

CANADA / JUDGMENT

Wang v. Wang

2020 BCCA 15

COURT

British Columbia Court of Appeal

DECIDED

16 January 2020

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2020 BCCA 15 Wang v. Wang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Wang v. Wang,

2020 BCCA 15

Date: 2020/01/16

Docket: CA45052

Between:

Hong Jie Wang also known as Anita Wang

Appellant

(Plaintiff)

And

Yong Li Wang also known as William Wang

Respondent

(Defendant)

Corrected Judgment: The text of the summary of this judgment was corrected on January 20, 2020.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated
December 28, 2017 (Wang v. Wang, 2017 BCSC 2395,
Vancouver Docket S-163857).

Counsel for the Appellant:

M.D. Andrews, Q.C.

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Counsel for the Respondent:

J.A. Henshall

M.B. Funt

Place and Date of Hearing:

Vancouver, British Columbia

November 7, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 16, 2020

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

Summary:

Mr. Wang and Ms. Wang contracted to jointly purchase property. Ms. Wang granted Mr. Wang a power of attorney for the purpose of applying for a mortgage to secure the necessary funds in the event Ms. Wang's funds were not ready by the closing date. Mr. Wang received Ms. Wang's funds before the closing date and applied for a mortgage nonetheless. He funded the purchase of the property with his deposit (\$75,000), the mortgage proceeds (\$570,000), and Ms. Wang's cash contribution (\$651,000). A judge held Mr. Wang did not breach a fiduciary duty and in any event, Ms. Wang was barred from an equitable remedy on the basis of the clean hands doctrine. The judge ordered a contractual accounting.

On appeal, Ms. Wang contends the judge erred in failing to find Mr. Wang owed Ms. Wang a fiduciary duty, in failing to find Mr. Wang breached the fiduciary duty, in restricting the remedy to a contractual accounting, and in holding that Ms. Wang was barred from an equitable remedy. Held: Appeal allowed. The power of attorney created a fiduciary duty that Mr. Wang act in Ms. Wang's best interests; Mr. Wang breached this duty. Ms. Wang is not barred from an equitable remedy as the clean hands doctrine is narrow and does not encompass her activities here. As a remedy, with an exception for Mr. Wang's interest in the property due to his deposit, Mr. Wang's interest should be held in a constructive trust for Ms. Wang with a charging order in favour of Mr. Wang to repay him the principal amount of the mortgage, and there needs to be an accounting of related expenditures and receipts.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This is an appeal centered on a power of attorney. The power of attorney was given by Ms. Wang, the appellant, to Mr. Wang, the respondent, allowing him to "do on [her] behalf anything that [she could] lawfully do by an attorney", subject to the conditions and restrictions that he was "only to sell, transfer, dispose of and mortgage" a five-acre parcel in Port Coquitlam, British Columbia that the parties were buying.
- [2] The first question before us is whether the power of attorney created a fiduciary duty on the attorney, Mr. Wang, to refrain from using the instrument for his benefit to the burden of the donor, Ms. Wang. If the answer is "yes", the second question is whether the attorney breached the fiduciary duty. If the answer to that question is "yes", the third question is what remedy, if any, should issue.
- [3] The judge found there was no fiduciary duty breached by Mr. Wang, and ordered only an accounting between the parties to equalize their contributions to the purchase price and expenses connected to the property. Ms. Wang appeals from the order and seeks a remedy for breach of fiduciary duty.

The Circumstances

- [4] The judge faced problems in her fact finding role both because there were serious issues of credibility that diminished the value of the parties' evidence, and because the document trail discussed two versions of the purchase transaction, one at a price of \$1.27 million and one at \$1.5 million. As to credibility, the judge said:
- [42] I agree that neither party is credible. I did not find any of the witnesses who testified in this case credible. In my opinion, no one told the truth about their relationship and the circumstances surrounding the purchase of the Property. They all testified to occurrences and events that made no sense and were not credible.
- [48] In my view, little, if anything, the plaintiff testified to can be relied upon.

