COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kong v. Saunders,*
2014 BCCA 508

Date: 20141222
Docket: CA041485

Between:

Kam Shi Kong and Kim Hoi Kong

Respondents
(Plaintiffs)

And

Pamela Christine Saunders

Appellant
(Defendant)

And

Carlo Chung Wing Kong

(Defendant/Third Party)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia
dated December 9, 2013 (*Kong v. Kong*, 2013 BCSC 2252,
Vancouver Docket S129070)

Counsel for the Appellant:	D.R. McLeod
Counsel for the Respondents:	G.H. Dabbs
Place and Date of Hearing:	Vancouver, British Columbia November 12, 2014
Place and Date of Judgment:	Vancouver, British Columbia December 22, 2014

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Willcock

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Summary:

The respondents lent a sum of money to their son and the appellant, his former spouse, to assist them in purchasing a matrimonial home. The loan was evidenced by a promissory note which was expressed to be payable on demand. After the breakdown of the marriage 14 years later, the respondents demanded repayment of the monies they asserted were owing under the promissory note and commenced the underlying action to recover them. In ordering that the respondents be repaid the funds out of the proceeds of the sale of the house, the trial judge held that the action was not statute barred because there was an understanding that demand would not be made until the house was sold. Held: appeal allowed. The claim is statute barred. As the loan was payable on demand, the limitation period began to run when the loan was made and expired before the action was commenced. There was no agreement that demand would not be made prior to the sale of the house, and a unilateral understanding to that effect by the respondents is not sufficient to prevent the running of the limitation period.

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Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This case involves the increasingly common situation where the parents of one of the parties to a marriage or a common law relationship advance funds to the couple for the purpose of assisting them in acquiring a condominium or a house. When the marriage or relationship of the younger couple comes to an end, issues often arise in connection with the question of whether the funds advanced by the parents are to be returned to them or whether both parties of the now separated couple are entitled to retain the benefit of the funds.

[2] One of the common issues is whether the advance of funds was a loan or a gift. Another issue that can arise, where it was a loan, is whether enforcement of the loan is statute barred as a result of the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266, rep. by S.B.C. 2012, c. 13, effective June 1, 2013.

[3] Both of these issues, and two other issues, were present in this case. The judge resolved all of the issues in favour of the plaintiffs, the parents of Carlo Chung Wing Kong (Mr. Kong Jr.), and effectively granted judgment against Mr. Kong Jr. and his former wife, the appellant, Pamela Christine Saunders.

[4] While all four of those issues are also raised on this appeal, it is my view that the appeal can be resolved on the basis of the limitation issue. It is therefore unnecessary for me to discuss the other three issues.

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Background

[5] Prior to the commencement of the relationship with Ms. Saunders, Mr. Kong Jr. had been the registered owner of two properties as a joint tenant with his parents. Mr. and Mrs. Kong had provided all of the funds for the purchase of each of the properties, the second of which was purchased after the sale of the first. The evidence at the trial regarding the character of the advancement of these funds and the extent of Mr. Kong Jr.'s beneficial interest in these properties was somewhat conflicting. The conflict in the evidence does not need to be resolved for the purpose of this appeal.

[6] The second property was sold a little more than a year after Mr. Kong Jr. and Ms. Saunders began living in a common law relationship. The net proceeds from the sale of the property were approximately $160,000. These funds were used for the deposit and the down payment for the purchase of a new property on East 8th Avenue in Vancouver, registered in the names of Mr. Kong Jr. and Ms. Saunders. This property became the matrimonial home of Mr. Kong Jr. and Ms. Saunders, who married approximately one year later.

[7] When Mr. Kong Jr. and Ms. Saunders signed the conveyancing and mortgage documents, they also signed a promissory note dated December 5, 1997 in the amount of $160,000 in favour of Mr. and Mrs. Kong, which read as follows:

> FOR VALUE RECEIVED, I/WE, CARLO KONG also known as CARLO CHUNG WING KONG, and PAMELA SAUNDERS also known as PAMELA CHRISTINE SAUNDERS, the undersigned promise to pay to KAM SHI KONG and KIM HOI KONG or order at the ABOVE ADDRESS or as directed by them, the sum of ONE HUNDRED SIXTY THOUSAND ($160,000.00) DOLLARS (hereinafter called the "principal") without interest.
>
> The Lenders KAM SHI KONG and KIM HOI KONG shall have the right to demand payment of all or any of the principal of this PROMISSORY NOTE at anytime.

