

**IN THE DISTRICT COURT  
AT WAITAKERE**

**CIV-2011-090-001953  
CIV-2012-090-000481  
[2016] NZDC 15993**

BETWEEN                      ZHZ CORPORATE TRUSTEE LTD  
                                         Plaintiff

AND                              ZHENGANG CAO  
                                         Defendant

AND

BETWEEN                      ZHENGANG CAO  
                                         Plaintiff

AND                              QI ZHANG  
                                         Defendant

Hearing:                      9-10 September 2015; 12 November 2015 and 1 December 2015

Appearances:                B O'Callahan for ZHZ Corporate Trustee Ltd and Qi Zhang  
                                         D Wilson for Zhengang Cao

Judgment:                    24 August 2016

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**RESERVED DECISION OF JUDGE P A CUNNINGHAM**

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**Introduction**

[1] This case concerns two men who were once friends, Zhengang Cao and Qi Zhang. They have fallen out over two property transactions and a dispute about loans of money.

[2] The ZHZ Corporate Trustee Ltd (“ZHZ Trustee”) is the trustee of a family trust associated with Mr Zhang. Mr Zhang operated a property development business in Auckland assisted by his wife Hua Huang. Mr Cao has a business making kitchen cabinetry. He made kitchens for some of Mr Zhang’s developments. Mr Cao was impressed with Mr Zhang’s property development successes.

## **Background**

[3] The two men met around 2005 or 2006. In March 2008 Mr Cao agreed to buy a property at 30 Pleasant Way Gulf Harbour. Settlement occurred on 13 May 2008.

[4] Mr Zhang says that Mr Cao approached him wanting to buy a piece of land to build a house on. Mr Zhang said he referred Mr Cao to his wife Hua Huang because she held a power of attorney for Mr Zhang's sister Ying Zhang who owned the Pleasant Way property. From the Zhang family side the position is that Ying Zhang agreed to transfer this property to Mr Cao on condition that he held the property for her and if she decided to come and live in New Zealand Mr Cao would have to transfer it back to her. Hua Huang says she negotiated the terms of this sale to Mr Cao. This included that Ying Zhang would contribute approximately \$135,000 to the purchase price and pay all the interest on the mortgage Mr Cao had taken out to complete the purchase (\$536,000) and the rates. If Ying Zhang decided not to come to New Zealand, Mr Cao would retain the property and there would be repayment of monies paid by Ying Zhang from Mr Cao.

[5] Mr Cao's version of events is quite different. He says Mr Zhang approached him for assistance because he needed to access funds to complete some developments he required money for. He suggested that Mr Cao take a transfer of 30 Pleasant Way and allow Mr Zhang to utilize a bank loan he Mr Zhang would arrange. Mr Cao says Mr Zhang agreed to make all the mortgage and other payments in relation to the property. That once he had completed the property developments he would buy the land back. This was going to happen within 12 months. Mr Cao never saw the property before the sale settled.

[6] Mr Cao says that because they were friends and he trusted Mr Cao he agreed to assist him in this way.

[7] It is not disputed that after the sale was settled Mr Cao ended up having to meet some of the mortgage and rates payments. It is also not disputed that at the time Mr Cao's proceeding was issued the figure was around \$101,346.78.

[8] Mr Zhang says this money was repaid to Mr Cao when he purchased a property at 8 Virginia St from the ZHZ Trustee in September/October 2011. Mr Zhang says he achieved this by reducing the price of the property from \$620,000 to \$520,000.

[9] Mr Cao says that he bought the property at 8 Virginia Street because Mr Zhang told him he was in financial difficulty to the point where he was considering voluntary bankruptcy. An event which would mean that Mr Cao would never be able to recover what he was owed in relation to the 30 Pleasant Way property and other loans he had made to Qi Zhang.

[10] Mr Cao said that Qi Zhang offered to sell him 8 Virginia Street Henderson for \$570,000. He knew Mr Zhang had had it on the market for \$629,000 and it had not sold. Mr Cao said his wife did not like the property and would not agree to buy it for \$570,000. So he negotiated the price of \$520,000.

[11] In this context he raised with Mr Zhang the amount he was owed in relation to 30 Pleasant Way. Mr Zhang said this could be settled by Mr Cao retaining 30 Pleasant Way. Mr Cao did not agree.

