# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lu v. Li,*
2023 BCSC 271

Date: 20230227
Docket: S205071
Registry: Vancouver

Between:

**Haixia Lu also known as Hai Xia Lu**

Plaintiff

And

**Xue Yun Li**

Defendant

Before: The Honourable Justice Schultes

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | J.A. Dawson |
| Counsel for the Defendant: | J.E. Wittman<br>A. Lee |
| Place and Date of Hearing: | Vancouver, B.C.<br>November 25, 2021 |
| Place and Date of Judgment: | Vancouver, B.C.<br>February 27, 2023 |

## Introduction

[1] In this summary trial application, the plaintiff seeks judgment against the defendant on what is alleged to be an unpaid loan. The amount of principal and interest being claimed as of the hearing date was $661,970. The plaintiff also seeks a declaration that a property in Richmond that is owned by the defendant is subject to an equitable mortgage in her favour.

[2] The defendant argues that for several reasons the matter is not suitable for summary trial. She has also filed a jurisdictional response, submitting that the dispute should be resolved in the People's Republic of China. On the merits, she says that the funds in question were actually advanced as part of a joint investment by the parties with a third party, which did not pan out, and that she did not actually agree to the mortgage that is being claimed. As an evidentiary issue, a recorded conversation between her and the plaintiff in which she made statements about the issues is said to be subject to settlement privilege.

[3] At the time she swore her affidavits, the plaintiff was suffering from a terminal illness. She passed away about two months before the hearing of this application. The defendant does not oppose an order substituting her executor as the plaintiff. For the sake of clarity, I will continue to refer to the plaintiff in her personal capacity in the narrative.

## Evidence

### The Plaintiff's Version

#### *Previous Loan*

[4] The parties had been friends for many years, beginning when the both still lived in China. Both were retired when these matters arose.

[5] Before the alleged loan in issue, there was a transaction between them that is potentially relevant to the nature of their financial relationship.

[6] The plaintiff deposed that in May 2017, the defendant asked to borrow 1 million Chinese yuan from her, and she agreed.

[7] This arrangement was documented in a “Loan Agreement” that was signed by both parties[1].

[8] The loan period was between May 8, 2017 and May 8, 2018. Interest was in the fixed amount of $20,000 Canadian dollars - $10,000 to be paid in June 2017 and another $10,000 on the last day of the loan period.

[9] The plaintiff provided the money to the defendant in keeping with the agreement.

[10] The defendant made the required interest payments during the loan period. At the end of that period, after making the second interest payment, she asked for an extension for an additional year, which was granted by the plaintiff. This extension was added in writing to the loan agreement, including the term that “the content of the agreement remains unchanged”. In her affidavit the plaintiff deposed that this included an additional $20,000 in interest during the extension period, but she did not describe actually receiving it.

[11] In May of 2019 the defendant asked for an extension for another year, which the plaintiff again granted on the same basis. This time the $20,000 in interest was paid at the outset. None of the principal had been repaid by this point however.

[12] In January and April 2020, the defendant made payments towards the principal, which reduced the amount owing to 600,000 yuan. On April 17, 2020 the loan agreement was endorsed to reflect this outstanding amount.

[1] All of the relevant documents in this application were originally written in simplified Chinese characters but have been translated into English by an official translator.

[13] The plaintiff began this action on May 12, 2020, shortly after the second extension expired. By May 2021 the defendant had repaid the outstanding amount, and by the time this application was heard nothing further was owing on it.

***The "Loan" in Issue***

[14] According to the plaintiff, around May 2018 she told the defendant that she had sold a property that she owned in China. The defendant then asked her for a loan of 3 million yuan. She sought a term of two years and offered an interest rate of 8% per year.

[15] The plaintiff expressed hesitation about doing so, because she was elderly and averse to any financial risk, but the defendant assured her that the money would be safe. During this same time period the defendant told her that she had purchased nine properties in the Greater Vancouver area.

[16] According to the plaintiff, the defendant told her that to secure the loan she would grant the plaintiff a mortgage against any properties "in which she had, or would acquire an ownership interest", including her own home, which was on Granville Avenue in Richmond. In particular, she would register a mortgage against that home at her own expense.

[17] The plaintiff deposed that she would not have agreed to provide this loan if the defendant had not made those representations.

[18] Like the previous one, this transaction was documented in a "Loan Agreement". It described the loan amount, the term, and the interest rate in the manner that the plaintiff described in her affidavit. In addition, the agreement specified the amount that 8% interest per year worked out to in yuan (240,000) and required that the interest amount for each year be paid on specific dates.

[19] It also provided that the defendant's Granville Avenue property would be mortgaged to the plaintiff, and that the defendant would not sell or otherwise mortgage the property while that mortgage was in place. However, this agreement

did not contain the additional term that the plaintiff had described in her affidavit - providing for mortgages to the plaintiff on any other properties in which the defendant had or acquired an interest.

[20] The mechanism for transferring the funds to the plaintiff was to be through their respective bank accounts at the Agricultural Bank of China (Beijing). After the plaintiff transferred them to the defendant, the defendant was to "submit a money order to [the plaintiff] for signing". The signed money order was then to be "kept as evidence."

[21] The plaintiff provided the money pursuant to the agreement on May 25, 2018. As the agreement required, the defendant provided her with the first installment of interest of 240,000 yuan on that day. On March 21, 2019 the defendant paid her the equivalent in Canadian dollars of that amount ($49,000) as the second interest installment. The plaintiff's bank records show these payments.

[22] The defendant did not pay back the principal. She also did not register a mortgage on her Granville Avenue property. The plaintiff only found out that there was no mortgage in her favour on that property when she began this action.

[23] The defendant actually sold the Granville Avenue property in January 2020. Although she had told the plaintiff the month before that she was considering doing it, she did not tell her that it had been accomplished until March 2020. In March, the defendant also disclosed that she had sold another one of her properties, which was on Hazelbridge Way in Richmond. The plaintiff asked her several times in April and May of 2020 to pay back the loan from the proceeds of these sales, without success.

[24] The plaintiff and defendant frequently exchanged messages by WeChat. Beginning in January 2020, the defendant made comments in the messages that the plaintiff's counsel relies on as confirmation that the transaction was a loan, and of the defendant's continuing obligation under it.

