
CANADA / JUDGMENT

Zhang v. Soong,

2012 BCSC 758

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 758 Zhang v. Soong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang v. Soong,

2012 BCSC 758

Date: 20120523

Docket: S112627

Registry: Vancouver

Between:

Wei Jin Zhang

Plaintiff

And

James Soong and Julie Soong

Defendants

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiff:

D.S. Boyle

Counsel for the Defendants:

J.A. Henshall

Place and Date of Hearing:

Vancouver, B.C.

March 8, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 23, 2012

INTRODUCTION

- [1] Mr. Zhang seeks an order for specific performance of a written contract ("Contract") providing that the Soongs would transfer residential property ("Point Grey Home") to Mr. Zhang for \$2.65 million. The Soongs oppose that order, arguing both that the Contract is not enforceable, and that the court should refuse the equitable remedy of specific performance.
- [2] Mr. Zhang is a business man who seeks to move with his family into the Point Grey Home. He says that it is uniquely suitable for his family.
- [3] The Soongs are a married couple who have lived in the Point Grey Home for about twenty years. Ms. Soong signed the Contract both on her own behalf and, using a power of attorney, on behalf of her husband. Mr. Soong is in his nineties, and is presently living in an extended care facility at the University of British Columbia ("UBC"). Ms. Soong is in her mid seventies, and is struggling with caring for her ailing husband and with depression.
- [4] The Soongs say the Contract is unenforceable because it does not reflect the intention of Ms. Soong, and they rely on the doctrine known as non est factum. They also argue that the Contract is unenforceable because of a counteroffer. They say that, even if the Contract is enforceable, the court should deny specific performance, on the basis that damages would be an adequate remedy for Mr. Zhang, and that specific performance would be too great a hardship for the Soongs.
- [5] Mr. Zhang's application proceeded to a one-day Rule 9-7 Summary Trial hearing. The evidence provided at the hearing consisted of 12 affidavits, excerpts from the examination for discovery of both Mr. Zhang and Ms. Soong, a Notice to Admit and the response, a report from a firm of real estate appraisers together with a subsequent email message with further information, a letter from a geriatric psychiatrist who is caring for Ms. Soong, a letter from a lawyer with copies of a document, and copies of two purchase contracts signed by Mr. Zhang in relation to other properties.
- [6] I am grateful for counsel's clear and thorough arguments.

ISSUES

- [7] The issues are as follows:

- (a) Can the court decide the issue of non est factum on the basis of the evidence at the Summary Trial?
- (b) Can the court decide the issue of whether Mr. Zhang rescinded the Contract by making a counter-offer on the basis of the evidence at the Summary Trial?
- (c) Can the court decide whether specific performance is the appropriate remedy on the basis of the evidence at the Summary Trial?
- (d) What are the next steps in this lawsuit?

FACTS

- [8] The Soongs were married in 1954 and raised two children. They moved to Canada prior to 1982.
- [9] Ms. Soong's highest level of education was a high school diploma from Taiwan. Her high school education included two to three years of studying a "little bit" of English. Ms. Soong speaks Mandarin fluently. She speaks only basic conversational English, and cannot read or write English. Throughout her adult life, she has primarily been a homemaker. She worked outside the home for a few years at a gift shop and for a few years as a key puncher at research company.
- [10] Mr. Soong worked in Taiwan as a journalist and professor, and then in Canada for a bank.
- [11] When they first moved to Canada, the Soongs lived in a home on 11th Avenue, then in a home on 10th Avenue for ten or 15 years. The third home they bought in Canada was the Point Grey Home, which they bought in 1991 and have lived in ever since. When they moved into the Point Grey Home, their daughter, Ms. Peterson, was living four houses away with her family. Ms. Peterson's husband, Mr. Peterson, handled the Soong's financial matters together with Mr. Soong.
- [12] The Soongs' grandson, Charles Soong ("Charles"), lived with the Soongs from 1998 until early 2010. Charles assisted Ms. Soong with things like reading the mail and using the computer.
- [13] The Soongs' son, who was Charles's father, passed away in 2004.
- [14] Mr. Peterson passed away in 2008. Ms. Soong's mother also passed away that year. Ms. Soong had to become more involved in her financial affairs, and did so with the assistance of Ms. Peterson and Charles.
- [15] In 2009, Ms. Peterson underwent brain surgery due to a brain edema. As a result of her own medical problems, the loss of her husband, and the needs of her own children, Ms. Peterson has not always been able to assist and support her mother as much as she would have liked.
- [16] Mr. Soong gave a written general power of attorney to Ms. Soong on December 9, 2009.

