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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.301/96

**LOW
PRIORITY**

BETWEEN

K. OHNUMA

Plaintiff

AND

H.J. JIANG aka A. CHANG

First Defendant

AND

S.J. McDONALD

Second Defendant

Hearing: 20,21,22 October 1997

Counsel: M. Dunning and C. Spillane for Plaintiff
D. J. Ryken for First Defendant

Judgment: 29 OCT 1997

JUDGMENT OF SALMON, J.

Solicitors: Russell McVeagh McKenzie Bartleet, Auckland for Plaintiff

Patrick Loughlin McGuire, Parnell, Auckland for First Defendant

In these proceedings the plaintiff seeks to recover from the first defendant moneys and other benefits provided to the first defendant. At the commencement of the hearing I was advised that the claim against the second defendant had been settled and in the event the second defendant took no part in the hearing.

In the course of this judgment it will also be necessary to determine proceedings relating to a caveat placed by the plaintiff against land held in the name of the first defendant (hereinafter referred to as "the defendant").

Background

The plaintiff met the defendant in a Tokyo karaoke snack bar in late 1994. The relationship blossomed and was consummated in a sexual sense in either New Zealand or Australia in either May or June of 1995. In June 1995 a house was purchased in Auckland. The relationship between the plaintiff and the defendant ended in early 1996. Over this period of time the plaintiff gave the defendant sums of money. He paid for travel for himself and the defendant to New Zealand, Thailand and Australia. He provided the sum of \$100,000 towards the cost of the Auckland house and he purchased and arranged for the importation into New Zealand of a number of Japanese motor vehicles which were then sold in this country.

3.

The plaintiff's claim is effectively under three heads. The plaintiff claims the return of cash advances and travel expenses totalling \$84,538. It is claimed that the money and other benefits represented by this sum were provided in consideration of an agreement on the defendant's part to work for the plaintiff in the future in Japan and that a term of that agreement was that the defendant would act fairly and honestly towards the plaintiff and would not act in a way which would have an adverse or detrimental impact on the relationship of trust that existed between them. It is claimed that the defendant breached that agreement and accordingly, the return of that sum is claimed.

The second area of claim concerns the house purchase. In respect of that purchase the plaintiff claims that he entered into an oral agreement with the defendant whereby he would provide funds to purchase an investment property, the property would be purchased in their joint names and would be treated on the same basis as the other benefits made available to Ms Chang. The plaintiff claims that the agreement has been breached. An enquiry is sought into the dilution of the value of the property consequent on the breaches and damages are claimed.

The third area of claim concerns the importation into New Zealand of seven second-hand Japanese motor vehicles. The plaintiff alleges that in late June 1995 he agreed with the defendant that the moneys generated from the sale would be dealt with -

- (a) as to the first four vehicles by applying the entire proceeds to pay for the renovation of the house or the purchase of fixtures, fittings and chattels for the house;
- (b) as to the remaining three vehicles, the defendant would reimburse the plaintiff for the cost of purchasing and sending the vehicles to New Zealand and would retain any profit for her own use;
- (c) any moneys advanced to the defendant in this way would be dealt with on the same basis as the other benefits made available to her. It is claimed that in breach of that agreement the defendant has failed to reimburse the plaintiff for the purchase price and related expenses of the vehicles.

There are further causes of action relating to all three claims under the head of unjust enrichment, resulting trust and breach of fiduciary duty. I now propose to consider legal submissions made on behalf of the parties and then to address separately each of the three areas of claim referred to above.

Onus of Proof

Counsel addressed legal argument to me on the question of onus of proof in relation to cases involving alleged gifts. As will be seen from what follows I have not found it necessary to consider onus of proof other than in relation to the ownership of the house. In deference to counsel's arguments I set out my findings on this issue.

There is a conflict between the decision of the English Court of Appeal in *Seldon v Davidson* [1968] 2 All ER 755 and the decision of the High Court of Australia in *Heydon v The Perpetual Executors Trustees and Agency Company (WA) Ltd* [1930] 45 CLR 111. In the English decision the plaintiff sought to get back money which she had paid to the defendant. The defence was that the money was intended as a gift. At page 757 Willmer, L.J. said:

"The way I look at it is this. Payment of the money having been admitted *prima facie* that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement. This is not a case of father and child or husband and wife or any other such blood relationship which could have given rise to a presumption of advancement."

The Court referred to the "... very scanty authority on this subject" and noted that the researches of counsel went back to the year 1801 and to a case of *Cary v Gerrish* (1801) 4 Esp. 9. In his judgment Edmund Davies, L.J. referred to the slightly later case of *Welsh v Seabourne* (1816) 1 Stark. 474. Both those cases were distinguished. The Court held that the burden of proof was on the defendant to establish the existence of the gift.

