

CANADA / JUDGMENT

Chahal v. Chahal

2020 BCCA 147

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 147 Chahal v. Chahal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chahal v. Chahal,

2020 BCCA 147

Date: 20200521

Dockets: CA45442; CA45444

Docket: CA45442

Between:

Bhupinder Singh Chahal aka Bhupinder Singh Chahal

Respondent

(Claimant)

And

Sarbjit Kaur Chahal aka Sarbjit Chahal, Satpal Kaur Boyal,

Harjas Investments #1 Inc. and A Brosis Consulting Company Inc.

Respondents

(Respondents)

And

Jaswant Singh Chahal and Gurmit Kaur Chahal

Appellants

(Respondents by Counterclaim)

- and -

Docket: CA45444

Between:

Bhupinder Singh Chahal aka Bhupinder Singh Chahal

Appellant

(Claimant)

And

Sarbjit Kaur Chahal aka Sarbjit Chahal, Satpal Kaur Boyal,

Harjas Investments #1 Inc. and A Brosis Consulting Company Inc.

Respondents

(Respondents)

And

Jaswant Singh Chahal and Gurmit Kaur Chahal

Respondents

(Respondents by Counterclaim)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated
June 13, 2018 (Chahal v. Chahal, 2018 BCSC 964, Chilliwack Docket E9697).

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Place and Date of Hearing:

Vancouver, British Columbia

January 8 and 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 21, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Dickson

Summary:

Following a long, interrupted trial, the trial judge issued extensive reasons that made a number of findings about the source of funds for the purchase of property and the beneficial ownership of property in this hotly contested family proceeding. The documentary evidence was unsatisfactory, the principal witnesses were unreliable, and much of the evidence of those witnesses was directly contradicted by other witnesses. On appeal, the husband and his parents challenge some of the orders made by the trial judge and argue that she erred in law and fact. The appellants also say the reasons are insufficient to explain how the trial judge arrived at her findings on the disputed issues. Held: Appeals dismissed. The appellants are not able to identify any errors warranting appellate intervention.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Bhupinder Chahal and his parents, Jaswant Chahal and Gurmit Chahal, appeal a number of orders made following a contentious family law trial. Sarbjit Chahal, the wife of Bhupinder Chahal, her mother, Satpal Boyal, Harjas Investments #1 Inc. and A Brosis Consulting Company Inc., are respondents. The orders under appeal concern the ownership and division of property claimed by Bhupinder and Sarbjit Chahal (the "Couple") or by other members of their families. The underlying family action was brought in 2011 under the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). The parties did not agree to proceed under the Family Law Act, S.B.C. 2011, c. 25, when it came into force, so the FRA governs the division of assets in this case.
- [2] The task facing the judge was extremely difficult. The trial was scheduled to last 15 days but took three years and more than 70 days of hearing to conclude. The difficulty in conducting a trial in segments with lengthy interruptions over three years was compounded by serious evidentiary concerns. The judge found that the parties and other witnesses lacked credibility, document production was delayed and incomplete, evidence was presented in a disorganized way, and property was held, or alleged to be held, beneficially by individuals who did not have legal title. Moreover, the parties gave conflicting evidence and took diametrically opposed positions on many of the key factual issues. The resulting reasons for judgment, indexed as Chahal v. Chahal, 2018 BCSC 964 (the "Reasons"), are 248 pages and 1,289 paragraphs in length. The trial judge, Justice Gray, made dozens of findings to resolve disputed issues of fact about property acquired and investments made (or alleged to have been made) by the parties and their families during their 27-year marriage and in the years following their separation.
- [3] Ultimately, the judge decided the issues by examining the whole of the evidence and making findings of fact based on her assessment of the balance of probabilities. The three appellants challenge the judge's conclusions about some, but not all of the contested property issues. In doing so, they attempt to identify legal errors. However, I am not persuaded that the judge erred in law as alleged or at all. As I will explain, I am of the view

that the challenged orders are founded on findings of fact made by the judge following her extensive review of the evidence. The appellants have not identified any palpable errors, let alone errors that could be said to be overriding. Accordingly, I would dismiss the appeals.

Parties and Business Entities

[4] As many of the parties and witnesses share the same last names, I will follow the course adopted by the judge and will identify the parties and other family members by their first names. I do so to avoid confusion and for ease of reading these reasons coherently with the trial reasons and do not mean any disrespect to the parties and witnesses. These are the individual parties and principal witnesses:

Bhupinder:

Bhupinder Chahal, appellant, husband of Sarbjit

Sarbjit:

Sarbjit Chahal, respondent, wife of Bhupinder

Jaswant:

Jaswant Chahal, appellant, father of Bhupinder

Gurmit:

Gurmit Chahal, appellant, wife of Jaswant, mother of Bhupinder

Dhyan:

Dhyan Boyal, husband of Satpal, father of Sarbjit

Satpal:

Satpal Boyal, respondent, mother of Sarbjit

Parminder:

Parminder Boyal, brother of Sarbjit

[5] I will also use the same shorthand versions of the names for key companies and business entities as used by the judge. These are as follows:

448:

448605 B.C. Ltd., a company that operates CBS

ABCCI:

A Brosis Consulting Company Inc., respondent

ABCCP:

A Brosis Consulting Company Partnership, a business that held an investment in SVII

BCBCHIL:

Bhupinder Chahal BC Hazmat Industries; a business operated by Bhupinder

CBS:

Coast Building Supplies, a business operated by Jaswant

Harjas:

Harjas Investments #1 Inc., respondent

SVII:

Sun Village Investments Inc., a business that held an interest in Sun Village Plaza

TCI:

Triple C Industries, a business owned by the Couple and that owed a tax debt to the Canada Revenue Agency ("CRA")

The judge appended a 14-page glossary to the Reasons that helpfully lists all of the shorthand references she used to describe the parties, companies, witnesses, documents and properties.

Trial Reasons

Issues and Concerns

[6] At para. 89, prior to setting out the lengthy chronology of the evidence, the judge set out the key factual issues she had to decide in order to resolve the property disputes. Each issue involved a contested asset or liability and the judge had to determine, amongst other things, where investment funds came from; what certain agreements meant; who owned certain assets; and whether one party would need to account to another party. Of those 15 issues, seven are raised on appeal in addition to some of the sub-issues the judge decided throughout the course of the reasons.

[7] The judge described the difficulties she faced at paras. 10-36 of the Reasons under the heading, "Challenges". At paras. 77-88, she explained the additional challenges surrounding the lack of credibility and reliability of most of the witnesses. I would briefly summarize her concerns as follows:

- The evidence was provided in an interrupted way over an extended period of time. The trial was scheduled to last 15 days, but it took more than 70 days over two years to present the evidence and argue mid-trial applications. There were six extended breaks of more than one month. After the conclusion of the evidence, the parties agreed to rely on written argument but it took almost a year for them to prepare and deliver those submissions. The trial commenced on August 11, 2014 and the final written submissions were delivered on June 23, 2017.

- Early in the trial, it became apparent that incomplete document production was a significant issue. The judge suggested that the trial be adjourned to allow for proper document production but the parties insisted the case was ready for trial: at para. 14. Following applications for document production, the judge issued a detailed order--52 paragraphs in length--stipulating what documents the parties should produce and authorizing third parties, including banks, to release documents if they were not produced by a party. In spite of this order, many relevant documents were never produced.
 - The parties ultimately produced thousands of poorly organized documents. Neither the documents nor the evidence was presented in chronological order. The documents were difficult to interpret for a variety of reasons including that they were handwritten or incomplete. At times, it was difficult to tell which of the similarly named companies or partnerships the documents referred. To further complicate matters, the parties alleged that some of the documents were forged by other parties.
 - The property issues were complex and it was extremely difficult for the judge to trace the investments and determine ownership. The parties claimed that property was owned beneficially by one or more people who were not the registered owners. Properties were mortgaged to obtain funds for investment in other properties and to pay for living expenses. There were also assertions that funds had been received from or provided to relatives in India for investment purposes.
 - Much of the evidence of the principal witnesses was completely contradicted by the evidence of other witnesses. The judge was thus required to make findings of fact on contradictory evidence about a multitude of disputed issues.
 - The judge found that she was unable to rely on the evidence of many of the witnesses, including the Couple. Bhupinder had memory deficits as a result of brain damage he suffered in a motor vehicle collision in 1995. The judge found that much of his testimony was simply speculation. Sarbjit handled the Couple's financial affairs including their businesses and investments but had no training in accounting or bookkeeping. The judge found that much of her evidence was speculation based on her review of documentation that had been prepared over a period of 34 years. Sarbjit had to "correct" a significant amount of her evidence after document review. The difficulties with her evidence were complicated by the high degree of hostility between Bhupinder's trial counsel and Sarbjit. This made it difficult for the trial judge to determine if Sarbjit's angry demeanor was a result of feelings of hostility or being caught in a lie.
- [8] Given the difficulties, the judge detailed the approach she followed to resolve the property issues. She identified each contested property by asset, property, account or investment, and set out the positions of the parties with regard to each. She identified the issues that she had to decide in order to resolve the contrary positions of the parties. She then examined the evidence of the witnesses by setting out the evidence chronologically by year from 1988 to 2016. The chronology is set out at paras. 90-909 of the Reasons. To describe the chronology as thorough is an understatement.

