

CANADA / JUDGMENT

Piga v. Uffelman

2022 BCSC 983

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Supreme Court of British Columbia

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2022 BCSC 983 Piga v. Uffelman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Piga v. Uffelman,

2022 BCSC 983

Date: 20220610

Docket: S202392

Registry: Victoria

Between:

Tonino Piga and Cindy Piga

Plaintiffs

And

Kristalynn Uffelman, Personal Representative of the

Estate of Carmella Katherine Reuter, and Carmella Katherine Reuter

Defendant

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Trial:

Victoria, B.C.

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February 24, 2022

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June 10, 2022

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Introduction

- [1] Tonino ("Tony") and Cindy Piga, the plaintiffs, were close friends with Carmella and James Reuter. The plaintiffs owned and operated a pub in Victoria (the "Pub") from 1993 to 2009. Until 2006, the Reuters lived in the Goldstream Mobile Home Park located at 2807 Sooke Lake Road in Victoria (the "Old Home"). The Old Home was quite close to the Pub and, through their attendance and later employment at the Pub, the Reuters came to know the Pigas quite well. They developed a very close friendship.
- [2] Mr. Reuter died in 2014, followed by Mrs. Reuter in 2019. Kristalynn Uffelman is one of the Reuters' children. She defends this action as the executor and personal representative of her mother's estate. Mrs. Reuter's estate is substantially comprised of the net proceeds from the sale of a home located in the Sooke Lake Modular Home Co-op at #71 - 2911 Sooke Lake Road in Victoria (the "New Home"). The New Home was purchased in 2006. Mr. and Mrs. Reuter lived there until their deaths. Ms. Uffelman has been unable to administer Mrs. Reuter's estate because the plaintiffs assert the estate owes them a debt in the amount of approximately \$85,000. This action concerns this alleged debt.

The Claim and the Defences

- [3] The plaintiffs' central claim is for breach of contract. They claim they entered into an oral agreement with Mr. and Mrs. Reuter to loan them money to purchase the New Home. They say they did so because they wanted to help their friends at a time when they were being forced to sell the Old Home and were unable to obtain conventional financing. The plaintiffs assert that they loaned the Reuters the full purchase price of the New Home, as well as other funds at a later time. The plaintiffs allege the parties agreed the Reuters would repay the full amount of the loan, interest free, from the proceeds of sale of the Old Home, and any remaining balance would eventually be repaid from the sale proceeds from the New Home whenever the last of Mr. and Mrs. Reuter was either placed in an elder care facility or died, whichever came first (the "Agreement"). The Agreement was not reduced to writing.
- [4] The Reuters purchased and moved into the New Home in 2006. A few years later, when the Reuters' Old Home still had not sold, the Reuters transferred title to the plaintiffs, who then sold it and kept the net sale proceeds, deducting that amount from the balance owing on the loan pursuant to the Agreement.
- [5] Once Mrs. Reuter died, the plaintiffs demanded payment of the balance of the loan owing under the Agreement from the executor. The plaintiffs claim that the defendants have breached the Agreement by refusing or neglecting to pay the balance owing on the loan - \$85,322.51.
- [6] The plaintiffs make two claims in the alternative. First, they claim that the defendants have been unjustly enriched by the transfer of the Purchase Funds to Mr. and Mrs. Reuter. The plaintiffs say that the transfer of money is an enrichment to the defendants and a corresponding deprivation to them, with no juristic reason for the defendants to maintain

ownership of the funds. In the further alternative, the plaintiffs claim that the estate holds the Purchase Funds in a resulting trust for their benefit because of the defendants' failure to provide sufficient evidence that the transfer was intended to be a gift.

- [7] The plaintiffs rely on their own evidence, as well as certain documentary evidence in support of their claim, including the 2006 contract of purchase and sale for the New Home, a 2006 bank draft showing Mrs. Piga paid approximately \$105,000 to a law firm in trust, a receipt for funds paid by Mrs. Reuter to that same firm, as well as documents pertaining to the plaintiffs' 2010 sale of the Reuters' Old Home. The plaintiffs also seek to tender evidence from four other witnesses - Tanya Barnes, an employee of the plaintiffs and friend to Mrs. Reuter; Elizabeth Willman, another employee of the plaintiffs and friend to Mrs. Reuter; Margaret Hart, a neighbour and close friend to Mrs. Reuter; and Bruce Cowick, a close friend to Mrs. Reuter. These four witnesses primarily testified about conversations they had with Mrs. Reuter over the years where she purportedly discussed the Agreement at issue.
- [8] The plaintiffs recognize that the evidence of these witnesses, being hearsay, is presumptively inadmissible. However, they seek to admit this evidence under the principled exception to the hearsay rule. The defendants oppose the admission of this hearsay evidence, but in the event it is admitted, they seek to rely upon hearsay evidence from other witnesses called in their case, as well.
- [9] For convenience, and by agreement of the parties, I heard the controversial evidence in a global voir dire, on the understanding that the non-hearsay aspects of all of the witnesses' evidence was admissible at trial and that any hearsay evidence ruled admissible would be rolled into the trial proper without the necessity of having the witnesses recalled. The parties recognized, as did I, that this accommodation avoided holding multiple voir dires, the potential for duplication of evidence and, particularly in the context of a fast-track action such as this, such a procedure would be in accordance with the purpose and object of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [10] The defendants take the position that the plaintiffs have failed to establish the existence of a contract between them and the Reuters, or any of their alternative claims. In addition to challenging the admissibility of the hearsay evidence of the four non-party witnesses, the defendants submit that the plaintiffs lack credibility and the reliability of their evidence has been so undermined that I should not accept it. They emphasize that there is no documentary evidence to support the plaintiffs' claims.
- [11] The defendants also take alternative positions, which largely depend on my factual findings. First, they argue that if I determine that the plaintiffs did indeed advance the Purchase Funds to the Reuters, I should find that they were a gift. In the further alternative, the defendants say that if I determine the Purchase Funds were advanced and that the parties had an agreement that they would be repaid, I should find that the Reuters met their repayment obligations, in full, when the plaintiffs received title to the Old Home many years ago.

- [12] Finally, the defendants submit that if I determine the plaintiffs have established the existence of a valid and enforceable contract, I should characterize the loan as a demand loan and find the claim is statute barred by operation of the provisions of the Limitation Act, R.S.B.C. 1996, c. 266.
- [13] The defendants called evidence as well. In addition to some documentary evidence, the executor, Ms. Uffelman, testified, as did her husband, Aaron Wilson, her sister, Katherine Uffelman, and Brenda Bond, a friend to Mrs. Reuter. These witnesses testified about conversations they had with Mrs. Reuter. I will rule on the admissibility of the hearsay aspects of their evidence as well, on the same understanding as described above.

Credibility and Reliability

- [14] Given that there is no written agreement between the parties, Mr. and Mrs. Piga's credibility, and the reliability of their evidence, are key issues. Their evidence must be "tested against those facts that are not seriously in dispute and with the preponderance of the evidence and the probabilities surrounding the events": *Clifford v. Flores et al*, 2004 BCSC 358 at paras. 39-40; *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 328; *Du v. Ji*, 2016 BCSC 1319 at paras. 61-62; and *Chiu v. Lam*, 2016 BCSC 299 at paras. 39-40.
- [15] The court's fact-finding role requires an assessment of the credibility, which is the truthfulness and honesty of a witness, and the reliability, or accuracy of the witness' evidence. Although fundamental to the judicial task, these assessments have been recognized as notoriously difficult: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 6. This assessment requires consideration of many factors, which were conveniently summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:
- [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).