In the Australian case the plaintiff sued for money said to have been lent to the defendant as trustee for a deceased. The defendant denied the allegations and said the money was a gift. The High Court of Australia held that the burden of proving the facts in support of the cause of action rested on the plaintiff. It appears that the early English decisions were referred to

in argument, but no reference to any authority is made in the judgments of the Court.

In New Zealand the decision in *Seldon v Davidson* (supra) has been followed by Hardie Boys, J. in *Milne v Armijo* (unreported, High Court, Christchurch Registry, CP.7/88, 25 August 1989) and by Temm, J. in *Freidlander v Leeming & Others* (unreported, High Court, Auckland Registry, CP.1008/90, 25 June 1993). In neither case was any reference made to the decision of the High Court of Australia. Each Judge held that the law is that where there is not the kind of relationship in which the presumption of advancement arises the payment of money by one person to another *prima facie* gives rise to an obligation to repay within a reasonable time of the making of the payment.

I see no reason to differ from the findings of either of those learned Judges. Having considered the decision of the High Court of Australia I prefer that of the English Court of Appeal. In the case of a payment of a sum of money by one person to another it is all too easy to claim that it is a gift. If for no other reason, that is sufficient in my view for placing the onus on the person who raises such a claim to establish that that is so.

In most cases, of course, as indeed in this case, there will be evidence of surrounding circumstances or relationships which will make it clear whether or not a payment was intended to be a gift and it will not be

necessary to have recourse to considerations of burden of proof. The exception in this case is the money provided by the plaintiff for the purchase of the house where considerations of burden of proof on gifts and other considerations have led me to the conclusion that the payment in that case was not a gift.

Provision of Benefits

The plaintiff says that at their first meeting at the karaoke bar where the defendant worked as a hostess he and the defendant developed an instant rapport and he continued to visit the bar and meet with her. They had evening meals together on a number of occasions and he says that he discussed business related matters which were of topical interest. The plaintiff is a wealthy man. He acknowledged having net assets worth the equivalent of around NZ\$14 million.

In her evidence Ms Chang describes their conversations in rather different terms. She describes how the plaintiff told her he was married and that he had just broken up with his girlfriend of eight years. The plaintiff began taking the defendant to jet boat racing events where Mr Ohnuma would spend amounts of up to \$1 million yen on bets during the course of an afternoon. The plaintiff gave the defendant money on these occasions; sometimes he gave her the whole of his winnings which could amount to as much as US\$2,000. The defendant says that throughout her relationship with the plaintiff they never discussed business matters. He did not

introduce her to any of his business associates and she was never taken to any of his business premises. She says that the relationship was purely romantic right from the beginning.

In cross-examination the plaintiff denied that initially his relationship with the defendant was purely personal. He said it started off as a business relationship. He acknowledged the visits to the motor boat racing events and the gambling and that he gave money to the defendant.

I accept the defendant's evidence as to the nature of the relationship in its early stages. I have no doubt that the plaintiff's intention from the start was to develop a romantic relationship with the defendant. My conclusion on the basis of the evidence is that he entertained her and gave her sums of money with this end in view. It may well be that he hoped that she would be of assistance to him in his business at some future time, but I am satisfied that this was not his primary motivation during the period after they first met. The activities in which the parties engaged and the gifts from the plaintiff to the defendant are quite inconsistent with a business relationship but are completely consistent with an intention on the plaintiff's part to develop a romantic relationship with the defendant.

There is some slight evidence from friends of the defendant supporting the romantic nature of the relationship during this early time in

Japan, but the finding I have reached does not depend on that evidence but rather, on the evidence of the plaintiff and the defendant.

As a result of the view I have reached on the nature of their relationship I reject the suggestion that the parties entered into an oral agreement of the nature referred to in paragraph 4 of the first amended statement of claim. I am satisfied too that the travel expenses and later provision of cash, were made as a result of the developing romantic involvement and not pursuant to any form of contract between the parties. It follows that I reject the plaintiff's claim for the recovery of the sum of \$84,538.