- [9] The judge described the methodology she used to make sense of a morass of conflicting evidence. She examined the whole of the evidence to determine what she could and could not accept. She made findings of fact based on her assessment of what was most probable. She set out the approach she took at paras. 86-88:

The British Columbia Court of Appeal said the following about credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

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

In this case, the court must pay particular attention to what facts are most probable, because it is not possible to have confidence in the reliability of the evidence of witnesses including Bhupinder and Sarbjit.

In considering what evidence to accept, it was helpful to consider the following issues, which relate to the probability of certain facts:

- a) What were the Couple's annual personal expenses?
- b) Did Satpal, Dhyen, Parminder, or any combination of them, have money available to make investments at the relevant times?
- c) Did Bhupinder or Sarbjit participate in dishonest transactions?

Overview of Judge's Analysis

- [10] At paras. 933-956, the judge set out findings about the Couple's stated income and their annual personal expenses. She noted their annual earnings as reported in their tax returns. The earnings were modest in most years. She set out their expenses based in part on their F8 Financial Statements and in part on the expenses required for mortgages, property taxes, insurance and life insurance. She reasoned that the Couple probably did not report all of their income on their tax returns. She also reasoned that they used business funds to pay personal expenses and borrowed from family and friends to pay expenses. The judge explained that this evidence was relevant to determining if the Couple had funds available to purchase property or assets at relevant times. Most significantly, she found that the Couple was in difficult financial circumstances and being pursued by creditors in 1997 and that they earned very little income in the following years.

- [11] At paras. 957-973, the judge considered whether Dhyan, Satpal, or Parminder had funds available to invest at relevant times. The judge ultimately concluded that Dhyan and Satpal did have money available to make investments at relevant times.
- [12] At paras. 974-979 of the Reasons, the judge considered whether the Couple participated in dishonest transactions. She noted that they both admitted to doing so, on occasion. She found that they failed to report net rental income and capital gains as they should have done. She found that both Bhupinder and Sarbjit acted dishonestly at times. When resolving the disputed issues of fact, the judge was acutely aware that the Couple lacked credibility.
- [13] At paras. 982-1223, the judge analyzed the evidence for each contested asset and stated her conclusions. In doing so, she summarized the parties' positions and referred to some of the evidence described in the lengthy chronology. She repeated some but not all of the findings she made in that section.

Issues on Appeal

Bhupinder's Appeal

- [14] Bhupinder says the judge erred in her findings on seven of the disputed property issues. I will deal with each of those below. In his factum, Bhupinder also advanced three somewhat broader arguments that he now says are not stand-alone grounds of appeal but provide support to the specific grounds he has raised.
- [15] First, Bhupinder says that the Reasons are inadequate in that they do not explain the pathway to judgment for some of the disputed property issues. I will comment on Bhupinder's specific arguments in the course of these reasons but it is worth stating that there is no deficiency in the Reasons. They adequately perform the function intended: *F.H. v. McDougall*, 2008 SCC 53 at para. 98. The judge was faced with an extremely difficult task in having to find facts out of an evidentiary quagmire. She set out in great detail how she approached the evidence. The approach she took to resolving disputed issues of fact is one that has been frequently endorsed by this Court. This argument does not add anything to the grounds of appeal.
- [16] Second, in his factum, Bhupinder argued that his trial counsel provided ineffective assistance to him by failing to present expert accounting evidence to assist in proving his claims. Since he has now withdrawn that ground of appeal, I need not deal with it.
- [17] Third, Bhupinder says the judge erred by failing to declare a mistrial on her own motion in light of the difficulties presented by the case. While this argument was not pursued at length at the hearing of the appeal, Bhupinder says the difficulties that could have led the judge to declare a mistrial should animate our consideration of the errors alleged. In particular, he says the inability to present oral submissions at the end of the trial contributed to legal errors made by the judge.

- [18] Not only is this argument without merit, it is an extraordinary reach. At trial, neither party sought a mistrial or an adjournment. Early in the trial, the judge suggested to the parties that the trial should be adjourned and begun again after full document discovery. The parties rejected that invitation, insisting that the case was ready for trial. Bhupinder now suggests that the failure to permit oral submissions resulted in the judge misapprehending evidence. However, when the judge suggested that the parties rely on written submissions, all parties agreed that was an appropriate way to proceed.
- [19] There is no doubt that the trial was far from ideal. However, the difficulties were caused by the way in which the parties approached the case. The judge did everything in her power to manage a difficult situation and facilitate a full hearing of the issues raised. The trial was conducted in a way that was fair and just for all parties.

Jaswant and Gurmit's Appeal

- [20] The appellants, Jaswant and Gurmit Chahal, argue that the judge erred in finding that the respondent, Sarbjit Chahal, was the beneficial owner of 37 shares in 448. They say the respondent's claim to those shares was not pleaded and that the judge's legal analysis was flawed.

Standard of Review

- [21] Almost all of the issues raised on appeal concern findings of fact. A finding of fact is subject to a high standard of deference. An appellate court can intervene only if an appellant identifies a palpable and overriding error affecting the judge's assessment of the facts: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. A palpable error is one that is plainly seen or obvious: *Housen* at para. 6; *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33. An error will be palpable if a judge made an unreasonable finding of fact or a finding unsupported by the evidence: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 55-56. An error is overriding if it is determinative of the outcome of the case: *Salomon* at para. 33.
- [22] Some of the issues on appeal raise questions of mixed fact and law. I will address these questions in more detail in the discussion below but begin by noting the standard of review for questions of mixed fact and law depends on the precedential value of the question: *Housen* at para. 28. I am of the view that none of the grounds of appeal raises issues that are subject to a correctness standard of review.

Bhupinder's Appeal

1. ABCCI or ABCCP Ownership

- [23] Bhupinder and Sarbjit disagreed over who held an interest in SVII, a company that owned the Delta property Sun Village Plaza. There were significant contradictions in the testimonies of Bhupinder and Sarbjit regarding the investment in SVII in 1999. They disagreed as to who made the initial investment, how the funds were obtained, which entity

(as between ABCCI and ABCCP) held the investment and whether Parminder held an interest in SVII. The documentation tendered to support the different versions of the history of the investment was woefully inconclusive. The judge had to resolve the parties' dramatically different versions of the history of the investment on unsatisfactory evidence.

- [24] The interest in SVII was acquired by ABCCP for \$195,000. The investment appears to have been made using funds from a bank draft in the amount of \$196,200 received by Parminder in March 1999. At about the time the interest was acquired, a Bank of Nova Scotia bank account signature form describes the customer name for the account as Sarbjit and Parminder with a business/trading style of "A Brosis Consulting Company (ABC)". The evidence at trial did not include any share certificates or a copy of the SVII share register but the parties agreed that ABCCP acquired a 6.6% or 6.7% interest in SVII.
- [25] Bhupinder said the investment was acquired by the Couple through ABCCP and that the money to acquire the property came from an earlier hotel investment they had made. The hotel was sold about the time that the investment was made in SVII. (I note that there was no clear evidence about the amount the Couple received from that investment.) Bhupinder said the Couple sent the funds received from the hotel investment to India to Jagir Johal. In making this assertion, Bhupinder referred to a February 1999 cheque that was payable to Mr. Johal. Mr. Johal lives in Germany and is a brother-in-law to Surinder Gill, who is Bhupinder's cousin. Mr. Gill testified that the funds used to purchase the investment came from the hotel investment proceeds.
- [26] Bhupinder also argued that the interest in SVII was held, as of trial, by ABCCI, a company that he incorporated in 2005. The Couple are directors of ABCCI, but Sarbjit was not involved in its incorporation.
- [27] Sarbjit and Parminder testified that the funds for the investment in SVII did not belong to the Couple but came from their family in India. Parminder said the funds were given to him in India by his father. Sarbjit said that the funds provided to Mr. Johal had nothing to do with the Couple. Rather, she testified that the money was provided to Parminder and her by their parents to use for investment purposes. It was Sarbjit's position that she and her brother each continued to hold 50% of the investment in SVII and that her half of the investment was family property such that Bhupinder was entitled to one half of her interest.
- [28] The judge found that Sarbjit's position was "more probable" and accepted that the investment in SVII was made with funds received from Sarbjit's parents for the benefit of Sarbjit and Parminder. The judge found that the interest in SVII was, at least initially, held by ABCCP, a partnership established by Sarbjit and her brother, Parminder. The name "A Brosis Company" seemed to refer to a family company owned by a brother and sister. Accordingly, she found that one half of the value of the investment was family property and that Sarbjit had to transfer one half of her interest in that investment to Bhupinder. The judge also found that Bhupinder established ABCCI with the hope of taking over Parminder's share of the investment: at para. 1010.

