

CANADA / JUDGMENT

Pan v. Dong

2024 BCSC 869

COURT

Supreme Court of British Columbia

DECIDED

22 May 2024

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2024 BCSC 869 Pan v. Dong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pan v. Dong,

2024 BCSC 869

Date: 20240522

Docket: S2010806

Registry: Vancouver

Between:

An Dong Pan

Plaintiff

And

Jia Hao Dong, Xu Dong Liu and Jing Cai

Defendants

And

Jia Hao Dong and Xu Dong Liu

Third Parties

Before: The Honourable Justice Hardwick

Reasons for Judgment

The Plaintiff appearing on her own behalf:

A.D. Pan

Counsel for the Defendant Jing Cai:

J.P. Scouten

D. Sue-A-Quan

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 8 - 12; 15 - 18

and March 28, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 22, 2024

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Introduction

- [1] This case addresses issues arising from the murky underworld of currency conversions between Canada and China.
- [2] The plaintiff An Dong Pan ("Pan") brought this action against the defendants, Jia Hao Dong ("Dong"), Xu Dong Liu ("Liu") and Jing Cai ("Cai") seeking to recover losses totaling \$431,000 sustained in a currency exchange transaction between Canadian dollars ("CDN") funds and the Chinese currency Renminbi ("RMB").
- [3] Pan was not actually the party that advanced the funds at first instance. Rather, Pan was assisting a client in his professional capacity as a realtor when the currency transaction failed to proceed successfully.
- [4] Pan, to his credit, used personal funds to reimburse his client when it was apparent that the currency exchange was not going to proceed successfully. There is an Absolute Indemnity Agreement which confirms the standing of Pan to pursue this claim. This is not disputed.
- [5] At the time of trial, for reasons I will articulate, the only effective remaining defendant was Cai. Liu and Dong did not appear at trial. Although not expressly given under oath or affirmation, I accept Pan's submission that he did make efforts to locate Liu and Dong but was unsuccessful. It would clearly be in Pan's interests to have been able to examine them and so the failure to call them cannot result, I conclude, in any adverse inference against Pan (see *Singh v. Ready*, 2019 BCCA 79 at paras. 9-10).
- [6] In a similar regard, Pan, who self-represented himself at trial very capably, is a sympathetic plaintiff. With few quite minor exceptions, I find Pan to be a credible witness such that a comprehensive *Bradshaw v. Stenner*, 2010 BCSC 1398, analysis would not be required but for the nature of the claims.
- [7] Indeed, consistent with this, Cai acknowledges that Pan sustained a loss in the amount of \$431,000, but denies that she is legally liable for that loss on the interpretation of the relevant law and the application of the generally uncontested facts to said law.

Factual summary

- [8] Noting the above reference to the absence of Dong and Liu, the witnesses who testified at trial were as follows:

- a) Pan;
 - b) Shu Leon Sun;
 - c) Hong Jun Fan (whose evidence, upon considering the defendant Cai's objection, I ultimately ruled inadmissible as not meeting the requisite evidentiary test for relevancy in this case based upon the pleadings despite my accepting his evidence was otherwise credible);
 - d) Xiaoling Wang; and
 - e) Cai.
- [9] A significant number of documents were also tendered as evidence at the trial, including various "WeChat" communications related to the currency exchange transaction directly at issue in the action, as well as written communications regarding other currency exchange transactions that Cai, Dong and Liu had been previously involved in.
- [10] The "WeChat" communications between the parties were translated into English for the purposes of this proceeding and appropriate certifications of those translations were provided and entered into evidence. Despite being appropriately before the Court, official translations can still present some challenges to the court where the court is wholly reliant on translations due to an unfamiliarity with the language in issue.
- [11] In this regard, I will recognize that I do have some concerns that there were slight inaccuracies in the translation of "WeChat" communications" in this matter. However, both Pan and Cai were the parties involved in the most material "WeChat" communications and had the opportunity in direct and/or cross-examination to bring the Court's attention to any issues arising. I am thus satisfied that the "WeChat" communications, as translated, are reliable except as where clarified or contextualized by the parties.

The Pleadings

- [12] The notice of civil claim in this action was filed on October 26, 2020.
- [13] The amended notice of civil claim was filed on October 30, 2020, and a second amended notice of civil claim was filed on July 7, 2023. (the "SANOCC").
- [14] The SANOCC pleads certain material facts against Dong, Liu, and Cai in support of claims made against all of the defendants, jointly and severally in the amount of \$431,000 under the following causes of action:
- a) Breach of contract;
 - b) Fraudulent misrepresentation;
 - c) Negligent misrepresentation;
 - d) Negligence;

- e) Liability of Dong and Liu, as principals, for the alleged wrongs committed by Cai as their agent; and
 - f) Unjust enrichment.
- [15] The relief sought in the SAN OCC includes inter alia that the defendants pay to Pan \$431,000 plus interest and costs.
- [16] The response to the amended notice of civil claim of Cai was filed on November 30, 2020 and the response to the second amended notice of civil claim of Cai was filed on October 26, 2023.
- [17] On November 18, 2021, Pan successfully obtained a default judgment against Dong in the amount of \$431,000 plus costs (the "Default Judgment").
- [18] Pan successfully personally served Liu with the SAN OCC and was within his rights under the Supreme Court Civil Rules to obtain default judgment against Liu. Pan elected not to do so. I accept he did so on the basis of the belief that Liu is impecunious and that the default judgment would be a "dry judgment" but he nonetheless intentionally made this election to obtain default judgment against only Dong and pursue this matter to trial against Cai.

