
CANADA / JUDGMENT

Xie v. Yuan

2020 BCCA 45

COURT

British Columbia Court of Appeal

DECIDED

4 February 2020

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2020 BCCA 45 Xie v. Yuan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Xie v. Yuan,

2020 BCCA 45

Date: 20200204

Docket: CA45424

Between:

Shuang Xie

Appellant

(Claimant)

And

Jun Yuan

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated June 8, 2018 (Xie v. Yuan, 2018 BCSC 941, Vancouver Docket E121223).

Counsel for the Appellant:

G. Sherman

Counsel for the Respondent:

G. Myers

M. Lai

Place and Date of Hearing:

Vancouver, British Columbia

November 14, 2019

Place and Date of Judgment:

Vancouver, British Columbia

February 4, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

Summary:

The appellant appeals the decision of the trial judge refusing to reallocate the division of assets agreed to by the parties at the time of their divorce. The appellant alleges that the judge made several errors of fact and failed to give effect to the principles applicable to a marriage of short duration. Held: Appeal dismissed. The agreement was prepared by the appellant at the end of their marriage and provided that each party would retain property of which they were the registered owner. The circumstances at the time of distribution were not shown to be different from those contemplated at the time of the agreement. The judge made no palpable and overriding errors of fact in considering the parties' contributions to the acquisition of assets, nor did she err in the application of the relevant principles in a manner that warranted appellate intervention.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] The issue on this appeal is whether the trial judge erred in concluding that a marriage agreement between the parties allocating ownership of real property to the registered owner of each parcel was not unfair.
- [2] The context of this decision was a short marriage between a Canadian citizen and a Chinese national. Both the marriage and divorce took place in China, but the focus of the dispute was a property in Richmond, B.C. At the time of their divorce, the parties entered into an agreement prepared by the appellant and styled a Divorce Agreement in which the parties agreed that ownership of their various properties would be allocated to the registered owner of each parcel. The respondent was the registered owner of the Richmond property. Within a year after the divorce, the appellant brought proceedings seeking a reapportionment of the family assets, and specifically the property in Richmond.
- [3] At the time this dispute arose, judicial reapportionment of the division of property between spouses was authorized by s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128. The Divorce Agreement signed by the parties was a marriage agreement within the meaning of that Act. Reapportionment of the division of property under a marriage agreement may occur if a judge is satisfied that the allocation is unfair having regard to the factors listed in s. 65(1) of the Act.
- [4] In this case, the appellant submitted that in the context of a marriage of short duration, the contributions to the family assets, and particularly to the Richmond property, were so unequal as to make the agreement they had signed unfair. An initial trial judgment had been set aside by this Court with directions for a new trial. Following the new trial, the judge concluded that the appellant had not met her burden of showing the agreement was unfair, and declined to order reapportionment.
- [5] The appellant has appealed, arguing that the judge made several factual errors and failed to give effect to the principles applying to marriages of short duration. In my opinion, the judge did not make any errors warranting appellate intervention. For the reasons that follow, I would dismiss the appeal.

Background

- [6] The appellant is a Canadian citizen who is well-educated and speaks more than one language. The respondent is a Chinese citizen and is unilingual. The parties had their first contact on a Chinese dating website in late 2008. After their initial contact, the appellant went to China in February 2009 to meet the respondent and spend some time travelling with him. They were married on July 8, 2009 in Zhuhai, China.

- [7] In May of 2010, the parties came to Canada. Very shortly after arriving, the appellant arranged for the respondent to purchase a property in Richmond, British Columbia. The property was registered in the respondent's name, subject to a mortgage for which he is mortgagor. I will refer to this property as the Richmond Property. It is this property that is the focus of this litigation.
- [8] The marriage did not succeed, and on May 19, 2011, the parties obtained a divorce in Beijing. On the same day, they signed a document styled a Divorce Agreement ("the May 19 Agreement"), which contained the following relevant provisions (after translation):

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.]

