

CANADA / JUDGMENT

Wang v. Jin

2021 BCSC 1222

COURT

Supreme Court of British Columbia

DECIDED

24 June 2021

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2021 BCSC 1222 Wang v. Jin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wang v. Jin,

2021 BCSC 1222

Date: 20210624

Docket: S169584

Registry: Vancouver

Between:

Shi You Wang also known as Shiyong Wang and

Chong Feng Wu

Plaintiffs

And

Wei Guo Jin also known as Weiguo Jin and

Xuan Wen Yang also known as Xuanwen Yang

Defendants

- and -

Docket: S167106

Registry: Vancouver

Between:

Weiguo Jin

Petitioner

And

Xuanwen Yang

Respondent

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

The plaintiffs Shi You Wang aka Shiyu Wang and Chong Feng Wu:

Self-Represented

Counsel for the defendant/petitioner Wei Guo Jin aka Weiguo Jin:

E. Craig Watson

The defendant/respondent Xuan Wen Yang aka Xuanwen Yang:

Self-Represented

Place and Date of Trial:

Vancouver, B.C.

May 10-14, 17-21, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 24, 2021

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I. Introduction

- [1] This trial of a related petition and action (with counterclaim) concerns a real estate investment gone awry. The property in question is a 21,000 square foot, 12-bedroom manor house, on 61 acres, off the Port Mellon Highway, between Gibsons and the Langdale ferry terminal, at the foot of Mt Elphinstone (the "Property"). Translated Mandarin marketing materials refer to it as the "North American Royal Aristocratic Castle."
- [2] The participants did not know each other to any extent before entering into the transaction. Mr Yang (the respondent, as well as defendant and plaintiff-by-counterclaim), was the primary organizer of the project, and still lives on the Property. Mr Yang had been contemplating a Sunshine Coast property purchase since 2014. Around September 2014, he asked Jason Yi, a realtor, to advise him of potential properties. In early 2015, Mr Yi told Mr Yang of the opportunity to purchase the Property. Mr Yang then approached other potential investors, including Mr Jin (the petitioner, defendant, and defendant-by-counterclaim), and Mr Wang (the plaintiff and defendant-by-counterclaim). Around March 10, 2015, Messrs Yang, Wang, and Jin signed the "Contract for the Joint Purchase of Sunshine Coast Resort Housing at 1390 Port Mellon Hy" (as translated) (the "JVA"): the central document in this litigation, quoted fully below.
- [3] Mr Wang's co-plaintiff is his wife, Ms Wu: he purported to transfer his interest in the project to her just after the Property purchase completion date.
- [4] Although the plaintiffs Mr Wang and Ms Wu initially sought a proprietary interest in the Property, their amended claim now simply seeks an order for the return of their \$631,436.83 investment, plus 10 percent contractual interest, as set out in the JVA or, alternatively, interest under the Court Order Interest Act, RSBC 1996, c 79.
- [5] Mr Jin's primary position is that the JVA is void for uncertainty. He seeks a declaration that he owns a 50 percent legal and equitable interest in the Property. He accepts that the plaintiffs advanced \$631,436.83 into the project, and that they are entitled to a refund. He proposes that the amount due to the plaintiffs serve as a first charge on the Property, which should then be sold under the Partition of Property Act, RSBC 1996, c 347, ss 6 or 7 (the "PPA"). He and Mr Yang would divide the sales proceeds 50/50, after reimbursement to each of Messrs Yang and Wang for their respective mortgage payments, taxes, and necessary expenses with respect to the Property, as established through an accounting before the Registrar. The plaintiffs support this proposal.
- [6] Alternatively, if the JVA is found to be enforceable, Mr Jin seeks the return of his capital, plus 10 percent per annum, like the plaintiffs. In that case, he also seeks orders to relieve him of his obligations as co-mortgagor (with Mr Yang) on the Property. He concedes that if the JVA is found to be enforceable, his proprietary claim to the Property, and to the PPA sale remedy, evaporate.

- [7] In his counterclaim, Mr Yang seeks specific performance of the JVA. He sees the JVA as a long-term "constitution" governing the parties with respect to the Property purchase, as well as a wide variety of ambitious development projects for the Property post-purchase. He takes the position that each of Messrs Jin and Wang failed to make mortgage and other payments, and failed to contribute additional capital contributions to the Property; they walked away from the project, thereby breaching the JVA. Further and alternatively, Mr Yang argues that his work to develop the Property and develop tourism and other businesses for the Property entitles him to a declaration of constructive or resulting trust in his favour over the interests of Messrs Jin and Wang.
- [8] This trial was conducted under five challenging circumstances.
- [9] First, the necessary COVID-19 protocols restricted mobility and seating, in a crowded trial with four parties, two interpreters, and one counsel.
- [10] Second, neither the plaintiffs nor Mr Yang were represented at trial. The plaintiffs and their counsel parted ways the week before trial. Mr Yang had not been represented since July 2020, but for most of these proceedings was represented by a series of lawyers. Thus for both sets of unrepresented parties, their final pleadings and affidavits were prepared with the assistance of legal counsel. The Court repeatedly endeavoured to explain the procedure and rules of trial to those parties, to allow them a full opportunity to make their case. For example, they were permitted to keep open their cross-examinations of Mr Jin overnight, in order to obtain mid-trial legal assistance. They were encouraged to obtain legal assistance for their final arguments, and appeared to have done so.
- [11] Third, all of the parties are native Mandarin speakers with little or no English ability; they gave their evidence, conducted examinations, and made argument through interpreters. The Court is grateful for the work of the interpreters Alex Fu, Louis Tian, Fred Liu, Tony Yu, Linda Yu, Yue Xu, and Geok Poon, who appropriately served the Court as much as the parties, and who must have been even more weary than the judge after every day.
- [12] Fourth, the trial was in effect a hybrid trial, based primarily upon the affidavits filed in the petition, supplemented by direct examination with respect to facts engaged in the action, followed by cross-examination and re-direct. In this, it was fortunate that the bulk of each party's evidence was provided in the form of voluminous solemnly-affirmed affidavits (two by each of Messrs Yang and Jin and one by Mr Wang), prepared with the assistance and advice of legal counsel for the purpose of the December 2017 summary proceeding.

II. Credibility and reliability

- [13] As a fifth challenge, not one of the parties -- any of the four participants in the project -- was a reliable or credible witness. All were evasive, despite repeated instructions and admonitions; each repeatedly provided argumentative assertions rather than answers. Their positions, actions, and testimony were inconsistent. In the stand (contrary to his argument), Mr Jin considered Mr Wang to be wholly disentitled from the return of his investment,

because of his inaction in the project, while he himself expected reimbursement despite his own inactivity. As set out below, Mr Wang's testimony was inconsistent with his discovery transcript. Ms Wu repeatedly speechified in her evidence, even after its internal inconsistencies were revealed, as with respect to the timing of the alleged trust agreement. As will be surveyed below, Mr Yang misled both Mr Jin and the plaintiffs, and potential investors and customers, throughout the sorry saga.

- [14] Typically, a trial judge can reasonably look to one or more anchor witnesses in the stormy seas of testimony to discern a reliable history; here, there was none. In this, I echo the recent words and approach of Horsman J in *Li v Liang*, 2021 BCSC 862:
- [76] I accept that some of the difficulties with the evidence of the witnesses may flow from translation issues. Virtually all witnesses at this trial testified in Mandarin with the assistance of an interpreter. Many witnesses, including Bao, testified via video link from China. I acknowledge the stress that many of the witnesses were under, particularly those who had to testify from China in what was, for them, the middle of the night. I am also mindful of the cautionary words of Justice Griffin, as she then was, in *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-40, regarding the need to account for cultural and linguistic differences in assessing the credibility of witnesses.
- [77] However, acknowledging the challenges the parties faced in presenting evidence at this trial, and the importance of being mindful of linguistic and cultural nuances, does not resolve the credibility and reliability issues I have identified. Given these concerns, I place limited reliance on the viva voce evidence of the main parties where it is not corroborated by independent evidence.
- [15] That said, the Court has greater confidence in the evidence of Mr Jin, and that of Ms Wu and Mr Wang, over that of Mr Yang, where that evidence was at odds. Mr Yang was the most evasive, obtuse, inconsistent, and rhetorical witness (winning gold in a competitive field). He disavowed his own sworn affidavits and discovery evidence when confronted with inconsistencies. He veered from professed general haziness in memory to sudden sharp recall of documents and meetings when pressed. Whenever he was presented with a document in English, such as the Contract of Purchase of Sale Addendum, or demand letters from counsel, he claimed not to have read or understood their contents, notwithstanding his recourse to translators when it suited him, and notwithstanding the fact that those communications concerned a \$7-million transaction of great importance to himself and the other parties.[1] When confronted with certain documents, including the Contract of Purchase and Sale, he shrugged off responsibility or understanding, claiming that the realtor told him to sign them, and he did so without understanding or contemplation. Throughout the litigation, he failed to comply with court orders and rules with respect to document production, trial briefs, and other matters. That all said, overall, Mr Yang came across as hapless rather than fraudulent: a dreamer, albeit one pursuing the twin goals of money and legacy, in increasingly desperate straits of his own making.