[29] In finding that Sarbjit's version of events was more probable, the judge applied the reasoning set out at paras. 86-88 and 933-973 of the Reasons. At para. 1009, she set out specific reasons for arriving at her conclusion. In light of the Couple's financial situation at the time the interest in SVII was acquired, she found it unlikely that they had any funds available for an investment. She found it unlikely that the Couple would send funds to India through Mr. Johal, as suggested by Bhupinder, when Sarbjit's close relatives were in India and could handle funds. She also considered the fact that Sarbjit and Parminder established the Bank of Nova Scotia account in the name of A Brosis Consulting Company at the time of the investment. In addition, she was of the view that the distribution of income from the investment to Satpal and Sarbjit for the first six years of the investment was consistent with the way in which Sarbjit's parents were assisting the Couple financially at that time. In arriving at that conclusion, she rejected the evidence of Mr. Gill as to the source of the funds.

[30] The judge concluded Sarbjit and Parminder each owned 50% of the company that owned SVII, whether that company was ABCCI or ABCCP.

[31] On appeal, Bhupinder argues that the judge made three errors:

- Awarding 50% of the shares in ABCCI to Parminder when he was not a party to the action and had made no claim against the shares;
- In reapportioning the family property (without doing any proper analysis) by awarding half of the SVII investment to Parminder; and
- In rejecting the evidence of Mr. Gill when he was not challenged in cross-examination on his statement that the funds to acquire the investment belonged to Bhupinder, violating the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

[32] I would not give effect to any of these arguments as they misconceive the key issue before the Court.

[33] The judge correctly described the issue at para. 89 of the Reasons:

Regarding ABCCI, or ABCCP, whichever one owns shares in SVII, which company owns the Sun Village Plaza, and which Bhupinder says belongs entirely to the Couple, and Sarbjit says belongs 50% to Sarbjit and 50% to Parminder, whose funds were used in 1999 to purchase the interest in Sun Village Plaza through ABCCI or ABCCP and in turn through SVII?

The judge had to decide if the interest was acquired by the Couple or by Sarbjit and Parminder in 1999. The finding that the interest was acquired by Sarbjit and Parminder with funds provided by their parents resolved the question of whether 50% or 100% of the investment (whether held by ABCCI or ABCCP) was family property. The judge did not make an award to a non-party; she did not grant an interest in family property to Parminder; and she did not reapportion family property. Rather, she made a declaration as to the hotly contested ownership of the interest in SVII. The judge's conclusion is reasonable and based on findings of fact that were available to her

on the evidence. The conclusion cannot be set aside unless Bhupinder can demonstrate that the judge made palpable and overriding errors in her findings of fact. He has not done so.

- [34] I would also reject the argument that the judge erred in law by rejecting the evidence of Mr. Gill when he was not challenged in cross-examination on his assertion as to the provenance of funds. The rule in *Browne v. Dunn* states that if a cross-examiner is going to challenge the evidence of a witness by extrinsic evidence, the cross-examiner must give notice to the witness of that intention: *R. v. Drydgen*, 2013 BCCA 253 at para. 13. In support of this argument, Bhupinder relies on the statement of Justice Southin in *Steele-Wells v. Mahood* (1995), 4 B.C.L.R. (3d) 57 (C.A.) at para. 5:

It is of the utmost importance, in my view, that an inference should not be sought to be drawn against a witness, whether a litigant or a non-litigant witness, unless the inference which is sought to be drawn is squarely put. The rule is not absolute, and it is a concept which has been addressed before in this Court.

[Emphasis added.]

- [35] The rule in *Browne v. Dunn* is intended to ensure trial fairness: a witness should have the opportunity to respond to or comment upon a different version of what transpired if their version is to be challenged. As noted in *Steele-Wells*, however, "the rule is not absolute". Here, there can be no suggestion that trial fairness was compromised. Moreover, the rule does not mean that the testimony of a witness not subject to cross-examination is presumed to be true: *Drydgen* at para. 13. The parties contested the issue before the court and they each called witnesses who gave conflicting evidence about the source of the funds used to acquire the interest in SVII. Bhupinder and Mr. Gill gave evidence contradicting and responding to the version of events put forward by Sarbjit and Parminder. In arriving at the finding that the SVII investment was acquired by Sarbjit and Parminder, the judge referred to the evidence and explained why she found Sarbjit's version of events more probable.

- [36] The court's order was intended to give Bhupinder his half of Sarbjit's interest. The judge recognized that it was unclear whether the interest was presently held by ABCCP or ABCCI and the order made intended to cover off both possibilities. The appellant has failed to identify any error in law or fact. I would dismiss this ground of appeal.

2. 155 Street Property Ownership

- [37] Satpal purchased the "155 Street property" in November 1997 for \$175,000 and title was registered in her name. In May 1998, she borrowed \$260,000 from the Canadian Imperial Bank of Commerce secured by a first mortgage on the property. As a condition of the loan, the bank required Sarbjit to be registered on title as an owner and so Satpal transferred a 1% interest to her at that time. Satpal remained on title as the registered owner of a 99% interest. Around 1998, the Couple and their children moved into the house and lived there until they separated in 2010. Thereafter, Sarbjit and the children stayed in that property: at paras. 1083-1084. On April 30, 2009, Satpal transferred all but 1% of her interest in the

property to Sarbjit. From then on, Sarbjit was the registered owner of a 99% interest in the property.

[38] At trial, Bhupinder argued that the 155 Street property belonged entirely to the Couple and was a family asset. He said the property was acquired using funds provided by his father, Jaswant, and his uncle, Tara Hothi, as well as funds obtained by refinancing another family property (the 154 Street property). In the alternative, he argued that Satpal's transfers of the interests in the property to Sarbjit in 1998 and 2009 were gifts and said that this was confirmed by the allegation made in Satpal's counterclaim. He sought 50% of the value of the equity in the property either because it belonged to the Couple or that it was family property that belonged to Sarbjit.

[39] Sarbjit argued that the 155 Street property never belonged to the Couple. She took the position that from 2009, her 99% interest in the property was held in trust for the benefit of Satpal subject to an oral agreement made at that time.

[40] At para. 89 of the Reasons, the judge described the issues she had to decide about the 155 Street property in light of the evidence and arguments at trial:

With respect to the 155 Street Property, which is registered in Sarbjit's name as to 99% and Satpal's name as to 1%, which Sarbjit says is subject to an oral agreement made in the spring of 2009 between the Couple and Sarbjit's Parents concerning sharing of net profits after repaying the purchase price and certain debts ("155 Street 2009 Oral Agreement"), while Bhupinder says the 155 Street Property belongs entirely to the Couple:

- i) Whose funds were invested in the 155 Street Property in 1997 and afterwards?
- ii) Was a 155 Street 2009 Oral Agreement made as alleged by Sarbjit providing for a sharing of a "net profit" between the Couple and Sarbjit's Parents?

[41] The judge considered all of the evidence to determine who initially purchased the property. She concluded that the property was purchased by Satpal, likely with the assistance of Dhyhan and Parminder: at para. 1088. She rejected Bhupinder's primary positions which were that he and his family paid for the property or that he and Sarbjit had contributed money for the purchase. The judge explained why it was unlikely that Bhupinder's family (or he and Sarbjit) had funds available, and why, if they had provided the funding, it was unlikely that title would have been registered in Satpal's name.