The Purchase of the Property

The defendant first came to New Zealand in March 1989 and became a New Zealand resident in 1992. In 1993 she made a trip back to China to visit her parents and after that visited her brother in Japan. She worked in Japan during this period and after a short time back in New Zealand returned to Japan in January 1994 and enrolled in a school where she learned the Japanese language. Visa requirements necessitated her leaving the country each three months. In about May of 1994 she began working part time at the karaoke snack bar where she eventually met the plaintiff. As their relationship developed it is the defendant's evidence that the plaintiff suggested that she should live with him as his mistress in Tokyo and she says that they talked about buying a house. She, of course,

discussed the time she had spent in New Zealand and during one conversation the cost of houses in this country was mentioned. The defendant said that it would be possible to buy a house in New Zealand for around \$100,000 which the plaintiff thought was very cheap. The defendant says that after obtaining a real estate catalogue from New Zealand the plaintiff said that if a house could be bought in New Zealand for \$100,000 he would buy it for the defendant. The parties arranged to fly to New Zealand and left Japan on 6 May 1995.

The plaintiff's version of events leading up to this first visit to New Zealand was that the defendant told him that a lot of money could be made out of buying property in New Zealand and that he was attracted to this idea and to her proposals. He denies that he said he would purchase a house for the defendant, and in particular denies that he proposed to give her \$100,000 as a gift.

The plaintiff speaks neither English or Chinese so that during their time in New Zealand he was entirely reliant on the defendant to communicate with people. There is no doubt that he intended to bring \$100,000 in cash to New Zealand to buy a house. However, because banks were closed at the time they left Japan he could not cash his cheque. During this first stay in New Zealand the parties looked at houses, but could find nothing at around \$100,000 which the plaintiff wished to purchase.

The plaintiff stayed in New Zealand for about two weeks. During that time the plaintiff and the defendant went to the races, to the Waiwera hot pools and to Rotorua where they stayed for a night. In the Rotorua hotel they slept in the same room and for a portion of the night in the same bed. This was the first time they had slept together. The defendant says that their sexual relationship started on this occasion. The plaintiff denies that, saying that it started somewhat later in Australia. I do not think it matters. There is no doubt on the evidence of each of them that by the time of their stay in New Zealand they were romantically involved.

The plaintiff and the defendant both returned to Japan on 16 May. However, the defendant was denied entry. Apparently the primary reason for this is that it was the day of the poison gas attack by a religious sect in a Tokyo subway. Many foreigners were denied entry on that day and the defendant was sent back to New Zealand. She was upset at this happening because her employer in Japan was expecting her back and she had other matters to attend to in Japan.

The plaintiff rang the defendant on several occasions after she returned to New Zealand and it was arranged that he would fly back to New Zealand and that the two of them would immediately go to Sydney and then return to New Zealand.

The plaintiff maintained in his evidence that his return to New Zealand was because of his interest in business opportunities here, although he agrees that he was in touch with the defendant on several occasions over the period between his return to Japan and his second visit. He acknowledged in cross-examination that at this stage he was in a personal relationship and that because of that personal relationship he would be happy to promote her in the business world as well.

The parties stayed for a week in Sydney. They went sightseeing and slept together at the hotel at which they stayed. They visited Canberra to gamble at the casino there. On 11 June they came back to New Zealand and stayed, as on the previous occasion, with friends of the defendant. They again went to look at houses and eventually entered into an agreement to buy one at Pakuranga. The price agreed on was \$268,000. An agreement was drawn up. It shows both plaintiff and defendant as purchasers and both of them signed the agreement. They visited a solicitor, Mr S. J. McDonald. He gave evidence of the discussion that took place. His evidence (which I accept) was that his instructions were given to him by the defendant. He explained the difference between a joint tenancy and a tenancy in equal or unequal shares, and was told that the intention was that the parties should hold the land on a joint tenancy basis. He gave the plaintiff a trust account deposit slip to enable the plaintiff to deposit funds in his trust account for the settlement of the purchase. All this happened at his first, and only meeting with the plaintiff in late June 1995.

After that first meeting the only instructions which Mr McDonald obtained were from the defendant. He had no way of contacting the plaintiff. He had difficulty getting instructions from the defendant and did not receive funds with which to pay the deposit on the purchase. He prepared a memorandum of transfer which he sent to the solicitors for the vendors and in due course received a signed transfer document and a settlement statement. His evidence is that on 24 July the defendant gave him instructions that she intended to complete the purchase of the property and would take title in her own name alone and that she would be arranging a mortgage. The purchase was eventually settled with Westpac bank providing the sum of \$187,500 and the defendant eventually providing the deposit of \$26,800, and the balance required to settle which together with fees totalled \$54,648.85. The reference to the plaintiff as one of the transferees in the transfer document was deleted and the alteration initialled by the solicitor for the transferors. Mr McDonald obtained no instructions from the plaintiff regarding the deletion of his name from the transfer.

