

CANADA / JUDGMENT

Xie v. Yuan

2018 BCSC 941

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 941 Xie v. Yuan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xie v. Yuan,

2018 BCSC 941

Date: 20180608

Docket: E121223

Registry: Vancouver

Between:

Shuang Xie

Claimant

And

Jun Yuan

Respondent

And

Guirong Xie and Efilcon Consulting Tech Ltd.

Respondents by Counterclaim

Corrected Judgment: Paragraphs 161, 175 and 179 were
corrected on October 22, 2018.

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

March 27, 28 & 30, 2017

April 3-5, 7, 10-13, 2017

June 22-23, 26-28, 2017

September 25-29, 2017,

November 21-22, 2017

Place and Date of Judgment:

Vancouver, B.C.,

June 8, 2018

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I. INTRODUCTION

- [1] The sole issue in this family law case is whether ownership of property located in Richmond, British Columbia, at 11260 Westminster Highway (the "Richmond Property"), currently registered in the respondent's name, should be re-apportioned in favour of the claimant. That result would follow if the claimant succeeds in her argument that the property allocation in an agreement the parties signed on May 19, 2011 (the "Divorce Agreement") is unfair and one of the properties should be reallocated pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 (FRA).

- [2] The trial before me was the second one in this case. The first trial was in August 2015. Before that trial, a Master ordered at a July 15, 2015 trial management conference (TMC) that the only issue at trial would be which, if any, of several agreements the parties signed were binding on them, and enforceable. That direction was apparently based on a concession made at that TMC by the claimant's then-counsel that if the Divorce Agreement was enforceable, the claim failed.
- [3] The first trial judge concluded that the Divorce Agreement was valid and enforceable, but he reallocated 100% ownership of the Richmond Property to the claimant based on unfairness: *Xie v. Yuan*, 2015 BCSC 2003.
- [4] The respondent successfully appealed that decision, and the Court of Appeal concluded (*Xie v. Yuan*, 2016 BCCA 238):
- [68]. . . In my view, it was fundamentally unfair and contrary to natural justice for the judge to embark on the s. 65 analysis and decide the case on an issue that was not before him. As in *Rodaro*, the s. 65 issue was a battle that was never joined at trial. The judgment as granted cannot stand.
- [5] The Court of Appeal also commented on the first trial judge's reasoning and approach to the division of assets:
- [69] I am also of the view that the judge's s. 65 analysis was in any event seriously flawed. Given that there must be a new trial on the issue of reappportionment, it is of some importance that those flaws are identified.
- [70] The FRA provides for a presumptive equal division of family assets upon the occurrence of a triggering event, such as a divorce (s. 56).
- [71] Section 61 of the FRA permits the parties to enter into a marriage agreement; in so doing, the parties may substitute a consensual regime for the statutory regime that would otherwise be imposed on them. As found by the judge in this case, the May 19 Agreement is a valid marriage agreement under s. 61 of the FRA.
- [72] Although the parties are entitled to enter into a marriage agreement, s. 65 of the FRA gives the court the power to reappportion the parties' assets if the provisions for the division of property under the marriage agreement would be unfair, having regard to the factors enumerated in that section: *Hartshorne* at para. 35.
- [73] In determining whether a marriage agreement operates unfairly, the court must first apply the agreement. Where the parties' current situation was contemplated at the time the agreement was made, and where the agreement and the circumstances surrounding it reflect consideration and response to this situation, the burden to establish unfairness is heavy: *Hartshorne* at para. 47.

- [74] In this case, the judge, in determining that the marriage agreement operated unfairly, limited his consideration to the Residence. This was a clear error. The May 19 Agreement was not limited to the Residence. With respect, the judge could not consider whether the May 19 Agreement operated unfairly in the absence of findings concerning the parties' other assets. A court must look at an agreement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves: *Miglin v. Miglin*, 2003 SCC 24 at para. 84.
- [75] In the Counterclaim, the Husband pleaded that the parties' properties should be distributed pursuant to the terms of the May 19 Agreement. However, if the May 19 Agreement was set aside, the Husband claimed, in the alternative, an interest in all of the family assets. In my view, it was an error in principle for the judge to reapportion the Residence without dealing with the parties' other assets. He could not reapportion the Residence in a vacuum.
- [76] I would also find that the judge made a palpable and overriding error in failing to recognize the Husband's contribution to the purchase of the Residence. The purchase was only possible because the Husband took out a \$1 million loan secured by a mortgage. The Husband remains liable to pay that mortgage. By contributing his credit and assuming this liability, the Husband clearly contributed to the purchase of the Residence: *Suen v. Suen*, 2016 BCCA 107.
- [77] It is also arguable whether the Wife in fact made any contribution towards the purchase of the Residence. According to the allegations in the Civil Claim, the monies used for the deposit and down payment on the Residence came not from the Wife but by way of a loan to the Husband from the Wife's father (who seeks to recover those monies from the Husband in the Civil Action). If the allegations in the Civil Action are accurate, the Wife's contribution to the purchase of the Residence was minimal; this may in turn impact the question of whether the May 19 Agreement is fair and any possible reapportionment under s. 65 of the FRA.
- [78] A further factual issue that arises in regard to fairness is whether the Husband has, in fact, repaid the monies advanced to purchase the Residence, either to the Wife or the Wife's father. The Husband alleges that he has. While there was some evidence at trial to support his position, the Wife denied any repayment. The judge did not make a specific factual finding in relation to that question. Such a finding is clearly necessary in weighing the fairness of the May 19 Agreement.
- [79] I would also note that a complete reapportionment in favour of one party is an infrequent remedy: *Kaur v. Ram*, 2006 BCCA 527. When a property has increased in value due to rises in the real estate market, which appears to be the case here, it would usually not be unfair for the parties to share equally in that increase: *Pasch v. Blackmore*, 2011 BCCA 420.

- [6] Thus, the Court of Appeal "set aside the judge's order in its entirety" and in its place substituted "a declaration that the [Divorce Agreement] is a binding marriage agreement" and the issue of whether there should be a reapportionment "will have to be resolved in further proceedings" (para. 80). The first trial judge was not seized of the case.

II. PRELIMINARY ISSUES

- [7] The parties raised four preliminary issues, which I now address.

A. Are the first trial judge's findings binding?

- [8] The claimant argued that because the Court of Appeal did not order a new trial, I should treat any findings not specifically "challenged by the Court of Appeal" as final or, at least, I should defer to them. She submits that the only factual findings that can be "re-litigated" are those upon which the Court of Appeal specifically commented: whether the respondent made a monetary contribution to the Richmond Property, and whether he repaid funds used to purchase the Richmond Property to the claimant or her father (paras. 76-77). She bases her submission on this point on the doctrine of issue estoppel.
- [9] I do not agree. The Court of Appeal was clear that the first trial judge erred in two respects. First, he ought not to have engaged in any analysis or consideration of the fairness of the Divorce Agreement, and doing so violated natural justice and was fundamentally unfair. On that basis, "the judgment as granted cannot stand" (para. 68, emphasis added). I assume the Court of Appeal intentionally chose the word "judgment" instead of "Order". Secondly, the Court of Appeal found errors in the first trial judge's approach to s. 65 of the FRA and concluded that since "there must be a new trial on the issue of reapportionment, it is of some importance that those flaws are identified" (para. 69, emphasis added).
- [10] Thus, it is clear that the Court of Appeal envisioned "a new trial" of the issue of reapportionment. Had the Court intended that I conduct merely a re-consideration of the fairness issue, but otherwise treat the first trial judge's factual findings as binding (possibly with some new evidence), it could have directed that; it did not.
- [11] Moreover, one of the errors the Court of Appeal identified in the first trial judge's analysis was his limiting the consideration about unfairness to the ownership of the Richmond Property, rather than first applying the Divorce Agreement, and then considering fairness in the context of all the family assets. In other words, the Court of Appeal found the first trial judge's assessment of what evidence was material to the application of s. 65 of the FRA to be incorrect. In that light, it would be a mistake to treat any findings as binding. The Court of Appeal's comments about a factual issue buttress this conclusion: see para. 76 (whether the respondent contributed to the purchase of the Richmond Property).

[12] The parties agreed that evidence from the first trial could constitute evidence in this trial. The parties appropriately could refer to any discrepancies between testimonies in the two trials as an aid to my findings of fact and credibility. The parties also agreed they could adduce additional evidence, which they both did.

B. Does the doctrine of res judicata preclude the claim?

[13] The respondent submits that the doctrine of res judicata prevents the claimant from arguing that the Divorce Agreement is unfair because she did not plead that issue and, according to the respondent, she did not properly raise the issue until this trial. The respondent also contends the doctrine applies because the claimant conceded at the TMC that her claim failed if the Divorce Agreement was enforceable.

[14] It is true that the claimant did not raise the issue of the Divorce Agreement's fairness at the first trial, but she disagrees that she has not properly pled the issue. The claimant did not identify the existence of the Divorce Agreement in her pleadings. Her position was that the Divorce Agreement was inapplicable and/or unenforceable with regard to the Richmond Property. The respondent points out, however, that the claimant did not amend her pleadings even after the response and counterclaim put the Divorce Agreement into issue.

[15] The claimant submits that the court form in use at the time only required her to choose (by way of ticking a box) that she was either seeking an "equal division of family assets, under the Family Relations Act" or "reapportionment of family assets, as follows and on the following grounds:" [Schedule 4 to Form F3 of the 2010 Supreme Court Family Rules]. The claimant checked the box next to "reapportionment", which she argues was sufficient to invoke s. 65. Her position is that once the respondent put the Divorce Agreement into issue, there was a lis between them on that issue and there was no need for her to amend her pleadings. She submits that her pleadings were general enough to encompass the fairness issue. She also argues there is no prejudice or surprise to the respondent from her position. Her position is that even if her pleadings were technically insufficient, she could easily have amended them during the trial.

