
CANADA / JUDGMENT

Ning v. Li

2016 BCSC 628

COURT

Supreme Court of British Columbia

DECIDED

23 March 2016

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2016 BCSC 628 Ning v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ning v. Li,

2016 BCSC 628

Date: 20160323

Docket: S140769

Registry: Vancouver

Between:

Tao Ning

Plaintiff

And

Ze Yu Li also known as Yu Ze Li also known as Yuze Li

Defendant

Before: The Honourable Madam Justice Bruce

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

Louise A. Lam

The Defendant:

Appearing In Person

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 24 and 25, November 10, 2015 and March 21 and 22, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 23, 2016

- [1] THE COURT: This is an action for breach of contract. The plaintiff seeks a declaration that the partnership created by the contract is dissolved, that he is entitled to terminate the contract and to be awarded damages for the defendant's breach of contract.
- [2] The defendant has counterclaimed for damages arising out of the plaintiff's decision to terminate the contract prematurely.
- [3] The plaintiff is a party to the agreement and the defendant does not dispute his right to sue in his own name. However, the plaintiff also sues as agent for Mr. Gao, who he alleges was an equal partner in his purchase of a 50% interest in the partnership business.
- [4] The defendant claims that he was unaware of the arrangement between the plaintiff and Mr. Gao, but he acknowledges that Mr. Gao was involved in the business and paid him monies for the purchase of the business and for the cost of upgrading the premises for the business.
- [5] In regard to the issue of an agency relationship, the plaintiff deposed that he entered into the agreement as principal and as agent for Mr. Gao, and together it was their intention to purchase a 50% interest in a business from the defendant, who represented that he owned 100% of this business. While only the plaintiff and the defendant are named parties to the agreement, and each party deposes there were different reasons behind this part of their arrangement, I am satisfied that the plaintiff is entitled to sue as principal and as agent for Mr. Gao.
- [6] Whether or not the agency relationship was fully disclosed to the defendant, the plaintiff and Mr. Gao depose that they had an agency relationship. The agency relationship is not disputed by the defendant. In these circumstances, the plaintiff may sue on his own behalf as principal, because he is a party to the agreement, and as agent for Mr. Gao as an undisclosed principal. The law is clear in this regard. See, *Barnett v. Rademaker*, 2004 BCSC 1060 at para. 44 and paras. 52 to 54.

- [7] The surrounding circumstances of the contract support the agency relationship and Mr. Gao's role in the partnership agreement. There is no dispute that he paid one-half of the purchase price and that he also contributed directly to the cost of the renovations for the business. The defendant also deposed that Mr. Gao was personally involved in the renovation of the business location.
- [8] Turning to the terms of the agreement, I find the partnership agreement was quite straightforward. The agreement required the plaintiff to pay \$115,000 for 50% of the business that was defined as a grill restaurant located at 6400 Kingsway and, further, he agreed to share the interior decoration costs with the defendant on an equal basis. The contract provided that the plaintiff was willing to supply \$65,000 to match the defendant's \$65,000 investment for interior decoration. If these costs exceeded \$130,000 in total, the plaintiff agreed to share the additional expenses equally with the defendant. During his examination for discovery, the defendant agreed that the phrase "interior decoration costs" included all of the start-up costs for the business.
- [9] The partnership agreement divided the responsibilities for getting the business up and running and after it became operational. The defendant was responsible for all of the required licences and business registrations. The plaintiff was to have control over the management of the business and the defendant would make recommendations. They agreed to operate in a "legal and reasonable way for their mutual interests".
- [10] The parties' evidence of the circumstances that led to this partnership agreement and what occurred thereafter is in dispute, and the issue is whether and to what extent any of this extrinsic evidence is admissible to interpret its terms. Further, if the extrinsic evidence is admissible to interpret the agreement, is the summary trial proceeding appropriate because of the parties' dispute about the material facts.
- [11] I am going to go through the material facts that are both disputed and undisputed. In August 2010, the defendant leased premises at 6408 Kingsway in Burnaby and commenced operations as a restaurant shortly thereafter. During the defendant's examination for discovery, he admitted that he had a partner in the restaurant, but there is no sworn evidence as to the identity of this partner. Nor is there any sworn evidence that the plaintiff or Mr. Gao were aware the defendant had a partner or that they knew the partner's identity. There is also no sworn evidence of the nature of the partnership or the terms of its arrangement with regard to 6408 Kingsway.
- [12] In January 2011, the defendant rented the adjacent premises at 6400 Kingsway from the same landlord and opened a karaoke business in that space. By the end of January 2013, the defendant decided that the karaoke business was no longer profitable and his new business plan was to expand the existing restaurant at 6408 Kingsway into the space at 6400 Kingsway. The menu was to be expanded and the seating capacity increased to 143 seats.