Notice to Admit

- [19] Pursuant to a notice to admit served by Cai dated January 18, 2023, Pan admitted the following in his response to notice to admit dated March 10, 2023 (the "NTA Response"). Recognizing there is overlap in certain defined terms in these reasons for judgment, I consider it important for the record that the admissions are set out verbatim as they appear in the NTA Response:
1. On January 7, 2020, the Plaintiff, An Dong Pan ("Pan") and the Defendant, Jing Cai ("Cai") entered into an agreement to exchange \$445,000 CAD for \$2,371,850 RMB (the "Agreement").
 - ...
 3. Cai entered into the Agreement as an agent on behalf of an undisclosed principal, the Defendant, Jia Hao Dong ("Dong").
 - ...
 9. Upon inquiry about the Missed Payment, Cai informed Pan that she was an agent acting on behalf of Dong and had been authorized by Dong to enter into the Agreement.
- [20] On January 22, 2020, Cai provided Pan with the phone number for Dong.
- [21] After January 22, 2020, Pan communicated directly with [Dong] through telephone call and text messages, and Dong made multiple representations regarding repayment of debts owing from the Agreement.
- [22] To date, Pan has received the following payments from Dong:

- a) \$5,000 CAD on March 28, 2020;
- b) \$2,000 CAD on May 13, 2020;
- c) \$2,000 CAD on May 27, 2020; and
- d) \$5,000 CAD on July 4, 2020.

[23] Presently there is still an outstanding balance of \$431,000 CAD owing to Pan (the "Amounts Owing").

[24] On or about August 30, 2020, Dong informed Pan that he would pay Pan \$10,000 toward the balance of the Amounts Owing by the end of every month, beginning in September of 2020.

Overview of Evidence Given at Trial

The Plaintiff's case

An Dong Pan

[25] Pan testified that he was first introduced to Cai through his wife who had purchased "bird's nests" from Cai previously. I learned during the course of the trial that "bird's nests" (also known as swallow nests), are created from solidified saliva by edible-nest swiftlets, Indian swiftlets and other swiftlets of the genera *Aerodramus*, *Hydrochous*, *Schoutedenapus* and *Collocalia*, which are harvested for human consumption. They are, I understand, a delicacy in Chinese cuisine and priced accordingly.

[26] It was through the purchase of these "bird's nests" by his spouse that Pan became aware that Cai was involved in the currency exchange business.

[27] Pan's wife was not a witness at trial.

[28] Pan testified about the circumstances of his entering into the first successful currency exchange transaction facilitated by Cai of \$100,000 CDN (the "First Transaction"). The funds owing pursuant to the First Transaction were paid to him through two separate tranches--a portion by cheque the same day, and a portion by cash paid several days later.

[29] Pan, despite being a commercial real estate agent, apparently did not conclude it was odd to receive a satchel of cash. This ties back into my opening statement about the murky nature of these currency exchanges.

[30] Pan testified that he entered into the second transaction which involved the exchange of \$445,000 (the "CAD Funds") for 2,371,850 RMB (the "RMB Funds") with payment in Canadian dollars to be received in the following amounts on approximately the following dates:

- a) \$85,000 on January 12, 2020;
- b) \$230,000 on January 16, 2020; and
- c) \$130,000 on January 18, 2020,

(the "Agreement").

- [31] Pan testified he arranged for the deposit of RMB Funds in China to a bank account provided by Cai on or about January 7, 2020. When the first tranche of the expected CAD Funds did not come through, he followed up with Cai who informed him that she was not processing the currency exchange herself but rather was acting as an agent for the defendants, Liu and Dong.
- [32] Pan testified that when none of the CAD Funds came through, he continued to follow up with Cai who provided him with Dong's phone number on January 22, 2020, consistent with the notice to admit. After that date, Pan started to demand payment from Dong and continued to communicate with Cai about his collection attempts.
- [33] As set forth above, Pan confirmed that he received a total of \$14,000 from Dong between March and July 2020.
- [34] As also set forth above, Pan testified that in August 2020, he entered into a repayment plan with Dong whereby Dong agreed to repay the sum of \$10,000 per month until the CAD Funds were fully repaid.
- [35] Pan acknowledged that Cai was not a party to the repayment plan for the CDN Funds and was, to his knowledge, only informed about it after he and Dong agreed to it.
- [36] On cross-examination, Pan confirmed that he was told that Cai was acting on behalf of someone else, who was repeatedly referred to as "the boss". However, Pan was very firm in his evidence that the reference to "the boss" was an ordinary cultural reference which was meaningless to him.
- [37] This is the key portion of the evidence of Pan that I do not accept as credible.
- [38] Pan confirmed in various WeChat messages that both he and Cai were agents or what I would describe as "middlemen". I recognize the latter is a gendered term, which the court is mindful to avoid for obvious reasons but the description of the scenario as Cai being a "middlewoman" fails, in my view, to accurately describe the situation based upon commonly recognized vernacular. In this regard, I note that "middleman" is defined in the Merriam-Webster dictionary as an intermediary or agent between two parties whereas the term "middle woman" in the same dictionary is defined as a woman who acts as intermediary between homeworkers and a lace warehouse. There is no lace of any kind in this case.
- [39] Lastly, Pan testified as to the various steps he took after proceedings were commenced to try and collect the CAD Funds from Dong and Cai, including registering certificates of pending litigation against properties owned by Dong, Cai, and Liu's parents at different times. As noted above, these efforts were largely unsuccessful save for the \$14,000. I will return to this point in due course.

