

CANADA / JUDGMENT

Chohan v. Chohan

2024 BCSC 420

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Supreme Court of British Columbia

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2024 BCSC 420 Chohan v. Chohan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chohan v. Chohan,

2024 BCSC 420

Date: 20240313

Docket: S1910965

Registry: Vancouver

Between:

Kulbir Chohan and Kulwant Chohan

Plaintiffs

And

Sukhdev Chohan and Hardeep Kaur Chohan

Defendants

And

River Nursery Ltd. and River Nursery 2018 Ltd.

Defendants by way of Counterclaim

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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No other appearances

Place and Dates of Trial:

Vancouver

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Vancouver

March 13, 2024

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I. Introduction

- [1] This dispute over the legal and beneficial ownership of 16328 56th Avenue, a 13-acre farm property in Surrey (the "Nursery Property"), pits brother against brother: the plaintiffs, Kulbir Chohan (born 1960) and the late Kulwant Chohan (born 1962; died June 2020, after the start of this litigation),[1] against their older brother, the defendant, Sukhdev Chohan (born 1949).[2]
- [2] The family originates in Punjab, India. They were farmers of limited means. They lived in a small farmhouse, sheltering their animals under the same roof.
- [3] Sukhdev immigrated to Canada around 1970, when Kulwant and Kulbir were boys. Kulwant and Kulbir immigrated to Canada, along with their parents, in 1979.
- [4] Upon arrival, the younger brothers and their parents lived briefly with Sukhdev in Prince George. They then moved to Surrey, where they lived on the Nursery Property, then owned by their maternal uncle, Joginder Hayer (who died in 2020), from whom the three brothers purchased the Nursery Property in February 1986 for \$210,000. Thanks largely to rises in Lower Mainland real estate values, the Nursery Property is now worth roughly \$4.4 million. [3]
- [5] The plaintiffs assert that around the time of the Nursery Property purchase, the three brothers agreed to a "pooling agreement", as follows:
- a) Kulwant and Kulbir would purchase the Nursery Property using their own funds. All three Chohan brothers would be registered on title of the Nursery Property, and all of the Chohan brothers would share in any benefits derived from the Nursery Property; and
 - b) Sukhdev would purchase investment properties in Prince George, with approximately equal value to the Nursery Property. All three Chohan brothers would share equally in ownership of these properties, and any benefits derived from them.

- [6] Kulwant and Kulbir did provide the funds to purchase the Nursery Property, directly and through a mortgage (that included Sukhdev as mortgagor), which was mostly repaid by 1992.
- [7] In 1987, Kulwant and Kulbir began renovating the existing rancher house on the Nursery Property. In 1992, they began construction of a 10,000 square foot multi-family house on the Nursery Property (the "Home"). They moved into the Home in 1994, and construction was completed around 1997. They funded the Home with a \$275,000 construction mortgage on which all three brothers, along with Hardeep (Sukhdev's wife and co-defendant) served as mortgagors (the "Construction Mortgage"). Kulwant and Kulbir paid off most of the Construction Mortgage, with Sukhdev contributing roughly \$20,000. Kulwant and Kulbir also paid most construction costs, with Sukhdev contributing roughly \$22,000 for windows.
- [8] After the 1986 purchase, Kulwant and Kulbir built a nursery business including a retail store (the "Nursery Business"), all the while holding full-time jobs: Kulbir at CN Rail and later Skytrain, and Kulwant at BC Ferries and later as a real estate agent. In September 1986, they incorporated River Nursery Ltd. to run the Nursery Business. Their wives and their parents (until their deaths: the father in 1990; the mother in 2011) supplied much of the labour and capital, as well as maintenance fees.
- [9] In 1999, after his Prince George mill employment ended, Sukhdev, with Hardeep and their two sons, moved down from Prince George. They began living in the Home with the younger brothers and their families. Sukhdev took over the role of managing the Nursery Business day to day, until he was evicted from the business in 2017. Despite this litigation, to this day, Kulbir and Sukhdev, along with members of their families, still live together in the Home, in tension and acrimony.[4]
- [10] Around 1988, while he lived in Prince George, Sukhdev did acquire an interest in several properties in that city. He did not purchase them alone or directly, but through a company, 330127 B.C. Ltd. ("PG Ltd."), the remaining two-thirds of which was owned by the Chohan brothers' cousin-in-law, Sarwan Power.
- [11] The first evidence of Kulwant and Kulbir asserting an interest in the Prince George properties came in 2014, after Mr Power's death. Kulbir claims that Sukhdev agreed to formalise their interest, while Sukhdev claims that he told his brothers they had no interest in the Prince George properties as they had contributed no money.
- [12] Kulwant contacted his business lawyer, Rand Buckley, around March 2017, stating a desire to formalise their alleged interest in the Prince George properties. This led to a meeting attended by all three brothers at the Buckley Hogan law firm in August 2017, and that firm's drafting of what turned out to be two bare trust agreements. As will be seen, these two trust agreements were both inconsistent with the pooling agreement and inconsistent with each other.

- [13] The brothers have not spoken to each other since a heated one or two hour meeting in late 2017 at the Home, attended by the three brothers, along with their sister and her husband (Balwinder and Pal Dhillon) (the "Green Room Meeting"). The plaintiffs, with the Dhillons, pressed their older brother to confirm that they had an ownership interest in the Prince George properties. According to Kulbir and the Dhillons, the meeting was calm: Sukhdev acknowledged that Kulbir and Kulwant had an interest, and offered to take them to Prince George the following day to show them the properties. According to Sukhdev, the meeting was argumentative: he made no such acknowledgement, and left the meeting upset in the face of his siblings' aggressive demands that he sign a bare trust agreement confirming their interest in the Prince George properties. He claims that as he left, Kulbir said words to the effect that "you'll never set foot on the Nursery Property again."
- [14] The day after the Green Room Meeting, the plaintiffs discovered that Sukhdev had earlier, in May 2017, sold his shares in PG Ltd. to Mr Power's children. At trial, Sindy Power, a chartered professional accountant, confirmed that she and her brother, not Sukhdev, had initiated that sale, undermining Kulbir's initial urged inference that Sukhdev had hurried the sale in the face of his brother's demands.
- [15] The plaintiffs also later discovered that Sukhdev had transferred half of his one-third interest in the Nursery Property to his wife Hardeep, for no consideration, without notice to the plaintiffs: Hardeep is now listed on title to the Nursery Property, as the registered owner of one half of an undivided one-third interest, as a joint tenant with Sukhdev.
- [16] The plaintiffs themselves also took unilateral actions, to the prejudice of Sukhdev. In December 2017, Kulwant and Kulbir withdrew \$1.33 million from the joint line of credit that they shared with Sukhdev; the funds were not returned for 15 months, during which time they were loaned to a cousin. That month, Kulwant and Kulbir also incorporated River Nursery 2018 Ltd., through which they have since operated the Nursery Business. They excluded Sukhdev from its operations, and have made him and Hardeep feel profoundly unwelcome in the Nursery Property and in the Home through various petty insults, nuisances, and exclusions.
- [17] The family schism sparked multiple legal proceedings. In April and June 2019, Sukhdev filed a claim (VLC-S-S-194821: the "First Action") and a petition (VLC-S-S-196471: the "Oppression Proceeding") against Kulbir, Kulwant, River Nursery Ltd., and River Nursery 2018 Ltd. In September 2019, Kulbir and Kulwant filed the present claim, to which Sukhdev and Hardeep have filed a counterclaim. The First Action and the Oppression Proceeding were confined to issues relating to the Nursery Business and did not deal with the Nursery Property.
- [18] On July 30, 2021, in *Chohan v. Chohan*, 2021 BCSC 1488, in the Oppression Proceeding, Justice Milman ordered Kulbir and Kulwant's estate to transfer one third of the shares in River Nursery 2018 Ltd. to Sukhdev. Sukhdev was to be given the same rights as a shareholder of River Nursery 2018 Ltd. that he had as a shareholder in River Nursery Ltd. Milman J also ordered a buyout of the shares in River Nursery 2018 Ltd. after the outcome of

the present proceedings; the process for the buyout is contingent on the findings in this action. The parties were prohibited from drawing any dividends from River Nursery 2018 Ltd. until the completion of the final buyout.