These comments by the defendant included:

- January 15: …[D]on't worry about us, I guarantee you will get the money even if I spend my entire fortune, but you must give me some time.
- February 29: I understand, the only thing I can do to solve the problem now is to sell the house.
- March 12: I want to go borrow some money now to pay you back, the problem is I can't borrow any even [if] I want to.
- April 5 (11:27 pm): Don't worry, neither the house nor I am going anywhere, all the money will be definitely returned to you, but you have to give me some time, you can't just push me to the death road
- April 5: (11:36 pm) Remember the time when you were willing to give me those three million dollars, now the accident happened, it was also so not expected, but I am not weaseling out, I am trying to find a solution…
- April 6: (2:00 am) …[T]hat investment was my mistake, I can't pass the buck. [I]t was me who took your money and did all this investment and financial management thing. [T]hat's why I can't do anything that hurts you no matter what happens. [T]here's no problem to mortgage my house, but it won't happen if I am only given one year. [N]obody buys houses right now because of the pandemic, this is also the reality…
- April 6 (8:01 am) If that wouldn't work you can also take legal action to get your hard-earned money back from me, you can totally use the contract we signed before to seek justice through legal procedures, now the house is still here, I am still here, it is me who owes you money, I am not weaseling out, nor am I saying that I'm not paying you back, the whole world has not been functioning well right now. Can you just give me some time? I need two years to return you the money, within these two years I think I can definitely sell the house.
- April 6 (10:10 am) [T]the accident was my fault. It has done great harm to two families.
- April 20:…I am not finding an excuse for the loss, I was also cruelly deceived, and my only house is put up for sale to return your money…I really fell on hard times, I'd rather you sue me and let the law punish me, what we can only do is patiently wait until the pandemic is over and sell the house, to solve the problem between us.
- After this action was begun, on date that is not shown on the messages: I have no money to return to you no matter how I guarantee or promise you…[B]ut don't worry, I will find a way to return your money, I never think of not paying you back, give me some time.

  [Emphasis added]

[25] Initially unknown to the plaintiff, the defendant had bought another property, on Camsell Crescent in Richmond, in July 2018, after the funds in issue were provided. Despite her representation to the plaintiff before the loan was agreed to

that she would put mortgages in the plaintiff's favour on any properties that she acquired an interest in, she did not put one on this property. The plaintiff provided evidence that the defendant listed it for sale several times after buying it.

[26] The plaintiff deposed that when the loan period ended in May 2020, the defendant offered to grant her a mortgage against this Camsell Crescent property. She was seeking more time to repay the loan. The plaintiff was agreeable to a further two-year extension on that basis, but the defendant did not provide the mortgage.

[27] There were also WeChat discussions between the parties that the plaintiff's counsel submits show a common intention to secure the outstanding loan with a mortgage on that property, as the plaintiff described. Although it is not specifically named in the messages, it is common ground that the defendant's references to her "house" were referring to the Camsell Crescent property.

[28] These conversations arose in the context of discussions between the parties about the defendant's efforts to sell the Camsell Crescent property.

[29] On March 30, the plaintiff suggested, in light of the fact that she and her husband had "grown old" and her worry that "accidents might occur", that she and the defendant should "do a notarization [which in context refers to a mortgage on the defendant's property] locally, to comfort me and make me feel at ease…"

[30] The defendant agreed, saying "[L]et's do it then", although she raised the obstacle of not currently having insurance on her vehicle.

[31] After expressions of regret on the defendant's part, including indicating that she did not feel like living anymore, the plaintiff wrote:

> …[I]t's just a notarization, I'm not asking you for money right now…signing it means that we trust each other that we will bear responsibility together, it's also responsible for my family if any accident occurs to us!

[32] However, later in that exchange of messages on that date, in the course of organizing a lawyer for them to attend to for the "notarization" that they had been discussing, the plaintiff wrote:

> But before we go, shall we discuss first because we haven't come to an agreement?

[33] In response to the message from the defendant on April 5 that I have previously described, in which the defendant expressed concerned about being pushed "to the death road", the plaintiff wrote:

> …You are just getting a notarization to make your house a mortgage, how is that pushing you to the death road?

[34] As I have also previously described, on April 6, in the course of requesting more than one year to carry out the sale of the property, the defendant had written that "[t]here's no problem to mortgage my house…".

[35] On August 10, 2020, after the Notice of Civil Claim and Response to Civil Claim had been filed, the parties had a meeting, which the plaintiff surreptitiously recorded and had transcribed. Pursuant to a Notice to Admit, the defendant agreed that the recording is accurate. According to her first affidavit, it took place at her "primary residence".

[36] During this conversation, the plaintiff confronted the defendant about her recently-filed Response to Civil Claim, which alleged that the funds advanced were not a loan but a joint investment. The defendant maintained that she was unaware of the contents of her pleading, because it was in English, and that she had not told her lawyer it was a joint investment. Instead, the defendant characterized the arrangement as a loan, for example referring to the "promissory note" that she had provided to the plaintiff, and said that it was "impossible" that she had told her lawyer that she and the plaintiff did not have a "debtor-creditor relationship".

[37] In the conversation, the defendant claimed that the only points in the Response to Civil Claim that the lawyer had discussed with her were that the 3 million yuan that she had borrowed from the plaintiff had not been used to purchase

her house, and that the "promissory note" provided that any disputes concerning it were to be resolved in China.

[38] The parties also discussed a possible resolution of the matter, which would involve the plaintiff removing what I infer was a certificate of pending litigation against the defendant's house. This would enable her to sell the house and pay back part of the amount she owed the plaintiff, with the rest to follow. The defendant asserts that her goal was to resolve the matter privately between them, and that she assumed that their discussions would not be disclosed to any third parties if they proved to be unsuccessful[2].

[39] The transcript of the communications was made an exhibit to the defendant's first affidavit, and was referred to in the affidavit itself.

**The Defendant's Version**

[40] The defendant agreed that she borrowed the 1 million yuan from the plaintiff in May 2017, which she said was for her "personal expenses". She also agreed that the written agreement accurately set out the terms of the loan, that she requested two extensions of the loan period, and that she made the interest payments and ultimately paid off the principal as required.

[41] Where the defendant's version differs from the plaintiff's is with respect to the second transaction.

[42] She explained that "in or around" May 2018, she was approached by a representative of a company in China called "Boda Yaxin (Beijing)". That person, whose name she no longer recalled at the time she swore her affidavit, advised her that Boda was offering a unique investment opportunity under which she would

[2] In his application response, the defendant's counsel refers to these assertions being contained in paras. 17-19 of the defendant's most recent affidavit. The copy of that affidavit in the application record ends at para. 16, and the next page contains only the jurat. I draw the inference that the page containing paras. 17-19 was inadvertently omitted. Because nothing ultimately turns on it, I am content to proceed on the basis of the representations in the application response about what was contained in those paragraphs.

receive a guaranteed return of 8%. She was recently retired and did not have an income, so she was attracted to the opportunity.

[43] She said that when she mentioned it to the plaintiff in the course of their social discussions, the plaintiff advised that she would also be interested in taking advantage of this opportunity. They agreed to pool their funds as a more efficient way of managing their investments in it.