- [17] Mr. Zhang is married and has five children ranging in age from 15 to 19 years old. Mr. Zhang and his family emigrated to Vancouver from mainland China in March 2010. In April 2010, they made an offer to purchase a house near Eric Hamber Secondary School ("Eric Hamber"). The purchase closed in June 2010, and since then, the Zhang family has lived in that home.
- [18] Mr. Soong was hospitalized in May 2010, and was transferred to an extended care unit at the UBC in September 2010. Since May 2010, Ms. Soong has spent most of her time, and often long days, at the hospital or extended care unit caring for Mr. Soong. Also since May 2010, Ms. Soong has suffered from anxiety, depression, weight loss, high blood pressure, irritability, problems concentrating, and forgetfulness.
- [19] Ms. Soong was acquainted with Ms. Greta Ho, a real estate salesperson with Sutton West Coast Realty Ltd. Ms. Soong's father and Ms. Ho's father were business friends in Taiwan. Ms. Soong told Ms. Ho about Mr. Soong's admission to hospital, and Ms. Ho suggested that Ms. Soong sell the Point Grey Home and move into a smaller home. Ms. Soong was persuaded by Ms. Ho, and signed a listing agreement. It provided that the Soongs listed the Point Grey Home for sale by Ms. Ho at \$2.88 million for the period June 18, 2010 to December 31, 2010.
- [20] Ms. Peterson learned in June 2010 that her mother had signed a listing contract with Ms. Ho. Ms. Peterson was surprised, and told her mother that it was not a good time to sell, because Ms. Soong was spending time with Mr. Soong at hospital. Ms. Soong told Ms. Peterson that she had no intention of selling the Point Grey Home.
- [21] Ms. Ho put a "for sale" sign on the Point Grey Home with Ms. Soong's agreement. Ms. Soong did not permit Ms. Ho to hold any open houses, but permitted her to show the Point Grey Home occasionally by appointment.
- [22] Ms. Soong told Ms. Peterson that Ms. Ho showed the home a few times. Ms. Peterson noticed that her mother was showing signs of forgetfulness, irritation, and weight loss.
- [23] By November 2010, Mr. Zhang's children had decided that they wanted to go to Lord Byng Secondary School ("Lord Byng"), because they thought it was a better school than Eric Hamber. The Zhang family decided that they would like the children to go to Lord Byng, and Mr. Zhang began looking for a home within the Lord Byng catchment area.
- [24] Ms. Soong told Ms. Peterson in late December 2010 or early January 2011 that she did not intend to sell her house, was not going to renew the listing contract with Ms. Ho, and wished to remove her home from the market.
- [25] Ms. Soong did not renew the listing agreement when it expired. However, Ms. Soong allowed Ms. Ho to show the Point Grey Home in early January 2011.

- [26] The Lord Byng school building is about three blocks from the Point Grey Home. Mr. Zhang looked at about 50 houses over a period of six months, including about 20 houses in the vicinity of Lord Byng, before entering into the Contract. His realtor was Ms. Lu, of Royal Pacific Realty Corp.
- [27] The evidence of Ms. Lu was provided by written answers to written questions. Ms. Lu contacted Ms. Ho on January 8 or 9, 2011, and asked if the Soongs still wanted to sell the Point Grey Home. Ms. Ho said yes.
- [28] On or about January 10, 2011, Ms. Lu, Ms. Ho, Mr. Zhang, and his wife viewed the Point Grey Home. That same day, Mr. Zhang offered to purchase the Point Grey Home for \$2.5 million. The offer was open until January 11, 2011, and Ms. Lu faxed the offer to Ms. Ho's home.
- [29] On January 16, 2011, Ms. Ho telephoned Ms. Lu and said that the Soongs wanted \$2.6 million for the Point Grey Home and a commission reduction to \$50,000.
- [30] Ms. Soong signed the Contract on January 16, 2011 between 9 and 10 p.m. It was a counteroffer, which provided for a purchase price of \$2.65 million. Ms. Soong also signed a listing agreement with Ms. Ho for the period from January 16, 2011 to December 31, 2011, at the price of \$2.88 million, and a property disclosure statement.
- [31] On January 16, 2011, Ms. Soong was 75 years old and Mr. Soong was 91 years old. Ms. Soong deposed as follows:

On or about January 16, 2011, Greta Ho came to my house with an offer and asked me to sign it. I was hesitant to sell my house but at the same time felt beholden to Greta Ho for the work that she had done. Greta Ho told me that even if I signed the [Contract], I could stop the sale of the [Point Grey Home] at any time. Because of that, I signed the [Contract]. ... As I remember, Greta Ho merely pointed at locations on the document that I needed to sign or initial, and I followed all of her instructions. My conversations with Greta Ho were in Mandarin. I recognize my signature on the [Contract] but did not read it and do not recognize the document otherwise.

- [32] Ms. Soong also deposed that Ms. Ho told her many times before January 16, 2011 that, notwithstanding any documents she signed, she could stop the sale of the Point Grey Home at any time. Ms. Soong deposed that that was the understanding she had when she met with Ms. Ho on January 16, 2011 and signed the Contract.
- [33] At her examination for discovery on November 24, 2011, Ms. Soong testified that she could not remember whether Ms. Ho told her what the document was when she gave Ms. Soong the Contract to sign. Ms. Soong also testified that she could not remember at the time of the examination for discovery what she thought she was signing. She testified that she probably knew that it was about the sale of the Point Grey Home.
- [34] In Ms. Soong's affidavit dated March 5, 2012, she deposed that Ms. Ho brought several documents on January 16, 2011, which she did not elaborate on because she was in a hurry, and Ms. Soong signed and initialed them where Ms. Ho asked. Ms. Soong denied that Ms. Ho

went over the documents in detail with her. She deposed that Ms. Ho mentioned the selling price and the completion date, but deposed that she did not recall any conversation about any other dates or subject clauses or terms of the Contract, and does not believe any such conversation occurred.

