COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Zheng v. Bank of China (Canada) Vancouver Richmond Branch,* 2023 BCCA 43

Date: 20230130
Docket: CA48006

Between:

Li Zheng

Appellant
(Plaintiff)

And

Bank of China (Canada) Vancouver Richmond Branch

Respondent
(Defendant)

Before: The Honourable Chief Justice Bauman
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated December 2, 2021 (*Zheng v. Bank of China (Canada) Vancouver Richmond Branch*, 2021 BCSC 2357, Vancouver Docket S207686).

Counsel for the Appellant:	N. Yan M.C. Ohama-Darcus E. Chen
Counsel for the Respondent:	R.E. Promislow
Place and Date of Hearing:	Vancouver, British Columbia October 3, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2023

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Grauer

Summary:

The appellant claims that the Bank of China (Canada) failed to warn her of a prevailing fraud before she transferred a large sum of money to an unknown person in Hong Kong. She appeals the dismissal of her claim on a summary judgment application. Held: Appeal allowed. There is a genuine issue for trial as to the Bank's knowledge of the prevailing fraud and its duty to warn the appellant when she first spoke to a teller about making the transfer. The extent of the Bank's knowledge of the fraudulent practice and its duty to warn the appellant raises a genuine issue for trial, as does the application and enforceability of an exclusion clause in the document the appellant subsequently signed at the Bank's request.

Reasons for Judgment of the Honourable Justice Griffin:

Overview

[1] Ms. Zheng was convinced by a fraudulent person to transfer $69,000 from her account with the respondent Bank of China (Canada) (the "Bank") to an account in another person's name at a Hong Kong branch of the Bank. She subsequently sued the Bank branch that accepted her instructions to make the transfer. The Bank applied for summary dismissal of the claim under Rule 9-6(4) on the basis that there was no genuine issue for trial. The application was granted by a Master. On appeal to the Supreme Court of British Columbia, the chambers judge upheld that decision, but primarily because he found the exclusion-of-liability clause in the Application for Remittance applied, and therefore Ms. Zheng's claim was bound to fail.

[2] Ms. Zheng appeals the order for summary dismissal.

[3] For the reasons that follow, I would allow the appeal and set aside the order for summary dismissal.

[4] Because the conclusion I have reached will revive the claim and it remains to be tried, I will be brief in my analysis of the viability of the claim.

Background

[5] Ms. Zheng alleges that she received a phone call on 15 May 2018 from a person purporting to be with the Chinese consulate. The person had the number from her driver's license, which was only one month old. The person told her that the

international police were looking for her and that she was accused of being involved in an international money laundering case. She was sent an arrest warrant. They threatened to freeze all of her bank accounts and to send her to jail in China where she would be banned from leaving the country. She was told to either fly back to China to stay in jail during the investigation or to transfer funds to Hong Kong that would then be returned to her after the investigation. She was told to keep the investigation confidential otherwise she would go to jail.

[6] On 22 May 2018, Ms. Zheng went to a branch of the Bank in Richmond where she sought a teller's assistance to transfer $69,000 from her account to an account in another person's name at a Hong Kong branch of the Bank. As part of the transfer process, the Bank had her sign an Application for Remittance. The remittance incorporated an exclusion-of-liability clause (the "Exclusion Clause") that included the following language in the Conditions of Transfer at para. 1:

> Bank of China (Canada) (the "Bank") acting in the capacity of a remitting bank will effect the remittance as requested on the Application for Remittance (the "Application") in the normal course of business without any liability on its part for any delay, failure of performance, damage, penalty, cost, expense or inconvenience resulting to the Remitter or any other person which may arise in consequence of errors or delays in the transmission of the relative message by telegraph, wireless cable companies, or by mail or courier services, or for the acts or omissions of any of its correspondents or agents, or for any cause beyond its control. The Bank is not liable to the Remitter or the Beneficiary (each as set out on the Application) or to any other person for incorrect or improper payment to any person arising out of the processing of any transfer, unless caused solely by the negligence or wilful misconduct of the Bank.
>
> [Emphasis added].