Shu Leon Sun

- [40] Mr. Sun testified that he was introduced to Cai and she facilitated a few successful currency exchange transactions in or about 2017 to 2018.
- [41] Mr. Sun continued to refer clients to Cai until one unsuccessful transaction of \$100,000 in or about April 2019. He was expecting the funds to be received within two to three weeks and when that did not occur, he followed up with Cai. It was at that time that Cai introduced him to Dong and provided Dong's contact information. Mr. Sun testified that he believed that Cai and Dong were working together but he did not know their relationship.
- [42] Mr. Sun confirmed that he believed Cai was acting as a "middleman" or intermediary facilitating the transaction between his client and the financiers of the transaction.
- [43] Mr. Sun confirmed that after he met with Dong and was provided his contact information, Dong first provided \$20,000 cash to him and then a few hundred dollars a week until he had been repaid approximately \$75,000 by December of 2019. I say approximately because Mr. Sun did testify at one point that he had been repaid \$70,000. In my view, this discrepancy does not affect the credibility of Mr. Sun's evidence. He is not a plaintiff who has to precisely prove his claim and this transaction completed some four years before the trial of this action. The fact that the funds were paid in cash by Dong though is entirely consistent with the other evidence led.
- [44] Mr. Sun also, I accept, recovered some of the funds owing indirectly by entering into a listing agreement to list Dong's property located in Richmond, BC ("Dong's Condo") for sale. In so doing, Mr. Sun acknowledged that he negotiated a higher rate of commission at 5% of the sale proceeds. This amount exceeds general industry standard commission rates for a residential property. Mr. Sun's evidence that the additional commission was not consideration for the failed currency transaction is not credible. It defies an air of reality that Dong would select Mr. Sun as the listing agent for the sale of the Dong Condo and pay a notably above market commission if there was not a connection between the listing arrangement and the failed currency transaction. Of note, Pan released his certificate of pending litigation against Dong's Condo to allow the sale to complete.
- [45] Pan confirmed that he only received approximately \$5,000 out of the approximately \$50,000 in the Dong Condo net sale proceeds and that he did not question the amount of commission that was received by Mr. Sun. This is second portion of Pan's evidence which I find suspect. I do not question the amount Pan received from the sale of the Dong Condo as that is clearly proven through documentary evidence. However, as a commercial real estate agent, Pan would, I find, have been aware that the amount of commission paid was above usual market rate and failed to make inquiries as to why despite his active litigation against Dong, Lui and Cai.

- [46] On cross-examination, Mr. Sun testified that Cai told him there were different methods of funding transactions with different funding speeds and exchange rates, and that one method of transaction would be for funds to be wire transferred from Hong Kong to Canada. He distinguished the wire transfer transaction from a different type of transaction where the recipient funds were already located in Canada.
- [47] Mr. Sun testified that Cai told him this particular unsuccessful transaction (namely, Mr. Sun's transaction) was for a wire transfer of funds from Hong Kong which had gotten "stuck" in Hong Kong for some unknown or unexplained reason. The particular relevance of this evidence will become clear in due course.

Xiaoling Wang

- [48] Ms. Wang testified that she was provided with Cai's contact through a mutual acquaintance and in or about April 2019, entered into a transaction with Cai to convert the sum of \$1,000,000 CDN from 5,040,000 RMB. Ms. Wang testified that she expected to receive the funds in about two weeks, but that she ultimately only received a total of \$100,000.
- [49] After she did not receive the full amount of the transaction, Ms. Wang continued to follow up with Cai and Cai informed her that the delay was due to issues with the funds in Hong Kong, and provided screenshots of conversations which stated there were issues in Hong Kong delaying receipt of the funds in Canada.
- [50] On June 2, 2019, Ms. Wang was provided with an agreement for the return of the remaining funds to be paid within two months (the "June 2019 Contract").
- [51] Ms. Wang confirmed that she and Cai went together to Dong's office where he produced the June 2019 Contract which Dong signed. She testified that Cai told her Dong was the legal representative of the business.
- [52] Ms. Wang confirmed that only Dong signed the June 2019 Contract initially and that she asked Cai to sign the June 2019 Contract on a later date after she spoke with her husband.
- [53] Ms. Wang testified that in January 2020 she was provided with Liu's WeChat contact, but when she attempted to add Liu, Liu did not accept her "add request". Ms. Wang testified that Cai periodically communicated with her until about January 2021 after which Cai ceased communicating with her.
- [54] On cross-examination, Ms. Wang confirmed that she did receive screenshots from Cai informing about the reasons for the delay but said that she believed these screenshots contained fake information designed to defraud her. Although not capable of being expressly proven, Ms. Wang's evidence in this regard was credible. This was not a trivial dispute about a Facebook Marketplace or Craig's List sale of a pair of shoes or a coat. This was a currency transaction involving \$1,000,000 CDN and Ms. Wang's suspicions regarding the explanations about the "disappearance" of the funds involved in the transfer are not spurious.

