

CANADA / JUDGMENT

Smart and Smart v. Guerster

2005 BCSC 792

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 792 Smart and Smart v. Guerster IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Smart and Smart v. Guerster, 2005 BCSC 792 Date: 20050601 Docket: 34000 Registry:

Kamloops Between: James Smart and Rosemary Smart Plaintiffs And Thomas Guerster

Defendant Before: The Honourable Mr. Justice Powers Reasons for Judgment James Smart and

Rosemary Smart appeared on their own behalf Thomas Guerster appeared on his own behalf

Date and Place of Trial/Hearing: April 11 - 15, April 18 - 20 and May 5 -6, 2005 Kamloops, B.C.

INTRODUCTION

- [1] The plaintiffs, Mr. and Mrs. Smart, are the former father-in-law and mother-in-law of the defendant, Mr. Guerster. The Smarts claim that the defendant owes them money for services they provided to him over approximately 4 years from 1998 to 2002. (\$35,090.00). They also claim out-of-pocket expenses they say they expended on his behalf. (\$3,710.36). They say this should be set off against money they owe to the defendant on a promissory note (\$32,550.40 including interest) and one-half of a shipping bill (\$3,266.15).
- [2] Mr. Guerster denies most of the Smarts' claims. He counterclaims for the amount owing under the note (\$40,421.75 including interest), a loan he says they assumed from their son (\$4,000.00), one-half of a bill for shipping furniture from Switzerland (\$4,269.04), the value of furniture from Switzerland (\$35,000.00), and money removed from his bank account without authorization (\$12,378.46).

BACKGROUND

- [3] The parties met in 1997 when Mr. Guerster was visiting from Switzerland. He also met their daughter who subsequently moved to Switzerland and married Mr. Guerster. Mr. Guerster owns rental property in Princeton, British Columbia, purchased in 1991. He and his wife visited Canada approximately once a year after their marriage. Ms. Smart would also visit Switzerland and spent time with Mr. Guerster and her daughter. The Smarts own rental property in Bella Coola and were considering plans for a large building in which they operated a group home. The parties shared an interest in acquiring property, improving it and renting it for a profit. Mr. Smart and Mr. Guerster were both capable of doing renovation

work and got along.

- [4] Mr. Guerster was having difficulty with his rental properties. He had a property manager but the time difference between British Columbia and Switzerland made communications difficult. Mr. Guerster asked Ms. Smart to act as a go-between for him and his property manager in Princeton. She did this, but was also concerned about the time and the responsibility. Mr. Guerster also asked Mr. Smart to help get the rental properties in shape after tenants left. Mr. Smart did some work on the defendant's properties in Princeton even though it is about 10 hours travel time from his home in Bella Coola. When Mr. Guerster was in Canada he would also work on his properties, sometimes with the help of Mr. Smart and sometimes alone. He would also work with Mr. Smart on projects around the Smarts' home.
- [5] The parties discussed going into business together and talked about some form of property management company. They also discussed other business opportunities. I am satisfied that these discussions were general in nature and no firm commitment was made. Mr. Guerster loaned \$24,500.00 to the Smarts in April/May of 2000. The Smarts thought this was an indication of his serious intentions. There was nothing firm or specific at that time. Although I accept it was a serious consideration for both parties, the form of the venture and the parties' contributions and interests were not determined. It was just an idea they were interested in pursuing.
- [6] The defendant and his wife moved to Canada in the spring of 2002. They shipped their belongings and some additional furniture by container to Vancouver and then to Princeton. Mr. Smart attended in Princeton and helped unload the container. He also used his truck and a trailer to move things from Bella Coola to Princeton and back. Some of the furniture from Switzerland went into the lodge that the Smarts were operating at this time.
- [7] Mr. Guerster purchased property in Hagensborg very close to Bella Coola in 2000 or 2001 and moved a mobile home onto it. The mobile home had been on the Smarts' property. Mr. Guerster began gutting the mobile home in 2000. They had acquired it from people Mr. Smart had built a home for. The mobile home was still in the name of the previous owners and was transferred into Mr. Guerster's name. Mr. Smart helped Mr. Guerster move the home and set it up on Mr. Guerster's property. Mr. Smart also helped Mr. Guerster build an addition on the mobile home. Mr. Smart supplied some lumber to Mr. Guerster that had been salvaged from a building that had burned.
- [8] The parties began to seriously discuss their business plan and negotiate the corporate structure and shareholdings in May 2002. They discussed what each of them would contribute. The Smarts believed they had an agreement, but Mr. Guerster was not happy with the proposals and he decided not to participate. He told the Smarts and relations between them became difficult. Mr. Guerster's wife was very disappointed and sided with her parents.

- [9] Mr. Guerster and his wife separated soon after and became involved in a difficult matrimonial dispute, which is ongoing. The Smarts asked Mr. Guerster for payment for work they did for him and rendered an invoice for that work. They commenced this action and Mr. Guerster responded with his counterclaim.

ISSUES

- [10] What, if anything, does Mr. Guerster owe the Smarts for any assistance they gave him with his properties in British Columbia and a mobile home placed on the Hagensborg property?
- [11] The Smarts prepared and sent an invoice to Mr. Guerster for services they say they provided to him from 1998 to 2002. The invoice was prepared after they had their falling out and Mr. Guerster had separated from their daughter. They say this represents fair compensation for what they did at his request. They say that they did not bill for this work before because they had discussed it, and at Mr. Guerster's request, thought it would be a factor in their business arrangements and would be accounted for then. Mr. Guerster takes the position that no money is owing. He believed it was family helping family. His evidence is there was no agreement or expectation for payment. THE INVOICE
- [12] The Smarts submit a letter and attached invoice (exhibit 27) that they prepared after the parties had a falling out over the property management company they considered as a means to share investments. The Smarts say that they did the work involved at the request of Mr. Guerster, and in the expectation that they would all be involved in the property management company. Mr. Guerster said he believed it was simply family helping family with no expectation for compensation but reimbursement for actual expenses. Mr. Guerster argues it would not make sense to pay someone to travel from Bella Coola to Princeton to do this kind of work. He also argues that, at least for part of the time, the houses in Princeton were vacant and therefore required very little in the way of management or work. Mr. Guerster also argues that he had a property manager for most of the relevant time and only paid that person 10% of the rent about \$140.00 - \$150.00 per month and would not pay Ms. Smart \$200 a month for similar services.
- [13] The only documents that support any claim for payment are two invoices dated December '98 and that related to work done in 1998. The out-of-pocket expenses were paid for, but not the labour. Mr. Guerster says that is because there was no agreement to pay for labour. He also said that he saw a document that he believed was marked as exhibit 7 in the discovery that indicated there would be no fee for the labour. He said it was a copy of a fax from the Smarts to his wife. He said the bottom half, which was blacked out, but still legible, said that the invoice was just to show what the work would have cost if it was paid for. It confirmed that there was no liability for the work. Mr. Guerster said he saw this at the office of the Smarts' lawyer, but was not given a copy and was told to leave the office. The Smarts' lawyer sent the file and documents to the Smarts shortly after. Ms. Smart said she has looked for exhibit 7 and could not find it. She denies that it was a document that said there was no liability for payment for these services. She points to the portions of the examination for