[7] Ms. Zheng alleges that neither the teller nor a "manager" asked her any security questions about the transaction and that the "manager" later told her that he did not ask her any questions because she "looked worried and stress[ed]."

[8] The "manager" was in fact an Internal Control and Compliance Officer, Mr. Bin Zhang, who deposed that he assisted in locating the signature specimen card and asked about the relationship between Ms. Zheng and the intended recipient. He deposed that he asked her this because it was an international

transaction greater than $10,000, but Ms. Zheng did not answer his question. He deposed that he "did not notice anything out of the ordinary."

[9] In June 2018, Ms. Zheng learned that the person who had contacted her was a fraud. She says she also learned that local media had reported this type of fraud occurring even before the transaction she was involved in. She alleges that the Bank knew of this prevailing fraud at the time of the transaction.

[10] Ms. Zheng subsequently brought an action against the Bank to seek the return of the funds (among other remedies), filing the Notice of Civil Claim on August 4, 2020.

Masters and Chambers Judgments

[11] The Bank applied for summary dismissal under Rule 9-6(4) on the basis that Ms. Zheng had not raised a triable issue in the action.

[12] The Bank filed Mr. Zhang's affidavit evidence in support of its application. Ms. Zheng, who was unrepresented by counsel, filed no evidence in response.

[13] The Master granted the application and dismissed Ms. Zheng's claim: 2021 BCSC 494. He found that her claim was essentially based on an allegation that the Bank had a duty to monitor transactions and to warn her that the transfer might involve a fraud. He found that the Bank had no such duty because the claim did not allege circumstances that could be regarded as establishing a fiduciary relationship between the Bank and Ms. Zheng. He concluded that the claim raised no genuine issue for trial, and he dismissed the claim.

[14] Ms. Zheng appealed the Master's decision. The chambers judge reviewed the decision on a standard of correctness. The parties agreed that the court could substitute its own assessment for that of the Master.

[15] Ms. Zheng drafted the Notice of Civil Claim herself but by the time of the appeal to the chambers judge, Ms. Zheng had counsel. The judge accepted her submissions that her claim revealed three distinct legal claims: (1) that the Bank

breached a duty to warn her about potential fraud; (2) that the Bank breached a contractual duty of care by allowing its wire transfer services to be used to facilitate fraud against Ms. Zheng; and, (3) that the Bank is liable in tort for conversion of the funds in Ms. Zheng's account: *Zheng v. Bank of China (Canada) Vancouver Richmond Branch,* 2021 BCSC 2357 at paras. 11–12 [*Zheng*].

[16] The chambers judge found that the claim in conversion was bound to fail. This conclusion is not challenged on appeal. Likewise, the appellant did not press the claim that the Bank allowed its wire transfer services to be used to facilitate fraud. The thrust of the appellant's claim is that the Bank had a duty to warn her that she may be a victim of fraud.

[17] The judge referred to the duty to warn claim as part of the Bank's duty to inquire:

> [50]….if the Bank was already aware of this "prevailing" scam that targets its customer demographic, it does not take detective work to inquire of the client's knowledge of that fraud when she attends in person at the branch to uncharacteristically transfer the substantial contents of her account to an overseas recipient.

[18] Leaving aside the effect of the Exclusion Clause, the chambers judge disagreed with the Master that the claim based on the Bank having a duty to warn was bound to fail: *Zheng* at paras. 27–34. The chambers judge was of the view that the claim that the Bank had a duty to inquire further of Ms. Zheng and to warn her about the potential for fraud was not bound to fail in light of several factors (at paras. 37–42):

a) Ms. Zheng's worried and stressed appearance when at the bank;

b) this was a large amount of money from a personal account;

c) it was almost all of Ms. Zheng's money in her account;

d) Ms. Zheng was at the branch in person, presenting an opportunity for further scrutiny or discussion;

e) the transaction appeared inconsistent with the declared purpose of the account in Ms. Zheng's account-opening documents; and,

f) Ms. Zheng's allegation that this method of fraud was "prevailing" in major Canadian cities before and at the time of the transfer and the Bank knew or ought to have known about the fraudulent scheme.

