

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bui v. Pacific Gate Development Group Ltd.*,  
2023 BCSC 1700

Date: 20230928  
Docket: S205460  
Registry: New Westminster

Between:

**Thi Phuong Bui**

Plaintiff

And

**Pacific Gate Development Group Ltd. and  
Tom Trungh Thang Nguyen**

Defendants

Before: The Honourable Mr. Justice Taylor

## Reasons for Judgment

Counsel for the Plaintiff: R.S. Atwal

Counsel for the Defendants: W. Ryan

Place and Date of Trial: New Westminster, B.C.  
March 27–30, 2023

Place and Date of Judgment: New Westminster, B.C.  
September 28, 2023

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**I. INTRODUCTION**

[1] This trial related to a dispute about an unfinished residential construction project. The project involved the plaintiff, a residential property owner named Thi Phuong Bui, and the defendants, a development company named Pacific Gate Development Group Ltd. (“Pacific Gate”), which had contracted with Mr. Bui in 2015 to build a house on his property, and Pacific Gate’s sole shareholder named Tom Trungh Thang Nguyen (also known as Tom Nguyen).

[2] The central legal issue at trial was whether a written release agreement signed by all parties in 2017 is valid and binding, with the effect that it bars Mr. Bui’s various claims against the defendants, including alleged breach of the construction contract between Mr. Bui and Pacific Gate.

[3] At trial, Mr. Bui argued that this release should be set aside on the basis of the doctrine of *non est factum*, with the effect that in his submission that he would be able to claim for damages against one or both defendants for breach of the construction contract. In the alternative, Mr. Bui argued that there was no consideration or insufficient consideration paid by the defendants under the release agreement and that the defendants should therefore be held liable in damages for breach of that release agreement. All this relief was opposed by the defendants.

**II. BACKGROUND**

**A. The Parties**

[4] Mr. Bui is the owner of a residential property with a civic address of 6892 Killarney Street, Vancouver, British Columbia (the “Killarney Property”).

[5] Mr. Bui immigrated to Canada from Vietnam in 1993. He testified that he attended school in Vietnam up to Grade 3 and, upon moving to Canada, also completed a six-month course in English as a Second Language. Nonetheless, he testified that he has very limited spoken and written English skills. He delivered his testimony at trial in Vietnamese with the assistance of an interpreter.

[6] Mr. Bui and his wife own a garden supply store named Binh Minh Garden Supplies located at 1751 Kingsway, Vancouver, British Columbia (the “Garden Store”). They have operated the Garden Store since 2004.

[7] Mr. Nguyen is the sole owner of Pacific Gate, a residential construction company incorporated in British Columbia.

[8] Mr. Nguyen has a sister, a real estate agent, whose name is Lynn Nguyen, also known as Thi Nhan.

**B. The Killarney Property Construction Contract**

[9] Mr. Bui testified that he was initially introduced to Mr. Nguyen’s sister by Mr. Nguyen’s parents, who were customers at the Garden Store.

[10] Mr. Bui recalled that he had discussions with Mr. Nguyen’s sister in or about 2015 concerning investing in real estate and that she convinced him to purchase from her a half interest in a property with a civic address of 3195 East Broadway, Vancouver, British Columbia (the “Broadway Property”). Mr. Bui also testified that Mr. Nguyen’s sister advised him that Mr. Nguyen was a builder and that he could give them a good price to tear down the old house on the Broadway Property, build a new one and sell it for a profit.

[11] Together, Mr. Bui and Mr. Nguyen’s sister entered into a contract with the defendant Pacific Gate to have a house constructed on the Broadway Property. Mr. Bui moved into the new house on the Broadway Property in November 2015 and purchased the remaining half of Mr. Nguyen’s sister’s interest in the Broadway Property in January 2016.

[12] Mr. Bui testified that, during the construction of the new house on the Broadway Property, Mr. Nguyen proposed to Mr. Bui that he also purchase the Killarney Property, which was owned by Mr. Nguyen’s mother. Mr. Nguyen proposed that Pacific Gate could also build a new house for Mr. Bui on the Killarney Property.

[13] Mr. Bui and Pacific Gate entered into a construction agreement on September 20, 2015 (the “Construction Contract”) under which Pacific Gate agreed to act as the head contractor for the construction of a house on the Killarney Property.

[14] Mr. Bui purchased the Killarney Property from Mr. Nguyen’s mother on June 22, 2016 with a completion date of July 22, 2016. It was never adequately explained at trial how Mr. Bui could have entered into the Construction Contract as the “Owner” of the Killarney Property in 2015 when he did not in fact purchase the property until almost a year later. However, as will be apparent later in these reasons, this is only one of many aspects of the business relationship between these parties that did not make commercial or legal sense.

**C. The Release Agreements**

[15] Construction on the Killarney Property under the Construction Contract commenced in 2015 and Mr. Bui made progress payments to Pacific Gate in 2015 and 2016.

[16] However, it is common ground between the parties that construction of the new house on the Killarney Property was never completed by Pacific Gate. It is also common ground that Mr. Bui and Mr. Nguyen had a variety of escalating disputes concerning changes to the scope of the project (that Mr. Nguyen alleged were requested by Mr. Bui) and delays in the project schedule.

[17] As a result of these disputes, the parties entered into a series of agreements, all of which were drafted by Mr. Nguyen. On September 29, 2016, Mr. Bui signed a release indemnifying Pacific Gate for any potential liability arising from Mr. Bui’s decision to choose coloured glass for one of the windows in the house, which Pacific Gate asserted did not meet a municipal building bylaw (the “First Release”).

[18] On the same date, Mr. Bui signed a second release indemnifying Pacific Gate from liability arising from Mr. Bui’s decision to install air conditioning and ducts in the house using a third-party contractor of his own choosing (the “Second Release”).

[19] The form and content of the First Release and the Second Release was virtually identical. The title of both documents was “Waiver and Release Agreement Re: 6898 and 6892 Killarney St., Vancouver, BC”. The last two paragraphs in each of these documents read as follows:

I, for myself, my heirs, successors and subrogates, HEREBY KNOWINGLY AND INTENTION - ALLY, WAIVE AND RELEASE, INDEMNIFY AND HOLD HARMLESS COMPANY, its directors, officers, agents, employees and volunteers from and against any and all claims, actions, causes of action, liabilities, suits, expenses (including reasonable attorneys’ fees) for any such damages after the installation.