> PROVIDED, HOWEVER, that should the undersigned, transfer, sell, assign, hypothecate or in any way deal with his/her interest in the [East 8th Avenue] property, then the full sum of $160,000.00 owing on this PROMISSORY NOTE, shall immediately become due and payable.

[8] The purchase price for the East 8th Avenue property was $319,000. The balance of the purchase price was paid by way of mortgage financing from Citizens Bank of Canada in the amount of $164,000.

[9] In February 2005, Mr. Kong Jr. and Ms. Saunders granted a second mortgage in the amount of $200,000 against the property in favour of The Toronto-Dominion Bank. The mortgage proceeds were used to finance renovations to the house. In October of the same year, Mr. Kong Jr. and Ms. Saunders refinanced the two mortgages and granted a new $370,000 mortgage to The Toronto-Dominion Bank.

[10] In May 2011, Mr. Kong Jr. and Ms. Saunders separated. In November 2011, a lawyer acting on behalf of Mr. and Mrs. Kong made demand on Mr. Kong Jr. and Ms. Saunders for repayment of the $160,000 they asserted was owing under the promissory note.

[11] The property was sold in the fall of 2012, and $160,000 of the sale proceeds were placed in a lawyer's trust account to be held pending the outcome of this matter.

[12] On December 21, 2012, Mr. and Mrs. Kong commenced the underlying action, seeking judgment against Mr. Kong Jr. and Ms. Saunders in the amount of $160,000.

Decision of the Trial Judge

[13] In reasons for judgment indexed as 2013 BCSC 2252, the trial judge held that the $160,000 had been advanced by Mr. and Mrs. Kong as a loan, and was not a gift. He rejected two defences advanced by Ms. Saunders asserting a lack of

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consideration and non-compliance with the *Bills of Exchange Act*, R.S.C. 1985, c. B-4.

[14] At the trial, it was the position of Mr. and Mrs. Kong that the six-year limitation period under the *Limitation Act* applicable to a claim on the promissory note did not begin to run until either the property was sold or a demand for payment was made. They relied on the decisions in *Berry v. Page* (1989), 60 D.L.R. (4th) 289, 38 B.C.L.R. (2d) 244 (C.A.) and *C.B. v. P.R.R. and L.D.R.; P.R.R. v. L.D.R.*, 2003 BCSC 1107. The primary argument of Ms. Saunders was that the loan became immediately due and payable under the terms of the promissory note when Mr. Kong Jr. and Ms. Saunders granted the three mortgages against the property, all of which were granted more than six years before Mr. and Mrs. Kong commenced their action.

[15] The reasoning of the trial judge on this issue was contained in the following paragraph:

> [23] On this issue, I agree with the parents' legal arguments, and, in particular, I see close parallels between the present case and *C.B. v. P.R.R.* and *L.D.R.; P.R.R. v. L.D.R.*, 2003 BCSC 1107. In that case, the court found that the mother was seeking to recover a loan that was repayable on the sale of the property. The *Limitation Act* did not apply. My interpretation of the Promissory Note and the understanding between the parties in this case is the same. The Kong parents were entitled to demand repayment of their loan on the sale of 2005 East 8th Avenue. Both their demand and the present law suit are not statute barred and the *Limitation Act* does not defeat their claim.

[16] As a result, the judge ordered that Mr. and Mrs. Kong were entitled to the $160,000 held in trust, together with pre-judgment interest and costs.

Discussion

[17] The previous *Limitation Act* applies to this case because it was still in effect at all materials times prior to the commencement of the underlying action. Under s. 3(5) of that Act, the residual six-year limitation period, which applies in this case, began to run on the date on which the right to bring the action arose.

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[18] The jurisprudence has established a distinction between demand loans and contingent loans in respect of the commencement of the running of the limitation period. Demand loans are, of course, loans payable on demand. Contingent loans are loans that are payable on a future date or upon the occurrence of a specified event.

[19] The limitation period in respect of contingent loans begins to run on the repayment date or the occurrence of the contingency. This is because an action for repayment of the loan cannot be brought prior to the repayment date or the occurrence of the contingency, as the case may be.