discovery that refers to exhibit 7, and points out that there is no reference to a portion being blacked out. The lawyer gave evidence and does not recall the document that Mr. Guerster is referring to.

- [14] The invoices for the work in December 1998 (exhibit 50) includes labour and materials but not travel. This involved extensive work. The charges were: Ridgeway House: Labour: \$1,050.00 Material: \$469.69 Total: \$1,519.69
- [15] The July 31 2002 invoice that covers the same work claims : Labour (5 days) \$1,000.00 Mileage: \$800.00 Total: \$1,800.00
- [16] No amount for material. The increase is \$750.00. Tulameen: Labour: \$150.00 Materials: \$283.00 Total: \$433.00 July 31, 2002 Invoice: Labour: \$200.00 Mileage: \$100.00 Total: \$300.00
- [17] No amount for material. The increase is \$150.00.
- [18] There is no explanation for the increase but I assume it represents an attempt to reconstruct past events.
- [19] Mr. Smart says the reason the December bills were not paid was that Mr. Guerster asked him to do the work, but Mr. Smart said he would have to be compensated. He said they discussed possible business ventures and that these properties might be a part of those ventures. The work would be taken into consideration then. Mr. Smart also said in his evidence that they agreed they would help each other.
- [20] The discussions in May 2002 were reduced to the forms of minutes that reflect Ms. Smart's view of the arrangements. They refer to the Princeton properties and a property in Hagensborg, being part of the assets of the holding company based on their assessed value. There is no mention of the value of the work done by Mr. Smart. It is only after Mr. Guerster tells the Smarts that he is not prepared to enter into the corporate arrangements proposed that payment for the work is mentioned.
- [21] There was no agreement to pay for any of the work that was done although Mr. Guerster agrees it was his responsibility to pay for any expenses, including travel expenses. The most that can be said is that the Smarts expected Mr. Guerster would go into business with them, he was their son-in-law and they were prepared to help him and their daughter.
- [22] Some of the work is what would be considered normal for helping family as Mr. Guerster suggests. Some of it was more extensive. The work benefited Mr. Guerster and his wife by improving the property. The work represented by the December invoices, and the invoices themselves, indicate there was some expectation of payment. The amount of \$1,200.00 is reasonable for that work. I find that amount to be owing.

- [23] The balance for the Princeton houses, especially when Mr. Guerster was present, is more consistent with family helping family. I find there was no obligation to pay for that work. Certainly Mr. Guerster would not expect to pay \$800.00 in mileage to have the Smarts attend in Princeton to do half a days work inspecting the houses after renters left or to winterize them. He could have arranged to have someone in Princeton do this work for considerably less. THE HAGENSBORG PROPERTY
- [24] The Smarts claim \$14,000.00 for the mobile home that was placed on that property. It is a mid 70's mobile home. Mr. Guerster says that it was a gift to him and his wife. The Smarts gave a mobile home to their daughter and her first husband, and Mr. Guerster says they told him they were doing the same with this one. It originally belonged to the Smarts, who obtained it from the owners of the property that became the Eagle Lodge. They paid \$2,000.00 for it and moved it to property they owned. They sold the property and the mobile home to the Dixons. The Dixons lived in it for a number of years before it was delivered to the Smarts. The mobile home became part-payment to the Smarts for building a home for the Dixons. The contract does not show any value for it. There is no evidence that the Smarts ever paid any provincial sales tax on it. It was not transferred into their name but sat on their property for a time until Mr. Guerster began to work on it and eventually moved it. It was open to the weather on at least one side, where an addition had been removed. Mr. Guerster says that he gutted it because of the poor condition it was in. The Smarts deny that it had suffered any damage. Mr. Guerster planned to live in it or rent it, or even sell it eventually. When Mr. Guerster decided to move to Canada he thought he and his family would live in it.
- [25] The Smarts helped him arrange to have it moved and set it up on the property. It was still registered in the name of the Dixons and was transferred into Mr. Guerster's name. The value was shown as \$5,000.00. I accept that it was worth at least that amount, but there is no evidence that it was worth \$14.00 or \$15,000.00 as claimed by the Smarts. The onus is on the Smarts to show that there was a contract to pay for the mobile home or an expectation of payment. They have not done so. I find there is no entitlement to payment. I find it is more likely than not that it was intended to be a gift.
- [26] I find the work that was done to clear the property and level the building site and build the addition was a significant benefit to Mr. Guerster. However, I find there was no expectation of payment. The work was extensive but was the sort of thing the Smarts and Mr. Guerster were used to doing to increase the value of their properties. It was intended to be help for the Smarts' daughter and son-in-law. Again, no value was placed on any of this work or the mobile home when the contributions for the corporation were discussed in the minutes. This is more consistent with Mr. Guerster's recollection than the Smarts. TRUCKING
- [27] The claims for time spent at \$200.00 a day has not been proven. There is no indication that the parties ever discussed payment for time spent, and it is more likely than not that this was family helping family as Mr. Guerster says. However, it was the parties' arrangements that the out-of-pocket expenses would be paid. There was no agreement to pay mileage, but

fuel costs should be paid. I have no direct evidence of the fuel costs. The most I have is the estimate of 20% of fuel and something for meals in a trip from Bella Coola to Princeton to Vancouver to Princeton and back to Bella Coola. This amount was \$194.00.