I HAVE CAREFULLY READ, CLEARLY UNDERSTAND AND VOLUNTARILY SIGN THIS WAIVER AND RELEASE AGREEMENT.

[20] Mr. Bui testified that Mr. Nguyen presented him with both these documents and insisted that he sign them or else Pacific Gate would not proceed with the construction work. He also testified that Mr. Nguyen asked Mr. Bui to make an additional payment of \$25,000 relating to the modifications to the colour of the window, which Mr. Bui paid.

[21] On June 20, 2017, Mr. Bui signed a third release with virtually identical language to the First Release and Second Release, indemnifying Pacific Gate from liability concerning changes to the laneway house design and potential delays caused by that design change, in relation to the Killarney Street construction project (the “Third Release”). The Third Release was also drafted by Mr. Nguyen.

**D. The Discontinuance of Construction**

[22] Following the signing of the First Release and Second Release, but prior to the Third Release, further disputes arose between Mr. Bui and Mr. Nguyen, which ultimately resulted in Pacific Gate discontinuing construction of the house on the Killarney Property in 2017.

[23] Some of the principal consequences of that decision were as follows:

- Pacific Gate did not complete construction of the house on the Killarney Property. Pacific Gate vacated the construction site at the Killarney Property

on June 1, 2017 and did not complete any work or supply any materials at the Killarney Property thereafter;

- Mr. Bui paid \$999,800 to Pacific Gate pursuant to the Construction Contract for construction of the house on the Killarney Property, principally in 2015 and 2016; and
- in an expert construction cost report dated December 12, 2017 (to which the defendants did not object), Ken King from Hanscomb Limited opined that the value of the construction work completed at the Killarney Property as of November 17, 2017 was \$786,000 excluding GST.

[24] Thus, the amount paid by Mr. Bui to Pacific Gate for the construction on the Killarney Property ultimately exceeded the value of the construction completed by Pacific Gate by an amount of approximately \$214,000. This was not denied by either defendant.

[25] Mr. Bui testified that the \$999,800 payment he made to Pacific Gate included a payment of \$950,000 pursuant to the Construction Contract and an additional charge requested by Mr. Nguyen for foam insulation costs.

[26] Mr. Bui secured financing in August 2016 from a private lender named Pacifica for the purposes of funding his payments to Pacific Gate. Mr. Bui testified that it was Mr. Nguyen and his sister who had introduced him to Pacifica and that Mr. Nguyen had verbally agreed to pay a percentage of the interest costs. This agreement was then included as a handwritten notation to an addendum to the Construction Contract.

[27] Mr. Bui testified that, further to that agreement, Pacific Gate ultimately paid him \$2,200 relating to the financing interest costs. This payment was reflected as a reduction to the \$25,000 payment made by Mr. Bui relating to the costs of the change to the window in a handwritten note on the First Release. Mr. Nguyen admitted that he agreed to share the Pacifica interest costs but denied he was otherwise involved with Mr. Bui's dealings with Pacifica.

[28] Mr. Bui and Mr. Nguyen both agreed in their testimony that they had a number of heated verbal and text message exchanges in early 2017. Mr. Bui testified that he was upset because Mr. Nguyen was not proceeding with the project in a timely manner despite being paid a substantial percentage of the price under the Construction Contract. He was also concerned about the interest costs he was incurring as a result of his project financing, which he could not afford.

[29] For his part, Mr. Nguyen testified that although he and Mr. Bui initially worked well together, he was finding Mr. Bui increasingly demanding and difficult to deal with as a customer, in particular due to the scope of the changes to the project requested by Mr. Bui. Mr. Nguyen testified that Mr. Bui's demeanor changed in 2017 and that he started using abusive language, swearing and making threats on Mr. Nguyen's life and family.

[30] Mr. Bui denied at trial that he ever threatened Mr. Nguyen but admitted that he did send Mr. Nguyen a "rude" text message on May 9, 2017 in which he called into question the honesty and integrity of Mr. Nguyen and his family. He testified that he was later sorry for sending the text. The text message (translated from Vietnamese) reads as follows:

why you took 950k and didn't do it because you know I borrowed with high interest rate and you want me to die. Hi Tom your parents before until now stole, got arrested, have agreement on record. You are the son, you should do the good thing, otherwise god will punish. Your mother robbed me of 315k, your sister robbed 15k, basement 20k, spray foam, do you think your family corporation shall be punished? Thanks.

[31] The text message apparently upset Mr. Nguyen and he demanded a formal apology.

[32] On May 10, 2017, Mr. Bui (with his wife as a witness) signed a typewritten document drafted by Mr. Nguyen in which Mr. Bui made the following apology:

I, Bui Thi Phoung [sic], hereby sincerely apologize for making false claims against [Pacific Gate], Tom Nguyen and his family. I, Bui thi Phoung [sic], admit that these claims are completely false, claims listed in the text message dated May 09, 2017, claims such as Tom Nguyen steal money from Bui Thi Phoung [sic] for spray foam and window. I also admit to falsely accused Ta Thi Lan of stealing money from Bui Thi Phoung [sic]. In the same text



message I, Bui Thi Phoung [sic] also make threat to harm Tom nguyen and his family. I admit that these threats were made in anger and does not hold any substance and warranty that Bui Thi Phoung [sic] will not ma[k]e any more future th[r]eats against Tom Nguyen and his family. Any future threats and claims ma[d]e by Bui Thi Phoung [sic] will be taken seriously and will result in full legal consequences.

[33] Mr. Nguyen also signed a similar handwritten apology letter drafted by Mr. Nguyen dated May 16, 2017:

Bui thi phuong has admitted his faults for threatening tom Nguyen and family and admit His text on May 9 2017 is False and came out of anger. Tom Nguyen will promise to continue to work on his house at 6298 Killarney st and will follow up with City hall to get laneway house permit that Bui thi phuong Request change.