- [35] In contrast, Ms. Ho deposed that she explained to Ms. Soong that she was signing a contract for the sale of the Point Grey Home, and, to the best of her recollection, explained that Ms. Soong's signature was binding. Ms. Ho deposed that Ms. Soong appeared to understand that she had entered into a contract to sell the Point Grey Home. Ms. Ho further deposed that Ms. Soong did not do or say anything to lead Ms. Ho to believe that she understood the Contract she signed was not a contract to sell the Point Grey Home. Ms. Ho deposed that she did not represent to Ms. Soong that Ms. Soong could stop the sale at any time, and she did not at any time have any concerns about Ms. Soong's ability to understand the nature of the Contract. Ms. Ho deposed that Ms. Soong requested a reduction in commission in January 2011, which was granted.
- [36] Ms. Ho did not at any time advise Ms. Lu or Mr. Zhang that she had concerns about Ms. Soong's mental capacity.
- [37] On the next day, January 17, 2011, at around 9:30 a.m., Ms. Ho telephoned Ms. Lu and said that she had misunderstood the Soongs, and they actually wanted \$2.65 million and a commission reduction to \$50,000. Ms. Ho asked Ms. Lu to split the commission, and Ms. Lu told Ms. Ho that her bottom line was \$28,000.
- [38] Ms. Ho delivered the counteroffer to Ms. Lu on January 17, 2011 at about 11 a.m. It provided that the Soongs offered to sell for \$2.65 million, and it was open for acceptance until 9 p.m. on January 17, 2011.
- [39] Around noon on January 17, 2011, Mr. Zhang accepted that counteroffer by initialling the changes at his home. Ms. Lu telephoned Ms. Ho and agreed to leave the completed Contract at Ms. Ho's house. Ms. Lu did so between 4 and 5 p.m. that day, creating the Contract.
- [40] The written Contract is dated January 10, 2011 on page 1 (but with dates of January 16 and 17 on page 4) and states that it was prepared by Ms. Lu. It refers to the Soongs as the seller and Mr. Zhang as the buyer, and it describes the Point Grey Home. It refers to a completion date of April 18, 2011, which is a change from the originally typed date of April 19. The original typed portion sets out a purchase price of \$2.5 million. That figure has been crossed out, as has the figure of \$2.6 million. The purchase price figure of \$2.65 million is not crossed out. The deposit is stated to be \$125,000, to be paid within 24 hours after all subject removals. The Contract was signed by Mr. Zhang and by Ms. Soong on her own behalf and on behalf of Mr. Soong.
- [41] There are also two written addenda of the same date as the Contract. Both, like the Contract, were signed by Mr. Zhang and by Ms. Soong on her own behalf and on behalf of Mr. Soong. One addendum sets out subject clauses for the sole benefit of the buyer, which are to be

removed by January 25, 2011, and some other terms. The subject clauses include clauses relating to financing, an inspection report, title search, property disclosure statement, and insurance approval. The other addendum provides that the seller agrees to do certain things, including removing debris from the property, and paying a specified brokerage fee. This addendum also provides that the buyer is satisfied with the measurements, and is entitled to assign the Contract.

- [42] Ms. Ho deposed that on January 17, 2011, Ms. Soong telephoned her and told her that she had changed her mind and did not want to sell the Point Grey Home.
- [43] Ms. Peterson deposed that in January 2011, Ms. Soong told her that she had signed an offer on her home, but she could stop the sale at any time, and she wanted Ms. Peterson to call Ms. Ho to stop the sale. Ms. Peterson deposed that Ms. Ho said that Ms. Soong could hope that the buyers would not remove the subject clauses, and, in any event, Ms. Soong could choose not to complete and the court would not force an elderly person from her home.
- [44] Ms. Soong deposed that Charles informed her that he had found a note among her documents. It is in Chinese and is dated January 18, 2011. It is on what appears to be Ms. Ho's letterhead and is signed by her. It says, "Hi Mrs. Soong, this is the legal contract of purchase and sale. Also attached 1) inspection 2) mortgage details. An inspector will come this Fri at 1 pm (Jan 21) to inspect the house. Keep in touch. Sincerely, Greta Ho." Ms. Soong deposed that she does not remember receiving or ever seeing this note or any of the mentioned attachments.
- [45] On or about January 21, 2011, Mr. Zhang came to the Point Grey Home with a group of people to do a home inspection. Ms. Soong deposed that she was "terrified" as they turned on all the fans and taps in the entire house, causing tremendous noise.
- [46] Mr. Zhang deposed that at the time of the inspection, he asked Ms. Soong why she wanted to sell her house and she told him that, after thorough discussion with her children, they came up with the idea to sell the house so she would not be as stressed by maintaining it and could concentrate on caring for her husband.
- [47] Mr. Zhang deposed that after the house inspection there was a meeting among Ms. Soong, Ms. Ho, Ms. Lu, Mr. Zhang, Mr. Zhang's wife, and the home inspector. Mr. Zhang deposed that at that meeting, Ms. Ho indicated that Ms. Soong would be prepared to remedy certain deficiencies, and Ms. Soong agreed, but that Ms. Soong later refused to sign documents which recorded that agreement.
- [48] Like Mr. Zhang, Ms. Lu's evidence was that Ms. Soong told Mr. Zhang that she would repair the deficiencies found by the home inspection, and that Ms. Ho told Ms. Lu that the Soongs would repair the deficiencies. Ms. Lu stated that Ms. Ho told Ms. Lu that the Soongs would not sign the written addendum concerning repair of the deficiencies, but that that they would fix the deficiencies.