[42] The judge also rejected Bhupinder's alternative argument that Sarbjit received the 99% interest in the property as a gift from Satpal. She concluded that the evidence established that the 2009 transfer was made without consideration and found that the statutory presumption of indefeasible title in the name of the registered owner had been rebutted: at para. 1108. She found that Satpal was the beneficial owner by operation of a resulting trust.

- [43] In spite of having difficulty interpreting the terms of the oral agreement, the judge found it to provide that when the 155 Street property was sold, Satpal would receive from the sale proceeds the return of the \$175,000 down payment made in 1997. Further, the amount borrowed against the property by the Couple would be their responsibility. Any market increase in the value of the property would be shared equally between the Couple and Sarbjit's parents: at para. 1099.
- [44] The judge found the 2009 oral agreement, when Satpal transferred all but 1% of her interest to Sarbjit, was a gift of future equity in the property that was made to ensure that Satpal and Dhyan would recover their initial investment in the property. Accordingly, the resulting trust was modified by the future gift which would enable Sarbjit to share with Satpal in the equity remaining after paying out existing mortgages and the initial \$175,000 investment. The judge also found that Bhupinder was entitled to one half of Sarbjit's interest in the 155 Street property as family property that she acquired by way of the oral agreement. The judge made orders to give effect to these findings. Sarbjit was given the option of either selling the property or having it valued and paying out Bhupinder's interest: at paras. 1110-1112, 1118.
- [45] On appeal, Bhupinder says the judge erred in making the order because:
- a) Satpal advanced no claim against the property in her counterclaim and so it was an error for the judge to make an award to her;
 - b) The finding of a resulting trust is an error of mixed fact and law because Satpal led no evidence of her intention that could displace the presumption of title; and
 - c) The judge failed to give effect to the admission made by Sarbjit in her counterclaim that the property was gifted to her.
- [46] I do not find any of these arguments persuasive.
- [47] The pleadings adequately raised the issue of ownership of the property. Bhupinder's notice of family claim alleged, on the various alternate bases noted above, that the property was entirely family property. At para. 1076 of the Reasons, the judge set out the claim advanced in Sarbjit's counterclaim seeking "reapportionment" on the basis that Sarbjit received her 99% interest by way of an agreement with Satpal or as a result of a gift from her.
- [48] While the pleadings and, in particular, Sarbjit's counterclaim were poorly drafted, they were sufficient to place the issues before the court that the judge identified at para. 89 of the Reasons: who purchased the property; whose funds were subsequently invested in it; and, at the time Sarbjit acquired the 99% interest, whether the parties agreed to share the equity in the property when it was sold. These issues, and the question of what portion was family property subject to equal division, were the focus of the evidence at trial. The parties, including Satpal, presented their conflicting versions of who purchased the property and what the basis was for the transfers that occurred in 1998 and 2009. In light of the pleadings and the evidence at trial, the judge did not err in making the orders she did to resolve this dispute.

- [49] I would also reject Bhupinder's argument that the judge erred in concluding that Sarbjit held her 99% interest in the 155 Street property on a resulting trust for Satpal. Bhupinder says the judge made a palpable and overriding error because she did so in the absence of any evidence from Satpal as to her intention in transferring the interest to Sarbjit in 2009. He argues that the judge could not have reached that conclusion without such evidence.
- [50] The judge's finding of a resulting trust involved a question of mixed fact and law and is subject to deference on appeal: *Housen* at paras. 26-28. There was a considerable body of evidence identified by the judge that she relied on in coming to her conclusion. Fundamental to the finding was her conclusion that the property was purchased entirely with funds provided by Satpal and her family. Contrary to Bhupinder's argument, there was evidence from Satpal about what she intended as to ownership of the property. While the evidence was limited, she asserted that the property did not belong to Sarbjit and Bhupinder but that "it was our property", meaning herself and Dhyan.
- [51] While the judge's conclusion on the existence of the resulting trust is stated rather succinctly, she set out the arguments of the parties in some detail. The Reasons also include a lengthy quote from this Court's decision in *Suen v. Suen*, 2013 BCCA 313. The passage cited by the judge comprehensively describes the law to be applied when considering whether the statutory presumption of indefeasible title has been rebutted as well as the law applicable to the presumption of resulting trusts. The passage cited included para. 37 from *Suen*:

The imposition of a resulting trust does not require proof of intention, but rather it is a legal doctrine that is imposed, "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner': Oosterhoff, [Oosterhoff on Trusts: Text, Commentary and Materials, 7th ed. (Toronto, Carswell, 2009)] at p. 25" (Kerr at para. 16).

- [52] Bhupinder has not pointed to anything in the Reasons that suggests the judge did not apply the law as stated. Having found that the property was beneficially owned by Satpal and that the transfer was made for no consideration, the judge examined the evidence as to the circumstances at the time of the transfer and concluded at para. 1098:

The evidence did not support a finding that Satpal made a gift to Sarbjit of an interest in the 155 Street Property. I have concluded that Satpal transferred registered interests to Sarbjit because Satpal was concerned about her responsibility to pay the mortgage registered against the 155 Street Property, and on the basis that the [Satpal and Dhyan] would retain their initial investment of the purchase price.

- [53] The judge also considered the evidence about the oral agreement and found that the parties entered into the agreement with the terms described at paras. 1099 and 1112. Bhupinder has not identified any error of fact, let alone a palpable and overriding error, nor has he identified an error of law.

[54] Finally, I am unable to see any merit in Bhupinder's argument that the judge failed to give effect to the "admission" made by Sarbjit in her counterclaim that the property was gifted to her. Whether Sarbjit's pleadings amounted to an admission is a question of mixed fact and law. In this case, the question is reviewable on a deferential standard because the alleged error does not amount to a pure error of law: *Housen* at paras. 27-28. The judge explained, at para. 1092, why she was not prepared to interpret Sarbjit's pleading as an admission that Satpal made a gift of her interest in the property. She found the pleading difficult to interpret. It is imprecise and poorly drafted. Undoubtedly, the judge considered the fact that Sarbjit was a self-represented litigant. Given the difficulty in determining the history of the property and the unusual way in which the families structured their financial relationships as well as Sarbjit's lack of legal representation, I see no error in her conclusion that the pleading did not amount to an admission. I would dismiss this ground of appeal.

3. Harjas Ownership

[55] Harjas was incorporated on October 11, 2011 after the Couple separated. Harjas purchased the property described as the "Langley property" in 2011. The sole shareholder of Harjas is Satpal. At the same time that the company was incorporated, Satpal granted a power of attorney to Sarbjit, who carried out most of the transactions involved in the purchase. The property was purchased with a \$75,000 down payment and a mortgage for \$332,000. The judge found that some of the funds for the purchase came from many members of the Boyal family, although it appears from the judge's chronology of bank transactions in 2011 that those were likely repaid once the mortgage was obtained about a month after the purchase. In any event, the judge concluded that the down payment came from funds belonging to Satpal that had been placed in the "Sarbjit/Satpal Joint CIBC Account". It is the source of the funds for the down payment that forms the basis of Bhupinder's assertion that the Langley property is family property.

[56] Bhupinder argued at trial that Harjas was held by Satpal in trust for the Couple; it was a family asset equally divisible between them. He said that the funds used for the down payment were family property. The Langley property produced rental income and it was Bhupinder's position that Harjas had to account for that income. Sarbjit's position was that she had no interest in Harjas and that it was solely owned by Satpal. She managed it for her mother pursuant to the power of attorney. Sarbjit said that her parents had acquired it so that she and the children could benefit from the rental income if they needed it.

[57] The judge described the issue to be resolved at para. 89 of the Reasons: "whose funds were used to purchase the shares in Harjas and the Langley Property in 2011, following the separation of the Couple?" The judge found that the money used for the down payment to purchase the property came from the Sarbjit/Satpal Joint CIBC Account but that it belonged to Satpal, rather than to the Couple: at para. 1129. As a result, she concluded that the shares in Harjas and the Langley property belonged to Satpal.