- [16] In *Erickson*, Justice Ballance also held:

- [8] It is accepted as a general rule that judicial assessment of credibility starts on the footing that the witness is telling the truth: see *Halteren v. Wilhelm*, 2000 BCCA 2. However, truthfulness and reliability are not always one and the same. A witness may sincerely believe that she is telling the truth, but lack the sufficient memory, perspective, cognitive ability or narrative capacity to give reliable testimony. Alternatively, a witness "may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours the desired outcome": *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. And there is always the possibility that a witness may simply choose to lie for whatever reason.
- [17] To the above principles, I would add that a court may believe some, all, or none of the evidence of a witness, and that credibility determinations "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. M.(R.E.)*, 2008 SCC 51 at para. 49. I would also add that it is important not to base credibility determinations on emotional evaluations, stereotypes, guesswork or other lines of impermissible reasoning. Credibility and reliability decisions must be grounded in reason and made as objectively as possible.
- [18] In the case of the plaintiffs, I have assessed their evidence with a particularly critical eye, mindful of the lack of evidence from those on the other side of the alleged Agreement.
- [19] The plaintiffs each testified about the history of their relationships with Mr. and Mrs. Reuter and gave details about the arrangement at the heart of this litigation. I watched and listened to both the plaintiffs testify and be subject to cross-examination. They were not perfect witnesses. They each had some memory frailties as they tried to recall events from many years ago. Their memories were not always perfectly aligned. However, I find their evidence on material points was internally consistent, largely consistent with each other, consistent with the documentary evidence tendered and consistent with other evidence I accept. Overall, the evidence of each of the plaintiffs seemed very reasonable in light of the probabilities of the case as a whole and shown to be in existence at the time.
- [20] In short, I find that both Mr. and Mrs. Piga were credible witnesses and their evidence, to the extent of their memories, was reliable. I find they were both doing their best to be fair, measured, and honest in their recollections. These are honest, hard-working people, who clearly loved Mr. and Mrs. Reuter and had no ill-intentions toward them, their family members, or their legacy. Their evidence about the close, familial-type of relationship that they had with the Reuters over the years rings true and is supported by the non-hearsay evidence offered by all of the other witnesses who testified and knew them all for many years, evidence which I accept.
- [21] Although it is clear the Pigas now regret the informal manner in which they approached their financial dealings with the Reuters, I am left with the firm impression from the whole of their evidence that other than perhaps documenting their dealings or structuring them in a way that may have avoided this litigation, they would do it all over again to help their friends.

- [22] The defendants criticize aspects of the Pigas' evidence. I will address the specific areas as they arise in the course of my findings later in these reasons, but will say here, in a general sense, that I either place little weight on those areas as they were not put to the plaintiffs in some instances, or that they are so minor and inconsequential so as not to undermine their credibility or the reliability of their evidence in any way.
- [23] In short, I accept the evidence of the plaintiffs. I would reach this conclusion even without considering the additional supporting evidence the plaintiffs tendered from the other witnesses. None of the evidence tendered, or sought to be tendered, by the defendants undermines this conclusion. I am convinced the Pigas are truthful and that their evidence is reliable.
- [24] I will also say a brief word here about my general assessment of the credibility of the executor, Ms. Uffelman, and the reliability of her evidence.
- [25] Ms. Uffelman is in a difficult position. She is still suffering from the grief of losing her mother, a grief that has been prolonged by the delay in administering her mother's estate. Ms. Uffelman is aware of her duties to both the beneficiaries of the estate, which are her siblings and step-siblings, as well as to any creditors, which may include the plaintiffs, who she knows to be long-time friends to her mother. Of course, Ms. Uffelman is also a beneficiary. Ms. Uffelman takes the position that she was unaware of the debt alleged by the plaintiffs in this case and that they have failed to provide sufficient proof of it.
- [26] Ms. Uffelman concedes that she has no direct knowledge of the transactions at issue in this litigation. While I can accept certain, non-controversial aspects of her evidence, where her evidence conflicts on material points with the evidence of either of the plaintiffs or with other evidence that I accept, I find that I prefer the evidence of the plaintiffs and those other witnesses. I found Ms. Uffelman's testimony to be evasive at times. It was also, at times, internally inconsistent.
- [27] For example, Ms. Uffelman testified that the only debt she was aware of at the time of her mother's death was a line of credit at the bank and that this debt was specified in her mother's Will. In cross-examination, she was asked to review her mother's Will and conceded that it identified no specific debts.
- [28] Another more significant example of inconsistency relates to Ms. Uffelman's assertion that she had no knowledge of any funds being advanced to her parents by the plaintiffs. Ms. Uffelman testified that she did not recall either her mother or Mr. Reuter ever mentioning money given to them by the plaintiffs. This evidence directly contradicts her February 3, 2021 examination for discovery evidence where she said:

Q Okay. So that was going to be my next question. So same question: Do you remember your dad, James Reuter, ever mentioning any loan from or debt to the Pigas? And your answer was "I don't remember any." Is that --

A My dad always talked that it was a gift. He helped them so much all the time going back. And he was. He was either driving truck up Campbell River for him, logging. He did lots for him. It wasn't just a "be at the bar" thing.

[29] When confronted with this very clear inconsistency on such a material point, Ms. Uffelman exhibited signs of physical discomfort in the witness box, shrugged and gave a rambling answer that included saying that what she said at the examination for discovery was true, but that she did not really recall, that her dad "never really talked about stuff", that if the Reuters did receive funds it was a gift, and that, in the end, she did not know. It was clear even to Ms. Uffelman that this answer was inconsistent with her prior in-court testimony, and inconsistent with her examination for discovery evidence. After giving this answer, Ms. Uffelman immediately closed the examination for discovery transcript and placed it off to the side. In this way, her body language clearly showed her discomfort in continuing this line of questioning.

Admissibility of the Hearsay Evidence

Legal Principles

- [30] The parties both seek to tender hearsay evidence from certain witnesses. Hearsay is an out-of-court statement tendered for its truth. It is presumptively inadmissible because of the dangers it presents. Because hearsay statements are made outside of court, the court does not have the opportunity to observe the declarant under oath, and cannot test the truthfulness or value of the statement under cross-examination. Admitting such statements may compromise trial fairness and the truth-seeking function of the court: *R. v. Bradshaw*, 2017 SCC 35 at paras. 19-21.
- [31] However, some hearsay evidence "presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact-finding": *R. v. Khelawon*, 2006 SCC 57 at para. 2. For this reason, the courts have carved out exceptions to the hearsay rule and have developed a more flexible approach to the exclusion of hearsay evidence called the "principled exception". Under this approach, hearsay may be admitted into evidence when the party tendering it establishes, on a balance of probabilities, that the admission of the evidence is (a) necessary; and (b) reliable: *Khelawon* at para. 47; *Bradshaw* at paras. 22-24. In this case, necessity is conceded for all of the evidence attributed to Mrs. Reuter.
- [32] Once the necessity of the evidence has been established, its threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it": *Khelawon* at para. 49. In assessing threshold reliability, the court must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them: *Khelawon* at paras. 4 and 49; and *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at para. 75.

- [33] Threshold reliability can be established in one of two ways: (a) procedural reliability (i.e., through adequate substitutes for in-court cross-examination, such as statements made at a preliminary hearing); or (b) substantive reliability (where, because of the nature or circumstances of the statement, the statement is inherently trustworthy): Bradshaw at paras. 28-30.
- [34] With respect to procedural reliability, the majority of the Court in Bradshaw held:
- [28] Procedural reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (Khelawon, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (Khelawon, at para. 76; Hawkins, at para. 75; Youvarajah, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (B. (K.G.), at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (Hawkins) or cross-examination of a recanting witness at trial (B. (K.G.); R. v. U. (F.J.), [1995] 3 S.C.R. 764), is usually required (R. v. Couture, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95). In this respect, I disagree with the Court of Appeal's categorical assertion that safeguards relevant to assessing procedural reliability are only "those in place when the statement is taken" (para. 30). Some safeguards imposed at trial, such as cross-examination of a recanting witness before the trier of fact, may provide a satisfactory basis for testing the evidence.
- [35] With respect to substantive reliability, the Court in Bradshaw held:
- [30] A hearsay statement is also admissible if substantive reliability is established, that is, if the statement is inherently trustworthy (Youvarajah, at para. 30; R. v. Smith, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (Khelawon, at paras. 4, 62 and 94-100; R. v. Blackman, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).
- [31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (Smith, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (Khelawon, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (Smith, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (Khelawon, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-

examination" (Khelawon, at para. 107; Smith, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (Khelawon, at para. 62); when the only likely explanation is that the statement is true (U. (F.J.), at para. 40).