- [9] On April 23, 2012, the appellant commenced a Notice of Family Claim in the Supreme Court of British Columbia seeking reapportionment of family assets, specifically the Richmond Property for which the respondent was on title. Reapportionment was sought under s. 65(1) of the Family Relations Act. The respondent opposed the reapportionment, arguing that the allocation in the May 19 Agreement should be upheld.
- [10] The parties had made several other agreements concerning the ownership of various properties prior to the May 19 Agreement. At a trial management conference, an order was made that the trial of the proceeding would be limited to determining which of these agreements was binding on the parties. After an eight-day trial, the first trial judge found that the May 19 Agreement was a marriage agreement within the meaning of s. 61(2) of the Family Relations Act, and was binding and enforceable between the parties. He then went on to determine that the May 19 Agreement was unfair within the meaning of s. 65(1) of the Act, and ordered that the Richmond Property be reallocated to the appellant: 2015 BCSC

2003.

- [11] This Court allowed an appeal from that judgment on the basis that the trial should have been limited to the question set out at the trial management conference, namely which of the several agreements made by the parties in relation to family assets was binding on them. It was contrary to natural justice for the judge to embark on the s. 65 analysis and decide the case on an issue that was not properly before him: 2016 BCCA 238 at para. 68 (the "First Appeal"). As a result, this Court set aside the first trial judgment, substituted a declaration that the May 19 Agreement was a marriage agreement binding on the parties, and remitted the question of reapportionment to the trial court to be determined at a new trial. This Court also stated that at the new trial, reapportionment should be assessed by reference to the allocation of all family assets, not just the Richmond Property.
- [12] That second trial took place in 2017 and judgment was pronounced in June of 2018. The new trial judge reviewed the status of all the family assets, and concluded that the allocation set out in the May 19 Agreement was not unfair. Accordingly, she declined to make a reapportionment order pursuant to s. 65(1). Her extensive reasons are indexed at 2018 BCSC 941. The appellant appeals.

Reapportionment under the Family Relations Act

- [13] Under the Family Relations Act, the parties are at liberty to decide for themselves the ownership or division of family assets by making a marriage agreement. This Court has already held that the May 19 Agreement was a marriage agreement within the Act. A marriage agreement will be binding unless the Supreme Court exercises its discretion to reapportion the assets pursuant to s. 65(1), which reads as follows:

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.

- [14] The manner in which the discretion under this statute is to be approached was set out by the Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22. The general principle is that "courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship" (para. 9):
- [36] in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess the arrangement on which they reasonably expected to rely.
- [15] The exception to this deference to the parties' agreement is based on fairness. Fairness is to be assessed at the time an application for reapportionment is made:
- [43] The essence of this inquiry is whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and, if so, whether at that time the parties made adequate arrangements in response to these anticipated circumstances.
- [16] Fairness then is to be assessed by reference to the parties' expectations at the time the agreement was made, and whether those expectations were borne out by the time the marriage had broken down. The Court in *Hartshorne* made this point by citing a passage from *Miglin v. Miglin*, 2003 SCC 24, which includes the following:

We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. It will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

- [17] In *Santelli v. Trinetti*, 2019 BCCA 319, this Court summarized the *Hartshorne* approach in this way:
- [72] The court must first apply the terms of the agreement to the division of property. Then, the court must ask whether the parties' agreement accurately contemplated the circumstances in which they now find themselves on separation. The final step is to consider the factors outlined in s. 65(1) to determine whether the agreement operates unfairly.
- [18] The critical question in the fairness analysis was expressed in *H.S.S. v. S.H.D.*, 2018 BCCA 199:

- [57] The critical question in assessing the operational unfairness of the marriage agreement is whether the current circumstances were within the contemplation of the parties at the time the agreement was made. The burden lies on the party seeking reapportionment to establish the agreement's division of property would be unfair considering the s. 65(1) factors, and if the current circumstances were previously contemplated, the burden on the proponent of unfairness, says Hartshorne, is heavier.
- [19] It follows from this approach that provided there is no indication of duress, coercion or undue influence in the making of the agreement, the Court should focus on the time that has elapsed between the making of the agreement and the breakdown of the marriage to determine whether the agreement has become unfair as a result of unforeseen consequences. As the Court in Hartshorne put it:
- [44] If the parties' lives unfold in precisely the manner they had contemplated at the time of contract formation, then a finding that the contract operates unfairly at the time of distribution constitutes, in essence, a substitution of the parties' notion of fairness with the court's notion of fairness central to any analysis under s. 65(1) of the FRA is consideration of how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution
- [20] When the marriage agreement is made early in the marriage and the breakdown occurs many years later, it will be necessary to scrutinize the circumstances at the time of distribution of assets to determine whether intervening events have made the allocation under the agreement unfair, having regard in particular to the factors set out in s. 65(1). On the other hand, when, as here, the marriage agreement is made at the end of the marriage, so that the time between the making of the agreement and the distribution of the assets is very short, it will be less likely that a court will intervene to substitute the court's notion of fairness for that of the parties.
- [21] All of this assumes that the marriage agreement is free from factors such as duress, coercion or undue influence. In the case at bar, the evidence was that the May 19 Agreement was prepared by the appellant. The judge pointed out that the appellant was well-educated, holds a Ph.D. in Chemistry, is adept at managing money and is very experienced in business. The appellant did not suggest there was any unequal bargaining in the creation of the May 19 Agreement. Her primary argument was that the contributions to the family assets were disproportionate, particularly in relation to the Richmond Property. In these circumstances, the practical burden on the appellant to upend the agreement she had made at the end of her marriage was a heavy one.

The Trial Judgment

- [22] Pursuant to this Court's direction that reapportionment must be considered by reference to all the family assets, not just the Richmond Property, the trial judge began by reviewing the evidence of the 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.

[23] The judge addressed and rejected an argument made by the respondent that the Richmond Property was not a family asset. Her conclusion on that point was not an issue in this appeal.

[24] Finally, the judge found that the parties' investment in a development on 7th Avenue in Vancouver (the "7th Avenue Project") was a family asset. By the time of the trial, this development had failed and represented a loss to both the parties.

- [25] Much of the trial was consumed with contentious evidence concerning what contribution each made toward the acquisition of these assets, most of which had been sold or dissipated by the time of the trial. Resolution of this issue proved to be challenging. All of the assets other than the Richmond Property were located in China, and there was little agreement between the parties as to either the correct documentation in relation to those assets or the events leading up to their acquisition. Each party accused the other of not providing all relevant documents. The trial judge concluded that the reliability of the documents produced by both parties was "highly dubious".
- [26] The trial judge adopted the appellant's submission that the only practical adjustment that could be made was in relation to the Richmond Property:
- [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.
- [27] In the First Appeal, this Court pointed out the need to assess the respondent's contribution to the purchase of the Richmond Property in order to assess the fairness of the May 19 Agreement. On the uncontested facts, Justice Goepel was able to conclude that the respondent had made a contribution through his liability on the mortgage on the property:
- [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.
- [28] A factual issue, however, remained to be resolved concerning whether the respondent had contributed financially to the purchase of the Richmond Property, a matter in dispute between the parties. Justice Goepel expressed the issue in this way:
- [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.
- [29] The determination of the respondent's financial contribution to the purchase of the Richmond Property also proved to be challenging, as it related to a transaction in China for which the evidence was disputed, the documentation was unsatisfactory and credibility issues arose in respect of the evidence of both parties. The judge explained the issue in this way:

- [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.
- [30] The relevance of this scheme to the determination of the respondent's contribution to the purchase of the Richmond Property was explained by the judge in this way:
- [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.
- [31] The appellant took the position that the receipt did not prove she actually was paid in respect of the Richmond Property. The trial judge, however, rejected her evidence and concluded that the funds had been paid to her for that purpose:
- [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.
- [32] The trial judge then reviewed the factors set out in s. 65(1) and came to the following conclusion:
- [189] I am not persuaded by the claimant that the Divorce Agreement operated unfairly, and I decline to reappportion 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.