- [19] The plaintiffs rely on contractual and equitable principles in their claim. They argue that due to his breach of the pooling agreement, Sukhdev holds title to the Nursery Property in trust for Kulbir and Kulwant by way of an express trust and a resulting trust or, alternatively, a constructive trust. The plaintiffs argue in the alternative that even if the pooling agreement is not made out, they will still be entitled to orders for a resulting trust or constructive trust, or an order based in unjust enrichment, due to Sukhdev's failure to contribute to the purchase of the Nursery Property and his marginal contributions to the costs of the Home construction and the Nursery Property over the years.
- [20] The defendants deny the existence of a pooling agreement. They argue that even if there were discussions of a pooling agreement, it is too imprecise for enforcement. They argue that the brothers acquired and operated the Nursery Property as part of a joint family venture, exhibiting a common understanding that each brother would contribute what he could to the Nursery Property, Nursery Business, and Home, for the economic betterment of the entire family, including their parents and respective children. This communal understanding was forged and reflected through the years Sukhdev served as a beachhead in Canada, sending financial support home to India; and then sponsoring the family's immigration to Canada, placing them in housing and employment upon their arrival in Canada, guaranteeing the purchase mortgage for the Nursery Property, which became their home and business, contributing \$200,000 in start-up funds for his younger brothers' construction business in 1999, and then returning with his family to the Nursery Property to provide daily management of the Nursery Business. It was beyond any conception of the brothers that there would ever be an accounting of each of their individual contributions to the Nursery Property, Nursery Business, and Home, let alone one that would dispossess or diminish Sukhdev's interest in the Nursery Property. The Prince George properties were his own separate investment project, consistent with investment projects carried out by Kulbir and Kulwant in the absence of Sukhdev: these included a Burger King franchise and several Surrey residential properties.
- [21] For the reasons below, the Court dismisses both the plaintiffs' claim and the defendants' counterclaim.
- [22] The plaintiffs have failed in their onus to establish the facts and terms of the alleged pooling agreement. The brothers, with legal advice, registered all three brothers on title to the Nursery Property. The presumptive and conclusive evidence that the registered parties hold indefeasible title to the property, set out in s. 23(2) of the Land Title Act, RSBC 1996, c 250, is not ousted. On the contrary, the brothers and their family exhibited a joint family enterprise in the acquisition and operation of the Nursery Property, Home, and Nursery Business, as a means of providing shelter and economic support for all three generations of the Chohan family. In the words of Sukhdev, "we considered the entire family as one everything

everyone did was for the family." Personal and business expenses were fluid, as were transfers and contributions among family members: the focus was on the collective good, with no concept, even if it were possible given the family's inconsistent documentation and cash-based business, that there would be a future accounting based on specific contributions of individual family members.

- [23] With respect to the counterclaim, while the younger brothers were wrong to expel Sukhdev from the Nursery Business, this wrong will be appropriately righted through the buy-out mechanism already ordered by Milman J, in the appropriate forum for consideration of the Oppression Proceeding claims. Further, Sukhdev's claims for special, punitive, and aggravated damages were neither properly pleaded nor established at trial.

II. Credibility

- [24] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739, aff'd 2020 BCCA 130, leave to appeal to SCC ref'd, 39246 (21 January 2021), Justice Mayer usefully distills the jurisprudence on the assessment of the credibility and reliability of witnesses:
- [89] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.
- [90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.
- [91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
- [92] Some additional factors which may impact credibility include the following:

- a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony: see paras. 57-59, 86 of *F.H. v. McDougall*, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1.
 - b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: *Le v. Milburn*, 1987 CarswellBC 2936 (W.L.) at para. 1; *Jones v. Jones*, 2008 BCSC 1401 at paras. 31, 32 and 60; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 9.
 - c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: *Bradshaw* at para. 190;
 - d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: *Osayande v. Canada (Minister of Citizenship And Immigration)*, 2002 FCT 368 at paras. 19 and 21;
 - e) Credibility will be undermined when a witness (or party) has failed to produce documents: *Bradshaw* at para. 188; *Pacific West Systems Supply Ltd. v. Vossenaar*, 2012 BCSC 1610 at paras. 84 to 86;
 - f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: *R. v. Storey*, 2010 NBQB 86 at para. 78; *Wang v. Wang*, 2017 BCSC 2395 at paras. 45-46 and 89-90; and
 - g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: *Bradshaw* at paras. 191 to 192.
- [93] A court should not be overly focused on the demeanor of a witness or the smoothness of their presentation. Testifying at trial, which in this case included extensive cross-examinations on matters occurring almost seven years ago, is a stressful endeavor. Special care should be given not to equate difficulties in providing evidence through an interpreter with evasiveness. In this case Allen Liu, Gary Chow and Candy Chen provided their evidence through an interpreter and I have taken the difficulties inherent in translated evidence into account in assessing their credibility.

[emphasis in original]

- [25] In *Phoenix Homes Limited v. Takhar*, 2023 BCSC 184, Justice Kent provided balanced observations about assessing the credibility of witnesses from different cultures and backgrounds, or whose testimony is filtered through an interpreter:

- [63] I would note, however, that a determination of what is "reasonable" or "inherently believable" is, like concepts of "common sense" and "implausibility", often a subjective assessment reflecting personal experience and one that may be unintentionally informed by implicit bias and even inappropriate stereotyping or myths. This is particularly true in cases involving testimony of witnesses from different cultures and backgrounds not necessarily understood by the trier of fact. As noted in *Kim v. Choi*, 2019 BCSC 437:
- [17] Caution should be exercised in assessing the testimony of witnesses from other cultures or where English is a second language and the evidence is received through an interpreter. The reason for caution was explained in *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42:
- [39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.
- [40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.
- [41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.
- [42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.
- [18] The *Fu* caution is instructive, but it does not provide a license for a witness to lie. Simply because a witness comes from a different culture and speaks a different language does not result in a free ride in the witness box. A truthful witness is not diminished and an untruthful witness is not elevated. A truthful witness is to be believed and a liar is to be rejected.

[emphasis added]

- [26] Bearing these cautions in mind, with the exceptions of Navjit/Susan (Kulwant's widow) and Pal Dhillon, no witness was particularly credible or reliable. This is partially understandable, given that the facts in question span 40 years. For the most part, however, the witnesses called by each side recited their party lines, based on memories reconstructed through a partisan lens. Their evidence was tailored to advancing each side's cause at trial.
- [27] Of the witnesses, the primary adversaries, Sukhdev and Kulbir, were the least credible and reliable. Both were evasive and argumentative in cross-examination. Both were prone to obfuscation and speechifying as strategies to avoid straight answers. Neither was particularly frank at conceding adverse points to the other side. Kulbir was particularly reticent to credit Sukhdev with any past contributions to the Nursery Property, the Nursery Business, or Home.
- [28] Each of Kulbir and Sukhdev were impeached on inconsistencies between their discovery and trial evidence, seeking to provide a more favourable recitation of testimony to their case in the trial versions of the evidence. Such inconsistencies were especially egregious in the present circumstances, as most of the discoveries were held only weeks before the start of trial (and, indeed, Sukhdev was impeached in his discovery held during the mid-trial hiatus, necessitated and ordered after the defendants were permitted to amend their response mid-trial).
- [29] As an example, at trial Sukhdev insisted that he had told his parents and brothers about the discount he had purportedly obtained from his uncle for the Nursery Property purchase; at discovery he did not recall if he told them or not. At trial, Sukhdev maintained that he had a clear knowledge of the properties owned by PG Ltd.; in discovery he testified that he had left everything to do with PG Ltd. to Sarwan Power, and he did not know precisely which properties PG Ltd. owned.
- [30] Sukhdev also exhibited testimonial inconsistencies at trial. In direct examination, Sukhdev testified that Kulwant had told him that they needed to go to the Buckley Hogan law firm to sign a draft document, and that he asked Kulwant to bring the draft home for him to read slowly; he claimed that Kulwant had said that Mr Buckley would not allow removal of the document, and that they needed to go to his office. During cross examination, however, he initially said that he had no idea why Kulwant had taken him to Buckley Hogan, and that he was not aware of any document to sign (despite having already met with Mr Buckley once before). He maintained that he was not told that there would be papers to sign.
- [31] Some of the brothers' testimony was particularly implausible, in light of their own testimony about the closeness of the family. Both cut off their noses to spite their faces in order to downplay the contributions made by each other to the family.

- [32] Kulbir was implausibly reluctant to admit that Sukhdev had sent money back to India to support the family. He tried to evade that admission by suggesting that he was too young to know, that the money came to his parents so he would not know, and then suggesting that the money was not really necessary for the family's benefit, despite their sparse standard of living at their small Punjab farm.
- [33] Kulbir was similarly reluctant to admit Sukhdev's contributions to the Nursery Business and Property from 1999 to 2017. He claimed, implausibly, that Sukhdev and his family moved down from Prince George to the Nursery Property in 1999 without any notice, and "forced their way" into the house and business. He then resisted all suggestions of Sukhdev's importance in managing the Nursery Business, while Kulwant and Kulbir worked other full time jobs, for those 18 years.
- [34] Kulbir also sought to minimise Sukhdev's contributions to the education fees of his nephews and niece: the plaintiffs' own children. Documents confirmed that Sukhdev paid roughly \$60,000 of these costs, out of his personal bank account.
- [35] For his part, Sukhdev claimed that he did not know whether Kulbir and Kulwant were working full-time in "outside jobs" at the time the Nursery Property was purchased. He claimed that Kulwant was only doing an apprenticeship. Later in his cross-examination, he claimed that he had never spoken to his brothers about their incomes. When asked about Kulwant's job in 1994, he said he did not know, because he never asked and Kulwant never told him. This strains belief given Sukhdev's own repeated testimony about how close he was to his brothers, and how he spoke with the family every single day on the phone from Prince George.
- [36] The filtration of most of the witnesses' (and each party's) testimony through an interpreter--although all have spent most of their lives in Canada, and exhibited a decent command of English on the stand, peppering their testimony with English phrases, and at times correcting the interpreter--further distorted the testimonial process and diminished the Court's faith in the spontaneity and credibility of their answers. Their attempts to escape impeachment by blaming the earlier unfavourable discovery answers on the translations, hurt rather than helped their credibility.
- [37] Finally, while one must be cautious in placing too much weight on demeanour, in light of the cautions in *Phoenix* and the cases cited therein (*Fu v. Zhu*, 2018 BCSC 9 and *Kim v. Choi*, 2019 BCSC 437, *aff'd* 2020 BCCA 98), the verbal reticence of both Sukhdev and Kulbir to provide straight answers, and their constant attempts to provide answers favourable to their case regardless of the truth, was consistent with their slow delivery and general tendency to keep their eyes fixed downwards. Kulbir would stare long and hard at documents, with frantic, furtive eyes, before answering questions; he wrung his hands together during unfavourable portions of the cross-examination. Sukhdev also shifted uncomfortably during difficult points in his cross-examination.