- [58] Bhupinder says the judge erred in arriving at her conclusion that Harjas and the Langley property belonged to Satpal because there was "no logical basis" and "no pathway to judgment" for the judge's conclusion.
- [59] I would not give effect to this argument. The conclusion reached by the judge is based on findings of fact. To succeed in this argument, Bhupinder was required to show that the judge made a palpable and overriding error. He cannot point to any such error, relying instead on the suggestion that the judge's reasoning is not clear and that she did not explain her conclusion. In my view, there is no merit to either of these arguments.
- [60] While the judge's reasons were not extensive, she clearly described the issue and the parties' positions. It must be remembered that reasons do not need to be extensive; they need not dot every "i" and cross every "t". Reasons are sufficient if they are responsive to the live issues and the parties' key arguments: *R. v. Walker*, 2008 SCC 34 at para. 20. Appellate intervention is not warranted if the record permits meaningful appellate review: *Shannon v. Shannon*, 2011 BCCA 397 at para. 9.
- [61] The judge set out the evidence and the positions of the parties accurately and in detail. Like many of the other transactions, the evidentiary record was not clear. The provenance and ownership of the funds in the Sarbjit/Satpal Joint CIBC Account was a matter of controversy and could not easily be resolved. The amount of money in the Sarbjit/Satpal Joint CIBC Account varied over time but in May 2011, it contained almost \$650,000. It is evident from the Reasons that the judge was aware of the difficulties presented by the frailty of the evidence and by the way in which the parties managed and comingled their families' finances. The judge accepted that some of the funds in that account belonged to the Couple and some to Satpal. She made findings in that regard that benefited both parties.
- [62] Bhupinder's argument conveniently ignores critical facts: the Couple had separated when the Langley property was purchased; it was purchased by Harjas, a company solely owned by Satpal and the mortgage was taken out by Harjas. The judge knew about the evidence concerning the credits and debits to the Sarbjit/Satpal Joint CIBC Account. She resolved the question about the source of the funds used to acquire the Langley property based on her assessment of all of the evidence. I cannot see any error in her conclusion. I would dismiss this ground of appeal.
4. Sarbjit/Satpal Joint CIBC Account
- [63] As of November 30, 2014, \$562,337.38 was held in the Sarbjit/Satpal Joint CIBC Account. At trial, Bhupinder claimed that all of the money in the account was family property as the account was frequently used by the Couple for family purposes. He said that of those funds, \$75,000 was saved for the education of their daughter, Jasleen. Sarbjit argued that only about \$184,000 belonged to the Couple, \$65,000 was an education fund that belonged to Jasleen, and the balance of the money in the account belonged to Satpal. However, Sarbjit also argued that the Couple should only receive \$9,000 of the funds in the account, because Satpal was entitled to repayment of \$175,000 for the down payment she made to purchase

the 155 Street property.

- [64] As a result of the inadequacies in the evidence, the judge found it difficult to determine the source of the money deposited in the account. However, she rejected Bhupinder's submission that she should infer that it was all family property because Satpal was unable to demonstrate the source of the funds and how much belonged to her. Instead, the judge arrived at her best assessment of the amount that belonged to the Couple, recognizing that most of the time they were in financial difficulty and did not have ready access to savings. She found that approximately \$132,500 of the Couple's funds, which were the net proceeds of the sale of a property in Squamish, remained in the Sarbjit/Satpal Joint CIBC Account: at para. 1139. She accepted Sarbjit's submission as to how much of the money belonged to the Couple, Satpal and Jasleen, recognizing that Sarbjit managed the finances for the Couple and Satpal. She reasoned that it was unlikely the Couple could have more than \$184,000 in the account "particularly in light of their many years of personal expenses which significantly exceed their reported incomes": at para. 1141. However, she rejected Sarbjit's position that Satpal should receive repayment of the down payment for the 155 Street property, having found that Satpal was not entitled to repayment of that amount until the property was sold. In the result, she ordered that Bhupinder was entitled to \$92,000, one half of the funds in the account that belonged to Sarbjit.
- [65] On appeal, Bhupinder begins by asserting that the judge found that the Sarbjit/Satpal Joint CIBC Account was a family asset. Given that finding, he says there was no legal basis for the court to conclude that some of the funds did not belong to the Couple. He says this is the case particularly in light of the fact that the judge also found that she could not accurately determine the source of the funds that went into the account. He says that the judge effectively ordered a reapportionment in favour of Sarbjit but gave no reasons supporting such a reapportionment. He says this is another instance where the Reasons do not show a "pathway to judgment".
- [66] I do not see any merit in this ground of appeal. The premise that the judge found that the Sarbjit/Satpal Joint CIBC Account was a family asset is incorrect. The judge did not make that finding. She concluded that the account was used by Sarbjit for the Couple and by Satpal and that a portion of the funds in the account belonged to each. She found that, of the funds in the account as of the relevant date, \$184,000 belonged to the Couple. This is a finding of fact. This finding was available to the judge on the evidence. She examined more than 20 years of family history, conflicting testimony and a huge volume of inconclusive documentation. The judge's findings and conclusion on the ownership of the funds in the Sarbjit/Satpal Joint CIBC Account is entitled to deference. Bhupinder has not demonstrated any palpable and overriding error. The judge did the best she could in light of the shortcomings in the evidence. She examined and considered all relevant evidence and arrived at a conclusion as to "what was most probable" (as per paras. 86-88) in the face of incomplete and irreconcilable evidence.

[67] There is no merit to the suggestion that the judge reapportioned family property. She did not. She determined what the family property was and divided it equally.

[68] I would dismiss this ground of appeal.

5. TCI Tax Liability

[69] TCI was incorporated in 1989. Bhupinder, Sarbjit and Gurmit were equal shareholders. It carried on the business of selling fireplaces and was active for a number of years after incorporation until Bhupinder was seriously injured in a motor vehicle accident in 1995. TCI was a family business operated by Bhupinder and Sarbjit who used the company to pay for business and personal expenses. The judge concluded that while Gurmit was an equal shareholder with the Couple, she was not actively involved with the business and never made capital contributions to the company. The company was dissolved in 1997 and reinstated in 2004. It continued to operate and was profitable until the time it ceased operations in about 2008 or 2009: at para. 1025. By the time the parties separated, TCI owed approximately \$275,000 in taxes to the CRA. The judge found that the debt was incurred for family purposes and so could be taken into account when dividing family property. Neither party contests that conclusion.

[70] At paras. 921-928, the judge set out the parties' positions on the division of assets, generally, and explained the proper approach to considering family liabilities under the FRA by referring to *Beese v. Beese*, 2008 BCCA 396, A.H. v. F.L., 2013 BCSC 1444, and *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241 (C.A.). She observed that where liabilities have been incurred for a family purpose, a court should take those into account in the division of assets between spouses in order to ensure fairness.

[71] The judge set out the parties' positions regarding the TCI debt at paras. 1197-1207. Bhupinder argued that all family assets and debts should be divided equally, including the TCI liability to CRA. Sarbjit sought reapportionment of the family assets to the extent that she should not be responsible for any of the TCI liability to CRA. Sarbjit said she should not be responsible because the debt arose after she stopped managing TCI's financial affairs and because Bhupinder ignored it, presumably resulting in additional penalties and interest. When Sarbjit learned of the debt, she hired a lawyer and Manjit Atwal ("Manjit"), an accountant, to sort out the company's books and negotiate with CRA. She said she also spent a considerable amount of time and effort to try to resolve the issue. She successfully got the CRA to reduce the debt from about \$275,000 to \$123,826.43. Sarbjit also argued that Gurmit should be responsible for the debt: at para. 1201.

[72] The judge rejected the suggestion that Gurmit should share in any responsibility for the debt: at para. 1211. However, she did agree with Sarbjit that Bhupinder should be solely responsible for the debt. She acknowledged that, generally, an income tax debt owing at the triggering event is to be apportioned equally between spouses. However, if the conduct of one spouse has increased the amount of the debt, different considerations may apply: at para. 1213. The judge concluded that Sarbjit did not become aware of the CRA claim when

Bhupinder was notified and that he must have failed to deal with it appropriately in a timely manner: at para. 1215. She also accepted that Sarbjit made extensive efforts to reduce the liability and devoted considerable time and effort: at para. 1216. Her reasoning is set out at para. 1217:

I considered whether it would be appropriate for the Couple to share Sarbjit's out-of-pocket expenses for Manjit and the lawyer, and to require Bhupinder to pay Sarbjit something in recognition of her time entering data. However, Bhupinder not only failed to respond to CRA's demands in a timely way and to initiate the accounting, he failed to make the accounting proceed easily and smoothly. He failed to ensure that Manjit had timely access to the computer information with a working computer and a password. As I have said, Bhupinder has artificially reduced his income for the purposes of this trial, and delayed in providing important information about the sale of some of BCBCHIL's assets. The litigation has been time-consuming and document-intensive. The alternative of ordering an accounting of Sarbjit's expenses in reducing the TCI debt to CRA would add further litigation expense to both Bhupinder and Sarbjit.