[16] I agree with the claimant. The main issue between the parties was reapportionment of the Richmond Property. Although the respondent raised the Divorce Agreement for the first time in his response, the "grounds" for seeking reapportionment as pled remained the same: her contribution to the purchase of the Richmond Property and the short duration of the marriage.

[17] In any event, the respondent was well aware that the issue at this trial would be the fairness of the Divorce Agreement given the Court of Appeal's judgment so there was no prejudice to him.

[18] However, the respondent also submits that the concession made by claimant's then-counsel at the TMC binds the claimant, based on the doctrine of res judicata. The claimant submitted during the trial (and in her reply submissions) that I ought not to assume that

concession was made without reviewing a transcript, or hearing counsel's testimony. I disagree. I am satisfied that I can accept the word of one of the respondent's counsel, Ms. Lai, who was the only counsel before me who attended that TMC. Based on that, I find that the claimant's then-counsel made a statement consistent with a concession that the case would end if the court found the Divorce Agreement valid.

- [19] The respondent points out both parties agreed at the start of the trial that the only issue would be which agreement was binding and enforceable. Together with the alleged concession, he submits cause of action estoppel bars the claimant from seeking to overturn the Divorce Agreement. He says the doctrine "applies not only to matters actually in dispute, but to every point which properly belonged to the subject of a litigation in which the parties by exercising reasonable diligence might have brought forward at the time of the previous hearing": *Martelli v. Martelli*, [1983] B.C.J. No. 2016, 148 D.L.R. (3d) 746 (C.A.) at para. 10.
- [20] However, I am not persuaded the statement amounts to a legal concession at law that survived the first trial, the Court of Appeal hearing and this trial. Even if I found that the statement was a binding concession, the claimant could have applied to withdraw it, probably successfully. For those reasons, I conclude that the doctrine of cause of action estoppel does not apply.
- [21] The respondent submits the wording of para. 80 of the Court of Appeal judgment ["[w]hether there should be a reapportionment under s. 65 of the FRA is a matter that remains to be determined"] implicitly, and presumably necessarily, includes the question of whether the claimant is estopped from arguing unfairness under s. 65 of the FRA. I do not agree. I find it difficult to accept that the Court of Appeal would not have made a specific comment about *res judicata* if its view were that the new trial judge should consider the issue. I do not find the respondent's interpretation of para. 80 is fair or probable. I therefore conclude he cannot invoke the doctrine *res judicata* in this case.
- [22] In any event, even if the doctrine of *res judicata* were available, I would exercise my discretion and not apply it. Its application in the context of the unique circumstances of this case would be inconsistent with the goals of achieving justice, fairness and full resolution of the dispute between the parties.

C. Is the Richmond Property a family asset?

- [23] The respondent contends the claimant cannot invoke s. 65 of the FRA because the Richmond Property is not a family asset. He submits the claimant is advancing a claim in debt, and the only contentious issue is whether he ever paid her back.
- [24] Section 58(2) of the FRA defines family asset to include property owned by one spouse and "ordinarily used by a spouse or a minor child for a family purpose". The respondent focusses on the phrase "family purpose" saying that it means the family as a whole: *McLennan v. McLennan*, [1980] B.C.J. No. 1590, 20 B.C.L.R. 193 (S.C.) at para. 11. He contends that he purchased the Richmond Property specifically to allow his children to live separate and

apart from the claimant. Therefore, the "entire" family did not use it. He also submits it was never "used" in any manner by the claimant and in the course of "customary mode of life": *Elsom v. Elsom*, [1982] B.C.J. No. 1586, 35 B.C.L.R. 293 (S.C.) at paras. 43-44.

- [25] These cases do not assist the respondent. It was clear in *McLennan* that a person's ordinary use of the property constituted a family purpose so long as the purpose benefitted the whole family. The discussion in *Elsom* contemplated whether the person used the property at issue (a boat) frequently enough for the use to be in the "customary mode of life". Clearly, having a place for one of the parties' children to live is a family purpose, and while they lived there, they were doing so in their "customary mode of life".
- [26] The respondent also relies on the specific wording of a document drafted by the claimant, which he signed on June 3, 2010, as confirming he borrowed money from the claimant for the down payment on the Richmond Property. The respondent submits that once he borrowed the money, those funds became his and therefore "his" money purchased the house. He also argues that the evidence is clear that the money was not hers, but came from either her brother or her parents. Thus, the money borrowed was not the claimant's, which means she can have no claim that she paid for the home, and therefore the equity in the home was never a family asset. Instead, this action is really a claim in debt. The respondent also submits the wording of a statutory declaration he signed on April 7, 2011, which states that he will "reimburse" the claimant for the money used to buy the property, plus interest supports his position for the same reasons. Lastly, the respondent refers to his and his daughter's testimony that the claimant repeatedly said the Richmond Property was only for the respondent, and that neither party ever referred to it as a joint investment.
- [27] I agree that the parties never referred to the Richmond Property as a "joint" investment, but that is not determinative.
- [28] The issue is simple. The statute states that "property owned by one or both spouses ordinarily used by a spouse or a minor child of either spouse for a family purpose" is a family asset. It makes no mention of whose money bought it; the only considerations are ownership, ordinary use and family purpose. The Richmond Property clearly falls into this category.
- [29] The respondent also advances an argument that the Richmond Property is not a family asset because the definition in s. 58 of the FRA can be "modified" by s. 61. He claims that s. 61 recognizes that spouses are free to make agreements between themselves regarding what are family assets before or during their marriage. Even if that were a correct statement of the law, the Divorce Agreement would have to explicitly state that the Richmond Property is not a family asset for this submission to be feasible. It did not and I give no further effect to this argument.

[30] Moreover, the respondent presented no case, and I am unaware of any authority, that supports the idea that the parties can alter the statutory definition of "family asset" through an agreement. The proposition makes no sense. Section 61 of the FRA allows the parties to "manage" the ownership of a family asset in a manner they see fit. However, doing so does not alter the definition in s. 58 of the FRA. Accordingly, I conclude that the Richmond Property is a family asset under s. 58(2) of the FRA.

D. Is the Richmond Property subject to the Divorce Agreement?

[31] The claimant submits that it is open to me to conclude that the Divorce Agreement does not apply to the Richmond Property. In support, she refers to expert evidence that Chinese law does not extend to foreign assets and to her own testimony that she did not "believe" it applied.

[32] In my view, that avenue is not open to me. The Court of Appeal's conclusion that the Divorce Agreement is "a binding marriage agreement" (para. 80) is binding on me. "Marriage agreement" is defined in s. 61(2) of the FRA as an agreement for the "management of family assets" or "ownership in, or division of, family assets". The Richmond Property is a family asset. That defeats this submission.

[33] The first trial judge did not mention expert evidence, although the parties tendered it. The claimant contends because of that, I can review the expert evidence and conclude that Chinese law does not extend to foreign assets. She also repeats her primary position that she did not "believe" it applied.

[34] However, those factors do not matter because the Court of Appeal specifically stated, "the only issue that was to be decided at [the first] trial was which of these various agreements governed the parties' disposition of their assets" (para. 12) and that the first trial judge "found that the [Divorce Agreement] was a marriage agreement under s. 61 of the FRA, and binding and enforceable between the parties" (para. 15, emphasis added). Had the Court of Appeal understood or considered it would be appropriate for either party to argue that I ought to apply Chinese law to the Divorce Agreement, it could have stated that explicitly, or been less directive and clear about the impact of the Divorce Agreement and the legal issue it was sending back for trial.

[35] The Court of Appeal was aware that the parties disputed the validity of the agreements, in part, because they were executed and registered in China, whereas the property at issue was in Canada. That is presumably why the Master ordered that the parties adduce expert evidence as to Chinese law at trial. I also note that at the first trial, the parties apparently agreed that Canadian contract and family law was applicable, not Chinese law (see para. 34 of the first trial decision).

[36] By issuing a declaration that the Divorce Agreement was binding on the parties, the Court of Appeal was not leaving open the issue of whether the Divorce Agreement applied to the Richmond Property. In my view, the claimant cannot make that argument.

[37] Moreover, even if I am wrong, I do not accept the claimant's evidence that she had a firm belief when she signed the Divorce Agreement that it did not apply to the Richmond Property, based on the timing of her starting this litigation. She filed the claim just barely before the time limit in China to challenge the Divorce Agreement expired. Her explanation for not referring to the Divorce Agreement in her claim is that she believed it was irrelevant. Why, then, did she wait to commence the action? If she believed the Divorce Agreement did not apply, it would have made sense for her to file her action soon after the divorce. The respondent submits her timing was strategic. For those reasons, I do not accept that she had a firm belief that when she signed the Divorce Agreement, it did not apply to the Richmond Property.

[38] For all those reasons, I conclude the Richmond Property is clearly subject to the Divorce Agreement.

III. THE RICHMOND PROPERTY

[39] The issue before me is whether the Richmond Property should be re-apportioned in favour of the claimant pursuant to s. 65(1) of the FRA. The claimant has the burden to establish on a balance of probabilities that the Divorce Agreement is unfair. Section 65 of the FRA states:

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[40] The parties agree on the legal principles applicable to s. 65. Additionally, as applied to the facts of this case, the Court of Appeal has given me specific direction.