The Defendant's Case

The Defendant, Cai

- [55] As an opening comment regarding the credibility of Cai, and having regard to the Bradshaw factors, it was my observation that Cai presents as a rather naïve and somewhat unsophisticated individual who was notably uncomfortable testifying, even with the benefit of an interpreter but who, with the one particular noted exception, also attempted to answer the questions posed truthfully. There was no change in her demeanour as between direct and cross-examination.
- [56] However, I also note that the conduct of Cai following the removal of the certificate of pending litigation of her personal residence, as noted in para. 39 of these reasons, brings into significant question her credibility. Specifically, within approximately one month of the removal of the certificate of pending litigation, Cai transferred ownership of her primary residence to her spouse. The allegation of a fraudulent conveyance contrary to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 was not before me at trial, but I have absolutely no doubt that the timing of these events was not purely coincidental.
- [57] Returning to the chronology, Cai testified that she became involved with Dong and Liu's business in facilitating currency exchanges when she first met Liu as a customer for her "bird's nest" business.
- [58] After exchanging funds on behalf of a number of her customers, Cai became more involved in referring business to Dong and Liu's currency exchange business, which she stated she believed had mutual benefit as it satisfied her "bird's nest" customers and likewise provided a source of currency exchange clients for Liu. She deposed that she received no direct financial benefit from her role in these transactions. This evidence is suspicious at best and simply lacks any reliability given Cai was continuing to facilitate these currency exchanges after her own unsuccessful currency exchange. This is the portion of Cai's evidence which I expressly reject. Rather, I conclude that Cai was continuing to facilitate these currency exchanges in an attempt to recover some or all of the funds that she personally had lost in her currency exchange transaction with Dong and Liu.
- [59] Largely consistent with the evidence of Mr. Sun, Cai explained there were originally two primary ways of exchanging currency:
- a) Firstly, Cai described a "face-to-face" transaction which involves the customer depositing RMB into an account in China, and then receiving the equivalent CDN the same day or shortly thereafter; and
 - b) Secondly, Cai described a slower exchange method, where the customer would provide their Canadian banking details and expect the exchanged funds to be deposited into their account approximately 15 days after the RMB funds to be exchanged were deposited into a specified bank account in China.

- [60] The quicker "face-to-face" method had a less favourable exchange rate, and the slower exchange method had a more favourable exchange rate. Cai confirmed that many customers, including Ms. Wang and Mr. Sun, chose the slower exchange method with the better exchange rate. This is consistent with the evidence of Ms. Wang and Mr. Sun.
- [61] Cai testified that the currency transactions all took place without issue until in or about May 2019 when a number of wire transfers originating from Hong Kong did not go through. There was no evidence led to contradict the success of the transactions facilitated by Cai prior to in or about May 2019.
- [62] Cai further testified that when issues then arose she followed up with Liu who told her that there were issues with the banks in Hong Kong due to "turmoil" at the time and that the funds were "stuck" in Hong Kong. Whether this was true is unknown because I accept that Cai was relying on what she was being told by Liu and Liu, as noted, did not give evidence at trial. This explanation was consistent though with what was told at the material time to Mr. Sun.
- [63] Cai also testified that she was aware of other persons whose wire transfers also got "stuck" in Hong Kong but there is no actual proof of these unidentified transactions before the Court.
- [64] Despite the vague nature of the evidence of wire transfers being "stuck" in Hong Kong, I do accept that Cai regularly forwarded updates and information she received from Liu and Dong to the intended beneficiary of the currency exchange.
- [65] Returning again back in the chronology of events, Cai testified that she conducted a wire transfer transaction around the same time as Ms. Wang did, so she was not in a position to "warn" Ms. Wang about the possibility of funds being "stuck" in Hong Kong.
- [66] By the time Cai discussed the currency exchange possibility with Pan and his wife around the end of December 2019 however, Cai knew or believed that the wire transfer method of funding transactions was "unstable". Cai testified she advised both Pan and his wife that they should not proceed with the wire transfer mechanism of funding this currency exchange transaction. In addition to orally advising them not to proceed by wire transfer, Cai also sent Mrs. Pan a WeChat message repeating her recommendation.
- [67] Around this time, Liu had informed Cai of another type of exchange which did not necessarily require the transfer of money internationally from Hong Kong to Canada and which would be funded by cash already located in Canada. This transaction involved the deposit of RMB in China and the receipt of Canadian dollars by way of a bank draft issued from a Canadian bank account. Liu informed Cai, and Cai, I accept, legitimately believed that this was more secure than the wire transfer mechanism because a Canadian bank draft ensured that the funds had already cleared and were available in Canada.

- [68] On or about December 29, 2019, Pan elected to make the First Transaction using the face-to-face transaction method to convert a total of \$100,000 at an exchange rate of 5.33, said rate which was provided by Liu. Liu informed Cai to instruct Pan to split the deposit into two separate bank accounts in China due to the possibility that the banks in China would flag any transaction exceeding 500,000 RMB as it was the end of the year.
- [69] Pan deposited 533,000 RMB into two accounts in China, one belonging to Mr. Song in the amount of 500,000 RMB and one belonging to Cai in the amount of 33,000 RMB. In turn, Cai remitted the 33,000 RMB received from Pan to another bank account as directed by Liu.
- [70] Pan was to receive the \$100,000 in two separate tranches of \$50,000 each. Pan received a cheque in the amount of \$50,000 the same day that he transferred the 533,000 RMB and was to receive the remaining \$50,000 in cash by January 8, 2020. On January 8, 2020, Cai picked up \$50,000 in cash and delivered to it Pan as described above.
- [71] On January 7, 2020, Liu informed Cai that there would apparently be three tranches of funds becoming available in the form of bank drafts in the following amounts on the following dates:
- a) \$85,000 on January 12, 2020;
 - b) \$230,000 on January 16, 2020; and
 - c) \$130,000 on January 18, 2020.
- Lui did so by sending Cai a screenshot of a conversation she had with persons she told Cai were the financial backers of these funds, and asked Cai if she knew anybody who might want to purchase these three bank drafts.
- [72] Cai contacted Pan, forwarded a snippet of the screenshot sent by Liu, and asked Pan whether he wanted to purchase these three bank drafts which would become available on these three aforementioned dates. Pan agreed and they entered into the Agreement.
- [73] Prior to the second tranche of \$50,000 of the First Transaction being received on January 8, 2020, Pan had already entered into and fully funded the Agreement on January 7, 2020, despite Cai suggesting that he make the three payments one step at a time and only to make the next installment payment after he had received the previous one. Pan did not take on Cai's suggestion but rather had the entire RMB Funds deposited in China as described.
- [74] Pursuant to the Agreement, the first tranche was due on January 12, 2020. On January 12, Pan followed up with Cai about the first tranche. Cai, I accept, followed up with Liu and was given reassurance that the funds were incoming. Cai forwarded her communication with Liu to Pan repeating the assurance that she was provided by Liu.
- [75] The second and third tranches did not come through and by January 22, 2020, it was clear that there were delays with receipt of the CAD Funds.