[44] According to the defendant, because she was already "on track" with her investment plan, the plaintiff suggested to her that the pooling of their funds "could be done informally, with [the plaintiff's] investment nominally being held in [the defendant's] name." The loan agreement was drafted as "a measure of protection" for the plaintiff, at the plaintiff's suggestion, as evidence that the defendant had received the money. The defendant was described in the agreement as having borrowed the plaintiff's funds, "so as to ensure that there was a paper trail of her having provided [the defendant] funds in relation to the [i]investment [o]pportunity." Crucially from the defendant's perspective, the document "did not genuinely set out a loan".

[45] As a result, the plaintiff advanced the 3 million yuan "of her own volition", for "purposes exclusively related to the [i]nvestment [o]pportunity".

[46] The defendant denied having made any of the representations to induce the plaintiff to enter into the loan agreement that were alleged by the plaintiff, including representing that she would grant mortgages against any properties in which she had or acquired an interest, or specifically against her Granville Avenue property.

[47] Their funds were then pooled and invested with Boda, the defendant said. She invested approximately 1.96 million yuan of her own.

[48] She asserted that it was "an implied term [of the agreement] consented to and acknowledged by" the plaintiff, "that each party was to bear their own risks proportionate to the amount of funds invested."

[49] The defendant also deposed that as both she and the plaintiff were living in China at the time they entered into the agreement, "it was a material term of [it] that in the event a dispute arose both parties would adjourn [perhaps meaning "attorn"] to a court of competent jurisdiction in China."

[50] As her counsel highlighted, several aspects of the agreement had a connection to China:

- Both parties had accounts at the Agricultural Bank of China Beijing, and the loan was to be provided by the plaintiff transferring the money from her account at the institution to the defendant's;

- In the event that a party was unable to "discharge" the agreement, the agreement designated a relative of each – the plaintiff's husband and the defendant's son – who would be "entrust[ed] and entitl[ed]" to do so. In addition to providing these relatives' names, the agreement included their Chinese identity card and passport numbers, and their addresses in China; and

- The agreement provided that, "[i]f either party breaks [it], the Parties…may file a lawsuit to the legal administration in China for resolution."

[51] She maintained that the funds that she transferred back to the plaintiff after they entered into the agreement, which the plaintiff characterized as interest on the loan, were made to "alleviate any further concerns" of the plaintiff, and were made "following repeated requests" by her.

[52] While the defendant believed at the point that she and the plaintiff pooled and invested their funds that Boda was a legitimate company, she found out in June 2019 that the investment opportunity was "little more than a sham."

[53] She agreed that she sold her Granville Avenue property in January 2020, as the plaintiff alleged. In keeping with her overall position on the nature of the agreement, she denied that she was under any obligation to notify the plaintiff that it

was listed for sale, or to pay a portion of the sale proceeds to her. The defendant took the same position on the sale of her Hazelbridge Way property, which she sold "at or around" the same time.

[54] With respect to the issue of a mortgage on her Camsell Crescent property, the defendant denied ever advising the plaintiff that she would grant a mortgage over it. She said this in relation to the WeChat messages between them on this topic:

> 27 I assert that such representations were either not made or were made at that time purely to calm the nerves of the [p]laintiff and to ensure the stability of our long-term friendship. At no point did I fully intended to register a [m]ortgage against the Camsell Property.

[55] She provided a similar response to the recording of her conversation with the defendant on August 10, 2020. Because the plaintiff had "aggressively confronted" her in prior situations, she made certain comments during the conversation that she believed were "untrue", "in an attempt to prevent further escalation". Specifically, she maintained that it was not true that (1) her relationship with the plaintiff was one of creditor-debtor, (2) her Response to Civil Claim incorrectly denied any relationship between the funds advanced by the plaintiff and her primary residence or other property and; (3) she had intended, and continued to intend to repay the funds.

[56] The defendant provided a second affidavit, which was sworn two days before the hearing date. Although the defendant's main arguments have to do with jurisdiction and suitability for summary trial, this affidavit and the documents attached to it will be relevant if the matter is decided on its merits, to provide support for the defendant's assertion that the money received from the plaintiff was part of the Boda investment. The plaintiff's counsel objected to its inclusion, but I ruled that it was admissible, subject to the right of the plaintiff to provide reply material if there was any prejudice. The plaintiff's counsel did not ultimately consider it necessary to provide such material.

[57] This affidavit attached records from the defendant's account at the Chinese Agricultural Bank. In her affidavit the defendant mistakenly described the year of

these transactions as 2019, but since the records themselves refer to 2018, nothing turns on this.

[58] These records show a “transfer deposit” into the defendant’s account of “3000000.00” on May 25, 2018. Under the heading “Time and message” for that transaction are what appear to be an account number and the plaintiff’s name[3].

[59] Immediately below that entry, on the same date, was a “Transfer withdrawal” of “240000”, again with a reference to the plaintiff. It is common ground that this was a payment back from the defendant to the plaintiff although, as I have described, the defendant denied that it was an interest payment under the agreement.

[60] Also on the same date, there were two reductions of the defendant’s balance, by “1000000” each time. The “Time and message” for both of these reductions makes reference to an account number and the name “Beijing Boda Yaxin Wujin Investment Management Co., Ltd.” These transactions were described in the translated record as “Consumption”. That term was not further explained, but in context it seems to refer to a payment from the account.

[61] There was another transaction, described as a “Transfer withdrawal” of “1000000” on May 28, but there was no reference to Boda under “Time and message”. Only the number “135246” was shown. The defendant’s counsel says that this was the third payment to Boda, out of the 3 million yuan obtained from the plaintiff.

[62] In addition, the defendant relied on these banking records to show the interest payments that she received from the investment. From June 24 to December 24 2018, there are monthly transfer deposits of “33333.40” with a “Time and message” that includes the name Zeyun Zhang.

[3] There is another entry above this transfer deposit, also labelled as a transfer deposit of “1000000” with a reference to the plaintiff under “Time and message”. This may represent the funds that were the subject of the previous loan in 2017, although is not clear. Counsel did not address it in their submissions, and it does not appear to have any relevance to the current issues.

[63] To show the basis of her belief that what Boda was offering was legitimate, the defendant attached what she said were the "investment agreements" that she entered into with it. These consist of four documents, each titled "Private Lending Consultation and Service Contract". They relate to the years 2019-2020. The defendant explained that the original 2018 contracts were renewed, from which I infer that she does not have access to those originals.

[64] In three of the four contracts, the defendant was listed as the "Assignee" under the agreement. In the fourth the name of the person with that title was left blank. In all of them Mr. Zhang was listed as the "Assignor", and Boda was listed as the "Administrator".

[65] There were two schedules to each contract. The second schedule was titled "Form of Transacted Creditor Rights Details". In each contract this schedule listed the defendant as the "creditor".

