

CANADA / JUDGMENT

Man v. Chung

2007 BCSC 619

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 619 Man v. Chung IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Man v. Chung, 2007 BCSC 619 Date: 20070504 Docket: S050992 Registry: Vancouver Between: Alan Fuk Yuen Man Plaintiff And Ann Kam Chi Chung Defendant Before: The Honourable Mr. Justice Leask Reasons for Judgment Counsel for the plaintiff Beverley D. Hoy Counsel for the defendant Kenneth H. Jang Date and Place of Trial: December 19-21, 2006 Vancouver, B.C.

- [1] Alan Man and Ann Chung had an intimate relationship. They do not agree on when it started, when it ended, how much money Mr. Man supplied to Ms. Chung, or whether the money was a gift or a loan. Mr. Man says the intimacy began in 1989 or 1990 and ended in 1997. He says he made loans to Ms. Chung totalling \$135,338 and also entrusted her with a used Rolex watch for resale for which he paid \$3,000. Ms. Chung says that intimate relations began in 1999 and ended in 2004. She says the Rolex watch was a gift from Mr. Man to her and that she also received monetary gifts of approximately \$90,000, which Mr. Man paid to support her. Both parties agree that their intimate relationship was a secret, not disclosed to family or friends.
- [2] Both Mr. Man and Ms. Chung do agree that they met in 1989 while Ms. Chung was living in Canada with her sister-in-law, Irene Fu. Mr. Man was friends with Ms. Fu and the three of them saw each other frequently. Ms. Chung's husband was working in Hong Kong while she waited in Canada to obtain landed immigrant status.
- [3] After obtaining her immigration papers, Ms. Chung returned to Hong Kong in 1990. In 1992 she came to Canada with her husband and children. They bought a house on Kenny Street in Coquitlam in May 1992. Mr. Man was a frequent visitor to the house and was friendly with both Ms. Chung and her husband. Ms. Chung knew few people in Canada other than her sister-in-law and Mr. Man. She treated him as a confidant and discussed family problems with him, including the financial stress that she and her husband were experiencing. Their recollections of Mr. Man assisting Ms. Chung by paying her property taxes in the mid-'90s are consistent.

- [4] Mr. Man was, at that time, a real estate agent who owned a house in Burnaby and worked in the lower mainland. In 1997 he moved back to Hong Kong and began working there. He continued to own his Burnaby house. In 1999 Mr. Man and his wife obtained a divorce.
- [5] Ms. Chung was divorced from her husband in 2001. The property they owned on Kenny Street was sold and from her share of the proceeds she purchased a property on Parkway in Coquitlam, in March 2002. Later Ms. Chung sold that property and purchased her current residence on Johnson Street in Coquitlam.
- [6] The parties agree that between October 1999 and October 2004, Mr. Man paid to Ms. Chung, either by cheque or wire transfer, the following sums: 1999 \$4,000 2000 \$11,910 2001 \$17,700 2002 \$37,000 2003 \$26,500 2004 \$16,000 Total \$113,110 The general pattern of payment was a remittance of at least \$1,000 per month with larger lump sum payments from time to time. The Schedule of Admitted Payments is attached as Exhibit "A" to these Reasons.
- [7] Although there are significant differences between the parties about the amount of money involved, the key disagreements center on the timing of the couple's sexual relationship and the purpose of the payments.
- [8] In his direct evidence, Mr. Man did not mention the sexual relationship. He gave evidence of his admitted assistance to Ms. Chung to pay property taxes on her Kenny Street property. He also testified that between January 1995 and March 1999 he had given Ms. Chung approximately \$15,000 in cash in instalments ranging generally between \$200 and \$600. His evidence was that none of those payments were a gift - all were loans to assist Ms. Chung during a period of financial hardship, which he expected to be repaid either when her finances improved or her real property was sold.
- [9] When cross-examined about their sexual relationship, Mr. Man stated that it had commenced sometime in 1989 or 1990 while he was teaching Ms. Chung to drive. He said the relationship ended when he returned to Hong Kong in 1997 and was never resumed.
- [10] Mr. Man's evidence was that the entire series of payments made from 1999 to 2004 were loans intended to assist Ms. Chung with the cost of maintaining her real estate and mortgages and these payments were intended to be repaid to him on the sale of her real property. He also denied ever sending extra money to Ms. Chung's Canadian account for her to deposit in his TD Canada Trust account.
- [11] Ms. Chung's evidence was a complete denial of receiving moneys from Mr. Man prior to October 1999 except for his assistance in paying her property taxes in the mid-90s.
- [12] Ms. Chung also denied any sexual intimacy with Mr. Man during the entire period that Mr. Man said constituted their sexual relationship. Ms. Chung's evidence was that she lost contact with Mr. Man when he returned to Hong Kong in 1997 and did not see him again for approximately two years. Late in 1998 Mr. Man came to the casino where Ms. Chung worked. He began phoning her and arranging to meet with her when she got off work in the casino. Sometime in May 1999 their intimate relationship commenced. It continued until Chinese