Position of the Parties

- [33] The appellant takes the position that the trial judge erred in her review of the evidence, misconstruing the evidence in some respects and failing to give effect to uncontested evidence in others. She also submits that by essentially reappportioning the Richmond Property entirely to the respondent, the trial judge disregarded the uniform approach in the jurisprudence concerning marriages of short duration.
- [34] The respondent submits that any errors in assessing the evidence were minor and inconsequential. Further, he argues that the trial judge did not reappportion the Richmond Property to him, but rather gave effect to the marriage agreement made by the parties at the time their marriage was ending. In the respondent's view, the only issue is whether the trial judge properly applied the test for reappportionment as set out in *Hartshorne*.

Standard of Review

- [35] The standard of review on reappportionment appeals under s. 65(1) of the Family Relations Act was summarized recently by Justice Butler in *Santelli*:
- [71] An order made under s. 65 is an exercise of discretion made by the trial judge, taking into account the factors listed in that section. The standard of review on appeal is deferential. This Court should not interfere unless it can be shown that the judge made a material error, seriously misapprehended the evidence or erred in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 11. While *Hickey* dealt with a support order, the standard of review applies to the division of property under the FRA: *Beese v. Beese*, 2008 BCCA 396 at paras. 24-25.
- [36] To the extent that the appellant challenges factual findings of the trial judge, this Court will not intervene unless the errors are obvious and material to the outcome of the trial, a standard commonly referred to as the palpable and overriding error test.

Allegations of Error

- [37] The appellant raises a number of issues in respect of the trial judge's reasoning, but they can be summarized in this way:
- (a) an allegation that the trial judge made a palpable and overriding error in her assessment of whether the payment by the respondent of ¥1,778,600 to the appellant should be characterized as a contribution to the purchase of the Richmond Property;
 - (b) an allegation that the conclusion of the trial judge that the respondent took all of the financial risk in relation to the Richmond Property and the appellant took none of that risk was clearly wrong and undermined the judge's consideration of the s. 65(1)(a) factors; and
 - (c) an allegation that the trial judge erred in principle in her consideration of the s. 65(1)(e) factor, the needs of each spouse to become or remain economically independent and self-sufficient.

The Payment of ¥1,778,600

- [38] I have referred to the circumstances of the payment by the respondent to the appellant of ¥1,778,600. Both parties agreed that the respondent paid the appellant ¥1,778,600 in respect of family assets. The appellant says, however, that in her consideration of the financial contributions, the trial judge double counted this payment, resulting in an overstating of the respondent's contributions. The appellant points out that the trial judge stated in three separate places in her reasons for judgment that the ¥1,778,600 was the respondent's contribution toward the Richmond and Zhuhai properties, but then stated twice that the ¥1,778,600 represented the respondent's contribution to the 7th Avenue Project. The appellant submits that this error was central to the judge's balancing of the monetary contributions of the parties to the family assets.
- [39] The factual issue raised by the appellant concerns the judge's statements in relation to the respondent's contribution to the 7th Avenue Project. The relevant passages are these:
- [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.

[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.

[Emphasis added.]

[40] The respondent's position is that the reference to 1,778,000 yuan in paragraphs 141 and 155 is a typographical error, as the judge must have been referring to the 1,600,000 yuan referred to in para. 140. I can see no other reasonable explanation for the introduction of the amount of ¥1,778,600 to para. 141 immediately following the statement (not challenged on this appeal) that there was no dispute that the respondent had paid ¥1,600,000 that he understood would be his contribution to the 7th Avenue property. The judge does not otherwise account for this payment in discussing the various financial contributions of the parties.