- [28] The best I can do is estimate a reasonable amount for two trips of shorter duration. I find that \$500.00 is a fair amount for the fuel costs.
- [29] The trip to transport materials from Bella Coola and back is claimed as a reimbursement by the Smarts elsewhere and is duplicated here. I will deal with it when I deal with the reimbursements. STORAGE
- [30] There was never any agreement to pay storage, but I find it is reasonable to expect Mr. Guerster to pay the Smarts to move his belongings from their property to the Hagensborg property. Mr. Smart sent a letter to Mr. Guerster telling him that unless Mr. Guerster made arrangements to move these goods, that Mr. Smart would do so and bill him for it. I find the \$50.00 claimed is reasonable. AGENT
- [31] Ms. Smart claims \$2,400.00 per year for four years she says she acted as agent for Mr. Guerster in dealing with his property in Princeton. There was never any agreement to pay for this work. Ms. Smart said she tried to be fair in determining the amount and referred to what she is paid for her work with the local water district. However, the work that Ms. Smart did for the water district was considerably more than she did for Mr. Guerster. Mr. Guerster says he would never agree to pay this amount especially when he had a property agent in Princeton that he paid 10% of the rent to.
- [32] Ms. Smart is simply trying to claim for services she provided to a member of her family after a falling out with that person. I accept that the Smarts were disappointed when Mr. Guerster decided not to proceed with the business venture. They have said that they felt used by Mr. Guerster. I find that is the reason for the billing for services, rather than any agreement or understanding to be compensated. Ms. Smart has also failed to prove the amount claimed is reasonable. Initially, little was required of her, except to act as a go-between for Mr. Guerster and his agent. She gave Mr. Guerster some advice, but that was no more than would be expected of family members. She did represent Mr. Guerster at two arbitrations before the rentalsman and communicated with a lawyer to enforce the arbitrator's decision. She also helped to make sure expenses were paid including taxes. She also spent some time paying some of the bills related to the property. However, she has not demonstrated how much time and trouble was involved, and has certainly not shown that this was worth the amount she has claimed. I find that this has not been proven. DOES MR. GUERSTER OWE THE SMARTS ANY MONEY FOR EXPENSES INCURRED BY THEM ON HIS BEHALF?
- [33] The Smarts have presented a calculation of money they say they expended on Mr. Guerster's behalf and which they say has not been reimbursed. The amounts are: Exhibit 49 - Lumber for addition (\$500.00) This relates to lumber used on an addition to the mobile home on Mr. Guerster's property in Hagensborg. The lumber came from a pile of lumber salvaged from a building which had been burned. The nails had to be removed from much of it. Mr. Guerster

believed that it was given to him without any expectation of payment. The Smarts can only say they would not have given it to him if they did not believe they were going into business together, and that this property might become part of the company assets. I find it is more likely than not that this lumber was useful, but not of any great value. The Smarts had it sitting in a pile on their property for some time, and I find it was simply given to Mr. Guerster and their daughter without expectation of payment or compensation. The Smarts have failed to prove on the balance of probabilities that they are entitled to be paid for this lumber, and the evidence falls short of proving its value. This claim is dismissed. Cash to Credit Union account (\$400.00) Ms. Smart signed and deposited a cheque for \$400.00 on the account of A.F.A.B. November 24, 2001, into Mr. Guerster's account in the Valley First Credit Union in Princeton. There was little money in that account and expenses were to be paid relating to Mr. Guerster's rental properties. Mr. Guerster says it is an interest payment on a loan he made to the Smarts' son who had operated A.F.A.B., but he is only speculating. In June 2001, a cheque was written from A.F.A.B. to Mr. Guerster in the amount of \$930.00. That cheque referred to Dixon invoice #1191064. A letter was also sent to Mr. Dixon referring to that invoice indicating that a cheque had been written to Mr. Guerster on the instructions of Mr. Dixon. The letter was carbon-copied to Mr. Guerster and to Ben Smart, the Smarts' son. The \$400.00 cheque written on November 24, 2001, does not make any reference to any invoice. The Smarts were operating A.F.A.B. on behalf of their son by that time. The explanation for the payment of the monies given by the Smarts is consistent with the unorthodox way in which Ms. Smart dealt with Mr. Guerster's accounts. I find that it is more likely than not the money was advanced by the Smarts and is payable to them. October 31, 2001 Kodiak Electric (\$116.63) The Smarts' evidence is that this related to work done for Mr. Guerster on his property in Hagensborg. Mr. Guerster does not know what it is for and does not believe that he hired Kodiak to do any work for him. The Smarts have produced a cheque dated October 31, 2001 payable to Kodiak. The cheque is drawn on A.F.A.B. The note on the cheque is Re Draw (Guerster). This is consistent with the practice of sometimes paying accounts on behalf of Mr. Guerster from their own funds and seeking reimbursement. The Smarts have produced an invoice from Kodiak that states it is work for Mr. Guerster on a mobile home. I find this amount has been proven on a balance of probabilities. January 15, 2002 BC Gas (\$17.46) The Smarts do not own property that is serviced by BC Gas. They have not been able to produce the cheque that relates to this. They believe it is in Mr. Guerster's possession because he took the files that relate to his properties. However, a copy of the invoice with a handwritten note confirming it was paid with a cheque #45 has been filed. Their bank statement of January 31, 2002 shows cheque #45 for \$17.46 cleared January 21, 2002. I find this amount has been proven. January 15, 2002 Princeton Light and Power (\$107.99) Three bills from Princeton Light and Power totalling \$107.99 have been produced with a handwritten note that they have been paid by cheque #46 January 15, 2002. The bank statement confirms this cheque did clear on January 25, 2002. I find this amount has been proven. January 15, 2002 Hamilton Insurance (\$110.00) Mr. Guerster agrees that this amount is owing. February 12, 2002 Hamilton Insurance (\$90.00) The Smarts' bank statement shows that cheque #494 for \$90.00 cleared on February 22, 2002. Hamilton Insurance is Mr