New Year in 2004. Mr. Man professed his love for Ms. Chung, insisted on looking after her by providing monthly support payments and spent time with her whenever he returned to Vancouver. Ms. Chung testified that she had always thought that Mr. Man had an intimate relationship with her sister-in-law, Irene Fu, when she first met him through Irene in 1989. During the period when Ms. Chung says she and Mr. Man were intimate, she also says that Mr. Man denied any continuing involvement with Irene Fu. However, in conversation with Ms. Chung, Mr. Man frequently appeared to have extremely up-to-date information about her husband's activities. She suspected that this information came to him from Irene Fu. During his Chinese New Year visit to Vancouver in 2004, Ms. Chung says she tried to end the relationship. Mr. Man was persistent in denying contact with Irene Fu and professed his love for Ms. Chung. It is in this context that the dispute about the Rolex watch arose. Mr. Man says he gave it to Ms. Chung to resell for a profit. Ms. Chung says he gave the Rolex and a diamond bracelet to her in an attempt to persuade her to maintain the relationship.

- [13] Under cross-examination, Mr. Man was questioned about why he would entrust valuable jewellery to Ms. Chung to sell when she already "owed" him so much money. His answer was that he knew she was trustworthy in commercial matters because she had sold considerable quantities of ginseng for a business acquaintance of his and that the two of them had both profited from those transactions. Under further questioning Mr. Man was unable to provide any meaningful specifics about their ginseng business. Nor was any confirmatory evidence of any kind supplied. Ms. Chung categorically denied ever selling ginseng for Mr. Man or anyone she met through him.
- [14] In June 2004, Ms. Chung told Mr. Man to stop sending her support - the relationship was over. At trial, Mr. Man's explanation of why he sent \$2,000 on June 10 and four further monthly instalments totalling \$4,000 up to October 4, 2004, was that Ms. Chung told him that she had been in a car accident; the damage to her vehicle amounted to \$6,000 and I.C.B.C. was not paying her. Mr. Man said he didn't have \$6,000 in June but sent \$2,000 right away and the balance in monthly instalments. Ms. Chung testified that her vehicle accident did not occur until August, 2004. The law
- [15] Counsel agree that the burden of proof is on the plaintiff to prove that he paid money to the defendant. Once payment is proven, the onus shifts to the defendant to prove that the payment was a gift. The creation of a gift must be clear and unequivocal. In *Kibsey Estate v. Stutsky*, [1990] 2 W.W.R. 632 (Man. C.A.), Lyons J.A. said at p. 36: As to the standard of proof necessary to prove the gifts, it is also agreed that it must be such as to leave no reasonable room for doubt regarding the donor's intentions. *Kibsey* has been followed in B.C. in *Wettstein v. Wettstein*, [1992] B.C.J. No. 1026 (S.C.) and *Singh Estate v. Shandil* 2005 B.C.S.C. 1448. In the absence of binding authority, I would have been inclined to impose a lesser burden of proof on the recipient of an alleged gift. Counsel before me agreed on the *Kibsey* standard and this is not the case to explore the issue further. Proof of payment
- [16] It is convenient to divide the payment issue into a number of categories:

- (1) Property taxes prior to 1999;
- (2) Cash advances prior to 1999;
- (3) The cheque dated December 10, 1999;
- (4) Cheques and bank transfers from 1999 to 2004;
- (5) Cash transfers back to the plaintiff;
- (6) Cash payments to the defendant in 2004;
- (7) The Rolex watch;
- (8) The diamond bracelet;
- (9) The defendant's payment to the plaintiff in November 2004;
- (1) Property taxes prior to 1999;

[17] Ms. Chung admits that Mr Man assisted her by paying the property taxes for three years on the Kenny Street property that she owned jointly with her husband. Her evidence was not completely clear whether the years were 1994-1996 or 1995 - 1997. Her counsel submits that it was 1994-1996; Mr. Man's counsel submits it was 1995-1997. I am satisfied that Mr. Man made payments either to Ms. Chung or for her benefit to the property tax authorities of approximately \$6,000. I do not find it necessary to resolve the dispute whether the payments were made in the years 1994 - 1996 or 1995 - 1997.

- (2) Cash advances prior to 1999

[18] Mr. Man testified that he made cash advances to Ms. Chung of approximately \$15,000. Ms. Chung denied receiving any money from Mr. Man during this period other than the property tax payments.

[19] Mr. Man's evidence was that Ms. Chung would telephone him and ask him to meet her at one of several Coquitlam restaurants near her home; they would meet; she would ask him for financial help; he would withdraw cash from an ATM and give it to her. He kept no records of these advances at the time but was able to reconstruct the transactions from his ATM records after the lawsuit was commenced. I was unconvinced by Mr. Man's evidence on this subject. It would have been relatively easy to believe that such an event could have occurred a few times, but Mr. Man's insistence that it was a relatively regular occurrence over a number of years, with no contemporaneous records and no claimed discussion of the subject between the people involved until many years later, did not have the ring of truth. The plaintiff has the burden of establishing that he made these payments on a balance of probabilities. He has not satisfied that burden. I found neither the content of his evidence on this subject nor his manner of giving it at all convincing.

- (3) The cheque dated December 10, 1999

- [20] The cheque dated December 10, 1999 in the amount of \$2,000 drawn on Mr. Man's bank account was deposited in Ms. Chung's bank account. Ms. Chung acknowledges receiving the cheque from Mr. Man. However, Mr. Man denies signing the cheque.
- [21] The first witness called by the plaintiff was a handwriting expert who testified that the signature on the December 10, 1999 cheque did not match other known samples of Mr. Man's handwriting. In cross-examination, the expert acknowledged that he could not say Ms. Chung had written Mr. Man's name. He also stated that a difference in handwriting may be caused by a number of factors, including an injury to the hand, the type of pen used and different writing surfaces. The expert testified that there was some evidence suggesting that the pen used in writing the December 10th cheque was faulty.
- [22] The cheque itself was numbered appropriately in sequence with other cheques that Mr. Man admittedly signed and gave to Ms. Chung. It clearly came from Mr. Man's cheque book. No evidence was led to suggest that Ms. Chung had any opportunity to steal the blank cheque or any reason to do so. In cross-examination Mr. Man stated that he had never refused a request for money from Ms. Chung.
- [23] On the whole of the evidence on this subject, I am satisfied on a balance of probabilities that Mr. Man signed the cheque dated December 10, 1999. I am prepared to give him the benefit of the doubt that he does not remember signing it and does not recognize the signature as his. I will refrain from commenting on the wisdom of raising the issue in this trial.
- (4) Cheques and bank transfers from 1999 to 2004
- [24] In evidence before me are cheques and records of bank transfers showing that the plaintiff transferred significant sums of money to the defendant commencing at the end of 1999 and continuing until late in 2004. These transfers are admitted by the defendant and I have no difficulty finding as a fact that \$113,110 was transferred from Mr. Man to Ms. Chung during this period in addition to the \$2,000 December 10, 1999 cheque.
- (5) Cash transfers back to the plaintiff
- [25] Ms. Chung, while acknowledging receipt of the cheques and bank transfers that I have just described, testified that, on a number of occasions, Mr. Man told her that he was sending her more money than she needed and he wanted her to deposit the "extra funds" in his TD Canada Trust account. In her direct evidence, her counsel presented the bank transfer evidence, evidence of a cash withdrawal from her account and evidence of a corresponding cash deposit in Mr. Man's TD Canada Trust account. Ms. Chung testified that each time, following Mr. Man's instructions, she transferred the funds from her account to his. Mr. Man adamantly denied giving her any such instructions or being aware that she had made any such deposits in his account. Ms. Chung's evidence was that such transfers totalled \$16,700. A Schedule of the transfers is Exhibit "B" to these reasons.

