

2. THIS COURT ORDERS and ADJUDGES THAT the Defendant pay to the Plaintiff \$25,000.00 for costs.

This Judgment bears interest at the rate of 4% per annum commencing August 26, 2005.


DAVID EVANS
REGISTRAR

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO.:
LE / DANS LE REGISTRE NO.:

MAR 17 2006

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:



Court File No. 04-CV-262457 SR

JI JIANG CHENG

- and -

YEN TRANG LUU

Plaintiff

Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

JUDGMENT

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Solicitors for the Defendant

FRIDAY, AUGUST 26, 2005

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-- Upon commencing at 2:15 p.m.

R E A S O N S F O R J U D G M E N T

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Harvison Young J., (Orally):

The plaintiff, Ji Jiang Cheng, seeks to recover \$50,000 from the defendant Yen Trang Luu. He alleges that this amount was promised to him by the defendant in return for his agreement in 1998 to retire his shares in the corporation that had been created to hold and operate the restaurant business, which they were to operate together. In addition, he bases his claim on an agreement or promissory note dated October 1999 and signed by the defendant which acknowledges the 1998 agreement and agrees to pay the above amount plus interest back by 2002. This did not happen, giving rise to this action for breach of contract.

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The Facts

The context of these legal facts is important to an understanding of this case and, in my view, to an understanding of the evidence of the witnesses. This context is, for the most part, not in dispute. By late
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1997, the plaintiff and the defendant's daughter Tanya had been dating for almost a decade. According to Tanya's uncontradicted evidence, they were going to get married. At the same time, according to the evidence, the plaintiff and the defendant's son Tommy were planning to buy, renovate, and operate a restaurant. Both the plaintiff and his mother and the Luu family were to be involved, in various ways, in the venture. Put another way, it was to be a family restaurant. A corporation was created for this purpose whose articles provided that Tommy held 75 per cent of the shares and the plaintiff the other 25 per cent. The purchase of the restaurant (which had been operated by Mr. Kwok under the Chinese name of The Great Shanghai Restaurant) closed in March 1998, and renovations began shortly thereafter. The restaurant opened late in the summer of 1998. Ultimately, it closed in 2003. But by July 1998, Tanya Luu and Ji Jiang Cheng had ended their relationship and the plaintiff had ceased to have any involvement in the planning, renovation or operation of the business. He was willing to return his shares but wanted the \$50,000 returned to him, which he had put into the restaurant venture. Some seven years later, the families have remained in conflict over this and this trial is one manifestation of this conflict.

The Legal Issues

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In order to succeed, the plaintiff must show either that the alleged agreement of 1998 constituted a contract between him and the defendant to pay him \$50,000 in order to retire his shares, or that the 1999 agreement was a promissory note and an enforceable contract in its own right. I will deal with these in turn.

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Before reviewing the evidence in more detail in relation to the issues to be determined, a few brief comments on the evidence in general are warranted. With the exception of Ms. Maryhelen Tso, the Luu family solicitor, whose evidence was clear, consistent and helpful to the court, I did not find any of the witnesses' evidence to be entirely reliable. In particular, and somewhat remarkably, Yen, Tommy and Tanya Luu gave evidence which contradicted each others' in some significant respects. Nevertheless, much of the testimony formed a generally consistent picture upon which I can rely in order to resolve the issues before this court.

The Alleged Offer in 1998 to Buy Back the Shares

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At the outset, I find that the plaintiff, as evidenced by the bankbooks admitted into evidence and by much of the evidence given by the defendant's own witnesses, did put \$50,000 into the nascent restaurant in early 1998.

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This money came out of the plaintiff's account within days of the incorporation of the business which provided that the plaintiff would hold 25 per cent of the shares and Tommy Luu 75 per cent. In my view, nothing turns on the ultimate source of the funds that Mr. Cheng used, whether he borrowed the money from his mother, a bank, or no one at all. Tommy Luu is the only witness who denied that Mr. Cheng put any money into the business and I reject his evidence on that point. While the defendant took the position that Mr. Cheng had paid this money to Anthony Kwok, from whom the restaurant was purchased, there was no solid evidence to support this and Mr. Kwok did not testify. Tanya Luu mentioned it only as a hypothesis. I do not, however, accept the plaintiff's mother's evidence that the money went directly to Mr. Luu Senior. Much of her testimony was very vague and she frequently asserted her age as a reason for her inability to recall. Nevertheless, she recalled very specifically having seen the cheques made out to the defendant. I find this somewhat incredible and I reject it. In short, while I am satisfied that the money was applied to the restaurant venture, I cannot find that it was paid directly to the defendant, Mr. Luu Senior.