- [49] The defendant's evidence does not make sense either. He has no explanation for his signature and initials on Document No. 2 or his initial on the purchaser's statement of adjustments showing \$1.5 million as the purchase price. I do not believe he cannot recall how and why and at whose behest the documents were created.
- [50] After listening to all of the witnesses, I have decided I cannot believe any of them about the circumstances surrounding the purchase of the Property.
- [54] In this case there has been both deliberate falsehood and exaggeration on the part of all of the witnesses. As noted above, not only do the parties dispute almost all of the material facts, they accuse each other of lying to the court, and dispute which documents they signed or saw. In these circumstances, the fact finding process becomes very difficult, if not impossible.
- [5] Because the dealings on the property are far from straight forward, I will describe them in an abbreviated way only, side-stepping much of the confusion that was addressed at trial that is not relevant in this court.
- [6] Mr. Wang is a resident of British Columbia, born in Shandong, China. Ms. Wang is a business person resident in Shandong, China.
- [7] In May 2011, Mr. Wang contracted to purchase the property for \$1.27 million. In August 2011, in Shandong, Mr. Wang met with Ms. Wang. She expressed an interest in acquiring a half interest in the property. On August 18, 2011, the parties entered into an agreement. Referring to Mr. Wang as Party A and Ms. Wang as Party B, the contract provided:
1. Both parties agree to jointly contribute about 1.5 million (one million and five hundred thousand) Canadian dollars to purchase a land with a size of about 5 acres located at 2973 BURNS RD V3C 3V4 in BC Canada (Appendix 1: land lot plan). Among that amount, Party A shall contribute 50% of the funds and Party B shall contribute 50% of the funds.

The above mentioned contribution of funds by both parties includes all expenses relevant to the purchase of the land, including but not limited to legal fees, fees for land registration and land transfer, etc.

3. Party A is responsible for all issues related to the land purchase, including retaining a lawyer, making applications to the authorities concerned, arranging for Property transfer, land title registration etc.
4. Party B shall be responsible for making timely payment for land related costs that she should undertake.
5. Both parties' rights to the land

Party A and Party B jointly own the said land lot, in addition, they jointly possess all other rights/titles to the said land lot, including but not limited to the possession, use and the revenue generated therefrom.

Neither party has the right to limit, transfer or reduce the rights that the other party has to the land without a written consent by that party. Any loss or damaged caused to a party as a result of breach of contract by the other party shall be compensated by the party in breach of the contract.

Both parties have the right to share all gains from the land including but not limited to the increase in value of the land, rental income, purchase and sale income, government subsidies etc. according to the proportion of the contribution of the funds.

[Emphasis added.]

- [8] In September 2011, Ms. Wang travelled to Canada and signed an addendum, dated September 30, 2011, to the contract of purchase and sale of the property. The addendum added her as a purchaser, established a completion date of October 14, 2011, and recorded payment of a deposit to the vendor of \$75,000. It is not disputed that the funds for the deposit were paid by Mr. Wang. While in British Columbia, Ms. Wang took banking steps to facilitate the purchase, one of which was making the power of attorney on October 8, 2011. Ms. Wang returned to China on October 9, 2011.
- [9] The terms of the power of attorney are uncontroversial and I have set out the essential provisions of it in para. 1. The purpose of making the power of attorney, which is not determined by the judge, is somewhat more difficult to address, yet is relevant to the central premise of Ms. Wang on this appeal that the mortgage authorized by the power of attorney was to fund her share of the purchase price in the event she could not fund it from China in time for the closing. Ms. Wang's evidence on the issue, which she could not rely on in any event given the judge's low view of her credibility, was that she was unaware of the power of attorney. Mr. Wang's testimony, as described by the judge, was that:
- [26] he was concerned the plaintiff's money might not arrive on time. As he had paid \$75,000 in deposits on the Property, he wanted to ensure he could complete the purchase. According to the defendant, he told the plaintiff that in case her money did not arrive on time he needed a power of attorney from her so that he could apply for a mortgage and complete the purchase, and she agreed. The plaintiff and the defendant attended before a notary public, Mr. Brar, on October 8, 2011, and the plaintiff signed a power of attorney. Mr. Brar was not called by either party to give evidence at the trial.
- [10] Where a judge has not made a finding of fact important to the case, it is open to us to do so if that can be done safely on the record: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 33. I consider in this case that this portion of Mr. Wang's evidence is reliable for the purpose of this appeal; it makes sense in the context of the timing of Ms. Wang's travel schedule and the looming completion date; it was not contradicted by Ms. Wang; it is evidence given by Mr. Wang such that it does not lie in his mouth to deny it now and he has not denied it, and his factum refers to the prospective problem that her money may not arrive on time. I proceed, therefore, on the basis that the power of attorney was given as a back-stop in case Ms. Wang's money did not arrive in time for the completion.