- [13] The restaurant at 6408 Kingsway remained open, but the karaoke space at 6400 Kingsway was closed and the defendant applied for a building permit to expand the existing restaurant into the space at 6400 Kingsway in or about February 2013. Although the defendant deposed in his affidavit dated November 9, 2015 that the plaintiff had a copy of the building permit and expansion floor plan, during his examination for discovery he testified that he merely showed a copy of these documents to the plaintiff and Mr. Gao. When asked why he did not give them a copy of the permit and the floor plan, the defendant testified it was because they did not ask for a copy.
- [14] The defendant also supported his position that the plaintiff had a copy of the floor plan by reference to an invoice from a drywall contractor that showed the plaintiff as the client and referred to a proposal. However, this invoice was dated August 22, 2013, at which time the plaintiff was in China. Thus, it is unlikely that the plaintiff was directly involved with the drywall contractor.
- [15] By March 2013, the defendant's preliminary plans for the expansion were approved by the City of Burnaby. In anticipation of the renovated combined businesses, the defendant ordered lighting fixtures and furniture from China at a cost of about \$40,000 and he continued to pay the rent on both premises. The rent for 6400 Kingsway was about \$11,000 per month and the rent for 6408 Kingsway was just over \$6,000 per month.
- [16] In early May 2013, Mr. Gao and the plaintiff approached the defendant and made an offer to purchase the business at 6400 Kingsway. Although what transpired during the parties' negotiations is in dispute, it is not disputed that the plaintiff and Mr. Gao decided to buy 50% of the shares in the business at 6400 Kingsway from the defendant and that the parties agreed to operate the business as a grill restaurant. They also agreed to form a partnership to operate the grill restaurant. The defendant drafted a partnership agreement in Mandarin and sent it to the plaintiff for review. The defendant deposed that he also sent an estimate for the renovation cost that was to become part of the agreement; however, it was not included in the agreement. The plaintiff asked the defendant to add another article to the agreement, which became Article 11, and dealt with the management of the restaurant. Apart from Article 11, the balance of the agreement remained identical to the defendant's draft.
- [17] The agreement was signed by the parties on May 31, 2013. It was first drafted in Mandarin and later translated into English, and the parties signed both versions of the contract. There is no dispute about the accuracy of the translation of the agreement into English.
- [18] Pursuant to the terms of the partnership agreement, the plaintiff and Mr. Gao paid \$115,000 to the defendant for the purchase of the 50% interest in the restaurant business to be located at 6400 Kingsway. Further, between May 2013 and October 2013, the plaintiff and Mr. Gao deposed that they paid the sum of \$142,000 for start-up expenses pursuant to the terms of the contract. These monies were either paid directly to the defendant in cash or deposited into the business account opened for the restaurant. The defendant disputes \$40,000 of these

payments, which correspond to the payments that the plaintiff and Mr. Gao deposed that they paid in cash to the defendant.