- [41] The parties agree that the leading case regarding the interpretation of s. 65 of the FRA remains *Hartshorne v. Hartshorne*, 2004 SCC 22. That case established a two-step process for applying s. 65. First, the court applies the agreement. Specifically, the court must assess and award financial entitlements pursuant to the agreement and then consider entitlements from all other sources, including spousal and child support (neither arise in this case).
- [42] Secondly, the court considers whether the agreement operates unfairly having regard to the factors listed in s. 65(1). At this stage, the court considers the parties' personal and financial circumstances, and how those have changed over time. In *Hartshorne*, the Court stated that "[w]here the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier". One measure of unfairness is to ask whether applying the factors in the statute would "reveal that the economic consequences of the marriage breakdown were not shared equitably in all the circumstances" (para. 47). When deciding whether an agreement is fair, consideration is limited to the statutory factors and the parties' conduct is not relevant: *McLean v. McLean*, [1990] B.C.J. No. 2123, 49 B.C.L.R. (2d) 230 (S.C.) at 17.
- [43] In *Gold v. Gold*, [1993] B.C.J. No. 1799, 49 R.F.L. (3rd) 41 (C.A.), the Court of Appeal stated that notwithstanding there was a presumption of equal division of assets under the legislation, an unequal division of assets may be necessary to achieve fairness (para. 51). In assessing fairness, the court can consider if it would have made a similar division of the property if that division was executed at the time of the triggering event: *Stark v. Stark* (1990), 47 B.C.L.R. (2d) 99, 26 R.F.L. (3rd) 425 (C.A.) at paras. 43-49.
- [44] The parties agreed that two of the s. 65(1) factors do not feature significantly in this case [ss. 65(1)(b) and (c)] and neither provided legal submissions on those sections. I agree that those factors do not have a material impact on the conclusion and will limit my analysis to the other subsections.

A. Undisputed Facts

- [45] A number of facts are not in dispute as I discuss in the following paragraphs.

1. The Divorce Agreement

- [46] The Court of Appeal reproduced at para. 39 of its judgment the relevant portions of the Divorce Agreement (translated):

II. Dealing of the Property Issue (including private residential houses):

The real properties are allocated in accordance with the ownership of the title on the respective properties. The parties have no discord. The shares of the parties' joint investment in Xin Jiang (Alar New Sugar High Tech Ltd.) all belong on Jun Yuan. The Wife cannot vary this share agreement with any reason or excuse.

III. Dealing of the Debt:

After the divorce, the parties do not owe any debt to each other. If there is any debt owed to a third party, the party who owing the debt is responsible for it.

IV. Other Agreements:

When this Agreement is in conflict with other agreements, this Agreement prevails.

V. The above Agreement is negotiated and agreed to by the Husband and the Wife. If there is any dispute or legal liability as a result of the Husband and/or the Wife hiding or omitting facts, the Husband and the Wife are fully responsible.

VI. This Agreement takes effect on the date when the divorce is officially registered.

[Emphasis added.]

[47] The parties agree that the Divorce Agreement means that any real property registered to the respondent at the time of divorce belongs to him, and vice versa. The Richmond Property has always been registered in the respondent's name.

2. The parties' families and relationship

[48] The claimant was 49 years old at trial. She is a Canadian citizen, but not a Chinese citizen. That is relevant because as a non-citizen, she was limited with regard to her ability to participate in businesses and financial arrangements in China, specifically with regard to owning property. The respondent's Chinese citizenship gave the claimant access to those things that she otherwise would not enjoy. I am satisfied that the evidence demonstrated this was of considerable benefit to and valued by her.

[49] The claimant is well educated and speaks more than one language. She has a Ph.D. in Chemistry, but she also studied engineering and theology. Her speciality is in "materials science". There are about 20 patents in her name. She is very experienced in business, and has been very successful in many different business ventures in China and Canada. Primarily she is involved in evaluating manufacturing projects before they go public. She is adept at managing money and manages her parents' money and investments in addition to hers. She has two children from a previous marriage, both of whom were teenagers during the marriage.

[50] The respondent was 48 years old at trial and is a Chinese citizen. He has permanent resident status in Canada. He has a college education and is unilingual; he testified through an interpreter. His work experience has been managing major construction projects. When the relationship began, he was working for two companies in Zhuhai, China on projects related to the deep-water harbour under construction there. Because of this work, he had a number of contacts in the construction industry in Zhuhai

- [51] He also has two children from a previous marriage who live with him. His daughter, Chu Bo Yuan was about 23 years old at trial. Ms. Yuan testified at trial that she looked after the blueberry operations and rentals on the Richmond Property when she was not attending the University of Alberta. She lived on the Richmond Property for about three months in 2011, and has been living there since June 2012.
- [52] The respondent's son, Yuxin Yuan (known as Paul), was 21 years old at trial and was completing his grade 12 by correspondence. He has lived on the Richmond Property since June 2012. For a time, he had responsibility for the rentals on the Richmond Property.
- [53] The parties had their first contact on a Chinese dating website in late 2008. They corresponded for about three months before meeting in person in China around February 2009. The claimant went to China and they spent some time together, travelling. They also discussed and pursued business opportunities together.
- [54] The claimant was clear with the respondent that she wanted to remain a resident of Canada and they talked about his moving to Vancouver. Because they wanted to be together and the claimant wanted to travel, the respondent stopped working to be with the claimant. They agreed he would apply for a Canadian visitor's visa. He asked for her assistance to complete the application, and she did so.
- [55] Canada refused his first application for a visitor visa in about April 2009. At that time, he had the equivalent of about of \$100,000 CAD in a Chinese bank account in his name, which apparently was not enough to satisfy immigration officials. In order to improve his chances at another application, the claimant transferred about 1.2 million yuan (roughly the equivalent of \$250,000 CAD) to an account in the respondent's name to demonstrate financial solvency.
- [56] The respondent testified that he did not consider that money to be his and did not use any of it; it was in his account only to enhance his application for a visa. The claimant did not contest his evidence on this point, although she said that they used the money from that account to pay for joint expenses while they were in China. She also said she transferred that money from her father's account.
- [57] It was around this time that they discussed marriage. The claimant decided to sponsor the respondent for immigration purposes rather than his applying for another visitor's visa.
- [58] The parties married on July 8, 2009 in Zhuhai. They lived together in Beijing from about July 2009 to May 2010, travelling within China for business opportunities and for pleasure; they did some travelling outside of China. The respondent's children moved to live with them in Beijing. His daughter attended a nursing school and his son went to private school for a short time, and then the claimant offered to home-school him.

- [59] The parties explored a number of investment opportunities through their business contacts. The parties dispute most of each other's evidence about these ventures, in terms of their individual participation and the financial consequences. I discuss some of that evidence later in this judgment.
- [60] The parties came to Canada in May 2010 (the respondent had obtained permanent resident status by this time). Within days of arriving, the claimant arranged for the respondent to buy the Richmond Property; they viewed properties on-line before they arrived. He executed a power of attorney appointing Kun Wang (someone the claimant knew) to act on his behalf with respect to some aspects of the Richmond Property. The claimant also arranged for the respondent to get a mortgage. The parties returned to China in early June 2010 and the respondent signed the mortgage documents in Beijing.
- [61] The Richmond Property has a house that generated rental income, a 2.2 acre blueberry farm and enough land to keep small farm animals such as chickens. Ms. Yuan said starting in the summer of 2010, although she did not yet live on the Richmond Property, she attended it every day. She set up and managed a "U-Pick" operation for the blueberries. She testified that either she or her brother have managed that operation every summer since 2010. This evidence was unchallenged.
- [62] Mr. Wang lived on the property and did renovations in addition to being a handyman. He also dealt with tenancies, including collecting rent, but only for about six months. Ms. Yuan testified that she took over that role until she left to study in Alberta and her brother was responsible for management. That is when, according to the respondent, his son stole money from a line of credit and rental income to take part in an ill-advised scheme proposed by his friend.
- [63] The claimant submits Paul's misfeasance is an invented story to cover up for the respondent's mismanagement of the Richmond Property. I heard and granted an application during the trial relating to the management of the Richmond Property. Paul filed an affidavit in that application in which he describes his wrongdoing. The claimant did not apply to cross-examine him. I have no reason to doubt his credibility given that his evidence does match the testimony of both the respondent and Ms. Yuan. By court order, the mortgage returned to good standing and a property manager has been managing the rental income and mortgage payments and filing regular reports with the court.