[19] The chambers judge found:

> [43] In my respectful view, if this allegation of "prevailing" fraud is true, and the Bank knew or ought to have known about it, this tips the balance towards an obligation on the part of the Bank to at least make an inquiry with Ms. Zheng about the potential for fraud. In this respect, I would suggest that much turns on the extent of what the Bank knew, or ought to have known, about this particular scheme and how specific that information was. Knowledge of the specific fraud, together with the other factors described above, at least make for an arguable case that the Bank was "put on its inquiry" and required to question Ms. Zheng about her awareness of the scam and the potential fraudulent nature of the transaction she was pursuing.
>
> [Emphasis added.]

[20] The chambers judge noted that although Ms. Zheng pleaded that the Bank ought to have known of this prevailing fraud and had a duty to warn her, the Bank put forward no evidence on what the Bank knew about this mode of fraud and how the banking industry deals with such prevailing frauds: at para. 45.

[21] Earlier the judge had noted that the onus was on the Bank, on a summary judgment application pursuant to R. 9-6(4), to file evidence meeting all the causes of action in the Notice of Civil Claim: at para. 19, citing *Beach Estate v. Beach,* 2019 BCCA 277 at para. 48 ["*Beach Estate*"].

[22] Despite finding that there would be a potential duty on the part of the Bank to inquire and warn, the chambers judge found that the Exclusion Clause applied in the circumstances. He noted at para. 69: "[Ms. Zheng] has not alleged or argued the clause is unconscionable, and she has not suggested any policy reasons as to why it should not apply: see *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4".

[23] Because of the applicability of the Exclusion Clause, the chambers judge concluded the claim was bound to fail as there was no reasonable prospect that Ms. Zheng could establish her loss was solely caused by the Bank's negligence or wilful misconduct. As such, he dismissed the appeal.

Issues

[24] This appeal requires consideration of two overall issues:

a) whether the judge erred in finding that the Notice of Civil Claim disclosed a genuine issue for trial as to whether the Bank had a duty to warn Ms. Zheng of the fraud. Ms. Zheng submits the judge was correct in this part of his analysis; the Bank submits he was in error and that this is an alternative ground for upholding the dismissal of the claim.

b) whether the judge erred in finding no genuine issue for trial based on his interpretation of the Exclusion Clause. Ms. Zheng submits the judge erred in this regard; the Bank submits he did not.

[25] The judge was sitting on appeal from the master. On our review of the judge's order, the question we must answer is whether he properly identified and applied the standard of review: *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 33.

[26] The judge identified that the standard of review he was to apply was correctness, and because the order was a final order, he understood he could substitute his own assessment of the matter for that of the Master: para. 18. This is the right approach.

[27] The second ground of appeal also raises a question of law because it involves the interpretation of a standard form contract, the Application for Remittance, for which the standard of review is also correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] 2 S.C.R. 23 at paras. 24–25.

[28] As will be explained, in my view the judge was incorrect in his interpretation of the Exclusion Clause and how it relates to Ms. Zheng's claim, leading to an incorrect finding that there was no genuine issue for trial.

Analysis

Approach to Summary Judgment

[29] The present appeal is not from a trial on the merits, but rather, from a chambers application to dismiss a claim as disclosing no genuine issue for trial, pursuant to R. 9-6. The relevant sub-rules of R. 9-6 are:

> Rule 9-6
>
> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule …(4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> ….