[12] The sale and purchase agreement they signed (without a real estate agent being involved) said the deposit of \$100,000 had already been paid directly to the vendor. Mr Cao said this was because Mr Zhang wanted that money for himself and he did not want the bank to take it. He told Mr Cao the mortgage on the property was \$420,000.

[13] Mr Cao did not pay the \$100,000.00. On 5 October 2011 Mr Zhang and Mr Cao signed a document in which Mr Cao agreed to pay Mr Zhang \$100,000 in cash within a week of settlement of the sale. He did not pay this money to Mr Zhang.

[14] Mr Cao says that Mr Zhang owes him \$23,000 for two loans he made to him. \$13,000 on 29 July 2010 and \$10,000 on 1 September 2011. Mr Zhang acknowledges these loans were made to him but he says an amount of approximately

\$20,000 should be off set to reflect a payment he made in China to a supplier of Mr Cao's of RMB 100,000. The balance Mr Zhang says is owing by him is \$2,850.

### **The competing claims**

[15] The ZHZ Trustee claims the \$100,000 deposit for 8 Virginia Street plus interest and costs.

[16] Mr Cao claims the amount paid by him in relation to 30 Pleasant Way up to the date of filing his claim in April 2011 of \$101,346.78 plus \$13,000 and \$10,000 loaned to Mr Zhang and not repaid. Interest and costs. He does not seek any orders in terms of the ownership of Pleasant Way.

### **The issues**

[17] I define the issues I need to decide as follows:

- (i) Does Mr Zhang owe Mr Cao \$101,346.78? This turns on whether it was Mr Zhang he entered into the arrangement with or some other person.
- (ii) Does Mr Zhang owe Mr Cao \$23,000 or a lesser sum due to part repayment by him?
- (iii) Was the true purchase price of 8 Virginia St \$620,000 or \$520,000?
- (iv) I do not need to decide if Mr Cao owes Mr Zhang the \$100,000 because he acknowledges that he does. What I do need to decide is whether Mr Cao should pay interest on this sum.

## **The first issue**

Does Mr Zhang owe Mr Cao \$101,346.78 for payments he made for 30 Pleasant Way?

[18] In order to make a decision about this I need to decide who I believe about how the transfer of this property came about.

[19] Mr Zhang gave evidence and so did his wife Hua Huang. She said that Mr Cao rang her in March 2008 about whether they had any land in Gulf Harbour. She said Mr Cao told her had been to see it. He said he had been speaking to Mr Zhang. Hua Huang said she spoke to the owner of this land Ying Zhang who was not really wanting to sell the property as she had not decided whether she was coming to live in new Zealand or not. Ms Huang said she proposed to her sister in law that she should transfer the property to Mr Cao and if she decided to come over it would be transferred back to her. She said Mr Cao would be holding it on behalf of Ying Zhang. She said Ying Zhang agreed to this.

[20] Ms Huang said she proposed the price be that of the government valuation of \$670,000. She said Mr Cao agreed. When asked questions about the content of her discussions with Mr Cao she replied that she did not discuss much with him but he knew that if the sister wanted to come to New Zealand he would have to transfer it back.

[21] She gave evidence that there was no discussion about what would happen if Mr Cao wanted to build a house on the land. She agreed that her sister in law would pay the deposit and the mortgage interest. The deposit was the difference between the sale price of \$670,000 and the amount raised by mortgage \$536,000. She said she introduced Mr Cao to a mortgage broker.

[22] Ms Huang raised an amount of \$150,000 from Ying Zhang herself and her husband and friends and deposited that amount in three separate payments into Mr Cao's Westpac bank account that Mr Cao opened on 20 March 2008. She later explained that from the balance payable to Ying Zhang after the sale settled of

\$285,610.31 she repaid the \$150,000 she had raised and paid the balance to Ying Zhang. There was a bank statement showing the \$285,610.31 going into an account in the name of Y Zhang on 13 May 2008. It did not show transactions after that date.