- [73] She concluded that as between the Couple, Bhupinder should be solely responsible for the debt because Sarbjit had satisfied any obligation she had to Bhupinder regarding the debt: at para. 1219.
- [74] On appeal, Bhupinder argues that the judge erred by failing to require the parties to be equally responsible for the debt to the CRA since it was a debt incurred for a family purpose. He raises three grounds of appeal;
- i. Sarbjit did not claim reapportionment of the debt in any pleading;
 - ii. the conclusion must be wrong in fact as Sarbjit shared in the benefits of the funds withdrawn by the Couple from TCI and made no payment to reduce the CRA debt; and
 - iii. the Reasons fail to include any pathway to judgment.
- [75] There is no merit to Bhupinder's submissions. First, Sarbjit did seek a judicial reapportionment of the division of property, generally, in her counterclaim. Second, as the judge correctly noted at para. 927, a judge must consider family debt to ensure a fair division of assets: Beese at para. 46.
- [76] Bhupinder's second and third arguments can be discussed together. The judge clearly explained why, notwithstanding the fact that the liability arose out of faulty bookkeeping, Sarbjit had satisfied her obligations with respect to the liability. Contrary to Bhupinder's submissions, the judge did not find that Sarbjit had not benefitted from the funds withdrawn from TCI. More importantly, whether Sarbjit benefitted was not the issue the judge needed to determine. At issue was who, as between Bhupinder and Sarbjit, was liable for the tax liability owed to the CRA. The judge found that Sarbjit had satisfied her obligations by trying to reduce the amount owing. There was a clear explanation for why the judge found that Bhupinder should be liable for the tax. I can see no error in the judge's reasoning, let alone a palpable and overriding one. I would dismiss this ground of appeal.

6. Jewelry and Real Property in India

[77] Sarbjit listed some jewelry and real property in India on her form F8. At trial, Bhupinder claimed he should be compensated for one half their values. He sought at least \$37,500, being one half of the value of the jewelry listed on her form F8, and \$60,000 for land in India, being one half of the amount of money that he says she sent to India for the purchase of land.

[78] Bhupinder argued that the judge should accept that Sarbjit owned the real property in India and that she had valuable jewelry in her possession. Sarbjit denied owning any property in India as of the date of trial and said Bhupinder had taken the jewelry. The judge set out the claims and the conflicting evidence. She was unable to conclude that Sarbjit held any land in India or that either party possessed the jewelry.

[79] At para. 1060, the judge set out her conclusion about the jewelry claims:

As discussed, I do not accept all the evidence of either Bhupinder or Sarbjit. Neither Bhupinder nor Sarbjit has established on a balance of probabilities that the other has family jewelry in his or her possession. I will not make any order regarding family jewelry.

[80] At para. 1134, the judge set out her conclusion about the claim for an interest in family property in India:

Bhupinder has failed to establish on the balance of probabilities that Sarbjit has property in India derived from the Couple's funds. Sarbjit has explained that she took some steps to pursue the purchase of property in India, but did not complete the purchase. As a result, Bhupinder's claim that property in India is owned by Sarbjit and is a Couple's Family Asset is dismissed.

[81] On appeal, Bhupinder argues that the Reasons are internally inconsistent because the judge relied on Sarbjit's form F8 for the purpose of assessing the value of her vehicle but did not rely on it for the purpose of proving the existence of the jewelry and the property in India. He says it is not possible to determine the pathway to judgment.

[82] This ground of appeal has no merit. The judge set out the evidence and the arguments of the parties. She explained why she could not rely on the evidence of either party, generally. She explained how she decided these issues based on her assessment of the balance of probabilities. She also referred to specific evidence that she was prepared to accept: at paras. 1057-1060. Bhupinder is unable to point to any error that could be said to be palpable or overriding. I would dismiss this ground of appeal.

7. Motor Vehicles and BCBCHIL Assets

[83] At trial, the parties each wanted to retain their personal vehicles. The judge relied on values in the parties' form F8s to arrive at the amount of a compensation order to effectively equalize the value of their vehicles. Sarbjit's 2003 Infiniti was initially acquired by BCBCHIL with the intent that she would use and retain it, just as Bhupinder would retain his 2010 Lexus. The parties agreed at trial that they should evenly divide the \$98,000 received by

BCBCHIL as the proceeds of sale of some its assets. However, they disagreed on whether Bhupinder retained any additional assets of BCBCHIL. Sarbjit claimed that she should receive half the value of the commercial vehicles that she said Bhupinder still owned.

- [84] At paras. 1046-1047, the judge valued the vehicles using form F8 values and required Bhupinder to pay compensation of \$16,000 to Sarbjit to equalize values. She relied on Bhupinder's first form F8 sworn in 2012 saying that the value of \$42,000 was the "appropriate figure". With regard to the commercial vehicles, she concluded at paras. 1049-1050:

The BCBCHIL Asset Sale 2014 Agreement does not include the sale of vehicles. It therefore appears that Bhupinder has retained these vehicles, either personally or through operation of BCBCHIL.

Bhupinder must account to Sarbjit for half the value of these vehicles. The value reported with the income tax return is the best evidence available of their value. Therefore, Bhupinder must pay Sarbjit \$49,000 for her half-interest in the assets which were retained by BCBCHIL, and Sarbjit has no further interest in the shares of BCBCHIL.

- [85] On appeal, Bhupinder argues that the judge erred in using the wrong form F8 to value Bhupinder's vehicle. He argues that she should have used the 2014 form F8 and says that the error led to the judge over-valuing his vehicle such that the compensation order should be only \$9,500. With regard to the commercial vehicles of BCBCHIL, he says that the company did not own any commercial vehicles, only the Couple's personal vehicles. Accordingly, he says that the compensation order for the commercial vehicles should be set aside or replaced with an order that the vehicles be sold and the parties share in the proceeds.

- [86] The findings challenged are clearly findings of fact. Like many of the other findings, they were made on conflicting evidence with little in the way of documentary proof. To set aside the findings of fact, the appellant must show that the judge made a palpable and overriding error. I am of the view that he is unable to point to any palpable error.

- [87] With regard to the personal vehicles, the judge specifically found that the value in Bhupinder's 2012 form F8 was the appropriate one to use. Earlier in the Reasons, she had disregarded Bhupinder's later form F8 statements because she was of the view that he was attempting to minimize his income and assets. She also concluded, at paras. 1026-1028, that Bhupinder retained assets in BCBCHIL that were not sold or accounted for:

Bhupinder's reported income has plunged dramatically since around the time of the Couple's separation. Bhupinder reported employment income of \$96,000 in 2011. He reported annual income of \$105,000 in Bhupinder's February 2012 First F8. He reported employment income of only \$19,950 in 2013.

If Bhupinder is earning as little as he has reported, he has artificially reduced his income for the purposes of minimizing his assets for this trial. I am not confident that he has produced all the information relevant to his assets. As an example, he wrongfully delayed in providing information about the sale of some of the assets in BCBCHIL.

The conclusion I am able to reach on the evidence regarding assets is that Bhupinder has retained assets belonging to BCBCHIL. The financial statements set out values which include depreciation, and the depreciation claimed for tax or accounting purposes may or may not be equal to the change in market value.

[88] Bhupinder has not pointed to any clear evidence to show that the judge erred in her findings. Having found that Bhupinder's evidence about the vehicles was unreliable and that he had retained the commercial vehicles, I would not conclude that the judge erred in making either compensation order. I would dismiss this ground of appeal.

Jaswant and Gurmit's Appeal

Background

[89] 448 was incorporated in 1993 by members of the Chahal and Gill families to hold interests in CBS and Jasgill Investments and Contracting Ltd. ("Jasgill"), a construction company. CBS, a business involved in selling building supplies, was also formed in 1993 with three corporate shareholders, one of which, P.S. Sangha Ltd. and Sons ("PSS"), was partly owned by Amrik Sangha. As of trial, Jasgill and CBS were owned by three companies: 448, PSS and 436129 B.C. Ltd.: at para. 188. When 448 was incorporated, the Chahal family shares were held equally by Jaswant, Gurmit and their son Ranjit. Ranjit was said to have borrowed funds from Jaswant to purchase his shares.