[66] The schedules also had headings for the principal involved, the assignment period and the expected annualized rate of return, among others. Those three headings were completed as follows:

| **Principal** | **Assignment Period** | **Expected Rate of Return** |
|---|---|---|
| 1. "Two million five hundred thousand Yuan" | May 24, 2019 - May 24, 2020 | 16% |
| 2. "90,000.00" | June 12, 2019 – August 12, 2019 | Not stated |
| 3. "Two million one hundred fifty thousand Yuan" | May 9, 2019 - May 9, 2020 | 16% |
| 4. "Two hundred thousand Yuan" | May 8, 2019 to July 8, 2019 | Not stated |

[67] The last of these contracts had a feature of its Schedule Two that was not found in the other ones: it provided that the "redemption payment" was to be paid into the defendant's account at the Agricultural Bank.

[68] The defendant deposed that as soon as she realized that the investment was a sham, she reported it to the Beijing Police Department.

[69] On September 8, 2019, Mr. Zhang was detained by the police. She said that while he was detained he provided her with a “promissory note”, in which he committed to paying back 4.94 million yuan by September 25, 2019, and assumed personal liability for the investment funds. The corresponding document attached to her affidavit is titled “Repayment Plan”. Mr. Zhang placed his fingerprint on it in several locations, which I infer was a means of further affirming its contents. In it, he committed to paying back the amount described by the defendant, which he referred to as “the investment [the defendant] made in our company.” He committed to assuming personal liability if the money was not repaid by the specified time.

[70] The defendant described retaining counsel in China to initiate civil proceedings with respect to the loss. She said that the investigation of the Beijing Court revealed that Mr. Zhang had stolen the money from Boda and transferred it to his personal account. Because this involved criminal actions, the Court transferred the case back to the police, who began an investigation. The defendant asserted that there were other victims of this fraudulent scheme besides herself and the plaintiff.

[71] The defendant explained that she was not able to able to obtain records of the case from the police in Beijing because it would have required her personal attendance there, something that was precluded by travel restrictions arising from the pandemic.

## Issues

### Jurisdiction

#### *Governing Principles*

[72] The initial question is whether the court in British Columbia has territorial competence over this action. This is addressed by s. 3 of the *Court Jurisdiction and Proceedings Transfer Act*, which provides that:

> 3 A court has territorial competence in a proceeding that is brought against a person only if

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.
>
> [Emphasis added.]

[73] The subsections that potentially apply here are (b) and (e). Although there is some evidence in the material from which an inference with respect to (d) might be drawn, it was not directly addressed in the affidavits of either party.

[74] Under s.10 of the *CJPTA* a "real and substantial connection" between this province and the facts of the proceeding is presumed in certain situations. The ones that potentially apply here arises if the proceeding:

> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property…
>
> [or]
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia…

[75] If territorial competence is found, s. 12 provides that a court in this province may nonetheless decline it if it concludes that "a court of another state is a more appropriate forum in which to hear the proceeding": ss. (1). Sub-section (2) provides that in resolving that question, the court must consider "the circumstances of the proceeding, which include:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

[76] Finally, it is relevant to note that an agreement that disputes between the parties will be resolved in a particular jurisdiction is known as a "forum selection clause". The proper approach when a court is presented with such a clause is to (1) determine whether the clause is enforceable and applies to the circumstances and, if so, (2) assess whether there is "strong cause" in favour of denying a stay of proceedings, despite the clause: *Z.I. Pompey Industrie v. ECU-Line N.V*, [2003] 1 S.C.R. 450 at paras. 19, 39. In *Preymann v. Ayus Technology Corporation*, 2012 BCCA 30 at para. 49, the Court explained that the forum selection clause should be considered after the court has determined that it has territorial competence. The inquiry should then be whether the clause is "clear, unambiguous and enforceable".

***Plaintiff***

[77] A crucial factor underlying the court's territorial competence in this case, the plaintiff's counsel submits, is that fact that the plaintiff is seeking the declaration of an equitable mortgage in the Camsell Crescent property. This falls squarely within s. 10(a), as a proceeding to declare a security interest over immovable property in British Columbia.

[78] Also on the issue of territorial competence, counsel argues that the defendant has already submitted to this Court's jurisdiction. Despite the jurisdictional response that was filed by her present counsel shortly before the hearing, she previously filed a substantive Response to Civil Claim, produced a list of documents, and responded to this summary trial application.

[79] Her counsel submits that the portion of the alleged loan agreement that the defendant relies on as requiring proceedings in China is permissive rather than mandatory – providing only that the parties "may" choose to proceed in China. It is not a "forum selection clause" as that term is defined in the case authorities, and it does not purport to oust this Court's jurisdiction.

[80] Given the absence of a contractual requirement for the litigation to proceed in China, the defendant bears the onus of showing that the Chinese courts are clearly the more appropriate forum. Such efforts must fail, counsel argues, in light of the facts that both parties reside in this province and the property that is said to be subject to an equitable mortgage is located here. The last point is important, because it means that the plaintiff cannot obtain relief with respect to that property from a court in China. In essence, it was a loan secured on property in British Columbia, and so its "guts" were to be performed here.

[81] Despite the existence of a criminal investigation in China, there is also little possibility of inconsistent outcomes in the two jurisdictions, counsel submits, because the essential documents relating to the transaction that is actually in issue are here.

***Defendant***

[82] Her counsel argues that the required real and substantial connection between this province and the facts underlying the action that is needed to support a finding of territorial competence is not present. Section10(e) does not assist the plaintiff, counsel argues, because the obligations under this agreement were to a substantial extent, if not entirely, to be performed in China.

[83] On the question of whether the defendant has submitted to the jurisdiction of the court, counsel reminds me that Rule 21-8 of the *Supreme Court Civil Rules*, which governs disputes over jurisdiction, does not impose any time limit on the filing of a jurisdictional response, so nothing turns on the proximity of the defendant's response to the hearing date.

[84] If I am satisfied that this court has territorial competence, which is sometimes described as jurisdiction *simpliciter*, he submits that a review of the relevant factors should result in this court declining jurisdiction. The agreement in question was drafted in China, by parties who were there at the time; they chose Chinese courts as the form for any required dispute resolution; and the transaction that was being documented was funded through a transfer between them within a Chinese bank.

[85] The resulting investment was with a Chinese company, and in terms of proof of the defendant's case, Mr. Zhang and the relevant records from Boda are also located in that country. Further, the referral for a criminal investigation in China means that there might be a different outcome in the courts there, and expert evidence could be required, at considerable expense (on behalf of the defendant I took it), to show that those courts would reach a different conclusion.

***Discussion***

[86] First of all, I conclude that British Columbia has territorial competence over this proceeding.