- [11] By October 13, 2011, no money had been received from Ms. Wang. On that day, Mr. Wang applied for and obtained a mortgage on the property in the amount of \$570,000. Around this time the date for completing the purchase was extended.
- [12] Mr. Wang received \$750,000 from Ms. Wang by transfers on October 14 and 17, 2011.
- [13] The purchase price was, in the end, \$1,270,000. The purchase completed on October 28, 2011, transferring the property to Mr. Wang and Ms. Wang as joint tenants, paid for by way of a credit of the \$75,000 deposit by Mr. Wang, the mortgage proceeds of \$570,000, and \$651,000 of the \$750,000 sent by Ms. Wang. Two statements of adjustments - one for a transaction for \$1,270,000 and another for a transaction for \$1,500,000 - both record the mortgage proceeds contribution of \$570,000, and are dated October 14, 2011, but were apparently signed later.
- [14] Thus, on the transaction that closed, the one with a price of \$1,270,000, Ms. Wang contributed \$651,000 and her interest in the property was burdened with the mortgage obligation. Mr. Wang paid \$75,000 and his interest was burdened with the mortgage obligation. (The balance of Ms. Wang's \$750,000 transfer to Mr. Wang is not accounted for in this litigation.)
- [15] Mr. Wang made all payments on the mortgage and when the principal came due in 2016, repaid the principal outstanding. He has paid all property taxes and maintenance expenses. There is a suggestion that the property has been rented, so there may be receipts of off-setting rental income.

The Claim

- [16] Ms. Wang commenced the action in 2016. In it she sought a variety of remedies including: a declaration that Mr. Wang holds his interest in the property in a constructive trust for her; an order directing the registrar of land titles to register the property solely in her name; in the alternative, an order for an accounting and an order for disgorgement of profits; in the alternative, damages for breach of contract, fraudulent misrepresentation, conversion, and equitable compensation; and punitive damages.
- [17] Before us, Ms. Wang seeks: an order that Mr. Wang disgorge the benefit he received from breaching his fiduciary duties to Ms. Wang, that being his interest in the property; or in the alternative, an order that he holds his interest in the property on a constructive trust for Ms. Wang, but allowing for an accounting of his contribution; and in the further alternative, a new trial. At the hearing of the appeal counsel for Ms. Wang focussed on the remedy of disgorgement of the benefit, on the prophylactic principle.

The Reasons for Judgment

- [18] As I read the reasons for judgment, the judge did not fully grapple with the implications of the existence of the power of attorney as they relate to Ms. Wang's claim of a breach of fiduciary duty. The judge started in para. 2 by referring to the claim, including for breach of fiduciary duty, but then almost immediately after, in paras. 4 and 5, expressed her conclusion in contractual terms:
- [4] For the following reasons, I have concluded that the plaintiff has not established that the defendant acquired his interest in the Property by fraud or breach of his contractual duties, or that the Property should be transferred to her.
- [5] I have concluded that the agreement between the parties is that they would share equally in the costs of purchasing the Property, the expenses and all revenue generated by the Property. I have concluded that the defendant breached the contract by failing to account for rental revenues received from the Property. I have concluded the appropriate remedy is that there be an accounting of each party's contribution, and that the contributions be equalized. In my opinion, the plaintiff is not entitled to any equitable relief.
- [19] The judge then turned to the background of the case. There, she recited the circumstances of the making of the power of attorney, including Mr. Wang's testimony to the effect he needed the power of attorney to enable him to apply for a mortgage and complete the purchase in the event Ms. Wang's money did not arrive in time.
- [20] After recording the background, the judge turned to the discussion, addressing the claim in two parts - the claim for breach of contract and the claim for equitable relief. She rejected the claim in contract. In doing so she said:
- [71] As well, I do not believe the plaintiff's evidence that she was unaware she signed a power or attorney or that there was a mortgage on the Property. Nor do I believe the plaintiff that the defendant took out the mortgage without her knowledge and consent. As I stated earlier, it is apparent from the statement of adjustments the plaintiff agreed she received that part of the purchase price was made up of a mortgage in the amount of \$570,000.
- [21] The judge then addressed the claims for equitable relief "based on allegations of fraudulent misrepresentations and breach of fiduciary duties". She described the claim for breach of fiduciary duty as allegedly premised on a fiduciary duty owed "in regards to the purchase , and as a result of having [Ms. Wang's] power of attorney". The judge first addressed the claim for breach of fiduciary duty outside of the power of attorney. She reviewed the terms of the contract, not the power of attorney, which indicated to her that Ms. Wang had not relied on Mr. Wang and said:
- [81] The evidence establishes that this was not a relationship built on trust, it was one formalized by contract.