Guerster's agent. The Smarts cannot produce the cheque. They believe Mr. Guerster would have it. I accept their evidence that they paid it on Mr. Guerster's behalf and it is owing. Mr. Guerster accepts that it is owing. February 12, 2002 Princeton Water Taxes (\$529.20) Mr. Guerster accepts this is owing. February 12, 2002 BC Gas (\$156.83) The Smarts have been unable to produce the cheque. Their bank statement shows a cheque #495 for this amount cleared February 15, 2002. I find this amount was paid by them and is owed to them. February 6, 2002 Filing Fee (\$50.00) Mr. Guerster originally accepted that this is owing. However, when we came back on May 4, he took the position that it had not been proven. I find it more likely than not that it was incurred on behalf of Mr. Guerster to collect monies owed by one of his tenants. I find that it is owing to the Smarts. February 8, 2002 Canada Post Registered Mail (\$11.98) I am satisfied that the Smarts incurred this expense to send documents to a lawyer who was pursuing one of Mr. Guerster's tenants for arrears of rent. January 30, 2002 Crafters Choice Subscriptions (\$38.97) This related to magazine subscriptions purchased at the request of Mr. Guerster's wife and were part of Mr. Guerster's family obligations to the Smarts. I find that they incurred it with the expectation that Mr. Guerster would repay them. It is owing. February 20, 2002 BC Gas (\$11.02) The Smarts cannot produce the cheque but have produced their bank statement which shows a cheque cleared February 27, 2002. I accept their evidence that it was incurred on behalf of Mr. Guerster and is owing. March 12, 2002 Vanderburgh (\$93.18) Mr. Guerster accepts that this is owing. March 12, 2002 Vanderburgh (\$435.31) The bill for this work has been produced. The Smarts say it has been paid by them. Mr. Guerster has no evidence to show he has paid it or that it is outstanding. I find it has been paid by plaintiffs and is owing to them. March 12, 2002 BC Gas (\$150.77) A copy of cheque #520 dated March 12, 2002 has been produced to prove this amount. I find it is owed to the Smarts. March 12, 2002 Princeton Light and Power (\$40.27) A copy of cheque #521 dated March 12, 2002 has been produced to prove this amount. I find it is owed to the Smarts. April 12, 2002 BC Gas (\$135.71) This has been accepted by Mr. Guerster. April 12, 2002 Vanderburgh (\$35.38) This has been accepted by Mr. Guerster. May 18, 2002 Co-op (TV, Floss, etc.) (\$180.83) The Smarts say this was payment for items purchased by their daughter, Mr. Guerster's former wife. The Smarts were unable to produce the receipts for it but have produced a cheque and a statement of account for a similar transaction in 2000. When we continued the trial on May 5, the Smarts were able to produce the receipt and identify what items were incurred for Mr. Guerster and his then wife. Mr. Guerster suggests the Smarts should pursue their daughter, but I am satisfied that it is a family debt and Mr. Guerster is also responsible for it. The Smarts may set it off against any amounts owed by them. I am satisfied this has been proven on a balance of probabilities. I find it is owing. May 24, 2002 Revy (\$137.38) The Smarts have produced a receipt for this and identified the items that relate to Mr. Guerster. Mr. Guerster was working on the mobile home in Hagensborg, and I am satisfied that these items relate to that residence. I find that these items have been proven. May 22, 2002 Princeton Building Mart (\$16.58) This has been accepted by Mr. Guerster. The Smarts have no reason to make purchases in Princeton except on Mr. Guerster's behalf. I accept that this was incurred for Mr. Guerster's benefit. Kevin's wages (\$50.00) This was not explained by the Smarts,

therefore, I am unable to find that it is owing. Trailer (\$100.00) Mr. Guerster accepts this is owing. May 26, 2002 20% of fuel and Tom's food (\$194.86) This relates to a trip from Bella Coola to Princeton to Vancouver and back to Bella Coola. Mr. Smart and Mr. Guerster took the belongings of Mr. Guerster's wife to Princeton. Mr. Guerster also drove a car belonging to Ms. Smart to Williams Lake on the way. They travelled to Vancouver and purchased a car for Ms. Smart and returned to Princeton to pick up furniture to deliver to Bella Coola. Mr. Smart said that after discussions, Mr. Guerster agreed to pay 20% of the costs. Mr. Guerster denies that. The trip benefited both parties and I accept that, on this occasion, there was an agreement to pay this amount. It is owing. SUMMARY Cash to Credit Union: \$400.00 Kodiak Electric: \$116.63 January 15, 2002 - BC Gas: \$17.46 January 15, 2002 - Princeton Light and Power: \$107.99 January 15, 2002 - Hamilton Insurance: \$110.00 February 12, 2002 - Hamilton Insurance: \$90.00 February 12, 2002 - Princeton Water Taxes: \$529.20 February 12, 2002 - BC Gas: \$156.83 February 6, 2002 - new filing fee: \$50.00 February 8, 2002 - Canada Post registered mail: \$11.98 January 30, 2002 - Crafters Choice Subscriptions: \$38.97 February 20, 2002 - BC Gas: \$11.02 March 12, 2002 - Vanderburgh: \$93.18 March 12, 2002 - Vanderburgh: \$435.31 March 12, 2002 - BC Gas: \$150.77 March 12, 2002 - Princeton Light and Power: \$40.27 April 12, 2002 - BC Gas: \$135.71 April 12, 2002 - Vanderburgh: \$35.38 May 18, 2002 - Co-op: \$180.83 May 24, 2002 - Revy \$137.38 May 22, 2002 - Princeton Building Mart: \$16.58 Trailer: \$100.00 May 26, 2002 - 20% of fuel and Tom's food: \$194.86 Total: \$3,160.35

- [34] They do not have the cheques to show payment for these. They say Mr. Guerster took the documents when he left Bella Coola. Mr. Guerster denies this, but is in possession of notes that Ms. Smart made to identify other transactions. They have produced some bank statements to prove that these amounts came from their account. During the adjournment, they were also able to find some carbon copies for some of these cheques, and as a result, the parties have agreed to many of them. PROMISSORY NOTE
- [35] What is the balance due on the promissory note, and is part of it payable in Swiss francs? If so, what is the appropriate day to calculate the exchange rate?
- [36] The parties do not agree how the loan came about, but do agree that Mr. Guerster loaned the Smarts \$24,500.00 in April 2000. The Smarts made four payments from May to August. The terms of payment were then changed to provide for interest to be paid April 31 in 2001, 2002 and the balance December 31, 2002. Ms. Smart prepared a promissory note to reflect this. There were also discussions that some of the money would be repaid in Swiss francs. Ms. Smart said that Mr. Guerster wanted Swiss francs in Canada but she did not know why. Mr. Guerster said he did not want to take the risk of changes in the exchange rate and wanted to be repaid in Swiss francs. If the rate changed the Smarts would take the risk or enjoy the benefit. He said the rate was poor at the time.
- [37] The note was prepared by Ms. Smart and reads: Promissory Note Value of Note: \$24,500 For value received, the undersigned promises to repay Thomas Guerster the sum of Twenty four thousand, five hundred dollars, together with interest from this date at the rate of 7.5% per annum, both before and after default, until paid in full. Payments will be as follows: •