- [38] The Court has little faith in any testimony provided without the reassurance of a corroborating document. Where conflicts exist between the oral evidence of interested witnesses, and contemporary records made in the ordinary course of business, "the most reliable evidence as to what transpired will likely be found in contemporaneous documentation": *Wu v. Sun-Gifford, Fine Line Interiors Group Ltd. & Bluerock Developments Ltd.*, 2001 BCSC 191 at para. 29; see also *Ratanshi v. Kalra*, 2024 BCSC 283 at para. 99. In this case, the Court places much more faith in documents than in the oral testimony of any witness.
- [39] That said, documents offer limited comfort in this case, and in themselves further undermine the parties' credibility. I have no confidence that the parties, and in particular the plaintiffs, have conducted a thorough search for documents or, more damningly, have produced all documents relevant to this litigation. It is clear that many categories of relevant documents remained unproduced by both sides. Further, both sides produced hitherto unproduced documents right before trial, and indeed, in the middle of trial.
- [40] A few examples will suffice. The plaintiffs produced the bulk of their listed documents--168 of 245 categories--in the three weeks before the trial. These include hundreds of pages from Kulwant's boxed business records. Apparently these documents were not hidden away, but were kept in his office, where they could and should have been readily located and produced in a timely manner. Sukhdev produced various banking and RESP records mid-trial on August 23, 2023, even though they were clearly relevant on the pleadings and on his own testimony. During cross examination, Sukhdev claimed he had made efforts on his own to obtain records. This is contradicted by his counsel's letter confirming that they first attempted to obtain such records in April 18, 2023: two months after the start of trial.
- [41] Another category of documents that the plaintiffs opted not to voluntarily seek out and disclose was the Buckley Hogan law firm file generated by Kulwant and Kulbir's request to draft a bare trust agreement for Sukhdev to sign, leading to the meeting with Mr Buckley and all three brothers. That file would offer a rare objective life buoy on the central issue in the case. The file was only obtained mid-trial, after I expressed frustration with its absence. The file, when disclosed, revealed that two contradictory bare trust agreements had been prepared, rather than the single draft bare trust agreement originally produced by the plaintiffs (which, while still inconsistent with the pooling agreement thesis, would have better supported their position). The second bare trust agreement (with Kulbir as beneficiary) also bore an internal Buckley Hogan note that Kulbir had taken it home for signing, yet Kulbir never produced his own copy of the agreement.
- [42] Both sides maintained and retained and produced incomplete and, at times, unreliable business records, consistent with the undocumented and fluid financial relationships and transfers between family members. As set out below, the consequences of this neglect are more profound for the plaintiffs, who were unable to convince the Court that their allegedly disproportionate contributions to the Nursery Property, Nursery Business, and Home in fact came from their own incomes and savings, rather than from inter-familial transfers, or

funds generated from the Nursery Business which all three brothers equally owned. Specifically, the plaintiffs have failed to produce tax returns, or other financial records that would show the income, expenses, and payments of the Nursery Business, which they admit was almost entirely cash-based, from 1986 to 1999: the period in which they had sole operational control over the Nursery Business and while Sukhdev, living in Prince George, knew little about the profits and operations of the Nursery Business. The Court agrees with the defendants' argument on this important point:

There are several possibilities as to why there are no financial records for the Nursery Business from 1986 to 1999 from the Plaintiffs. First, no records were kept. That would be suspicious and indicate to the Court that the Company was operating mainly in cash, which was what Sukhdev has said. Second, there were records but they have not been kept, which would also be curious and suspicious and indicate that as soon as they could be destroyed as they indicated cash transactions. It would have to be Kulbir and Kulwant destroyed those records, not Sukhdev. Third, records were kept, as would be common given that most business have either a tax return, Financial Statements, bank account statements, General Ledgers, cancelled cheques and the like but those records have not been produced by the Plaintiffs. That is likely given that the Plaintiffs do have all sorts of receipts and various financial documents from the 1986 through 1999 time period. As a result in any of these circumstances, the Court must view with a great deal of suspicion the fact that these records have not been produced and hold that against the Plaintiffs in a negative finding in relation to credibility.

- [43] There is insufficient evidence before the Court to make a categorical finding amongst these possibilities. The tenor of the documents produced by the plaintiffs, however, indicates the more dismal explanation. The plaintiff brothers retained and produced ancient invoices and cheque books: evidence important for their side's arguments that they made most of the Nursery Property payments. It seems odd that the brothers would retain these dusty minute financial records, while not retaining and producing more important records from the same time period that would paint a more complete picture of their personal receipts from the Nursery Business and their own employment, including general ledgers, tax returns, pay stubs, and bank records.
- [44] These documentary failures also undermine the parties' credibility, particularly that of the plaintiffs. As stated by Justice Martinson, in *Freeman v. Freeman*, 2008 BCSC 857, in a family litigation context equally applicable to this ostensibly commercial family litigation where there is a knowledge imbalance between the parties:
- [20] . It is usually reasonable to infer, particularly in the absence of a reasonable explanation, that if a person does not provide complete financial disclosure, there is information that the person does not want the court to see that would be detrimental to his or her case and advantageous to the other side.
- .

[28] This Court has concluded that each party to a matrimonial proceeding, whether with respect to the division of assets or the payment of maintenance, has a duty, separate and apart from the requirements of Rule 60D, to make full financial disclosure to the other party and to the court. That duty is of particular significance where one of the parties has relevant information unknown to the other: *Wang v. Yang*, 2003 BCSC 1451; *Turpin v. Turpin*, [1991] B.C.J. No. 35 (QL).

[emphasis added]

III. Legal presumption of s. 23 of the Land Title Act

[45] All three brothers were registered as owners of the Nursery Property.

[46] The parties agree that s. 23(2) of the Land Title Act creates a legal presumption of indefeasible title for those whose names are registered on the property:

Effect of indefeasible title

23(2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following: .

[47] The parties also agree that the presumption of indefeasible title may be rebutted, to account for the underlying equitable interests between the parties, through the establishment of a constructive or resulting trust, or otherwise: *Yang v. Zhang*, 2017 BCSC 524 at paras. 53-58.

[48] The parties also agree that the party seeking to challenge the state of title bears the burden of proof to establish ownership contrary to the registration: *Virk v. Pannu*, 2006 BCSC 921 at paras. 9-10, *aff'd Bajwa v. Pannu*, 2007 BCCA 260.

[49] As set out in *Suen v. Suen*, 2013 BCCA 313 at para. 34, that party may dislodge the statutory presumption of indefeasible title by:

- (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;
- (ii) the operation of an agreement between the parties that is contrary to the registered legal title; or
- (iii) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

[50] In *Yang*, Justice Warren notes that the jurisprudence places a premium on contemporaneous evidence of the transferor's intention with respect to title:

- [58] To ascertain a transferor's actual intention, the court must weigh all the relevant evidence, both direct and circumstantial: *Harshenin v. Khadikin*, 2015 BCSC 1213 at para. 44. The traditional rule required evidence of the transferor's intention at the time of the transfer to "be contemporaneous, or nearly so, to the transaction": *Pecore* at para. 56. Evidence of intention that arises subsequently is no longer automatically excluded, so long as it is relevant to the transferor's intention at the time of the transfer. Such evidence must, however, be approached cautiously with a view to guarding against self-serving evidence or placing undue weight on evidence that may reflect a change of intention: *Pecore* at para. 59.
- [51] Accordingly, in *Virk*, various contemporaneous conveyancing documents evinced a clear intention to place Mr Pannu on title:
- [37] Attached to Pannu's affidavit is the file of the conveyancing solicitor, Peter Hammond, which demonstrates that Pannu was the driving force behind the purchase of the Queen Street Property. In particular, counsel for Pannu points out that the critical documents, including the mortgage application, the statements of adjustments, the property transfer tax form, the form A transfer, the order to pay, the acknowledgment of receipt of standard mortgage terms and the insurance binder, all refer to Pannu as either an owner or a purchaser.[5]
- [52] As expanded below, the plaintiffs have failed to discharge their persuasive burden of dislodging the presumption that Sukhdev held, and now Sukhdev and Hardeep hold, a one-third legal and beneficial interest in the Nursery Property.
- [53] On the contrary, the contemporaneous documentary evidence, read together, indicates the clear intention of all three brothers to place all of their names on title as equal co-owners in the Nursery Property:
- a. the December 6, 1985 agreement between Sukhdev, Kulbir, and Kulwant Chohan with Joginder Hayer for Hayer Nurseries Ltd. states clearly, "[t]hat the property of 16328 #10 Highway has been sold to Sukhdev, Kulbir, and Kulwant Chohan for \$210,000.00 dollars";
 - b. the February 12, 1986 Land Title Act transfer of an estate in fee simple expressly transfers Hayer Nurseries Ltd.'s interest in the Nursery Property to all three of Sukhdev, Kulbir, and Kulwant;
 - c. the February 14, 1986 Form 17 mortgage application is entered into and signed by all three of Sukhdev, Kulbir, and Kulwant at the offices of John Kelso, a Surrey solicitor;
 - d. the March 5, 1986 title search of the Nursery Property indicates that title to the Nursery Property was registered in the names of all three of Sukhdev, Kulbir, and Kulwant, with no notation of joint tenancy; and

- e. the April 15, 1987 letter from the solicitor Mr Kelso to all three of Sukhdev, Kulbir, and Kulwant on the purchase of the Nursery Property refers to a phone call with the Chohan brothers that same day. It confirms that title to the Nursery Property is held by the Chohan brothers as tenants in common and explains that each brother holds an undivided one-third interest in the Nursery Property.
- [54] Further, in his June 27, 2018 affidavit, the vendor, their late uncle Joginder Hayer, confirms that the Nursery Property was sold to all three brothers: his nephews.
- [55] This contemporaneous evidence, dovetailed with the objective evidence of the late uncle, makes clear that the parties did intend to place all three brothers on title, on top of the s. 23 presumption. Further, as will be expanded below, I am also satisfied that Sukhdev materially contributed to the acquisition and maintenance of the Nursery Property.

IV. The plaintiffs' claim of express trust: the pooling agreement

- [56] The plaintiffs primarily claim under the alleged pooling agreement, arguing that it established an express trust over the properties held by PG Ltd. in favour of Kulbir and Kulwant. The pooling agreement can no longer be performed, as Sukhdev breached it when he sold his interest in those Prince George properties in May 2017. The plaintiffs submit that the appropriate remedy is a declaration that Sukhdev breached the pooling agreement, and that he and Hardeep hold their one-third interest in the Nursery Property in trust for Kulbir and Kulwant. They seek an order that his interest be transferred to them, and that title of the Nursery Property be transferred solely into their names, pursuant to s. 37 of the Law and Equity Act, RSBC 1996, c 253.
- [57] In addition to Kulbir's claims that Sukhdev agreed to the pooling agreement around 1986, and acknowledged the younger brothers' co-ownership of the Prince George properties around 2014, the plaintiffs also point to recent actions by Sukhdev as evidence of the pooling agreement. The plaintiffs claim that although Sukhdev refused to sign the bare trust agreement in the Green Room Meeting, his offer to show his brothers the Prince George properties acknowledged their co-ownership. They argue that Sukhdev's attendance at the Buckley Hogan law firm similarly constitutes an acknowledgement.
- [58] Sukhdev claimed that he did not know why he was attending the law firm meeting, and that he was ambushed at the Green Room Meeting. In any case, his refusal to sign any documents is consistent with his position. I also agree with the defendants that Sukhdev's offer to attend the law firm meeting and to show the Prince George properties is equally consistent with his role as an elder brother peacemaker: regardless of the legitimacy of his brothers' demands, a family dispute clearly had arisen, and he was willing and anxious to find some sort of solution.
- [59] While the brothers may have, before or after the Nursery Property purchase, discussed the concept of jointly owning properties other than the Nursery Property, and may have even evinced a general intention along those lines, the plaintiffs have failed in their onus to

establish that the brothers reached an enforceable pooling agreement with sufficient certainty of terms, or otherwise, before the Nursery Purchase. Further, the brothers' actions before and after the Nursery Property purchase undermine their asserted pooling agreement in several ways.

- [60] First, Kulbir's evidence about the formation of the pooling agreement is sparse, with no details of the date (pleaded, apparently incorrectly, as "in or around late 1986": that is, after the Nursery Property was purchased in February 1986), location, or format of communications. It is also so vague on the specific terms of the alleged agreement itself to be unenforceable. At trial, Kulbir ventured that he understood that under the pooling agreement, the Prince George properties would have to be within roughly \$100,000 of the cost of the Nursery Property. Even in its 2023 asserted reconstruction, the pooling agreement is silent on critical details such as the completion date for the purchases; whether and how their ownership would be registered; whether the property would be held in trust for the other brothers; or whether the property or properties would be in the name of one or more of the brothers, or one or more corporations.
- [61] In this, the present alleged oral agreement suffers the same deficiencies as the alleged oral agreement amongst family members rejected in *Suen*. The *Suen* Court reversed the trial judge's finding of an enforceable oral agreement:
- [69] At the very least, the 2002 Agreement does not appear to meet the requirement for certainty of objects. There was no consensus between the parties on the specific terms of the agreement or trust. For example, there was no specified duration for the services that Andy had to provide in return for the legal title to Pender, or the exact nature and value of the services he had to provide (e.g., did it extend to future debts and expenses of Albert's at any limit), or whether Albert had any obligation to stay out of debt for a specified period, to earn any income to support himself, or, in the absence of an actual transfer, whether the agreement extended to the replacement property of Capstan Way. Furthermore, it remains unclear why, if Andy received the whole beneficial interest in Pender pursuant to this agreement, he registered the legal title to Capstan Way in their joint names.
- [62] The *Suen* Court's comments apply equally to the present alleged pooling agreement:
- [43] Communications in the family context are often no more than statements of intent or wishes. For a promise, in that context, to rise to the level of a binding enforceable contract there must be strict proof of the terms of the bargain including: the parties, the property, and the consideration. See *McKenzie v. Walsh* (1920), 61 S.C.R. 312, and *Ross v. Ross*, [1958] O.R. 49, 11 D.L.R. (2d) 561 (O.N.C.A.).
- [63] Second, at para. 72, the *Suen* Court also noted, as here, that the alleged agreement with respect to land failed to comply with s. 59(3) of the Law and Equity Act:
- (3) A contract respecting land or a disposition of land is not enforceable unless

- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
- (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

[64] Third, in addition to the inconsistency with respect to its date, noted above, the plaintiffs' own notice of civil claim is inconsistent with the pooling agreement as alleged, where Sukhdev alone would be responsible for the Prince George purchases. At para. 36 of Part 1, however, the plaintiffs allege that "[i]n or around May 1988, the plaintiffs contributed \$10,000" towards PG Ltd.'s purchase of a Prince George property.

[65] Fourth, the alleged pooling agreement is unfair and illogical on its face. Sukhdev alone is to finance 100 percent of the Prince George purchase, and only receive a one-third share, while his two brothers would enjoy two-thirds of both the Nursery Property and the Prince George properties.

[66] Fifth, the brothers' retention of Mr Kelso for the Nursery Property purchase provides particular proof of their common intention that Sukhdev was to enjoy a legal and beneficial one-third interest in the Nursery Property, unencumbered by any trust provisions or qualifications related to the Prince George properties or otherwise. The brothers could easily have had Mr Kelso document the pooling agreement, or the younger brothers' interest in the Prince George properties, just as Mr Kelso had documented Sukhdev's interest in the Nursery Property, if such an agreement existed, but did not. As Madam Justice Ross states in *Aujla v. Lidder*, 2019 BCSC 206, a case with some parallels to the present:

[107] In addition, I am not satisfied that the parties intended that Resham hold a beneficial interest in the property in proportion to his contribution to the down payment. In other words, I am satisfied that it was not the intention of the Lidder defendants or Resham, at the time of purchase, that Resham would acquire a 50% interest in the Property. I reach this conclusion for the reasons set out in relation to the contract claim. Of particular importance is my view that, given the state of the title, if it were the case that this was what the parties intended, it would have been the subject of discussion at the December 4, 2015 meeting with the solicitor. Instead, as noted above, Resham first raised his dissatisfaction with the solicitor in September 2016.