- [82] As stated earlier, the plaintiff's evidence that she trusted the defendant because he was from her home village is not credible, given that the population of Shandong, China is 9 million people. I have been provided with no authority that would support a finding that a sophisticated businesswoman who owns a large corporation is owed fiduciary duties by an individual she is purchasing an investment property with. This is particularly so when the parties' relationship is governed by a contract drafted by the plaintiff's counsel.
- [84] The defendant was responsible for managing the purchase of the Property pursuant to the August Agreement. The fact that he did so does not create a fiduciary relationship between the parties. This was a commercial arrangement; negotiated and executed at arm's length.
- [22] In the result the judge dismissed any claim of fiduciary duty resulting from the contract.
- [23] The judge next addressed the import of the power of attorney and said, in its entirety:
- [86] As stated earlier, I do not believe the plaintiff's evidence that she did not know she was signing a power of attorney. The evidence from the defendant is that Mr. Brar had them both review the various documents, and that the plaintiff said she understood the power of attorney prior to signing it. Also, as stated earlier, I do not believe the plaintiff's evidence that she did not know about the mortgage. She has admitted she was provided with a copy of the statement of adjustments which clearly sets out that mortgage proceeds in the amount of \$570,000 were used to purchase the Property.
- [87] As a result, the plaintiff has failed to establish that the defendant breached any fiduciary duties he owed her as a result of the power of attorney.
- [24] The judge then, in the alternative, rejected the claim for equitable relief on the basis that Ms. Wang had not come to court with clean hands, relying on the fact her \$750,000 was brought into Canada for tourist reasons, not investment purposes. The judge inferred that bringing the money to Canada designated "tourist reasons" "is not a legal manner to transfer money to be used for investment purposes".

Grounds of Appeal

- [25] Restating the grounds of appeal somewhat, Ms. Wang contends the judge erred:
1. in failing to find the power of attorney created a fiduciary duty on Mr. Wang to Ms. Wang in his exercise of the power of attorney;
 2. in failing to find Mr. Wang breached that fiduciary duty in exercising the power as he did; and
 3. in holding that an equitable remedy was barred by the clean hands doctrine, and restricting the remedy to a contractual accounting.