3. Family assets

- [64] The parties agree the following are family assets as defined in s. 58 of the FRA:
- a) Three condominium units in Zhuhai purchased by the parties around October and November 2009. No reliable documents were produced to verify the following facts, but generally the parties were in agreement about them:

- i. Unit # 601, Building 18, Ocean View Garden, apparently purchased for 700,000 yuan. The parties disagreed about how much each contributed to the purchase price. It was in the respondent's name and he testified he sold it in 2012 for 950,000 yuan. This represents a profit of 250,000 yuan.
 - ii. Unit # 303, Building 18-C, QingLv South Road, which was in the claimant's name. She purchased it for 2,085,000 yuan. Her evidence was that she later sold it for about 2.3 million yuan. This represents a profit of approximately 215,000 yuan.
 - iii. Unit # 1504-152 QingLv South Road, purchased for 1.6 million yuan. It was in the claimant's name. The parties disagree as to the amount the claimant received when she sold it in 2013. The claimant testified that she sold it for 2 million yuan. This represents a profit of approximately 400,000 yuan.
- b) Shares in Alar New Sugar High Tech Ltd. (Alar), which is a company registered in China to operate a factory to refine sugar from the stevia plant. The parties were jointly involved in this venture with two other business partners, who were associates of the claimant. The parties agree these shares have no monetary value.
- [65] I have previously found, at para. 30 of this judgment, that the Richmond Property is also a family asset. It was bought on May 31, 2010 for \$1.53 million CAD. The claimant paid the \$50,000 deposit. She also transferred just over \$488,000 to the respondent. The remainder of the purchase price was funded by a mortgage in the respondent's name for \$1,071,000.
- [66] It was not clear if that money came from the claimant's account or from her parent's account. Her evidence was unclear on this point. She produced bank statements showing transfers of the appropriate amounts from her bank account to the respondent's bank account, but she also testified that she was responsible for investing her parents' money and that was the true source of those funds. To be clear, to the extent the claimant wants me to find that she paid for the house solely from her own funds, I am not satisfied on a balance of probabilities that is true. I find instead, that some combination of her and her family's money purchased the Richmond Property.
- [67] Over time, the parties' relationship soured, resulting eventually in their divorce conducted and registered in China on May 19, 2011. A party can challenge an agreement accompanying a divorce in China for only one year after the divorce is registered. This claim was filed and served on April 23, 2012. The respondent does not read English (a fact of which the claimant was aware) and had to rely on Ms. Yuan to translate the pleadings.
- [68] As noted by the Court of Appeal, the parties signed a number of agreements and declarations throughout their relationship addressing ownership of property. Those agreements were put into evidence before me and all but one were written and signed in Chinese, with accompanying translations. In addition, the claimant drafted all the agreements, or gave instructions to the drafter. They are:

- a) a pre-nuptial agreement dated June 18, 2009;
- b) an undated declaration concerning the Zhuhai properties;
- c) a declaration dated June 14, 2010 addressing personal debts;
- d) an undated declaration regarding the Richmond Property;
- e) a declaration dated August 22, 2010 that the claimant's father is the "funder" of the Richmond Property and a condo in Zhuhai and can "collect" the properties unless the defendant repays the funds;
- f) a document dated August 22, 2010 setting out whose name is on title, who is the "actual funder" and who is the owner of 8 different properties, with witnesses' signatures;
- g) an agreement dated August 29, 2010 titled "divorce agreement" (the "August 2010 Agreement"); and,
- h) a statutory declaration dated April 7, 2011 written in English that the respondent will reimburse the claimant for the down payment on the Richmond Property.

[69] The respondent testified that while the parties were married, he agreed without complaint to sign any agreement or declaration the claimant requested. She did not challenge his evidence on this point.

B. Credibility

[70] Both parties submit my assessment of credibility is a key issue, and they acknowledged that my assessment ought not to rely or refer to the first trial judge's credibility assessments.

[71] The test for assessing credibility is not controversial, and *Farnya v. Chorney*, [1951] B.C.J. No. 152, [1952] 2 D.L.R. 354 (C.A.) is often cited as providing a helpful guide. That case, and others, confirm that credibility must be assessed looking at the evidence as a whole, rather than isolated pieces of evidence. Moreover, a witness's demeanour or appearance is unlikely to be helpful, in contrast to, among other things, assessing their opportunity for observation, their knowledge, their memory, and their capacity to answer questions clearly. As stated in *Farnya* at para. 10:

In short, the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

- [72] There is a juridical difference between a witness's credibility and his or her reliability. Credibility is the truthfulness of a witness, whereas reliability is the accuracy of his or her testimony. Obviously, a witness that is not credible may also be unreliable. However, the opposite is not necessarily true; unreliable witnesses are not necessarily being dishonest.
- [73] The parties challenge each other's credibility numerous times in their submissions based on inconsistencies in their testimony before me, and testimony given in the first trial or at examination for discovery. They also suggest the overall story provided by the other side with regard to certain events is implausible or unsupported by reliable, or in some instances, any documentation. At some point, they each accused the other of either fabricating documents or knowingly signing inaccurate documents.
- [74] In addition, they both contend that the other party has failed to provide full and/or timely disclosure. The claimant emphasized the point, with justification. In particular, she submits the respondent delivered a large amount of his documentary evidence after the claimant closed her case because there was a break in the trial of a number of months. In addition, the respondent sought to introduce into evidence at the beginning of this trial documents previously not disclosed. Claimant's counsel took the eminently reasonable position of not objecting to some of those documents based on their possible relevance, notwithstanding their very late disclosure. I hasten to add there was never any suggestion that respondent's counsel was responsible for any late disclosure.
- [75] The claimant points to the significantly late disclosure as a reason to doubt the respondent's credibility, in addition to his conduct in the litigation. The respondent did not complete his Form 8 until September 25, 2017 (the 17th day of trial) and it did not include any information about assets in the United States, notwithstanding that is where the respondent had been living and working until he returned to Canada on Day 3 of the trial. There was also a mid-trial application by the respondent to admit into evidence an audio recording, which I denied: *Xie v. Yuan*, 2017 BCSC 1766.
- [76] For his part, the respondent submits that despite repeated requests and court orders, the claimant has never fully disclosed her and her family's Chinese banking records or all documentation from an alleged family asset (the development at 7th Avenue in Vancouver).
- [77] Almost everything relevant to the issues at trial took place in China, including the parties' marriage and divorce, the signing of many documents and the location of almost all family assets. Normally that would not be worthy of any mention, but it becomes significant in this case because of the respondent's allegations that the parties (and two business associates) actively participated in an illegal scheme to siphon off money from a group of Chinese government-agency investors by misrepresenting to them the true cost of equipment purchased for a factory. The respondent has not produced documentation to "prove" such an illegal scheme occurred, which is unsurprising since the whole point was to deceive the Chinese government investors. Equally natural, it is difficult for the claimant to "prove" a negative: that the scheme did not exist. The existence of the scheme is relevant to each

party's version of the distribution of assets during the marriage, which may affect the fairness of the Divorce Agreement.

- [78] They each insist that if the other had properly disclosed all relevant documents (especially Chinese bank records) their version of events would be substantiated. Yet they both insist that what documentation does exist supports their version over the opposing party's version of events.
- [79] The reality is that this Court is unaware of what would constitute the "usual and ordinary course of business" so as to make documents produced by a Chinese bank or business presumptively admissible under the Evidence Act, R.S.B.C. 1996, c. 124. The parties did not have a document agreement in that regard.
- [80] All of these factors draw into question the reliability of the majority of documents produced, and the significance of the absence of Chinese banking documents. For example, the claimant challenges some of the documents the respondent points to as illustrating how the scheme was carried out by saying they do not correspond with what "one would expect to see" had the transactions occurred in Canada. Yet I have no basis upon which I can assume that such documents would necessarily exist, or if they did, how one obtains them or what they would reveal. On top of that, the claimant managed her parents' finances and claims to have used their money for many investments, but she did not disclose their banking records.
- [81] In general, the reliability of the documents produced by both sides is highly dubious. For one thing, there were few original documents produced; virtually every document was a photocopy and many of them were very poor photocopies. Very often each party's photocopy of the same document looked different; there may be a reasonable explanation for that (one person used the photocopier's "enlarge" button, the other did not) but no explanation was provided. The parties' produced numerous duplicates of documents. For reasons unclear to me, there were often two different English translations of the same document. There were sometimes differences between a word or phrase on one translation and another, mostly immaterial. However, on at least one occasion, a difference was pertinent and I resorted to relying on the interpreter attending trial to let me know which translation was more faithful to the "original" document. There are suspicious anomalies on some of the documents written in English. One glaring example is the mortgage on the Richmond Property. It is in the respondent's name, but the claimant's passport, Hong Kong ID number and birthdate appear on the signature page under his name (where it asks for the borrower's identification information). Both parties claimed their signature appeared on one or more documents, but that they did not actually sign, implying the other party manipulated the document.
- [82] The Chinese banking documents were extremely difficult to understand, even when translated. One example that is both typical and illustrative is the claimant's reliance on a translated document issued by the China Construction Bank. That document records 6,000,000 yuan transferred from an account in the name of her father (Guirong Xie) to Alar

on March 18, 2010. Her father's bank account number is listed on that document as "14899910209991001" and Alar's account number as "65001692100052502826". However, the claimant also testified that another document proved this transaction occurred, and she pointed to a document translated as "Table of inquiry on retail transaction history" for an account with the "Bank of China, Beijing Science & Technology Branch". It purports to be a print out of account numbered "4141000-01-88-0033975" from January 1, 1950 to April 30, 2010. That account does show a debit of 6 million yuan on March 18, 2010 but there is no indication on the document of whose account it is, and the account number does not match either numbers on the other document the claimant said proved the transaction. Nor is there any indication on that printout where the money went.

- [83] It is in this context that I must assess the parties' credibility. The task is considerably more difficult because of the preceding factors.
- [84] The claimant submitted that the late and incomplete disclosure by the respondent is an independent factor that lowers the weight that I should place on his documents and his evidence. I am not persuaded the late disclosure necessarily negatively influences the respondent's credibility as a witness. The respondent had what I find to be plausible (although not excusable) explanations for the very late disclosure. Those reasons were consistent with his testimony in general.
- [85] Thus, I am not persuaded that his late disclosure was a strategic effort to split his case to the prejudice of the claimant. Instead, I find that he genuinely had difficulty getting documents from China for reasons I will discuss later in this judgment. Moreover, the parties disagreed even during the trial as to the scope of issues to be litigated. That would affect the scope of document disclosure. Therefore, while I find the respondent lacked diligence producing his documents, I am not persuaded that his lack of diligence equates to his being dishonest with the court.
- [86] The parties agreed to conduct almost all of their joint investments in China. They chose to marry and divorce in China. As noted above, business documents we expect to see from Canadian banks and/or businesses might not be routinely created or easily available to the litigants in China. That fact does not weigh more heavily against either party. In my view, the evidentiary complications referenced in the preceding paragraphs influence both parties' evidence in the same manner.
- [87] As to the personal credibility of the parties, I found the respondent to be, generally, a credible witness. There were inconsistencies in some of his evidence, but they were about details upon which it was not unreasonable for his memory to be vague or confused. Many of the inconsistencies were not material, nor unreasonable.
- [88] The claimant similarly had some inconsistencies, although her memory was more precise about financial matters. However, I consider the precision of her recall in light of the fact that she controlled most of the investments and financing and was an experienced businessperson. The respondent worked in the construction industry in China, but I did not

understand that he had as much or any experience with investing in other projects to the same degree as the claimant. Moreover, the claimant did not dispute that she was responsible for managing and keeping track of their investments. The respondent testified that he relied completely on her business acumen. Even without that testimony, his reliance is consistent with all of the evidence in the case. Accordingly, I do not find discrepancies in their recall of details of transactions to be very helpful in assessing credibility.