[26] I found Ms. Chung's account of these transfers straightforward and convincing. The contemporaneous bank records established a reliable "paper trail" documenting the transfers. Mr. Man's denials were hollow and unconvincing. Nobody could be expected to explain every transaction in his bank account (especially transactions from a number of years in the past) but Mr. Man could not produce a specific alternate explanation for 15 transactions described by Ms. Chung. On all of the evidence I am satisfied that Ms. Chung made the repayments she claims and I reject Mr. Man's denials.

(6) Cash payments to the defendant in 2004

[27] In his direct evidence, Mr. Man said that he had made two cash payments to Ms. Chung in the spring of 2004; one payment of \$4,000 and another of \$3,000. He said the money came from gambling winnings. Ms. Chung denied receiving either payment.

[28] In her closing submissions, Mr. Man's counsel withdrew his claim for the \$7,000. In the circumstances it is unnecessary for the Court to make any finding concerning the alleged payments.

(7) The Rolex watch

[29] In the spring of 2004, Mr. Man gave Ms. Chung a used Rolex watch. He purchased it from an acquaintance for \$3,000. His evidence is that he gave it to her so that she could attempt to resell it to a patron of the casino where she worked and they could divide the profits. Ms. Chung denies this and says that it was a gift he gave to her (along with a diamond bracelet) in his attempt to persuade her to continue their relationship. She testified that she had no desire to retain the gift but simply kept the watch because there was no convenient opportunity to return it. At the conclusion of Ms. Chung's evidence, the Court asked her if she was prepared to give the Rolex watch and diamond bracelet back to Mr. Man. She said that she was. Mr. Man was not present in court at the time. At the Court's suggestion, Ms. Chung gave the watch and bracelet to her counsel, who delivered them to Mr. Man's counsel.

(8) The diamond bracelet

[30] The only separate significance of the diamond bracelet is that Mr. Man denies giving the bracelet to Ms. Chung. After Ms. Chung's lawyer handed the used Rolex watch and the diamond bracelet to Mr. Man's lawyer in the court room, counsel for Mr. Man filed a written "Reply to Defendant's Final Argument", in which she included the following statement: In addition to the foregoing, the bracelet will be delivered to the defendant's counsel to be returned to the defendant before the defendant's counsel's Reply is required to be filed in court.

[31] There was no mention of this topic in the defendant's counsel's reply which took the form of an "Amended Final Argument". I do not find it necessary to decide the ownership of the diamond bracelet. Whoever has it may keep it as far as the Court is concerned.

(9) Defendant's payment to plaintiff in November 2004

- [32] There is no dispute that the plaintiff continued making deposits to the defendant's bank account until October 2004. The defendant's evidence is that she told the plaintiff that the relationship was definitely over, she wanted no further support from him, and to stop making payments to her account. She testified that she didn't realize he had continued to make the deposits until November. When she did realize it, she closed the bank account, received just over \$4,000 from her bank, added cash to that amount, and deposited \$5,000 in his bank account. Her bank records show no withdrawals from the account between June 2004 and November 12, 2004 when she closed the account. There is no dispute that Ms. Chung repaid \$5,000 to Mr. Man on November 12, 2004. Payment summary
- [33] I find as a fact that the plaintiff paid property taxes for the benefit of the defendant in the approximate amount of \$6,000 prior to 1998.
- [34] I find as a fact that between 1999 and 2004 the plaintiff transferred to the defendant a total of \$115,110.
- [35] I find as a fact that the defendant transferred back to the plaintiff a total of \$21,700.
- [36] I find as a fact that in the spring of 2004 the plaintiff transferred possession of a used Rolex watch for which he had paid \$3,000, to the defendant. In court, the watch was returned to plaintiff's counsel.
- [37] In summary, the defendant has had the benefit of \$6,000 in property taxes paid for her and a net transfer of \$93,410. Loan or gift?
- (a) Property tax payments
- [38] Both Mr. Man and Ms. Chung agree that when Mr. Man paid the property taxes on the Kenny Street property owned jointly by Ms. Chung and her husband, the payments were not intended as gifts. Ms. Chung's evidence is that when she offered to repay the property taxes, Mr. Man said "You need it, you hold on to it." Mr. Man did not acknowledge making any such statement. He does not claim to have asked for the return of the mid-90s property tax payments until 2004. On the whole of the evidence I am satisfied that Ms. Chung has given an accurate account of the property tax transactions. They were initially loans; when Ms. Chung attempted to repay the loans, Mr. Man declined to accept her offer; his words and actions at that time converted the loans to gifts. I am completely satisfied of that and have no doubts whatsoever.
- (b) Payments and transfers between 1999 and 2004
- [39] This is where the most significant differences exist between the evidence of Mr. Man and Ms. Chung. Mr. Man says that their sexual relationship had ended several years earlier and that he continued to lend her money in a series of payments totalling over \$110,000 gross and over \$90,000 net. Mr. Man says that he loaned Ms. Chung the money because he knew she was short of funds, she asked him regularly for money, and he was confident he would be repaid out of the proceeds of the sale of her real estate.