[34] Mr. Bui testified that he could not read the content of the apology letters but that he understood that they were apologies for his comments in the May 9, 2017 text message. He also testified that he was advised by Mr. Nguyen that he had to sign the letters or that Pacific Gate would not proceed with the construction work. This was not denied by Mr. Nguyen.

[35] Mr. Nguyen testified that at some point he became afraid of Mr. Bui. Mr. Nguyen testified that Mr. Bui and Mr. Bui's uncle (who Mr. Nguyen alleged was involved with organized crime) had attended at Mr. Nguyen's residence and made certain threats. This was denied by Mr. Bui in his testimony. Mr. Nguyen testified that he had video and audio evidence to corroborate these allegations and I adjourned the trial to give him the opportunity to adduce this evidence. However, Mr. Nguyen was unable to locate any such evidence, and none was introduced at trial.

#### **E. The July 2017 Release**

[36] Mr. Nguyen testified that he decided during the summer of 2017 that Pacific Gate wanted to cease construction on the Killarney Property due to the various disputes and issues with Mr. Bui. He testified that he decided to offer Mr. Bui \$250,000 in exchange for a full release, and that he presented this offer to Mr. Bui.

[37] On July 3, 2017, Mr. Bui signed a fourth release drafted by Mr. Nguyen (the “July 2017 Release”). The format and content of the July 2017 Release is materially different from the first three releases in at least three ways:

1. The July 2017 Release specifies that the “Releasee” includes both Pacific Gate and Mr. Nguyen and not merely Pacific Gate, as in the prior releases;
2. The July 2017 Release specifies that the consideration for the release was a payment to be made from both Mr. Nguyen and Pacific Gate to Mr. Bui in the amount of \$250,000. Previously, no payment had been offered by either of the defendants to Mr. Bui; and
3. The July 2017 Release makes no specific mention of the Killarney Property or the related construction project; it is a broader release encompassing all liability of any kind.

[38] Like the previous releases, the July 2017 Release includes the word “RELEASE” in bold, underlined typeface at the top of the document. Mr. Bui’s wife witnessed the July 2017 Release.

[39] Mr. Bui testified that he did not understand the content of the July 2017 Release and understood it simply to be a further apology letter. He denied ever asking Mr. Nguyen for money or a refund relating to the Construction Contract or otherwise, and denied agreeing to accept a financial payment as consideration for the July 2017 Release. He testified that he felt compelled to sign the July 2017 Release because Mr. Nguyen told him that he would not proceed with construction without it.

[40] Mr. Nguyen testified that he discussed the content of the July 2017 Release with Mr. Bui, that he gave Mr. Bui the opportunity to discuss the draft of the July 2017 Release with his wife or legal counsel if he desired, and that Mr. Bui understood and expressly agreed to the terms therein. This was denied by Mr. Bui.

[41] Immediately following the signing of the July 2017 Release, there were a series of financial transactions between the parties that appeared to correspond roughly to the payment obligations stipulated under the July 2017 Release. However, the testimony of both Mr. Bui and Mr. Nguyen with respect to the actions they took in relation to these payments was confusing, contradictory and at times difficult to reconcile with common sense.

[42] The testimony of Mr. Bui and Mr. Nguyen was consistent at least with respect to the following facts:

- On July 4, 2017, Mr. Nguyen arranged for a payment from Pacific Gate to Mr. Bui's account in the amount of \$100,000; and
- On July 6, 2017, Mr. Nguyen arranged for another two payments of \$100,000 and \$50,000 from Pacific Gate to Mr. Bui's account.

[43] Mr. Nguyen testified that the foregoing payments were made to satisfy the \$250,000 consideration owed by the defendants under the terms of the July 2017 Release.

[44] Mr. Bui testified that he was instructed by Mr. Nguyen to deposit these payments into Mr. Bui's account but then also directed to make payments out from that same account in equivalent amounts to third parties. He stated that this was all arranged by Mr. Nguyen and Mr. Nguyen's sister, who accompanied him to the bank. Mr. Bui testified that he did so because Mr. Nguyen had instructed him to make these payments if he wanted the construction of the house to be completed. Specifically:

- on July 6, 2017, Mr. Bui provided Mr. Nguyen and his sister, at their request, with a bank draft made out to Pacific Gate in the amount of \$100,000;
- on July 6, 2017, Mr. Bui provided Mr. Nguyen and his sister with two bank drafts in the amount of \$50,000 each, made out to a person named "Hoang Thi Hong Thuy". Mr. Bui testified that he had no knowledge of who Hoang Thi

Hong Thuy was but insisted that Mr. Nguyen had directed him to make out these drafts to that named person and that Mr. Bui had given them to Mr. Nguyen and his sister without asking further questions; and

- on July 6, 2017, Mr. Bui provided Mr. Nguyen and his sister, at their request, with a \$50,000 bank draft made out to Pham & Company, which is a law firm which Mr. Bui admitted had advised him on earlier “paperwork” relating to the Killarney Property.

[45] Mr. Nguyen’s testimony concerning the sequence of payments from Mr. Bui was very different than Mr. Bui’s. Specifically:

- With respect to the July 6, 2017 \$100,000 bank draft from Mr. Bui to Pacific Gate, Mr. Nguyen admitted in his testimony that he did ask Mr. Bui to make out that bank draft and that he received the draft. He explained that the original \$100,000 payment from Pacific Gate on July 4, 2017 had been made out to Mr. Bui’s wife at Mr. Bui’s request and Mr. Nguyen had decided after the fact that a payment should be made to Mr. Bui personally, not Mr. Bui’s wife. Mr. Nguyen testified that he asked Mr. Bui to return the bank draft originally made out to Mr. Bui’s wife after which Mr. Nguyen says he wrote a separate draft in the same amount to Mr. Bui personally;
- With respect to the two \$50,000 bank drafts from Mr. Bui to Hoang Thi Hong Thuy on July 6, 2017, Mr. Nguyen denied that he ever directed Mr. Bui to make these payments or ever received these bank drafts. He also denied that he knew who Hoang Thi Hong Thuy was and testified that he had no association with this person. Thus, strangely, both Mr. Nguyen and Mr. Bui testified that they were unable to identify Hoang Thi Hong Thuy. At trial, counsel for both parties advised that they had made efforts to identify and locate Hoang Thi Hong Thuy but had been unable to do so. The identity of Hoang Thi Hong Thuy therefore remained a mystery at the conclusion of the trial; and

- With respect to the bank draft to Pham & Company, Mr. Nguyen denied that he ever directed Mr. Bui to make this payment or ever received this bank draft. Mr. Nguyen also denied having any business dealings with Pham & Company.