- [49] In contrast, Ms. Soong deposed that after the home inspection, Ms. Ho informed her that Mr. Zhang had a list of deficiencies that he wanted her to repair. Ms. Soong deposed that she told Ms. Ho that she refused to do these repairs.
- [50] In January 2011, Ms. Soong consulted her family doctor about anxiety and depression and was referred to another doctor, who referred her to the Westside Mental Health Team.
- [51] Mr. Zhang signed a further Contract addendum dated January 25, 2011 which removed the subject clauses. Mr. Zhang presented it to the realtor on January 25, 2011. Ms. Ho did not tell Ms. Lu prior to the removal of the subject clauses that the Soongs did not want to proceed with the sale.
- [52] Mr. Zhang paid the deposit on January 26, 2011.
- [53] Ms. Soong deposed that on one occasion after the subject clauses were removed, when she again told Ms. Ho that she did not want to sell the Point Grey Home, Ms. Ho said that the buyer would not sue her and her husband, and, even if he did, the judge would not force elderly people from their home.
- [54] There is a further form of addendum which is dated January 25, 2011 and is signed only by Mr. Zhang. It sets out a number of subject clauses for the sole benefit of the buyer, including clauses relating to a mortgage, inspection report, title search, property disclosure statement, and insurance approval.
- [55] A property close to the Point Grey Home was listed for sale on February 9, 2011 for \$2.175 million, and sold for \$2.75 million. Ms. Ho became aware of this sale in February 2011. The property is on the same side of the street as the Point Grey Home and the lot is the same size, but the house is much older than the Point Grey Home.
- [56] Ms. Lu deposed that throughout her dealings regarding the Point Grey Home, she did not receive any indication that the Soongs did not understand the nature of the transactions contemplated by the Contract, or that they were suffering from any mental infirmity. She deposed that after she delivered the Contract to Ms. Ho, Ms. Ho told her that the Soongs would not accept the offer unless they agreed to reduce their commission, and that they agreed to do so and signed fee agreements with the new rate.
- [57] Ms. Soong's family doctor, Dr. Wang, wrote a letter dated February 25, 2011 and addressed "to whom it may concern". The evidence did not disclose why Dr. Wang prepared the letter. The letter states that Ms. Soong is suffering from anxiety, stress, and depression, and should not be making any legal, financial, or medical decisions until her condition improves. This letter was not tendered as an expert report under the Rules of Court, and therefore the opinion is not admissible on the Summary Trial.

[58] Mr. Liu, as solicitor for the Soongs, wrote Mr. Zhang a letter dated March 8, 2011. While it is marked "without prejudice", it does not make any settlement offer. Neither party argued that it was inadmissible on the Summary Trial. Mr. Liu wrote that the Soongs did not intend to complete the sale of the Point Grey Home as contemplated in the Contract. The letter refers to health problems suffered by Ms. Soong, and then says:

Mrs. Soong had thought that selling her home would relieve some stress, but realized that the contemplated sale has only heightened her anxiety and worsened her health. Emotionally and psychologically, Mrs. Soong was not of right mind and health to make the decision to sell her home.

[59] This letter also states that Mrs. Soong agreed to meet with Ms. Ho to consider an offer, and that while she still did not want to sell, she "could not resist her realtor's persuasive pressure and signed" the Contract. The letter includes the following:

In order to persuade Mrs. Soong into signing the [Contract] and a listing renewal, her realtor advised her that she could cancel the [Contract] at any time because she was senior and because the [Contract] contained conditional terms, and that no court would enforce an agreement against a senior to remove her from her home. [Ms. Ho] advised Mrs. Soong that seniors in her area change their minds all of the time about selling their homes without consequence. ... Mrs. Soong could not say no directly to [Ms. Ho's] persuasive pressure and signed the [Contract] in the belief that she could change her mind.

After inspection of her home, Mrs. Soong felt extremely uncomfortable and knew that she could not sell her home. When Mrs. Soong advised her realtor of her decision not to sign the subject removal, it was then that her realtor advised her that she had entered into a binding [Contract] and that her execution of the subject removal was not required and that she should seek legal counsel.

[60] Mr. Boyle, as counsel for Mr. Zhang, wrote Mr. Liu a letter dated March 14, 2011. Mr. Boyle wrote that Mr. Zhang affirmed the Contract, and that Mr. Boyle had instructions to commence an action for specific performance if the Soongs failed to complete the sale on April 18, 2011.

[61] Ms. Soong was assessed by Dr. D'Oyley on March 22, 2011. Ms. Soong lost points on testing for delayed recall, and she displayed evidence of disorientation to time. She reported symptoms of major depression: low mood and tearfulness, poor concentration, poor motivation, poor energy, and hopelessness. Dr. D'Oyley diagnosed Ms. Soong with major depressive illness with cognitive impairment.

[62] Mr. Zhang was ready, willing, and able to complete the purchase of the Point Grey Home. He provided the purchase funds to his lawyers and executed the necessary documents. The Soongs did not complete the sale.

- [63] Shortly after the sale failed to complete on April 18, 2011, Mr. Zhang's doctor prescribed him medication for high blood pressure, which Mr. Zhang has been taking ever since.
- [64] Ms. Soong was prescribed medication for depression around mid-April 2011.
- [65] Mr. Zhang commenced this lawsuit on April 20, 2011.
- [66] Charles returned to Vancouver in May 2011, and resumed living in the Point Grey Home.
- [67] Charles deposed that he spent his time from May to July 2011 alleviating Ms. Soong's financial burdens. He deposed that most of the Soongs' income was now spent on Mr. Soong's monthly fees for the extended care unit, leaving Ms. Soong with very little money to live on. Charles took steps like seeking a renewal of tax deferral and adjusting pension payments and retirement benefits. Charles deposed that he first learned in mid-May 2011 that Ms. Soong had signed the Contract.
- [68] The Soong's original Response to Civil Claim was filed on July 26, 2011. Mr. Zhang deposed it was not until his receipt of the Response to Civil Claim that there was any suggestion that Ms. Soong did not have the mental capacity to enter the Contract or did not comprehend the nature of the Contract.
- [69] Since September 2011, the Zhangs' three younger children have been attending Lord Byng, and the Zhangs have been driving their children to and from the school. The Zhangs were only able to enrol the children at Lord Byng because Mr. Zhang had a binding contract of purchase for a property in the Lord Byng catchment area prior to February 2011.
- [70] Mr. Zhang deposed that the Point Grey Home is unique to him and his family for a number of reasons. The reasons include its views of the city and mountains, its proximity to Lord Byng, the number and design of the bedrooms and the basement suite, and its suitability for Mr. Zhang's family in the view of his "Feng Shui" professional. In addition, Mr. Zhang's best friend lives six houses away. Both he and Mr. Zhang travel a lot for business and have agreed to look after the other's family while the other is away.
- [71] An appraisal report of Grover, Elliott & Co. Ltd. dated February 17, 2012 lists nine comparable listings. Mr. Zhang deposed that the nine homes are not suitable for various reasons, including the particular comparable home's age and size, the noise in the area of the comparable home, the view, the distance from Lord Byng, and one comparable home's proximity to a church.
- [72] At the time of the Summary Trial hearing, Ms. Soong continued to live in the Point Grey Home with Charles. Charles was nearly 24 years old and an undergraduate student at UBC. Ms. Soong deposed that it is her hope to live in the Point Grey Home until her death. Mr. Soong continued to live in the extended care facility at UBC and was in critical condition. Ms. Soong deposed that she has become increasingly concerned about the care that her husband is receiving and wishes to bring him home to live with her and Charles. Ms. Peterson was 56 years old and continued to live four houses away from the Point Grey Home.