The plaintiff's evidence was that he was unaware of the defendant's instructions to Mr McDonald concerning purchase in her name alone and that it remained his expectation that the property would be held by them jointly. He says that his original intention was to send \$100,000 to Mr McDonald's trust account, but later, at the defendant's request, he paid this sum into her account because she had said that the deal as a whole

would be cheaper if that was done. In fact, he did send \$100,000 to Ms Chang's ASB Visa bank account together with an additional \$10,400 which he originally said was to cover the defendant's expenses on their Sydney trip with the remainder to be divided between furnishing the house and general expenses. In answer to questions in cross-examination he said that the extra \$10,400 was to pay back the defendant's friend for money which the friend had provided to enable a car to be purchased. When pressed he said he was unsure about the purpose of the additional \$10,400.

It is the defendant's evidence that the original intention was that the plaintiff would provide the full purchase price, but that because of cash flow problems that intention was changed to one whereby he would provide \$100,000 and the balance would be raised on mortgage. The plaintiff denies that, saying that it was always intended that a mortgage would be raised.

There is some evidence to support the plaintiff's contention in that regard. The agreement for sale and purchase has a box for financial conditions, after the words "last day for arranging finance" the date "21/6/95" has been inserted. However, in that part of the box where there is provision for the name of a lender and the amount required, the word "nil" has been written. The evidence from the agreement, therefore, seems to be at best, equivocal.

On balance I prefer the evidence of the plaintiff in this regard. The house was to be an investment as well as a place where Ms Chang could live when in New Zealand and it is logical, and indeed, quite usual for there to be a mortgage, with payments to be met from the income generated by renting the property. The parties were agreed that the intention was that the property should be operated as some sort of boarding house with rooms rented out.

The defendant's evidence is that the plaintiff agreed that the \$100,000 should be a gift and that the house should be solely in her name, with her taking responsibility for the mortgage. I am satisfied that the onus of proof of these assertions must be on the defendant. The agreement and their initial discussions with Mr McDonald raise a *prima facie* inference in favour of a joint tenancy form of ownership. The defendant has not discharged the onus that is upon her to establish that that original intention changed. Nor has she discharged the burden of proving that the \$100,000 was intended to be a gift. Accordingly, I hold that the property should be held in the names of the plaintiff and defendant as joint tenants.

There is evidence which indicates that the defendant attempted to dispose of the property to prevent the plaintiff from obtaining an interest in it. After the relationship broke up the plaintiff learned that the property was not in their joint names. On 28 February 1996 the plaintiff wrote to the defendant asking why his name was not included in the title to the property

as had been intended by the agreement. The defendant responded in a letter dated 14 April 1996. She suggested in that letter that the agreement had expired on 10 July 1995 and that she had purchased the house on 28 July. That, of course, was not correct. The property was purchased pursuant to the agreement which both parties signed.

The defendant also said in that letter:

"I don't have any designs on the property. Whether I have it or not is all the same to me."

Despite this statement, she had already taken steps to undertake an urgent sale of the property to a friend. The defendant acknowledged in evidence that that was so, and that she concealed that fact from the plaintiff.

In my view this sequence of events supports the conclusion that the defendant knew that the plaintiff was entitled to joint ownership of the property.

I reject the submission on behalf of the plaintiff that the property would be treated on the same basis as the other benefits made available to the defendant. In other words I do not accept the existence of a contract which would require the defendant to repay to the plaintiff the \$100,000 provided by him.

I accept the plaintiff's claim that in relation to the purchase of the house the defendant had fiduciary obligations to the plaintiff. In this regard the defendant's counsel referred to *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 and the following passage from the judgment of Mason, J. at page 96:

"The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed."

I agree that in relation to the purchase of the property the characteristics of a fiduciary relationship existed. Ms Chang was, as counsel for the plaintiff contended, Mr Ohnuma's voice and ears in New Zealand. On the purchase of the property she was in a position of power relative to Mr Ohnuma.

The Car Imports

There were two shipments of cars to New Zealand. In respect of the first, it is the plaintiff's evidence in chief that the entire sale proceeds were to be used for renovating the house, buying furniture and other amenities. So far as the second shipment was concerned his evidence is that he was to

be reimbursed for the cost of purchase and importation and that the defendant could keep the profits.

In cross-examination and in re-examination the plaintiff's evidence appeared to change in relation to the first shipment. The plaintiff's evidence on this point given in answers to re-examination was that the first shipment was more or less on a trial basis to see what would happen and that if there was some profit then the defendant could use it.