III. Facts

A. The Property

[16] Although they differ on the month, Mr Jin, Mr Wang, and Mr Yang agree that they first met some time in 2014. Mr Wang met Mr Jin through Mr Yang. At the time Mr Jin and Mr Wang transferred their funds to Mr Yang, neither knew him very well, and neither had taken further steps to investigate him. Nor had Mr Yang investigated his two envisioned business associates.

[17] As set out above, Mr Yang was actively seeking a real estate investment on the Sunshine Coast, and sought out Messrs Jin and Wang as potential sources of funds. Around March 9, 2015, Messrs Jin, Yang, and Wang, along with Mr Yi, and a few other potential investors and spouses, travelled to the Sunshine Coast to view the Property.

[18] Over the next few days they held meetings at Mr Wang's house, and then at Mr Yang's house, to discuss the potential investment.

B. The Joint Venture Agreement

[19] On March 10, 2015, Messrs Jin, Wang, and Yang signed the JVA, written in Mandarin, and translated as:

Contract for the Joint Purchase of Sunshine Coast Resort Housing at 1390 PORT MELLON HY, V0N 1V6, Canada

I. Joint investment between Jin Weigo, Yang Xuanwen, Li Dejian, Wang Shiyu

II. Purchase address, location, area, and price,

1, Location, 1390 PORT MELLON HY, Sunshine Coast Island, Vancouver, V0N 1V6

2, Land area, 53 acres, nature of the land: agricultural land, housing area 22319 ft,

3, Marked sale price, 7.995 million CAD, final price, hopefully 7 million CAD,

III. Housing purchase requirements and conditions

1, Conditions upon submission of housing, everyone shall inspect and confirm that there are no Issues with the housing,

2, Each party shall buy the housing with mortgage according to the agreement, and each party shall pay interest according to the proportion of their mortgage,

3, Definition of property rights and proportion of shares, the names of investing parties shall be written on the deed, each party shall have the same proportion of shares, with each of the four parties being entitled to 25% of the shares, 4, Contribution of shares by each investing party, approximately 600 thousand CAD, deposit of ten thousand CAD upon signing the joint contract.

5, Payment time, to be paid concurrently according to the purchasing contract and the bank's mortgage contact, in a punctual matter.

6, Plans for the land after purchasing the housing, ecological agriculture, forestry, and animal husbandry, aquaculture, processing plant for flowers and medicinal herbs, lumber, expansion of road network, renovation and development of land, greenhouse, Investment in agricultural production space and development of tourism, later purchase of luxury houses, cars, and boats, development of tourist routes, responsibility for shuttling tourists. Purchase of agriculture, forestry, animal husbandry, and aquaculture industries, Investment in machinery and equipment for the renovation of land

7, Post-purchase registration of business according to local government regulations in Canada, North American tourism company, North American cooperative, North American pharmaceutical factory, Chongqing Business Center of Canada, Union Center for Chinese Workers and Merchants on North America, Vancouver, Sunshine Coast Tourism Resort and Hotel, etc.

VI. Working plan and tasks after the purchase of housing

1, Apply for BC Immigration plan indicators, 2, Apply to redefine parts of the agricultural land as commercial land, 3, Apply for lumber quota, 4, Apply for livestock breeding quota for breeding fish, horses, cattle, sheep, pigs, and chickens. 5, Apply to change agricultural residences into commercial hotels for tourists.

V. Special agreement terms for rules and regulations in cooperative enterprise management

1, Terms of cooperation, fair and just, equitable and mutually beneficial, open and transparent, purpose of cooperation is to help each other

2, Principles of management, major issues shall be voted upon by all shareholders, and once a consensus is reached, it shall be signed and passed.

3, Special agreement on freedom of entry and exit, only internal transfers among shareholders, external transfers are not allowed, refund of capital and interest at a rate of 10% interest per year,

4, The cooperative business shall be managed and run in accordance with Canadian laws.

5, Special agreement on later merchants and expansion of shareholders, shareholders who join in the first phase are original shareholders, those who join at a later date shall not enter without at least double the investment

VI Signatures of all shareholders to confirm participation

[signed by Messrs Yang, Jin, and Wang]

[formatting and bolding as in original; italics added for emphasis]

- [20] There are two certified translations of the JVA before the Court. Those translations are in substantial agreement. In the second version, provided by Mr Wang, article V.5 is translated as follows:
5. Special covenants regarding the management system and regulations for the joint venture enterprise
 - 1) Terms for the cooperation: fairness, justice, equality and mutual benefit, openness and transparency, cooperative spirit of mutual assistance;
 - 2) Principles for the management: all important matter shall be subject to the consent and approval of all the shareholders by way of the vote and the signature;
 - 3) Special covenants regarding the freedom of participation and exit: shares shall only be transferred internally, no shares shall be transferred to any external parties; contributed capital may be redeemed along with the interest calculated at the annual rate of 10%;
 - 4) The joint venture enterprise shall be managed and operated in accordance with the Canada Corporations Act;
 - 5) Special covenants regarding the subsequent financing admission of new shareholders: shareholders who contribute capital during the initial stage shall be deemed to hold the stocks of original issue; during the subsequent stages, new shareholders may be admitted on the condition that they each make a minimum amount of capital contribution that is twice the amount for the original shareholders.

[formatting and bolding as in original; italics added for emphasis]

- [21] Mr Yang drafted and typed the JVA and presented it to Messrs Wang and Jin. Although he says it reflects the collective views of the three, it is clear on the evidence that not all terms were agreed to or discussed in advance (particularly all of the potential uses of the Property), and that Mr Yang was the primary author.
- [22] Mr Jin testified that articles V.2 and V.3 were especially important to him: that major issues would be decided by consensus, and that he would be free to exit the project at any time, receiving a refund of capital, with 10 percent interest. Although Mr Yang had just "suddenly" presented the JVA to him, and although the document was not negotiated, he signed it based on these reassurances. With respect to the envisioned plans for the Property set out in articles III.6 and III.7, he understood the document to be "a kind of visionary agreement".
- [23] The JVA expressly referred a fourth original investor, Dejian Li. Mr Li did not sign the agreement, and around March 12th advised Mr Yang that he would not participate.

C. The Contract of Purchase and Sale and Addendum: March 2015

- [24] On March 12, 2015, a standard-form Contract of Purchase and Sale was signed by each of Messrs Jin, Yang, Wang, and Li, as purchasers, and J. Greatbanks as the vendor, of the Property. The purchase price was \$6,660,000.
- [25] On March 13, 2015, Mr Jin and Mr Wang each provided \$75,000 directly to Mr Yang, representing their respective 25 percent shares of the \$300,000 deposit. Mr Wang's contribution was provided by way of a cheque drawn on Ms Wu's account. Mr Yang contributed \$150,000, for a total purchase deposit of \$300,000.
- [26] Also on March 13, 2015, Mr Wang signed an "Autherization Letter" [spelling as in original]. It is written in English. It states that: "I, Shiyong Wang, herein authorized Xuanwen Yang and Weiguo Jin on behalf of me to sign in purchase the property at 1393 Port Mellon [sic] Highway only." Mr Wang confirmed that he was only authorizing Mr Yang to sign on his behalf in order to purchase the Property, and was not giving Mr Yang general authority to decide, sign, or vote on his behalf: a limited authority clear on its wording. For his part, Mr Jin said that he did not know about such authorization, or the "Autherization Letter". Mr Yang says that the letter was written up by the realtor Mr Yi, and that he himself did not know of it until after it was signed.
- [27] The next key document in the sequence is the Contract of Purchase of Sale Addendum dated March 28, 2015. It stated:
- The four original buyers, e.g. Weiguo Jin, Xuanwen Yang, Shiyong Wang, and Dejian Li, agreed to change the final buyers as Weiguo Jin, Xuanwen Yang only, and Shiyong Wang, and Dejian Li are excluded in this purchase. All other parts of this contract remain the same and in full force and effect.
- [28] The document bears, on the signature line, the names of each of Messrs Yang, Wang, Jin, and Li, in Chinese and English. Mr Yang admits that he signed Mr Wang's name on the Addendum, claiming that the "Autherization" entitled him to do so. Mr Yang also signed for Mr Li, saying that Mr Li had authorized him to sign in a telephone call from China.
- [29] For his part, Mr Wang said that he did not know about the Addendum removing him from the project. He says that Mr Yang neither told him about the Addendum, nor asked for his permission to sign his name on it.
- [30] Mr Jin testified that Mr Yang "suddenly" presented the Addendum for his signature, and that all other signatures (including signatures purporting to be those of Messrs Wang and Li) were already on the document. Mr Jin testified that Mr Yang had said that Messrs Wang and Li wanted to remove themselves from the project, but had not explained why. Mr Jin testified that from that point forward, he understood that only he and Mr Yang remained as the investors in the Property, each holding a 50 percent interest.