Interest payments paid once a year on or before April 31st of each year until December 31, 2002. · The principal to be paid on or before December 31, 2002. Principal to be paid as follows: · 20,000 Swiss Francs (approximately \$17,285.35 Canadian) · Balance (approximately \$7214.65) in Canadian funds Signed at "Bella Coola, October 12, 2000." "Thomas Guerster" "Jim Smart" "Tammie Guerster" "R Smart" Witness Witness

- [38] Was the promissory note intended to run from the time the money was advanced or the date of the note? The parties presented me with their calculations of the amount due on the promissory note. They both calculate interest from May of 2000. The Smarts have calculated the interest in Canadian dollars. Mr. Guerster converted 20,000.00 Swiss francs to Canadian dollars in December of 2002, and calculates interest on that amount. Mr. Guerster's bank statement shows that he made a deposit of \$17,285.35 on April 19, 2000. This was the equivalent of 20,000 Swiss francs. The additional \$7,214.65 brings the total to \$24,500.00. The Smarts actually drew the money on May 24, 2000. However, I am satisfied that they are correct in calculating the interest to include May of 2000, when the money was made available to them and they could access the account.
- [39] The form of the promissory note indicates that Mr. Smart is signing as a party and Ms. Smart as a witness. However, the statement of claim says that they are both liable, and Ms. Smart confirmed in her submissions that it is her position that both she and Mr. Smart are liable on the promissory note.
- [40] Ms. Smart says that the exchange rate was to be the rate at the time the money was advanced. This does not seem logical to me. There was no need to deal with the exchange rate if the loan was in Canadian dollars and no need to deal with the exchange rate except for Mr. Guerster's benefit. The exchange rate on the note allows the parties to know how much would be repaid in Swiss francs and how much in Canadian dollars. The most logical interpretation is that the Smarts would repay Mr. Guerster 20,000 Swiss francs, and the balance shown on the note (\$7,214.65) and the interest in Canadian dollars. However, I disagree with Mr. Guerster when he argues that the calculation of the exchange rate should be as of the date the promissory note was due, with interest calculated on the increased Canadian amount from that time. The interest is to be calculated on the amount in Canadian dollars and paid in Canadian dollars.
- [41] The judgement for an amount in a foreign currency must be expressed in Canadian dollars as of the date of the judgement. The principle in British Columbia is to provide the successful plaintiff with sufficient Canadian funds to purchase the amount awarded in foreign currency at the time of the judgement. (*Banque Indosuez v. Canadian Overseas Airlines Ltd.* (1990), 40 CPC (2d) 33 (BCSC) aff'd without reference to this point: CA011947, Vancouver Registry, 12 March 1992 (BCCA)).
- [42] The amount owing is as follows: A payment was made on May 9, 2000 for \$490.93. The Smarts had calculated the payments on a monthly basis. I find the appropriate date to begin to calculate interest is May 1, 2000. Payment Made: Balance: May 1, 2000 \$24,500.00 Interest

to May 9, 2000 = \$45.31 ($\$24,500.00 \times 7.5\% \times 9/365$) \$490.93 \$24,054.38 Interest to June 9, 2000 = \$153.22 ($\$24,054.38 \times 7.5\% \times 31/365$) \$490.93 \$23,716.67 Interest to July 15, 2000 = \$175.44 ($\$23,716.67 \times 7.5\% \times 36/365$) \$490.93 \$23,401.18 Interest to August 12, 2000 = \$134.64 ($\$23,401.18 \times 7.5\% \times 28/365$) \$590.93 \$22,944.89 Interest to April 30, 2001 = \$1,230.54 ($\$22,944.89 \times 7.5\% \times 261/365$) \$24,175.43 Interest to April 30, 2002 = \$1,813.16 \$25,988.59 Interest to April 30, 2003 = \$1,949.14 \$27,937.73 Interest to April 30, 2004 = \$2,095.33 \$30,033.06 Interest to April 30, 2005 = \$2,252.48 \$32,285.54 Interest to May 31, 2005 = \$2,421.42 \$34,706.96 Total principal and interest = \$34,706.96.

- [43] I find that the agreement was that the note would be repaid by payment of 20,000 Swiss francs (at the time of the note \$17,285.35), and the balance of \$7,214.65 and the interest on the total amount in Canadian funds. The portion of the total owing that represents the balance and the interest is \$34,706.96 - \$17,285.35 (equivalent of 20,000 Swiss francs) = \$17,421.61.
- [44] Therefore, the Smarts are required to pay Mr. Guerster \$17,421.61 and an amount equal to 20,000 Swiss francs as of the day of judgement.
- [45] Neither party had evidence of the exchange rate at the end of the trial. They agreed to attend at a bank to determine the rate and provide documentation to support it. They have provided documentation that shows the rate of exchange varies from bank to bank as follows: From Mr. Guerster - May 6, 2005 @ 12:08 p.m. - CIBC 20,000 Swiss francs rate 1.0885000 \$21,770 From the Smarts - May 6, 2005 @ 11:52 a.m. 20,000 Swiss francs rate 1.0649000 (this may be the rate the bank will pay to a customer, not the rate they will sell for) \$21,298.00 From the Smarts - Valley First Credit Union - May 5, 2005 20,000 Swiss francs - sell to customer $20,000 \times 1.0711$ 20,000 $\times 1.0188000$ - buy from customer \$21,422 Toronto Dominion - May 6, 2005 @13:01:20 Limit 16,000 Swiss franc - sell to customer $20,000 \times 1.0534$ 20,000 $\times 1.0034$ - buy from customer \$21,068.00
- [46] The rate should be the best rate available to the customer, that is, the rate a reasonable person would pay, and is sufficient to allow the purchase of the foreign currency.
- [47] Judgement for 20,000 Swiss francs. The exchange rate I have used is that from the Toronto Dominion Bank 1.0534. Therefore, the Canadian equivalent is 20,000 Swiss francs $\times 1.0534$ = \$21,068.00 SUMMARY
- [48] Therefore, the Smarts owe Mr. Guerster on the promissory note the sum of \$21,068.00 (equivalent of 20,000 Swiss francs).
- [49] The total in Canadian funds and interest $\$21,068.00 + \$17,421.61 = \$38,489.61$.
- [50] I have used the figure the parties have given to me effective of May 6, 2005. In the event that there is a change in the exchange rate between that date and the date of judgment which is significant, the parties may agree to the correct exchange rate as of the date of judgment when that is the day these reasons have been filed. Failing that agreement, that issue may be settled before the registrar. The parties could then present evidence by way of affidavit, or