[23] There was a balance of about \$15,000 in Mr Cao's account to meet mortgage payments being the difference between the \$150,000 and the amount required to settle (see para 21 herein). In August 2008 Ms Huang deposited another \$15,000. After this Mr Cao made some payments, Ms Huang said she rang and told him that the sister was tight on money and could not pay. According to Hua Huang, Mr Cao agreed to make the payments. There was a period of 9 months in 2011 when Hua Huang said Ying Zhang was sending her money for the mortgage payments and she paid either \$2800 or \$2900 into Mr Cao's account each month. There was no documentary proof to support where these payments came from.

[24] In paragraphs 5 to 7 above I have set out some of the account Mr Cao gave me. He did not agree he made the arrangements to take title to the Pleasant Way property with Hua Huang, he said he dealt with Mr Zhang. When Mr Cao found out that the property was in the name of Ying Zhang he said he confronted Mr Zhang about this. Mr Zhang told him that his sister held the property on trust for him.

[25] Mr Cao said that Mr Zhang arranged the mortgage broker for him. He said he had to give certain financial information to the mortgage broker but only met with him once or twice. Mr Cao said that he had not been a Westpac customer up to that time. He was not concerned about the price because he was effectively holding the property on trust for Mr Zhang.

[26] On the second day of the hearing Mr Cao produced a document which was a listing of the property at 30 Pleasant Way with the real estate agency Barfoot and Thompson. This showed that Steven was noted as the primary contact for the listing at an asking price of \$649,000. Mr Cao said that Steven was Qi Zhang. This evidence was not challenged.

[27] Mr Cao said he became so concerned about the amount of money he was having to make in mortgage payments that he had Mr Zhang sign a document he prepared acknowledging what he had paid on 6 May 2010. This document had been translated by a firm of registered professional translators as follows:

#### Proof of Loan

From 25 April 2008, Zhengang Cao opened in Westpac Bank the account of 03-0104-0095841-00 and obtained from the bank a sum of \$536,000 (New Zealand dollars) in loan. The loan was completely used up by Qi Zhang.

By 13 April 2010 Zhengang Cao had paid on behalf of Qi Zhang a total of \$56395.46 in interests and rates (Rodney & Auckland), which, after being checked by Zhengang Cao and Qi Zhang, has been confirmed. This is hereby established as proof.

Both Mr Zhang and Mr Cao signed this document.

#### **Discussion**

[28] Mr Callahan submitted that Ms Huang's evidence was detailed and credible. Including that because she had power of attorney for her sister in law it was natural that she would be the person Mr Cao would have to negotiate with.

[29] Further that the evidence showed that Mr Zhang did not benefit from the net proceeds available to Ying Zhang after the sale of the property to Mr Cao.

[30] The only document linking Mr Zhang to the transaction was the one dated 6 May 2010. Which he explained when he gave evidence that he believed he was signing on behalf of his sister that Mr Cao had contributed \$56,395.46 to payment of interest and rates. He said he did not realise the significance of the last sentence in the first paragraph at the time he signed it.

[31] I do not agree that Mr Huang's evidence was credible in many respects. During the hearing there were obvious interpretation and understanding issues and I make it clear that I am not referring to those. I am confident that in the end I understood what Hua Huang was saying.

[32] I find it hard to accept that if Ying Zhang said she did not want to sell the property, Hua Huang would try and talk her into an arrangement whereby Mr Cao would hold it in trust for her. Particularly when there was no documentation setting out what Hua Huang alleges was agreed. The alleged arrangement and lack of detail and documentation created risk for Ying Zhang.

[33] The lack of detail in Hua Huang's version of the alleged agreement, included what the timeframe was for Ying Zhang to make up her mind about whether she wanted to retain the property or not. There was no discussion about what would happen if Mr Cao wanted to build a house on the land. There was no discussion about what would happen if neither Mr Cao or Ms Yang wanted to retain ownership of the land.

[34] Ms Huang's evidence that Ying Zhang was not really wanting to sell the land is inconsistent with the fact it was listed with Barfoot and Thompson for sale in February.

[35] There was no documentary evidence about what happened to the balance of the proceeds of sale to Mr Cao, I am referring to the \$285,610.81 amount. It should have been possible to produce this. Similarly there were no supporting documents to show that Ying Zhang was the source of the \$15,000 that went into the account of Mr Cao in August 2008 and the amounts in late 2010 until August 2011. This despite the fact Mr Cao raised these issues in his claim when it was filed in April 2012.