The offer to buy back the shares presents its own difficulties. According to Mr. Cheng's evidence, the offer came around April from Mr. Luu Senior when the

5 plaintiff was asked for more money and was concerned that
the venture would not be as successful as the Luus
anticipated. Mr. Luu Senior denies having made such an
offer and, indeed, seemed rather vague about the details of
10 the legal structure in general concerning the business.
Accordingly, I am not able to find on a balance of
probabilities that Mr. Luu Senior offered to buy the shares
back from Mr. Cheng for \$50,000. I do, however, find that
such an agreement was formed at some point during the spring
or summer between Tommy Luu and Mr. Cheng. This is
15 corroborated by Ms. Tso's evidence that Tommy Luu had told
her in mid-1998 that Mr. Cheng was no longer involved with
the business, that he wanted to buy back the shares but did
not have the money to do so at that point. It is also
evidenced by the agreement or promissory note dated October
20 29, 1999. I do accept Mr. Cheng's evidence that by 1999,
when he had not received any money from Mr. Luu, he was
concerned and wanted something in writing. I do not find
this to be inconsistent with Tanya Luu's evidence that the
25 plaintiff had called her and told her that his mother was
anxious and wanted her money back. The difficulty in
pinpointing precise individuals as the respective promisees
and promisors has been a difficulty which is a theme of this
trial, but it may again be helpful to refer to the broader
30 context. This was to be a family venture on both sides, and

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it is thus not surprising that the evidence suggests a sense on the part of the Luus, or at least Tanya and her father, that honouring this agreement was a family obligation. Similarly, it should not be surprising that the plaintiff's mother was also pressing for the honouring of the 1998 agreement to repay the \$50,000 in return for the shares.

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The Written Agreement of October 29, 1999

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This brings me to the written agreement of October 29th, 1999. The defendant and the plaintiff presented very different versions of the circumstances surrounding this written agreement, with the plaintiff and his mother insisting that it was drafted at a meeting with the two of them, Tanya and Mr. Luu Senior present. The defendant's version is that the plaintiff called Tanya and asked her to take a document to her dad for him to sign and that she did so.

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This version makes much more sense on the facts and I accept this version. Having said this, and for the reasons that follow, it does not matter where or at whose instigation it was signed.

Was it a Promissory Note?

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Having heard the submissions of the parties, I find that this document is a promissory note within s.

176(1) of the *Bills of Exchange Act*. It is an unconditional promise in writing by Tanya and Yen Luu to pay Mr. Cheng a total amount of \$55,000 plus interest. This is a sum certain within the meaning of the statute.

The Defences

There are two possible defences, non est factum and absence of consideration, and I find that on the facts, both must fail.

As a preliminary matter, I note that the defendant did not admit that his signature was on the note until the eve of trial, and amended his pleadings at the beginning of the trial to add these defences.

Non est factum

Mr. Quance argued persuasively for the defendant that he could not be bound to a document that was written in a language that he did not understand, which he did not read, and with respect to which he did not have independent legal advice. Having read the authorities to which I was referred by both parties, however, I am satisfied that the defence cannot apply here and that the leading case of *Marvco v. Harris* does apply. It is clear that the defence is a restricted one and must not be attributable to "carelessness" by not reading the document