- [31] Notwithstanding the Addendum removing Mr Wang from the purchase, and Mr Jin's stated understanding, Mr Yang and Mr Wang both intended Mr Wang to remain as a participant. The problem, explained Mr Yang, was that Mr Wang had a poor or no relationship with HSBC, and would not be able to apply for a mortgage or put his name on title.[2]

D. The tourism company and the "Key Works Memo": June 4-8, 2015

- [32] Around June 4, 2015, Mr Jin had the first glimmer that Mr Yang was prone to making unilateral decisions, and implementing those decisions through the unauthorized use of his business colleagues' names.
- [33] Specifically, Mr Jin learned that Mr Yang had just incorporated the "North American Sunshine Tourism Company". Mr Jin learned that he was listed as a director, although he had never been asked to so serve, and had never authorized the use of his name, and had never signed a consent to serve as a director. Mr Jin contacted Mr Yang's lawyer, Mr Zheng (the same lawyer who had served as the conveyancing solicitor), and asked to be removed from the corporate records; the lawyer did so.
- [34] Mr Yang's evidence was that he was disappointed by Mr Jin's position. He set up a meeting with Mr Jin to talk about the way forward for the project.
- [35] At some point in June 2015, Messrs Jin and Yang met. Mr Yang presented Mr Jin with a "Key Work Memos" [sic] setting out 16 government applications that they needed to make as part of the project. These applications covered almost all possible uses for the Property, including, among other things:

- I. ".licenses to run hotel, forest park and summer camp ";
- II. " land readjustment. The land of 53 acres is to be divided into 5 pieces where five super large houses could be built ";
- III. " mineral water production and processing factory, exporting to North America and China";
- IV. " sawdust processing and disposal, environmental projects, and governmental support regarding land and planning as well as economic subsidies, to purchase 500-acre in the industrial park ";
- VI. " land and planning for the Gambier Island submarine power transmission project ";
- VII. " licenses to run casino and nightclub, and for renting Indian land ";
- VIII. " road advertisement and for building Oversee Pavilion and religious statues on top of the mountain ";
- XIII. " base of agricultural flowers and herbs and planted marijuana";
- XIV. " to create Sunshine tourism head office in North America, to purchase yachts and buses, and request routes"; and

XV. ".a co-manufacturing and assembly helicopter and yacht company ."

[all as in translated original]

- [36] Mr Jin described, again, Mr Yang presenting the document to him "all of a sudden", and asking him to sign. Mr Jin wrote his name, followed by "read" or "reviewed" (both are acceptable translations of the Chinese character), to indicate that he had read the document, but was not necessarily agreeing to it. The two interpreters at the trial confirmed that the original Mandarin verb would not communicate the idea of "agree": only "read" or "reviewed". Mr Jin emphatically testified that he was not agreeing to pursue those projects.
- [37] In any case, Mr Yang himself did not view the document as binding: "[w]hen I showed this document to Jin, he said he would think it over and let me know what he thought at a later date."
- [38] It is not clear on the evidence when the document was presented to Mr Jin. It is dated June 8th, but each of Messrs Jin and Yang added the date "21/6" after their signatures, indicating that it likely was presented and considered at the later date, and certainly after the closing date for the purchase of the Property.

E. Mr Yang and Mr Jin obtain the HSBC mortgage

- [39] On June 5, 2015, Messrs Jin and Wang, alone, obtained a mortgage from HSBC for \$5-million, for the remainder of the purchase price. Mr Jin said that he did so on his understanding, again, that only he and Mr Yang remained as investors, each holding a 50 percent interest.
- [40] Once again, Mr Wang said that he did not know why he was not named as a mortgagor on the HSBC mortgage.

F. June 15, 2015 completion

- [41] June 15, 2015 was the Property purchase completion date. The total amount paid was \$6,795,792.36.
- [42] Each of Mr Jin and Mr Wang (via a bank draft signed by Ms Wu) paid \$556,436.82 to Mr Zheng, the conveyancing lawyer. Mr Jin stated that he did not know about the Wu/Wang payment.
- [43] Mr Yang transferred \$1,112,873.65 -- twice the amount advanced by each of the others -- to Mr Zheng.
- [44] That same day Mr Jin transferred \$50,000 into his HSBC account to cover his share of the mortgage payments on the Property.
- [45] The purchaser's statement of adjustments, prepared by Mr Zheng, lists only Mr Yang and Mr Jin as purchasers.

- [46] Only Mr Yang and Mr Jin were registered as owners on title, which recorded each as holding "an undivided 50/100 interest".

G. Mr Wang demands his money back

- [47] On or just after the completion date, the plaintiffs discovered that Mr Wang was not listed as an owner on title. Mr Wang confronted Mr Yang. He demanded his money back, plus 10 percent, under the article V.3 exit provisions of the JVA. He told him that he was no longer a member of the business relationship. Mr Yang said that he could not return the money to Mr Wang.
- [48] On June 17, 2015, after closing, by an assignment agreement, Mr Wang assigned his interest in the project to Ms Wu. The plaintiffs did not consult with Mr Jin before so doing, and Mr Jin did not know about the purported assignment.

H. The alleged trust agreement

- [49] The plaintiffs say that both Mr Yang and Mr Jin agreed, before the closing date, that Mr Jin would hold the plaintiffs' 25% interest in trust. For his part, Mr Jin, as stated above, claims no knowledge of the involvement of the plaintiffs after the Addendum removing Mr Wang from the Contract of Purchase and Sale.
- [50] The evidence on the asserted trust agreement was vague and inconsistent. The plaintiffs alleged that an actual trust agreement was drafted; the document was neither listed nor put into evidence. They did not recount any specific conversations between Mr Jin on one hand, or either of the plaintiffs on the other, but asserted that they had all attended at a lawyer's office in order to sign the trust agreement. At trial, Ms Wu claimed that there had been several discussions before the closing date, and that Mr Jin initially agreed to the proposal. In cross-examination, she was confronted with her examination for discovery confirmation that she did not discuss the proposed trust agreement with Mr Jin until after closing, and, specifically, until after she and Mr Wang had discovered that Mr Wang was not on title, which surprising revelation only arrived on or soon after closing. In short, Ms Wu's testimony does not make sense: there would be no need to discuss a trust arrangement until and unless they learned that Mr Wang was not on title.
- [51] The totality of the evidence suggests that, at best, Ms Wu and Mr Wang, on one hand, and Mr Yang on the other hand, may have discussed a trust arrangement before closing, but none of those individuals secured Mr Jin's agreement, or discussed it with him before closing.
- [52] In any case, this hazy aspect of the narrative is no longer relevant, given the plaintiffs' amendment renouncing a proprietary claim and only seeking reimbursement of their investment funds, and given my conclusion below with respect to the enforceability of the JVA and the remedies under that agreement.

I. Messrs Jin and Yang contribute to the HSBC mortgage

[53] For the six months after closing, from July 15 to December 15, 2015, Mr Jin continued to pay 50 percent of the \$15,719.90 in monthly mortgage payments to HSBC, via the \$50,000 he had deposited in the HSBC account. He says that at the end of the period he attended at HSBC but was told that there no need for further deposits, as there was still money available in the mortgage account. Mr Yang has made all subsequent payments. To Mr Yang's complaint about no further payments, Mr Jin stated that he did not receive any request from either Mr Yang nor HSBC for further payments. Mr Yang's evidence on this differs: he claims that both he and HSBC representatives attempted to phone Mr Jin to supplement the mortgage account. Given my conclusions below, I need not resolve this point of evidence.