[41] If the trial judge did double count the ¥1,778,600 in assessing the respondent's contribution to the purchase of family assets, then she did not account for the payment of ¥1,600,000 by the respondent for that purpose. In my view, however, the more likely explanation for what appears to be a clear error is that it represents a typographical error rather than an error in the reasoning process.

[42] The second element of the appellant's challenge to the judge's treatment of the ¥1,778,600 contribution is the submission by the appellant that the judge committed a palpable error in treating these funds as a contribution from the respondent to the family assets without considering offsetting losses to the parties from at least two projects, the 7th Avenue project in Vancouver and the Alar joint venture in China. The premise behind this submission is the assertion that "the trial judge made a finding that ¥1,778,600 was a personal contribution to the 7th Avenue Project".

- [43] I have already indicated why I do not accept that the judge considered the ¥1,778,600 contribution as relating to the 7th Avenue Property, notwithstanding what appears to be a typographical error in paras. 141 and 155 of her judgment. The judge stated that these funds were a contribution to the Richmond Property and there was evidence from which she could reach that conclusion. As for the losses on the 7th Avenue Property, the judge held that the project represented a loss for both parties.
- [44] In my view, any errors in respect to the assessment of the ¥1,778,600, if not purely typographical, do not amount to palpable and overriding errors warranting appellate intervention.

The Significance of the Mortgage

- [45] The second ground of appeal advanced by the appellant concerns a statement by the trial judge that by signing the mortgage on the Richmond Property, the respondent was "taking all the financial risk" for the property (para. 171). The appellant argues that she funded the purchase of the property through the substantial down payment, so that any decline in value would first impact her equity in the property. Thus, she argues that the judge's statement is clearly in error, and meets the palpable and overriding error standard for appellate intervention.
- [46] The respondent submits that the risk the judge was referring to was explained in para. 183: there is an inherent risk at putting one's name on a large mortgage. The claimant [appellant] did not and has not ever taken that risk. The respondent has, and I am satisfied that represents a "contribution" to the Richmond Property.
- [47] In my view, the appellant's parsing of the trial judge's comment about financial risk does not establish a palpable error, and certainly not an overriding one. The judge was responding to the main theory of the appellant, that the contributions of the parties to the assets, and particularly the Richmond Property, were so unequal as to render the May 19 Agreement unfair. The judge regarded the fact that the respondent alone was on the mortgage, together with the direct contribution from the ¥1,778,600 payment, to be relevant factors in that assessment. It was open to the judge on the evidence to come to that conclusion.

The Judge's Consideration of the s. 65(1) Factors

- [48] Finally, the appellant submits that the trial judge erred in her consideration of the s. 65(1) factors, particularly sub-sections (a), "the duration of the marriage" and (e), "the needs of each spouse to become or remain economically independent and self-sufficient".
- [49] The trial judge began her assessment of the s. 65(1) factors by stating that there was a presumptive entitlement to half of the family assets, citing this Court's judgment in *Gold v. Gold* (1993), 49 R.F.L. (3d) 41.