simply statements from the respective banks as they have done so far and address the issue before the registrar. I believe that matter could be dealt with by telephone, unless the registrar ordered otherwise. I have said above that it is the best rate available to the customer that is to be used, and I trust that the parties would be able to agree on that amount without the necessity of a further hearing. \$4,000.00 LOAN TO PLAINTIFFS' SON

- [51] Have the Smarts assumed liability to Mr. Guerster for a loan he made to their son in the amount of \$4,000.00? I find that Mr. Guerster did lend the Smarts' son \$4,000.00 to help him obtain a mower. Mr. Guerster has not been repaid. The Smarts took over the operation of their son's business to complete his contracts for service after he left Canada. The business was a proprietorship not a limited business. It performed grass cutting and general landscaping services. The most Mr. Guerster can say is he expected the Smarts to pay the liabilities if they took over the operation. Mr. Smart may have told him he would be paid when the mower was sold but there was no contract or liability created to Mr. Guerster. There was no consideration for this promise if it was made. This claim is dismissed.
- SHIPPING BILL

- [52] Do the Smarts owe Mr. Guerster \$4,269.04 or \$3,266.15 for one-half of the shipping bill? The Smarts agree they owe one-half of the bill for the shipping costs to Vancouver, but not the insurance or the shipping to Princeton. Mr. Guerster arranged the insurance on his own and most of the items shipped were his and his wife's belongings. The Smarts did not benefit from the shipping to Princeton and expected that the goods they claimed would only be shipped to Vancouver. Mr. Guerster would have incurred the cost of shipping his own goods to Princeton in any event. There is no evidence that he incurred any significant increase in costs because the Smarts' belongings were also shipped. I find the Smarts are responsible for one-half the costs of the shipment to Vancouver in the amount of \$3,266.15 and court ordered interest from February 25, 2002, at the pre-judgement rate allowed by the registrar from time to time up to the date of this judgement. DO THE SMARTS OWE MR. GUERSTER FOR FURNITURE FROM THE SMARTS THAT IS IN THEIR LODGE, OR ANY AMOUNT?

- [53] Mr. Guerster claims the Smarts received the following furniture:

1. upright piano \$7,000
2. three complete bedroom suites 3 X \$5,000 = \$15,000
3. one set living room furniture \$8,000
4. two bedroom cupboards 2 X \$2,000 = \$4,000
5. one night stand \$1,000

- [54] There is no evidence to support the values. Mr. Guerster says this is what he thinks they are worth. He bases his opinion on visiting antique stores in British Columbia and looking at the prices. He said this was to be part of his contribution to the property management business they were contemplating. The furniture is in the Eagle Lodge operated by the Smarts and he wishes to be paid for it.
- [55] Ms. Smart says that the furniture in the lodge is furniture she purchased in Switzerland or was given to her in Switzerland and is not the property of Mr. Guerster.
- [56] She says the piano was a gift to her from Mr. Guerster. Ms Smart said that she told Mr. Guerster that she had a piano when she was younger and sold it when she and Mr. Smart moved. She told Mr. Guerster that she missed it. It was an upright with a brass sounding board. She said that Mr. Guerster presented her with the piano that is in the lodge and told her it was a birthday present to replace the piano she sold. She was touched by this and cried at the time. The Smarts spent over \$800.00 having it tuned and repaired. I find that this was a gift as she described.
- [57] I am satisfied that some of the furniture was acquired by Ms. Smart but not all of it.
- [58] The two side boards that are shown in exhibit 34, the back side, were acquired by Mr. Guerster in exchange for work he did for the previous owners, an older couple he knew in Switzerland. Ms. Smart only met them on one occasion and it is not likely that they would simply give these items to a stranger. The exhibits show them in use at Mr. Guerster's home in Switzerland. They will be returned to Mr. Guerster in Princeton within 30 days of the date of this decision. They will be returned in good condition and at the Smarts' expense.
- [59] The balance of the furniture is more difficult. It is clear that both Mr. Guerster and Ms. Smart were interested in old or antique furniture. Ms. Smart did acquire some on her visits to Switzerland. Some was acquired by visiting drop and shop locations where things are recycled and some at stores. Some things were acquired when people abandoned them at the end of their driveway. The dumping fees in Switzerland are high and the evidence is that this is a normal way of disposing of things.
- [60] Some of the larger items may have been purchased at a second hand store. There is a dispute between the parties about who acquired what and how. I have little more than the word of Mr. Guerster against the word of Ms. Smart.
- [61] The only documents are copies of receipts for some furniture from a second hand store in Switzerland called Heilsarmee. The amount for three receipts is only \$165.00 Canadian approximately. One invoice was produced by Mr. Guerster that showed a number of items, but again the value was only 190 Swiss francs in 2002. Ms. Smart says Heilsarmee is the same as the Salvation Army. Mr. Guerster says it is a step above and a play on the name. The parties both say they purchased items from this store at approximately the same time. A photo of Mr. Guerster's car loaded with furniture has been filed. The shipping documents from Switzerland do not support the claim that the furniture had any special value.