[30] The rules of civil procedure recognize that when it comes to providing access to justice, there are often tensions pulling in opposite directions. To the plaintiff who feels wronged but cannot prove all elements of the claim until discovery of the defendant, a preliminary defence motion to strike the claim poses a barrier to justice. To a defendant who feels a claim being advanced against them has no merit, the prospect of having to go through the expense and inconvenience of a lengthy pre-trial and trial process before the claim is dismissed seems unjust.

[31] The balance that has been struck in R. 9-6 is to allow a party the opportunity to bring a preliminary application to show the court that a claim or defence has no merit and therefore it should not be allowed to proceed to trial. However, the burden on the applicant is high. It is not enough to show that the claim or defence has little merit, nor is it appropriate to ask the court to weigh competing evidence. Rather, the applicant must show that the claim or defence presents no genuine issue for trial and it is bound to fail.

[32] This Court in *Vandev Consulting Limited v. Pacific Maple Manufacture Inc.*, 2022 BCCA 97, noted that a defendant can succeed on a R. 9-6 application "by showing the case pleaded by the plaintiff is unsound [does not support a cause of action] or by adducing sworn evidence that gives a complete answer to the plaintiff's case": at para. 42, citing *Beach Estate* at para. 48.

[33] However, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect, or if the defendant's evidence fails to meet all the causes of action raised by the plaintiff's pleadings, the application must be dismissed: at paras. 42–43, citing *Beach Estate* at para. 48 and *Canada (Attorney General) v. Lameman,* 2008 SCC 14 at para. 11; see also *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500 at paras. 12–13. Where the plaintiff has pleaded a cause of action and facts in support are within the defendant's knowledge and control, a defendant bringing a summary judgment application must provide evidence that the pleaded claim is without merit*: Balfour v. Tarasenko,* 2016 BCCA 438 at para. 43.

[34] A judge on a summary judgment application is not permitted to weigh evidence, assess credibility or draw unfavourable inferences against the party defending the application: *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27.

Duty to Warn

[35] In full context, Ms. Zheng's pleading of the "prevailing fraud" must be understood as a claim that there were hallmarks of the fraud perpetrated against her that were common and known to the Bank. The Bank filed no evidence to refute Ms. Zheng's pleading that it knew of the "prevailing fraud". Ms. Zheng's pleading of this fact is to be assumed true given that there was no evidence filed to refute it.

[36] The Bank says that there is no general duty on the part of a Bank to inquire of a customer when receiving instructions directly from that customer to transfer funds. Rather, the Bank's contractual obligation is to accept its customer's instructions. It refers us to a number of authorities in support of this proposition: *Du v. Jameson Bank*, 2017 ONSC 2422 [*Du*], *D2 Contracting Ltd. v. The Bank of Nova Scotia*, 2015

BCSC 1634, aff'd 2016 BCCA 366 [*D2*], *Jaguar Transport Ltd. v. TD Canada Trust*, 2004 MBQB 219 [*Jaguar*], and *Foodinvest Limited v. Royal Bank of Canada,* 2020 ONCA 665 [*Foodinvest*].

[37] However, each of these cases turn on the facts. In *Du*, the financial institution had "no reason to believe" that there was fraud involved in the instructions to wire transfer money: at paras. 57, 70. In *D2*, the bank had no knowledge of irregularities and forged cheques until the plaintiff reported the same to the bank. In *Jaguar*, there was nothing on the facts to indicate that the bank had knowledge of the forgeries affecting the customer. In *Foodinvest,* the transfers to a Polish bank account were all authorized by the plaintiff using a self-service transfer facility without the assistance or supervision of any bank personnel. It was not a case where the bank customer was present in the Branch and requested the bank's assistance to make a transfer. The Court in that case considered that the relevant agreement for the self-service portal was "exhaustive" on the subject of RBC's potential liability, and found the duty of care did not require the bank to concern itself with the *bona fides* of the underlying transactions.

[38] In short, none of the cases the Bank relies upon involve facts where the bank had knowledge of a prevailing fraud and the circumstances of the transaction at issue put the bank on notice that it should warn its customer of the fraud, and the bank had the ability to warn the customer because the customer was in the bank branch inquiring about how to carry out the transaction.