[87] The defendant has clearly submitted to the court's jurisdiction during this proceeding, as captured by s. 3(b). Despite the recent filing of the jurisdictional response, the defendant previously filed a substantive Response to Civil Claim, provided a list of documents, filed a substantive response in this summary trial application and, but for a scheduling problem, would have been examined for discovery. Her counsel is quite correct that Rule 21-8 imposes no time limit on the filing of a jurisdictional response, but the ability it provides to takes steps in the litigation without submitting the jurisdiction of this court is essentially limited to applications to contest that jurisdiction, or the validity of the originating process, after the jurisdictional response has been filed (ss. (1) and (3)). Under the rule, a party who contests jurisdiction cannot defend on the merits except while waiting for a decision on a permitted jurisdiction-related application (ss. (5)(b)(ii)).

[88] If it is necessary to resort to the existence of a real and substantial connection between British Columbia the facts upon which this proceeding is based, as envisioned in s. 3(e) of the *CJPTA*, one of the factors in s. 10 of the *CJPTA* that leads to a presumption to that effect is clearly engaged. This action seeks a declaration that there is an equitable mortgage over real property in British Columbia, which falls within ss. (a).

[89] Although that finding is sufficient to support the presumption, I will consider the potential application of ss (e)(i) (contractual obligations to be performed to a

substantial extent in this province). *JTG Management Services Ltd. v. Bank of Nanjing Co.,*2015 BCCA 200, is helpful on this issue:

> 37 Fundamentally, the inquiry with respect to s. 10(e)(i) of the *Act* concerns the existence of circumstances that connect performance of the contract to the forum. In asking whether the obligations were to be performed in British Columbia, the inquiry focuses on the expectations of the parties as to performance at contract formation... Put another way, the *Act* requires the Court to engage in a preliminary interpretive inquiry to determine the limited question of the jurisdiction (or jurisdictions) where the parties intended the contract to be performed. The phrase "performed to a substantial extent" clearly denotes that the contract may be performed in multiple jurisdictions; thus, it is no bar to the operation of s. 10(e)(i) to say that the contract was intended to be performed in more than one jurisdiction... It is entirely possible to have an international contractual arrangement whereby both parties to the contract perform obligations "to a substantial extent" in their home jurisdictions.
>
> [Emphasis added.]

[90] I think that is similar to the situation here, except that in this case both parties were to perform the obligations under the agreement in both jurisdictions. While the transfers to fund the alleged loan took place in China, the security arrangements that the agreement put in place could only be carried out in British Columbia, since that was the location of the specific property that was identified as being subject to a mortgage. Thus, it is accurate to characterize the obligations under the agreement as having to be performed to a substantial extent here.

[91] The last issue in relation to territorial competence has to do with the effect of the clause in the agreement about enforcement proceedings in China.

[92] I conclude that as a potential forum selection clause it fails at the definitional stage, by using the permissive “may” to the action “file a lawsuit to the legal administration in China for resolution”. Considering the clause in light of the entire contract and the surrounding circumstances, I cannot identify any basis for attaching a different objective meaning to “may” within that context than its ordinary one. It certainly does not produce any practically absurd results to apply that meaning, so that another one should be preferred (see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 61). Indeed, it may make

objective sense, as an effort to give the parties a measure of flexibility in the litigation despite the factors connecting the transaction to British Columbia.

[93] This conclusion is similar to the one that was reached in *Wang v. Wang*, 2018 BCSC 667, a case relied on by the plaintiff's counsel. There, the court found, at para. 25, that a purported forum selection clause providing that in the event of a breach, "either party may bring a suit in the people's court of the area where the lender resides in accordance with the law" was not "clear and unambiguous", as the authorities required.

[94] As a result, it is not necessary to proceed further in the analysis of this clause. I am satisfied that it means the parties were permitted, but not required, to litigate any breaches in China.

[95] With respect to the application of s. 11, I do not think any of these factors should lead to jurisdiction in British Columbia being declined.

[96] In my opinion, the location of the property specified in the agreement, as well as of the property to which an equitable mortgage is sought to be attached, is a strongly influential factor. Because only a British Columbia court can give effect to remedies relating to them, the law on at least that issue must be the law of this province. There can be no multiplicity of proceedings or conflicting decisions arising from that issue, since it can only be heard and decided here. A stand-alone enforcement in China of the debt that the agreement created, isolated from both the original means by which it was to be secured and the current application for alternative security, would make no sense, and would actually be the approach that offers the greatest risk of inconsistent rulings.

[97] The other factors under s. 11 do not appear to be to be particularly significant in comparison.

[98] I do not fully understand why expert evidence on the outcome in China would be required if the agreement is litigated here under Canadian law, but I take the representation that it would, and would be an additional expense to the defendant, at

face value. On its own however, it does not outweigh the factors in favour of a British Columbia trial.

[99] The banking documents are already available, as are a meaningful number of the defendant's contracts with Boda, and Mr. Zhang's promissory note. On the basis of what has been provided so far, it is speculative to anticipate that further documents from the police investigation that would need to be obtained in person would implicate the plaintiff in the investment schedule in any way. There is already ample evidence of the defendant's participation in it, to the extent that such evidence supports her version of events.

[100] Finally, to the extent "the fair and efficient working of the Canadian legal system as a whole" will be enhanced by not requiring the plaintiff to abandon enforcement of her security under the agreement, that also makes British Columbia the most appropriate forum.

[101] As a result, I am unable to accept the defendant's arguments on jurisdiction.

**Suitability for Summary Trial**

***Governing Principles***

[102] As is well known, Rule 9-7(15) of the *SCCRs* provides that:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii)the court is of the opinion that it would be unjust to decide the issues on the application…

[103] Relevant factors in deciding whether it would be "unjust" to decide the issues summarily have been found to include: "the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course

of the proceedings… the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices": *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.,* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at p. 215, and *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369.

[104] With respect to the determination of credibility, "[i]n appropriate circumstances, it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone": *ARC Digital Canada Corp. v. Amacon Alaska Development Partnership*, 2023 BCCA 34 at para. 40, citing *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, [1995] 6 B.C.L.R. (3d) 391 (C.A.)

[105] Similarly, in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, the Court stated:

> [22] ...It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A [the predecessor of Rule 9-7]. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.
>
> [Emphasis added.]

[106] There is no rule that examinations for discovery must always take place before a matter can be dealt with by way of summary trial, and the suggestion that something "might turn up" in the course of discovery is not sufficient to defeat a summary trial application: *Tassone v. Cardinal*, 2014 BCCA 149 at para. 38.

[107] More generally, when a summary trial is set down, the parties are obliged "to take every reasonable step to put themselves in the best position possible...[and] cannot, by failing to take such steps, frustrate the benefits of the summary trial process." As in the case of discovery "the defendant may not simply insist on a full

trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up'": *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275, at para. 34.

***Defendant***

[108] Her counsel submits that deciding this matter summarily would be unjust.

[109] Because the parties' versions of events are fundamentally opposed and irreconcilable, the assessment of credibility will be determinative of the outcome, counsel emphasizes, and that assessment cannot be carried out on the existing material. This means that the necessary facts cannot be found at this point.