[46] Subsequent to the foregoing exchange of payments, Mr. Bui and Mr. Nguyen continued to communicate concerning the construction of the house on the Killarney Property. Mr. Bui repeatedly called and texted Mr. Nguyen in July and August 2017 to ask him to return to the Killarney Property to complete construction. Mr. Nguyen declined Mr. Bui's phone calls but did periodically respond to texts.

[47] Mr. Bui continued to text message Mr. Nguyen into 2018 requesting Mr. Nguyen to return and finish construction on the Killarney Property, but Mr. Nguyen did not comply.

[48] Mr. Bui testified that in January 2018, he hired a lawyer to send a demand letter to Mr. Nguyen, demanding that Mr. Nguyen return to the Killarney Property to complete construction. Mr. Bui testified that, after the signing of the July 2017 Release, Mr. Nguyen increased his price for completion by an amount of \$98,000 plus GST, and that he felt Mr. Nguyen was essentially holding him ransom. Mr. Nguyen denied that he asked for that amount. Mr. Nguyen stated that Mr. Bui offered that amount but that Mr. Nguyen told him to speak with an estimator first.

[49] In March 2018, Mr. Bui advised Mr. Nguyen by text message that he was prepared to pay Mr. Nguyen's increased price of \$98,000 plus GST to complete the project. This offer was not accepted by Mr. Nguyen.

[50] Mr. Bui commenced his claim against the defendants on August 23, 2018.

### **III. ISSUES**

[51] The issues at trial were:

1. whether the July 2017 Release should be set aside on the basis of the doctrine of *non est factum*; or

2. in the alternative, whether the defendants breached the terms of the July 2017 Release by failing to deliver any, or in the alternative sufficient, consideration.

#### **IV. ANALYSIS**

##### **A. *Non Est Factum***

[52] The first issue is whether the July 2017 Release should be set aside on the basis of the doctrine of *non est factum*.

[53] Mr. Bui argues that the July 2017 Release should be set aside with the effect that the defendants are jointly and severally liable for breach of the Construction Contract in the amount of \$214,000 (the amount that Mr. Bui overpaid Pacific Gate for work on the Killarney Property). This was opposed by the defendants.

##### Applicable Law on *Non Est Factum*

[54] As articulated by the Court in *Karroll v. Silver Star Mountain Resorts Ltd.* (1989), 33 B.C.L.R. (2d) 160 at 164, 1988 CanLII 3294 (S.C.), the law on *non est factum* starts with the assumption that an individual signing a written agreement intends to be bound by its terms:

One must begin from the proposition set out in *L'Estrange v. Graucob* [citation omitted] that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents". Maugham L.J. went on to state two exceptions to this rule. The first is where the document is signed by the plaintiff "in circumstances which made it not her act" (*non est factum*). The second is where the agreement has been induced by fraud or misrepresentation.

[55] Thus, where an individual signs what they know to be a legal document affecting their rights, he or she is bound to its terms unless he or she can establish one of the exceptions to the rule, such as *non est factum*.

[56] In *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752, Justice Dardi summarized the principles governing *non est factum*, citing the leading case of *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 1982 CanLII 63, observing that the principle is "extremely narrow in scope":

[82] In Andrews & Millet's *Law of Guarantees*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 2001) at 104, the authors summarize the principle of *non est factum* as follows:

The principle of *non est factum* is a special category of the law of mistake, and is extremely narrow in scope. It is a defence which may be available to someone who has been misled into executing a deed or signing a document which is fundamentally different from that which he intended to execute or sign. His mistake must have been as to the essential nature of the transaction, rather than as to its terms; a mistake as to the legal effect of those terms by the signatory or by his legal adviser will not suffice. In most cases in which the defence is raised, the mistake will have been induced by fraud, though this is not an essential or decisive factor.

...

[100] The principles of *non est factum*, as formulated in the weight of the authorities, can be summarized as follows:

1. The burden of proving *non est factum* rests with the party seeking to disown their signature. For a person of full capacity, the application of the doctrine must be kept within narrowly prescribed limits.
2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

[57] In *Hsu v. Hsu*, 2023 BCSC 683, Justice C. Ross discussed the relevance of the personal characteristics of the signing party, including the party's ability to communicate in English:

[510] In assessing the issue, the personal characteristics of the party raising the defence including their capabilities and literacy are relevant considerations, see *Farrell Estates* at para. 130 and *Van Der Ros v. Van Der Ros*, 2003 BCCA 270 at para. 11.

[511] The doctrine applies in circumstances in which the party does not speak English, see *Garcia v. Garcia*, [1986] A.J. No. 560 (K.B.) and *Di Giacomo v. Di Giacomo*, 2021 BCSC 2313. Where a party does not read and comprehend English, it is not careless for them to sign without reading the document where it was provided by a trusted advisor. It is reasonable in such circumstances for the party to rely on the trusted advisor's explanation of the document: see *Zhang v. Soong*, 2012 BCSC 758 at para. 95.

Positions of the Parties

[58] Mr. Bui took the position at trial that he did not understand the contents of the July 2017 Release and believed it to be an apology letter instead of a legal release. In support of this argument, Mr. Bui argued that:

- Vietnamese is his native language and that he has, at best, very limited English language skills;
- his highest level of education was grade 3 in Vietnam and that he undertook only one, six-month English as a Second Language course upon immigrating to Canada;
- although he is the salesperson at his family-run business, he testified that all of his clientele speak Vietnamese and his wife takes care of the management of the business. He does not do business in English;
- although he has entered into residential real estate contracts in the past, he conducts business based on trust and does not require an interpretation of documents if he trusts someone;
- he signed the documents presented to him by Mr. Nguyen on the basis of trust, and never had the documents translated; and
- Mr. Nguyen advised him at the time of signing the July 2017 Release that it was an apology letter and that he had to sign it to ensure that the construction would proceed. He did not have the opportunity to take it home and review it because Mr. Nguyen asked him to sign it the same day, and he trusted Mr. Nguyen.