Ms. Soong deposed that she has no place to move to and lacks the motivation to look for and move into a new home. She deposed that she is very fearful that if she is forced to move, she will not be able to adjust and to remain self sufficient.

[73] Dr. Rosin is a geriatric psychiatrist who took over Ms. Soong's mental health care on April 12, 2011. Dr. Rosin wrote a letter which includes the following:

... Dr. D'Oyley saw [Ms. Soong] before referring her to me. ... Mrs. Soong was anxious about finances, given her husband's illness according to Dr. D'Oyley and apparently agreed to sell her home, but changed her mind.

I am unable to comment on allegations by Ms. Soong that undue influence may have been exerted on her by the real estate agent. However, if she was depressed during these transactions, it is possible that her anxiety and depression influenced her decision making. Given Mrs. Soong's stressors, her husband's ongoing illness and her own increasing medical and emotional frailty, compelling her to move from her home may well have a detrimental [e]ffect on her mental health. Moving is regarded as a major life event and stressor and moving under compulsion may well compound that stress.

[74] Also at the time of the Summary Trial hearing, Mr. Zhang and his family continued to live in the home near Eric Hamber. Mr. Zhang deposed that the lawsuit and the failure of the purchase to close has caused and will continue to cause him and his wife great anxiety and stress. He fears that if this sale does not complete, the school board will not permit his children to remain at Lord Byng. Mr. Zhang does not want to disrupt the children's studies by moving them yet again to another school.

[75] Also at the time of the Summary Trial hearing, there were apartments and houses for rent in the Point Grey area of Vancouver near the Point Grey Home and the extended care facility at UBC in which Mr. Soong was living. The Soongs were registered owners of a condominium in downtown Vancouver and Ms. Soong and Ms. Peterson were the registered owners of another condominium in the same building. Both condominium units are rented to tenants.

ANALYSIS

(a) Non est factum

[76] The leading case in Canada on the doctrine of non est factum is the decision by the Supreme Court of Canada in *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774.

[77] The relevant principles were recently summarized by Dardi J. in *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752 at para 100, as follows:

1. The burden of proving non est factum rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.

2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

[78] The analysis remains highly fact-specific and contextual. Estey J. wrote the following in *Marvco*, at 787:

I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of non est factum from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence. The policy considerations inherent in the plea of non est factum were well stated by Lord Wilberforce in his judgment in *Saunders*, [[1971] A.C. 1004], at pp. 1023-24:

The law has two conflicting objectives: relief to a signer whose consent is genuinely lacking ; protection to innocent third parties who have acted upon an apparently regular and properly executed document. Because each of these factors may involve questions of degree or shading any rule of law must represent a compromise and must allow to the court some flexibility in application.

[79] Mr. Boyle, as counsel for Mr. Zhang, argued that the Contract is not fundamentally different from what Ms. Soong says she thought it was. He argued that the difference between what Ms. Soong says she believed she was signing and the actual terms of the Contract did not go to the nature of the document, but either to its contents or to its legal consequences.

[80] For this point, Mr. Boyle relied on the following quote from G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 281-282:

... Most of the cases in which [non est factum] has been raised resulted in lack of success for the party seeking to rely on the plea. Various reasons were given for this. In some instances there was no mistake. In others the mistake that was made did not go to the nature of the document that was signed, but either to its contents or to its legal consequences, neither of which would suffice to satisfy the test in *Saunders*.

[emphasis added by Mr. Boyle]

- [81] I am not convinced that the underlined passage can support the emphasis Mr. Boyle put upon it. Far from being endorsed in *Saunders v. Anglia Building Society*, [1970] UKHL 5, [1971] A.C. 1004, the distinction drawn in *Fridman* between the nature of the document that was signed and its contents and consequences was rejected by the House of Lords in that case.
- [82] Lord Wilberforce described the historic distinction between a document's content and legal character as being "terminologically confusing and in substance illogical." Instead, the court held that the material question was whether there was an essential difference in substance or kind between the agreement the defendant thought he had signed and the agreement he had actually signed. Lord Wilberforce stated that other expressions could be used in place of "essentially", including "basically", "fundamentally", and "radically".
- [83] This part of the reasoning in *Saunders* was discussed with approval in *Marvco*, where Estey J., at 784, summarized the House of Lord's conclusion as follows:

it was the consensus of the several members of the House of Lords participating in the *Saunders* case, *supra*, that for the principle [non est factum] to operate, the document must be fundamentally different, either as to content, character or otherwise from the document that the signor intended to execute. Prior to this decision the plea of non est factum was only available if the mistake was as to the very nature or character of the transaction. It was not sufficient that there be a mistake as to the contents of the document: *Howatson v. Webb*, [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1; *Muskham Finance Ltd. V. Howard*, [1963] 1 Q.B. 904. This distinction was rejected by the House of Lords in favour of a more flexible test.