- [19] It was primarily the defendant who oversaw the renovation at 6400 and 6408 Kingsway, and who paid the vast majority of the renovation costs, as well as the rent for the space, from the monies the plaintiff and Mr. Gao contributed under the partnership agreement. Although the defendant deposed that Mr. Gao agreed to install the surveillance system in August 2013, and thus could be said to have been involved in the renovations to that extent, the plaintiff was in China from early July to the end of September 2013. As a consequence, the plaintiff could not have been involved in the renovation after early July 2013.
- [20] The defendant's evidence concerning the plaintiff and Mr. Gao's involvement in the renovations is internally inconsistent. While the defendant deposed in his affidavit dated November 9, 2015 that Mr. Gao and the plaintiff were present for the pulling down of the drywall in 6400 Kingsway, in his first affidavit dated October 27, 2014, he deposed that this work began on May 20, 2013, prior to the signing of the agreement. Further, the defendant said that he supervised this work and made no reference to the plaintiff or Mr. Gao being present.
- [21] It is also apparent from the defendant's first affidavit that he was paying all of the contractors and was generally at the premises when the renovation work was carried out in the spring and fall of 2013. The defendant also submitted that the plaintiff and Mr. Gao had breached their obligation to manage the work because they were so infrequently present to supervise the renovation. This is inconsistent with his November 2015 affidavit, which states that it was the plaintiff and Mr. Gao who generally supervised the entire renovation.
- [22] The defendant opened a bank account for the business on May 27, 2013, and money was deposited there by the plaintiff and Mr. Gao. It is not disputed that the defendant and his wife deposited some of their own monies in this account from their personal account. Most of the expenses were paid out of this account, including \$11,000 for the monthly rent. Monies the defendant had previously paid for the furniture and fixtures he had ordered from China prior to the partnership agreement were not paid out of the business account. The defendant and his wife also deposed that they paid for additional expenses from their own monies after the partnership commenced, and these expenses were not paid from the business account.
- [23] The plaintiff and Mr. Gao dispute much of the defendant's evidence that he paid for items not run through the business account, as well as the defendant's evidence that these were actually expenses for 6400 Kingsway's renovation.
- [24] The renovation proceeded during the spring and summer of 2013, and the defendant repeatedly asked the plaintiff and Mr. Gao to contribute more funds for the cost of the renovations, and they continued to comply with his requests. In June 2013, the defendant received the furniture deliveries from China and made applications for an expansion of the business licence and liquor licence from 6408 Kingsway to include 6400 Kingsway. None of

the correspondence from the City of Burnaby regarding the permit applications was copied to the plaintiff and Mr. Gao. There was also no evidence that the defendant sent copies of his permit applications to the plaintiff and Mr. Gao.

- [25] When the plaintiff returned from China in late September 2013, he became concerned that the defendant was not matching his and Mr. Gao's contributions in regard to the start-up costs for the restaurant in accordance with their agreement. The plaintiff examined the bank account records and concluded that, while he and Mr. Gao had made large contributions to the partnership costs, the defendant had not matched their contributions and, at the same time, the defendant had paid out all of their contributions to the business account and deposited very little of his own money. The plaintiff asked the defendant to produce receipts for expenditures and to itemize the costs he had borne for the start-up expenses.
- [26] Further, it was at this time in early October 2013 that the plaintiff and Mr. Gao deposed that they discovered that the defendant did not leave enough money from their contributions to pay for a kitchen and other essential items for a restaurant, and that his intention had all along been to expand the restaurant at 6408 Kingsway into the space at 6400 Kingsway, rather than create a standalone restaurant at 6400 Kingsway.
- [27] When the defendant's response with regard to the expenditures was considered unacceptable to the plaintiff and Mr. Gao, they sent a demand letter to the defendant demanding the return of all their investment monies due to his breach of the partnership agreement.
- [28] Thereafter, the defendant deposed that he incurred the cost of the rent and the balance of the construction costs until January 2014, when he gave up the lease for 6400 Kingsway and placed all the furniture into storage. Although the defendant deposed that he advised the plaintiff and Mr. Gao that his business plan was to expand the restaurant at 6408 Kingsway before they entered into the partnership agreement, Mr. Gao and the plaintiff deposed that they were not advised of this fact and were led to believe that they were buying into a standalone grill restaurant located at 6400 Kingsway. It was only after the dispute arose that the plaintiff and Mr. Gao say they learned that the defendant planned to expand 6408 Kingsway, rather than operate a standalone restaurant at 6400 Kingsway.
- [29] This is a summary trial proceeding and thus the court is limited by the affidavit evidence filed by the parties. Significantly, there are factual disputes in this case and the court is not entitled to decide material issues of fact based on an assessment of credibility. However, fundamentally this is a case of contract interpretation. The disputed evidence, which concerns the conduct of the parties before and after the agreement was signed, does not become an issue unless it is determined that this extrinsic evidence is admissible to interpret the contract.