[89] However, with regard to two major events, the parties' testimony was directly at odds: their alleged participation in an illegal scheme to siphon funds from Chinese government agencies, and the respondent's alleged payment to the claimant of a particular sum of money at a certain point in time. For both events, only one of them can be telling the truth; these are not examples where their differing testimony can be attributed to anything but their credibility.

[90] The two events are also important to the resolution of the case because they relate to the distribution of assets during the marriage. Before analyzing whose version to believe, I summarize the contested events.

a. Contested events relating to Alar sugar factory

[91] After purchasing the properties in Zhuhai, the parties decided to invest in a joint venture with three Chinese government entities (referred to by them as the Army Group) in December 2009. The claimant, the respondent and two business associates that the claimant knew well (Fake Zhu and Tieren Li) formed a joint venture. The claimant's business partners had contacts with and access to Chinese government investment sources, but the claimant testified that she negotiated the contract with those investors herself.

[92] The joint venture crystallized into the Alar company that they incorporated in March 2010. Alar's purpose was to build and operate a factory in Xinjiang, China that would extract sugar from the stevia plant. The parties and their two business associates together held 60% of the shares in Alar, and those were issued in the respondent's name. The Army Group held the remaining 40% of shares.

[93] The respondent was the nominate shareholder in Alar; the claimant could not hold shares because she was not a Chinese citizen and she testified there was a reason why Mr. Zhu could not be the shareholder, although it was not clear to me what that reason was. Mr. Li joined the investment after Alar was formed. The claimant testified she received the equivalent of \$1,000 CAD monthly salary as the chief technological officer. She said she removed herself from any involvement in about August 2010, but then returned and provided technological services for about five months in 2013, earning approximately 7,000 yuan.

- [94] The arrangement was that the claimant would procure capital investment of 15 million yuan on behalf of the joint venture, and design the equipment that needed to be custom made. The Army Group would provide 10 million yuan as capital investment. The claimant injected 6 million yuan into Alar in mid-March 2010, from her father's account. She was unable to raise the additional 9 million yuan.
- [95] Mr. Zhu was to be responsible for procuring equipment and be the on-site engineer; Mr. Li would be the liaison with the government agencies and administer the site; and the respondent would provide construction management services. Mr. Zhu together with the claimant also had the technical expertise relating to the factory's operations. The factory would be using a new technique for extracting the sugar apparently jointly invented by Mr. Zhu and the claimant.
- [96] The claimant's testimony about the respondent's role in the project was inconsistent. At times, she testified he was merely a "figurehead", but she later conceded he did have some role in construction supervision. He disagreed with that characterization; he testified he was actively involved in construction management of the factory, and he was responsible for overseeing finances.
- [97] Later in the claimant's testimony she described a business meeting at which she learned that the Army Group was angry with the respondent because they were "not getting what they paid for" in construction services. This suggests that he was supposed to have that role. Similarly, at another point in her testimony, she stated that the respondent was responsible for procuring equipment that she custom-designed for the factory, and money was transferred to him for that purpose. That is inconsistent with her previous testimony that she and Mr. Zhou were responsible for equipment, and that the respondent was merely a figurehead. I find the respondent was actively involved in the construction management of the factory and not merely a figurehead shareholder. However, I also find that he was not responsible for equipment.
- [98] According to the respondent, the claimant's inability to raise 15 million yuan triggered the four investors to concoct the following scheme. The scheme itself was simple: they would, as individuals, design and order equipment for the extraction process to be made locally and then sell it (through a Hong Kong company owned by the claimant) to Alar as if the equipment had been imported, at an inflated price. The four investors would then divide up the "profit" from that scheme. While the scheme was simple, creating a paper trail was not. The first plan was the claimant's Hong Kong company would issue a receipt as if she had invested 9 million yuan in it, and they would show the Army Group the receipt to substantiate that the claimant could invest 9 million yuan in Alar. The Army Group did not accept that receipt being "proof of payment" (investment) because construction of the plant had not yet started.

[99] After that rejection, the respondent says it was decided that Alar's ledger would contain false entries to substantiate the purchase of equipment at a higher price. According to him, one of the Efilcon companies in the claimant's control transferred 9 million yuan to the respondent noting on the company ledger that the money was for purchasing "equipment" (the bank slip appears to say it was for "other projects"). However, the respondent testified he then transferred on that same day the same amount back to Alar. He never kept the money.

[100] He also said the claimant transferred to him from one of her Efilcon companies 2 million yuan in November 2010. He testified he gave the money directly to the Chinese official who was involved in the illegal scheme.

b. Contested evidence about payments

[101] The parties agree that on December 14, 2010, they met with Mr. Zhu at a café in a Beijing hotel. The claimant signed a document stating that she received 1,778,600 yuan from the respondent. The document purports to allocate 700,000 yuan of that to be repayment for the properties in Zhuhai, and 1,000,000 yuan as partial repayment of down payment for the Richmond Property.

[102] The respondent admits those funds did not come from him personally. Instead, he testified the purpose of the meeting was to discuss how to divide the "profits" from the illegal scheme. He testified Mr. Zhou had control of some of that money, including the respondent's share, which was about 2 million yuan. The respondent says instead of taking that money himself, he asked Mr. Zhou to pay it to the claimant. The respondent testified that they went to a bank next door and Mr. Zhou transferred the money and that is why the claimant signed the receipt. He explained that it was obvious he could not produce any banking records to verify this because the money came from Mr. Zhou and went directly to the claimant; those are not records in his control.

[103] The claimant submits the receipt does not prove she actually was paid, and says the respondent ought to have produced a bank document showing withdrawal from his account and deposit into hers. At the same time, she submits the receipt should be relied upon as proof that the respondent accepted that he was obliged to pay her back for the properties, supporting her evidence that the Richmond Property was never intended to be his (an issue I address elsewhere in this judgment).

[104] The claimant stated she only signed the receipt as a way to persuade the respondent to pay 2 million yuan to Mr. Zhu, which she says was necessary for Mr. Zhu to recoup the 2 million yuan that the respondent said was used to pay off the Chinese official. She denies there was any pay-off and suggested instead the respondent kept the money for himself.

4. Analysis and conclusions on credibility

- [105] The claimant submits that I should not believe the respondent because his explanation and testimony about this scheme (in both trials) was "incomprehensible". Her position is that the respondent's evidence at the first trial about this scheme is unreliable because counsel asked the respondent leading questions during his direct examination. She submits that necessarily reduces the weight of his evidence.
- [106] I disagree. The first trial judge ruled it was permissible to lead a witness through direct examination in certain circumstances (see Transcript, p. 325, l 41 to p. 326, l. 9). While not instructing or directing counsel on how to present the evidence, the first trial judge did suggest it might be helpful with regard to the respondent's evidence about the scheme. However, the trial judge also stated that he had difficulty understanding the scheme, both generally, about how it operated, but perhaps more importantly, how or why it was relevant. He was also concerned whether the respondent fairly confronted the claimant with the evidence about the scheme.
- [107] Given the Court of Appeal's specific comments and the first trial judge's approach to the issues, it would be unwise for me to place too much reliance on how evidence was led before the first trial judge as an important factor in assessing credibility.
- [108] However, I also disagree with the claimant that the respondent's evidence was "incomprehensible". Having read the transcript, I do not find the respondent's evidence was confusing. More importantly, I did not find his testimony during this trial about the scheme to be confusing or hard to follow.
- [109] The claimant also challenges the documents adduced by the respondent that he testified are consistent with his evidence about the scheme. The respondent makes the obvious point that it is unsurprising that the documents do not "prove" an illegal scheme; false documentation is part of the fraud. As to the other documents, the respondent submits it is difficult for him to retrieve banking documents from China because personal attendance is often required, but he is fearful of returning to China. He testified that he signed a power of attorney for his daughter to retrieve the documents, but according to him, the bank refused to release the documents to her. His daughter's testimony was consistent with his on this point.
- [110] The claimant's explanation for some transactions that she accepted were documented was simply that the respondent was paid money for a specific purpose, but he just kept it. However, she had no explanation as to why he would receive the money at all. She simultaneously says she and Mr. Zhou solely were responsible for equipment, but they entrusted the respondent with 9 million yuan to procure equipment. Her evidence is internally inconsistent. It is also inconsistent with her constant theme that the respondent was a mere figurehead. The respondent's explanation makes more sense.
- [111] The claimant's explanation about why she signed the receipt makes no sense. I cannot see how her signing a document about a fake transaction would be a method of persuading the respondent to pay money to Mr. Zhou. It is also at odds with her continual insistence

throughout their marriage that the respondent sign documents that she drafted to confirm financial arrangements. She was careful about trying to document financial transactions and arrangements between them, to an almost fanatical degree. I find it highly improbable that with that attitude, she would sign a document if she did not actually receive the money.