[emphasis added]

- [67] Sixth, in contrast to the Nursery Property, and undermining the concept of a clean agreement for parallel shared fraternal ownership in both the Surrey and Prince George properties:
- a) The Prince George properties were never registered in the three brothers' names.
 - b) The Prince George properties were owned through a corporation, PG Ltd., the majority shares of which were owned by a separate individual outside of the immediate family: Mr Power.
 - c) In contrast to the single Nursery Property, PG Ltd. owned three or four different properties.
 - d) Neither Kulbir nor Kulwant (or other family members) visited or even knew of the location or identity of the Prince George properties.
 - e) Neither Kulbir nor Kulwant (or other family members) ever contributed, financially or through labour, to the Prince George properties. Kulbir claims to have contributed \$10,000 at some point, but can provide no particulars or documentation to support this claim. Ms Power was not aware of any contributions. Her searches of the PG Ltd. records revealed no evidence of such a payment.[6]
 - f) Although Kulwant and Kulbir were close to and kinfolk of the Power family, neither of Sarwan Power's children, the present shareholders in PG Ltd., ever understood them to be co-owners of or involved in PG Ltd., or to have asserted any such interest or role. Nor were they ever told by their father of Kulwant or Kulbir having any ownership of or involvement in PG Ltd.
- [68] Seventh, at least by 2014, Kulbir and Kulwant knew that they were not on title, and knew that the Prince George properties were co-owned through a corporation with Mr Power. Despite these dissimilarities with the Nursery Property arrangement, they raised no objection until around 2014, after the death of Mr Power, who might have had something to say on the matter. Paragraph 107 of Aujla, quoted above, also speaks to this point.
- [69] Eighth, akin to the long silence about the alleged co-ownership of the Prince George properties from their acquisition around 1986 to 2014, there is no documentation--communications or otherwise--indicating that Kulwant and Kulbir possessed any ownership interest in the Prince George properties.
- [70] Ninth, the communications and documentation generated by Kulwant's visit to the Buckley Hogan law firm constitute inconsistent admissions against interest with respect to the pooling agreement as alleged:
- a) The file opening note for Kulwant records him not describing a past agreement, but a future likelihood: "brother will be agreeable to that agreement..." The instructions also assert that Sukhdev was holding a two-third interest in PG Ltd. for Kulwant; there is no mention about Kulbir having any kind of interest in the PG Ltd. at all.

- b) Two contradictory and inconsistent bare trust agreements are generated: in one Sukhdev grants Kulbir a two-thirds interest in PG Ltd; in the other Sukhdev grants Kulwant a two-thirds interest.
- [71] Finally, the 2017 events and communications do not reflect the pooling agreement as alleged by the plaintiffs. The evidence of what was said at the Green Room Meeting is not entirely consistent with the existence of a pooling agreement. In their trial testimony, neither Kulbir, Balwinder, nor Pal Dhillon recounted Kulwant or Kulbir referring to an earlier agreement, or asserting an entitlement to the Prince George properties based on an agreement, at the meeting. Their assertion that at the meeting they began negotiating various financial matters is also inconsistent with their assertion of a clear defined present entitlement to the Prince George properties, based on a specific past agreement. Rather, the plaintiffs' Green Room Meeting demands sought to retroactively redistribute ownership interests rather than enforce a previous agreement. According to the evidence of the most objective witness, Pal Dhillon, Kulwant and Kulbir said to Sukhdev: "tell us about your property over there [in Prince George]" and "if the nursery is in the names of three, then that Prince George property should also be in our three names" (emphasis added). Pal's wife, Balwinder, aligned with Kulbir, also repeatedly asserted, using the specific phrase, that Sukhdev admitted that he had to "give" an interest in the Prince George properties to the younger brothers. In short, the collective tenor of that evidence indicated that the younger brothers' ownership interest in the Prince George properties was aspirational and corrective, rather than historical and contractual.
- [72] In short, the overwhelming weight of the evidence rejects the existence of an enforceable pooling agreement as a matter of fact or a matter of law. Again, the brothers may have had vague discussions of such an arrangement at some point. But the overall tenor of the evidence is just as consistent with the two younger brothers--with increasing wealth and sophistication, and decreasing memories and appreciation of Sukhdev's past generosity to the family--watching the significant increase in the value of the Nursery Property, to which they had contributed significantly more than their older brother, feeling resentment towards Sukhdev, and demanding a share in his Prince George investments in order to balance things out ex post facto.

V. The plaintiffs' alternative trust claims

- [73] The plaintiffs seek in the alternative an order that the Nursery Property be transferred to them on the basis of a resulting trust or constructive trust: each a means of overcoming the statutory presumption of indefeasible title under s. 23(2) of the Land Title Act.

A. Resulting trust

- [74] A resulting trust is inferred where no value is given for a legal interest, and operates to rebut the statutory presumption of indefeasible title: *Suen* at para. 34; *Pecore v. Pecore*, 2007 SCC 17 at para. 20. Such value must be "tangible, meaning real or material, value": *Freeland v. Farrell*, 2022 BCCA 99 at para. 63.
- [75] That said, the value provided need not be a direct monetary contribution towards the purchase. For example, in *Virk/Bajwa*, the defendant provided value rebutting a resulting trust, by serving as a covenantor on a mortgage, assisting in searching for the property, and engaging a realtor. As stated in the trial decision:
- [40] I find that there is no cogent evidence upon which to find that the statutory presumption of indefeasibility is rebutted. It is a fact that had a default occurred under the mortgage, Pannu solely could have been held responsible for any shortfall. The evidence also discloses that he was the driving force in terms of finding the Queen Street Property, engaging in negotiations for its purchase, and then facilitating its purchase by way of the mortgage with Envision.
- [76] Other cases have applied the *Virk/Bajwa* principle that serving as a mortgagor or covenantor may provide sufficient consideration to defeat a resulting trust claim: *Aujla* at para. 106; *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 at paras. 65-68; *Lafavor v. Nelson*, 2019 BCSC 1903 at para. 65; *Banihashemi v. Behshad*, 2021 ONSC 1145 at para. 44.
- [77] These principles apply to Sukhdev's role in the present case. While not contributing directly towards the purchase price, Sukhdev did provide multiple instances of real and direct contribution to the purchase of the Nursery Property, without which it is unlikely that the family would now possess that very valuable piece of real estate.
- [78] First, Sukhdev served as a covenantor on the \$142,500 purchase mortgage (the "Purchase Mortgage"). His inclusion as an owner and mortgagor on the Purchase Mortgage (roughly \$337,690, adjusted for inflation) at 11.25 percent was not gratuitous, altruistic, or risk-free. Sukhdev confirmed his understanding that if he did not sign the mortgage, the bank would not advance the money to purchase the Nursery Property. This makes sense. At the time of the purchase, Sukhdev was 37 years old, and had lived and worked in Canada for 16 years. His younger brothers, then aged 24 and 22 years, had only lived in Canada for five years, and had short Canadian work histories. The bank required a letter from Sukhdev's employer setting out how much he earned, and the length of his employment. The plaintiffs assert, without corroborative documentation, that they had savings and profitable employment at the time. In his cross-examination, however, Kulbir implicitly acknowledged that they required a guarantor: when pressed with the proposition that the bank required Sukhdev as a guarantor, Kulbir shot back that "we could have found some other guarantor." The totality of the evidence indicates that Sukhdev's inclusion on the mortgage was important, if not critical, for the financing of the Nursery Property purchase.

- [79] Second, Sukhdev located the Nursery Property: in fact, co-owning and running the Hayer Nursery business with their uncle Joginder for several years before the purchase. While in business with Joginder in the Hayer Nursery, Sukhdev helped improve the property, grooming the way for its future use as a nursery by the brothers, by working on the greenhouses, heating systems, and plant tables.
- [80] Third, the totality of the evidence supports Sukhdev's claim that he negotiated a discount for the purchase of the property, from his uncle's original list price of \$267,000 in November 1984, to the \$210,000 actually paid. Entered into evidence was an original postal envelope, with stamps franked on January 21, 1985, from Joginder to Sukhdev. Within is the Multiple Listing Service ("MLS") contract showing a November 1984 list price of \$267,000, with handwritten annotation, apparently by Joginder: "old price." The envelope also contains a copy of the newspaper advertisement, with a photograph of the property and particulars, including the \$267,000 price. The plaintiffs did not attempt to argue that these documents were forgeries, and there are no signs that they are not authentic.
- [81] Kulbir testified that regardless of the original list price, the property had indeed been listed at \$210,000, and that they purchased it at that listed price, with no discount. Kulbir states that he was the brother who communicated with Joginder about the purchase, and states that he knew nothing about any discount; he did concede, however, that Sukhdev may have communicated privately with Joginder about the sale. In support of his position, Kulbir obtained a 2018 printout of the historical information presently in the MLS database about the listing. That printout provides a listing date of 11/20/1984, and an expiry date of 11/20/1985. It lists the "Previous Price" (\$210,000) and the "Original Price" (also \$210,000). In contrast to Sukhdev's 39-year-old envelope, Kulbir provided no original advertisement or listing agreement showing the property listed at \$210,000. It was not explored whether such advertisements or listings exist on microfilmed newspapers or other publications, or in some dusty archive or warehouse, but one would expect such printed materials to exist somewhere.
- [82] While the entries comprising the MLS database would qualify as business records, there was no direct testimony about the circumstances or reliability of the data and, specifically, the prices listed in the 2018 printout. Counsel confirmed that the MLS contact person had no way of directly verifying its accuracy, apart from confirming that these records were kept in the ordinary course of business, and that the MLS data entry clerks would have presumptively striven for accuracy. It is unknown when this information was typed into the database or by whom. The printout itself expressly cautions, at the bottom of the page, that, "information herein deemed reliable but not guaranteed." Importantly, the printout is inaccurate on its face: it fails to set out the original price of \$267,000, as stated not only in the 1984 MLS agreement but also the 1984 listing advertisement. Instead, it erroneously lists both the original 1985 and final 1985 price as \$210,000.