- [30] The first step is to objectively determine the contractual intent of the parties by construing the plain and ordinary meaning of the words in the contract as a whole in light of the factual matrix surrounding it. Where the language of the contract is not ambiguous, which means there is only one reasonable interpretation, the words of the agreement are presumed to reflect the intention of the party. Extrinsic evidence, even in the face of ambiguity, cannot effectively amend the express terms of the agreement.
- [31] In this case, the terms of the partnership agreement clearly identified the premises at 6400 Kingsway as the location of the partnership and the purpose of the partnership, which was to start up a grill restaurant at that location. The agreement does not refer to an expansion of 6408 Kingsway as forming any part of the partnership. The agreement is completely silent as to any involvement of the premises at 6408 Kingsway in the partnership arrangement between the parties.
- [32] The partnership agreement stipulates that the defendant owns 100% of O'Point KTV, which is the name of the karaoke business at 6400 Kingsway, and thus he is legally entitled to sell 50% of it to the plaintiff and Mr. Gao. No warranty is made in regard to the defendant's ownership in the business at 6408 Kingsway, which reasonably infers that only the premises at 6400 Kingsway formed the subject of the agreement. Moreover, because the defendant has a partner in his restaurant at 6408 Kingsway, he would be unable to warrant that he owned the entire business as stipulated in the agreement.
- [33] Thus, the only reasonable inference is that the defendant meant he owned 100% of the business at 6400 Kingsway, and did not intend to include 6408 Kingsway's business in that warranty.
- [34] By the terms of the partnership agreement the defendant transferred independent control over the management of the partnership business to the plaintiff. This provision could only refer to the space at 6400 Kingsway because the defendant had a partner in the restaurant at 6408 Kingsway. There is no evidence of the partnership terms between the defendant and his partner at the restaurant at 6408 Kingsway. Nor is there evidence that the defendant's other partner consented to this article in the agreement. As a consequence, I must conclude that this part of the factual matrix surrounding the agreement leads to a strong inference that only 6400 Kingsway formed the subject of the partnership agreement, as otherwise the defendant could not grant 100% control over management to the plaintiff and Mr. Gao.
- [35] On the other hand, part of the factual matrix that existed before the contract was signed included the defendant's business plan and a building permit and floor plan that contemplated an expansion of the restaurant at 6408 Kingsway into the space at 6400 Kingsway. While this evidence is not in dispute, the defendant's evidence that he advised the plaintiff and Mr. Gao of this plan before the contract was signed is disputed by the plaintiff and Mr. Gao, who depose that they only learned of the defendant's business plan after the renovation was substantially complete in the fall of 2013.