[39] As the chambers judge noted, there is authority for finding that a bank owes a duty of care to its customers, including a duty to inquire in the face of the bank's knowledge of a potential fraud: *Zheng* at paras. 27–30, citing *Groves-Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce,* [1976] 64 D.L.R. (3d) 78, 1975 CanLII 912 (B.C. C.A.) and *Semac Industries Ltd. v. 1131426 Ontario Ltd.*, 2001 CanLII 28375 (Ont. S.C.).

[40] The Bank also argues that Ms. Zheng did not plead causation. I disagree. She pleaded that she "was reliant upon the knowledge that the bank has in dealing

with financial frauds and therefore would have expected to be warned about such serious crimes happening in Canada": Notice of Civil Claim at p. 3. It is also implicit from the whole of her claim that she alleges if she had been warned, then she would not have entered into the transaction. She stated this expressly in her Response to the Notice of Application: at p. 18.

[41] The Bank submits that Ms. Zheng filed no evidence in response to Mr. Zhang's affidavit that he asked her who the intended beneficiary of the transfer was and she declined to answer. The Bank says that this proves that Ms. Zheng would have made the transfer regardless of any inquires; therefore, by her own admission and pleadings, she cannot prove causation. I disagree. There is no evidence that the Bank warned Ms. Zheng that there was a prevailing fraud of this sort. Had it done so, Ms. Zheng may well have realized she was being duped and halted the transaction. I therefore see causation as a genuine issue for trial.

[42] I agree with the chambers judge that the Bank's knowledge that there was a prevailing fraud of the nature that affected Ms. Zheng, and its knowledge of the unusual nature of this transaction for Ms. Zheng who was present in the branch, could form a basis for the Bank to owe her a duty to inquire and to warn her about the fact that there was a fraud targeting people like her and causing them to empty their bank accounts by transferring monies to Hong Kong branches of the same Bank. The judge was correct in finding that there was a genuine issue for trial in this regard, unless the Exclusion Clause clearly applied and would otherwise defeat the claim.

Exclusion Clause

[43] The chambers judge found that the Exclusion Clause would apply to limit any liability if there was a breach of a duty to warn, leaving no genuine issue for trial. In so finding, the judge also held that Ms. Zheng did not plead that the Exclusion Clause was unconscionable nor did she suggest any policy reasons as to why it should not apply. In my view, the judge erred in these conclusions.

[44] The chambers judge recognized at para. 69 that had Ms. Zheng put in issue the question of whether the Exclusion Clause was unconscionable, he would have been required to engage in the analysis set out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon*]. He did not engage in this analysis because in his view Ms. Zheng did not plead unconscionability.

[45] While the Supreme Court of Canada in *Tercon* was divided on the result, it agreed on the proper approach to interpretation of exclusion clauses: *Tercon* at paras. 62, 122. The first issue is whether the exclusion clause even applies to the circumstances established in evidence. The second issue is whether the clause was unconscionable at the time it was made. The third issue is whether the clause should not be enforced for reasons of public policy.

[46] In *Tercon*, the majority of the Court held that an exclusion clause in a request for proposals did not apply to a bidder's claim for damages against the Province. The exclusion clause limited liability for claims that resulted from "participating in [the] RFP". The Court found that that the conduct of the Province in considering an ineligible bidder arose outside of the RFP process and so the clause did not apply. It reached this conclusion considering the context of the parties' entire contract: at paras. 63, 65, 74. Alternatively, the Court would have reached the same conclusion on the basis that the clause was at least ambiguous: at para. 79.

[47] The Bank argues that the Exclusion Clause applied to any liability arising from the Bank's processing of the transfer instructions. Relying on the language of the Exclusion Clause, it says that since the loss of Ms. Zheng's funds was not "solely" due to any error by the Bank in processing the transfer instructions or its "wilful misconduct", it applies to preclude any claim against the Bank. The chambers judge accepted this argument.