[emphasis added]

- [84] I have also considered the cases cited in *Fridman* in support of the distinction between a mistake as to the nature of a document and a mistake as to its contents or legal consequences. While some of the cases make obiter reference to such a distinction, in my view they do not support it.
- [85] As a result, as in *Saunders*, *Marvco*, and *Farrell Estates*, the material question in this case is whether Ms. Soong signed the Contract believing that it was fundamentally different from what the Contract provided.
- [86] Ms. Soong's evidence is that Ms. Ho told her many times before January 16, 2011 that, notwithstanding any documents she signed, she could stop the sale of the Point Grey Home at any time. Ms. Soong deposed that that was the understanding she had when she met with Ms. Ho on January 16, 2011 and signed the Contract. Ms. Ho's evidence conflicts with Ms. Soong's evidence on that point.

[87] Ms. Soong's claimed belief is not implausible. In the real estate context there are contracts which a party is entitled to rescind even after signing an otherwise binding contract, whether because of legislation or the terms of the contract itself. For example, the Real Estate Development Marketing Act, S.B.C. 2004, c. 41 ("REDMA"), provides as follows at s. 21:

21(1) A purchaser does not have a right of rescission under this section

- (a) if the purchaser is not entitled to receive a disclosure statement under this Act, or
 - (b) as a result of receiving an amendment to a disclosure statement in respect of a development property, including an amendment described in section 16 (1) (a) (ii), unless the purchaser has not previously received any disclosure statement in respect of that development property.
- (2) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, a purchaser of the development unit may rescind the purchase agreement by serving written notice of the rescission on the developer within 7 days after the later of
- (a) the date that the purchase agreement was made, and
 - (b) the date that the developer obtained, under section 15 (1) (c), a written statement from the purchaser acknowledging that the purchaser had an opportunity to read
 - (i) the disclosure statement provided under that section, or
 - (ii) a new disclosure statement, if any, described in section 16 (1) (a) (i).
- (3) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission on the developer.
- (4) A notice of rescission under subsection (2) or (3) must be served according to the regulations.
- (5) If a developer is served with a notice of rescission that complies with the requirements of subsections (2) to (4), the developer must immediately inform the person who is holding the purchaser's deposit under section 18.
- (6) If a person who is holding a purchaser's deposit under section 18 is informed, under subsection (5), of the purchaser's rescission, the person must promptly return the deposit to the purchaser.

- [88] In my view, a contract which can be rescinded at any time is fundamentally different from a legally binding contract which does not have such a right of rescission. Therefore, if I accept Ms. Soong's evidence over Ms. Ho's, the agreement Ms. Soong signed was fundamentally different than the agreement she thought she was signing, and the doctrine of non est factum could be available to her.
- [89] Mr. Boyle also argued that Mrs. Soong could not invoke non est factum because it was Ms. Ho, Ms. Soong's own "trusted advisor", who misrepresented the effect of the Contract, rather than Mr. Zhang or someone acting on his behalf.
- [90] For this argument, Mr. Boyle relied on passages from *Araki v. Wlodyka*, [1983] B.C.J. No. 2486 (S.C.), *Zeitler v. Zeitler Estate*, 2008 BCSC 775, as well as the decisions in *Marvco* and *Saunders* generally. The passage from the reasons for judgment of Ruttan J. in *Araki* is as follows:
- [45] A signer is not generally entitled to rely on someone he or she trusts to ensure the document is appropriate to the signer's intentions. In *Saunders v. Anglia*, the defendant was a 78-year-old woman who could not read because her glasses were broken, and who relied on her nephew and his friend and still was bound by her signature on a transfer of interest in land to that friend, though she had intended to transfer the interest to her nephew. In *Marvco*, the mortgagors relied on their daughter's common law husband in signing documents in a lawyer's office. The case at bar is not nearly so extreme. The plaintiff was not entitled to rely on an unrelated adverse party to advise her, even though he was in fact himself a lawyer, without his being asked to do so. As I have already held, there was no confidential relationship between Mrs. Araki and the defendant.
- [91] The passage from the reasons for judgment of Arnold Bailey J. in *Zeitler* is as follows:
- [82] As a competent, literate businessperson, I find that Dina cannot avoid the consequences of her actions by asserting now that she thought the documents meant other than they did, or by merely alleging that she relied on Alfons: *Van Der Ros v. Van Der Ros*, 2003 BCCA 270; *Toronto-Dominion Bank v. San-Ric Developments Ltd.* (1987), 11 B.C.L.R. (2d) 260 (S.C.).
- [92] The relevant passage from *Toronto-Dominion Bank*, referenced in *Zeitler*, reads as follows:
- There are all sorts of situations in which people sign documents upon somebody else's representation as to what is in them. Clients sign documents upon a lawyer's representations, parents sometimes sign upon their children's representations, spouses sign on the representations of the other spouse and so forth. If our trust is misplaced and the instrument is not what we intended, we have only ourselves to blame for having trusted someone who could not be trusted.