- [36] The factual matrix is only admissible to give context to the written agreement when the other parties are aware of it. Further, the factual matrix cannot overwhelm the analysis or result in a wholesale amendment of the contract. It can only illuminate the terms of the agreement, not contradict them.
- [37] Based on my reading of the contract, even if it was the defendant's intention to expand the 6408 business into the space at 6400 Kingsway and take on two new partners, he did not incorporate any language into the partnership agreement to accomplish this objective and evidence admissible as factual matrix cannot fill this gap in the contractual language.
- [38] Extrinsic evidence that goes beyond the factual matrix also cannot be used to contradict the express terms of the agreement. It may only be used to interpret the agreement when there is an ambiguity in its terms, and then only if it is consistent with a reasonable interpretation of the language used by the parties. The language of the contract clearly describes an agreement to form a partnership to operate a grill restaurant at 6400 Kingsway, and not to an expansion of an existing restaurant at the adjacent location.
- [39] In my view, there is nothing ambiguous about the terms of the partnership agreement insofar as it describes the nature of the bargain struck by the parties. The extrinsic evidence led by the defendant that the partnership was in fact to be an expansion of the restaurant at 6408 Kingsway clearly contradicts the express terms of the partnership agreement signed by the parties.
- [40] To accept the defendant's version of the events would render meaningless the term of the agreement that the address of the partnership is limited to 6400 Kingsway, the defendant's warranty that he owned 100% of the business, and the term that the plaintiff would be the independent manager of the business. In addition, Article 2 of the agreement assigned responsibility for obtaining the required business licences and registrations to the defendant. Had the parties intended the agreement to relate to an expansion of 6408 Kingsway in accordance with the defendant's business plan, surely this provision would have referred to obtaining an extension of existing licences and registrations attached to the business at 6408 Kingsway, which is what the defendant actually did.
- [41] Further, the extrinsic evidence led by the defendant does not unequivocally support his interpretation of the partnership agreement. The defendant referred for the first time to a budget of renovation costs in the November 9, 2015 affidavit. He deposed that this budget was given to the plaintiff at the time they were negotiating the partnership agreement, but it was not included in the agreement at the plaintiff's request. He argued that the omission of a kitchen from the budget supports his claim that the partnership was formed to expand the existing restaurant at 6408 Kingsway, where the kitchen was located. There is a budget referred to in the written agreement. However, there is no budget attached to the agreement and there is no evidence to indicate that the list of costs the defendant allegedly sent to the plaintiff was the budget that he intended to attach to this agreement.

- [42] I note that the email the defendant deposed that he sent to the plaintiff, attaching a list of costs, refers only to the partnership agreement and not to any type of budget. Further, this list of costs is not entitled "budget", and it says nothing about an expansion of the restaurant at 6408 Kingsway. It refers to the cost of several items for the renovation, but does not refer to this list as the entire cost estimate.
- [43] The \$128,000 estimate in the list does correspond approximately to the reference in the contract to \$130,000 for interior decoration, but the renovations contemplated by the defendant and his actual expenses were well in excess of this estimate and included many items that were excluded from this list.
- [44] The list of estimated costs does not include any item that would have alerted the plaintiff or Mr. Gao that the defendant's plan was to expand 6408 Kingsway into the space occupied by the karaoke business at 6400 Kingsway. Indeed, the list indicates a contrary intention. The fact that the rent listed in the estimate is solely for 6400 Kingsway and does not include any portion of the rent for 6408 Kingsway is clearly supportive of the plaintiff's position that an expansion of that premise did not form part of the agreement.
- [45] For these reasons, I find the fact that the kitchen renovation is omitted from the list of items is not extrinsic evidence that supports the defendant's position.
- [46] In addition, the extrinsic evidence of the defendant's use of the business bank account is clearly supportive of the plaintiff's position. The bank account opened for the partnership business and into which the plaintiff and Mr. Gao deposited funds was not used to pay the rent for 6408 Kingsway. Only the \$11,000 monthly rent for 6400 Kingsway was paid from the monies contributed by the plaintiff and Mr. Gao. Moreover, while there were also renovations to the space at 6408 Kingsway at the same time as the renovations were carried out in 6400 Kingsway, the defendant deposed that the former expenses were never paid out of the partnership business account.
- [47] In my view, had the partnership contemplated an expansion of the restaurant at 6408 Kingsway as its purpose, there would have been no reason to limit the sharing of expenses to monies spent for 6400 Kingsway. The defendant's accounting practices after the agreement was signed therefore clearly support the plaintiff's argument that he bargained for a separate restaurant at 6400 Kingsway.
- [48] I am also unable to place any weight on the defendant's evidence that he disclosed to the plaintiff and Mr. Gao the floor plans and building permit applications for the expansion. In his discovery evidence, he testified that he only showed them copies of the document. However, in a much later affidavit of November 9, 2015, he deposed that Mr. Gao had a copy of the floor plan which he provided to the drywall contractor. Clearly this evidence is inconsistent and cannot be relied upon.