J. The August 24, 2015 letter

[54] On August 24, 2015, Mr Yang asked Mr Jin to "just sign" a letter to Mr Wang. Mr Yang told Mr Jin that it was in response to a July 2, 2015 demand letter received from the plaintiffs' litigation counsel (which letter was in fact sent and received), for the purpose of negotiating a settlement. Mr Yang was the sole drafter of the document.

[55] The letter confirms that Mr Yang holds 50 percent of the shares through actual investment, and Mr Jin holds 25 percent of the shares through actual investment. It also said that:

According to the partnership agreement, Shiyong Wang accounts for 25% percent of the investment, but the actual investment was 670,000 yuan which accounted for 10% of the total investment. In light of Shiyong Wang's voluntary withdrawal, his 25% of the shares will be internally purchased after negotiation.

[56] Mr Jin signed the letter. He understood it to refer to Mr Wang's initial \$75,000 investment, and that it was for the purpose of negotiating a resolution to the threatened with litigation. He disclaimed any intention to agree to pay Mr Wang for 25 percent of the shares of the Property.

K. The first McDonald's meeting: August 31, 2015

[57] The August 24th letter appears to have led to a negotiation the next week.

[58] August 31, 2015 saw the first of two meetings at the McDonald's Restaurant in Kerrisdale. Messrs Jin, Wang, and Yang, and the realtor Mr Yi attended.

[59] According to Mr Wang, he complained that he had invested 25% of the funds for the purchase, yet Messrs Jin and Yang each claimed to own 50 percent of the shares. Mr Wang again demanded the return of his money, plus 10% interest under the JVA. On discovery, he confirmed that he "just wanted his money back", and was not seeking back into the venture, or a proprietary interest in the Property.

[60] According to Mr Yang, however, the parties agreed at the meeting to add Mr Wang's name the title the Property; confirmed that Mr Yang would own 50 percent of the shares, with Messrs Jin and Wang holding 25 percent each; and agreed to change the bank and reapply for a loan, with the new cost to be apportioned according to the ratio of shares. Mr Yang says that the parties signed what he calls the "Second Agreement", but which is entitled the "Summary of Negotiation":

1393 Port Mello Hwy

Summary of Negotiation

1. Date: August 31, 2015
2. Location: McDonald's, West 41st Avenue
3. Participants: Weiguo Jin, Shiyong Wang, Xuanwen Yang, Jinxin Yi
4. Content: To define the legitimate rights and interests of investors
5. Results: After friendly negotiation, Weiguo Jin, Shiyong Wang and Xuanwen Yang reached an agreement and unanimously suggested to:
 - 1) Add Shiyong Wang's name to the real estate property rights;
 - 2) Change bank and reapply for a loan. The conditions of the new loan and the original loan should be the same, and the new costs incurred should be apportioned according to the ratio of shares;
 - 3) The agreed ratio of shares on the original contract was Weiguo Jin: 25%, Shiyong Wang: 25%, and Xuanwen Yang: 50%.

Weiguo Jin, Shiyong Wang, Xuanwen Yang

August 31, 2015

[spelling and phrasing as in original]

[61] For his part, Mr Wang said on discovery that no agreement was reached, but said at trial that an agreement was reached; he started his cross-examination by professing to barely remembering the discovery, but at this point, was able to quote the question and translation from the discovery. The Court places no weight on his version of the meeting.

[62] For his part, Mr Jin describes, again, what Mr Yang calls the "Second Agreement" as a record of proposals that Messrs Yang and Wang wished to discuss: not a contract to which he agreed. He says that he would not have agreed to obtain another loan, because he had no need for additional funds. He also recalls that they discussed Mr Wang buying Mr Jin's interest for \$2 million, but as he received no money, he transferred no interest.

L. Mr Jin demands his investment back

- [63] The evidence is sparse on what transpired between August 31, 2015 and the next meeting, in March 2016.
- [64] Mr Yang himself testified that Mr Jin had demanded return of his funds at various times after the completion of the sale. At one point of his testimony, he indicated that Mr Jin, like Mr Wang, had demanded a refund, soon after the completion date. At another point in his testimony, he stated that Mr Jin wanted to leave the project by September 2015.
- [65] The clearest date for an unambiguous demand for a refund and exit is in early 2016. Mr Jin testified that around Chinese New Year 2016 (that is, February 8th), he demanded the return of his investments from Mr Yang. He cited his discontent with Mr Yang in three specific areas: Mr Yang's unauthorized naming of Mr Jin as a director in his tourism company and his demand that Mr Jin contribute a further \$500,000 for that company, both coupled with his discovery that Mr Yang had been using the Property for various revenue-generating projects without his knowledge or approval.
- [66] Mr Yang said that he would have to discuss or negotiate with his wife a return of Mr Jin's funds. He told Mr Jin that he did not in fact have the funds to reimburse. He said that he would be able to reimburse the fund if Mr Jin brought in other investors, specifically through the sale of the Property's mineral water resources. To this end, he provided Mr Jin with several documents concerning the water on the Property, including a chemical analysis conducted in May 2015.
- [67] Based on Mr Yang's demand, Mr Jin brought hydraulic hydrological engineers and equipment from China to the Property, spending USD \$180,000 in the process.

M. The second McDonald's meeting: March 22, 2016

- [68] On March 22, 2016, there was a second meeting at the Kerrisdale McDonald's, attended this time by Ms Wu, Mr Jin, Mr Yang, and the realtor Mr Yi, acting as a mediator.
- [69] Again, each of Ms Wu and Mr Jin demanded their investments back, plus 10% interest per year, under article V.3 of the JVA.
- [70] Mr Yang said that he would pay Mr Jin his money back if Mr Jin paid the property taxes and the salary of the employees he had hired.
- [71] Mr Yang presented Mr Jin and Ms Wu with the document entitled "Supplementary Agreement on Cooperative Investment in Real Estate Property on Sunshine Coast Islands" [sic] dated March 22, 2016. That document said that "[t]he three parties have reached a consensus through negotiation on matters after purchasing the real estate property with cooperative investment " It sets out \$314,000 per year in expenses, broken down under the headings of property tax, purchase insurance, Hydro, mortgage interest, staff salary, and equipment maintenance expenses, with the addendum "(open for judicial review)". It then breaks down responsibility for those expenses with Mr Yang bearing 50 percent and each of Messrs Jin and Wang bearing 25 percent.

- [72] Mr Yang said that if Mr Jin did not agree to the terms of his supplementary agreement, and did not pay his share of the stated expenses, the Property was "my property now". Mr Jin replied that he would pay property tax, once he received a copy of the tax notice, but he would not pay the salaries of the staff, as he had not hired those staff. He asserted that Mr Yang should be paying him rent, for his free residence of the Property, and a share of profits from Mr Yang's various side-businesses on that Property.
- [73] At that point, Mr Yang declared that the Property was now solely his own. He stated in his affidavit that he considered the relationship to have completely broken down. He walked out of the meeting.

N. Further acrimony

- [74] On May 21, 2016, Mr Jin attempted to visit the Property. Mr Yang's employees prevented him from entering the building, and told him to leave the Property. This dispute resulted in Mr Jin calling the RCMP.
- [75] On June 2, 2016, Mr Watson, on behalf of his client Mr Jin, wrote to Mr Yang to demand payment to the greater of Mr Jin's June 2015 purchase funds, and 50 percent of the then-appraised value of the Property. Mr Yang did not respond to the letter, although he does not dispute receiving it. At trial, he said that as he did not understand English, he would have expected Mr Watson to have written to his lawyer if he sought the return of the funds.

O. Commencement of litigation: August 4, 2016

- [76] On August 4, 2016, Mr Jin filed his petition against Mr Yang. He sought a declaration that he owned 50 percent of the Property, and an order for sale.
- [77] On October 18, 2016, Ms Wu and Mr Wang filed their notice of civil claim against both Mr Jin and Mr Yang. As indicated, they initially sought specific performance of the joint venture agreement, and formal acknowledgement of his beneficial ownership of half of Mr Jin's interest in the property. Mr Yang counterclaimed in that action, also seeking specific performance of the JVA. He then amended his counterclaim to seek a constructive trust over that portion of the property attributable to his contributions to its acquisition, maintenance, and improvement.

P. Mr Yang's management of the Property

- [78] In the period before and after the March 22nd final falling out, Mr Yang continued to pay the mortgage payments, property taxes, and maintenance costs.
- [79] At the same time, Mr Yang made unilateral decisions. These included advertising and operating the building on the Property as a hotel, without obtaining the necessary municipal zoning authority or permits. Mr Yang stated that he understood that a "homestay hotel" did not need such approvals. He hired staff for the hotel and extensively advertised the hotel. This effort attracted some guests. It also attracted a warning letter from the Sunshine Coast

Regional District, and some particularly scathing online tripadvisor.com reviews. He also constructed farm buildings, and turned the front lawn of the Property into a two-acre farm.