[36] In addition to Ms Huang's evidence there are difficulties with the evidence of Mr Zhang.

[37] Mr Zhang said that Mr Cao approached him wanting to buy the Pleasant Way property. He said he referred him to his wife Hua Huang. He was at pains to distance himself from the transaction. Mr Zhang is the person with the property transaction experience. It does not make sense to me that he would leave all the negotiations between his sister and Mr Cao to his wife.



[38] In addition there is the document dated 6 May 2010. Mr Zhang's counsel sought to differ with the interpretation of the last sentence in the first paragraph saying it would be in the future tense. Ms Audrey Yang who gave essentially accounting evidence on behalf of Mr Cao was asked questions about this. She disagreed that it could be so interpreted indeed she agreed with the translation that had been provided.

[39] The document dated the 6 May 2010 is consistent with Mr Cao's version of events. It records that the bank loan was used by Qi Zhang. And the very fact it was created and signed at all supports Mr Cao's evidence about his concern that he was paying out money he had not expected to.

[40] Mr Zhang agreed he read the document before he signed it and that he added up the amounts to make sure the amounts recorded were correct. Mr Zhang is a property developer and understands about land transactions. I can come to no view other than he agreed with what the document says.

[41] I then need to consider Mr Cao's version of how this transaction came about.

[42] On the one hand it is not easy to understand how Mr Cao could have exposed himself by entering into this arrangement with Mr Zhang. By exposed I refer to the liability to the bank which became a reality and the potential problem if Mr Zhang would not be able to take a transfer of the land back.

[43] However a number of things support Mr Cao's statement that he trusted Mr Zhang. They are:

- (i) They were friends;
- (ii) They did business together;
- (iii) Mr Cao was impressed by Mr Zhang's success as a property developer;
- (iv) He had no reason to distrust him;

- (v) On the face of it there was no financial risk to Mr Cao because Mr Zhang said he would make all the payments of interest on the mortgage and he would buy the property back within 12 months.

[44] I find that the agreement was entered into by Mr Cao and Mr Zhang. It follows that Mr Zhang is responsible for the payments made by Mr Cao in the sum of \$101,346.78 as claimed by Mr Cao.

**The second issue the two loans totalling \$23,000**

[45] Mr Zhang does not dispute that Mr Cao made the two loans to him on the dates Mr Cao said he did. \$13,000 on the 29 July 2010 and \$10,000 on the 1st of September 2011. It follows that Mr Cao has proved he made these loans to Mr Zhang.

[46] There is no dispute from Mr Cao that Mr Zhang paid NZ\$20,000 equivalent in Chinese currency to his supplier in China on 2 August 2010. Mr Cao says he paid NZ\$20,000 to Mr Zhang to enable this to happen.

[47] The submission was made on behalf of Mr Cao that it makes no sense for Mr Zhang to need to borrow \$10,000 on the 29th July 2010 and then have the funds four days later to make a payment of double that amount on Mr Cao's behalf to his supplier in China.

[48] Mr Zhang explained this in the following way. He said that his cashflow changed on a daily basis as money came in and out. That may be so, but I do agree there is some force in the submission made on behalf of Mr Cao.

[49] If Mr Zhang is correct, then as at the date of 2 August 2010, Mr Cao would have owed Mr Zhang around \$NZ 7,000 approximately (being the difference between \$20,000 and \$1300). Mr Zhang did not record this in any way which is curious given that by this time Mr Cao was being careful about recording his money dealings with Mr Zhang.

[50] Mr Zhang gave evidence that there were other loans between the two men including that he loaned Mr Cao money on occasion. This was not put to Mr Cao.

[51] The second payment of \$10,000 did not happen until over a year later.

[52] Mr Zhang has not satisfied me that he offset these two loans when he paid Mr Cao's supplier in China on 2 August 2010.

[53] There will be judgment for Mr Cao against Mr Zhang in the sum of \$23,000.

### **The third issue 8 Virginia St Henderson**

[54] Mr Zhang says this transaction came about in this way. He said Mr Cao approached him to buy 8 Virginia Street. That Mr Cao was complaining about what he was owed in relation to Pleasant Way. So he decided to sell 8 Virginia St to Mr Cao for the sum of \$520,000 when this property was really worth \$620,000. The reduction in price was Mr Zhang's way of repaying Mr Cao what he was owed in relation to Pleasant Way. At this point his sister had said she was not coming to New Zealand.