Standard of Review and the Parties' Positions

- [26] The parties agree that as to questions of law, we must ask ourselves whether the judge was correct, and that as to questions of fact or mixed fact and law we must ask whether the judge made an obvious (palpable) and material (over-riding) error: *Housen v. Nikolaisen*, 2002 SCC 33. The parties do not agree, however, in the characterization of the errors alleged.
- [27] Ms. Wang advances the proposition that a power of attorney (absent a provision to the contrary) creates a fiduciary duty wherein use of the instrument must be for the benefit of the donor over the attorney's self-interest. This submission, says Ms. Wang, raises questions of law as to the effect of granting a power of attorney on the creation of a fiduciary duty, and the content of the fiduciary duty. Ms. Wang then invites us to find that there was a breach of that duty, and to order an equitable remedy. Addressing the judge's conclusion that, in any event, the doctrine of clean hands precludes an equitable remedy, Ms. Wang says the judge erred in law in basing her conclusion on matters not connected to the use of the power of attorney, and on inferences of misconduct unsupported by the evidence. These issues, says Ms. Wang, are to be decided on a standard of correctness.
- [28] Mr. Wang says the issue of the existence of a fiduciary duty is a question of fact or mixed fact and law, to which the deferential standard applies. He says that Ms. Wang knew he was using the power of attorney to raise money from a mortgage even while she was contributing her share, and so it must be taken that the power of attorney allowed him to use the mortgage for his own contribution. Whether this is so, he says, depends on facts, meaning that the correctness standard is inapplicable. On this view of the import of the power of attorney, Mr. Wang did not breach a fiduciary duty and the claim to an equitable remedy is defeated.

Discussion

Ground 1. The Power of Attorney and Existence of a Fiduciary Duty

- [29] It is not entirely clear from the reasons for judgment whether the judge found there was no fiduciary duty, or whether she concluded there may have been a fiduciary duty but there was no breach. I have explained that although the judge mentioned the power of attorney, she did not discuss it. She found at para. 81 that the parties' relationship was not founded on trust, and then said cryptically in para. 87 that Ms. Wang had failed to establish a breach of any fiduciary duty Mr. Wang owed her as a result of the power of attorney.
- [30] Here we must consider whether the power of attorney created a fiduciary duty. In my view, jurisprudence establishes that it does. In *Houston v. Houston*, 2012 BCCA 300, Madam Justice Newbury discussed the nature of powers of attorney. She observed at para. 26 that it is a type of agency, and accepted that the power of attorney, being a grant of power from the donor to the attorney, created a fiduciary duty (see para. 53). As well, in *Easingwood v. Cockroft*, 2013 BCCA 182, I adopted the fiduciary duty framework in discussing a power of attorney, the question in that case being whether, in the circumstances, attorneys could create an inter vivos trust on behalf of the donor. I refer also to *Canadian Aero Service Ltd. v.*

O'Malley, [1974] S.C.R. 592, per Justice Laskin.

- [31] In *Egli v. Egli*, 2004 BCSC 529, Madam Justice Garson (then of that court) discussed the competing theories that a power of attorney creates a fiduciary duty: one that a power of attorney creates a fiduciary duty by virtue of it being a form of agency, and the other, perhaps emerging, that a conclusion there is a fiduciary duty in a particular attorney-donor relationship follows from satisfaction of the three conditions for a fiduciary set out in *Frame v. Smith*, [1987] 2 S.C.R. 99: being that the person (here attorney) has scope to exercise some discretion or power; the person can unilaterally exercise this discretion or power to affect the legal or personal interests of the beneficiary (here donor); and the beneficiary is peculiarly vulnerable or at the mercy of the person.
- [32] With respect to a power of attorney, it appears to me that the three Frame characteristics will always exist, even if the discretion or power is narrowly circumscribed by the instrument. In any case, these criteria are met in this case. Mr. Wang was given power to transact interests in land without prior permission, and Ms. Wang was at the mercy of the deals he might strike in her name.
- [33] Mr. Wang contends that the power of attorney was, in this case, just part of the contractual arrangement he had with Ms. Wang, and he relies upon the judge's finding that the relationship was not built on trust.
- [34] With respect, it appears to me the judge has answered the wrong question in her para. 81. In considering whether a fiduciary duty was created by the power of attorney, in the narrow scope of activity authorized by the instrument, we are not concerned with the foundation of the parties' relationship, which assuredly was contractual. Rather, the question is whether, in respect to authorizing Mr. Wang to create a mortgage over the donor's interests, Mr. Wang was bound by a fiduciary duty not to prefer himself over Ms. Wang.
- [35] I can see no basis in law, or in this particular instrument, to eliminate the fiduciary duty owed by Mr. Wang to Ms. Wang. It seems clear to me that this power of attorney created a fiduciary duty owed by Mr. Wang to Ms. Wang in respect to the discretion and power he was authorized to use.
- [36] I conclude that as a question of law, Mr. Wang was bound, through the power of attorney, to a fiduciary duty to Ms. Wang.
- [37] The question, then, is the content of that duty. The standard content of a fiduciary duty was succinctly described by Professor Waters in "The Development of Fiduciary Obligations", in Rebecca Johnson et al., eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal History Project for the Supreme Court of Canada Historical Society, 2000, 81, at p. 83), adopted in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24:

The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interests, never the fiduciary's own.