[80] Mr Yang also sought further investors for other proposed developments on the Property. These included a farm and a mineral water plant.

[81] As one example, a prospectus for the "North American Centre for international summer camp", published by Mr Yang's company Sunshine Travel Corporation of North America, featured stock photographs of the Property, mountains, sports cars, luxury yachts, helicopters, alpacas, a presumably non-West Coast Indigenous person wearing a Dakota feather headdress, and happy camping children. It promised:

III. Base:

Brief introduction of Sunshine Coast Islands, BC, Canada: the shiniest Pearl on the Pacific Ocean, world's top leisure vacation and retirement holy place, named a secluded heaven in the human world, with the hardware condition of Canadian treasure Islands and six incomparable advantages.

1. Recently selected by the United Nation as the most livable community in the world .
2. Abundant resources and a small population on a vast land, with a total area of 3,776.62 square kilometres, equivalent to 3 times of the area of Beijing, at a total population of 28,000.
4. The cleanest air and water quality in the entire world, century-old forest with primordial ecosystem, a forest coverage of a proximally 90 percent, mountain and ocean air with the oxygen content between 25 and 30, very high content of negative oxygen ion in the air, between 20,000 and 50,000 per cubic centimetre. Negative oxygen ion is called "the vitamin in the air" and "the longevity element".

V. Activities:

4. Activities at the Centre for International Summer Camps inside the old-growth forest park on Sunshine Coast Island, including European-style castle hotel, basketball, volleyball, tennis, table tennis, golf training, indoor swimming, walk on the beach, island tour on a yacht or seaplane, outdoor BBQ and camping on Gambler Island, biking, hiking tours and shooting and military training activities with Scouts Canada!

[82] As another example, a prospectus for "Canadian Sunshine Coast Island Geriatric Rehabilitation Centre", prepared by Mr Yang, listing himself as "Chief Editor" and Mr Jin and Mr Wang as "Associate Editors", offers a "carefree retirement" on the Property "at price advantage: lower than the purchase prices of seniors apartments in Beijing, China, ocean-view suites, unbeatable price advantage."

Q. Mr Yang's purchase of neighbouring properties

- [83] Mr Yang also made personal investments in anticipation that the Property would be developed successfully. On March 3, 2016, Mr Yang, through his Corporation Chinese Cooperation Community of North America Ltd., purchased from the YMCA eight properties neighbouring the Property, for \$4.9-million. The transaction closed on September 30, 2016. Mr Yang stated that he intended to develop the neighboring properties along with a Chinese property development company.
- [84] Mr Yang had earlier attempted to buy those properties. On June 28, 2015, just after the completion of the Property purchase, he offered \$4.55-million, but the offer was rejected. He did not tell Mr Jin or Mr Wang about his intention or attempt to obtain those neighbouring properties. At trial he confirmed that his intention was at that time, as realized in September 2016, to obtain those properties for himself rather than for the joint venture participants.

R. Petition and appeal

- [85] The petition proceeded to a hearing, in isolation from the action. Accordingly, neither Ms Wu nor Mr Wang participated, but indicated that they were not opposed to an order for sale under the PPA.
- [86] On December 6, 2017, the chambers judge issued unpublished oral reasons. The Court ordered a sale under the PPA, s 7. The Court rejected Mr Yang's argument that the JVA governed the relationship between the parties, and envisioned a long-term investment; the Court found the JVA to be "at best a statement of interest or intent", and "so vague and aspirational as to be meaningless." Mr Yang also argued that the Property could not be sold until the parties' respective interests had been determined, including whether Mr Yang's mortgage, maintenance and other payments with respect to the Property entitled him to an increased ownership interest. The chambers judge was satisfied that those claims could be addressed by way of an accounting after the sale. Finally, in response to Mr Yang's protestation that he purchased the neighbouring lots in reliance on the JVA, the Court noted that those purchases occurred after the filing of the petition seeking the sale of the property, and that no prejudice could lie.
- [87] Mr Yang successfully appealed that decision. The Court of Appeal allowed the appeal, finding three errors.
- [88] First, the enforceability of the JVA was not resolvable by way of affidavits on a summary application. There was evidence that the parties had entered into subsequent written and oral agreements amending the JVA, and that Mr Jin had taken steps to enforce its terms. Further, the issue was intertwined with the ownership issues remaining in the Wang/Wu action, and should not be determined in isolation.

- [89] Second, the Court gave no weight to the article V.3 freedom of exit provision in the JVA. Mr Yang argued on appeal, but less forcefully than he had in the Court below, that such a remedy may well be more beneficial to him than paying fair market value to buy out the other owners on a sale ordered under the PPA.
- [90] Third, with respect to Mr Yang's argument of prejudice with respect to his purchase of adjacent lots, the chambers judge misapprehended the date of those purchases: although the closing date for those purchases was after the filing of the petition, Mr Yang contracted to purchase those properties before the petition.
- [91] In the circumstances, the Court of Appeal directed that the petition be re-heard, along with the Wang action. The Court awarded the costs of the appeal to Mr Yang, with the costs of the first petition hearing to be determined by this present Court.

IV. Discussion and decision

A. Is the JVA a binding contract?

- [92] All parties argue that to some extent the JVA, or certain terms of the JVA, are enforceable, or were enforceable at one point.
- [93] As stated, Mr Yang argues that the JVA is fully enforceable. He sees it as a "constitutional" document governing a long-term joint venture relationship between the parties in developing the Property through various projects. Messrs Jin and Wang would not only have to contribute purchase funds and enter into a mortgage. They would also, by implication (as there is no express term), have to provide further capital contributions to realize those projects. They would also have to participate in those projects, as through serving as directors in corporations realizing those projects. In Mr Jin's mind, when each of Mr Wang and Mr Jin asked for the return of their investment, and failed to make further contributions, they effectively walked away from the JVA, abandoning their investment, and allowing Mr Yang to solely retain the Property.
- [94] Mr Wang also argues that the JVA is enforceable. He, like Mr Jin, points to the article V.3 "freedom of entry and exit", arguing that it permitted him to exit at any time, with refund of capital and interest at a rate of 10% interest per year.
- [95] Mr Jin takes the initial position that the JVA is not a binding contract, for various reasons that will be discussed further below. Alternatively, he argues that the JVA was soon supplanted by the Contract of Purchase and Sale, and the Addendum thereto.
- [96] In *Oswald v Start Up SRL*, 2020 BCSC 1730, Giaschi J usefully gathers and summarises the jurisprudence on whether a putative contract is enforceable:
- [121] *Matic v. Waldner*, 2016 MBCA 60 at para. 57, sets out the three requirements that must be established for there to be a binding contract: there must be an intention to contract; the essential terms must be agreed; and the terms must be sufficiently certain:

- [57] The principle that can be distilled from *Bawitko and Ghitter (Ron) Property Consultants Ltd v. Beaver Lumber Co*, 2003 ABCA 221, 330 AR 353 (quoted by Fridman), is that there are three requirements for a binding contract--the intention to contract; the essential terms of the contract have been settled; and the terms are sufficiently certain. Whether the three requirements are met in any case is to be determined from the perspective of the objective reasonable bystander.
- [122] Matic also sets out that the determination of whether there is an enforceable contract involves a contextual analysis of all the material facts and circumstances, but excluding the subjective intentions of the parties:
- [63] The determination of whether the requirements for an enforceable contract have been met involves a contextual analysis, taking into account all the material facts. Such facts can include the subsequent conduct of the parties, including subsequent negotiations. Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) states (at p 164):

Whether the parties acted as if they had a binding agreement after entering into an understanding is given great weight by the courts in determining whether there is an unenforceable agreement or a binding contract. The parties' subsequent conduct transcends all three of the categories of unenforceable agreements to agree, such that conduct indicating a belief that one is bound will reinforce a conclusion that essential terms have been agreed or that the agreed terms are sufficiently certain or that there was no intention to delay the creation of binding obligations until execution of a formal contract document.

[Emphasis in original.]