[48] Ms. Zheng argues on this appeal that the chambers judge erred in finding that there was no genuine issue for trial because the Exclusion Clause applied to preclude her claim for damages.

[49] I agree. The judge failed to consider that, by analogy to the views of the majority in *Tercon*, Ms. Zheng has an available argument at trial that the Bank's error arose before the processing of the transfer instructions and therefore outside of the context and application of the Exclusion Clause.

[50] In my view, Ms. Zheng has an available argument that the duty to warn arose when she first advised the teller that she wanted to make the $69,000 transfer. It appears from the Bank's Notice of Application that this occurred first in the chronology of events when Ms. Zheng attended in person at the Bank's branch. Ms. Zheng has an argument available to her, on her pleadings, not answered by the Bank's evidence, that the Bank's duty to warn arose when she made her oral request, and had the Bank fulfilled this duty, none of the other steps in effecting the transfer would have occurred, including filling out and signing the Application for Remittance containing the Exclusion Clause.

[51] The claim, seen this way, is not based on an error in processing the transfer once the Bank accepted the Application for Remittance, but rather, it is based on the Bank not warning Ms. Zheng about the fraud when it first learned she wished to make such a transfer. Seen this way, the claim has nothing to do with the Bank carrying out Ms. Zheng's instructions on the Application for Remittance, but rather, it has to do with it not intervening and warning her so that she would not give these instructions.

[52] Thus, I see the application and interpretation of the Exclusion Clause in this case as depending on the facts of the Bank's knowledge of the prevailing fraud and its duty to warn Ms. Zheng <u>before</u> it asked her to provide a signed Application for Remittance. Since there is a genuine issue for trial about those facts, the judge ought not to have interpreted the Exclusion Clause as barring the claim.

[53] I also consider there to be a genuine issue for trial as to the enforceability of the Exclusion Clause and whether in the circumstances it was unconscionable.

[54] On the question of whether Ms. Zheng pleaded that the Exclusion Clause was unconscionable, it is fair to say that Ms. Zheng's Notice of Civil Claim was not a model of a good pleading due to the fact she drafted it without the assistance of legal counsel. However, the judge overlooked that the same pleaded facts that supported a duty to warn could support an argument that the Exclusion Clause was unconscionable.

[55] Further, Ms. Zheng also expressly mentions the legal concept of unconscionability in her Notice of Civil Claim. At p. 3 of the Notice of Civil Claim, Ms. Zheng checked a box on the template form "Other", and wrote next to it "Unconscionable Acts or Practices/Negligence in care/Duty to Warn/Making False Statement/Business Practices and Consumer Protection Act". Elsewhere in her pleading, she complains about the Bank's refusal to give her a refund and compensate her when she complained to them about the fraud and their failure to warn her of the prevailing frauds: Notice of Civil Claim, Part 1 at para. 12. At Part 2: Relief Sought at para. 4, her claim states: "[t]he bank had the constructive knowledge about the fraud. Failure in warning the client of the frauds contributed massive financial loss and health damages. The bank acted the role of aiding and abetting the crime by not warning the client". In Part 3: Legal Basis, she lists the *Business Practices and Consumer Protection Act,* S.B.C. 2004, c. 2 [*BPCPA*] and refers to "Unconscionable acts or practices 8(1)(2) and (3)."

[56] The *BPCPA* provides in s. 8:

> 8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> > (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
> >
> > (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity,

> ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
>
> (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a prescribed circumstance.

[57] Ms. Zheng did not pursue her claim based on the *BPCPA* before the chambers judge nor does she rely on it on appeal. That does not mean, however, that she abandoned her pleading of unconscionability.