[20] It may seem intuitive that the limitation period in respect of demand loans begins to run on the date of the demand for repayment, but this is not so. The reason is that the law has developed in a manner that it is not necessary for demand to be made before action can be brought for repayment of the loan. This means that an action may be brought at any time after the demand loan is made. As a result, the limitation period begins to run on the day the loan is made.

[21] The above principles have been previously accepted by this Court in one of the cases relied upon by Mr. and Mrs. Kong, *Berry v. Page*, where Mr. Justice Wallace said the following at 247 (B.C.L.R.):

> The characterization of the loan as either a contingent loan or a demand loan determines whether or not the action is statute barred under the Limitation Act. It is well established that the cause of action accrues, and the statute of limitations runs, from the earliest time at which repayment can be required (Chitty on Contracts, 25th ed. (1983), vol. I, para. 1843, p. 1024). For a demand loan, the statute of limitations runs as of the date of the advancement of the funds, and not from the date of the demand. No demand is necessary in order for the cause of action to arise: *Barclay Const. Corp. v. Bank of Montreal* (1988), 28 B.C.L.R. (2d) 376 at 381, [1988] 6 W.W.R. 707, 40 B.L.R. 150 (S.C.); *Heubach v. Sprague*, 41 Man. R. 292, [1933] 2 W.W.R. 99, [1933] 3 D.L.R. 647 (C.A.).
>
> Case law supports the proposition that if money is lent to be repaid at a particular time in the future, or upon the happening of a specified contingency, then the cause of action arises at the time specified or upon the happening of the contingency: *Ingrebretsen v. Christensen*, 37 Man. R. 93, [1927] 3 W.W.R. 135 (C.A.); *Re Gould; Ex parte Garvey*, [1940] O.R. 250, [1940] 3 D.L.R. 12 (C.A.). In these circumstances, the cause of action does

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> not arise, and the statute of limitations does not run until the contingency is satisfied.

[22] A more recent decision of this Court, *Ewachniuk Estate v. Ewachniuk*, 2011 BCCA 510, has also acknowledged these principles. In that case, the Court held that a loan payable one year after demand fell within the category of a contingent loan, with the result that the limitation period did not begin running on the day the loan was made. The reason is that an action could not have been brought for repayment of the loan on the day the loan was made because the demand and the lapse of time after the demand were conditions precedent to the bringing of an action.

[23] The common law is the same in other provinces: see, for example, *Johnson v. Johnson*, 2012 SKCA 87. Interestingly, with the new *Limitation Act*, British Columbia has joined Alberta and Ontario in specifically addressing the limitation period for a demand obligation. Section 14 of the new *Act* effectively provides that the limitation period does not begin running until demand is made.

[24] The promissory note in the present case is, on its face, payable on demand. In my opinion, unless there was evidence that the agreement between the parties was that demand would not be made until the happening of a certain event or the repayment terms were otherwise than as stated in the promissory note, the limitation period began running on the day the loan was made and expired well before Mr. and Mrs. Kong commenced their action.

[25] As they did before the trial judge, Mr. and Mrs. Kong say that the present situation is the same as the circumstances in *C.B. v. P.R.R.* In that case, the plaintiff and her deceased husband had advanced funds to their daughter and her husband to assist them in buying a house. The daughter and her husband first granted the parents a demand mortgage for the amount of the funds advanced. Upon the request of the daughter and her husband, the mortgage was discharged and replaced with two promissory notes expressed to be payable on demand. Subsequently, on the advice of an accountant who did not think the promissory

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notes were in proper form, two new promissory notes were signed. The new promissory notes were expressed to be payable "after date" but no date was specified.

[26] After holding that the advance of funds was a loan and not a gift, Madam Justice Baker held that the limitation period had not expired because she found it was a term of the loan that it would not be payable until the property in question had been sold. I do not take any issue with this conclusion because the judge made a finding that the agreement between the parties was that demand could not be made for repayment of the loan until the property was sold.

[27] In the present case, the judge found that his interpretation of the promissory note and understanding between the parties was the same as in *C.B. v. P.R.R.* However, there is no doubt that, on the proper interpretation of the promissory note, it was payable on demand. There was no evidence in this case of any agreement or understanding between the parties that demand could not be made for repayment of the loan prior to the sale of the property.