[110] The proceedings are at an early stage in terms of the procedural steps, and no examinations for discovery of the parties have been performed, despite the defendant's attempt to make herself available just before the hearing date. While the plaintiff's documents have been disclosed, the defendant's self-represented status for significant parts of the proceedings means that she still has to disclose additional documents. (As a result, I took counsel to be saying, the means by which credibility could more accurately be assessed, even in a summary trial setting, are not yet available.)

[111] Several of the other recognized factors also weigh against a summary trial, it is argued. The amount at issue is very significant, and if it were enforced by the mortgage that is being sought, it would deprive the defendant of her personal residence. The plaintiff's counsel has not demonstrated any urgency that would require proceeding in this manner, and given that relatively little has occurred in the litigation so far, the cost savings from proceeding summarily will not be significant.

***Plaintiff***

[112] Her counsel submits that the necessary facts, including admissions of indebtedness by the defendant, are undisputed, so they can be readily found based on the present material. He notes that affidavits of a deceased person are admissible despite the absence of cross-examination, with the ultimate weight to be

accorded to them a matter for the trier of fact. The plaintiff's affidavits would also meet the criteria for admissibility under the principled exception to the hearsay rule.

[113] It would also not be unjust to decide it on a summary basis, her argues. The evidence is unlikely to change if the matter proceeds to trial.

[114] Significantly, rather than prepare to put her best foot forward, the defendant has delayed the matter, as shown by the procedural history, which he summarized as.

- She was self-represented until July 2021, when she retained counsel. That counsel obtained an adjournment of the summary trial, which was set for later that month. The summary trial was then rescheduled for August.
- Two weeks after retaining counsel, she filed a Notice of Intention to Act in Person.
- In early August, she retained her second counsel, who obtained an adjournment of the summary trial date set for later that month. The summary trial was re-set for the ultimate hearing date in November 2021.
- She retained her present counsel on September 21. The plaintiff had passed away on September 14.
- A condition of the adjournment was that the defendant agree to an examination for discovery on October 26. She was unable to attend on that date because of illness. On November 12, her counsel proposed a new discovery date of November 17, which was before the hearing date, but a court reporter could not be obtained on that amount of notice.

***Discussion***

[115] I am satisfied that the facts necessary to decide this matter as a summary trial can be found on the basis of the existing material.

[116] As I will discuss further, the issues to be decided would be (1) whether the agreement is a valid one on its face; (2) whether the defendant's extrinsic evidence should be permitted to vary its apparent meaning; (3) the weight to be attached to the defendant's alleged admissions of indebtedness under the agreement; and (4) whether she agreed to place mortgage on the Camsell Crescent property to secure that indebtedness.

[117] The first issue will be resolved on a construction of the objective meaning of the words of the agreement, in light of the surrounding factual circumstances that were known to the parties. The second issue requires a legal analysis of whether an exception has been demonstrated to the usual rule against introducing extrinsic evidence of the meaning of the words of a contract. The third and fourth issues can be resolved by analyzing and drawing the appropriate inferences, if any, from the electronic messages and recorded conversations.

[118] Any conclusions about the overall plausibility of the defendant's version of the true nature of the agreement can readily be drawn from the affidavits that assert it.

[119] The point is that the fact-finding exercise in this case will involve deciding what inferences should be drawn, or conclusions reached, from a body of mainly uncontested facts. Having passed away, the plaintiff is not in a position to contradict the defendants' exculpatory explanation, so it cannot be rejected unless it is inadmissible to contradict the written contract, or it does not make sense in light of the evidence as a whole.

[120] Nor do I think it would be unjust to decide the matter summarily.

[121] Viewed in the light that I have described, I do not see this as a typical credibility contest. The defendant's evidence seeks to support a reinterpretation of a written document and recorded communications, the apparent meanings of which will otherwise be decisive. The real question will be whether the alternative interpretation of their contents that she put forward, viewed in light of its inherent degree of plausibility and any objective confirmation of it that may be available, is

more likely than their apparent meaning. In other words, the resolution of the case will involve ascribing meaning to largely undisputed evidence. As I will discuss, if I accede to the plaintiff's submissions on the applicability of the parol evidence rule, most of what the defendant says about the true nature of the agreement will not even be admissible.

[122] Of course the assessment of credibility, particularly the defendant's since she seeks to displace the apparent meaning of the evidence, will play a role, but this is still very far from the battles of uncorroborated assertions between parties that are frequently found to be unsuitable for summary trial.

[123] On that note, the defendant's counsel referred to two decisions – *Jutt v. Doehring*, (1993) 24 B.C.A.C. 313 at para. 13, and *Cotter v. Dominion of Canada General Insurance Co.*, 2018 BCSC 1527 at para. 32 - to support the proposition that meaningful credibility disputes will require a trial with *viva voce* evidence to resolve. As I have said, I do not agree that the present dispute is of that nature. To the extent that this case does require any credibility assessment, I am satisfied that both of those decisions reflect the inappropriateness of resolving in a summary trial the credibility issues that arose on their particular facts, and that they do not displace the general principles that I have previously summarized.

[124] The amount at issue is indeed large and judgment against the defendant, particularly on the equitable mortgage, would have significant consequences for her, but those factors will not change in a full trial, and they would be influential only if allowing further time for such a trial to take place could somehow ameliorate them.

[125] While there is no particular urgency that weighs in favour of summary proceedings, I do not think matters would be rushed along by it in any sense.

[126] Examination for discovery of the plaintiff is obviously no longer possible even for a full trial, and the defendant's discovery, if it had occurred, could not have been read in on her own behalf.

[127] The defendant's list of documents may not be complete, but she has unfolded the Boda investment narrative quite fully in the ones that she has provided. As I mentioned previously, we have not heard that any remaining documents, including from a criminal investigation in China, are likely to implicate the plaintiff in that investment.

[128] Until she retained her current diligent counsel, her response to the plaintiff's previous efforts to set the matter for summary trial was quite dilatory, and she has known for a meaningful period of time that the plaintiff was seeking to resolve the case by this means.

[129] The case is not a particularly complex one in itself, and a summary trial does not threaten to add any complexity.

[130] All issues are in play in both types of trial, so litigation in slices is also not a danger.

[131] Finally, when considering proportionality, the one day of submissions that has been required for this application offers a significant savings of time and expense over a full trial which, even with the plaintiff's case proceeding on the basis of her affidavits, would still take at least three days.

**Settlement Privilege**

***Governing Principles***

[132] These were helpfully summarized in *Ross v. Bragg*, 2020 BCSC 337, a decision relied on by the defendant:

> 11 Settlement privilege "wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible": *Sable Offshore Energy Inc. v. Ameron International Corp*, 2013 SCC 37, at para. 2.
>
> 12 In *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2008 BCSC 442, Madam Justice Wedge adopted the following criteria for settlement privilege from Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2d. ed., at para. 14.207:
>
> a) A litigious dispute must be in existence or within contemplation;

> b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> c) The purpose of the communication must be to attempt to effect a settlement.