- [50] I note that while it is true that there is a presumptive entitlement to equality in the division of the family assets under s. 56 of the Family Relations Act, s. 56(3) provides that this entitlement is subject to a marriage agreement. This point was made in Gold:
- s. 51 [now s. 65] provides a standard against which to measure unfairness; but neither the Act nor the authorities direct that unfairness may only be cured by equality. As already mentioned, the prima facie provision for equality in s. 43 [now s. 56] is made expressly subject to s. 48 [now s. 61] which authorizes marriage agreements, and s. 51 [now s. 65] only mandates fairness, not equality.
- [51] Thus, when parties have entered into a marriage agreement, the starting point for analysis under s. 65 is not the presumption of equality, but the division of assets made by the parties in their marriage agreement. The accuracy of the parties' anticipation of the circumstances that would prevail after the marriage breakdown provides important context for the consideration of the s. 65(1) factors.
- [52] Nevertheless, the presumption of equality expressed by the trial judge does not appear to have affected her analysis of the s. 65(1) factors. If anything, it operated to the benefit of the appellant, as the party seeking to upend the agreement that had been made. Accordingly, I conclude that the error in approach does not require appellate intervention on that account.
- [53] The judge then considered the "duration of the marriage" factor from the perspective that short marriages tend to favour accepting an unequal distribution in favour of the party who brought more assets into the marriage. She concluded, however, that this factor favoured the respondent because of the contributions he made to the Richmond Property.
- [54] The appellant submits that a modest contribution to the purchase of the Richmond Property was insufficient to overcome what the appellant characterized as a requirement that where the marriage is of short duration and the major portion of the family assets was brought into the marriage by one of the spouses, there must be a substantial reduction of the other spouse's share where the other spouse receives a major portion of the family assets under the agreement (my emphasis). This Court's oral judgment in *Zaurrini v. Zaurrini* (1981), 33 B.C.L.R. 15, was cited as authority for that proposition.
- [55] The theme throughout the appellant's argument was that the judge should have assessed the fairness of the allocation of the assets as if the May 19 Agreement had never been made. But this case was not an independent assessment of whether the allocation of assets was fair. This case required an assessment of whether the marriage agreement made by the parties at the end of their marriage was unfair having regard to the factors in s. 65(1) and the principles set out in *Hartshorne*. *Zaurrini* was not a case in which a marriage agreement had been made. The governing authority for this case is not *Zaurrini*; it is *Hartshorne*. The operating principle is that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship. When these private arrangements are challenged, it is not necessary for the respondent to show that their agreement was fair. The claimant must satisfy a judge that the agreement was unfair by

establishing either that the circumstances of the parties at the time of separation were not within the reasonable contemplation of the parties at the time the agreement was formed, or that the agreement the parties made did not provide adequate arrangements in response to these anticipated circumstances. Duration of the marriage must be assessed in light of the time within the marriage when the marriage agreement was made and the circumstances anticipated by the parties at that time.

- [56] Although the trial judge did not expressly consider the change in circumstances factor explained in *Hartshorne*, that factor could only have favoured the respondent given the timing of the marriage agreement. Accordingly, I conclude that appellate intervention is not warranted.
- [57] The appellant's objection to the trial judge's consideration of s. 65(1)(e) is that the respondent's self-sufficiency was not an issue raised by the respondent, and accordingly the parties had not led evidence sufficient to enable a conclusion on this factor to be drawn. The appellant also submits that the judge was wrong in saying that both parties had agreed that s. 65(1)(e) applied to the case, as she had argued that the respondent's self-sufficiency was not an issue for consideration.
- [58] The respondent submits that while the appellant took the position that self-sufficiency was not an issue for the judge, the respondent had expressly asked the judge to consider it.
- [59] In a reapportionment application, the factors set out in s. 65(1) must be considered by the judge unless the parties agree that they have no application, as they did with respect to ss. (b) and (c). The judge did not err in considering this factor, and having in mind the deferential standard of review of the judge's conclusions under s. 65(1), I would not interfere with her conclusions on this factor.
- [60] Finally, the appellant submits that the trial judge erred in her duty to give cogent reasons for judgment. I do not see any merit in this submission. The trial judge explained her findings of fact in light of evidence that was unsatisfactory in many respects. She considered the provisions of s. 65(1) that the parties did not specifically exclude from consideration, and provided her reasons for not exercising her discretion as requested by the appellant. I would not give effect to this ground of appeal.

Conclusion

- [61] I have concluded that the judge did not commit any palpable and overriding errors in her assessment of the facts nor did she err in her assessment of the applicable legal principles in a manner that would justify appellate intervention. For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Fitch"

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