[55] He says he and Mr Cao agreed that:

- (i) The purchase price of \$520,000 would reflect the \$100,000 Mr Cao was owed in relation to 30 Pleasant Way;
- (ii) Mr Cao would retain ownership of Pleasant Way;
- (iii) When Mr Cao was in funds he could pay Ying Zhang what she was owed;
- (iv) At that point Mr Zhang would recover the \$100,000 from his sister which he had effectively paid Mr Cao in relation to Pleasant Way by reducing the purchase price.

[56] Mr Zhang said his sister agreed to this arrangement.

[57] The sale and purchase agreement involved Mr Cao paying a deposit of \$100,000. He says he told his lawyer he trusted Mr Cao and that he would pay him. Because the payment of \$100,000 was not made he spoke to Mr Cao who said he would be able to make the payment a week after settlement thus another agreement was prepared recording this. Mr Cao was due to pay the \$100,000 by 17 October 2011 but this did not happen. Court proceedings followed.

[58] Mr Cao's version of this transaction is quite different. Mr Cao painted a picture of Mr Zhang's ability to repay him what he was owed as deteriorating. Including that by September 2011 Mr Zhang was telling him he was considering filing for bankruptcy. He said Mr Zhang asked him to invest in his property developments but Mr Cao told him he could not afford to do this. He said that Mr Zhang then proposed that he sell 8 Virginia Street to him. He said Mr Zhang needed \$100,000 (as opposed to the ZHZ trustee) which is why the sale and purchase agreement was written in the way that it was. Mr Cao accepted that initially Mr Zhang did want him to take ownership of Pleasant Way as part of the deal over 8 Virginia St but he did not agree. He was concerned about the actual value of 30 Pleasant Way (meaning what equity there was in it) and wanted to ensure he was paid what was owed to him by Mr Zhang.

[59] Mr Zhang told Mr Cao he had the Virginia Street property on the market for \$629,000 but it had not sold. He proposed the price of \$570,000. Mr Cao said he discussed this with his wife who did not agree to that price. So he negotiated the price down to \$520,000 which Mr Zhang accepted. Mr Cao gave his reason for entering into the purchase of 8 Virginia St as a way of avoiding Mr Zhang becoming a bankrupt in which event he would never get his money back.

## **Discussion**

[60] On behalf of Mr Zhang, Mr Callahan submitted that Mr Cao had given two different versions. One in an affidavit dated 26 March 2013 in relation to an interlocutory application and another when he gave evidence in this Court.

[61] In the 26 March 2013 affidavit Mr Cao said:

- (i) On 1 September 2011 Mr Zhang came to his office and asked to borrow \$10,000. He promised he would repay what was owed in relation to Pleasant Way within a week. Mr Cao lent him the \$10,000;
- (ii) On 7 September 2011 Mr Zhang phoned Mr Cao and said he did not have the money to repay him the \$10,000 or the amount owed regarding Pleasant Way;
- (iii) On 20 September 2011 Mr Zhang came to his office wanting to borrow more money or for Mr Cao to invest in his construction project. Mr Cao said he could not afford to lend him more money;
- (iv) On 26 September 2011 Mr Zhang said he was going to file for voluntary bankruptcy. In this conversation Mr Zhang suggested he sell Mr Cao 8 Virginia Street for \$520,000, that he would only have to pay \$420,000 on settlement and the \$100,000 equity would set off the debt against Mr Zhang's debt to him.

[62] Mr Cao said he agreed. The agreement reflected the \$100,000 deposit had been paid.

[63] On 3 October 2011 Mr Zhang said he needed a further \$100,000. At that stage Mr Zhang had not signed the agreement and if Mr Cao did not agree to lend him a further \$100,000 he would not proceed with the sale of 8 Virginia Street.

[64] Mr Cao asked for security for the further \$100,000. No sufficient security was forthcoming from Mr Zhang.

[65] On 5 October 2011 Qi Zhang asked Mr Cao to sign the acknowledgement of debt for the \$100,000 and when he had sufficient security, the further advance of \$100,000 would occur.