- [62] Ms. Smart said she acquired the furniture for the bed and breakfast. Mr. Guerster said he expected to be credited for it. Some photos of the furniture were filed.
- [63] They include: Exhibit 35 Dresser and nightstand Ms. Smart said she purchased this. Page 2 Single nightstand Ms. Smart said she purchased this. Page 2 2 nightstands Ms. Smart said she purchased this. Page 3 Dresser Ms. Smart said she purchased this. Page 4 Odd end table Ms. Smart cannot recall, but says Mr. Guerster told her it was theirs. Office armoire Ms. Smart purchased from a private home. Exhibit 37 Dresser and nightstand Part of 2 nightstands Ms. Smart found at someone's driveway. Armoire Ms. Smart does not recall. Exhibit 38 Armoire Ms. Smart does not recall, but then said she purchased this with dresser and nightstand in exhibit 37. Exhibit 36 Print-out from the Eagle Lodge website Ms. Smart indicated the items she believed came from Switzerland as follows: Matt's Room: Bedroom set and armoire Ms. Smart cannot recall where she obtained those from. Sterling's Room: Single nightstand Ms. Smart cannot recall where she obtained that. Fred's Room: Exhibit 38 Dresser Ms. Smart says this came from Heilsarmee. Tim's Room: 2 nightstands Ms. Smart says she obtained these from the end of someone's driveway. JD's Room: Armoire, dresser and mirror Ms. Smart says she obtained these from Heilsarmee.
- [64] Mr. Guerster filed a bill for the purchase of some furniture from Heilsarmee February 26, 2002. It is for a total of 190 Swiss francs. Even with the difference in value from Switzerland to Canada, it is hard to accept that the value would be in the thousands of dollars as claimed.
- [65] The onus is on Mr. Guerster to prove that the furniture is his. The conflicting evidence and lack of records is insufficient to prove ownership on the balance of probabilities. It also seems unlikely that the Smarts would agree to pay one-half of the shipping costs from Switzerland unless a significant amount of the goods being shipped were their property. Therefore, with the exception of the two side boards I have referred to above, the claim to the furniture is dismissed. CHEQUES WRITTEN ON MR. GUERSTER'S ACCOUNT
- [66] Have the Smarts taken \$12,378.46, or any amount from Mr. Guerster's bank account without his authority and without repaying it? Ms. Smart had access to Mr. Smart's chequing account for the purposes of dealing with expenses relating to his property in Princeton. The Valley First account was set up in a manner that allowed both Mr. and Ms. Smart to write cheques on the account. The unorthodox way in which the Smarts dealt with these accounts has complicated the accounting. Mr. Guerster used the word "embezzlement" in his statement of claim and in some of his submissions. This is certainly a serious allegation. However, what Mr. Guerster was really saying was that he wanted the Smarts to give him an accounting of the monies taken from the account. When documents were produced to explain the payments made, Mr. Guerster was prepared to accept them. There were difficulties in producing some of the documents because Mr. Guerster removed files that related to these accounts and his property when he left the Smarts' home in Bella Coola. The parties are unable to agree what documents were in those files, however, some of the sticky notes are handwritten notes that Mr. Guerster produced and were the kind of notes Ms. Smart said she made in order to identify the purpose of certain transactions and their repayment. Ms.

Smart had difficulty explaining all of the transactions without those materials.

- [67] Mr. Guerster identifies a number of cheques in issue in his counterclaim: CIBC Account: Cheque #4 December 3, 1998 \$932.85 Cheque #5 December 4, 1998 \$34.56 (Mr. Guerster is no longer claiming this) Cheque #4 & 5 This relates to work done in Princeton and invoices sent in December '98. This is for the materials and travel expenses, but not for the labour. Cheque #6 December 5, 1998 Ms. Smart said this was to reimburse Ben Smart for one-half of shipping to Mr. Guerster's wife. I find this package included more than Christmas gifts and was for Mr. Guerster's benefit. \$25.00 Cheque #7 May 13, 1999 \$1,280.93 (Mr. Guerster is no longer claiming this) Cheque #8 May 13, 1999 \$1,861.54 (No claim) Cheque #9 May 13, 1999 \$150.00 (No claim) Cheque #15 November 3, 1999 Ms. Smart said this was for nutritional supplements ordered by Mr. Guerster's wife. I accept this was properly paid. \$44.75 Cheque #16 November 4, 1999 Ms. Smart said Mr. Guerster has the documents and she cannot explain this item. This is no longer disputed by Mr. Guerster. \$13.74 Cheque #20 December 17, 1999 \$1,000.00 (No claim) Cheque #24 May 24, 2000 Related to promissory note - no issue with this cheque. \$24,500.00 Cheque #25 Debit June 5, 2000 Ms. Smart said this was to Country Fair at the request of Mr. Guerster's wife. This is no longer disputed. \$50.00 Cheque #29 June 30, 2000 \$760.95 Cheque #30 Cheque #29 and #30 are for payment of the Smarts' property taxes. Ms. Smart said it was repaid. Exhibit 47 is a note that Mr. Guerster produced. Ms. Smart says this is a note she would have produced to show that it had been repaid and would have been attached to a cheque for that amount. \$1,413.44 Cheque #31 August 27, 2000 Ms. Smart said this was for groceries purchased by Mr. Guerster and his wife when they were in Canada. I find that this was paid as stated by Ms. Smart. \$468.37 Cheque #35 January 16, 2001 Ms. Smart said this was for books ordered by Mr. Guerster's wife and is not disputed. \$20.10 Cheque #37 February 14, 2001 Ms. Smart said this was a subscription to a magazine for Mr. Guerster's wife and is not disputed. \$24.97 Cheque #43 July 10, 2001 Ms. Smart could not identify this. \$63.38 VALLEY FIRST ACCOUNT
- [68] This account was opened when Julie Moser became the property manager for Mr. Guerster in October 2000. The application for membership shows the applicants as James and Rosemary Smart. The deposit accounts are in trust for Tom Guerster. Jim and Rosemary Smart requested their names to be removed from the account on April 9, 2002. Cheque #106 July 31, 2001 This reimbursed the Smarts for payments they made on Mr. Guerster's taxes on his property. I find this has been explained. \$2,825.82 Cheque #107 August 7, 2001 Ms. Smart believed this was a reimbursement for personal expenses. \$240.00 Cheque #110 August 14, 2001 Ms. Smart could not explain this. She believes that the explanation was on the cheque by way of a sticky note and should have been in the file that Mr. Guerster took when he left their residence in 2002. This would be consistent with her practice. \$1,163.06