- [40] Ms. Chung says Mr. Man pursued her after a chance meeting in late 1998 and their sexual relationship began in the spring of 1999 and continued until early 2004 when she broke the relationship off. She says the money was paid to her for her support incidental to the loving relationship they had during that period. In her evidence, Ms. Chung said it was always understood between them that the payments were not loans and she would not have accepted loans at that time. Although her finances were "tight" she did not have to have the funds from Mr. Man. Counsel for Ms. Chung submits it would have made no sense to borrow money from Mr. Man for the purpose of making her mortgage payments and that the whole explanation for the current lawsuit and Mr. Man's claim for "repayment" of the "loans" turns on Ms. Chung's ending of their romantic relationship in 2004. Ms. Chung says Mr. Man said to her "If I lose the person, I want the money back."
- [41] I believe Ms. Chung and I disbelieve Mr. Man. There are several reasons for this. First, I have already found that Mr. Man falsely claimed to have advanced an additional \$15,000 cash to Ms. Chung between 1995 and 1999. Second, I have already found that Mr. Man lied to the court when he denied giving Ms. Chung instructions to pay money into his TD Canada Trust account and denied knowing that she had done so. Those reasons alone would be sufficient to find against Mr. Man. However, there are additional reasons. I did not believe his evidence about assisting Ms. Chung to make money by selling ginseng. His account lacked the specific details one expects to hear in a truthful story concerning a series of honest commercial transactions. Furthermore, had such transactions actually occurred, Mr. Man would have been able to bring evidence before the court either in the form of documents or witnesses to confirm his story. He did not do so. I also found his account of the beginning and ending of the sexual relationship so lacking in detail as to be highly suspect. The fact that he gave his entire direct evidence without mentioning the existence of the sexual relationship also weakened his credibility. In general his account of what happened between himself and Ms. Chung did not feel "real." In particular, the amount of money transferred between late 1999 and the fall of 2004, the size and regularity of the payments and the absence of any contemporary documentation of the "loan" or businesslike plan for repayment, all reinforce my disbelief of his evidence.
- [42] In contrast, Ms. Chung's evidence made sense to me. The amounts she accepted prior to 1998 to pay property taxes (treated by her as a loan at that time) were consistent with what one might accept from a good friend. Repayment would be possible if the family income improved or the family home was sold.
- [43] Ms. Chung's evidence concerning the beginning of the sexual relationship, her concerns about her former sister-in-law being a rival for Mr. Man's affections, her decision to break off the relationship, and her difficulties in doing so in the face of Mr. Man's persistence, all made sense to me and had the ring of truth. Her account of accepting "support payments" to make her life easier while romantically involved with Mr. Man also made sense. Her evidence that accepting such a lengthy series of payments as a "loan" with no apparent ceiling and no financially sound repayment plan would have been unacceptable to her,

showed common sense. In general, her evidence was appropriately detailed without having the rehearsed quality of a made up "story". Even the preserving of the Rolex watch and diamond bracelet in a little flannel packet to bring to court and display made sense in the context of her evidence.