[38] Concerning the specific fiduciary duties of attorneys to donors, in *Easingwood*, I referred at paras. 76-77 to the standard of the best interests of the donor. Justice Garson was more expansive in *Egli*, saying:

82] It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage (*Chapman*). The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor (*Robertson, Mental Disability and the Law in Canada* at 183). I am not aware of any authority that detracts from this principle in circumstances where the benefit is conferred on family members.

[39] Thus, in the least, the fiduciary may still benefit in spite of the existence of a fiduciary duty, provided the donor is not burdened by its exercise; in such a circumstance there is no conflict of interest.

[40] Here I can see no basis, including the contractual arrangement between Mr. Wang and Ms. Wang, to stray from the standard content of a fiduciary duty.

[41] I conclude this power of attorney, given to Mr. Wang, fixed him with a fiduciary duty to use it for the benefit of Ms. Wang. While it is possible that the exercise of the power might also benefit him, the hallmark of compliance with the fiduciary duty was creation of benefit to her.

Ground 2. Did Mr. Wang Breach the Fiduciary Duty?

[42] The judge found that Mr. Wang's actions did not breach any fiduciary duty he owed under the power of attorney, and referred to the copy of the statement of adjustments which set out the mortgage proceeds of \$570,000 used to purchase the property. Mr. Wang interprets the statement of adjustments as evidence of consent to the use Mr. Wang made of the power of attorney, and the judge appears to have given some weight to that proposition.

[43] Doubtless it is open to a donor to consent to attorney behaviour that may fall outside the limits of the empowering instrument, or that may appear to favour the attorney over the donor. This is not such a case. While the judge found Ms. Wang consented to Mr. Wang using the mortgage proceeds, it is not clear to me that she was speaking of the time of completion of the sale when Mr. Wang acted under the power of attorney. If so, the conclusion stands contrary to the judge's finding in para. 55, that "[i]t is clear from the August Agreement that the parties intended to contribute equal amounts of money to purchase the Property", and to a certificate signed by both parties on October 9, 2011, referred to by the judge in para. 29, in which each party committed to pay 50% of the purchase price. On the other hand, if the judge was speaking of Ms. Wang's state of mind in November 2011, when Mr. Wang delivered documents to her, I see no basis in the evidence to justify extrapolating it to an earlier, pre-completion, date, or to Mr. Wang. It is to be remembered that Mr. Wang never alleged that Ms. Wang consented to his use of the power of attorney to fund his own contribution. In other words, I fail to see how the statement of adjustments is evidence of Ms. Wang's consent to use of the mortgage proceeds as Mr. Wang's share of the purchase price for

completion, and I see no other evidence to this effect. On the record, it cannot be said that Ms. Wang agreed Mr. Wang could use the power of attorney to obtain a mortgage to satisfy his obligation to contribute half of the purchase price, and I do not read the judge's reasons for judgment as making this finding.

- [44] The result of the transaction is that Ms. Wang contributed \$750,000 to the purchase, of which \$651,000 was transferred to the vendor, and obtained in exchange a joint interest in the property subject to the burden of the mortgage. Mr. Wang contributed \$75,000 and obtained a joint interest in the property subject to the burden of the mortgage. In short, the contribution of the parties to the purchase was unequal in Mr. Wang's favour, by reason of his use of the power of attorney. This seems to me to be a clear breach of the fiduciary duty Mr. Wang owed Ms. Wang under the power of attorney. The judge, by failing to address consent to use of the power of attorney in this way, erred in law in finding there was no breach of the duty.