[58] A fair reading of Ms. Zheng's pleading supports a conclusion that she was asserting that the Bank's conduct as a whole was unconscionable: in knowing of the fraud, not warning her of it, and then relying on the Exclusion Clause. Allowing for the fact that she drafted her pleading without the assistance of legal counsel, a fair reading of it should have led to the conclusion that Ms. Zheng put the question of whether the Exclusion Clause was unconscionable in issue.

[59] Just as the Bank's evidence filed in support of the summary judgment application did not address Ms. Zheng's pleading that it knew of the prevailing fraud and had a duty to warn, the Bank's evidence also did not meet the pleading of unconscionability.

[60] The evidence filed by the Bank included Ms. Zheng's personal account application form. This showed that she was the sole owner of the account, and she was employed as a sales professional at Tiffany & Co., a jewellery retailer. It listed the source of deposits in the account as "income saving"; the intended use was "family support for living expense around $30,000.00". This evidence supports an argument that Ms. Zheng was not a sophisticated person with a large income, that

she was vulnerable to the prevailing fraud, and that the transaction she intended was highly suspicious in light of the large sum involved, the fact that it practically emptied her bank account by way of a transfer out of the jurisdiction, and the Bank's knowledge of her employment and intended use for the account.

[61] The Bank's evidence was that a Bank employee, Mr. Zhang, considered it necessary to ask Ms. Zheng about the intended beneficiary of the transfer. This supports Ms. Zheng's claim that the Bank was put on notice to make such an inquiry. The sufficiency of its inquiry, and whether it should have included a warning in light of Ms. Zheng's claim that the Bank knew about prevailing frauds, raises a genuine issue for trial not just with respect to the duty to warn, but also with respect to the applicability and enforceability of the Exclusion Clause.

[62] An unconscionable and unenforceable bargain can arise when there is a significant inequality of bargaining power and the contractual term is improvident: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 54, 62–65 [*Uber*]. Standard form contracts have features that make them more susceptible to being found unconscionable: *Pearce v.4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 208, citing *Uber* at para. 89.

[63] The Application for Remittance is a standard form contract, one which Ms. Zheng had no ability to negotiate. The question of whether there was substantial unfairness in the bargain will depend on the findings of fact at trial, especially the findings having to do with the Bank's knowledge about the type of fraud at issue.

[64] There is a genuine issue for trial as to whether it was unconscionable for the Bank to have Ms. Zheng sign a document containing the Exclusion Clause and confirm instructions for the transfer, in circumstances where the Bank allegedly knew about the type of prevailing fraud sufficient to trigger a duty to warn and to inquire of Ms. Zheng, particularly in light of Ms. Zheng's vulnerability.

Disposition

[65] In summary, the Bank filed no evidence in support of its summary judgment application as to whether it had knowledge of a prevailing fraud similar to that which affected Ms. Zheng. This gives rise to a genuine issue for trial and could support Ms. Zheng's claim that in the circumstances of this case, the Bank had a duty to inquire and to warn her. If the Bank knew of the prevailing fraud and did not warn her after she informed the Bank she wanted to make the transfer, and before having her fill out and sign the Application for Remittance, there is a genuine issue for trial as to whether the Exclusion Clause applied and whether it was unconscionable and unenforceable.

[66] I would allow the appeal, set aside the judge's order, and substitute an order that the Bank's application for summary judgment be dismissed.

[67] I add that it is intended by these reasons to revive that part of Ms. Zheng's claim that is based on the Bank's duty to warn and to inquire of her regarding the prevailing fraud. It is not intended to revive that part of Ms. Zheng's claim that she abandoned before the judge, that is, her claims: based on the allegation that the Bank breached a contractual duty of care by allowing its wire transfer services to be used to facilitate fraud against Ms. Zheng; based on the tort of conversion; or based on the *BPCPA*.

[68] Ms. Zheng submitted that each side should bear their own costs of the appeal, and advised that she has earlier been granted no fee status on her appeal. I would agree that an order that each side bear their own costs is an appropriate order in the circumstances.

"The Honourable Justice Griffin"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Grauer"