[112] Again, I find the respondent's explanation to be more logical. I find that receipt is an accurate account of the respondent's share of the illegal scheme paid directly to her in partial repayment for the Richmond Property as indicated on the face of the document.

[113] Based on my overall review of all the evidence from both trials, I prefer the evidence of the respondent to the claimant with regard to the Alar scheme, and specifically her receipt of 1,778,600 yuan from him. I also find on a balance of probabilities that the two million yuan the respondent received was used to pay off a Chinese official. His evidence is plausible; it holds together and is logical.

[114] Overall, therefore, I approach the claimant's evidence with caution because of the lack of credibility of her evidence on two major disputes in the case. More so than in other cases, that conclusion carries weight with my analysis of the legal issues for the reasons I have discussed earlier in this judgment about the unsatisfactory state of the documents.

B. Other Disputed Facts

[115] There are other disputes, which the parties devoted a significant amount of time in evidence and submissions, although I do not find these topics were as material to my conclusions as those discussed in the preceding portion of this judgment.

1. What were the parties' intentions with regard to the Richmond Property when it was purchased?

[116] The parties' intentions about property when purchased is not determinative to either its categorization as a family asset, or the fairness of reallocating its ownership. As I understand it, each of their positions was that their intentions and attitudes toward the Richmond Property supported their respective positions on the fairness of the Divorce Agreement. It seems to me that at best, this evidence may provide merely context that may or may not support either party's position about the Divorce Agreement's fairness or their narrative of their positions more generally.

[117] The respondent testified that his children wanted him to buy a home for them so that they did not have to live with the claimant, or in property owned by her. There was an unfortunate incident when the washing machine flooded. Ms. Yuan testified that the claimant was angry and unforgiving towards her about that despite Ms. Yuan's then young age and recent arrival to Canada. The claimant confirmed the flooding incident but denied she treated Ms. Yuan unkindly. There was other testimony about the claimant's relationship with Ms. Juan and Paul. It was clear that they were not close. I find, therefore, that the children did not want to live in her apartment, or with her.

- [118] The respondent testified that the claimant agreed that he should buy a house for himself and his children. The parties viewed the Richmond Property within a day or days of landing in Canada in early May 2010. The respondent testified that he relied completely on the claimant for the purchase, including arranging and managing finances for the home purchase and maintenance (payment of utilities), since he was newly arrived in Canada and spoke no English. The claimant did not disagree with that evidence. The respondent signed the mortgage documents (which were all in English and not translated) in Beijing, witnessed by a Ms. Guo. The mortgage had a line of credit attached.
- [119] The claimant testified that she was a guarantor on the mortgage, but the documents produced do not verify that, and the respondent gave permission to the bank to release all documents related to the mortgage. I am satisfied on a balance of probabilities that the claimant was not a guarantor on the mortgage. However, I think the claimant had a genuinely mistaken belief about that as opposed to her being purposefully dishonest.
- [120] The claimant testified that she wanted the Richmond Property for her family to enjoy, although she did not state any of them intended to live on it. The evidence was that her parents and children (who live in Canada) only visited the property once or twice.
- [121] The respondent points out that he is the mortgagor, which is more consistent with the intention the house would be for him and/or his children. The claimant testified the mortgage was in his name because as a new immigrant, he could get a more favourable interest rate. There was no reliable evidence to confirm that. The claimant testified she dealt with someone at the bank who she knew. That connection appears to have been beneficial to get the mortgage in the first place. In any event, the respondent having the mortgage in his name meant he was taking the financial risk which is more consistent with an intention the Richmond Property was meant to be his.
- [122] Based on an assessment of all the evidence, especially the parties' testimony, I am satisfied on a balance of probabilities that at the time the Richmond Property was purchased it was intended to be where the respondent's children would live, and generate some income. I do not find that the claimant intended her family would use the Richmond Property. As noted above, however, it is unclear to me how much significance this finding has to my assessment of fairness under the Divorce Agreement.
1. What was the triggering event?
- [123] Section 56(1) of the FRA identified four possible points in time when a party is legally entitled to an undivided half interest as tenant in common in a family asset, although that interest is subject to a "marriage agreement" according to s. 56(3)(b).
- [124] The claimant argues that the August 2010 Agreement constitutes the event triggering the application of s. 56. She claims that the August 2010 Agreement was a "separation agreement" pursuant to s. 56(1)(a). The respondent submits May 19, 2011 is the triggering event pursuant to s. 56(1)(c) because that is the date their divorce was registered.

- [125] In *Janis v. Janis*, 2016 BCCA 364 at paras. 54-55 the Court of Appeal commented on the triggering event and valuation date:
- [54] In summary, the foregoing authorities support the following propositions. When considering reapportionment under FRA s. 65, the presumptive valuation date is the date of the triggering event. When considering a compensation order under s. 66, the presumptive valuation date is the date of trial. However, the court retains the discretion to determine a different valuation date for the purpose of achieving fairness between the parties. Setting a different valuation date may be appropriate where there has been an increase or decrease in the value of a family asset between the triggering date and the date of trial. The conduct of one party as it relates to an increase or decrease in value may be a relevant consideration.
- [55] I emphasize, however, that the ultimate goal is achieving fairness. Lotzkar indicates that a mechanical application of any of these principles is not desirable and may be antithetical to achieving a fair result.
- [126] Despite the parties' disagreement about the triggering date, the claimant agrees with the respondent that the duration of the period of their separation is not a significant factor in the analysis on fairness. In particular, she submits that the parties' basic financial position did not change much during separation. That being the case, it is not entirely clear to me what legal or practical difference results between a triggering date of August 2010 rather than May 2011.
- [127] As I understand it, the claimant's reasoning is that in appropriate circumstances, deeming the triggering date to be the valuation date is "an acceptable means to effect an unequal division of assets" (written submissions, para 135). The claimant proffers in her written submissions calculations to illustrate why, in her view, fairness is better achieved in this case by choosing August 29, 2010 (rather than the date of trial) to be the valuation.
- [128] With respect, that is not the methodology contemplated by the Court in *Janis*. The claimant is urging me to engage in "backward" reasoning. However, the issue is straightforward: is the August 2010 Agreement a "separation agreement" for the purpose of s. 56 of the FRA? "Separation agreement" is not a defined term in the FRA and the parties provided me with no case law to guide my interpretation.
- [129] However, I am satisfied that the evidence demonstrates that the parties did not separate in August 2010. The parties both confirmed that notwithstanding any documents they signed, they lived together and remained intimate after August 2010.
- [130] The claimant also argues that the August 2010 Agreement was not invalidated per se by the Divorce Agreement; the latter specifically states that where it is in conflict with other agreements, it prevails. The claimant argues the previous agreements were merely "superseded", not rescinded by the Divorce Agreement, but only if they conflicted. Therefore, she argues the August 2010 Agreement can still be the triggering event.

- [131] The compatibility of the August 2010 Agreement with the later Divorce Agreement is not determinative as to whether it can be a triggering event. The sole issue is whether it is a "separation agreement". In my view, no further analysis is needed nor appropriate. Thus, I am satisfied on a balance of probabilities that they did not consider themselves separated until immediately before they got divorced on May 19, 2011. That being the case, I do not find that the August 2010 Agreement is a separation agreement for the purposes of s. 56(1) of the FRA, and the triggering date is May 19, 2011.
- [132] Furthermore, there is a dispute about the circumstances of the respondent's signing of the 2010 August Agreement. The respondent testified that there was a heated business meeting in Xinjian in August 2010 amongst the parties and two other business associates concerning Alar. According to him, the claimant told him to sign two agreements that she drafted or she would divorce him. He said that was the first time she mentioned a divorce, and he believed she was temporarily angered by the meeting. He also submitted the threat was a strategy to appease her business partners. The respondent testified the subject of divorce did not arise again until the following spring. He said he signed the agreements without much thought because her threat, made in the presence of their business partners, embarrassed him. He wanted to save face so he signed them immediately.
- [133] He says one of those documents must have been the August 2010 Agreement, but the other one is a document dated August 22, 2010 addressing ownership of the Richmond Property and another property; the signatures on the latter document are witnessed. The claimant introduced into evidence another document dated August 22, 2010 that has the parties' signatures on it, but the respondent does not recall signing it and points out there are no witnesses to the signatures.
- [134] The claimant's evidence was that she treated her business partners as friends and they were all staying in the same residence. It was Sunday so they did not discuss business. She claimed the respondent signed voluntarily, fully understanding what the agreements meant.
- [135] The problem is that there was no other evidence that the claimant's relationship with Mr. Zhou or Mr. Li was anything other than business partners. She also testified that her business partners were fed up with the respondent and did not want to continue being in business with him. However, that admission is inconsistent with her testimony that "no business" was discussed.
- [136] I also found her dismissal of the respondent's explanation for signing the documents without reading them (to save face) to be telling. She did not even acknowledge that he may have felt that way, and curtly dismissed his evidence outright.
- [137] Given that the business venture was clearly discussed, I have considerable doubt that the claimant's version of events is true. Because of that and the other reasons discussed above, I am satisfied that the parties' remained married and together until May 19, 2011.

2. Were there other properties that were family assets?

[138] The respondent submits other properties were family assets and their value should be included in the consideration of whether to reapportion ownership of the Richmond Property. The claimant denies any of them were family assets. I examine each in turn.

a. Development at 7th Avenue, Vancouver

[139] The parties invested in a development located at 553/555 West 7th Avenue in Vancouver (7th Avenue Project). A major investor in this project was No. 255 Seabright Holdings Ltd., the president and director of which was Thomas Ivanore, who testified at trial on behalf of the claimant.