- [49] Second, the defendant's evidence that the plaintiff and Mr. Gao were aware of the nature of the renovations going on at the two Kingsway premises is also unreliable. Whereas in the first affidavit the defendant deposed that the drywall work commenced on May 20, 2013, which is prior to the signing of the contract and indicates that he supervised the work, it was not until the November 9, 2015 affidavit that the defendant deposed that Mr. Gao and the plaintiff were present for the drywall work and helped with this work. Moreover, in both his affidavits the defendant only vaguely refers to tearing down walls, which was necessary inside the karaoke premises as well as between the two premises. It is unclear, based on the defendant's two affidavits, that the plaintiff and Mr. Gao played any role in tearing down the walls adjoining the two premises.
- [50] Lastly, the defendant's bare statement that the plaintiff and Mr. Gao supervised the whole of the renovation is not only contrary to his first affidavit, wherein the defendant says he supervised the drywall work, but contrary to the undisputed evidence that the plaintiff was in China from early July to the end of September 2013.
- [51] The defendant's statements about the parties' negotiations for the contract in his first affidavit also support a conclusion that the subject of the partnership agreement was limited to the business at 6400 Kingsway. At paragraphs 22, 24 and 25 of the affidavit dated October 27, 2014, the defendant says as follows:
- 22 On May 8, 2013, I was on a trip to [Horseshoe] Bay with Shanzhao Qian in West Vancouver. I received a phone call from the Plaintiff Tao Ning and Jian Gao. In this phone call, the Plaintiff Tao Ning and Jian Gao wanted to discuss about purchasing 50% of business shares on 6400 Kingsway.
- 24 On or about May 11, 2013, I asked for \$130,000 to sell the 50% shares of 6400 Kingsway business. The Plaintiff Tao Ning and Jian Gao didn't have that much money and offered \$115,000 to purchasing 50% of business share on 6400 Kingsway.
- 25 On or about May 11, 2013, I agreed the \$115,000 sale price because the Plaintiff Tao Ning and Jian Gao promised to be fully responsible to manage the business of 6400 Kingsway and fully engage work for free during renovation period.
- [52] Nowhere in this statement does the defendant depose that the plaintiff and Mr. Gao agreed to purchase a 50% interest in a business that was merely going to be an expansion of another business which they had no ownership in or control of. It does not appear that 6408 Kingsway and its business formed any part of the initial discussions or the bargain struck, as described by the defendant.
- [53] When interpreting the written agreement between the parties it is also important to consider what is omitted. In this case, the agreement is completely silent as to how the parties were going to operate the business at 6400 Kingsway as an expansion of the restaurant at 6408 Kingsway. There are no terms in the agreement addressing what facilities and equipment would be shared by the two premises, how profits and expenses would be

shared and divided, whether both partnerships would share staff, and how control over the staff would be exercised, and what the relationship between the defendant's partner in 6408 Kingsway would be with the plaintiff and Mr. Gao.

- [54] The fact that these terms were not included in the contract strongly supports the plaintiff's position that they only agreed to a standalone grill restaurant business at 6400 Kingsway.
- [55] For these reasons, I find the extrinsic evidence is not only inadmissible, because it contradicts the unambiguous terms of the agreement, but for the most part it also supports the plaintiff's position and is otherwise unreliable or equivocal.
- [56] I thus find that the defendant did not enter into a partnership agreement to start up and operate an expanded restaurant at 6400 and 6408 Kingsway with the plaintiff and Mr. Gao. At one point it may have been the defendant's intention to expand the restaurant rather than open an independent restaurant at 6400 Kingsway. However, he failed to incorporate terms into the partnership agreement to accomplish this objective and did not come to an agreement to do so with the plaintiff and Mr. Gao.
- [57] As a consequence, the only enforceable contract between the parties is an agreement to construct and operate a standalone grill restaurant at 6400 Kingsway in a partnership relationship.
- [58] The defendant failed to carry out the terms of the partnership agreement in several respects. First, he did not obtain licences for the restaurant, and instead he obtained permission to extend the licences from 6408 Kingsway so as to include 6400 Kingsway.
- [59] Second, the defendant spent all of the monies contributed by the plaintiff and Mr. Gao on a renovation that contemplated an expansion of the existing restaurant. As a consequence, the space at 6400 Kingsway lacked the essential elements necessary for a standalone restaurant, most significantly a kitchen.
- [60] I also note that there is no evidence that the defendant sought and received the consent of the landlord to change the use of 6400 Kingsway from a karaoke space to a grill restaurant. The purpose for the space was an express term of the lease and the lease restricted the use of the premises to a karaoke and snack bar. This would have been a concern regardless of the other breaches of the partnership agreement. However, it is a minor issue when one considers the gravity of the other breaches committed by the defendant.
- [61] In my view, the defendant's actions constitute a fundamental breach of the partnership agreement and provided grounds for the plaintiff, as principal and as agent for Mr. Gao, to terminate the partnership and sue for damages.