- [93] I do not accept these cases as establishing as a proposition of law that a party is barred from invoking the doctrine of non est factum solely because the misrepresentation or mistake as to the effect of the agreement in question came from the parties' own advisor. The source of the misrepresentation or mistake can certainly be a factor in the analysis, but it is not determinative.
- [94] In *Sullivan v. Crnogorac* (1983), 60 N.S.R. (2d) 201, for example, two Yugoslav men with limited ability to read and comprehend English were able to successfully invoke non est factum despite the fact that the agreement in question was drafted by their lawyer on their instructions, because the judge was satisfied that the lawyer had misunderstood the defendants' instructions and the defendants had not understood the agreement when it was explained to them.
- [95] The remaining question to consider, therefore, is whether Ms. Soong was careless in signing the Contract. On the evidence at the Summary Trial, I am unable to conclude that she was. In some cases, a party who can read English has been found to have been careless in signing documents provided by a trusted advisor without reading them. In this case, however, Ms. Soong could not read the Contract. It was reasonable in all circumstances for Ms. Soong to rely on her real estate agent, Ms. Ho, to tell her what the Contract said. If the court accepted Ms. Soong's evidence that Ms. Ho told her that the Contract permitted her to stop the sale of the Point Grey Home at any time, Ms. Soong signed a document with a fundamentally different legal effect from the Contract. If Ms. Ho told Ms. Soong that the Contract was a fundamentally different document from what she signed, Ms. Soong was not careless in signing it and the doctrine of non est factum could be available to her.
- [96] In short, because I cannot determine whether to prefer the evidence of Ms. Soong or Ms. Ho regarding what Ms. Soong was told about the Contract before and when she signed it, I am not able to find the facts necessary to determine whether Ms. Soong can avoid the Contract by relying on the doctrine of non est factum.
- (b) Counter-offer
- [97] Mr. Henshall, counsel for Ms. Soong, argued that Mr. Zhang rescinded the Contract by providing Ms. Soong with the addendum which set out that the Soongs were required to make repairs. Mr. Henshall argued that delivery of this document was an implied threat that Mr. Zhang would not remove his subject clauses if she did not make the repairs. Mr. Henshall argued that Ms. Soong's refusal to sign the addendum was an acceptance of that rescission and ended the obligations under the Contract.
- [98] I reject this argument. There is nothing in the addendum which states that it will rescind the Contract. Mr. Zhang was entitled to ask Ms. Soong if the Soongs would agree to modify the terms of the Contract. Asking that did not end the obligations of the parties under the Contract.

(c) Specific Performance

- [99] Mr. Henshall argued that the court should not grant Mr. Zhang the relief of specific performance. Mr. Henshall argued that specific performance should be refused, both on the basis that damages are an adequate remedy, and that specific performance would cause hardship to Ms. Soong.
- (i) Adequacy of Damages
- [100] A party seeking specific performance of a contract for the purchase and sale of land must establish that damages would not be an adequate remedy for them and that there is "some fair, real and substantial justification for the claim": see *Semelhago v. Paramadevan*, [1996], 2 S.C.R. 415, and *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633.
- [101] In *Taberner v. Ernest & Twins Developments Inc.*, 2001 BCSC 367, Lowry J. (as he then was) considered whether a Vancouver condominium was "sufficiently unique" to warrant specific performance. He found, at para. 9, that the "combination of features are not to be found in any other property shown to have been on the market" and that "they probably could not have been substantially duplicated in another available condominium unit."
- [102] In *Ali v. 656527 B.C. Ltd.*, 2004 CarswellBC 1823, aff'd 2004 BCCA 350, Beames J. held that a property was unique. The property was a custom-built 6,000 square foot home, located in an exclusive pocket in a neighbourhood unlike any other in the municipality. There was no evidence of the availability of comparable substitutes. Beames J. found that the property was "sufficiently unique" to support the remedy of specific performance. The appeal was dismissed on the basis that the finding was reasonably supported by the evidence. Lowry J.A. wrote, at para. 29, that the determination of whether the property is unique can be based on both objective factors and the plaintiff's subjective considerations.
- [103] In *Chan v. Tu*, 2006 BCSC 934, Goepel J. granted specific performance of a contract for the purchase and sale of a residential property. Goepel J. wrote that he was "satisfied that this home, for this family, is unique and that no substitute was readily available". The home was in a particular school district, with a garden, had five bedrooms, was less than 20 years old, and was in a particular price range. The plaintiff's evidence was that he did not find any comparable homes in the area that were acceptable to him, but there was no objective evidence of the availability of comparable homes.
- [104] In *Li v. Au*, 2006 BCSC 671, Loo J. refused the remedy of specific performance. There was objective evidence of other comparable homes, including two properties on the same street, each of which the plaintiff had rejected for subjective reasons. Loo J. wrote that there did not have to be identical homes readily available, and she concluded that the home was not unique.
- [105] In *Sihota v. Soo*, 2010 BCSC 886, Bruce J. awarded specific performance. The property was a residential lot in a particular area of Vancouver, close to a school, the plaintiff's parents' home, and other amenities. The defendants led evidence of 22 other properties which they argued were comparable. Bruce J. wrote that the evidence "is sufficient to satisfy me that

the property is unique in the sense that a comparable property that would meet all of the plaintiff's requirements is not readily available." In addition, damages were not an adequate remedy because one of the defendants did not have the ability to pay damages.

[106] In *Serebrennikov v. Sawyer's Landing Investments Ltd.*, 2010 BCSC 1276, the plaintiff had purchased a replacement property. Goepel J. considered the similarities and differences between the replacement home and the home which was the subject of the contract in question. Goepel J. held that the purchase of the second home "objectively demonstrated" that there was an acceptable substitute for the home which was the subject of the contract and denied specific performance.

[107] The question for the court is whether there is some fair, real, and substantial justification for Mr. Zhang's claim for specific performance. In this case, there are many features which are combined in the Point Grey Home, including the proximity to Lord Byng and the house of Mr. Zhang's friend, the view, the number and configuration of bedrooms and other rooms, the age of the house, and the noise in the area. This home, for Mr. Zhang, is unique, and no suitable substitute is readily available. As a result, on the evidence at the Summary Trial, I reject the argument that damages will be an adequate remedy for Mr. Zhang.