- [64] The facts and circumstances that should be considered will depend upon the context of each case but could include written or oral communications between the parties; communications to third parties; the conduct of the parties; the nature of subsequent negotiations, including when and how they came to an end. The subjective intention of the parties is not relevant in this analysis
- [123] Madam Justice MacKenzie writing for the Court of Appeal recently addressed intention to contract in similar terms in *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at paras. 15-17. She noted that it is the objective intention of the parties that is relevant, not their subjective intention, and further noted that the objective intention is to be determined by looking at all of the circumstances or all of the material facts. Ultimately, the question is whether an objective reasonable bystander would conclude the parties intended to contract:

[15] While the existence of a binding and enforceable contract requires an intention to contract, it is not subjective intention that is relevant, but objective intention: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 35; *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23. This principle stems from the seminal case, *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that [the] other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[16] This Court in *Berthin v. Berthin*, 2016 BCCA 104, put the requirement this way:

[46] The test, of course, is not what the parties subjectively intended but "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": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

The test for determining consensus ad idem at the time of contract formation is objective: it is "whether the 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"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": Fridman, *supra*, p. 15 [At para. 27.]

[17] In determining intention to contract, a court is not confined to the four corners of the agreement, but may look at "all the circumstances" or "all the material facts": *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at para. 21; *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144 at para. 75; *Lacroix v. Loewen*, 2010 BCCA 224 at para. 36 (per Finch C.J.B.C.). In *Langley*, McEachern C.J.B.C. observed that McLachlin J. (as she then was) in *Osorio v. Cardona* (1984), 15 D.L.R. (4th) 619 (B.C.S.C.), considered "evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties."

[97] Mr Jin's primary position is that the JVA is merely an unenforceable "agreement to agree." Oswald also sets out the law on that assertion:

[124] It is also trite that "an agreement to agree" is not an enforceable contract and neither is a list of guiding principles: *Berthin v. Berthin*, 2016 BCCA 104 at para. 48. However, if the parties have agreed on all essential terms and merely intend to incorporate those terms into a future formal document, there is an enforceable contract. These principles are set out in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97, 26 A.C.W.S. (3d) 350 (Ont. C.A.) at 12-13:

As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.

[98] A court is generally loath to find a putative contract void based on an unrealistically stringent view that essential terms are impossibly uncertain:

[125] As indicated above, the parties must have agreed on the essential terms of the contract for a contract to be enforceable. However, the courts will be reluctant to find a contract void for uncertainty. These principles were addressed in *Berthin* at para. 47:

[47] Of course, the terms in question must be enforceable - i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, *supra*:

An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.

If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.

Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."

[Emphasis added.]

[126] If the parties have left open for future negotiation a key term or terms, then an enforceable contract will not be found: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 333; *Berthin* at para. 49.

[99] Even where the putative agreement is not professionally or elegantly drafted, the court must make every effort to give effect to the parties' intentions by looking at its substance rather than its mere form:

[127] A particular problem in this matter is the fact that that the MOU is not a finely crafted document or a model of clarity. It was drafted on short notice by a lawyer in India on the instructions of Mr Oswald. It is apparent that this lawyer was not a native English speaker. Likewise, none of the parties to the MOU are native English speakers and, having heard the parties testify, it is apparent that although they have competency in English, all of them struggled with the language to some extent. Their limited proficiency in English is also apparent from the many emails they have exchanged.

[128] *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75, provides guidance as to how a poorly drafted document, such as the MOU, should be approached. Specifically, in such circumstances the court should make every effort to find a meaning in the words used consistent with the intentions of the parties and should avoid applying form over substance:

[47] There is no question that the documents the parties signed were inelegantly and inartistically drafted. They contain typographical errors and substantive mistakes. There seems to be little doubt that the form of the contracts and the offers from which they arose did not strictly comply with the specifications in the USA. However, the inquiry is not whether the contracts were competently drafted, but rather whether they disclose the parties' intentions as to the substance of their agreement. In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C.C.A.), the majority outlined the role

of the court at 517-18:

In the first place, consideration must be given to the duty of a Court and the rules it should apply, where a claim is made that a portion of a commercial agreement between two contracting parties is void for uncertainty or, to put it another way, is meaningless. The primary rule of construction has been expressed by the maxim, *ut res magis valeat quam pereat* or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good". The maxim has been basic to such authoritative decisions as *Scammell v. Ouston*, [1941] 1 All. E.R. 14; *Wells v. Blain*, [1927] 1 D.L.R. 687, [1927] 1 W.W.R. 223; *Ottawa Electric Co. v. St. Jacques* (1902), (SCC), 31 S.C.R. 636, as well as many others, which establish that every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early as 1868 in *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, that if the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.

Clause 10 of the contract is admittedly a highly inartistic piece of draftsmanship and clearly poses difficulties in construction. However, keeping in mind the rules of interpretation which I have outlined, and approaching the terms of the contract and cl. 10 in what I consider a "reasonable and business manner" (see *Wells v. Blain* at p. 691), it is my opinion that cl. 10 is not so uncertain as to be meaningless. On the contrary, I consider it has a clear meaning but is badly expressed. ...

[48] In *Langley*, before citing *Marquest Industries*, McEachern C.J.B.C. stated the following at para. 37:

[37] Having determined that the legal force of the arrangements represented by the communications I have described is not contingent upon the preparation of a formal document, it is necessary to consider what the terms of the bargain are and whether they are legally sufficient to constitute a binding agreement. This analysis is carried out according to the standard rules of contract construction: give the words their plain and ordinary meaning where that meaning does not conflict with the context of the communications as a whole. Where there is ambiguity, extrinsic evidence may be considered.

[55] The trial judge did not make every effort to give effect to the parties' intentions by looking at substance and not mere form. Rather than attempting to extract meaning from the parties' expression of their contractual intention as the authorities require, the trial judge applied an overly formalistic and literal approach to interpreting the document. When this approach produced ambiguity and inconsistencies with undisputed facts, the trial judge did not attempt to resolve them by looking to extrinsic evidence, as *Langley* prescribes. In omitting to apply these principles of contractual interpretation set out in *Marquest Industries* and

Langley, the trial judge erred in law.

[Emphasis in original.]

- [100] As in the Oswald memorandum of understanding, the JVA is neither comprehensive nor artfully drafted. But also, as in Oswald, I find that the parties intended the JVA to be of contractual force, and that the objective reasonable bystander would view it as such: para 137. I also find that the essential terms of that contract can be determined with a reasonable degree of certainty, with respect to the primary objective of obtaining the Property, but also with respect to the governance of the joint venture following acquisition.
- [101] The plain language of the JVA indicates contractual intent. It starts with the title "Contract for the Joint Purchase of Sunshine Coast Resort Housing ", and ends with "Signatures of all shareholders to confirm participation." It refers to "Special agreement terms" and "housing purchase requirements and conditions". It speaks throughout about what the participants "shall" do with respect to purchase in contribution. It sets out mechanisms for management, decision-making, voting, transfers of interest, and exit.
- [102] The JVA sets out the essential terms of the Property acquisition and use. It identifies the subject matter of the transaction: the Property. It sets out the anticipated price. It sets out the timing. It sets out the contribution and ownership of each party. It sets out a mechanism for governing the joint venture, including management, voting, decisions, share transfer, and exit.
- [103] The conduct of the parties before the JVA is consistent with the JVA being a binding contract. While Mr Yang was the primary author, and did not invite further negotiations before obtaining signatures, it was the direct result of the visit to the Property, followed by two meetings, immediately before its execution, amongst the parties.
- [104] The conduct of the parties immediately after the JVA, particularly that of Messrs Yang and Jin, also reflects a common understanding that the JVA was a binding contract. Messrs Jin and Yang obtained the mortgage, and executed both the Contract of Purchase and Sale and the Addendum in furtherance of the JVA. All parties executed the Contract of Purchase and Sale and paid the required deposit and purchase funds.
- [105] Their later conduct, as the relationship deteriorated, also evinces a common understanding that the JVA is a binding agreement. Mr Wang and Mr Jin each cited and relied upon the article V.3 freedom of exit provision in demanding the return of their funds plus contractual interest, on multiple occasions in 2015 and 2016, and in their pleadings through to the date of trial.[3] Mr Yang, of course, always considered the JVA to be binding: a "constitutional document" that enabled him to press forward on any number of projects on the Property.