- [36] Threshold reliability can also be established by drawing on procedural reliability and substantive reliability in tandem, but the majority in Bradshaw warned that this combined approach should be used with great caution: para. 32.
- [37] The majority in Bradshaw also discussed how a court should make use of corroborative evidence to determine the substantive reliability of a hearsay statement. Only certain types of evidence can serve as corroborative evidence in the substantive reliability inquiry. The majority of the Court held that corroborative evidence must itself be trustworthy and must tend to show the "truthfulness or accuracy of material aspects of the hearsay statement": paras. 44-50.
- [38] The Court then set out a four-step process for determining whether corroborative evidence is of assistance in assessing substantive reliability in the admissibility inquiry. A trial judge must apply the following steps:
1. Identify the material aspects of the hearsay statements that are tendered for their truth. This means isolating the purpose that the hearsay evidence is intended to speak to, to ensure that the corroborating evidence is relevant to supporting the truth or accuracy of the hearsay evidence on that point. For example, if, in a criminal case, the Crown seeks to introduce a hearsay statement for the purpose of showing that an accused intentionally killed someone, the corroborative evidence must speak to intention. If the accused admits to the killing, but claims that it was an accident, corroborative evidence showing that the accused committed the homicide but that does not speak to intention, would not be relevant and, therefore, should not be used to support the threshold reliability of the hearsay statement;
 2. Identify the specific hearsay dangers raised by the tendered statement. Specific hearsay dangers include the accuracy of the statement, including difficulties associated with the declarant's perception and memory of the subject matter of their declaration. Where a hearsay statement is video recorded, accuracy is unlikely to be an issue. If, as in Bradshaw, the material aspect of the hearsay statement is the accused's participation in a murder, then perception and memory are also unlikely to be at issue, because it is unlikely that the declarant would forget who participated in the murder. The specific hearsay danger at issue in Bradshaw was sincerity (with regards to the accused's participation in the murders). Sincerity is a danger in all hearsay statements, but it raises particular concerns where the declarant has made inconsistent statements in the past, has a motive to lie, or is a Vetovec witness: *R. v. Vetovec*, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1.

3. Based on the circumstances and its dangers, consider alternative, even speculative, explanations for the statement. If likely alternative explanations exist (even if speculative), then the corroborative evidence cannot be used to establish the substantive reliability of the hearsay statement. For example, in *Khelawon*, the existence of bruises on the complainant's body did not rule out alternative explanations to assault because it was possible that the complainant fell and caused the bruises himself;
4. Determine whether, given the circumstances of the case, the corroborative evidence led at the voir dire rules out these alternative explanations such that the only remaining likely explanation for the statements is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

For example, in *R. v. Khan*, [1990] 2 S.C.R. 531, there was no likely alternative explanation that could explain the presence of semen on a child's clothes, except that a sexual assault occurred. Therefore, the child's hearsay statement was admitted into evidence under the principled exception. By contrast, in *R. v. R.(D.)*, [1996] 2 S.C.R. 291, the child's hearsay statement regarding a sexual assault by the father was inadmissible, even though evidence existed that supported the statement (bloody underwear). Because the evidence could be explained by another explanation (an assault by her brother), that evidence did not corroborate the threshold reliability statement. The corroborating evidence must itself be trustworthy. Where corroborating evidence is a statement, and there is concern that the corroborating statement is untrue, this statement is not relevant to determining the substantive reliability of a hearsay statement: *Bradshaw* at para. 50.

- [39] Although in a different context than the case at bar, it is instructive to see how the majority in *Bradshaw* applied those steps. The accused, Mr. Bradshaw, was charged with two counts of first degree murder. As an associate of the accused, Mr. Thielen, was also charged, but pled guilty to second degree murder before trial.
- [40] Mr. Thielen and the accused were the targets of an undercover police operation. While being surreptitiously recorded by police, Mr. Thielen made two inconsistent statements to undercover officers in which he said that he had shot both victims, and then later that he had shot one victim, but the accused shot the other. Before trial, after being confronted with recordings of the statements, Mr. Thielen confessed to the killings, and also named the accused as having participated in the killings. Mr. Thielen participated in a videotaped re-enactment of the killings. Mr. Thielen was called by the Crown to testify at the trial of the accused, but refused to testify. He was held in contempt of court.
- [41] Following a voir dire, the trial judge, applying the principled exception to the hearsay rule, admitted the re-enactment video into evidence. The judge concluded that the recorded re-enactment of the killing was sufficiently reliable to be admitted because it was voluntary, incriminating, made after Mr. Thielen received legal advice and was corroborated by extrinsic evidence. The court issued a *Vetrovec* warning to the jury, instructed the jury on the dangers of hearsay, and gave the defence latitude to question the motives behind Mr. Thielen's statements. Mr. Bradshaw was ultimately convicted. The British Columbia Court of

Appeal overturned the conviction, concluding that the trial judge had erred in admitting Mr. Thielen's recorded statement.

[42] At the Supreme Court of Canada, the majority applied the steps as follows:

Step 1: Identify the material aspects of the hearsay statements that are tendered for their truth

[43] The Court found that because the re-enactment video was tendered to establish the accused's participation in the murders, the material aspect of the hearsay statement was Mr. Thielen's assertion that the accused participated in the murders.

Step 2: Identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case

[44] The Court concluded that because the re-enactment was video-taped, accuracy was not at issue. The specific hearsay danger raised in the case was Mr. Thielen's sincerity with regards to the accused's participation in the murders.

Step 3: Based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement

[45] The majority of the Court found there was an alternative explanation for the hearsay statement - that Mr. Thielen lied about the accused's participation in the murders, either because he was pressured to do so or in order to obtain a lighter sentence for himself.

Step 4: Determine whether the corroborative evidence rules out alternative explanations such that the only remaining likely explanation for the statement is the witness' truthfulness of a material aspect of the statement

[46] The majority of the Court concluded that the evidence considered by the trial judge that was taken to corroborate the statement, such as accurate descriptions of the weather on the night of the murders, was not relevant because Mr. Thielen himself was present at the time of the murders and his descriptions did not speak to whether the accused participated in the murders. Justice Karakatsanis, writing for the majority, also considered the trial judge's reliance on the accused's recorded statements in which he acknowledged involvement in the murders on two occasions. Justice Karakatsanis concluded that these admissions could not be used to corroborate Mr. Thielen's hearsay statements because there were serious reasons to question the truthfulness of the accused's statements on these occasions (the statements were made in the context of a "Mr. Big" undercover operation in which false statements can be induced, and there was the possibility that Mr. Thielen had asked the accused to lie and say that he had been involved in the murders).

[47] After concluding that the trial judge erred in admitting the hearsay statement through the substantive reliability avenue, the majority also considered whether the statement could have been admissible through the procedural reliability avenue. Justice Karakatsanis

concluded that this route was also not appropriate, because Mr. Thielen was not cross-examined at the time he gave the statement, the statement was not made under oath or affirmation, he was not warned about the consequences of lying, and he was not available to be cross-examined at trial. The majority concluded that procedural safeguards utilized by the trial judge, such as jury instructions, were insufficient to support the statements procedural reliability.

- [48] With these principles in mind, I turn now to consider the admissibility of the proposed hearsay evidence in this case.

Proposed Hearsay Evidence in this Case

The Plaintiffs' Witnesses

- [49] The plaintiffs seek to tender evidence from four witnesses regarding statements Mrs. Reuter (as well as Mr. Reuter in one case) is alleged to have made to each of them at different times. Necessity has been established.
- [50] With respect to threshold reliability, the plaintiffs submit that all statements attributed to Mrs. Reuter (and Mr. Reuter in one case) by these witnesses are substantively reliable in that the nature of the circumstances in which they were made, taken with the corroborative evidence, makes them inherently reliable. The corroborative evidence they point to is documentary evidence showing the plaintiffs paid the Purchase Funds for the New Home in 2006 and were paid the net proceeds of sale from the Old Home in 2010. They also point to certain text messages between the executor and Mrs. Piga showing an intention to repay the plaintiffs for the monies loaned.
- [51] Also common to all of the proposed evidence is its' material aspects and specific dangers. The material aspects of all of the hearsay statements are tendered to support the central finding in this action - the existence of an oral contract between the plaintiffs and the Reuters, in the terms alleged by the plaintiffs. The specific dangers raised are the credibility of the witnesses and the accuracy of their recollections, as none of the statements were recorded in any way, as well as the sincerity of Mrs. Reuter's statements (as well as Mr. Reuter's in one case) surrounding the circumstances of the purchase of the New Home and any debt owing to the plaintiffs.