***Defendant***

[133] Her counsel submits the necessary elements of the privilege were all fulfilled during the recorded conversation. The explicit topic of discussion for a significant portion of it was a resolution of their existing dispute outside of the legal steps that were then being taken by their counsel. The defendant also asserted that she did not envision those discussions being passed on any further if they were unsuccessful.

***Plaintiff***

[134] Her counsel notes the absence of any actual proposals in the course of the conversations, but more fundamentally says that the defendant has waived the privilege by attaching the transcript of the recording to a previous affidavit.

***Discussion***

[135] The transcript shows fairly direct efforts at resolving the existing lawsuit by the parties. In addition to the defendant's description of her own intentions, I also feel comfortable drawing the inference that the plaintiff would not have wanted the discussions to be used against her if they failed. Despite the existence of the elements of settlement privilege however, the conclusion that the defendant has waived that privilege by relying on the transcript of the parties' discussions in her affidavit in this action, which appears to have been prepared with the assistance of her previous counsel, is really inescapable. To his credit, her current counsel candidly acknowledged during submissions that this was a possible outcome of her actions.

[136] Therefore, I find that the privilege does not apply.

## The Merits

### *Governing Principles*

[137] In additional to the usual requirements of offer, acceptance, consideration, and certainty of terms, the elements of a contract in the specific context of a loan agreement were summarized in *Jacobs v. Yehia*, 2014 BCSC 845, rev'd on other grounds 2016 BCCA 38:

> 253 A loan is a specific form of contract. As such, it requires mutual concordance between the parties as to the existence, nature and scope of their respective rights and duties. Like other contracts, it may be evidenced orally, in writing, by conduct or by a combination thereof: *Biehl v. Strang*, 2011 BCSC 1373, paras. 326-330; *Le Soleil [Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303], para. 323.
>
> 254 The essential elements of a loan were discussed by Satanove J. in *Lee v. 1137434 Alberta Ltd*., 2009 BCSC 284. As she noted, they have been described as: i) a principal sum; ii) placed with a borrower; iii) on agreed terms for the payment of interest; and iv) liability on the borrower's part for return of the principal with accrued interest. A loan has also been defined as delivery by one party and receipt by another of money on agreement, express or implied, to repay the money with or without interest: *Lee*, paras 9-10.

[138] The correct approach to interpreting a contract was described in Geoff R. Hall, *Canadian Contractual Interpretation Law* 4th ed (Toronto, LexisNexis Canada, 2020), at 2.41

> The exercise…is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the actual matrix.

[139] The parol evidence rule, as it applies to this process, was summarized in *Gallen v. Allstate Grain Co.*, (1984) 53 B.C.L.R. 38 (C.A.) at para. 10, leave to appeal refused [1984] S.C.C.A. No. 171:

> 10 … Subject to certain exceptions, when the parties to an agreement have apparently set down all its terms in a document, extrinsic evidence is not admissible to add to, subtract from, vary or contradict those terms.

[140] The rule does not apply to the factual matrix surrounding the contract, because those facts are “used as an interpretive aid for determining the meaning of

the words chosen by the parties, not to change or overrule the meaning of those words": *Sattva Capital Corp. v. Creston Moly Corp.,* [2014] 2 S.C.R. 633 at para. 60.

[141] Two other relevant exceptions to the rule are to establish a collateral agreement or in support of an allegation that the document was not intended by the parties to constitute the whole agreement: *Gallen* at para. 11. Crucially however, to be admissible such proposed additional agreements or terms must not contradict the written agreement: *Hawrish v. Bank of Montreal,* [1969] S.C.R. 515 at 520-1; *Village Gate Resorts Ltd. v. Moore,* (1997) 47 B.C.L.R. (3d) 153 (C.A.) at para. 25.

[142] Finally, there is the issue of equitable mortgages, as explained in *Vancouver (City) v. Smith,* (1985) 63 B.C.L.R. 180 (C.A.), citing *Re Sikorski* (1978), 21 O.R. (2d) 65, 89 D.L.R. (3d) 411 (H.C.) at p. 416:

> 12 …[T]he important feature of an equitable mortgage is the common intention of the parties to the mortgage contract to make the property in question security for the debt due. If this intention is lacking an equitable mortgage cannot be said to have been created.

[143] In that case the Court drew a distinction between a valid equitable mortgage and "a promise to give security in the future on request over unspecified real property and unspecified personal property" (para. 16).

[144] It is also important to keep in mind, as explained in *Elias Markets Ltd (Re),* (2006) 274 D.L.R. (4th) 166 (Ont. C.A.), citing *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p. 16, that:

> Equitable mortgages ... are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.

[Emphasis added.]

***Plaintiff***

[145] Counsel submits that the written agreement contained all of the essential terms, and demonstrated the required degree of certainty about the parties' obligations, to have binding effect.

[146] The defendant's efforts to contradict it based on alleged oral collateral representations runs afoul of the parol evidence rule. The alleged implied term that the funds advanced were for the joint investment, and that each party bore their own risk, is likewise inadmissible. Rather than being necessary to give effect to the agreement, or representing a term that the parties would obviously have assumed at the time, it seeks to negate the agreement's very purpose.

[147] In addition, it is argued that the substance of the defendant's allegations are improbable. It is unclear why the parties would not have made an agreement addressing the joint investment, if that was their actual intention. Notably, the defendant then paid a considerable amount of interest pursuant to an agreement that she maintained was not for a loan, and repeatedly confirmed her indebtedness under it in the electronic messages and the recorded conversation. The plaintiff's counsel says it is significant that there are no references to a joint investment in any of the WeChat messages, only to the defendant's own investment.

[148] With respect to the equitable mortgage being sought, the agreement specifically required the defendant to place mortgage in the plaintiff's favour on her Granville Avenue property, and not to sell or mortgage it further. Instead, she failed to have mortgage placed on it, and sold it without advising the plaintiff. When she was confronted in the WeChat messages, she ultimately agreed, in the messages in April 2020, to place a mortgage on the Camsell property, in return for an extension on the loan of two years. This demonstrates their common intention to charge the property as security for the defendant's debt.

[149] Looked at on a more technical basis, the paragraphs of the defendant's affidavits that address these issues are said to be filled with argument, opinion and unsourced hearsay, which should result in the numerous offending paragraphs being struck or disregarded. That would leave very little substantive content in those affidavits.

***Defendant***

[150] Her counsel seeks to demonstrate that numerous aspects of the evidence support her version of what she and the plaintiff actually agreed. For example, the introductory language of the agreement was:

> Subject: Out of respective needs, [the parties] agree as follows through consultation in principle of mutual assistance and benefit and win-win cooperation…

[151] Counsel argues that this is much more suggestive of a jointly beneficial activity like an investment than a straightforward loan with interest.