- [106] In his primary argument, Mr Jin argues that the JVA is unenforceable as it lacks sufficient clarity in drafting and intention to allow an objective bystander to accept it as a binding agreement capable of enforcement. The reasons he cites, however, speak to potential breaches of the JVA, and to disagreements on the interpretation and effect of certain terms, rather than to its formation and enforceability; those deficiencies do not undermine an objective view that the JVA was meant to have contractual effect.
- [107] As one example, Mr Jin observes that the parties did not implement certain aspects of the relationship envisioned in the JVA: no corporation was formed to hold the Property or to carry out its development, Mr Wang did not participate in the mortgage and was not put on title, and Mr Yang claimed to emerge with a 50 percent ownership interest. Those post-contractual developments, however, do not speak to the enforceability of the JVA. Instead, they speak to alleged breaches of that agreement, or to differing interpretations of the agreement, or to simple failures to implement aspects of the agreement as the relationship deteriorated.
- [108] Mr Jin also argues that the long and unfocused list of potential uses for the property set out in articles III.6 and 7 and IV were visionary and imprecise, and would require further negotiations. The fact that parties will have to discuss and decide how to specifically implement certain aspects of the joint venture, such as whether the Property would be held for value appreciation, or developed as a hotel, camp, retirement home, or farm, is not in itself unusual. The JVA expressly sets out a mechanism for precisely those sorts of votes and decisions, in article V.2. The anticipation of further discussions and agreements during the implementation and management of the joint venture does not diminish the unified primary intention to acquire the Property pursuant to the JVA.
- [109] In *Langley Lo-Cost Builders Ltd. v 474835*, 2000 BCCA 365, cited in *Oswald*, above, the Court considered whether the parties had reached an enforceable contract to settle litigation between themselves by agreeing to jointly develop a real estate project. The trial judge found the alleged joint venture agreement to be unenforceable as vague and uncertain. The Court of Appeal disagreed, finding that no essential term was so vague, uncertain, or ambiguous that it could not be given realistic commercial meaning. This conclusion was based partly on the joint venture mechanism (a management committee with voting rights) to resolve details and problems that could arise:
- [75] Upon a consideration of the terms of the agreement in its factual matrix, I have no difficulty concluding that these parties, for good commercial reasons, agreed to resolve their differences by way of a joint venture in which Langley would finance, service and manage the development and sale of the lots. The language they used to describe their arrangement was inartistic, but one can readily understand the foundational substance of their arrangement. The right of Langley to manage the project provides the machinery to resolve the details and with great respect, I am unable to identify any essential term of the bargain that is so vague and uncertain, or ambiguous, that it cannot be given a realistic commercial meaning. As I have said, future difficulties in carrying out the bargain, which may or may

not arise, do not change the basic nature of the deal, which could be carried out under the direction of the management committee.

[emphasis added]

- [110] Similarly, in the present JVA, the liberal provisions for voting and consensus set out in Section V ("Special agreement terms for rules and regulations in cooperative enterprise management") in themselves compensate for imprecisions and silences in the agreement itself. Decisions must be made based on consensus and vote: article V.2. If there is deadlock or dissatisfaction, a party is free to leave the JVA: article V.3. These reassurances make precise and comprehensive terms as to the details of implementation less necessary in the agreement.
- [111] Nor is the JVA unenforceable as a proverbial agreement to agree.[4] Neither its text nor the parties contemplated its terms being replaced with a more comprehensive document, or make a binding agreement subject to approval of a formal document drafted by solicitors. Neither the JVA, nor extrinsic evidence, contemplated future negotiations as to key terms. Nothing in the text indicates that it is subject to conditions: see *Berthin v Berthin*, 2016 BCCA 104 at paras 48-49; *Hoban Construction Ltd. v Alexander*, 2012 BCCA 75 at para 41. In this, this case stands in contrast to Mr Jin's primary cited case of *Miller v Jellybean Park International Inc.*, 2013 BCSC 1237, where the parties expressly stated that the purchase would require further negotiation on and agreement to a formal purchase and sale agreement: para 56.[5]
- [112] Nor is it fatal that the JVA contemplates four participants, while only three signed and participated. With the entry and exit provisions, the JVA anticipates that parties may come and go. The parties proceeded to purchase the Property based on the JVA, regardless of the participation of Mr Li, specifically, or a fourth investor, generally: the presence of a fourth investor was not an essential term. Again, the parties evinced an understanding that the JVA was a binding agreement both before and after the Property purchase, regardless of Mr Li's election not to participate.
- [113] I turn now to the interpretation and effect of the JVA. I start with section V: "Special agreement terms for rules and regulations in cooperative enterprise management."
- [114] I agree with both Mr Jin and Mr Wang that on its plain language, article V.3 indeed provides an investor "freedom of exit": any participant could leave the project and receive a "refund of capital and interest at a rate of 10% interest per year." This was an important provision in a venture where the investors barely knew each other, and where Mr Yang, the primary driver of the project, needed and solicited the investment of Mr Wang and Mr Jin.
- [115] This dynamic is also reflected in article V.2, requiring that no major issues will be decided without a vote and consensus among shareholders.

- [116] Article V.2 is antithetical to Mr Yang's view of the entire JVA, and, in particular his assertion that he could unilaterally pursue any of the potential projects set out in articles III.6 and III.7 and VI, and require the other parties to finance those projects through capital contributions. The intention of those provisions was to list potential uses of the property: they neither bind the parties to pursue all of those scattershot potential uses of the property, much less bind the parties to support through further capital contributions whichever of those listed projects Mr Yang might unilaterally elect to pursue. The parties may have decided, through vote and consensus, to pursue any of the smorgasbord of ideas set out in article III.6. Or the parties may have decided to simply hold onto the Property and enjoy its appreciation in value: that was the primary intention of both Messrs Wang and Jin. On cross, Mr Yang himself acknowledged that the purchase of the Property was the primary investment; discussion of what to do with it would require further discussion and ultimate consensus. Despite this, Mr Yang did not obtain or even seek that consensus before unilaterally embarking on (and profiting from) his side-projects. He acknowledged that he did not consult with either Mr Wang or Mr Jin before starting on his various attempted ventures for the Property. He claimed that those two persons were difficult to reach. He relied on article III.6 and the Key Works Memo, and on his initial monetary contribution being twice that of Mr Jin or Wang, as justification.
- [117] Further, the JVA is wholly silent on the requirement of ongoing cash contributions by participants. This reflects, in part, the cooperative decision-making provisions in the JVA. The amount of contribution, and, indeed, any expenditures, would have to be decided by consensus or majority vote, neither of which Mr Yang sought or obtained.
- [118] Finally, Mr Yang drafted and created the JVA and presented it as a *fait accompli* to the others. While some terms reflected their discussions, others were added unilaterally by Mr Jin. Any ambiguity in its wording is resolved in favour of Messrs Jin and Wang: *Eli Lilly & Co. v Novopharm Ltd.*, [1998] 2 SCR 129 at para 53. As indicated above, however, the plain language of the JVA wholly fails to support Mr Yang's urged interpretation of the contract he drafted.

B. Is the June 8/21, 2015 "Key Work Memos" a binding contract?

- [119] As indicated above, in the "Facts" section, even Mr Yang, in testimony, and in his use of the verb "reviewed" above the signatures, did not consider the document to be a binding contract. Mr Jin emphatically denied any agreement to pursue those projects. The document adds little to the scattershot list of potential projects for the Property set out in articles III.6, III.7 and IV of the JVA. It is of no binding effect, and does not change the above analysis of the JVA.

C. Is the August 31, 2015 "Summary of Negotiation" a binding contract?

- [120] Nor was the August 31, 2015 "Summary of Negotiation", signed after the first McDonald's meeting, a binding agreement. It did not modify or supplant the JVA. Specifically, it did not constitute an agreement or acknowledgement by Mr Jin that he held 25 percent interest in trust for the plaintiffs, for three reasons.
- [121] Mr Yang, the drafter of that document, is alone in asserting that the document constitutes an agreement. He relies upon their three signatures at the bottom of the document. Mr Jin vehemently denies that an agreement was reached. As set out above, Mr Wang, at least on discovery, denied that an agreement was reached, although he later attempted to resile from that position at trial.
- [122] Turning to the text of the document, the operative portion of that document says "Results: after friendly negotiation, Jin, Wang, and Yang reached an agreement and unanimously suggested to:" [sic; emphasis added]. The word "suggest" itself indicates a non-binding proposal to move forward. In the course of trial, the two interpreters both confirmed that "suggested" was the appropriate translation (one interpreter used the word "proposed" instead), both indicating that the document was not intended to be binding.
- [123] The document then sets out three suggestions or proposals. The first and last seem concrete: add Mr Wang to title and agree that the original ratio of shares was 25 percent-25 percent-50 percent. But the second suggestion imparts a significant condition precedent: in effect, the three parties would reapply for a loan or mortgage at a different bank, with all three participants also subscribing to the mortgage. That condition did not come to pass: no steps were even taken. The other two proposals should not be considered binding or agreed upon by the parties.