- [83] Apart from avuncular kindness, it would make sense for Joginder to give Sukhdev a discount and to primarily discuss the sale of the property with Sukhdev. Sukhdev was not only the eldest brother, but had also served as Joginder's business partner for several years. Further, Sukhdev had in fact lost some \$80,000 in the failing Hayer Nursery enterprise: at least a portion of that lost investment is corroborated by contemporaneous cheques. A discount would go some way to correcting this financial setback, which would have been a particular concern at that time given the recent arrival of his younger brothers and parents in Canada.
- [84] Fourth, in the fact-specific exercise of assessing the provision of value rebutting the presumption of a resulting trust, Sukhdev's long-term pre-purchase contributions to his younger brothers and parents, at considerable personal sacrifice, also provide a critical nexus to the acquisition of the Nursery Property. Sukhdev served as the pioneer for his immediate family, bravely travelling alone, around the world, to 1970 Canada, less multicultural than it is today. Sukhdev sent money home from Canada to the Punjab for a decade, contributing to, inter alia, his younger siblings' educations. He sponsored their immigration to Canada. After their arrival, he helped establish their finances and residence: first in his own home, and then literally on the Nursery Property, when still owned by Joginder. But for these contributions by Sukhdev, the brothers would likely never have had the opportunity to purchase the Nursery Property.
- [85] I am satisfied that Sukhdev contributed, with the requisite value and connection, to the purchase of the Nursery Property, and has rebutted any presumption of a resulting trust.

B. Constructive trust and unjust enrichment

- [86] The plaintiffs argue further and in the alternative that the defendants' one-third share in the Nursery Property should be transferred to them on the basis of unjust enrichment. They say that in addition to providing the purchase price, Kulwant and Kulbir and their families contributed disproportionately, in work and money, to the Nursery Property, the Home located on it, and the Nursery Business conducted on it. They argue that the Nursery Property has dramatically increased in value due to these efforts, rather than general real estate trends in the Greater Vancouver area. They argue that Sukhdev has been enriched at their expense, without any juristic reason for that enrichment. As such, the defendants hold their one-third interest in the Nursery Property on constructive trust for the plaintiffs, and must disgorge that unjust enrichment through the transfer of that share.
- [87] The plaintiffs claim that they have personally contributed \$1.216 million of their own personal funds towards the Nursery Property, including the following:
- a) paying the down payment for the purchase of the Nursery Property (\$53,618) and the further \$10,000 payment due after closing;
 - b) paying the principal amount of \$142,500 and all interest payments on the Purchase Mortgage;

- c) substantially renovating and expanding the nursery, including constructing new greenhouses and a retail storefront;
- d) making numerous improvements to residence on the Nursery Property, including:
 - i. from 1987, renovating the rancher-style house; and
 - ii. from 1992 to 1997, supervising the construction of the Home, procuring all supplies, fixtures, doors, and windows, and hiring and overseeing the subcontractors;
- e) paying at least \$85,931 in property taxes; and
- f) paying the expenses necessary to preserve and maintain the Home, including home and glass insurance and garbage disposal.

[88] Three immediate problems protrude from the plaintiffs' assertions.

[89] First, it is implausible that Kulwant and Kulbir, earning modest incomes at early stages in their careers at BC Ferries and CN Rail respectively, would be able to pay off the \$142,500 mortgage at 11.25 percent in six years. As expanded below, they provide little contemporaneous documentary proof that they paid these and other Nursery amounts from their own incomes and savings rather than from the Nursery Business proceeds itself.

[90] Second, and similarly, some of the invoices that they first claimed to have paid personally, in fact were paid for by the Nursery Business. One example is the \$77,290 Batavia Greenhouse invoice.

[91] Third, at least for the first 13 years, it would make sense for Kulbir and Kulwant to contribute more to the Nursery Property expenses than Sukhdev, as they and their families received the sole benefit of residing on that property. Until he moved to the Home in 1999, Sukhdev received no benefit from the Nursery Property.

[92] The plaintiffs acknowledge that Sukhdev made some contributions to the Nursery Property over the years, but argue that these pale in comparison to their own contributions. Sukhdev would travel down on a regular basis from Prince George, on long weekends and holidays, to work on the Nursery Property and in the Nursery Business. Sukhdev purchased the windows for the Home, worth roughly \$22,000. He contributed roughly \$20,000 to the Construction Mortgage. He pledged his credit towards the \$1.6 million and \$1.33 million joint lines of credit held with his brothers. He made two small payments towards the home insurance for the Nursery Property in 1999. He contributed some \$235,000 in shareholder loans to the Nursery Business (around the time it was incorporated), although all but about \$21,000 has since been repaid. He provided much "sweat equity" towards the maintenance, improvement, and management of the Nursery Property, both before and, more significantly, after he moved from Prince George.

- [93] He (and Hardeep) also served as covenantors on the \$275,000 Construction Mortgage (adjusted for inflation: roughly \$504,000): while Kulwant and Kulbir were older and more established in 1994 than in 1986, the same observations with respect to the Purchase Mortgage made above also apply to the necessary or desirable inclusion of Sukhdev on the Construction Mortgage.
- [94] While the plaintiffs acknowledged that Sukhdev may have made some property tax payments between 2000 and 2015, they urged the Court to reject this evidence because "he was not able to identify with any precision the dates on which he made these payments or the manner in which he made them. There are no entries in any of his chequebook ledgers that relate to these purported payments."
- [95] As noted above, however, the plaintiffs are even more guilty of a failure to maintain and produce business records: a failing fatal to their claims for which they bear the persuasive burden. They failed to produce tax returns, general ledgers, and other financial records that would show the income, expenses and payments of the Nursery Business from 1986 to 1999: that is, during the period in which they had sole operational control over the Nursery Business and its books, finances, and earnings, while Sukhdev, the third shareholder, lived away in Prince George, receiving no dividends from and limited information about the Nursery Business.
- [96] Evidence of the Nursery Business's profits was murky. The plaintiffs claimed that the Nursery Business made little profit, and that any profit accrued at the end of the season, was left in the company's bank account and used to operate the company as needed. Notwithstanding their claims of the middling profitability of the company, Kulbir also claimed that he and Kulwant continuously invested personal funds back into in the business. It is not clear why the family would spend such effort and money to run an unprofitable business for fourteen years.
- [97] The opacity of the business is compounded by the plaintiffs' admission that the nursery was almost entirely a cash-based business, leaving the defendants and the Court with even less ability to test the plaintiffs' assertions.
- [98] There is ample evidence that the plaintiffs took and used cash that ought to have been directed to the Nursery Business and thus, indirectly, in part, to Sukhdev. Kulwant and Kulbir regularly woke up at 3 am to line up for a table at the Cloverdale flea market, in order to sell flats of nursery plants: wholly cash transactions. They would not have done so unless it had generated substantial returns. It appears from the conflicting testimony that while some of this money may have been deposited in the Nursery Business account, some was used for family expenses, and some was directly pocketed by family members: we have no way of knowing the specific amounts.
- [99] While the plaintiffs maintained and produced records from the period showing their contributions to the Nursery Business (in the form of chequebooks from many years), in order to support their case, they have produced few records--such as complete ledgers and

personal and corporate bank account records--that would allow the defendants and the Court to measure how much they personally took out of the business. Kulbir made the inherently implausible claim that he and Kulwant took no salary, draws, or cash personally from the Nursery Business in the thirty years between 1986 and 2017. As they have produced scant records, there is no way to test this assertion. Kulbir's claim not to have received any Nursery Business funds is also contradicted by the overwhelming tenor of the oral and documentary evidence at trial that the Nursery Business finances were managed with the same shambolic fluidity as the family's finances, and that there was no discrete treatment of family finances and Nursery Business finances.