[140] The respondent testified that the parties purchased a 1/3 interest in the 7th Avenue Project for \$715,000 CAD. There is no dispute that the respondent transferred about 1.6 million yuan to the claimant on March 4, 2011 which he understood would be used to invest in the 7th Avenue Project. However, he says that he found out some time later that the claimant registered that interest as belonging to a holding company only registered in her name, thus cutting out the respondent from the investment.

[141] The claimant testified that the respondent was not involved at all in the 7th Avenue Project. She also denied the 1,778,600 yuan she received from the respondent was for the 7th Avenue Project. According to her, that money was a partial repayment of the 2 million yuan transferred to the respondent in November 2010, which she says he kept for himself. However, I have already found that money was a payoff to a Chinese official in relation to the Alar scheme. Therefore, the respondent had no reason to repay her. I find that the 1,778,600 yuan was the respondent's contribution to the investment.

[142] The claimant's position is that 7th Avenue Project was not a family asset. She relies on the fact that the company was incorporated after what she says was the triggering event in August 2010 but I have rejected her position on that point. She then points out the shares in the company incorporated as vehicle for the investment in the 7th Avenue Project were only in the name of her and her father. She also points to a director's resolution transferring shares to her brother who she says was the beneficial owner because it was his money that was invested; she testified that the true source of the \$715,000 was her brother.

[143] Mr. Ivanore testified as to the complicated financing of the 7th Avenue Project beginning in about 2009. He confirmed the respondent was at the meeting where the deal closed. He was unaware if the respondent signed any documents, and seemed perplexed by a document that shows he (Mr. Ivanore) witnessed his own signature and the respondent's signature. He stated it was never his practice to witness a signature on a document that he was also signing, but conceded if someone else's lawyer had prepared the document, perhaps he did so. He could not confirm if the documents presented to him were the original ones that constituted the finalized deal. This was unsurprising given that he estimated the stack of documents signed was as much as 30 cm high. He did confirm that he dealt exclusively with

the claimant and only met the respondent once. This too is unsurprising given that the claimant generally took the lead in the business arrangements the parties jointly executed. Moreover, the respondent does not speak English.

- [144] The claimant says that her brother paid \$715,000 CAD, and that she made a direct deposit to purchase one of the units for \$1,486,000 CAD. Mr. Ivanore acknowledged receipt of those funds. She testified there is no "real evidence of a financial contribution" by the respondent "in the sense of traditional documentation from the project manager Mr. Ivanore or the directors of Efilcon acknowledging payment or shares issued".
- [145] The evidence did include email correspondence between Mr. Ivanore and an email belonging to the respondent, but the claimant says she was using that email address. She points to the fact the content is written in English. The respondent says that he was using a translation program to correspond directly with Mr. Ivanore.
- [146] The respondent said the claimant suggested the 7th Avenue Project as an investment opportunity for them. The evidence confirmed that the respondent personally signed a number of documents connected with the Project, notwithstanding that he could not read or speak English. There is also one offer to purchase showing the respondent as the sole purchaser.
- [147] The respondent claims that the claimant enticed him to invest in the 7th Avenue Project, but then did not include him in the corporate structure she created to support the investment. Only she and her father are shareholders and directors of the company created for their investment. She relied on that as proof that the investment had nothing to do with the respondent. The respondent alleged that is proof that she shut him out of the Project.
- [148] What is puzzling about the claimant's version of events is why she would bother using the respondent's email address. She said that she did not want to use her own personal email account for business, but that explanation still does not explain why she would use the respondent's email. Why not create a new email without her name in it? Moreover, there are emails within the same bundle of documents that did originate from the claimant's personal email, which is inconsistent with her own testimony.
- [149] I also find the content of the emails sent to Mr. Ivanore more consistent with them being translated than composed by the claimant. The claimant is highly intelligent and educated, yet some of the emails are written in stilted language consistent with the use of an on-line translation program. Lastly, in an email exchange relating to transferring the purchase price to the lawyer's trust account, the claimant indicated that the respondent would be the "signing officer". That is not consistent with someone that has "nothing" to do with the company. Her answer was in response to a question confirming the claimant and her father were the sole shareholders and directors, but the person asked "what about Jun Yuan?" There would be no reason to ask about his role if he was not involved in some capacity perceptible to the person dealing with the logistics of closing the deal.

- [150] I also find it odd that the respondent would sign documents relating to the 7th Avenue Project if he truly was not involved. The plaintiff claimed she took the respondent to one meeting as a way of demonstrating there was interest in pre-sales (from a potential Chinese investor) in order to get a construction loan. However, that does not explain why his signature is on any of the documents.
- [151] The claimant also testified that because the Richmond Property was in his name, she needed his participation because she did not have enough collateral. However, at the time, she owned at least two other residential properties in Richmond. Moreover, if she needed the Richmond Property as collateral, it was always in his name and he was the mortgagor; at the very least, he ought to have been nominally included in the corporate structure.
- [152] Ultimately, the claimant says the investment represented a loss. She ended up selling her interest in the 7th Avenue Project in September 2016 to another investor who had to invest more money into it to complete the project. It was completed about two years later.
- [153] In my view, it is significant that it was around the time of these 7th Avenue Project dealings that the claimant stated firmly that she wanted to get divorced. The respondent submits that desire is more consistent with her intention to cut him out, after she was able to take advantage of the collateral in the Richmond Property.
- [154] Overall, I prefer the respondent's evidence about his involvement in this project to the claimant's. I find the respondent believed the 7th Avenue Project was a joint project, and therefore a family asset, but that the claimant deliberately left the respondent's name out of the corporate structure.
- [155] There was no reliable evidence to demonstrate the worth of the 7th Avenue Project. It is unclear if the shares would have any value on the triggering date (May 19, 2011), and as of the date of trial, the shares did not exist. I accept the project represented a loss for the claimant, but I also find that it was a loss to the respondent. I find that the 1,778,600 yuan the respondent paid to the claimant was his investment in this project, and that the money was lost.
- b. Condo Unit #408 in Zhuhai
- [156] The respondent claims that the parties jointly bought four properties in Zhuhai not three. He says he purchased the fourth unit [#408] and the purchase and closing costs were about 200,000 yuan. He also says that it was then registered in the name of one of the claimant's relatives, who wanted to live in Zhuhai. The claimant denies any knowledge of Unit #408 including its purchase or ownership.
- [157] I am not satisfied that Unit #408 was a family asset. The respondent's evidence is that the property was bought for and registered in the name of a relative of the claimant, and if so, it was not owned by either party and does not meet the definition. In any event, there was inadequate evidence to substantiate that ownership, its purchase or its value.

c. Mine and Paper Mill in China

[158] On his Form 8, the respondent alleges two other investments the parties participated in were family assets. One is a mining project. He testified that the parties introduced a venture capitalist to the mine, which needed finances and the parties got a fee worth about 8% of the price. He stated he did not receive any portion of that fee. The other is a paper mill. The respondent says they jointly worked on this deal and successfully introduced a Canadian investor to the company receiving shares in the project and about 100,000 yuan. The respondent say the claimant kept that money and the shares for herself.

[159] There was no documentary evidence to support that the parties participated in those investments, or if they did, that they were profitable. The claimant testified at the first trial that they explored two investments, but ultimately did not participate.

[160] I am not satisfied I have sufficient evidence to establish that the parties invested in these projects. Accordingly, I am not satisfied they constitute family assets.

C. Legal Principles Regarding Unfairness of Marriage Agreements

[161] The claimant has the burden to establish that the distribution of family assets in the Divorce Agreement is unfair, and that reapportioning the Richmond Property to her would rectify that unfairness. I am mindful that this is a heavy burden upon the claimant and complete apportionment in favour of one party is an infrequent remedy: paras. 73 and 79 of the Court of Appeal decision. The process is to first apply the Divorce Agreement, and then consider whether in all the circumstances it is "fair" or not. The respondent's position is that the Divorce Agreement is fair, but in the alternative if it is not, a fair distribution would be 50% for each party.

[162] At para. 74 of its decision, the Court of Appeal confirmed that I should not consider fairness in isolation and I must consider the collective value of the family assets.

[163] As the claimant points out, as a practical matter, the only adjustment that can be ordered if I find the Divorce Agreement is unfair is with respect to the value of the Richmond Property, since the Zhuhai properties are no longer in the parties' names. The claimant submits that the best evidence of the value of the Richmond Property as of May 19, 2011 is the offer made by a prospective purchaser on April 24, 2011 to buy the property for \$1,660,000. I did not understand the respondent to disagree with using that figure.

[164] Section 65(1) of the FRA sets out the factors to consider when deciding whether judicial reapportionment on the basis of fairness is warranted:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[165] As mentioned above at para. 44, the parties agreed that the factors in ss. 65(1)(a), (d), (e) and (f) apply to this case.

[166] The court has a wide discretion to reapportion family assets in order to achieve fairness. There is a presumptive entitlement to half of the family assets, but there is no presumptive distribution that is either fair or unfair: Gold at para. 51.

1. The duration of the marriage - s. 65(1)(a) of the FRA

[167] Courts have commented that as a "general proposition where there is a short marriage, and a grossly disproportionate contribution towards the acquisition of the family assets as between the spouses, the division of assets should not result in a financial windfall to the party who made the smaller contribution": *Stefanek v. Stefanek*, 2009 BCSC 55 at para. 129. Importantly in that case, the judge accepted that non-financial contributions were worthy of recognition at para. 133.