- [76] As noted, on January 22, 2020, Cai provided Dong's phone number to Pan, and thereafter Pan continually contacted Dong to inquire about the CAD Funds. Pan also continued to update Cai with his attempts to recover the CAD Funds, and requested that Cai continue to urge Dong, which, I accept, Cai did.
- [77] Between March 2020 and August 30, 2020, Pan received \$14,000 from Dong on account of the CAD Funds, and entered into an agreement with Dong for repayment of \$10,000 per month until the CAD Funds were fully repaid. Cai was not a party to this agreement nor was she consulted about it by either Pan or Dong. Cai was only made aware of the existence of this settlement agreement after it had already been fully executed by Pan and Dong.
- [78] Up until August 2020, Pan continued to update Cai with his attempts to recover the funds from Dong and did not give any clear indication that he thought Cai was responsible for his loss until close to the date he commenced this action against Dong, Liu, and Cai.

Applicable Law

Credibility

- [79] In *Bradshaw*, the Court outlined the general principles involved in assessing the credibility of witnesses in a trial:
- [186] 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. 152 (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).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those

conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

- [80] In *Bui v. Pacific Gate Development Group Ltd.*, 2023 BCSC 1700, the Court, referring to the decisions of *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 and *Fu v. Zhu*, 2018 BCSC 9, noted other considerations for the Court in assessing the credibility of witnesses, and particularly witnesses who testified from other cultural backgrounds through interpretation:
- [62] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 87-93, Justice Mayer described the appropriate approach to credibility analysis as follows:
- [87] Before I proceed further with my reasons, I consider it appropriate to make some general comments with respect to credibility, which as I have already said is a central issue in this case. Credibility issues arose as a result of changes in witnesses' evidence before and during trial, the nature of responses to questioning at trial including the witnesses' demeanour, the overall plausibility or logic of the witnesses' testimony and the conflicts in evidence of both the party witnesses and the evidence of independent witnesses and the documentary evidence.
- [88] I am conscious of the principles set out in the leading authorities concerning how the court should deal with credibility and reliability questions. Those include *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.), *R. v. H.C.*, 2009 ONCA 56, *Bradshaw v. Stenner*, 2010 BCSC 1398, *Pacheco v. Antunovich*, 2015 BCCA 100, and the cases referenced therein.
- [89] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.
- [90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.
- [91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being

particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[92] Some additional factors which may impact credibility include the following:

- a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony: see paras. 57-59, 86 of *F.H. v. McDougall*, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1.
- b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: *Le v. Milburn*, 1987 CarswellBC 2936 (W.L.) at para. 1; *Jones v. Jones*, 2008 BCSC 1401 at paras. 31, 32 and 60; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 9.
- c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: *Bradshaw* at para. 190;
- d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: *Osayande v. Canada (Minister of Citizenship And Immigration)*, 2002 FCT 368 at paras. 19 and 21;
- e) Credibility will be undermined when a witness (or party) has failed to produce documents: *Bradshaw* at para. 188; *Pacific West Systems Supply Ltd. v. Vossenaar*, 2012 BCSC 1610 at paras. 84 to 86;
- f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: *R. v. Storey*, 2010 NBQB 86 at para. 78; *Wang v. Wang*, 2017 BCSC 2395 at paras. 45-46 and 89-90; and
- g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: *Bradshaw* at paras. 191 to 192.

[63] In *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42, Justice Griffin also discussed the proper approach to considering interpreted testimony from witnesses of varying cultural backgrounds:

[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.

Principal and Agency - Law

- [81] In *Lange*, *The Doctrine of Res Judicata in Canada*, 5th Edition (2021, Butterworths, Toronto, ON), the author sets out the doctrine of alternative liability in chapter 8, subchapter 7, which reads in part:

The doctrine of alternative liability is a common law doctrine¹ relating to the liability of an agent or principal to a third party in contract. Like inconsistent rights or alternative remedies, it is a form of the doctrine of election in litigation. The general principle is found in the often quoted statement from *Murray v. Delta Copper Co.* Newcombe J., speaking for the Supreme Court of Canada, stated:

The ordinary rule is that the principal and agent may be liable to the other contracting party in the alternative, which alternative liability continues until the election of the latter to accept one, either the principal or the agent, as his debtor.

The doctrine of alternative liability is driven by the doctrine of cause of action estoppel. A judgment against the agent or the principal operates as a bar to a judgment against the other and this is so even if the judgment is obtained by default and there is an undisclosed principal, as was held in *M. Brennen & Sons Manufacturing Co. v. Thompson*.³ The doctrine is based on the principle that, where a judgment is obtained, every cause of action upon which the judgment is based is merged in the judgment and disappears.