Elizabeth Willman

- [52] Elizabeth Willman worked for the plaintiffs, as a cashier in the liquor store of the Pub, for approximately 13 years until she left in October 2018. She met the Reuters many years ago and knew them well. At the time of Mrs. Reuter's death, Ms. Willman and Mrs. Reuter were very close. Ms. Willman visited with Mrs. Reuter three or four times per week. Ms. Willman has no financial interest in this litigation.

- [53] Ms. Willman recalled that it was about 2006 when the Reuters moved into the New Home. Regarding the circumstances leading to this move, Ms. Willman testified that Mrs. Reuter came running into the liquor store one day while Ms. Willman was working. She was crying and had Mr. Reuter "in tow". Ms. Willman heard Mrs. Reuter say that they had been evicted. She then witnessed Mr. and Mrs. Piga "scoop them into the office" to talk. Ms. Willman was not privy to their conversation.
- [54] Ms. Willman also testified that after the Reuters moved into the New Home, Mrs. Reuter talked to her many times about the arrangement that led to the purchase of the New Home. She recalled that the first of these conversations occurred shortly after the Reuters moved into the New Home, when Mrs. Reuter told her that the plaintiffs had purchased the New Home for them and that they did not buy it themselves because they had no money to do so. After this, Ms. Willman testified that she had many conversations with Mrs. Reuter about how the plaintiffs bought the New Home for them. It was Ms. Willman's impression from these conversations that the plaintiffs actually owned the New Home.
- [55] Ms. Willman testified that Mrs. Reuter talked to her, spontaneously, about this topic "every day, all the time" and repeatedly expressed her intention to repay the plaintiffs for the money they had given her and her husband to purchase the New Home. The defendants are critical of Ms. Willman's use of the phrase "every day, all the time" when she described the frequency of the discussions on this topic. Calling it most disturbing and unbelievable, the defendants submit that such an exaggeration undermines Ms. Willman's credibility and/or the reliability of her evidence. I disagree. Rather, I see it as Ms. Willman simply using a regular expression, or common turn of phrase, to explain that Mrs. Reuter raised and discussed this topic with her many times over the years.
- [56] Ms. Willman further testified that Mrs. Reuter told her that they had been unable to get a bank loan for the purchase of the New Home, that the plaintiffs had purchased the New Home and had wanted them to live in it as long as they took care of the taxes and any maintenance that needed to be done. Mrs. Reuter did not say anything to Ms. Willman about a timeline for repayment, but did tell Ms. Willman that the amount they owed the plaintiffs was about \$85,000.
- [57] After Mrs. Reuter's death, Ms. Willman learned of this legal dispute when she ran into Ms. Uffelman at the Pub and Ms. Uffelman told her the plaintiffs were "looking for their money". Ms. Willman testified that she was later asked by Mrs. Piga to provide a statement to the executor, in writing, about what she knew of this matter. Ms. Willman did so, without any input from others, and sent the letter she wrote to the executor. Ms. Willman was not contacted by Ms. Uffelman, or anyone on behalf of the Mrs. Reuter's estate, to verify the contents of her statement or provide any additional information.

Tanya Barnes

- [58] Tanya Barnes worked for the plaintiffs at the Pub for a number of years and has a close relationship with them. Ms. Barnes also knew Mrs. Reuter very well and had an equally close, if not stronger, relationship with her.
- [59] Ms. Barnes met the Reuters on her first day working at the Pub. Mrs. Reuter introduced herself and her husband as the cleaner and the maintenance worker. Over the years that followed, Ms. Barnes and Mrs. Reuter developed a close relationship, one that saw her in contact with Mrs. Reuter at least every other shift. Ms. Barnes spoke of her friend, Mrs. Reuter, in affectionate terms throughout her evidence, describing her as a lovely, honest, and hard-working person.
- [60] Ms. Barnes recalled that the Reuters moved into the New Home within the first couple of years of her knowing them. She testified about a conversation she had with Mrs. Reuter shortly after they moved in, regarding the circumstances of their move. Mrs. Reuter told her that they had moved from their prior residence because the conditions in that home "were not great" and that they "needed to get out of there".
- [61] Ms. Barnes testified that in later conversations, Mrs. Reuter told her about how they came to purchase the New Home. Mrs. Reuter told her that the plaintiffs had purchased the New Home because they were not in a financial position to purchase it themselves. She testified that if Mrs. Reuter "told me once, she told me a hundred times that she owed them [the plaintiffs] everything". She explained that Mrs. Reuter raised this topic spontaneously in many conversations with her over the years, and repeatedly expressed her appreciation for what the plaintiffs had done for them. Ms. Barnes also testified that Mrs. Reuter told her that she had a debt to the plaintiffs that needed to be paid.
- [62] Ms. Barnes also testified that Mrs. Reuter told her on several occasions that her children were "in the know" about the debt she owed to the plaintiffs. She recalled a specific occasion when Mrs. Reuter invited her to the New Home for tea and one of her daughters, Ms. Uffelman, was there on the porch. Ms. Barnes recalled that Mrs. Reuter was sick, suffering from cancer, at the time, but that her daughter had not yet moved in to care for her. As she understood it, the purpose of Ms. Uffelman's visit that day was to add her name to her mother's bank account to simplify the administration of her estate. Ms. Barnes testified that, in the context of discussing events following her death, Mrs. Reuter stated, in her daughter's presence, that "Tony will get paid what he is owed".
- [63] Further, Ms. Barnes testified that she was aware from her conversations with Mrs. Reuter that the plaintiffs had purchased the New Home for the Reuters, that Mrs. Reuter felt she owed them for that purchase and that the debt was to be taken care of after she died. Ms. Barnes did not press Mrs. Reuter for the details of the arrangement between the Reuters and the Pigas, as she felt that it was none of her concern. Ms. Barnes knew Mrs. Reuter to be an honest and sincere person.

- [64] After learning that this matter was going to court, Ms. Barnes volunteered to provide a written statement about her conversations with Mrs. Reuter to the executor. Ms. Barnes testified that she was not told what to write. After she provided the written statement, she was not contacted by the executor or anyone on behalf of the estate to verify its contents or to provide additional information.

Margaret Hart

- [65] Margaret Hart is currently retired from employment at Pearson College. At the time Mrs. Reuter died, she had been a neighbour of the Reuters for about 12 years and a close friend to Mrs. Reuter. Ms. Hart knows the plaintiffs, but is not close to them.
- [66] Ms. Hart testified about the history of her relationship with Mrs. Reuter. She recalled when the Reuters moved into the New Home across the street from her and recalled how she and Mrs. Reuter developed a good relationship over the years that followed. She described that they spent time together on the porch sitting, talking, and smoking cigarettes, went shopping together and did other activities. She saw Mrs. Reuter every day.
- [67] Ms. Hart testified that Mrs. Reuter told her about the circumstances surrounding the Reuters' occupation of the New Home. Mrs. Reuter told her that they were having problems in their prior residence, could not sell it, needed somewhere to live and had no money, so their good friends, the Pigas, offered and then bought them the New Home, as a place for them to stay in until they died. Repayment was to be on their death. Mrs. Reuter told Ms. Hart that the purchase price of the New Home was \$110,000 and that their prior residence sold for \$35,000. Mrs. Reuter told her that they owed Tony roughly \$85,000.
- [68] Ms. Hart also testified about the circumstances that led to her involvement as a witness in this litigation. She testified that Mr. Piga told her the Reuters' family members were refusing to pay the debt that was owed, and he asked her to write a statement about what she knew. Ms. Hart did so, without input from anyone. She provided her statement to the executor. No one representing the estate contacted her to verify the contents of her statement or to make further inquiries about the extent of her knowledge in this matter.

Robert Bruce Cowick

- [69] Robert Cowick is a retired police officer. He knew the Reuters for about 30 years and saw them fairly regularly before Mr. Reuter died. After Mr. Reuter died, he developed a very close relationship with Mrs. Reuter, visiting her twice a week on average. He thought of her like an older sister. Mr. Cowick described that he and Mrs. Reuter discussed many things over the years, including the purchase of the New Home. Mr. Cowick has no connection to the plaintiffs.