- [100] Viewed conversely, the plaintiffs have also produced few banking or tax or employment records that would establish that their separate salaries, and not proceeds from the Nursery Business itself, were the ultimate source of the funds on which they base their deprivation argument. We have to take Kulbir's word that he and Kulwant were making "really good money" at CN Rail and BC Ferries and other side employment, such as to afford the \$1.216 million they claim to have contributed to the Nursery Property.
- [101] Of course, if any portion of their claimed contributions to the Nursery Business and Nursery Property came from the Nursery Business rather than out of their own pockets, then not only are the plaintiffs not deprived to the extent they claim, but one third of those amounts represent involuntary, indirect, and unaccounted contributions to the Nursery Business and Nursery Property by Sukhdev himself, in the form of deprived dividends.
- [102] The plaintiffs' claim thus fails on the first and second prongs of the unjust enrichment inquiry: they have proven neither deprivation nor enrichment. The plaintiffs have not proven that the contributions that they made to the Nursery Property and the Home came out of their own personal earnings, rather than from the Nursery Business itself, which of course was one-third owned by Sukhdev.
- [103] In response to these documentary concerns, the plaintiffs note that this Court rejected the defendants' application to compel the production of such records a week before the start of trial: *Chohan v. Chohan*, 2023 BCSC 268. While the Master (as he then was) found that "the documents sought are arguably not relevant or material to the case as pled" (para. 17), the primary reason for dismissal was the last-minute timing of the application: a disclosure order would impede trial preparation and threaten an adjournment (para. 16).
- [104] The result of that documents application decision does not relieve the plaintiffs of their persuasive burden of establishing the extent of their personal contributions to the Nursery Property, the Home, and otherwise. The plaintiffs proceeded to trial without having produced those records, that might corroborate their oral testimony, at their own peril.

- [105] The recent chambers and trial decisions in *Kaur v. Bual*, 2021 BCSC 998 (Master Robertson, as she then was) and 2021 BCSC 1385 (Madam Justice Lamb) illustrate that a plaintiff's failure to adduce documentary evidence can be fatal to their claim, even if the defendant has earlier sought and been denied an order for production of said documents. Put conversely, a judicial denial of a discovery application does not relieve the successfully resisting party of its burden of proof at trial.
- [106] In *Kaur*, the plaintiff was injured in a motor-vehicle accident for which the defendant admitted liability. The plaintiff contended that her injuries derailed her professional aspirations to gain accreditation as a teacher, based on her earlier studies in Singapore.
- [107] Before trial, the defendant applied for production of documents, particularly academic transcripts, relating to Ms Kaur's Singapore education, arguing that these documents would inform the issue of whether her foreign training would have been recognised in Canada: para. 11. Master Robertson refused the defendant's application, holding that the prejudice to the plaintiff by granting the application for production "on the eve of trial" (as here) outweighed the possibly "limited probative value" of the documents sought: paras. 9, 12-13.
- [108] At trial, the wage loss claim was a key issue. Specifically at issue was whether Ms Kaur had proven that there was any realistic possibility that she would have become a teacher in Canada but for the accident. Lamb J reviewed Ms Kaur's training in Singapore, and her work history in Canada: paras. 75-79. She found that the plaintiff had failed to provide sufficient evidence to establish that her foreign training and credentials would allow her to obtain Canadian teaching accreditation: para. 80.
- [109] Apart from the evidentiary failing of the plaintiffs to retain and produce complete financial records, and their consequent failure in their persuasive burden, the absence of thorough records also defeats the plaintiffs' proposed remedy. It is neither feasible nor equitable to conduct an accounting and thereby divide the Nursery Property in a manner contrary to the registered one-third ownership, where the plaintiffs have waited 30 years to make such a claim, and have failed to preserve and produce evidence necessary for such an accounting.
- [110] I now turn from the unjust enrichment and deprivation enquiries to the third prong: the juristic reason enquiry. Apart from the plaintiffs' evidentiary failures and the impossibility of unscrambling the egg, the half-century of the family practice in Canada of intermingling family and business funds without scrupulous delineation of receipt and entitlement provides a further reason for equity to decline to intervene. To impose a strict accounting on these family members runs contrary to their practices and expectations since their arrival in Canada, and likely before.

- [111] In this, the parties' fluid financial relationship resembled that in *Steele v. Doucet*, 2020 ONSC 3386, where the Court confirmed that the two parties registered on title were each entitled to a 50 percent interest notwithstanding their unequal contributions. The Court rejected the plaintiff's request that the property be divided based on a minute ex post facto analysis of what each party had contributed:
- [130] In *Botehlo* [sic], the couple bought a house as joint tenants and then separated. The applicant made a claim in unjust enrichment on the basis that he contributed far more than the respondent to the costs of the home including the mortgage, property tax, and utilities.
- [131] Justice Woollcombe held that the applicant and the respondent made an agreement that they would share household expenses in order to pay down the mortgage and acquire equity in the home. While the applicant paid things like the mortgage, respondent made many payments for many other things including food and utilities from her a and resources and accounts.
- [132] Her Honour rejected the argument that it should weigh enrichment based on disproportionate contributions by the parties. She found that the parties both contributed to the household expenses as they were able to, given their incomes. Her Honour found that there was no evidence that the parties ever discussed the idea that they would apportion the cost of the home in a completely equal basis. Their agreement was that they would pay what they could from the money they earned, and this is precisely what they did. This was a reasonable and fair way to organize their affairs and any minor enrichment of the respondent and corresponding deprivation of the applicant because of a greater contribution by the latter did not create anything unjust.
- [134] With respect to the juristic analysis, both parties argued the mutual benefits each conferred on the other to establish, on Mr. Steele's part a 50-50 allocation of the property, and on Ms. Doucet's part to deny Mr. Steele any part of the equity.
- [135] Setting aside the pre-June 2009 equity, I am persuaded by the decision in *Botehlo* [sic]. In this case, as in *Botehlo* [sic], there was no evidence that the parties agreed, once and for all, that each would share in a specific ratio of household expenses or that in the event of separation each would benefit in a certain percentage share of assets. On the evidence before me, the parties' relationship was economically fluid, changing as the circumstances of the couple changed (usually those of Mr. Steele). On the evidence before me it appears that the arrangement was that the parties would contribute as they could to the relationship. The natural expectation would have been that they share in the increase in their wealth, equally.

[emphasis added]

- [112] In *Botelho v. Tajti*, 2019 ONSC 7271, discussed in the above quotation, the applicant made a claim of unjust enrichment, and for an unequal division of the net proceeds of the house sale, notwithstanding the fact that both ex-partners were registered on title. He argued that

he had contributed more than the respondent to its costs, including the mortgage, property taxes, and utilities payments. The Ontario Superior Court of Justice declined to intervene in equity based on unjust enrichment. Its comments about the fluidity of each party's contributions, as well as the evidentiary imprecision, both speak to the present case:

- [26] It is clear to me that the applicant and respondent made an agreement that they would share household expenses so as to enable them to pay down the mortgage costs and thus, ultimately, to acquire equity in the home. While the mortgage came from the applicant's account for the duration of the time the home was owned, the respondent made many payments for many other things including food, utilities, the applicant's FRO costs, the applicant's credit card, the applicant's phone, household needs and the applicant's daughter's expenses.
- [27] While it is impossible to be exact, from the evidence before me, it appears that the parties both contributed to the household expenses as they were able to, given their incomes. Those contributions enabled them to continue to own the home and to acquire equity in it. It is very unclear what the total amounts were that each contributed to maintenance of the house and its attendant expenses each month. I cannot say that their contributions were identical. Nor can I say what they were. But, I am not able to conclude, on the basis of the evidence before me, that the applicant has proven that the respondent was enriched by the fact that he paid the mortgage costs, or that he suffered any corresponding deprivation.

[emphasis added]

- [113] Botelho also speaks to the present artificiality of imposing an after-the-fact precise accounting, contrary to the parties' expectations:
- [28] Moreover, even had I found that there was an enrichment and deprivation, it seems to me obvious that there would be nothing "unjust" about it. The first stage of the juristic reasons analysis applies to the established categories of juristic reasons, which is not in play here. In their absence, the second step permits the consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied: *Kerr v. Baranow*, at paras. 40-44.
- [29] In this case, I find that there is no evidence that the parties ever agreed to, or even discussed the idea that they would apportion the costs of the home on a completely equal basis. Nor is there any evidence of an agreement that, were they to separate, they would go back and ensure that each had contributed to the joint expenses that enabled them to accumulate equity in the home equally. Their agreement was that each would pay what they could from the money each had. And this is precisely what they did. In these circumstances, when they chose to order their affairs in a reasonable and fair manner, if there was any minor enrichment of the respondent and corresponding deprivation of the applicant because he contributed more than she did towards building the equity in the home, there is nothing unjust about it.