[168] The claimant referred to a number of cases in support of her position that marriages of short duration often result in redistribution of family assets largely in favour of the party who contributed more financially to the family assets. None of the cases matches the factual circumstances of this case enough to be persuasive precedents. For example, *Jasinski v. Jasinski*, 2006 BCSC 878 is of limited assistance because the basis upon which reapportionment was sought indicated unconscionability and duress, and that the party did not fully understand the consequences of the agreement signed. Therefore, on those grounds, the Court concluded the agreement should be set aside (paras. 34, 40).

[169] However, as a general proposition, the parties agree that short marriages tend to favour accepting an unequal distribution in favour of the party who brought more assets into the marriage. In *MacDougall v. Gelin*, 2008 BCSC 1786, the Court accepted that an equal division of the value of the matrimonial home would be unfair because Ms. Gelin purchased the home with her funds only and Mr. MacDougall's non-monetary contributions to the home were minimal. That marriage was just over three and a half years. The Court awarded Mr. MacDougall 10% value of the matrimonial home (paras. 40-42). Similarly, in *Kamani v.*

Shariff, 2010 BCSC 987, which involved a four-year marriage where an asset purchased with funds from only one party resulted in the other party receiving only a 15% share.

- [170] This marriage was short, and there is no dispute that the down payment and deposit for the Richmond Property was paid by the claimant, although the evidence also suggested (but was not clear) that she received funds from her father's account to do so. In any event, the respondent did not contribute, directly, to the purchase price of the Richmond Property at the time of its purchase. However, I have accepted on a balance of probabilities that the claimant received the money as indicated on the receipt which constitutes a partial repayment of the contribution to the Richmond Property. Thus, I do find that the respondent made a financial contribution to the purchase.
- [171] I also find that his name being on the mortgage means he is taking all the financial risk and that is a type of contribution. I find this factor favours the respondent.
2. The extent to which the Richmond Property was acquired by one spouse through inheritance or gift - s. 65(1)(d)
- [172] The claimant's written submissions on this factor simply repeats that the claimant used either her funds, or a combination of her and her family's funds to purchase the Richmond Property. She does not claim that those funds were an inheritance or a gift solely to her benefit. Thus, this factor has no weight on the final analysis of the fairness of the Divorce Agreement.
3. The needs of each spouse to become or remain economically independent and self sufficient - s. 65(1)(e)
- [173] In my view, this factor favours the respondent. There was some evidence that the respondent was working illegally in the United States, which places him in a precarious position. I have found on a balance of probabilities that the fallout from the Alar scheme means it is possible he may have difficulty returning to China. He does not speak English so adjusting to life in either the United States or Canada will be challenging. He moved to and became a permanent resident of Canada at the behest of the claimant. The Richmond Property is his only major asset.
- [174] The claimant owns other property in Vancouver, has 20 patents to her name, and is involved in numerous business ventures in Canada and China. She did not assert that she had any financial difficulties, or a concern for her future financial stability because of the breakdown of the marriage. Moreover, she was clear that her family assets are pooled with her parents and the implication I draw from her evidence (especially the number of times she says she invested money from her parents' account) is that she has generous access to those funds.

4. Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the Richmond Property or the capacity or liabilities of a spouse - s. 65(1)(f)

[175] The claimant's position is the respondent has been financially irresponsible with the Richmond Property. The respondent testified (and there was supporting affidavit evidence from his children) that it was during this trial that he first became aware that his son (Paul) failed to deposit rental income into the bank account and withdrew funds from the line of credit, actions he hid from his father and sister. This caused the mortgage to fall into arrears. That situation has been resolved and the Richmond Property is now under the protection of a property manager. Thus, the risk of further financial mismanagement has been addressed.

[176] However, the claimant submits this factor is in her favour. Her position is that Paul's misfeasance is an invented story to cover up for the respondent's mismanagement of the Richmond Property in order to prevent her interim application to manage the property (heard and granted, on different terms on April 13, 2017) from succeeding. She also alleges that the respondent has been deliberately inaccurate with the court on several occasions about his descriptions of the state of the property.

[177] I agree with the claimant that the respondent is not careful at managing his financial affairs. The evidence shows that he showed bad judgment at apparently leaving the management of the property to his young daughter, and for a time, his son. I am also satisfied that the bank records reveal that the respondent has drawn on the line of credit to fund the mortgage and insurance payments, thus increasing his liability to the bank. Similarly, the rental potential of the Richmond Property is not being maximized.

[178] The issue before me is whether the respondent has done anything to increase or decrease the value of the Richmond Property. The parties agree that the value of the Richmond Property has increased significantly since it was purchased, and thus the equity in the Richmond Property has also increased. I accept that this was due primarily to market forces.

[179] The precise issue before me is whether any circumstance surrounding the "acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of a spouse" is material to the fairness of the Divorce Agreement. The test is not whether the respondent's careless management of the property means he does not "deserve" to have it remain in his name. In my view, the majority of evidence and submissions addressed by the parties was irrelevant and unhelpful to the legal issue before me. Despite the mortgage falling into arrears, there was no evidence that foreclosure was contemplated. The mortgage was brought up to date.

- [180] The evidence was clear that in terms of physically managing the Richmond Property, the claimant had no personal role. The respondent's daughter was largely responsible for managing the blueberry U-Pick operation, and collecting rent for the majority of the time following the purchase of the property. Even if that was done badly, the claimant has been unable to demonstrate that it had any significant impact on the financial value of the Richmond Property.
- [181] The claimant challenges the "story" that the respondent's son cheated his father, which is why the mortgage fell into arrears. While I can see why the claimant might reasonably hold that belief, I am not satisfied on a balance of probabilities that the story is invented. More importantly, given that the mortgage returned to good standing, it is largely irrelevant.
- [182] The Court of Appeal also noted that the first trial judge ought to have considered the fact that the mortgage on the Richmond Property was in the respondent's name, relying on *Suen v. Suen*, 2016 BCCA 107. The parties acknowledge the factual underpinnings of that case are very different. However, I do find it significant that the claimant chose to put the Richmond Property and the mortgage in the respondent's name only.
- [183] The claimant argues that the respondent has not built up any equity in the home "to lose" and therefore his name being on the mortgage is insignificant. I disagree. While it might seem to some a foregone conclusion that property values in the lower mainland will continue to rise, there is an inherent risk at putting one's name on a large mortgage. The claimant did not and has not ever taken that risk. The respondent has, and I am satisfied that represents a "contribution" to the Richmond Property. It is also true that his drawing on the line of credit probably diminishes in a real way the financial value of that contribution, but it does not eliminate it. As indicated above at para. 101, the respondent also paid the claimant about 1,000,000 yuan in partial repayment to her of the purchase price.
- [184] Thus, I am not satisfied that any circumstance regarding the maintenance, improvement or use of the property supports the claimant's position that the Divorce Agreement was unfair.
- [185] However, the claimant also submits that looking at the capacity and liability of the parties does illustrate unfairness. Her counsel submitted that the marriage negatively affected her financial position, but I am not persuaded that she was able to establish that on a balance of probabilities. Her lack of disclosure of all Chinese bank account records, including those of her parents, makes it very difficult to get an accurate picture of her financial circumstances. Furthermore, the evidence was clear and consistent that she was the driving force behind almost all the parties' financial ventures and investments. She could point to no investment or project that she took part in at his insistence that damaged her position relative to the other projects that she steered. She knew all of this when she signed the Divorce Agreement.

- [186] The claimant testified that she paid all of the costs (including deposits and purchase price) for the three Zhuhai properties. The respondent agrees she provided the majority portion of the purchase price, but he claimed he paid the deposits with cash. There is one document consistent with his evidence. It is a document indicating he used cash to purchase a property, although it does not indicate which one.
- [187] Neither party produced reliable documents to prove the sale price of the properties. They testified as to the profit earned but the parties contested some of that testimony. However, I found that the respondent paid the claimant back some amount for the purchases. Accordingly, I do not accept that Zhuhai properties were purchased completely by the claimant's funds. In addition, she admitted she made a profit from selling the Zhuhai properties that were in her name, but she disclosed no documents to establish how much profit.
- [188] The claimant points to the respondent's successful immigration to Canada as a benefit that flowed to him only because of the marriage. While that is true, it was at her insistence. Moreover, she obtained significant benefit from the marriage because of the respondent's Chinese citizenship, which gave her access to financial investments and use of bank accounts normally unavailable to non-Chinese citizens. Thus, in my view, those factors largely cancel each other out.

D. Conclusion on Fairness of the Divorce Agreement

- [189] I am not persuaded by the claimant that the Divorce Agreement operated unfairly, and I decline to reapportion any of the Richmond Property to the claimant's name.
- [190] The strongest factor in favour of unfairness was the short duration of the marriage. However, given that I have found the respondent paid the claimant back some of the purchase price of the Zhuhai properties and the Richmond Property, that mitigates the presumptions associated with a short marriage. Moreover, I find it appropriate to consider the context in which the parties signed the Divorce Agreement. The claimant is a sophisticated businesswoman who throughout their short marriage drafted documents relating to property and financing and insisted the respondent sign. He did so placidly, even by her own testimony. I find it is inconceivable that those circumstances differed when the parties signed the Divorce Agreement. I find she signed it voluntarily, fully aware of its consequences, including that it assigned to the respondent ownership of the Richmond Property.
- [191] For all those reasons, I find the Divorce Agreement is fair and I do not order any re-apportionment. The claim is dismissed.

IV. COSTS

[192] If the parties cannot agree on costs, they may seek a one-hour appearance before me, but that request must be made no later than 30 days from the date of this judgment.

"Sharma J."

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