[152] Beyond this, their WeChat messages refer to an "investment" and to an "accident" that was the defendant's fault, and indicate that she herself was "cruelly deceived" and that she and the plaintiff "are both the biggest victims".

[153] The records attached to the most recent affidavit are also relied on as important support for the defendant's evidence. The immediate onwards transfer to Boda of the funds that she received from the plaintiff, the contracts demonstrating the type of investment scheme with that company that she described, and the promissory note from the apparent culprit in the loss of the invested funds, all make it more likely that the defendant's version is accurate.

[154] With respect to the equitable mortgage, the defendant's counsel submits that the reference in the agreement to further property in which the plaintiff acquired an interest is just the kind of promise to give security in the future over unidentified real property that fell short of the requirements in the *Vancouver (City)* decision. This is in addition of course to the fact that the agreement did not express the parties' true intentions.

[155] The WeChat conversations are also insufficient to support an equitable mortgage – any inference of common intention on that point is contradicted by the plaintiff's observation on March 30 that "we haven't come to an agreement" yet.

***Discussion***

[156] To the extent that the defendant was seeking to demonstrate a collateral agreement or implied terms of the agreement that support her description of its actual purpose, I agree that that evidence is inadmissible as offending the parol evidence rule. Her evidence seeks not just to contradict, but entirely subvert the meaning of the agreement on its face. It is certainly not part of the legitimate surrounding factual matrix, which the Supreme Court of Canada warned in *Sattva* should not be allowed to "overwhelm the words of the agreement" (para. 57).

[157] One could also treat the defendant's position as a complete denial that the agreement actually reflected any common understanding between the parties of the obligations it purported to impose, and was, as the defendant deposed, intended simply to provide a "paper trail" for the funds that the plaintiff had jointly invested.

[158] If that is the defendant's position, then I conclude that it does not make sense. As the plaintiff's counsel submitted, it is not clear why the parties could not simply have drafted an agreement that captured what the defendant claims was their actual arrangement. The previous agreement shows that they were well able to reduce their financial arrangements to accurate written form. It is unclear what role the defendant already being "on track" with her investment plans would have played in their inability reduce their joint investment to writing, or how an agreement that did not accurately set out the nature of that arrangement would have provided any protection to the plaintiff. It also seems absurd that the defendant would make the interest payments required on the face of the agreement, solely to "alleviate" the plaintiff's concerns, if it were not actually a loan agreement.

[159] Nor does the proposed confirmatory evidence render this version of events any more believable. The defendant's documents are certainly capable of showing that the funds that the plaintiff provided ended up with Boda, that the defendant entered into a contractual investment relationship with that company, and that one of its officials subsequently confirmed his indebtedness to her once he was in the hands of the police. The critical deficiency in this material is the absence of evidence

linking the plaintiff to these actions in any way, which is the essence of the defence to the agreement.

[160] As admissions against interest by the defendant, her statements in the WeChat messages and the recorded conversation fatally undermine her position. I do not think that the particular words and phrases that the defendant's counsel has selected from them to support the allegation of a joint investment can outweigh the overwhelming inference that arises from an overall reading of them - that the defendant was falling on her sword for having lost the money that she borrowed from the plaintiff. Considering them as a whole, I also do not believe that these statements were made merely to placate the plaintiff – they have a heartfelt, deeply regretful tone, in which the defendant takes all of the responsibility on herself, never referring to their joint assumption of the risk of that loss that she now asserts was a term of the agreement.

[161] I am therefore satisfied that the written agreement reflects that actual terms of a loan from the plaintiff to the defendant, and that the defendant then repeatedly made admissions of her indebtedness under it.

[162] Turning to the question of the equitable mortgage, the clause in the agreement in which the defendant committed to placing a mortgage on any future-acquired property is not being put forward as the basis of the plaintiff's argument. I think this is correct, because while the purported granting of a future mortgage could potentially give rise to an equitable mortgage, in this case, as in *Vancouver (City)*, the property to be charged was not specified. Of course, the Granville Avenue property that was specifically mentioned in the agreement is no longer available to be charged.

[163] Instead, I think the question comes down to whether the WeChat communications objectively demonstrate a common intention to place a mortgage on the Camsell Crescent Property as security for the loan, which was not ultimately carried out in the form of an actual registrable mortgage.

[164] My conclusion is that there is too much ambiguity in these communications to satisfy me that such a common intention was formed.

[165] The defendant's responses "Let's do it then" in response to the plaintiff's request, and "[T]here's no problem to mortgage my house", if viewed in isolation, tend to support an acquiescence on her part. But one must also keep in mind that, having identified a potential lawyer to prepare such a mortgage, the plaintiff still suggested that they meet first because they did not yet have an agreement. The defendant also protested that the plaintiff's request for a mortgage was pushing her "to the death road", which suggests an ongoing degree of resistance on her part, although I appreciate that she subsequently made the "no problem" comment.

[166] I also find it a relevant factor that after that last comment, the subject of a mortgage was not addressed again in the WeChat communications, which continued into June. It seems odd that a concluded agreement to register a mortgage would sit unfulfilled without being commented on further. In fact, the parties were still haggling about the means by which the debt was to be repaid, and the need for the defendant to sell her house to satisfy it, during the recorded conversation in August.

[167] At its best, I think the evidence is capable of showing an intermittent receptiveness on the defendant's part to the idea of granting a mortgage, without it ever distilling down to a common intention to take that actual step, as opposed to her preferred option of repaying the loan when her house sold.

[168] These decisions make it unnecessary to address the concerns that have been raised about technical deficiencies in the defendant's affidavits. Her evidence with respect to the existence of a loan agreement fell short without even considering such deficiencies, and the outcome on the equitable mortgage issue was based on the insufficiency of the parties' WeChat communications to demonstrate a common intention, not on the defendant's affidavits.

## Conclusion

[169] As a result of these various findings, I will make the following orders:

- Zhong Gao is named the litigation representative on behalf of the plaintiff's estate and is substituted for her as party in this proceeding.

- The litigation representative has leave to amend the Notice of Civil Claim in accordance with Schedule "A" of his Notice of Application.

- Judgment is granted to the plaintiff on the loan to the defendant in the amount of $661,970 in Canadian currency.

- The application for an equitable mortgage is dismissed.

[170] My preliminary view is that the characterization of the agreement as a loan was by far the most significant issue in the trial and that the plaintiff, having prevailed on it, should receive her costs, at the usual scale of difficulty. If the defendant disagrees, I will keep an open mind on the issue, and counsel may arrange to make written submissions according to whatever schedule for the exchange and filling of the submissions suits them.

"Schultes J."