[90] Jaswant testified that he wanted all three of his sons to have equal shares in 448. Accordingly, in January 2007, Jaswant, Gurmit and Ranjit transferred some of their shares in 448 to Jaswant and Gurmit's other sons (Bhupinder and Narinder) and their wives, including Sarbjit. A number of share purchase agreements were entered into, all of which are in the same form (except for share numbers and total cost) (the "2007 Agreements"). At the same time, Ranjit transferred 37 of his shares to his wife, Susan. As a result of the transfers, each of Bhupinder, Ranjit and Narinder and their respective wives ended up with 37 shares in 448: at paras. 562-565. After the shares were transferred, Jaswant and Gurmit continued to each hold 39 shares in 448. The Chahal family shares in 448 owned by Sarbjit are the subject of the counterclaim brought by Jaswant and Gurmit.

[91] The 2007 Agreements provided:

1.1 Subject to the terms and conditions hereof, the Vendor agrees to sell to the Purchaser and the Purchaser agrees to purchase from the Vendor the Purchased Shares, effective January 2, 2007 (the "Closing Date").

1.2 The purchase price payable by the Purchaser to the Vendor for the Purchased Shares shall be \$..., which amount shall be settled privately between the Vendor and Purchaser.

[Reasons at para. 566.]

[92] The 2007 Agreements contained a provision that, if the "Minister of National Revenue" determines that the fair market value of the shares as of the date of the agreement is less than or greater than the stipulated price, the prices shall be adjusted retroactively to conform with fair market value: at para. 567.

[93] Each share was valued at \$5,003. Sarbjit's shares were purchased from Jaswant for \$185,111. No funds exchanged hands at the time of the purchases. However, in January 2008, 448 paid a dividend of \$30,000 to each of the three sons and each of their wives. All six then paid \$20,000 to Jaswant. A further dividend was paid to four shareholders (excluding Ranjit and his wife) in October 2009. After that payment, which was made shortly before the Couple separated, no further dividends were paid and the shareholders did not pay any other amounts on account of the purchase of the shares to Jaswant or Gurmit.

[94] In December 2011, after the Couple separated, Jaswant demanded the return of the shares from his sons and daughters-in-law. Ranjit, Narinder and their spouses returned their shares. Sarbjit refused to return her shares. Jaswant and Gurmit issued their counterclaim against Sarbjit and Bhupinder on February 14, 2012. They alleged a breach of the 2007 Agreements on the basis that the Couple failed to pay for their shares. Jaswant and Gurmit sought a declaration that the shares were held in trust and an order that the shares should be returned to them. On March 30, 2012, Sarbjit responded to the counterclaim agreeing that she entered into the share purchase agreement, but alleging that she had paid for the shares and was not in breach of that agreement. On August 7, 2015, after the start of the trial, Jaswant and Gurmit amended their counterclaim to allege that the share purchase agreements with Sarbjit and Bhupinder were "null and void".

[95] At trial, Jaswant, Gurmit, their three sons and two daughters-in-law all testified that the agreements required the purchasers of the 448 shares to pay the full purchase price as specified in the 2007 Agreements. Ranjit and Jaswant testified to the arrangement made between them for repayment of the money allegedly loaned to Ranjit for his purchase of shares. However, Sarbjit gave contradictory evidence: she testified that the 448 shares were given to the family members without any expectation of payment, other than for each of them to pay \$20,000 to Jaswant (and Gurmit) for the tax liability arising from the transfer of the shares. Jaswant testified that the tax liability was close to \$100,000. Mr. Sangha, who had helped set up CBS with Jaswant, testified that he heard Jaswant say that he gifted the shares to his children:

Amrik Sangha is not on speaking terms with Jaswant or Bhupinder. Amrik Sangha is an owner of PSS, which, like 448, in turn owns shares in CBS and Jasgill. Amrik Sangha testified that he was present when Jaswant told Amrik Sangha's father that Jaswant was giving his shares equally between his children, the same way that Amrik Sangha's father had distributed his assets to his children.

[Reasons at para. 570.]

[96] At para. 89, the judge described the issues she had to decide:

Regarding Sarbjit's registered shares in 448:

i) Were they a gift to Sarbjit from Jaswant?

ii) What is the effect of the 448 Share Purchase 2007 Agreement between Jaswant and Sarbjit?

[97] The judge set out the positions of the parties beginning at para. 1171. The "Chahal position", taken by Jaswant, Bhupinder and Gurmit, was that the 2007 Agreements were void for vagueness because they did not state when and how the purchase price was to be paid. Jaswant, Bhupinder and Gurmit also argued that the shares had to be returned because Sarbjit only paid \$20,000 of the \$185,111 purchase price. Further, they asserted that Ranjit had purchased his shares in 1993 for \$85,000 that he borrowed from Jaswant. They say Ranjit repaid that loan in three installments.

[98] The judge described Sarbjit's position at para. 1176:

Sarbjit's position is that Jaswant made a gift to her of the 37 shares in 448, at a time when he ensured that his three sons and their respective wives would share equally in 448. While not expressed in these terms, Sarbjit's argument is essentially that Jaswant and Gurmit wanted to make what could be considered a type of estate freeze. It would consist of a gift to their sons and daughters-in-law made in a way to provide evidence of the share value at the time. If so, the 448 Share Purchase 2007 Agreements were intended to provide evidence reflecting the fair market value, but Jaswant and Gurmit also forgave the written obligation to pay the purchase price.

[99] The judge concluded that the parties to the 2007 Agreements intended to fix the market value of the shares, "but at the same time, Jaswant and Gurmit forgave the 'purchasers' the obligation to pay them the purchase price. In the case of Sarbjit, Jaswant essentially made a gift to her of 37 shares in 448": at para. 1181.

[100] The judge gave a number of reasons for coming to that conclusion. She found the language in the 2007 Agreements that the payment "amount shall be settled privately between the Vendor and Purchaser" suggested there was no real intention the purchasers would pay for the shares. She found that the history of payments was consistent with Sarbjit's position. Each son and daughter-in-law, including Ranjit, paid \$20,000 to Jaswant shortly after receiving the first dividend and never made any further payments. The judge reasoned that if there had been a real intention for the purchasers to pay the purchase price, likely all of the dividends received would have been repaid to Jaswant and Gurmit. She found that the

payment of \$20,000 per shareholder reflected payment to Jaswant and Gurmit for the tax payable on the capital gain from the transfer of the shares: at paras. 1184-1186.

- [101] The judge found it significant that when the 2007 Agreements were executed, none of the sons or daughters-in-law had any realistic prospect of fully paying for the shares in accordance with those agreements. The judge also considered how the Couple had used funds they had available for other purposes in August 2007. Further, she observed that it would be "very easy" for Jaswant to redistribute the shares following the litigation. Finally, she rejected the suggestion that Ranjit's payment of \$40,000 in 2008 represented repayment of a 14-year-old debt as opposed to his (and his wife's) contribution to the parents' tax liability: at paras. 1187-1191.
- [102] The judge recognized that her findings were contrary to the evidence of all of the witnesses except for Sarbjit and Mr. Sangha. She relied on the surrounding circumstances and on the fact that Mr. Sangha was an independent witness who did not appear to have any reason to lie about what Jaswant had said. She found the evidence of the other members of the Chahal family to be unconvincing or vague: at paras. 1192-1193.
- [103] The judge found it was not necessary to consider arguments about the enforceability or vagueness of the 2007 Agreements as she found that they "essentially provide some proof of market value, but otherwise simply reflect gifts." She declared that Sarbjit was the beneficial owner of the 37 shares in 448 registered in her name: at paras. 1194-1195.
- [104] On appeal, Jaswant and Gurmit raise three grounds of appeal:
- a) the judge erred in law in failing to give effect to the formal admissions of fact contained in Sarbjit's response to the counterclaim;
 - b) the judge erred in law in determining their counterclaim on grounds not contained in the pleadings; and
 - c) the judge made palpable and overriding errors of mixed fact and law in concluding that the share purchase agreement effected a gift, without conducting a proper analysis and without giving effect to the presumption of a resulting trust.

Pleadings Issues

[105] I will address the first two grounds of appeal together.

[106] In their counterclaim, Jaswant and Gurmit alleged:

The Respondent, [Sarbjit] entered into a Share Purchase Agreement with [Jaswant] on January 2, 2007 where she agreed to pay him \$185,111.00 for the purchase of shares in the capital stock of [448]. To date she has failed to pay him for the shares and is in breach of the Agreement. Since the Respondent has failed to pay him for the shares [Jaswant] and [448] demand that the Respondent transfers the shares back from her forthwith. The Respondent is holding the shares in trust for [Jaswant] and [448].