D. Are the plaintiffs and Mr Jin entitled to return of their contributions, plus interest?

- [124] The Court of Appeal granted the appeal based in part on the chambers judge's deferral of the issue of the respective ownership interests in the Property. At that time, the plaintiffs sought a declaration that Mr Jin holds 25% interest in the property in trust for Ms Wu. That is no longer the case. The plaintiffs' sole ground of relief sought, again, is return of their contribution of \$631,436.83, plus 10 percent interest per year under article V.3 of the JVA.
- [125] Based on the analysis above, the plaintiffs are entitled to the sole remedy they seek under the JVA: return of their payments plus 10 percent simple interest per year, pro rated, and calculated from the date each payment was advanced.
- [126] Mr Jin is also entitled to the return of his total investment. This consists of the \$631,436.83 deposit and down payment, plus \$50,000 towards the mortgage payments, plus the USD\$180,000 he paid with respect to the mineral water development, at Mr Yang's behest. The USD\$180,000 will be converted to Canadian dollars, pursuant to the Foreign Money Claims Act, RSBC 1996, c 155. As with the plaintiffs, the 10 percent simple interest per year will be pro rated and calculated from the date each payment was advanced.

E. Other remedial orders to extricate Mr Jin from the investment

- [127] The problem remains that Mr Jin remains obliged under the HSBC mortgage as a co-mortgagor with Mr Yang. As he no longer has a proprietary interest in the Property, he should no longer bear obligations under it.
- [128] Mr Yang shall make all reasonable efforts to arrange alternative mortgage financing arrangements, and to discharge Mr Jin's obligations to HSBC under the mortgage agreement. He shall have two months from the date of this judgment to do so. Failing that, Mr Yang shall pay to Mr Jin's solicitors 50% of the full future amount remaining due under the mortgage, on undertakings to pay that amount to HSBC. Mr Yang must also provide an indemnity to Mr Jin to pay any other amounts reasonably and conceivably due in future under the mortgage. The parties may make alternative arrangements with respect to the timing and manner by which Mr Yang relieves Mr Jin of his mortgage obligations.
- [129] Alternatively, the parties may appear before the Court, on notice to HSBC, with respect to Mr Jin's release from his mortgage obligations. Such a hearing may consider an order under Rule 13-5, for a court-ordered sale of the Property.

F. The Partition of Property Act

- [130] Mr Jin concedes that if the Court finds the JVA, and its article V.3 freedom of entry and exit clause to be effective, he cannot seek relief under the PPA: 257565 B.C. Ltd. v Bartell Bros. Construction Ltd. (1983), 50 BCLR 155 (SC) at paras 15, 17; Ference v Lee, 2012 BCSC 1477 at para 42. Accordingly, the Court need not decide this issue.

G. Mr Yang's counterclaim

- [131] Mr Yang seeks specific performance of the JVA. The pleadings do not specify the specific performance sought, but the tenor of his arguments, including assertions during testimony, was that Mr Jin and the plaintiffs should be obliged to make capital contributions with respect to Mr Yang's past and future attempts to develop the Property, in proportion to their ownership interest. In the alternative, Mr Yang seeks damages in lieu of specific performance.
- [132] This position suffers from four fundamental flaws. As concluded above, the other parties were entitled to evoke the article V.3 freedom of entry and exit clause, which they did before any proven expenditures by Mr Yang. Second, again, the JVA is silent on capital contributions. Further, Mr Yang himself breached the article V.2 obligation to obtain consensus and hold a vote before making major decisions, which would include significant expenses and specific projects for the Property. Finally, Mr Yang did not provide any coherent evidence of expenses or damages that he suffered as a result of the actions of Mr Jin or the plaintiffs.

- [133] With respect to Mr Yang's purchase of the neighbouring properties, he first sought to obtain them in June 2015, and signed the contract of purchase and sale after the other parties had demanded their refunds. Indeed, that was the reason he did not tell Mr Jin or the plaintiffs about their purchase, and why he had to seek the assistance of a Chinese property development company for the purchase. When he obtained those properties from the YMCA, he had no reasonable expectation of participation or contribution by the other parties. He cannot claim prejudice. Mr Yang's counterclaim fails in this regard.
- [134] With respect to the mortgage, tax, and maintenance payments, Mr Yang would have been obliged to make those payments in any case with respect to a property that he now fully owns, as a result of the finding that Messrs Jin and the plaintiffs are restricted to return of their contributions plus interest, via the article V.3 exit mechanism, and that Mr Yang ought to have provided refunds upon demand. Mr Yang did not present any coherent evidence or argument with respect to damages flowing from his payment of those expenses up to the date of this judgment.
- [135] That finding also renders it unnecessary to consider Mr Yang's alternative argument that his subsequent contributions entitle him to a constructive and resulting trust over the Property, and an increased interest in the Property. Mr Yang emerges from this dispute as the hundred percent legal owner of the Property. There is no need to increase his ownership interest relative to that of Mr Jin or Mr Wang.
- [136] Finally, Mr Yang pleads that Mr Jin and Mr Wang, as business partners, or alternatively as joint venturers, owed him a fiduciary duty of utmost fairness and good faith, and that they breached this duty in failing to make mortgage and other payments.
- [137] Generally, the relationship between joint venture participants is not a traditional relationship of trust within which they owe a general fiduciary duty to one another: *Gadhri v 0760815 BC Ltd*, 2016 BCSC 521 at para 68, rev'd in part on other grounds 2017 BCCA 31. Where experienced businesspeople of similar bargaining strength negotiate an agreement to govern the relations, they can address potential vulnerability through specific contractual safeguards: *Frame v Smith*, [1987] 2 SCR 99 at 137-38. In such circumstances, damages, rather than the imposition of a fiduciary duty, are the appropriate remedy.
- [138] Members of a joint venture do generally owe fiduciary duties to the joint venture and to one another, however, when they are dealing with the property or enterprise that is the subject of the joint venture absent the other participants: *0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.*, 2021 BCSC 607 at paras 237-240. A fiduciary duty extends to those aspects of the relationship exhibiting the hallmark of fiduciary duty: vulnerability: *Frame* at 137; *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at 599.
- [139] Mr Jin and Mr Wang exercised no power over Mr Yang. Mr Yang was not at "the mercy of the other's discretion", to use the oft-cited phrase of Professor Ernest Weinrib, *The Fiduciary Obligation* (1975), 25 UTLJ 1 at 7, cited in at *Lac Minerals* at 600. Neither Mr Jin nor Mr Wang dealt with or controlled the Property or the assets of the joint venture. In

contrast, Mr Yang, like the defendant fiduciary in *Panorama*, had effective control over the joint venture, living on the Property, and unilaterally making decisions with respect to its use of that Property based on his misconception that he could oblige the others to fund his various attempted enterprises. Indeed, Mr Yang exhibits more of the attributes of a fiduciary than a vulnerable beneficiary. And in secretly purchasing the neighbouring properties for his own benefit, rather than for his fellow joint venturers, his actions exhibit more of the attributes of a breach of fiduciary duty.

- [140] The pleaded failures to make mortgage payments speak to an alleged breach of contract, rather than a fiduciary breach in dealing with the Property, such as a secret profit or breach of confidence. The parties had an agreement, the JVA, that governed their relationship, including, specifically, the rights and obligations of consensus and voting, and a mechanism for exit. It did not require the parties to make any contributions or payments beyond the initial payments for purchase. The Court should hesitate to read a fiduciary duty onto a written agreement where the parties themselves have not done so: *Blue Line Hockey Acquisition Co., Inc. v Orca Bay Limited Partnership*, 2009 BCCA 34 at para 57.
- [141] In any case, Mr Yang provided neither evidence nor authorities that would support his argument that a fiduciary duty existed, or that the other parties breached that duty. The counterclaim is dismissed.

V. Conclusion

- [142] As set out above, Mr Yang must refund the plaintiffs and Mr Jin, plus interest. Mr Yang remains the sole owner of the Property. Mr Yang must extricate Mr Jin from his obligations under the mortgage.
- [143] Mr Jin has requested the opportunity to make submissions on costs. The Court agrees that that is an appropriate next step, and invites the parties to secure a date through the Registry.

"Crerar J"

- [1] To be fair, Mr Jin also begged off comprehension when it suited him.
- [2] Mr Wang disputes this, noting that he is a HSBC customer.
- [3] Mr Jin relies on the JVA only in his petition. In his response to the plaintiffs' claim, he denies that the JVA is a binding agreement.
- [4] As was the primary unsuccessful argument in *Oswald*: paras 140, 167-172.
- [5] Further, the purported Jellybean Park agreement concerned a sale of a property and business from the plaintiff to the defendant, a sale for which the "fundamental matter" and essential term of price was unclear: para 58. Here, the parties are unified in their objective to purchase the Property.

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