- [69] The items that remain in issue are: Cheque #29 June 30, 2000 \$760.95 Cheque #30 July 13, 2000 \$1,413.44 Sub-total: \$2,174.39 These amounts were used by the Smarts to pay their property tax, and the issue is whether it was repaid. Cheque #43 July 10, 2001 \$63.38 Cheque #107 August 7, 2001 \$240.00 Cheque #110 August 14, 2001 Payable to Mr. Smart. \$163.06 The Total in issue: \$2,640.83
- [70] The Smarts argue that if they had all of the documents which Mr. Guerster took with him, they would be able to demonstrate exactly what these were for and that they had been repaid. They also argue that in the past, when Mr. Guerster would visit Canada, they would review the accounts with Mr. Guerster in some detail and when they had been explained to him, there was never any difficulty. It is extremely difficult for the Smarts to reconstruct what occurred from memory and without the proper documentation. Mr. Guerster says that he does not have any documents which would assist the Smarts. However, Mr. Guerster did have some of the handwritten notes which Ms. Smart has referred to. He produced two of them, which indicated "we owe". The Smarts were able to show repayment for one of those and Mr. Guerster accepted that.
- [71] Part of the problem is that Ms. Smart, in some ways, began to treat the account as available to her for payments that were for her benefit and not Mr. Guerster's. The account was in joint names, but it was really Mr. Guerster's account, and as between Mr. Guerster and the Smarts, the Smarts had no authority to use the money for their own benefit. Mr. Guerster is entitled to an explanation and an accounting. However, the confusion over the documents has made this very difficult. The Smarts have explained and identified all of the other items in question. Ms. Smart has been able to produce cheques to show repayments where she said repayments had been made, with the exception of these amounts.
- [72] I have considered the matter carefully and the evidence of the parties. Despite the disagreements between them as to what occurred, I find that they are all honest witnesses giving their best recollection as to what they understood has occurred between them. I find it is unlikely that the Smarts would intentionally use Mr. Guerster's money for their own purposes without repaying it. Despite the lack of documentation, I find that on the balance of probabilities these funds have been repaid. However, the difficulty that has arisen was largely created by Ms. Smart and the unorthodox way in which she dealt with these accounts and kept these accounts. That is certainly a factor to consider when dealing with the issue of costs. SUMMARY
- [73] I find the following amounts are owed by Mr. Guerster to the Smarts: For services provided: \$1,200.00 Fuel costs: \$500.00 Storage: \$50.00 Total Reimbursements: \$3,160.35 TOTAL: \$4,910.35
- [74] I find that the Smarts owe to Mr. Guerster the following amount: Promissory note: \$38,489.61 Shipping bill: \$3,266.15 Total: \$41,755.76

- [75] Mr. Guerster will have judgment against the Smarts for the difference in the amount of \$41,755.76 - \$4,910.35 = \$36,845.41.
- [76] I also order that the Smarts return to Mr. Guerster the two side boards referred to in ¶56 at their expense and in good condition.
- [77] The Smarts, in their written submissions, made some claim for compensation on the basis of quantum meruit for some of the services provided. The cases they refer to, however, are cases in which the court has found a contract for the payment of services. The contract, however, did not specify how the value of those services would be calculated and, therefore, applied the principle of quantum meruit. This is not the case here. The Smarts sought certain orders or declarations that dealt with whether they had authority to expend funds, or whether they had been guilty of embezzlement. The order speaks for itself. No such declaration is necessary.
- [78] The Smarts and Mr. Guerster both sought security or orders preventing removal of assets from Canada. There is no basis for such an order in the evidence before me. COSTS
- [79] The Smarts sought an order for aggravated damages, or special costs, claiming that Mr. Guerster had made materially false statements. I have not concluded that he did so, nor does that justify the aggravated damages as claimed by the Smarts.
- [80] The Smarts sought an order that any monies attributed to Mr. Guerster were deemed marital assets, and any monies charged to Mr. Guerster were deemed a marital debt. Mr. Guerster and the Smarts' daughter are involved in matrimonial litigation, including property division under the Family Relations Act. The matrimonial litigation is the appropriate litigation for determinations of matrimonial property and debts.
- [81] The Smarts sought an order for costs to reimburse them for the amount of money they paid to their former solicitor, and costs occurred since then. There is no basis for awarding them solicitor and client costs subject to any offers which were made pursuant to the Rules of Court and the effect of those orders, I am satisfied that in this case each party should bear their own costs, but will each pay one-half of the hearing fees. There appears to have been divided success.
- [82] With regard to allegations of embezzlement, I have already said that although Mr. Guerster used that word, what he was really seeking was an accounting. The accounting was confusing because of the manner in which Ms. Smart dealt with the accounts. Mr. Guerster was very reasonable and accepted explanations for the accounts when evidence was produced to support them. It would be wrong to penalize him for the position he took.

- [83] The Smarts claim special costs for aggravated damages on the basis that Mr. Guerster had wrongfully suggested that the Heilsarmee receipt was a receipt from an antique store. It has not been demonstrated that Mr. Guerster perjured himself, or knowingly attempted to mislead the court on that issue. His evidence was that it was not the equivalent of the Salvation Army stores which he had seen in Canada, but that it was a step above that.
- [84] The notice of motion that the Smarts brought to have Mr. Guerster found guilty of contempt was simply adjourned generally. It was not adjourned to the trial date. Madam Justice Loo's order simply says that the issue of costs on that motion would be adjourned to the trial. The order of Master Hyslop dated August 30, 2004 for production of documents, and directed that the costs of the application be left to the discretion of the trial judge. I find that the Smarts should have costs of preparation and attendance for those motions. The costs will be at scale 2. Documents were in issue throughout this proceeding. To the large extent, the difficulty was created by the fact that Mr. Guerster, although attempting to comply with his obligations under the rules, was representing himself and appeared to have difficulty appreciating what was required of him. However, the Smarts should not bear the burden of the additional expense they incurred as a result of that.
- [85] Subject to further argument, depending on any offers to which bring Rule 37 into effect, the parties will bear their own costs, but each will pay one-half of the hearing fees. "R.E. Powers, J." The Honourable Mr. Justice R.E. Powers

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