Ground 3. Remedy

- [45] On the conclusion that Mr. Wang breached his fiduciary duty to Ms. Wang, Ms. Wang is entitled to an equitable remedy unless the clean hands doctrine precludes it. The judge found that Ms. Wang lacked clean hands, referring to what the judge found was false evidence tendered at trial, and to the fact Ms. Wang's contribution came from China, at least in part, through sums designated "tourist reasons".
- [46] The clean hands doctrine decrees that "[h]e who comes to equity must come with clean hands": *Mayer v. Mayer*, 2012 BCCA 77. The doctrine is narrowly applied, however, and does not entitle a court to canvass all aspects of the party's behaviour known to the court. Its use must be kept to the circle of behaviour related to the relief sought. In *DeJesus v. Sharif*, 2010 BCCA 121 at para. 85, Chief Justice Finch adopted this passage from *Snell's Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 32:

The maxim ... must not be taken too widely; 'Equity does not demand that its suitors shall have led blameless lives.' What bars the claim is not a general depravity but one which has 'an immediate and necessary relation to the equity sued for,' and is not balanced by any mitigating factors.

He adopted, also, this statement from *The Principles of Equitable Remedies*, 6th ed. (UK: Sweet & Maxwell, 2001) at 169-170:

... it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief. ... So it was once emphasised "that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular

transaction, but must be made to be the very ground upon which the transaction took place, and must have given rise to this contract".

[47] I refer also to the reasons of Mr. Justice Smith in Mayer at para. 86 for the same proposition:

the person seeking equitable relief must be required to rely on the misconduct in order to vindicate his claim

[48] In this case, I consider that the judge's conclusion that Ms. Wang is barred from an equitable remedy because she does not come to the court with clean hands is incorrect.

[49] Mr. Wang did not plead this defence, nor address it in any way until his closing submissions. That feature, alone, undermines the conclusion that Ms. Wang should be driven from the judgment seat.

[50] More importantly, neither of the bases offered by the judge for applying the doctrine apply, and her conclusion on the legality of Ms. Wang's money transfers appears to be formed by taking judicial notice of matters requiring evidence.

[51] The judge's first reason for disentitling Ms. Wang from an equitable remedy, that she did not believe Ms. Wang's evidence, does not have a relation to the equity sued for: Snell's Equity. In other words, it does not come within the narrow ambit of the doctrine's application discussed in DeJesus and Mayer.

[52] Nor does the apparent tourist designation of the funds received by Mr. Wang come within that narrow ambit. Ms. Wang did not rely upon the impugned conduct of sending money to Canada with an imprimatur of "tourist reasons" in her claim of breach of fiduciary duty. Since Mr. Wang agreed he received the required funds from her before completion, no further question of the money transfer is engaged in this case.

[53] Equally fatal to the use of the doctrine is the basis for the judge's finding of fault with respect to the money transfers. The judge inferred that the designation "tourist reasons" amounted to illegality on the part of Ms. Wang. By that I understand the judge considered the payments were illegal in Chinese terms. I need not consider, and will offer no view, as to whether that is sufficient to impugn a payment required to close a Canadian transaction, because the judge's view of the illegality, in any case, is unsupported by evidence of Chinese law. Illegality under Chinese law is not a matter susceptible to judicial notice and, if it be an inference, is an inference based on speculation, not evidence.

[54] Accordingly, I conclude the doctrine of clean hands does not bar Ms. Wang from an equitable remedy.

[55] The question then is what remedy should issue. Ms. Wang advocates for the prophylactic remedy of disgorgement. Mr. Wang points to his re-payment of the principal amount of the mortgage when the mortgage came due, the mortgage payments he made, and his payment of taxes and other property related expenses, and says all that should follow is an accounting.

[56] The leading authority on disgorgement is *Strother*. Starting at para. 75, Justice Binnie for the majority observed that disgorgement has both a prophylactic purpose and a restitutionary purpose. Justice Binnie adopted descriptions of these two purposes:

[75] Monarch seeks "disgorgement" of profit earned by *Strother* and *Davis*. Such a remedy may be directed to either or both of two equitable purposes. Firstly, is a prophylactic purpose, aptly described as appropriating

for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.