For the purpose of applying the doctrine, it does not matter whether the plaintiff has sued the principal and agent in separate actions or in one action.⁴ It does not matter whether the judgment is obtained on the merits or by default, or that the judgment has not resulted in the satisfaction of the debt.

- [82] In situations of an undisclosed principal, the doctrine of alternative liability applies providing that the party seeking recovery has an election to pursue a judgment against a principal or an agent, but cannot claim against both: *Dan Gamache Trucking Inc. v. Encore Metals Inc.*, 2008 BCSC 343 at paras. 21-22:
- [21] The plaintiffs say that they had the option of either pursuing their claims in the bankruptcy proceeding or commencing an action against Encore. For that proposition they rely on *Crossline Carriers Inc. v. Selkirk Specialty Wood Ltd.*, 2004 ABPC 147. In my view, that case does not stand for the proposition that the plaintiffs are entitled to elect whether they want to prove that they have a property interest in the Account Receivable in the bankruptcy proceeding, or commence this claim. Rather, the case deals with the doctrine of alternative liability where one must choose whether to pursue an action against a principal or an agent.
- [22] The doctrine of alternative liability does not preclude a claimant from commencing an action against both a principal and their agent. It merely prohibits a plaintiff from obtaining a judgment from one and then pursuing the other: *Tedrick v. Big T. Restaurants of Canada Ltd.*, 1982 CanLII 2407 (SK QB), [1983] 2 W.W.R. 135, 21 Sask.R. 147 (Q.B.).
- [83] A plaintiff choosing to take judgment against one defendant makes an election, and is therefore estopped from making claim under the same cause of action against the other defendant. The liability is alternative, and not joint: *Fritz Plumbing Co. v. Guasp*, [1971] A.J. No. 90, 1971 CanLII 245 (AB QB) at para. 11-12:
- [11] Having entered judgment against the corporate defendant, how could the plaintiff now be heard to say that the corporate defendant was never liable to it for the same account? The positions are inconsistent and the plaintiff is estopped. If the plaintiff had proceeded to trial against both defendants, it could not have obtained judgment against both.
- [12] I hold that the plaintiff is barred from proceeding to judgment against the defendant Guasp by its election to enter default judgment against the other defendant.
- [84] In *Tiffany Gate Foods Inc. v. Jaguar Packaging Inc.*, [2007] O.J. No. 2015, 2007 CanLII 18149 (ONSC), the Ontario Superior Court of Justice adopted the reasoning of the Ontario Court of Appeal in *Lang Transport Ltd. v. Plus Factor International Trucking Ltd.*, 32 O.R. (3d) 1, 1997 CanLII 1904 (ONCA), and the Supreme Court of Canada in *Murray v. Delta Copper Co.*, 1925 CanLII 32 (SCC), [1926] S.C.R. 144 at p. 152, [1925] 4 D.L.R. 1061, and held that the doctrine of alternative liability precludes a plaintiff from taking judgment against both a principal and an agent:
- [36] Given the foregoing conclusion, effect must be given to the defence argument that the plaintiff, having chosen to sue Jaguar, is foreclosed from also seeking judgment against PMR, its agent. The applicable principle was stated in *Lang Transport Ltd. v. Plus Factor International Trucking Limited et al* (1997), 1997 CanLII 1904 (ON CA), 32 O.R. (3d) 1 (C.A.).

At common law, the rule of liability provides that either the principal or the agent may be liable to the third contracting party in the alternative. This alternative liability continues until the election of the third contracting party to accept one, either the principal or the agent, as the debtor: *Murray v. Delta Copper Co.*, 1925 CanLII 32 (SCC), [1926] S.C.R. 144 at p. 152, [1925] 4 D.L.R. 1061. Pursuant to this rule, the signing of default judgment is considered to be conclusive of an election to accept the party against whom default judgment is signed as the only debtor .

[85] More recently, in *Johwel Investments Inc. v. Welton*, 2022 ONSC 3148, the Ontario Superior Court of Justice (Commercial List) reiterated the doctrine of alternative liability does not preclude a plaintiff from commencing an action against both a principal and an agent, but prevents the plaintiff from obtaining judgment against both.

[25] Further, where an agent is personally liable on a contract, both the agent and principal are jointly liable on the contract, and the third party may obtain judgment against either the principal or the agent, but not both: *Canadian Encyclopedic Digest, "Agency"*, (Thomson Reuters Canada, 4th ed.), at IX.1(b).

[26] There is only one cause of action on the contract. When judgment is obtained and issued against the agent, the cause of action in contract merges into the judgment and no further proceeding can be taken against the principal. The ordinary rule is that the principal and agent may be liable to the other contracting party in the alternative, which alternative liability continues until the election of the latter to accept one, either the principal or agent, as his debtor: *Murray v. Delta Copper Co.* (1925), 1925 CanLII 32 (SCC), [1926] S.C.R. 144. See also *AGB Halifax Enterprises Inc. v. Wood Street Development Inc.* (1999), 1999 CanLII 7338 (ON CA), 125 O.A.C. 274.

[86] I note that *Johwel* was appealed, which reasons are reported at 2023 ONCA 132. Very simply stated, the appeal was dismissed on the basis that the appeal as "fundamentally flawed (at para. 21). The Ontario Court of Appeal thus did not substantively address the issue of alternative liability in a manner contrary to the lower court decision.