- [62] The breaches of contract by the defendant are fundamental for several reasons. They go to the root of the contract and frustrate the object of the contract because the parties contracted for a share in a restaurant at 6400 Kingsway rather than part ownership in the expansion of an existing restaurant at 6408 Kingsway. The defendant's expenditures of partnership monies were not related to the object of the contract, which constitutes substantial failure of performance.
- [63] Lastly, the breaches deprive the plaintiff and Mr. Gao of substantially the whole benefit of that which was the parties' intention that they should obtain from the contract. Instead of being partners in a standalone restaurant at 6400 Kingsway, they were now partners with the defendant and an undisclosed third party in an expanded restaurant at 6408 Kingsway.
- [64] By failing to carry out the bargain struck with the plaintiff in this manner, the defendant undermined the very thing bargained for, and that is the test found in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499-500.
- [65] Turning to the appropriate remedy, the law is clear that when there is a fundamental breach of contract, the other party is entitled to terminate the contract. The measure of damages is equal to the monies paid by the plaintiff and Mr. Gao pursuant to the partnership agreement because the defendant's breach of the partnership agreement essentially deprived them of the whole of the bargain they made.
- [66] The defendant admits that he received \$115,000 for a 50% share of the business. The defendant does not dispute that he received a further \$102,000 from the plaintiff and Mr. Gao for the start-up costs, and that these monies were used to renovate an expansion of the restaurant at 6408 Kingsway. This leaves a total of \$40,000 in dispute.
- [67] The plaintiff and Mr. Gao deposed that they made several cash payments to the defendant for a total of \$40,000 in June, July and August 2013. In each case, the plaintiff and Mr. Gao have provided their bank account records showing the cash withdrawals and on the same dates, or very close in time to these dates, the business account records show a transfer of the same amounts of cash from the defendant's personal joint bank account with his wife to the business account.
- [68] While the defendant's wife deposed that she deposited these amounts from their joint account, the defendant denied that he received these monies from the plaintiff and Mr. Gao on the dates specified. Neither the defendant nor his wife has provided any evidence as to where they obtained these funds. Although the plaintiff demanded that the defendant produce all of his bank records to support a claim the monies came from his personal funds, he failed to produce these records and instead only attached a portion of these records to his wife's affidavit.