- [70] Mr. Cowick testified that through conversations with Mr. and Mrs. Reuter, he learned that they were having difficulties at their prior residence and that friends of theirs suggested that they move to the upper mobile home park if they could get a trailer there. Mr. Cowick learned from them that they were able to purchase the New Home through a friend, Mr. Piga.
- [71] After the Reuters moved into the New Home, Mr. Cowick testified that they told him that Mr. Piga helped them out and sold their prior residence. He testified that the Reuters told him, multiple times, that the plaintiffs purchased the New Home ("all the time, especially toward the end of their lives. Every week they brought it up"). They raised this topic spontaneously in conversations, without any prompting from him.
- [72] Mr. Cowick further testified that Mrs. Reuter told him that "Tony had a big heart", that they [the Reuters] were "like parents to them [the Pigas]" and that "he [Tony] did [us] a big favour where we could live and have no problems". In terms of repayment, Mr. Cowick testified that closer in time to Mrs. Reuter's passing, Mrs. Reuter told him several times that the one thing she wanted to do before her "time is up" was to repay the plaintiffs and she hoped there would be a "little bit left for the kids".
- [73] Mr. Cowick was asked if there was anything in the circumstances of these conversations with Mrs. Reuter that caused him to think she was not sincere. He testified that he found Mrs. Reuter to be an honest person and that she conveyed to him that she recognized that the plaintiffs had done her and her husband a big favour. Mr. Cowick testified that Mrs. Reuter told him that the amount of the debt owing to the plaintiffs was between \$80,000 and \$85,000.
- [74] Mr. Cowick recalled advising Mrs. Reuter at one point that if she wanted to pay the plaintiffs back she should consult a lawyer or get something notarized. He is unaware of whether she did this.
- [75] Like the other witnesses, Mr. Cowick provided a written statement about his knowledge of these matters to the executor. He believes it was Ms. Hart who first told him that the plaintiffs had not been paid. He also spoke to the plaintiffs and learned the matter was going to court. Mr. Cowick volunteered to provide a statement about what he knew. He was not told what to say. No one representing the executor or Mrs. Reuter's estate contacted him about his written statement or sought any further information from him.
- [76] Mr. Cowick denied ever saying anything that amounted to the Reuters' debt having been repaid to the plaintiffs as a result of Mr. Reuter's slip and fall at the Pub in 2007.

Analysis

- [77] I find the hearsay statements adduced from Ms. Willman, Ms. Barnes, Ms. Hart, and Mr. Cowick are admissible. Because the hearsay statements from the four witnesses share factors that support their substantively reliability, I find it convenient to outline these factors

only once here. By doing so, I do not wish to be misunderstood that I am perhaps considering the statements from one witness as corroborative of another. I am not. I am considering their admissibility separate from one another. There are a number of factors that support their substantive reliability:

1. The witnesses were long-time close friends of Mrs. Reuter (and, in the case of Mr. Cowick, Mr. Reuter as well). Although Ms. Willman and Ms. Barnes are also close with the plaintiffs, all four witnesses struck me as unbiased, balanced, and fair. None of these witnesses have any motive to favour one side or the other in this dispute. None of these witnesses have any financial or other interest in the outcome of this litigation. None of them have any motive to lie or exaggerate their evidence. In short, I find Ms. Willman, Ms. Barnes, Ms. Hart and Mr. Cowick to be honest and reliable witnesses. That some of these witnesses were asked by the plaintiffs to provide a statement to the executor about what they knew does not undermine this finding in any way. No one told any of these witnesses what to write or what to say. That there were small inconsistencies with any of their evidence with that of either Mr. or Mrs. Piga, those inconsistencies were on minor and immaterial points, and are largely a reflection of the passage of time;
2. Each witness testified to many spontaneous conversations with Mrs. Reuter about the Reuters' agreement with the plaintiffs over a lengthy period of time. What Mrs. Reuter told each of them about the transactions and debt owing to the plaintiffs remained consistent to each of them over that period of time;
3. Mrs. Reuter (and, in the case of Mr. Cowick, Mr. Reuter as well) would have no motive to lie, exaggerate, or otherwise distort the information respecting the circumstances of the purchase of the New Home and the debt said to be owing to the plaintiffs when speaking with each of these witnesses. Each witness was a close friend to Mrs. Reuter who was uninvolved in these transactions. In other words, there would have been no benefit to Mrs. Reuter (as well as Mr. Reuter in one case) in making false statements to any of these witnesses about these matters. The Reuters had no reason to tell any of these witnesses these things other than if they were true;
4. There is no suggestion that either Mr. or Mrs. Reuter lacked capacity during any of these conversations with any of these witnesses. In fact, the evidence in respect of Mrs. Reuter in particular is that she had full capacity throughout her life; and
5. There is some reliable and trustworthy corroborative evidence that supports the substantive reliability of the hearsay statements elicited from each of these four witnesses.

The October 4, 2006 bank draft shows that Mrs. Piga paid the sum of \$105,821.28 to a law firm, in trust. The timing and amount of this draft coincides with the timing of the Reuters' closing on the purchase of the New Home and the amount required to close, less the deposit and any adjustments, as seen in the copy of the contract of purchase and sale for the New Home, another document which is in evidence. The law firm identified on the bank draft is the same firm to whom Mrs. Reuter wrote a cheque the following month. As well, all of the 2009/2010 documents

pertaining to the transfer and then sale of the Old Home show that it sold for \$35,000 and the net sale proceeds (approximately \$30,000) were paid directly to the plaintiffs. All of these documents are relevant to supporting the truth or accuracy of the material aspects of the hearsay statements. I do not find the text messages sent by the executor to Mrs. Piga after her mother's passing as corroborative evidence.

The corroborative evidence I have identified as relevant to the material aspects of the hearsay statements, being documentary evidence, is extrinsic and is reliable. Taken all together, this documentary evidence corroborates each of the witnesses' hearsay statements. In particular, the documentary evidence corroborates the detailed statements Ms. Willman, Ms. Hart and Mr. Cowick each attribute to Mrs. Reuter regarding the debt she said remained owing to the plaintiffs.

[78] I see no alternative, even speculative, explanation for the hearsay statements. I am satisfied that the only likely explanation for the hearsay statements is the truthfulness of their material aspects. I am satisfied the plaintiffs have established that the statements were made under circumstances which substantially negate the possibility that any of the witnesses were untruthful or mistaken in their recollections or that Mrs. Reuter (and in one case, Mr. Reuter) was untruthful or mistaken in what she said.

[79] I am satisfied the plaintiffs have established substantive reliability of these witnesses' hearsay statements. They are admissible.

The Defendants' Witnesses

[80] In addition to the testimony from the executor, the defendants called three witnesses, none of whom had personal knowledge of the matters at issue, or of Mr. and Mrs. Reuter's financial affairs. Like the non-party witnesses called by the plaintiffs, these witnesses testified to some matters of which they had first hand knowledge, as well as some hearsay statements attributed to Mrs. Reuter.

Aaron Wilson

[81] Aaron Wilson testified very briefly. He is married to the executor, Ms. Uffelman. They have been together for about 36 years. Mr. Wilson testified that his relationship with the Reuters was "bumpy" at the beginning, but that they "got used" to him and their relationship was ultimately a very good one.

[82] Mr. Wilson testified that he has no knowledge of the transactions at issue and that he never had discussions with the Reuters about their debts, including any debt that that may have been owed to the plaintiffs.

- [83] Mr. Wilson testified that he was aware the Reuters worked for the plaintiffs and were paid in cash for their work. He was also aware Mr. Reuter was injured in 2007. He testified that he was not present at the time, but that he understood that Mr. Reuter fell down the stairs at the Pub and "broke his neck". Mr. Wilson was not asked about the source of this knowledge. He was not cross-examined.
- [84] In their written submissions, the defendants concede the hearsay statements tendered by Mr. Wilson are not admissible. I agree. The source of his information about Mr. Reuter's fall was not identified.