[66] Because he felt under pressure he signed the document dated 5 October 2011. No security became available so Mr Cao did not advance \$100,000 to Mr Zhang. And he did not pay the deposit either.

[67] In his brief of evidence in this case Mr Cao said Mr Zhang wanted a separate agreement in which Mr Cao would be borrowing \$100,000 from him and would pay it to him. That the sale agreement would say the deposit had already been paid to cover this.

[68] He signed the acknowledgement of debt for the \$100,000. He said he did not pay it because they never agreed how Mr Zhang was going to repay Mr Cao what he was owed in relation to Pleasant Way and he believed he could set it off against what Mr Zhang owed him.

[69] I agree there are some differences in the two versions Mr Cao has given. What I understood him to be saying in this Court is that he agrees that \$100,000 should be set off against Mr Zhang's debt to him in relation to 30 Pleasant Way because he did not pay the \$100,000 which was part of the purchase price of 8 Virginia Street. That is consistent with what he said in the 23 March 2013 affidavit (para 27).

[70] The issue for me is whether Mr Cao agreed that the 8 Virginia Street property was worth \$620,000 and the reduction to \$520,000 reflected repayment of what was owed to Mr Cao in relation to 30 Pleasant Way. The burden of proof is on Mr Zhang/ZHZ trustee on this issue.

[71] It seems unlikely to me there was the agreed price reduction as Mr Zhang contends. My reasons for saying this include:

- (i) Mr Cao has consistently said the agreed sale price for 8 Virginia Street was \$520,000;
- (ii) Mr Cao was owed more than \$100,000 at this stage when you take into account the loans totalling \$23,000;
- (iii) The acknowledgement of debt dated 5 October 2011 refers to the \$100,000 being the deposit for 8 Virginia Street;
- (iv) Mr Zhang had no authority to propose a repayment of debt or transfer of the beneficial ownership of 30 Pleasant Way to Mr Cao. His wife Hua Huang held the power of attorney for Ying Zhang;

[72] It follows that Mr Zhang has not satisfied me the \$520,000 price for 8 Virginia Street reflected a repayment of money owed to Mr Cao regarding 30 Pleasant Way.

[73] Mr Cao has acknowledged he owes Mr Zhang the \$100,000. I need to decide if this money is owed to the ZHZ trustee or Mr Zhang personally and whether interest is payable to Mr Zhang.

[74] The document dated 5 October 2011 records that the \$100,000 was to be paid to Mr Zhang personally as opposed to the ZHZ trustee. That being the case this amount can be set off against the money owed to Mr Cao in relation to Pleasant Way.

## **Result**

[75] Mr Zhang is to pay Mr Cao the following amounts:

1. \$1,366.78 being the difference between the amount owed to Mr Cao by Qi Zhang in relation to 30 Pleasant Way (using Ms Yang's unchallenged calculation);
2. \$23,000 in outstanding loans.

## **Interest**

[76] Under the sale and purchase agreement the ZHZ trustee was entitled to penalty interest at the rate of 12% on unpaid amounts. However that changed when the document dated 5 October 2011 was signed, the \$100,000 was to be paid to Mr Zhang. I therefore decline to award any interest under the agreement for sale and purchase.

[77] As a matter of fairness, I do not award Mr Cao interest on the amounts he paid to support the mortgage and rates on Pleasant Way.

[78] Mr Cao is entitled to interest at the court awarded rate of 5% on the \$23,000 sum from the date of filing the claim to the date of payment.

## **Costs**

[79] If Mr Cao wishes to seek costs he is entitled to do so, I suggest that costs should only be claimed in relation to 30 Pleasant Way and his cause of action in relation to the two loans. This is because he has acknowledged that he owed Mr Zhang \$100,000 following the purchase of 8 Virginia Street.

[80] If the parties are unable to settle the issue of costs as between them then Mr Cao may file a memorandum by 16 September 2016. Mr Zhang has until the 30 September 2016 to respond.

[81] Finally I must and do apologise to the parties and to counsel for the delay in getting this decision completed.

Dated at Auckland this 24<sup>th</sup> day of August 2016 at 12.20 pm.

P A Cunningham  
District Court Judge