- [44] In addition, Mr. Man's telephone records both from British Columbia and Hong Kong seem much more consistent with Ms. Chung's account of the relationship than Mr. Man's. Furthermore, Mr. Man's behaviour in the spring and summer of 2004 seem much more consistent with a spurned lover trying to rekindle the romance than that of a creditor trying to collect a debt.
- [45] I have no doubt whatsoever that Mr. Man did not lend Ms. Chang the sums of money he paid to her between 1999 and 2004. The payments were gifts paid for her support. Both Mr. Man and Ms. Chung knew that at the time and know that today. To the extent that Mr. Man made contrary statements to the court, those statements were false.

Conclusion

- [46] For the reasons outlined above, I dismiss the plaintiff's claim against the defendant. I order the discharge or cancellation of the certificate of pending litigation registered against the defendant's property located at 11-1235 Johnson Street, Coquitlam, B.C. (P.I.D. 004-373-413, Strata Lot 11 of District Lot 386, Group 1, New Westminster District Strata Plan NW2407.)
- [47] During closing submissions, I advised counsel I did not intend to deal with the issue of costs in these reasons for judgment. If counsel are unable to agree on the costs consequences of these reasons, they are free to make application to the court. "P. Leask, J." The Honourable Mr. Justice P. Leask Exhibit "A" Schedule of Payments from Alan Man to Ann Chung 1999 October 20 \$3,000 customer's receipt December 3 \$1,000 cheque payable to cash Total \$4,000 2000 January 01 \$ 400 cheque made payable to cash January 10 \$1,000 cheque made payable to cash February 11 \$1,000 cheque made payable to cash April 13 \$1,010 June 09 \$ 500 cheque made payable to cash June 26 \$1,000 July 21 \$1,000 August 16 \$1,000 September 08 \$1,000 September 12 \$1,000 October 9 \$1,000 October 31 \$1,000 November 28 \$1,000 Total \$11,910 2001 February 13 \$1,000 February 27 \$1,000 March 09 \$1,000 April 03 \$1,000 April 11 \$1,000 May 04 \$1,000 May 24 \$1,000 May 26 \$1,000 July 04 \$1,000 August 27 \$1,000 September 19 \$1,000 October 11 \$1,000 October 18 \$1,000 November 06 \$1,200 November 23 \$2,500 December 27 \$1,000 Total \$17,700 2002 January 22 \$5,000 March 01 \$8,000 March 25 \$1,500 April 03 \$1,000 April 24 \$1,000 May 15 \$1,000 May 28 \$1,000 June 11 \$2,000 July 08 \$1,000 July 24 \$1,500 August 08 \$3,000 September 05 \$1,500 September 12 \$2,000 October 07 \$1,500 October 21 \$1,500 November 05 \$1,500 November 29 \$1,500 December 31 \$1,500 Total \$37,000 2003 March 19 \$1,500 April 14 \$1,000 May 07 \$1,000 May 15 \$1,000 June 06 \$1,500 June 13 \$2,000 June 30 \$6,500 July 21 \$1,500 August 18 \$2,000 September 03 \$1,500 October 10 \$3,000 November 14 \$2,000 December 05 \$2,000 Total \$26,500 2004 January 31 \$6,000 cheque made payable to cash April 17 \$1,000 May 04 \$1,000 May 28 \$1,000 June 10 \$2,000 June 30 \$1,000 July 29 \$1,000 August 31 \$1,000 October 04 \$1,000 Total \$16,000 Grand Total \$113,110

Exhibit "B" Summary of Cash Transfers back to Alan Man Date Amount Nov 26/01 \$1,500 Jan 23/02 \$2,000 July 25/02 \$ 500 Aug 8/02 \$1,000 Sept 9/02 \$ 500 Oct 8/02 \$ 500 Oct 22/02 \$ 500 Nov 7/02 \$ 500 Jun 9/03 \$ 500 Jul 2/03 \$5,000 Jul 23/03 \$ 500 Aug 19/03 \$ 500 Oct 10/03 \$1,200 Nov.17/03 \$1,000 Dec 5/03 \$1,000 Total \$16,700

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