Brenda Bond

- [85] Brenda Bond knew Mr. and Mrs. Reuter for about 38 years. She testified that Mrs. Reuter asked her to attend her home on January 28, 2018 to witness Mrs. Reuter's signature on her Will, a copy of which is in evidence. She does not know the plaintiffs.
- [86] Ms. Bond attended Mrs. Reuter's home on January 28, 2018. They had dinner and then went over the Will. Ms. Bond testified that they talked briefly about things that Mrs. Reuter needed to have taken care of. Mrs. Reuter told her that she had the bank loan, that she wanted her bills paid and the house sold, that she had a vehicle, and she said that she wanted "things to go to the kids". Ms. Bond reviewed the Will and noticed that Mrs. Reuter's estranged son, Kevin, was not included as a beneficiary. She asked Mrs. Reuter about the omission and Mrs. Reuter told her that Kevin was to get nothing because he was estranged.
- [87] Ms. Bond testified that Mrs. Reuter did not mention any debt owing to the plaintiffs and observed that no such debt was identified specifically in the Will. She also acknowledged that she did not have any direct knowledge of the Reuters' financial circumstances and had never looked over any of their financial records.
- [88] I do not understand the plaintiffs to necessarily oppose the admission of these hearsay statements, but rather they focus on the weight to be given to them in my ultimate assessment of the issues. Nevertheless, I find the defendants have established substantive reliability of these hearsay statements.
- [89] There are a number of factors that support this conclusion:
1. Although not necessarily a "solemn occasion", Ms. Bond clearly took her responsibility as witness to Mrs. Reuter's signature on the Will seriously. This was a serious occasion;
 2. Ms. Bond is not a beneficiary of the estate. She has nothing to gain in this litigation and no motive to lie. She was a balanced witness whose evidence was consistent. I found her to be a credible and reliable witness;
 3. Given the circumstances of the statements, including that they were made contemporaneous to the signing of the Will, Mrs. Reuter would have had no motive to lie or exaggerate to her close friend about these matters; and

4. There is corroborative documentary evidence in the form of the Will itself that shows Ms. Bond's signature and contains information consistent with aspects of Ms. Bond's recollections of the conversation she had with Mrs. Reuter at the time.

Katherine Uffelman

- [90] Katherine Uffelman, another daughter of the Reuters, testified briefly. She is one of beneficiaries under the Will. To avoid confusion, I will identify Katherine Uffelman as Katherine in these Reasons. By doing so, I mean no disrespect.
- [91] Katherine testified that she had no knowledge of her mother's estate plans prior to her passing and no understanding of her mother's debts, other than the "bank debt". Katherine did not testify as to the source of her knowledge about this "bank debt". She testified that she had no knowledge of the transactions at issue or the debt alleged to be owed in this action. Like her sister, Katherine also testified she was not aware of any means by which her parents could have paid for the New Home.
- [92] Katherine also testified that at some point, perhaps in 2016, she was present at the New Home at a time when others were there, including her mother and Mr. Cowick. She testified that comments were made about a loan owing to the plaintiffs and Mr. Cowick said to the group that "there was no debt because my father fell". Katherine did explain what this meant to her or provide any other context. Katherine testified that later, after the others left, she asked her mother about this and Mrs. Reuter said she did not owe any debts to the plaintiffs. Katherine also testified that she spoke to her mother on the telephone again later that day. During the conversation, her mother again said that there "was no debt".
- [93] In their written submissions, the defendants concede the hearsay statements tendered by Katherine are not admissible. I agree. The source of Katherine's knowledge that her mother's only debt at the time of her death was "the bank debt" was not disclosed by her evidence. As for the statements Katherine attributes to her mother after the gathering where Mr. Cowick was present, I would not find these are substantively reliable. Mr. Cowick, whose evidence I accept completely, unequivocally denied ever making the statement Katherine attributes to him. I do not accept Katherine's evidence in this regard.
- [94] I turn now to the central issue in this case.

Was There an Oral Contract?

Legal Principles

- [95] A cause of action in breach of contract requires, as its foundation, the existence of a valid and enforceable contract. The burden of proof lies with the plaintiffs.
- [96] A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Scotsburn Co-Operative Services Ltd. v. W.T. Goodwin Ltd.*, [1985] 1 S.C.R. 54 at 63. The common law holds

to an objective theory of contract formation. This means that, in determining whether the parties' conduct meets the conditions for contract formation, the court is to examine "how each parties' conduct would appear to a reasonable person in the position of the other party": *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 35.

- [97] A determination of whether there is an enforceable contract involves a contextual analysis of all the material facts and circumstances. A court is to analyze the evidence to determine whether, in all the circumstances, it is clear to the objective, reasonable bystander that the parties intended to contract, and whether the essential terms of that contract can be determined with a reasonable degree of certainty. The subjective intentions of the parties are irrelevant: *Berthin v. Berthin*, 2016 BCCA 104 at para. 46.
- [98] Regarding the requirement of intention to create legal relations, the Court in *Ethiopian Orthodox* explained:
- [36] For present purposes, it will suffice to focus on the requirement of intention to create legal relations. As G. H. L. Fridman explains, "the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *The Law of Contract in Canada* (6th ed. 2011), at p. 15; see also S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 105. This requirement can be understood as an aspect of valid offer and acceptance, in the sense that a valid offer and acceptance must objectively manifest an intention to be legally bound: *Crystal Square*, at paras. 49-50.
- [37] The test for an intention to create legal relations is objective. The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Kernwood Ltd. v. Renegade Capital Corp.* (1997), 97 O.A.C. 3; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at p. 607. In answering this question, courts are not limited to the four corners of the purported agreement, but may consider the surrounding circumstances: *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99, 34 B.C.L.R. (6th) 248, at para. 17; *Crystal Square*, at para. 37.
- [38] Under the objective test, the nature of the relationship among the parties and the interests at stake may be relevant to the existence of an intention to create legal relations. For example, courts will often assume that such an intention is absent from an informal agreement among spouses or friends: *Balfour v. Balfour*, [1919] 2 K.B. 571 (C.A.); *Eng v. Evans* (1991), 83 Alta. L.R. (2d) 107 (Q.B.). The question in every case is what intention is objectively manifest in the parties' conduct.
- [99] The lack of a written agreement, as is the case here, is not fatal because oral contracts are "perfectly enforceable": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771 at para. 10. The party seeking to enforce an oral contract must establish "that the parties intended to contract and that the essential terms of the contract can be determined with a reasonable degree of certainty": *Copcan Contracting Ltd. v. Ashlaur Trading Inc.*, 2010 BCCA

597 at para. 8. This may be more difficult with no written contract, but it is still possible: *Go Transport Ltd. v. Moore*, 2021 BCSC 1099 at para. 17.

[100] Justice Adair articulated the principles that apply to oral agreements in *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926 at para. 151, *aff'd* 2019 BCCA 72:

[151] In general, the interpretation of oral contracts turns on the same essential principles, although in the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties. This flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written contracts - the words of the agreement. See *De Cotiis v. Viam Holdings Ltd.*, 2010 BCCA 368, at para. 21 (citing *Fridman, The Law of Contracts in Canada* (5th ed., 2006) at p. 440).

[101] Informed by these principles, I turn now to my findings of fact and analysis of this issue.

Findings of Fact

[102] Cindy Piga is 58 years old and Tony Piga is 62 years old. They have been married for 38 years. They have two children, both of whom are now adults.

[103] Neither of the plaintiffs completed high school. Mrs. Piga completed grade 10 and later took some bookkeeping courses. Mr. Piga discontinued his formal education at the age of 14. He immigrated to Canada when he was 18 years old, speaking both French and Italian. He learned English while in Canada.

[104] The Pigas have always been hard workers and contributing members of their community. Mr. Piga began working in the logging industry and eventually started his own logging company. He obtained the funds to start this company through a loan from a friend, done on a handshake.

[105] After logging for about 25 years, the Pigas decided to go into the restaurant business. In 1993, they moved to Victoria and purchased the Pub. The Pigas ran the Pub until they sold it in 2009.

[106] For many years, Carmella and Jim Reuter lived in the Old Home. They lived near the Pub and, through their attendances at the Pub and the fundraisers they organized there, the Reuters got to know the Pigas quite well and developed a very close friendship.

[107] After a few years, the Reuters began to work at the Pub. They worked as janitorial contractors for approximately an hour or two each day. In exchange for their work, the plaintiffs paid them \$500 every two weeks in cash at first, and then later \$550 every two weeks. The employment agreement between the Reuters and the Pigas was not reduced to writing. This type of unwritten arrangement was not unusual for the Pigas, as they had similar arrangements with others who worked at the Pub.