The defendant's evidence in relation to the first shipment of cars is that the money from the cars was a gift to her to be used to pay for the renovations and to pay the mortgage or any of her other expenses as she saw fit. Similarly, the second shipment of cars was also to be a gift to her.

The evidence regarding the application of the proceeds of the sale of the cars is confusing. There appears to be no doubt, however, that the profit on the sale was to be used by the defendant as she thought fit. I am satisfied that the proceeds of sale, apart from profit, of the first shipment were to be used for the renovations to the house and other expenses in relation to the house. As to the proceeds of sale, other than profit on the second shipment, the plaintiff's evidence in chief was that Ms Chang was to, "Cover the costs of the vehicles. Apart from that she could keep the remaining profits." In cross-examination he said that originally there was no

real relationship between bringing the cars in and renovating the house.

There was then this exchange:

"When you brought the cars in by that stage it was clearly decided it was to pay for the renovations?... Yes I decided later.

Did you decide this before you sent the cars to New Zealand or after?... Later, before we bring the cars in we discussed about to pay the cost of the car."

In answer to a question regarding his intention in respect of the cars in both shipments he said:

"At the beginning I never promised all the proceeds to the gift, but from the beginning the cost has to pay back to me, but after house renovation as such and they realise they needed more funds so my thought start changing."

On the basis of the above evidence it seems the best interpretation is that the proceeds from the sale of the second shipment were also to be used for expenses associated with the house. The money sums involved seem to make this a reasonable conclusion. The evidence suggests that the cost of renovations was around \$40,000. Counsel for the plaintiff advised the Court that the landed cost of the seven cars in New Zealand was just over \$2,000,000 Yen. At current rates of exchange that would represent in New Zealand dollar terms; less than \$30,000.

The plaintiff was entitled to have this sum applied towards either the costs of renovation or the purchase of furniture and other amenities. It is not clear from the evidence whether or not that was done. That is a matter which may need to be the subject of further enquiry and evidence.

The Cessation of the Relationship Between the Parties

The findings I have made do not require me to make findings concerning a number of other contentious issues. However, because of the prominence it assumed in the evidence of both plaintiff and defendant it is appropriate that I should make a finding of fact concerning an incident which provided for the plaintiff the excuse or reason for bringing the relationship to an end.

On his fourth trip to New Zealand in December 1995 the plaintiff's evidence is that he was picked up by the defendant at the airport and went straight to the Pakuranga house. He says that he wandered around the house and saw a man lying asleep in the defendant's bed. He later learned that this was the carpenter and found this very strange and unusual because it was around 3 or 4 o'clock in the afternoon. This incident brought him immediately to the conclusion that the defendant was not the sort of woman that he had thought she was. His opinion of her changed and he decided that he could no longer invest money in her.

The defendant says that this incident did not occur on the day that the plaintiff arrived in New Zealand, but two or three days later. She says that the carpenter was a friend, that he was tired and that he was having a sleep on her bed, which she did not regard as being in any way improper.

In unchallenged evidence the carpenter confirmed the defendant's account.

There was a conflict regarding the time when the plaintiff challenged the defendant about this incident. The plaintiff says that the defendant gave conflicting explanations of the reason why the carpenter was on her bed. However, what is clear is that the plaintiff stayed for several days in New Zealand and that he and the defendant then travelled to Thailand where they holidayed together. The defendant says that it was not until a few weeks after she returned to New Zealand in January of 1996 that the defendant rang and accused her of being unfaithful. On the basis of the evidence I accept the defendant's explanation of the incident. I consider it to be more likely than not that the plaintiff decided to end the relationship and used the incident as an excuse for doing so.

The Consequences of this Judgment

The plaintiff is entitled to the following relief.

1. An order that the house should be held by the plaintiff and the defendant as joint tenants.
2. A declaration that the proceeds of the sale of the cars up to an amount representing the landed cost of those cars in New Zealand should be applied to the costs of renovation of the house and/or other expenses associated with the house. If an equivalent sum has not been spent on the house the plaintiff is entitled to damages

representing his share of the consequent reduction in value of the property.

3. Because the defendant was in a fiduciary relationship to the plaintiff so far as the house purchase was concerned, the plaintiff is entitled to judgment for his total reasonable costs associated with the caveat proceedings (M.677/96) and for any other costs associated with the protection of his interest in the house.
4. On M.677/96 an order that the caveat not lapse.

In all other respects the plaintiff's claim is dismissed. Leave is reserved to the parties to make further application in relation to the findings in favour of the plaintiff and in relation to costs.

A handwritten signature in black ink, appearing to read "D. J. Dalman". The signature is written in a cursive style with a large initial "D" and "J".