(*Chan v. Zacharia* (1984), 154 C.L.R. 178, per Deane J., at p. 198)

[76] The second potential purpose is restitutionary, i.e. to restore to the beneficiary profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. This rationale is applicable, for example, to the wrongful acquisition by a fiduciary of assets that should have been acquired for a beneficiary, or wrongful exploitation by the defendant of the plaintiff's intellectual property. The restitutionary purpose is not at issue in the case of *Strother's* profit. The trial judge rejected Monarch's claim that Darc usurped a corporate opportunity belonging to Monarch (paras. 128, 179 and 187). This finding was upheld on appeal (para. 73).

[77] The concept of the prophylactic purpose is well summarized in the *Davis* factum as follows:

[W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted by Binnie J.; para. 152.]

Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying *Strother* profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[Emphasis in Original]

- [57] Ms. Wang advances a claim for disgorgement of profits for both a restitutionary and prophylactic purpose - restitutionary to the degree that she had her money invested in the property but Mr. Wang did not, denying her the advantage he had of being able to use the contribution sum elsewhere, and prophylactic because in today's terms and considering only the parties' positions in this property, she has not suffered loss because the burden of the mortgage did not transmute into a financial drain on her resources but Mr. Wang has profited.
- [58] Mr. Wang resists a prophylactic approach, observing that Ms. Wang is now in exactly the same position she would have been in but for Mr. Wang's actions in placing a mortgage on the property. He advances the restitutionary principle contemplated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and urges us to apply the approach followed in *Olson v. Gullo* (1994), 17 O.R. (3d) 790 (C.A.), leave to appeal ref'd [1994] 3 S.C.R. xi; *MacDonald Estate (Re)* (1994), 95 Man. R. (2d) 123 (C.A.); *Mady Development Corp. v. Rossetto*, 2012 ONCA 31; and *Rochweg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.).
- [59] I acknowledge that there is a large degree of discretion in selecting a suitable remedy, and that the Ontario and Manitoba cases advanced by Mr. Wang decline disgorgement. With the exception of *Mady Development*, each of those cases is a case of partnership, which brings a pre-existing relationship to the question of remedy and may be seen as mitigating the need to sanction the faithless fiduciary. In respect to *Mady Development*, a case concerning the "reasonableness" of an arbitrator's award in an employment dispute, I am not persuaded that it sets out a rule of general application.
- [60] In contrast to the case of a partnership, we are concerned here with a breach of fiduciary duty at the time the parties became joint owners of the property. To decline an equitable remedy is to ignore the deterrent principle, to ignore Ms. Wang's extra risk when the transaction completed, and to ignore the potential inherent in Mr. Wang's uncommitted resources at the time of completion.
- [61] Considering both Mr. Wang's use of the mortgage proceeds to fund his interest in the property and his relatively small contribution to the purchase price, I can see no good reason to deny the common remedy of disgorgement.
- [62] Mr. Wang contributed \$75,000 to the purchase, about 6% of the purchase price. In my view Mr. Wang is entitled to a beneficial interest in the property to that degree, and return of the principal amount of the mortgage which he has paid. His interest in the property beyond 6% should be held in a constructive trust for Ms. Wang, provided also there is a charge in Mr. Wang's favour of \$570,000. I would not allow Mr. Wang to recover interest paid on the mortgage because his placement of the mortgage is the very breach of fiduciary duty calling for a remedy. To the extent Mr. Wang has paid taxes or expenses on account of the property, and received rental incomes, there should be an accounting and payment from one party to the other as that accounting indicates.

- [63] At the hearing of the appeal we did not receive submissions on the details of a disgorgement order as it relates to accounting for Mr. Wang's legitimate interest and monies paid on account of the property (including redemption of the mortgage) post-completion. Further, these comments are made on the premise that the remedy contemplated does not negatively affect Ms. Wang, that is, that the property has been rising in value.
- [64] I have described here only in general terms the nature of the interests that should result from an order, in my view. The parties may be able to agree on a form of order that accomplishes what has been described. Absent agreement, I would receive further submissions concerning remedy.

Conclusion

- [65] I would allow the appeal, with a direction that the terms of the remedial order in favour of Ms. Wang are to be the subject of further submissions, absent agreement by the parties on the terms of the order.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Dickson"

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