[107] In her response to counterclaim, Sarbjit alleged:

In further response to Schedule 4, the Respondent [Sarbjit] agrees that she entered into a Share Purchase Agreement wherein she agreed to purchase shares in the capital stock of [448] for the sum of \$185,111.00 but states she has paid. She is therefore not in breach of the agreement. Further the said Respondent is not holding the shares in trust for [Jaswant] or for [448].

[108] Jaswant and Gurmit rely on the basic principle that pleadings are intended to define the issues before the court. They say that Sarbjit's response to counterclaim clearly admits that she entered into one of the 2007 Agreements that required her to pay \$185,111 for the shares in 488. They say that an admission in a pleading is a formal admission that cannot be withdrawn without either the consent of the other party or leave of the court: Supreme Court Family Rules, B.C. Reg. 169/2009, R. 9-6(5)(c). Taking that formal admission with her failure to pay, the appellants argue that the judge could not have concluded that the share purchase agreement "simply reflected a gift". If the judge had accepted that admission as she should have done, it would have made the claim very simple: Sarbjit's failure to pay the purchase price was a breach of the share purchase agreement. Jaswant and Gurmit say that the failure to give effect to the admission was an error of law and that it prejudiced their ability to properly address matters at issue as set out in the pleadings.

[109] This argument was not advanced in the court below and the judge did not deal with it. I would not accede to the argument. Jaswant and Gurmit attempt to treat one part of Sarbjit's pleading (that she entered into the share purchase agreement) as an admission at the same time that they ignore her denial of any obligation to pay for the 448 shares. Sarbjit's pleading alleged both that she entered into the agreement and that she had no obligation to pay the \$185,111 as it had already been paid. In my view, the judge was correct in not treating the first part of that as an admission unconnected to her denial in the same pleading. To do so would amount to an oversimplification of the pleading and ignore the complexity of the evidence and the arguments that were before the Court.

[110] Jaswant and Gurmit begin their argument with the observation that their own pleading is "truncated" and "inelegant". They say this was necessitated by the requirement to use the forms mandated by the Family Rules. I would make the same observation about Sarbjit's pleading. It is truncated and inelegant. Nevertheless, it conveyed her position which was that she entered into the share purchase agreement, she was entitled to the shares and she was not required to make any payment for them.

[111] In fact, Sarbjit's evidence at trial was that she and Bhupinder believed that they owned shares in 448 long before the 2007 transaction. Bhupinder continues to assert, as set out in the chronology in his factum, that the Couple invested in CBS in 1993. Sarbjit testified that Bhupinder and Sarbjit's family had made financial contributions to Jaswant and the Chahals sufficient to pay for the shares. She also testified that she did not purchase the shares and that as they were transferred to all of the sons and spouses equally that could be regarded as a gift. In other words, the history of the Couple's involvement with the Chahal interest in 448

was more detailed and nuanced than Jaswant and Gurmit's argument would suggest.

[112] Further, the question of whether the shares had been given to Sarbjit by Jaswant was very much a live issue at trial. She was cross-examined by counsel for Jaswant and Gurmit on the question of whether the shares were a gift. Counsel stated in her opening at trial:

There is [sic] the issues of the shares that Sarbjit holds in 448605. The issue is whether the shares were sold to her, whether they were gifted to her and whether she has paid for them and whether or not she is obligated to return the shares to Mr. Chahal senior.

[113] It is no wonder that Jaswant and Gurmit did not raise this argument at trial as it is evident that the parties were fully aware of Sarbjit's position about the shares. She never admitted that she had an obligation to pay \$185,111 to Jaswant after the share transaction in 2007. In my view, the real question is whether the pleadings were sufficient to give Jaswant and Gurmit the opportunity to respond to the case raised by Sarbjit. There is no question that they were fully aware of her position and that they were not prejudiced in any way by the pleading.

[114] The argument that the judge erred in law by resolving the counterclaim on a basis that was never pleaded raises a similar issue. Jaswant and Gurmit argue that it was not open to the judge to decide the share issue on the basis of gift as Sarbjit's pleading does not raise that issue. As I have already noted, the question of whether Jaswant gave the shares to his sons and daughters-in-law was very much a live issue at trial. Not only did Sarbjit give the evidence outlined above; all three Chahal sons along with the two other daughters-in-law testified that the shares were purchased by them, not gifted to them. The parties were prepared to lead evidence on the nature of the transfer and argue whether the shares were sold or gifted.

[115] The real issue is not whether Sarbjit's pleading referred to a gift, or whether the pleading contained a formal admission, but whether Jaswant and Gurmit had notice of and a chance to respond to the contention that nothing was owed to Jaswant. What is important is that a party not be taken by surprise.

[116] As this Court emphasized in *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343 at paras. 38-39, fairness requires that a litigant should have due notice of the issues that are to be raised so that they can prepare themselves with the evidence and arguments necessary to present their case:

Fairness requires that a trial judge not bring issues into litigation without giving the parties an opportunity to address them. This is also reflected in *Walker v. Blades*, 2007 BCCA 436, 70 B.C.L.R. (4th) 226 at para. 16, and *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paras. 60 - 62. In *Walker*, the trial judge erred in dismissing an action on the basis that the plaintiff had repudiated the contract in issue, when repudiation had not been pleaded or argued. In *Rodaro*, the trial judge's error was in granting judgment in favour of the plaintiff on a theory of liability that had not been pleaded or argued.

The common thread running through these authorities is the proposition that a party is entitled to know and respond to the case against it, whether by the calling of evidence, or through submissions.

[117] Where there is no procedural unfairness, the court may exercise its discretion to decide an issue in a proceeding that does not squarely fit within the pleadings: *Terivita Corporation v. Commission of Competition*, 2013 FCA 28 at paras. 72-73, rev'd on other grounds 2015 SCC 3. The question is whether all parties have been informed of the issue and given a full opportunity to respond to it:

However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced: *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] 3 F.C. 40 (C.A.) at paras. 14 to 16; *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215 at paras. 18 to 22; *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, 1 C.L.R. (4th) 138 at paras. 42 to 47.

A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it: *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC*, 2012 FCA 103, 430 N.R. 326 at para. 27; *Murphy v. Wyatt*, [2011] EWCA Civ. 408, [2011] 1 W.L.R. 2129 at paras. 13 to 19; *R. v. Keough*, 2012 ABCA 14, [2012] 5 W.W.R. 45.

[118] There is no support for a suggestion that Jaswant and Gurmit did not have knowledge of the position being advanced by Sarbjit or that they did not have an opportunity to respond to her evidence or arguments. I would not give effect to either of these grounds of appeal.

Whether the Transfer Was a Gift

[119] Jaswant and Gurmit argue that the judge erred in failing to find that the transfer of shares was a gift. They repeat their arguments that the judge failed to give effect to Sarbjit's "admission" in her pleadings. They say the judge relied on speculation and circumstantial evidence in her conclusions. They also say the judge did not properly analyze whether the transfer was a gift.

[120] Jaswant and Gurmit also argue that the judge failed in not concluding that the presumption of resulting trust applied. They say the burden of proof to rebut the presumption was on Sarbjit and that the judge did not assess whether Sarbjit had rebutted the presumption.

[121] This ground of appeal raises questions of fact and questions of mixed fact and law. As with the issues of mixed fact and law raised above, the questions here do not give rise to an extricable question of law and as such, the deferential standard of review applies.

[122] I would not accede to Jaswant and Gurmit's arguments. I have already explained why I am not persuaded by their arguments about Sarbjit's pleadings. Moreover, it is incorrect to suggest the judge speculated in her reasoning. The judge concluded the transfer of shares was a gift after a painstaking review of the evidence. She considered the various testimonies of the witnesses and gave detailed reasons as to how she reached her conclusions: at paras. 1181-1193. Jaswant and Gurmit could point to no palpable and overriding error committed by the judge. There is no merit to the argument that the judge erroneously applied the law to the facts.

[123] Moreover, the suggestion that the judge was required to embark upon a resulting trust analysis is unwarranted. Such an analysis is required where a gratuitous transfer is challenged and where the donor's intention is unknown: *Pecore v. Pecore*, 2007 SCC 17 at para. 23; *Foley (Re)*, 2015 ONCA 382 at para. 26. The purpose of the resulting trust analysis is to determine the donor's intent. Here, the judge examined all of the evidence to determine Jaswant's intent. The judge accepted the evidence of Sarbjit and Mr. Sangha as to his intent in transferring the shares and, as such, she did not need to embark upon a resulting trust analysis.

[124] I would dismiss this ground of appeal.

Disposition

[125] I would dismiss Bhupinder's appeal and Jaswant and Gurmit's appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Dickson"

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