- [69] The defendant's wife referred to receiving money from her parents but did not disclose any documentary evidence of this transfer. Nor did she provide her bank records to show the receipt of these funds and she did not depose that these monies were paid into the business account and thus formed part of the defendant's contribution to the renovation expenses.
- [70] This is a summary trial proceeding and the court should not make findings of fact based on a weighing of the relative credibility of the parties' evidence. However, where the evidence of the defendant fails to support his position and the evidence of the plaintiff and Mr. Gao appears to be unassailable, it is not a question of relative credibility. In this case, I find the defendant has failed to produce any evidence that he supplied the disputed funds. There is only a bare assertion that he did not receive any cash payments from the plaintiff and Mr. Gao on the dates they depose.
- [71] In addition, I must draw an adverse inference against the defendant because he has failed to produce all his bank records. In this regard, I must infer that the bank account records would not support his case that the disputed monies came from his personal funds rather than from cash payments provided to him by the plaintiff and Mr. Gao.
- [72] In these circumstances, the defendant's bare assertion amounts to no evidence at all. Conversely, the sworn evidence of the plaintiff and Mr. Gao, supported by their personal bank account records and the business account records, provides cogent and reliable evidence that they supplied the disputed \$40,000 in cash payments to the defendant.
- [73] Accordingly, I order the defendant to pay the total amount of monies paid by the plaintiff and Mr. Gao for the purchase price of the partnership and the start-up costs as damages for breach of contract. I find the total amount owing to be \$257,000.
- [74] The defendant shall also pay the plaintiff's costs at Scale B, and pre-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [75] The defendant's counterclaim is based on the plaintiff's decision to prematurely terminate the partnership and the loss occasioned to the defendant as a consequence. However, because I have found that the defendant committed a fundamental breach of the contract, the plaintiff had a right to terminate the agreement when he did and sue for damages.
- [76] The counterclaim, as framed, has no merit because the monies expended by the defendant were not properly incurred pursuant to the contract between the parties or as a result of any breach of contract by the plaintiff.
- [77] The defendant has not pleaded damages in quantum meruit based on the plaintiff's knowledge that he was expanding the restaurant at 6408 Kingsway instead of creating a standalone restaurant at 6400 Kingsway. However, his oral argument clearly raises the issue of quantum meruit. Had this claim been pleaded by the defendant, I would have found that the counterclaim could not proceed by summary trial because the material facts in support of the plaintiff's knowledge of the defendant's business plan were in dispute.

- [78] Normally, the failure to plead this remedy would be fatal to the defendant's claim. However, in the circumstances of this case, I find it is appropriate to exercise my discretion to adjourn adjudication of the defendant's counterclaim and provide the defendant with an opportunity to amend his pleadings to include a claim for damages in quantum meruit.
- [79] The defendant is self-represented and English is obviously his second language. In fairness, I permitted the plaintiff to adjourn and apply to amend his pleadings to include a claim for Mr. Gao based on agency. It is late in the proceedings, but I find the defendant should be given the same opportunity.
- [80] It may be that the defendant will decide not to pursue his counterclaim for quantum meruit, and the plaintiff's judgment is not affected by this claim. However, the defendant should have an opportunity to seek legal advice about this matter.
- [81] I am not seized of the counterclaim. Oral evidence will be necessary to resolve the conflict in the material facts with respect to a claim for quantum meruit. The claim for breach of contract must be dismissed, but I adjourn this proceeding to give Mr. Li an opportunity, if he so chooses, to apply to amend his pleadings in the counterclaim for quantum meruit and therefore the dismissal of his counterclaim based on breach of contract will be held in abeyance pending that application.
- [82] Mr. Li will have three months to make this application. Thereafter, the plaintiff will be at liberty to apply for an order dismissing his claim entirely. On this basis, the defendant's counterclaim is adjourned generally.
- [83] Just for clarity, Mr. Li, the only portion of the counterclaim that you would actually be proceeding with is that based on quantum meruit because the facts in dispute would go to that claim only, not the breach of contract claim that you have pleaded in your counterclaim. In other words, although the facts that you allege in your counterclaim could support quantum meruit, if they were proven on a balance of probability, I have essentially dismissed your breach of contract claim because I found, on the basis of the terms of the contract, the plaintiff and Mr. Gao had a right to terminate at that time.
- [84] It is only if the court, in subsequent proceedings, grants you permission to amend your pleadings and you pursue a remedy in quantum meruit, that you will be able to proceed with your counterclaim at all, and you must make that application within the next three months.
- [85] I will not remain seized of that application. That proceeding will have to involve an oral hearing because of the conflict in the evidence.
- [86] I am going to order a copy of these reasons so the parties are very clear on what findings I have made in this case and what would be left for the court to decide if there is a quantum meruit proceeding.

"Bruce J."

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