Therefore, funds from Ms. Kim likely funded the remainder of the \$455,000 purchase price. Ms. Kim's proportionate share of the acquisition costs amounts to 56%. Accordingly, Ms. Choi's property located at 2380 Idiens Way shall be impressed with a constructive trust giving Ms. Kim a 56% interest, but capped at the monetary amount of the judgment. The cap is to ensure that Ms. Kim does not receive a windfall in the event the property value has

increased.

Conversion to Korean Won

[256] Most of the money was paid in Korean Won. The Foreign Money Claims Act, R.S.B.C. 1996, c. 155, can be applied in these circumstances so that the award accounts for changes in the conversion rate between the time when the losses occurred and the time when judgment is enforced. Section 1(1) states:

If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

[257] Where there are currency fluctuations, the successful litigant should receive the benefit: *Han v. Cho*, 2009 BCSC 458 at paras. 100-03. Although *Han* was a case of civil fraud, I am satisfied that the principles set out apply equally to these circumstances. If Ms. Kim was not provided with the benefit of the currency conversion, her actual award would be less than her loss because the value of the Canadian Dollar has declined since Ms. Kim, acting on Ms. Choi's deception, converted her holdings in Korean Won into Canadian dollars.

[258] The effect of the Foreign Money Claims Act was described in *Litecubes, L.L.C. v. Northern Light Products, Inc.*, 2009 BCSC 427 at para. 5:

The Act deals with measurement of compensation. How that compensation is then stated is perhaps best illustrated by way of example of a form of order under the Act. If, for example, the court determines that the plaintiff will be most truly and exactly compensated if the money payable under the order is measured in a currency other than Canadian currency, and in that regard the court determines that the measurement of compensation is US \$100, the form of order under the Act would be as follows:

This court orders that the defendant pay to the plaintiff the amount of Canadian currency that is necessary to purchase US\$100 at a chartered bank located in British Columbia at the close of business on the conversion date, as the conversion date is defined in s. 1(2) of the Foreign Money Claims Act, namely, on the last day before the date on which a payment of this judgment is made.

[259] In the case at bar, I have found that Ms. Kim was wrongfully deprived of 300,000,000 Korean Won. The result is that Ms. Choi will be ordered to pay, in Canadian dollars, the amount necessary to purchase 300,000,000 Korean Won.

[260] If there are any issues arising out of the conversion issue, the parties may apply for directions.

Costs

[261] The parties have requested that the question of costs be reserved for a further hearing following the release of the reasons. Either party is at liberty to address the matter of costs provided an application is made within 30 days. If no application is made, then Ms. Kim shall be entitled to her costs at Scale B.

Summary

[262] Ms. Kim shall receive judgment for the following:

- a) The amount of Canadian currency that is necessary to purchase 300,000,000 Korean Won at a chartered bank located in British Columbia at the close of business on the conversion date, as the conversion date is defined in s. 1(2) of the Foreign Money Claims Act, namely, on the last day before the date on which a payment of this judgment is made.
- b) A declaration that Ms. Kim is entitled to a 56% constructive claim impressed upon 2380 Idiens Way, Courtenay, B.C., but the amount of the claim shall not exceed the monetary sum of this judgment.

[263] Ms. Kim shall be entitled to her costs unless either party applies within 30 days to have the question of costs dealt with at a further hearing.

"S.D. Dley J."

DLEY J.

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