- [108] The friendship between the plaintiffs and the Reuters developed to the point where the plaintiffs came to regard the Reuters as family, effectively as their own parents as Mrs. Piga's parents had died and Mr. Piga's parents lived in Italy. Although the plaintiffs sold the Pub in 2009, the couples maintained their close friendship and continued to spend a great deal of time together in the years that followed. This finding is supported by the non-hearsay evidence of many of the witnesses.
- [109] In the fall of 2006, the Reuters approached the plaintiffs with a financial problem. They were living in the Old Home at the time and were facing eviction from the Goldstream Trailer Park, a situation that was understandably causing them considerable distress. Ms. Willman witnessed Mrs. Reuter's distress on the day the Reuters came to the Pub to see the Pigas. The plaintiffs were aware that the Old Home was of an age and condition that it could not be relocated. The Reuters were of limited financial means, a fact that the Reuters were aware of at the time. This finding is supported by the evidence of the executor.
- [110] This led to a suggestion that the Reuters might consider living in a different mobile home park behind the Pub, one where owners not only owned their mobile home, but owned the land upon which it sat as well. This would afford the Reuters more security. Mr. and Mrs. Piga discussed the matter between themselves and decided to offer to lend the Reuters the funds that they would need to purchase a trailer in this upper mobile home park, one that was for sale at the time.
- [111] Mr. and Mrs. Piga made this offer because they cared for the Reuters a great deal. They considered the Reuters to be good, honest people and they wanted to help them. With Mrs. Piga's parents gone and Mr. Piga's parents in Italy, they felt they were like family. They would have done the same thing for their own parents.
- [112] Mr. and Mrs. Piga were clear in their offer to the Reuters that these funds were not a gift, but rather an interest-free loan that was to be repaid by the Reuters, initially over the course of six months or a year, partly from the anticipated proceeds of sale from the Old Home, and then the balance would be paid, a little every month, over time, until the loan was paid in full. At the time, the Old Home was assessed at about \$70,000. The Reuters accepted this proposal.
- [113] A copy of the contract of purchase and sale for the New Home, in the Reuters' names, dated September 13, 2006, is before the court. This contract establishes that the purchase price for the New Home was \$110,000, and that a \$5,000 deposit was required to be paid. The sale was to complete on October 6, 2006. The Reuters were not in a financial position to pay for any of this on their own.

- [114] Mrs. Piga then wrote the Reuters a cheque from the Pigas' business line of credit for the amount of the deposit on the New Home (\$5,000). She then issued a bank draft for the balance required to close on the sale, in the amount of \$105,821.28. A copy of this bank draft, dated October 4, 2006, payable to a law firm in trust, is in evidence. It is signed by Mrs. Piga. The law firm is the same firm that Mrs. Piga wrote a cheque to the following month, in the amount of \$123.21. A copy of this cheque is in evidence.
- [115] Mrs. Piga believes, and I accept, that Mrs. Reuter paid this small amount for legal fees for the conveyance and that she reimbursed Mrs. Reuter for it at a later date. This is supported by the fact that Mrs. Piga had possession of a copy of Mrs. Reuter's original cheque this many years later. Mrs. Piga explained that even this modest amount was a significant amount of money for the Reuters at the time, an assertion that is consistent with the whole of the evidence.
- [116] The defendants submit that because the bank draft signed by Mrs. Piga does not indicate the intended purpose of the funds, it cannot support Mrs. Piga's assertion that these funds were advanced to the Reuters as part of their oral agreement. I do not agree. While there is nothing on the face of the document to indicate their intended purpose, the surrounding circumstances and factual matrix convince me that these funds were advanced to the Reuters, through their conveyancing lawyer, for the Reuters to purchase the New Home. These circumstances include:
- a) The date of the document coincides with the closing date of the Reuters' purchase of the New Home;
 - b) The law firm to whom the funds were paid in trust is the same law firm to whom Mrs. Reuter wrote a cheque a short time later;
 - c) The copy of the bank draft in evidence was found, by the executor, in Mrs. Reuter's personal possessions in the New Home;
 - d) The amount is consistent with what the contract of purchase and sale shows to be the purchase price of the New Home, less the deposit and accounting for adjustments; and
 - e) The Pigas had no other known source of funds that would have allowed them to purchase the New Home.
- [117] While the Pigas now clearly wish that they had structured things differently, they felt it was important for their friends to have their home in their own names.
- [118] In particularly compelling testimony, Mrs. Piga explained that it meant a lot to her to know that the Reuters, people she felt were like her parents, had a home and to know they were okay. This is why the Pigas offered to loan the Reuters the funds, interest free, so they could make the purchase of the New Home themselves. Mr. and Mrs. Piga never worried that the loan would not be repaid. Equally compelling, Mr. Piga explained how his upbringing affected his approach to dealing with this loan. He explained that he and his wife felt very

close to the Reuters, like they were their parents, and that in his mind "family is the only thing in life". He felt they had to help them out.

- [119] In total, I find the plaintiffs provided the Reuters the sum of \$110,944.49 (\$5,000 + \$105,821.28 + \$123.21) for their purchase of the New Home (the "Purchase Funds").
- [120] The Reuters used the Purchase Funds to purchase the New Home, which was registered in their names.
- [121] My conclusion that the plaintiffs advanced the Purchase Funds to the Reuters is also supported by Ms. Uffelman's evidence. Ms. Uffelman testified that she knew of no means by which her parents could have purchased the New Home on their own. She further testified that the plaintiffs were likely the source of the Purchase Funds.
- [122] The Reuters moved into the New Home and lived there together until Mr. Reuter died on October 21, 2014, at which time Mrs. Reuter became the sole registered owner of the New Home. Mrs. Reuter continued to live there alone until she died on February 1, 2019.
- [123] The Old Home remained at the Goldstream Mobile Home Park after the Reuters moved into the New Home. The Reuters tried to sell the Old Home, but had no success. They had tenants living in the Old Home for a time in order to cover the pad rental and utility costs. The plaintiffs had expected a significant portion of their loan to the Reuters to be repaid rather quickly from the sale of the Old Home. However, the timeline for repayment became longer and longer.
- [124] By 2009, the Old Home still had not sold and the Reuters were in a position where they had to rescind their tenancy with Goldstream Mobile Home Park. Their handwritten, signed letter of October 7, 2009 doing so, is in evidence. Around that same time, the Reuters transferred ownership of the Old Home into the plaintiffs' names in order for the plaintiffs to assume the pad rental payments and to be able to facilitate the sale of the Old Home. The plaintiffs paid \$107.75 to Burns & Taylor Registry Services Ltd. for the conveyance. A copy of this receipt is in evidence.
- [125] Now the registered owners of the Old Home, the plaintiffs tried to sell it. While doing so, they paid the required pad rental fees from October 2009 to May 2010 at a rate of \$485 per month and, in June 2010, at a rate of \$500 per month.
- [126] The Old Home finally sold in June 2010 for the amount of \$34,000. Prior to accepting this offer, the plaintiffs sat down with the Reuters and secured their agreement to the sale price, as their agreement was that the net sale proceeds of the Old Home would go directly to the plaintiffs, to be deducted from the debt the Reuters owed. Mrs. Piga described that there was no disagreement or emotional upset from anyone during this conversation. Although the amount was much less than they and the Reuters had been hoping for from the sale of Old Home, it was their best and only offer after quite a long time. Some of the documents pertaining to the sale of the Old Home are in evidence. The plaintiffs kept the net proceeds of sale from the Old Home, the sum of \$30,109.73 and applied those funds to the balance

owing under the parties' agreement.