[87] Additionally, in *Wang v. WK Travel Inc.*, 2022 BCCRT 1116, the British Columbia Civil Resolution Tribunal held:

21. This leaves WK's liability. The applicants did not explicitly state why WK should be liable, but I infer they allege that WK should be liable as CEA's agent. Under the law of agency and the doctrine of alternative liability, an applicant may sue both the agent and principal. However, it may only obtain a judgment against one or the other, and not both. See, for example, *Dan Gamache Trucking Inc. v. Encore Metals Inc.*, 2008 BCSC 343 at paragraphs 21 to 22. As I have found CEA liable for the tickets, I find the claims against WK for the tickets should be dismissed.

Principal and Agency - Application

- [88] There is no cause of action for a plaintiff against both a disclosed principal and an agent. Rather, only the principal can be liable and obtaining a judgment against the agent is a nullity.
- [89] There may exist a cause of action of a plaintiff against either an undisclosed principal or an agent where the plaintiff can commence an action against both the undisclosed principal and agent, but the plaintiff must make an election to take judgment against either the principal or the agent.
- [90] Where the plaintiff elects to take judgment against the undisclosed principal, the plaintiff is thereafter estopped from seeking judgment against the agent under the doctrine of alternative liability.
- [91] In the circumstances of the case at bar, once Pan discovered that Dong was the true party to the Agreement, all further discussions about payment, and all part-payments were made by Dong, and not by Cai.
- [92] Dong is the disclosed principal and the true contracting party under the Agreement. There is, I find, no cause of action against Cai as she was acting as an agent for Dong.
- [93] Alternatively, I accept that Dong was an undisclosed principal at the time that the Agreement was entered into. However, once Pan discovered the identity of Dong, Pan had an election to pursue either the principal, Dong, or the agent, Cai.
- [94] Pan did not need to make the election at the time the claim was commenced, and was entitled to claim against both Cai, and Dong. However, the effect of obtaining the Default Judgment against Dong in the amount of \$431,000 and taking the execution steps was that Pan made an election under the doctrine of alternative liability and is now estopped from seeking the same judgment of \$431,000 against Cai for the same cause of action.
- [95] The pleadings and evidence do not support any claim for joint and several liability of both Dong and Cai. There is no separate cause of action set out in the SAN OCC against Cai which differentiates from the cause of action against Dong that resulted in the Default Judgment.
- [96] Under this cause of action in breach of contract under the doctrine of principal and agency, the case against Cai simply must fail.

Negligent Misrepresentation - Elements

- [97] As the Supreme Court of Canada set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, and as cited in *Hao Ran Investments Ltd. v. He*, 2016 BCSC 61 at para. 101, an action in negligent misrepresentation requires the plaintiff to prove the following elements:
- a) a duty of care based on a "special relationship" between the representor and the representee;

- b) the representation in question must be untrue, inaccurate, or misleading;
- c) the representor must have acted negligently in making said misrepresentation;
- d) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[98] Not all representations constitute actionable misrepresentations under the law. Rather, promises to deliver goods and provide services in the future are more properly construed as covenants rather than representations. In *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489, our Court of Appeal held:

[11] Although this point was not addressed in the Supreme Court, I doubt that the alleged representations constitute representations at all, not to mention actionable misrepresentations. In my opinion, it is more appropriate to view the alleged representations as creating a collateral contract to the main consulting agreement in which the consideration was the entering into of the consulting agreement. Breach of this collateral contract might properly found a claim for damages.

[12] The respondents submit, and I agree, that the alleged representations are better characterized as covenants. John A. Yogis, *Canadian Law Dictionary*, 4th ed. (Happauge: Barron's, 1998) at 66 defines "covenant" as an "agreement or promise to do or not do a particular thing; a promise incidental to a deed or contract " In contrast, a "representation" is "a statement in regard to some past or existing fact, circumstance or state of facts pertinent to the contract, which is influential in bringing about the agreement" (*Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990) at 1301 [Black's]). A promise that something will be done in the future cannot properly be construed as a statement respecting some past or existing fact. As such, it is not a representation.

[99] Further, allegations of negligent misrepresentation pertaining to future conduct or future events are not actionable at law: *PD Management Ltd.* at paras. 12-14, 20.

Negligent Misrepresentation - Application

[100] In my conclusion the alleged representations made by Cai are not true representations, but rather are covenants or promises to fulfil the Agreement in the future. They are therefore not actionable under the tort of negligent misrepresentation.

[101] Alternatively, the alleged representations made by Cai relate to alleged future conduct, specifically, Cai allegedly represented on January 7, 2020, that payment of funds in certain amounts would be made between January 12 and 18, 2020. The fact that these future events did not occur cannot be the factual basis to prove a negligent misrepresentation action.

[102] Under this cause of action, the claim for negligent misrepresentation against Cai must also fail.

Fraudulent Misrepresentation - Elements

[103] As set out in *Continental Steel Ltd. v. CTL Steel Ltd.*, 2015 BCSC 1672 at para. 205, aff'd 2018 BCCA 82, an action in fraudulent misrepresentation requires the plaintiff to prove the following elements:

- a) the defendant made representations to the plaintiff;
- b) the representations were false in fact;
- c) the defendant knew that they were false or made them recklessly without knowing whether they were true or false;
- d) the plaintiff was induced to act in reliance on the representations . . .

[104] In *SWS Marketing Inc. v. Xavier*, 2022 BCSC 743, the Court confirmed the requirement for fraud to be strictly pleaded and proved with full particulars provided, and noted the importance of proper pleadings:

[164] Fraud claims must be strictly pleaded and strictly proved: *BG Checo International Ltd. v. British Columbia (Hydro and Power Authority)* (1990), 1990 CanLII 819 (BC CA), 44 B.C.L.R. (2d) 145 (C.A.), at p. 168. Moreover, the Rules provide, in Rule 3-7(18):

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, . . . full particulars, with dates and items if applicable, must be stated in the pleading.