[59] In response, Mr. Nguyen argued at trial that:

- Mr. Bui's English skills are better than he admits and that, in fact, many of their conversations were conducted in English. Mr. Nguyen denied in his testimony Mr. Bui's claim that Mr. Bui does not speak English. Mr. Nguyen



testified that both Mr. Bui and his wife do in fact speak English, although Mr. Bui's wife's English was better than Mr. Bui's. He testified that Mr. Bui preferred Vietnamese but spoke English, while Mr. Nguyen spoke Vietnamese but preferred English. He stated that, as they conversed relating to the Killarney Property construction project, the parties would switch from one language to the other from time to time;

- Mr. Bui had the opportunity to take the July 2017 Release home and review it with his wife who does speak English; and
- Mr. Nguyen carefully and accurately described to Mr. Bui the contents of the July 2017 Release.

Credibility and Reliability

[60] There were only two witnesses who testified at trial: Mr. Bui and Mr. Nguyen. Given the very divergent narratives delivered by these two parties, and the fact that there were no other corroborating witnesses, it is necessary for me to carefully assess the credibility and reliability of their testimony.

[61] The proper approach to assessing an interested witness's testimony was articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[62] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 87–93, Justice Mayer described the appropriate approach to credibility analysis as follows:

[87] Before I proceed further with my reasons, I consider it appropriate to make some general comments with respect to credibility, which as I have

already said is a central issue in this case. Credibility issues arose as a result of changes in witnesses' evidence before and during trial, the nature of responses to questioning at trial including the witnesses' demeanour, the overall plausibility or logic of the witnesses' testimony and the conflicts in evidence of both the party witnesses and the evidence of independent witnesses and the documentary evidence.

[88] I am conscious of the principles set out in the leading authorities concerning how the court should deal with credibility and reliability questions. Those include *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.), *R. v. H.C.*, 2009 ONCA 56, *Bradshaw v. Stenner*, 2010 BCSC 1398, *Pacheco v. Antunovich*, 2015 BCCA 100, and the cases referenced therein.

[89] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.

[90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.

[91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[92] Some additional factors which may impact credibility include the following:

a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony: see paras. 57-59, 86 of *F.H. v. McDougall*, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1.

b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: *Le v. Milburn*, 1987 CarswellBC 2936 (W.L.) at para. 1; *Jones v. Jones*, 2008 BCSC 1401 at paras. 31, 32 and 60; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 9.

- c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: *Bradshaw* at para. 190;
- d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: *Osayande v. Canada (Minister of Citizenship And Immigration)*, 2002 FCT 368 at paras. 19 and 21;
- e) Credibility will be undermined when a witness (or party) has failed to produce documents: *Bradshaw* at para. 188; *Pacific West Systems Supply Ltd. v. Vossenaar*, 2012 BCSC 1610 at paras. 84 to 86;
- f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: *R. v. Storey*, 2010 NBQB 86 at para. 78; *Wang v. Wang*, 2017 BCSC 2395 at paras. 45-46 and 89-90; and
- g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: *Bradshaw* at paras. 191 to 192.

[63] In *Fu v. Zhu*, 2018 BCSC 9 at paras. 39–42, Justice Griffin also discussed the proper approach to considering interpreted testimony from witnesses of varying cultural backgrounds:

[39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.

[40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.

[41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.

[42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.

[64] I find myself in the unusual position in this case of concluding that there were serious credibility and reliability issues with both witnesses. The narratives delivered by each of these witnesses were, for different reasons, each lacking in coherence, internal consistency and, in certain respects, even basic logic. Both parties had the opportunity to call other witnesses to corroborate their accounts but both chose not to do so.

[65] With respect to Mr. Bui's testimony, there were the following credibility and reliability issues:

- Mr. Bui testified that he has, at best, very limited English language skills, which is inconsistent with Mr. Nguyen's testimony that they communicated in both languages. While I am prepared to accept that Mr. Bui's mastery of English may be poor and that he has limited formal education, his testimony that he has little or no English skills is clearly inconsistent with the documentary record, as some of the texts he sent to Mr. Nguyen were indeed in English (although I acknowledge that the bulk of the texts between the parties were in Vietnamese). Further Mr. Bui admitted that he took a six-month English as a Second Language course when he moved to the country, and has worked in business in the Lower Mainland for over 20 years, making it difficult to believe he has not at a minimum acquired some English along the way;
- Mr. Bui testified that he signed the July 2017 Release without understanding a word of it because he "trusted" Mr. Nguyen completely. However, this testimony is very difficult to reconcile with the text he sent to Mr. Nguyen on May 9, 2017 where he accused Mr. Nguyen and his family of stealing from him, as well as his admission that he had become very angry with Mr. Nguyen by that point. These accusations and emotions are far more consistent with

the conclusion that Mr. Bui's trust of Mr. Nguyen had eroded or broken down prior to July 2017. There was also no evidence that Mr. Nguyen had taken any steps between May and July 2017 that would have restored that trust, as the evidence was that Pacific Gate had abandoned the construction site by June 1, 2017. Mr. Bui's testimony that he trusted Mr. Nguyen in July 2017 therefore strains credulity;