5 or by not taking steps to ascertain its nature. Mr. Luu admitted under cross-examination that he recognized the names of the parties and the amounts of money involved. This is not a document that was "fundamentally different from that which he thought he was signing", and there I am referring to *Shopper's Trust v. Dynamic Homes*. No reason was given as to why he or Tanya did not take a couple of days to consult Tommy Luu or, indeed, Ms. Tso, the family solicitor. The defendant also stated that he relied on his daughter's reassurances that "Daddy, I will not cause you any harm" and that he blindly signed the agreement. I am unable to accept the defendant's submission that this case is distinguishable from the cases cited by the plaintiff because here the plaintiff is not an "innocent third party who has relied on the promise" as in *Marvco* and other cases. 10 As a matter of principle, the equities in favour of the plaintiff, if anything, are rendered stronger where the promisee is an individual lender rather than a bank. The case cited by the defendant where the defence was allowed, *Royal Bank of Canada v. Wood*, is distinguishable from the present one on the fact that the defendant mother in that case spoke no English and the note was signed at the bank where the documents were put in front of them, not 15 explained, and with a clear sense of urgency. The facts in that case required that it all be done in fifteen minutes. 20 25 30

335
Reasons for Judgment - Harvison Young J.

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Here, the defendant was given the document by his own daughter in his own surroundings. It was late at night. No reason is given for not waiting until the next day when Mr. Luu Senior could have called Ms. Tso and or Tommy Luu. Accordingly, the defence of *non est factum* must fail.

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The Consideration Defence:

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As indicated above, I found that the plaintiff invested \$50,000 in the restaurant venture. As I have noted above, it does not matter where he obtained the funds or specifically whether they were lent or given to him by his mother. The plaintiff was confirmed as a shareholder. The promissory note signed by the defendant and his daughter acknowledged this investment and the terms of the oral agreement in 1998 that the \$50,000 would be returned and the plaintiff's shares retired. The plaintiff had relied on the defendant's promise to pay \$50,000 in return for ceasing to be involved in the restaurant, and moreover, he delayed enforcement. In addition, the
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consideration does not have to flow from the promisor to the promisee. It is sufficient if the promisee "does some act from which a third person benefits and which he would not have done but for the promise or some act which is a detriment to the promisee". Payment of the money to Mr. Cheng and the release of the shares was clearly

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Reasons for Judgment - Harvison Young J.

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something that Tommy Luu wanted but, as he had told Ms. Tso, could not afford. Moreover, as the restaurant venture was, in conception and operation, a collaborative family restaurant, and Mr. Luu did finance a great deal of it, discharge of this obligation was at the very least an indirect benefit to him as well. Accordingly, I find that there was consideration for the promissory note.

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For the foregoing reasons, judgment will issue for the plaintiff in the amount of \$50,000. Order to go accordingly.

-- Reporter's note: Issue of costs spoken to

-- Court adjourned at 3:05 p.m.

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THIS IS TO CERTIFY that the foregoing is a true and accurate transcript of my shorthand notes taken herein, to the best of my skill, ability and understanding.

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VANESSA GIORNO, OFFICIAL COURT REPORTER

JI JIANG CHENG

- and -

YEN TRANG LUU

PLAINTIFF

Trial Aug 22/05 10am T3
DEFENDANT

Court File No. 04-CV-262457SR

Aug 22/05

OTG on consent.
OTG excluding witnesses for duration
of the trial.

OTG on consent amending the statement
of defence as per def's ~~stated~~ motion.

Harrison Young J.

Aug 26/05

Trial Aug 22 - Aug 24. Judgment for the
claimant in the amount of \$50,000; order
to go accordingly. OTG for pre & post
judgement according to the terms of
the Cts of Justice Act. Cost submissions
to be agreed to if possible and, in any event to
be submitted to me in writing by Sept 15/05.
Harrison Young J.

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto



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Solicitors for the Plaintiff

COURT FILE NO.: 04-CV-262457SR

DATE: 20051128

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JI JIANG CHENG v. YEN TRANG LUU

BEFORE: MADAM JUSTICE HARVISON YOUNG

COUNSEL: YAN DAVID PAYNE for the Plaintiff
RICHARD QUANCE for the Defendant

ENDORSEMENT ON COSTS

[1] After reviewing submissions of parties, I order that the defendant pay costs to the plaintiff in the amount of \$25,000 plus prepayment interest from the date of filing of the signing of the promissory note. In setting the costs, I have considered the fact that the amount in issue was \$50,000, that the plaintiff had made an offer to settle while the defendant had not, and that the refusal to admit the authenticity of the note put the plaintiff to additional pre-trial expense. I have also considered possible duplications in the bill of costs, as well as the principle of proportionality of costs in simplified rules matters.


Harvison Young J.

DATE: November 28, 2005