[28] What Mrs. Kong testified in this regard was as follows:

> Q Now, what was your intention as to when the funds should be repaid?
> A It was not specifically mentioned, but since -- but when the property was sold then it should be returned to me.

All Mr. Kong Jr. said in his testimony was that if the property was sold, his understanding was that the money would be repaid to his parents. There is no evidence of any agreement or understanding on the part of Ms. Saunders that demand would not be made until the property was sold.

[29] On appeal, Mr. and Mrs. Kong argue that, in cases involving loans to family members, it should be sufficient for the plaintiffs to have had a unilateral understanding that they would not make demand until the property was sold. Mr. and Mrs. Kong point to *Berry v. Page*, and say all the trial judge found was that the parties "anticipated" the loan would be repaid when the property in question was

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sold, and the court held the limitation period did not begin running until the property was sold.

[30] In my opinion, *Berry v. Page* does not support the proposition that a unilateral understanding is sufficient. In that case, it was the anticipation of both parties that the loan (which was not expressed to be payable on demand) would be payable upon the sale of the property, and it did not involve a unilateral understanding. In addition, although the word "anticipated" may have been used by the trial judge, this Court considered there to have been an agreement between the parties (at 248, B.C.L.R.):

> In my view, the trial judge was correct to view the loan as one where the parties agreed it would be repaid at a future time determined by reference to a contingent event – i.e., the sale of the Gabriola property …
>
> [Emphasis added.]

[31] As a matter of principle, a unilateral understanding that the plaintiffs did not intend to demand repayment of the loan until the occurrence of a certain event cannot support a conclusion that the limitation period does not begin running until the event has occurred. The limitation period begins to run on the date on which the right to bring the action arose. An intention not to make demand until the occurrence of a certain event does not affect the right to bring an action.

[32] The phrase "the right to bring the action" is not just relevant to the issue of the running of the limitation period. It is also relevant to the issue of whether the defendant can defend the action as being premature because the right to bring it has not yet arisen. The phrase must have the same meaning for the purposes of both issues. An action cannot be defended as being premature on the basis of the plaintiff's unilateral intention not to make demand until the occurrence of a certain event. The defendant cannot enforce such a unilateral intention.

[33] In my view, a unilateral understanding that demand will not be made until the happening of a contingency is not sufficient to delay the running of the limitation period. There must be an agreement to that effect. It must be of such a nature that the defendant could defend the action as being premature if it was brought prior to

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the happening of the contingency on the basis that the right to bring the action had not yet arisen.

[34] Even if a unilateral understanding were sufficient to delay the running of the limitation period, the evidence in this case does not establish that Mr. and Mrs. Kong understood that no demand would be made for repayment of the loan until the property was sold. All the testimony of Mrs. Kong shows is that when the property was sold she expected the funds advanced by her and her husband to be paid to them. Indeed, the evidence actually demonstrates that Mr. and Mrs. Kong did not have the understanding that demand could not be made for repayment of the loan until the property was sold. Their demand for repayment was made before it was sold.

[35] Although the point was only briefly raised in the reply on behalf of Ms. Saunders at the hearing of the appeal, it may also be that the parol evidence rule would render inadmissible any evidence of a discussion or understanding between the parties that would alter the written terms of the promissory note. Examples of cases where the parol evidence rule has been invoked to exclude evidence of assurances or understandings that demand on a demand loan would not be made unreasonably or until the occurrence of a certain event include *Bilkey v. Paul*, 2004 BCSC 167, and *Powers v. Mesaros*, 2007 BCSC 694.

[36] In the result, there was no agreement between the parties that derogated from the right of Mr. and Mrs. Kong to bring action for repayment of the loan evidenced by the promissory note at any time after the loan as made. The limitation period began running when the loan was made, and it had expired before Mr. and Mrs. Kong commenced their action. The cause of action for repayment of the loan was extinguished six years after the making of the loan by virtue of s. 9(1) of the *Limitation Act*, and their action was statute barred. It is not necessary to consider whether the action would also have been statute barred as a result of the three mortgages granted by Mr. Kong Jr. and Ms. Saunders against the property.

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Conclusion

[37] I would allow the appeal, set aside the order of the trial judge, dismiss the underlying action and award the costs of the action and this appeal to Ms. Saunders.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Willcock"

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