- Mr. Bui testified that he believed the document was an apology. However, the evidence was that only weeks before he had previously signed two other apology documents. He did not explain in his testimony why he felt it was reasonable to sign three apology documents in quick succession or why he did not question why a further apology was needed;
- Mr. Bui's wife witnessed the July 2017 Release and thus clearly had an opportunity to view the document before it was signed. Mr. Bui admitted that his wife does speak some English (which was also the testimony of Mr. Nguyen) and also that she has managed their business and dealt with customers and suppliers since 2004 (and thus clearly has some experience dealing with business documents). Given her ability to speak English, Mr. Bui did not satisfactorily explain in his testimony why his wife did not translate the July 2017 Release or review it for him before he signed. Mr. Bui had the opportunity to call his wife as a witness to testify as to the circumstances of the signing of the July 2017 Release, her involvement and her alleged lack of proficiency in English but declined to do so. I make the adverse inference that she is sufficiently proficient in English to have reviewed and translated the July 2017 Release for Mr. Bui and most likely did so;
- Mr. Bui admitted in his testimony that numbers are the same in English and Vietnamese. In light of the fact that the sum of \$250,000 was written on the July 2017 Release, I have difficulty believing that Mr. Bui or his wife would not have seen this and asked questions about it;

- Further, Mr. Bui's testimony that he had no understanding that a payment was forthcoming relating to the July 2017 Release is very difficult to reconcile with the fact that, only two days later, the defendants made payments to him in the amount of \$250,000. Surely, if he had no understanding of the content of the July 2017 Release, it would have been reasonable for Mr. Bui to ask Mr. Nguyen why these payments were suddenly being made, but according to Mr. Bui's testimony he never did; and
- Mr. Bui's testimony that on July 6, 2017 he made \$100,000 in payments to a person he did not know (Hoang Thi Hong Thuy) on the basis solely of Mr. Nguyen's instruction appears so reckless that it simply defies belief. This is a significant sum of money. At a minimum, one would have expected him to inquire as to who the recipient was and why he was making the payment. Further, I note that, in addition to the \$100,000 in payments to Hoang Thi Hong Thuy on July 6, 2017, there were two additional bank drafts from Mr. Bui in evidence to that same person dated July 14, 2017 each in the amount of \$50,000. The purpose of these drafts was never explained, but this does raise questions about Mr. Bui's testimony that he did not know who this person was.

[66] With respect to Mr. Nguyen, there were also serious credibility and reliability issues. Specifically:

- Mr. Nguyen testified that he communicated regularly in both English and Vietnamese with Mr. Bui. This is inconsistent with the documentary record which indicates that the bulk of their text communication was in Vietnamese (although as noted above there were a relatively small number of English texts);
- Mr. Nguyen's evidence that he carefully explained all the legal documents he presented to Mr. Bui is very difficult to reconcile with the content of these documents, which contain clauses which are not commercially reasonable and heavily favour Mr. Nguyen, his family and Pacific Gate. For example,

Mr. Nguyen had Mr. Bui sign an addendum to the Construction Contract which contained multiple and repeated releases by not only Mr. Bui but also his wife and his children in favour of Pacific Gate, Mr. Nguyen's mother and sister. Further, the addendum contains conditions which bind the whole Bui family into the future (including Mr. Bui's children) and ensure that the Bui family cannot construct the Killarney Property with any builder other than Mr. Nguyen and Pacific Gate. It also provides that all deposits paid to date (at that time, \$150,000) would be forfeited if Mr. Bui breached the Construction Agreement in any way. It is difficult to believe that Mr. Bui would have agreed to these onerous terms if he had truly understood them;

- Mr. Nguyen testified that he was "scared" of Mr. Bui. This is difficult, if not impossible, to reconcile with the fact that he attended at Mr. Bui's residence on at least two occasions during the summer of 2017 to require Mr. Bui to sign an apology letter and to further threaten that he would stop construction if Mr. Bui failed to do so. Mr. Nguyen's actions clearly indicate that he believed he had leverage in the relationship and are far from consistent with those of a man afraid of Mr. Bui;
- Mr. Nguyen testified that he decided to pay Mr. Bui \$250,000 under the July 2017 Release but provided no satisfactory explanation as to how he calculated that number (which the construction costing report subsequently confirmed actually exceeded the amount of Mr. Bui's overpayment by about \$35,000). Mr. Nguyen testified that he "ballparked" the number but it is difficult to believe that an experienced business person would have done that without some analysis or rationale, in particular given that Mr. Nguyen had taken care the year before to extract a much smaller \$25,000 additional payment from Mr. Bui relating to the window. Further, if it is true that Mr. Nguyen explained the contents of the July 2017 Release to Mr. Bui, it is difficult to believe that there would be no evidence of prior negotiation or communication concerning the amount of the payment, as the parties had negotiated payment amounts before. There was no such evidence;

- it is telling, in my view, that the text messages between the parties contained no reference to the July 2017 Release. Given the significance of the July 2017 Release, this is surprising and certainly supports Mr. Bui's allegation that Mr. Nguyen delivered it without prior notice and likely did not adequately explain or discuss its significance with him;
- Mr. Nguyen testified that progress payments made by Mr. Bui to Pacific Gate under the Construction Contract were subject to city approval before payment. However, this is inconsistent with the addendum to the Construction Contract, which clearly states that construction payments had to be paid when due. Mr. Nguyen also failed to produce any City of Vancouver inspection results, or to provide any evidence as to construction milestones being achieved and the timing of inspections being passed as coinciding with the timing of the payments;
- Mr. Nguyen made a number of serious allegations against Mr. Bui and his family, including that Mr. Bui's uncle and friends are gangsters, that he was scared for his life and that he was followed multiple times with people showing up to his house to threaten him. Counsel for Mr. Nguyen also suggested during his cross-examination of Mr. Bui that Mr. Bui was involved in the marijuana growth operation business and was further engaging in money laundering. These allegations were completely unsupported by evidence. Mr. Nguyen testified that he had further evidence he had not yet presented in this litigation, and the trial was adjourned on more than one occasion to enable Mr. Nguyen to search for this evidence, including purported video surveillance showing Mr. Bui along with other men outside his home, a recording of Mr. Bui and/or other men threatening him and possible lay witnesses who would assist his case. However, Mr. Nguyen ultimately did not produce any such evidence. This did not assist his credibility;



- Mr. Nguyen’s testimony that he made out the original \$100,000 payment by Pacific Gate on July 4, 2017 to Mr. Bui’s wife and then asked Mr. Bui to return that payment after which he wrote a separate draft out in the name of Mr. Bui is difficult to accept. He did not adequately explain why he would have made payment to Mrs. Bui in the first place (since his business relationship was with Mr. Bui) nor did he adequately explain why he changed his mind. Further, Mr. Nguyen adduced no evidence at trial of a bank draft to Mr. Bui’s wife, even though he was given an adjournment by the Court to search his files and adduce that evidence. I make the adverse inference that no such bank draft existed; and
- Mr. Nguyen’s testimony that he crafted the July 2017 Release with a view to terminating the business relationship with Mr. Bui is inconsistent with his subsequent communications with Mr. Bui where he expressed an interest in resuming work at the Killarney Property for a higher price.