- [127] After this partial payment, the parties changed the terms of their initial agreement. In 2006, at the time of their initial agreement, the parties had expected the Old Home would sell in a relatively short period of time for near its appraised value. They expected the loan could then be repaid in fairly short order through the Old Home net sale proceeds and then in small monthly amounts after that. They had expected at the time of their initial agreement that the loan would be paid in perhaps six to 12 months. However, by 2009/2010, the landscape had changed. As I have found above, the Reuters had been unable to sell the Old Home and had to rescind their tenancy in the Goldstream Mobile Home Park. The plaintiffs assumed responsibility for paying pad rental fees for the Old Home and worked towards selling it. When it eventually sold in June 2010, it sold for much less than any of them had anticipated at the time of their original agreement. Even with the partial payment from the Old Home net sale proceeds, the balance on the loan remained high.
- [128] At the time of the sale of the Old Home, Mr. Reuter's health was poor and the plaintiffs were aware that the Reuters were not in a good financial situation. Given the close relationship they had with them, the plaintiffs decided that they did not want to add to their friends' stress, so they offered to have the Reuters repay the balance owing under the loan from the sale proceeds of the New Home whenever the last of Mr. and Mrs. Reuter went into a care facility or died. The plaintiffs did this because they wanted their friends to know they were safe in their home. The Reuters accepted this offer and expressed their thanks and gratitude to the Pigas many times after that.
- [129] The Reuters continued to reside in the New Home together until Mr. Reuter died on October 21, 2014, at which time sole registered ownership of the New Home passed to Mrs. Reuter.
- [130] Mrs. Reuter continued to live in the New Home following her husband's death. On January 28, 2018, she executed a very simple Will, a do-it-yourself Will, naming one of her children, Ms. Uffelman, as executor. In her Will, Mrs. Reuter directed that after payment of all of her debts, funeral and testamentary expenses, taxes and the like, the residue of her estate should be divided equally between Kristalynn Uffelman, Karen Uffelman, Katherine Uffelman, Katherine Lake and James Reuter Junior. These are all children or step-children. Brenda Bond, Mrs. Reuter's long-time friend, witnessed her signature. The Will does not identify any specific debts.
- [131] Mrs. Reuter died on February 1, 2019. After receiving the Grant of Probate, the executor attempted to sell the New Home. She learned the New Home had several problems that needed to be repaired before it could be sold. She made those repairs, and the New Home eventually sold for \$200,000. After paying the expenses associated with the repairs, the balance remaining in Mrs. Reuter's estate is approximately \$120,000. The sale proceeds compromise the entirety of her estate.

[132] I have already outlined my general findings about the credibility of the plaintiffs and the reliability of their evidence. I would add that the various specific criticisms levelled by the defendants do not impact these findings. The plaintiffs' failure to have a written agreement, to keep all of the relevant documents, to go to a lawyer, to talk to an accountant, are all explained by their close relationship with the Reuters. They trusted each other like family. This was not, in any sense, a commercial endeavour for the Pigas. The Pigas never thought repayment would be an issue and were prepared to wait to recover their funds, interest-free, until neither of their friends were living in the New Home. The plaintiffs did not loan these funds for any financial gain, they simply wanted to be repaid the principal amount. The Pigas' failure to tell others about this loan agreement with their friends is understandable as well. They considered it a very personal matter and they did not wish to share the Reuters' financial circumstances, or the circumstances of the loan, with anyone, not even their own children.

Decision

[133] Based on the testimony of the plaintiffs and the factual matrix I have found above, including the documentary evidence and the evidence of partial performance, I find the plaintiffs have established, on a balance of probabilities, that there was an oral contract between themselves and the Reuters in the terms they allege. I am satisfied it would be clear to the objective, reasonable bystander that they and the Reuters intended to contract and that the essential terms of that contract can be determined with a reasonable degree of certainty.

[134] In 2006, the plaintiffs and the Reuters agreed that the plaintiffs would loan the Reuters the funds they required to purchase the New Home and that the Reuters would wholly repay the amount of that loan, interest free, from the net proceeds of sale of the Old Home, and any remaining balance would be repaid slowly over time. In 2010, for the reasons I have found, the parties agreed to amend their original agreement so that the Reuters would wholly repay the plaintiffs the balance owing on the loan, as well as the Old Home pad rental costs paid by the plaintiffs in 2009 and 2010, on the following terms: the plaintiffs would receive the net funds from the sale of the Old Home as partial payment and the balance owing under the loan would be paid from the sale proceeds of the New Home whenever the last of Mr. and Mrs. Reuter was placed in an elder care facility or died, whichever came first.

[135] That Mrs. Reuter repeatedly told a number of her closest friends that she owed this debt to the plaintiffs only supports what would be clear to the objective reasonable bystander. In short, I am satisfied that there was an oral contract, the Agreement, as claimed by the plaintiffs.

[136] I am further satisfied that the plaintiffs met their obligations under the Agreement. They advanced the Reuters the following amounts under the Agreement:

- a) \$5,000 for the deposit on the New Home purchase;
- b) \$105,821.28 to complete the purchase of the New Home;
- c) \$123.21 to reimburse Mrs. Piga for the legal fees she paid regarding the New Home purchase; and
- d) \$4,487.75 for the conveyance cost of the Old Home and pad rental fees paid by the Pigas until the Old Home sold.

[137] All of these amounts total \$115,432.24.

[138] Although not fully developed in their submissions, the defendants contend that if I find (as I now have) the plaintiffs did indeed advance these funds to the Reuters, they were intended as a gift. This contention finds no support in the evidence. The plaintiffs, whose evidence I accept, have denied any donative intent when advancing the Reuters the funds. The defendants' further contentions that if there was indeed a debt owing that it was satisfied in different ways (as set out in their written submissions) are all speculative, and I similarly find no support for them in the evidence.

[139] The Reuters partially met their obligations under the Agreement when, in 2010, the plaintiffs received the net proceeds of sale from the Old Home in the amount of \$30,109.73. At that time then, the balance owing by the Reuters under the Agreement was \$85,322.51. That amount remains owing today.

[140] I am further satisfied the plaintiffs have established that, in breach of the Agreement, the defendants have failed to pay the balance owing under the Agreement to the plaintiffs, despite demand. There remains due and owing to the plaintiffs the sum of \$85,322.51.

[141] With this conclusion, it is unnecessary for me to consider the plaintiffs' alternative claims.

Is There a Limitations Defence?

[142] The defendants contend that if I conclude there was a loan, which I have, that it was a demand loan, either at the inception of the parties' agreement or that it became a demand loan in 2009 with the transfer of the Old Home. If so, they argue the limitation period for commencing an action expired long ago and thus the plaintiffs' claim is statute barred. However, if found to be a contingent loan, as the plaintiffs contend, the defendants agree that the action is not statute barred.

[143] The characterization of a loan as a demand loan or contingent loan has a significant impact on whether a claim is statute barred or not. The Court in *Kong v. Saunders*, 2014 BCCA 508 explained at para. 18:

- [18] The jurisprudence has established a distinction between demand loans and contingent loans in respect of the commencement of the running of the limitation period. Demand loans are, of course, loans payable on demand. Contingent loans are loans that are payable on a future date or upon the occurrence of a specified event.
- [144] A demand loan is a loan payable on demand by the lender. When no time is fixed for the repayment of a loan and interest is not mentioned, the loan is repayable on demand and interest is allowable only from the time when repayment is demanded. A contingent loan is payable at a future date upon the occurrence of a specified event. When a promise to pay is made conditional upon a contingency, no right to payment can arise until the happening of the contingency. Therefore, the limitation period in respect of contingent loans begins to run on the repayment date or the occurrence of the contingency. This is because an action for repayment of the loan cannot be brought prior to the repayment date or the occurrence of the contingency, as the case may be: Kong at para. 19.
- [145] I agree with the position taken by the plaintiffs that there really is no question that the Agreement was a contingent loan. It was a loan payable at a future date upon the occurrence of a specified event. The contingency that made the loan payable was the date Mrs. Reuter died or the date of the sale of the New Home after she died. As a result, the limitation period started to run from the date of Mrs. Reuter's death, February 1, 2019, or upon the date the New Home was sold, which happened after that. In any event, as the plaintiffs' Notice of Civil Claim was filed on July 21, 2021, the limitation period had not expired.

Conclusion and Costs

- [146] For the foregoing reasons, I am satisfied the plaintiffs have established that the defendants have breached the Agreement and that they are entitled to damages in the amount of \$85,322.51. They are also awarded pre-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, from the date of the sale of the New Home following the death of Carmella Reuter to the date of judgment.
- [147] As the successful party, the plaintiffs are also entitled to their costs of this action, on the ordinary scale.

"S.A. Donegan J."

DONEGAN J.

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