(ii) Hardship

[108] The remedy of specific performance is an equitable remedy and is discretionary. Mr. Henshall argued that an order for specific performance should be denied because it would cause Ms. Soong undue hardship. Mr. Boyle argued that the hardship Ms. Soong is suffering arises from circumstances unrelated to the Contract, like Mr. Soong's health.

[109] In certain cases, the court has refused equitable relief on the basis of hardship. That is discussed in *I.C.F. Spry, The Principles of Equitable Remedies*, 6th ed. (Sydney: Law Book Co., 2001) at 198, as follows:

But if the hardship suffered by the defendant, if specific performance took place, would be so much greater than the detriment that would be suffered by the plaintiff if he were confined to remedies in damages that it would be oppressive or unjust to grant relief, specific performance is denied. In these regards there must be a balancing of the interests of the parties ... in order to determine what course is most just in the circumstances.

[110] In *1110049 Ontario Ltd. v. Exclusive Diamonds Inc.* (1995), 25 O.R. (3d) 417 (C.A.), the court refused specific performance on the basis that damages would be an adequate remedy and, in addition, on the basis of hardship. In that case, the parties had agreed to the purchase and sale of a jewellery store. The vendor argued that the agreement was unconscionable because he had signed it while depressed and disoriented after the murder of his wife. The court rejected the argument that the agreement was unconscionable, but still denied specific performance. At 419, McKinlay J.A. wrote as follows:

In addition, hardship which would result from an order to specifically perform a contract is a factor to be taken into consideration in determining what remedy to grant. In this case there is an added reason to refuse specific performance ... While the evidence does not indicate that any improper pressure was exerted on Mr. Run by the respondent, his vulnerability at the time was manifest. There is no doubt that substantial hardship would result to Mr. Run by forcing a sale of his business which he now wishes to continue operating.

- [111] In *Bowser v. Prager*, [1999] O.J. No. 1438 (S.C.J.), Weekes J. refused specific performance of an agreement to purchase a residential property and awarded damages instead. Weekes J. found that the property was unique, but refused specific performance on the basis of hardship. The seller was mentally competent, but was depressed when he signed the contract. He was on social assistance and had been released about a month before from involuntary committal to a psychiatric institution. He had two sizable debts which he was unable to pay. He could not afford similar accommodation in the area and was at risk of becoming homeless. Weeks J. acknowledged that the buyer would also suffer hardship, but less than the seller in the circumstances.
- [112] In *Ballenas Project Management Ltd. v. P.S.D. Enterprises Ltd.*, 2007 BCSC 7, aff'd 2007 BCCA 166, Truscott J. wrote at para. 80 that the doctrine of hardship "only operates in equity where reasonable expectations are not denied and fundamental goals of contract are not subverted."
- [113] In this case, Mr. Zhang entered into the Contract without any knowledge that Ms. Soong either misunderstood the terms of the Contract or suffered from depression. Damages would not be an adequate remedy for him.
- [114] In considering whether the court should deny the remedy of specific performance to Mr. Zhang on the basis of the hardship to Ms. Soong, the court must consider the consequences to both parties, and determine what course is most just in the circumstances.
- [115] In 1110049 Ontario Ltd., the Court of Appeal referred to the seller's vulnerability at the time as being "manifest." While the degree of knowledge of the purchaser is not discussed in the Court of Appeal's reasons for judgment, the seller's wife worked in the jewellery store and had been murdered. The purchaser had another jewellery store in the same mall. It seems likely that the purchaser knew about the murder and the seller's vulnerability. In contrast, Mr. Zhang had no reason to think that Ms. Soong was vulnerable at the time of the Contract. In addition, the Contract deals with residential property rather than a business, and damages would not be an adequate remedy.
- [116] In contrast to *Bowser*, Ms. Soong is not at risk of becoming homeless.
- [117] Mr. Zhang acted appropriately in connection with the Contract. If the court finds that Ms. Soong knew when she signed the Contract that it created a binding agreement, the balance of justice might tip in favour of Mr. Zhang and specific performance might be the appropriate remedy.

[118] The conflicting evidence on the question of what Ms. Soong had been told and believed when she signed the Contract, however, makes it impossible for the court to make the findings of fact necessary to determine the question of the availability of the remedy of specific performance.

(d) Next Steps in Lawsuit

[119] Mr. Boyle argued that, if the court is unable to grant judgment, there should be an expedited trial.

[120] Supreme Court Civil Rule 9-7(17) provides that, if the court is unable to grant judgement and considers that the proceeding ought to be expedited, the court may order the trial of a proceeding generally or on an issue, and may make any order the court considers will further the object of the Rules.

[121] In this case, the question of what Ms. Soong believed she was signing when she signed the Contract depends on the court's view of the evidence of Ms. Soong and Ms. Ho. It is unfortunate, but unavoidable, that the court needs to hear the evidence of Ms. Soong, despite her present depression and stressors.

[122] In these circumstances, it is appropriate for the proceeding to be expedited, with the affidavits of Ms. Soong and Ms. Ho to stand as their direct evidence, and for them to be cross-examined before the court.

[123] It would be most efficient if the cross-examinations can proceed before me, but it may not be possible to schedule the necessary hearing in a timely way. As a result, I ask counsel to schedule a hearing before me for one hour at 9 a.m. on a day that I am available in Vancouver. I ask that at that time, counsel bring their calendars, and provide me with their estimate of how long they would expect to require for completion of an expedited trial. I will then seek to schedule the necessary hearing before me or another judge.

"Gray J."

The Honourable Madam Justice Gray

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