[67] Thus, there were serious credibility and reliability issues relating to the testimony of both witnesses. Further neither side drew my attention to compelling evidence of specific or unique cultural considerations or context that would otherwise impact my perspective relating to the inherent probability or improbability of the testimony (*Fu* at para. 41).

[68] At the conclusion of the trial, I was left with the impression that there is much more to the story than either witness was willing to admit, and that many details were omitted by both witnesses. Despite the shortcomings in the testimony, I have sought in these reasons to avoid speculation or supposition and to resolve the case based upon the evidence actually adduced at trial.

#### Application of the Legal Test

[69] The burden of proof on this issue rests upon Mr. Bui, as he admitted at trial that it was indeed his signature on the July 2017 Release.

[70] Taking into account the evidence, and balancing the credibility and reliability concerns, my conclusion is that Mr. Bui has failed to meet the burden of establishing that the July 2017 Release should be set aside on the basis of *non est factum*.

[71] I note in the first place that there was no evidence that Mr. Bui suffers from any mental disability or lack of capacity. While there was evidence that Mr. Bui is a man without much formal education and also that he has limited English language skills, there was also evidence that he has co-owned a successful business in Canada with his wife for over 20 years and that he has purchased properties for investment purposes. He therefore clearly has had some prior experience dealing with real estate, bank financing and other legal documents written in English. There was also evidence that Mr. Bui did send some text messages to Mr. Nguyen in English. Accordingly, I do not accept that Mr. Bui speaks no English at all.

[72] That said, I accept that Mr. Bui does not speak good English and did not have a detailed or sophisticated understanding of the legal documents that Mr. Nguyen drafted and provided to him throughout their relationship, including the July 2017 Release in particular. I also conclude that Mr. Nguyen failed to adequately explain the content of the July 2017 Release to Mr. Bui, and that Mr. Nguyen was likely seeking to take advantage of Mr. Bui's language deficit by securing legal terms which were more favourable for him and Pacific Gate. I find that Mr. Nguyen had established a pattern of such actions as revealed by the earlier legal documents signed by Mr. Bui.

[73] Is that a sufficient basis for concluding that the July 2017 Release was fundamentally different from what Mr. Bui believed he was signing? I am not convinced on a balance of probabilities that it was. As noted in my credibility analysis, I do not accept Mr. Bui's testimony that he thought it was an apology letter. Mr. Bui was aware that he had recently signed two other apology letters, which would surely have made him aware that a third apology letter was redundant. Mr. Bui clearly had the opportunity to discuss the document with Mrs. Bui, who witnessed the document and who I have concluded likely has the necessary English

skills and likely translated the document for him. Further, it would have been difficult for Mr. Bui to understand the exchange of payments that took place commencing only two days later if he did not have a general understanding of the nature of the document he was signing.

[74] Moreover, even if I had accepted Mr. Bui’s testimony that he believed he was signing an apology letter when he signed the July 2017 Release, I would nonetheless find his *non est factum* argument fails because Mr. Bui was careless in failing to take reasonable precautions in the execution of the document.

[75] In *Hsu*, Justice C. Ross found that where a party does not read and comprehend English, it is not careless for them to sign without reading the document where it was provided by a “trusted advisor” (at para. 511).

[76] Mr. Bui testified that he trusted Mr. Nguyen completely and that was why he signed the July 2017 Release without understanding its contents. However, for the reasons I have cited in my credibility analysis, I do not accept Mr. Bui’s testimony that a relationship of trust pertained between him and Mr. Nguyen at the time the July 2017 Release was signed. By that point, Pacific Gate had abandoned the construction of the home on the Killarney Property, Mr. Bui was angry and he had sent a text message to Mr. Nguyen on May 9, 2017 accusing him and his family of stealing from him. While I accept Mr. Bui’s testimony that he did at the outset of their relationship proceed on the basis of trusting Mr. Nguyen, that trust had clearly eroded by the time of the July 2017 Release. In that context, I cannot accept that Mr. Nguyen was a “trusted advisor” to Mr. Bui as of July 2017.

[77] In the alternative, even if there was a misrepresentation by Mr. Nguyen with respect to the contents of the July 2017 Release, I find that Mr. Bui’s reliance on that misrepresentation was not reasonable under the circumstances. Mr. Bui did not adequately explain at trial why he never asked any questions of Mr. Nguyen about the contents of the document or the subsequent payments. At a minimum, Mr. Bui clearly had the opportunity to discuss the document with Mrs. Bui, who witnessed the document and who I have concluded likely did have the necessary English skills

to translate the document for him. He also had the opportunity to consult with a lawyer (as the evidence was that he had retained Pham & Company relating to his real estate purchase and therefore clearly understood that legal advice was available). Quite simply, it appears Mr. Bui took no precautions at all in the review and execution of the document. Given the earlier breakdown in the relationship of trust with Mr. Nguyen I find that this was not reasonable under the circumstances and, indeed, reckless.

[78] Finally, I note here that Mr. Bui did not plead or allege fraud at trial and, as a result, I need not address that aspect of the doctrine of *non est factum*.

[79] For all the above reasons, the *non est factum* claim is dismissed and the July 2017 Release stands as a valid and binding agreement.

#### **B. Breach of Contract**

[80] As an alternative argument, Mr. Bui claims that he received no consideration or, in the alternative, inadequate consideration in exchange for signing the July 2017 Release and that the defendants thereby breached the terms of that agreement.

[81] In my credibility and reliability analysis, I have reviewed the testimonial evidence concerning the exchange of payments relating to the July 2017 Release. As I have previously described, the actions taken by both parties in relation to these payments were at best difficult to understand and at worst defied common sense. In light of this convoluted evidence, I find it most prudent to resolve this issue by relying to the maximum extent possible on the documentary evidence, which has a more objective quality than some of the testimony.