. . .

[168] These are not simply pleadings points. Proper pleadings, setting out the elements of a complete cause of action or defence, guide the evidence that must be adduced at trial. Here, neither inducement nor reliance on a false representation was pleaded or proved. Without evidence, the defence was doomed to failure.

[170] In summary, pleadings matter. The importance of proper pleadings, in accordance with requirements described in the authorities and the Rules, cannot be overstated. Counsel ignore those requirements at their peril.

[105] Application of the test requires the plaintiff to be very clear about what the "representations" are by looking at what has been pleaded in the notice of civil claim: *Heffel v. Cole*, 2023 BCSC 2139 at para. 132.

[106] In the present action, the SANOCC pleads that Pan relied upon certain alleged misrepresentations made by Cai on or about January 7, 2020, which induced Pan to enter into the Agreement. The key questions for the Court to determine in this case, then, are:

- a) What representations were made by Cai on or about January 7, 2020?
- b) What parts of those representations were false?
- c) What about those representations did Cai know or ought to have known were false?
- d) Was Pan induced to enter into the Agreement based on the representations?

Fraudulent Misrepresentation - Intention of the Represor

- [107] Allegations of fraudulent misrepresentation pertaining to future conduct or future events may be actionable at law if the party making the statement did not in fact have the intention at the time of the utterance: *Galaxy Sports Inc. v. Umbro Holdings Limited et al*, 2005 BCSC 278 at paras. 77-78.
- [108] An agent in a principal/agent relationship will not be considered liable unless the plaintiff can establish that the agent acted in a manner which constitutes fraudulent misrepresentation: *AZTA Management Corp. v. Croft Agencies Ltd.*, [2014] B.C.J. No. 2015, at paras. 139-142.
- [109] Civil fraud carries a high standard of proof and each of the elements of fraud must be proven with clear and convincing evidence: *Shen v. Gou*, 2023 BCSC 1735 at para. 107.
- [110] Mere silence is generally not enough to constitute a misrepresentation, but active concealment can be. However, an honest, albeit carelessly mistaken, belief will defeat an allegation of fraud: *Freeman v. Perlman*, 1999 BCCA 40 at paras. 15-17.
- [111] In *Crozman v. Ruesch*, [1993] B.C.J. No. 2345, 1993 CanLII 2670 (BCCA) at para. 10, our Court of Appeal held that a party who acts with honest intent will negate allegations of fraud by concealment, fraud by half truth, and fraud by untruth.
- [112] Applying these principles, I simply cannot conclude that the elements set out in para. 106 of these reasons were establish by Pan.
- [113] Pan is a more commercially sophisticated individual than Cai. He has been involved in prior currency transactions. Whilst I have rejected Cai's evidence that she did not have a self-interest in facilitating currency exchange transactions after her own unsuccessful experience, I am not satisfied that the elements of fraud have been proven with the requisite clear and convincing evidence.

Conclusion

- [114] Pan experienced a significant loss and most of the CAD Funds have not recovered, despite the Default Judgment. Although collection remains a possibility, I accept there is faint hope. Pan was a victim, there is no denying that. However, Cai was, I accept, also a victim and she likewise suffered her own significant loss.

[115] The question in issue in this case is whether Cai is responsible for Pan's loss of the CAD Funds through various causes of action pled.

[116] Ultimately, and notwithstanding my conclusions as to the credibility of Pan and his sympathy as a plaintiff, I have concluded that Pan has failed to meet his burden of proving the necessary elements of any of the causes of action pleaded in the SAN OCC and this case must be dismissed against the defendant, Cai.

Costs

[117] Costs are awarded in the discretion of the trial judge.

[118] Rule 14-1(9) of the Rules states the general principle that costs are awarded to the successful party:

Costs to follow event

(7) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[119] The standard of "success" required for the award of costs of an action under R. 14-(9) is "substantial success".

[120] The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246, describes the substantial success standard:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

[45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.

[121] Cai was the substantially successful party at trial and she, subject to the below proviso in my order, is presumptively entitled to her costs as ordinary costs in accordance with the Supreme Court Civil Rules.

- [122] I am specifically making the order that costs be ordinary costs despite the allegations involving fraud by Pan against Cai. Allegations of fraud should not be brought without merit and special costs are frequently awarded where fraud claims fail. This is trite law. However, that law does not trump the jurisdiction of the trial judge to exercise their discretion upon the specific facts of the case. In this matter, I do not consider the claim advanced by Pan to have been meritless, vexatious or scandalous. Ultimately the claim failed upon an application of the law to the relevant facts but the imposition of a special costs award would be unduly punitive, I conclude, as against Pan.
- [123] There may, however, be formal offers to settle which factor into the costs analysis.
- [124] Therefore, in the event that there have been formal offers which require the Court's consideration, the party seeking to rely upon the formal offer shall file written submissions with 14 days of these reasons for judgment and the responding party shall respond within seven days thereafter. These submissions shall be submitted through Supreme Court Scheduling.
- [125] Upon receipt of any written submissions, the Court reserves the right to require the parties to attend at a mutually agreeable date for one hour of oral submissions. Failing receipt of written submissions within this time frame, or such other time frame as might be agreed upon in a consent order of the parties to address counsel availability, the presumptive order that the plaintiff is entitled to her costs shall govern.

"Hardwick J."

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