[82] Taking into account the documentary evidence, I find that Mr. Bui's claim that the defendants paid no consideration must fail. However, I also find that his alternative submission that the defendants paid insufficient consideration should succeed.

[83] The documentary evidence is clear that Pacific Gate did indeed deliver bank drafts to Mr. Bui in the amount of \$250,000 during the period between July 4, 2017 and July 6, 2017. However, Mr. Bui's argument is that these payments were never intended for him and instead, at the direction of Mr. Nguyen, were intended for, and actually paid out to, the following recipients:

- \$100,000 to the unidentified Hoang Thi Hong Thuy;
- \$100,000 to Pacific Gate; and
- \$50,000 to Pham & Company.

[84] With respect to the \$50,000 payment to Pham & Company on July 6, 2017, I find that Mr. Bui has failed to meet his burden to establish on a balance of probabilities that the payment was made at the direction of Mr. Nguyen. To the contrary, the evidence at trial (as admitted by Mr. Bui) was that he had previously retained Pham & Company to represent him on prior real estate transactions. By contrast, Mr. Nguyen testified that he had no relationship with Pham & Company. It is therefore logical to infer that Mr. Bui may have had a pre-existing debt to Pham & Company which he was paying off.

[85] It is of course possible that Mr. Nguyen's testimony that he had no relationship with Pham & Company was not truthful. However, ultimately Mr. Bui had the burden of proof on this issue. Mr. Bui could have called a representative from Pham & Company to shed light on the nature of any client relationship with either party and the purpose of the payment, but failed to do so. On the basis of the evidence adduced at trial, I therefore find that Mr. Bui has failed to prove that the \$50,000 payment to Pham & Company was made at the direction of Mr. Nguyen.

[86] With respect to the \$100,000 payment to the unidentified Hoang Thi Hong Thuy out of Mr. Bui's account, there was simply no evidence either way about the identity of this individual or the reason for the payment. It remains a mystery. That said, there was evidence adduced at trial of subsequent bank drafts from Mr. Bui's account to Hoang Thi Hong Thuy. Since these bank drafts were for amounts which were over and above the \$250,000 paid to Mr. Bui under the July 2017 Release (and

therefore would not logically have been related to the July 2017 Release), this is at least a *prima facie* indication that Mr. Bui perhaps had some form of independent connection to Hoang Thi Hong Thuy, separate and apart from Mr. Nguyen's involvement. However, the evidence was inconclusive on this point.

[87] In any event, the burden of proof falls on Mr. Bui to establish that his \$100,000 payment to Hoang Thi Hong Thuy was made at the direction of or was tied to Mr. Nguyen and I find that he has failed to adduce sufficient evidence to satisfy that burden.

[88] With respect to the \$100,000 payment made by Mr. Bui to Pacific Gate on July 6, 2017, the situation is different. The evidence at trial was clear, as admitted by Mr. Nguyen, that Mr. Nguyen had directed the return of the \$100,000 payment from Ms. Bui back to Pacific Gate. Mr. Nguyen testified that he made out the original bank draft to Mr. Bui's wife and then asked Mr. Bui to return that payment after which he wrote a separate bank draft out in the name of Mr. Bui. However, I earlier found this testimony not to be credible and drew an adverse inference based upon Mr. Nguyen's failure to adduce the original bank draft to Mrs. Bui as evidence. There was therefore no evidence of a further payment of \$100,000 from the defendants back to Mr. Bui after July 6, 2017. I conclude that this \$100,000 was never repaid from the defendants to Mr. Bui.

[89] Thus the documentary evidence supports the conclusion that the defendants breached the terms of the July 2017 Release by failing to make repayment of the \$100,000 promised to Mr. Bui by Mr. Nguyen after Mr. Bui had returned the original \$100,000 payment on July 6, 2017. The defendants were both releasees under the July 2017 Release, and do not dispute the contractual validity of this document, and therefore should in my view be jointly and severally liable.

[90] Mr. Nguyen argues that any liability in this case should be limited to Pacific Gate, on the basis that the Construction Contract and the First Release, Second Release and Third Release each involved only Mr. Bui and Pacific Gate. He argues that the circumstances do not justify lifting the corporate veil: *Century 21 Coastal*

*Realty Ltd. v. 0863846 B.C. Ltd.*, 2017 BCSC 1498, aff'd 2018 BCCA 298 at para. 44.

[91] In my view, it is unnecessary to lift the corporate veil to find Mr. Nguyen personally liable in this case because Mr. Nguyen himself, in addition to Pacific Gate, was a party to the July 2017 Release and was therefore personally obligated in contract along with Pacific Gate to make a payment to Mr. Bui in the amount of \$250,000. This liability arose from the July 2017 Release itself and was not connected to the Construction Contract or the prior releases.

[92] It is also relevant that the scope of the July 2017 Release, drafted by Mr. Nguyen, was much broader than a release relating solely to the Killarney Property or the Construction Contract (and indeed did not even specifically reference the Killarney Property); it was a release of all liability of any kind relating to Mr. Nguyen and Pacific Gate. The benefit to Mr. Nguyen personally was clear: under the July 2017 Release he was released from all liability generally of any kind, and not just liability relating to the Killarney Property or the Construction Contract. In my view, in drafting and entering into this agreement, Mr. Nguyen clearly contractually committed himself personally, as he received a personal and distinct benefit over and above any separate benefit to Pacific Gate. Thus, the need to address the issue of lifting the corporate veil does not arise on the facts of this case.

[93] Accordingly, I find that Pacific Gate and Mr. Nguyen are jointly and severally liable to Mr. Bui in the amount of \$100,000 on account of the breach of their payment obligations under the July 2017 Release.

## **V. ORDER**

[94] The defendants are jointly and severally liable for breach of contract to Mr. Bui under the July 2017 Release in the amount of \$100,000. All other claims of Mr. Bui against the defendants are dismissed.

[95] The parties are granted leave to speak to the issue of costs.

“M. Taylor J.”