[emphasis added]

- [114] Again, when the brothers registered each other as the equal owners of the Nursery Property, none contemplated let alone agreed that an accounting would be held 37 years later and that their registered ownership interest would be later altered to reflect their respective penny-by-penny contributions over the next 33 years.
- [115] The recent decision of *De Angelis v. Siermy*, 2022 BCCA 401, lv to appeal to SCC ref'd, 40594 (27 July 2023), with many factual similarities to the present case, provides useful guidance. There, the Court of Appeal confirmed the trial judge's denial of the plaintiff's unjust enrichment claim in part based upon the family's collective ethos of mutual support, exemplified by the family's motto of "one for all and all for one:" para. 8. Both this Court and the Court of Appeal likened the arrangement to a joint family venture: para. 49. Specifically, the plaintiff Barbara De Angelis's historic receipt of benefits from the family businesses and from her siblings provided a juristic reason for any deprivation represented by the benefits that she in turn had provided them in the form of unpaid services:
- [48] It was also open to the judge to find distinct juristic reasons for different categories of services, as he did in distinguishing between the personal services provided to Annie and Joe, and those provided to their company and VPLT. But I agree with the appellant that it would be difficult to uphold a finding by the judge that the services Barbara provided to the family companies could be described as either donative or contractual; the categories are mutually exclusive. However, that is not what the judge did. Rather, he found that the services provided to Annie's companies were either "provided with donative intent, or under the umbrella of the family motto" (at para. 372), that is, as "part of the family ethos that everyone contributes and everyone gains from the family enterprise": at para. 362.
- .
- [50] It is open to a defendant to establish a juristic reason to deny recovery grounded in the parties' reasonable expectations. In the circumstances of this case, the judge was satisfied that the respondents had established that it would not be unjust to allow Annie and Joe and their company to retain the benefit of the services provided by Barbara--based on the reasonable expectations of the parties about the way the burdens and benefits of the family businesses were to be allocated: Kerr at para. 114.
- [51] . As Justice Cromwell explained in Kerr at para. 109, mutual benefit conferral "can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment". He stated further:
- [115] The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual

benefit conferral should only be considered at the juristic reason stage for that limited purpose.

It was accordingly open to the judge at the juristic reason stage to consider the nature of the family's give and take concerning the family companies.

[52] In summary on this ground of appeal, I see no basis to interfere with the judge's conclusion that Barbara provided services to Annie and Joe's company on the basis that "everyone contributes and everyone gains" from the family enterprise, and that it was not an unjust enrichment for Annie and Joe's company to retain the benefit of these services.

[emphasis added, underlining in original]

[116] In this, the parties' communal expectations and historic benefits and conduct over 50 years provide a residual basis for denying recovery. As Justice Cromwell stated in *Kerr v. Baranow*, 2011 SCC 10, citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25:

[43] In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus v. Becker*, [1980] 2 SCR 834, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter v. Beblow*, [1993] 1 SCR 980, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

[44] Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular

enrichments are unjust (Peter, at p. 990). For example, in Peter, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (Peter, at p. 990).

[emphasis added]

- [117] The resounding overall evidence of the history and practices of this family provide a further juristic reason for the defendants' continued retention of their one-third interest in the Nursery Property even if, viewed in isolation, Sukhdev contributed less overall to that property. Again, it was the expectation and practice of the Chohan family members to contribute here and there to all aspects of family advancement: the Home, the Nursery Business, the Nursery Property, at times other family members' businesses, and other expenses, all without any expectation of a formal accounting or reconciliation. The siblings advanced and lent money to each other and to other family members. They contributed to the educational and wedding costs of each other's children. They contributed to the expenses and spending money of their parents. The parents in turn would give and lend money to their children and grandchildren: presumably money that ultimately originated from the children. The Chohan family members' primary focus was on the collective well-being, wealth accumulation, and reputation of their family as a whole. The Chohan brothers and their families were engaged in a form of joint family venture or domestic partnership, with fluid and ad hoc financial contributions and receipts, imprecise accounting and documentation of those various interfamilial transfers, and no clear line between family and business expenses and profits.
- [118] This theme of the family collective comes not only from the evidence of Sukhdev, but from his siblings, Kulbir and Balwinder, as well as from Kulwant's widow, Susan/Navjit. They confirmed that this ethos was instilled by their late parents, arching from the family's origins in the Punjab in the 1960s, all the way up to the start of the acrimony in 2017. The family enterprise principle of communal advancement forms the conceptual foundation at the centre of the plaintiffs' case: the pooling agreement.
- [119] I do not base my conclusion on a formal finding of a joint family venture (beyond the general sense discussed in De Angelis, above), which concept is typically asserted in the context of a plaintiff claiming an entitlement to a property based on indirect contributions to the family (in contrast to the present case, where the younger brothers seek to remove Sukhdev's interest). That said, the joint family venture jurisprudence further illuminates why the family history of mutual advancement through imprecise contributions and imprecise accounting of those contributions serves to deny recovery in the present case. At the risk of redundancy, I turn to these cases, to which both sides referred extensively in argument.

- [120] In *Judge v. Judge*, 2015 BCSC 1764, Mr Justice Fitch, then of this Court, noted that in rare circumstances, a court can find a joint family venture such as to allow a claim to an interest in another family member's property:
- [378] In *Kerr*, at paras. 87-89, the Court held that where the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. There is no presumptive entitlement to an equal sharing of wealth.
- [379] The first step in the analysis is to determine whether the parties have, in fact, been engaged in a joint family venture. There is no presumption of a joint family venture, and no presumption that a particular asset is the product of a joint family venture.
- [380] Among the factors relevant to the determination of whether the parties were engaged in a joint family venture are: mutuality of effort (reflected by joint contributions or contributions to a common pool); economic integration (the more extensive the integration of the parties' finances, economic interests and economic well-being - including the existence of a joint bank account that was used as a common purse - the more likely it is that they should be considered as having been engaged in a joint family venture; and the actual intention of the parties expressed or implied (even where title is registered to one of the parties, acceptance of the notion that wealth will be shared may be apparent from the evidence as a whole, including the absence of concern for the accounting of monies spent for household expenses).
- [381] Mutual benefit conferral is, as a general rule, to be considered at the defence and/or remedy stage.
- [382] Although the principles developed in *Kerr*, including the concept of a joint family venture, were developed in the context of a common-law relationship, those principles provide a framework suitable for application to circumstances such as those in the case at bar.
- [121] The defendants note multiple factual similarities between *Judge* and the present case. There, the plaintiff, Kuldip Judge, was the first in her family to emigrate to Canada, from a life of poverty in India. She sponsored her husband, the respondent, Manjit Judge. Like the Chohan brothers, all four parties in *Judge* worked hard and contributed in various ways, and in different measures, to the acquisition of extended family wealth through what amounted to a joint family venture. The family members did not track how much each contributed to the operation and expenses of the household. Through the mutual efforts of the parties, several residential Kamloops properties were acquired or built, and rented. Three of those properties (the disputed properties) were held in the names of the respondents.

- [122] Justice Fitch proceeded to find that a joint family venture existed, such as to entitle both the claimant and certain respondents a share in certain properties held in the name of other family members:
- [383] In my view, and for reasons previously expressed, the claimant has shown substantial direct and indirect contributions to the acquisition and preservation of the properties. Those contributions include: the application of jointly held funds to the first investment property at 1227 14th Street; the application of income to the accumulation of wealth; the provision of vastly underpaid labour enhancing the pool of funds available for payout, primarily to Jagdev and Harbhjan; and the pledging of jointly held assets to obtain financing.
- [384] Jagdev and Harbhjan were enriched by Kuldeep's efforts. She made substantial contributions to the pool of wealth which, in turn, permitted the acquisition of the three investment properties. Kuldeep suffered a corresponding deprivation. She has fewer assets and savings because her contributions were diverted away from her to the acquisition of the disputed properties held by Jagdev and Harbhjan. There is no juristic reason for this enrichment.
- [385] I am also satisfied that all of the hallmarks of a joint family venture are present in this case. The extended Judge family was an economically integrated unit that pooled assets and applied them to the common end of maximizing wealth for the benefit of all parties to the joint venture.
- [386] The necessary link between the claimant's contributions and the acquisition and preservation of the properties has been established.
- [387] At the same time, I am satisfied that Jagdev and Harbhjan have shown substantial direct and indirect contributions to the acquisition and preservation of the three disputed properties. Specifically, I am satisfied that Jagdev and Harbhjan made some contribution from their own funds to the acquisition of the disputed properties. In addition, Harbhjan looked after the children and cooked, permitting the other members of the venture, particularly Manjit and Kuldeep, to work long hours and maximize their earnings. Manjit and Kuldeep were also enriched by Jagdev and Harbhjan's efforts. There has been a corresponding deprivation. There is no juristic reason for this enrichment. With respect to the three disputed properties, I am satisfied Jagdev and Harbhjan have demonstrated entitlement to a remedy rooted in unjust enrichment.

[emphasis added]

- [123] Despite Judge, the plaintiffs argue that recent jurisprudence generally resists the notion of a joint family venture establishing legal rights. Citing *Sidhu v. Sidhu*, 2023 BCSC 449, the plaintiffs argue that:

.a joint family venture is not its own cause of action. A person's involvement in a joint family venture is only considered at the remedy stage of the unjust enrichment analysis. A finding of unjust enrichment must first be made, only then can the court consider whether or not a joint family venture exists.

[124] The plaintiffs also cite the Sidhu discussion of the policy concerns raised by claims based on a joint family venture, as well as the evidentiary difficulty of measuring relative contribution and deprivation, and untangling the minute and daily give-and-take within a family over many years:

[224] As I noted above, at para. 125, the Court in Sangha found that a 'family collective' is not a legal entity in Canada:

[536] There is no such legal entity in Canada as a family collective. It would set a dangerous precedent to find one in this case. In such living and business arrangements, whenever there was a family rift, family members could litigate as to whether they owned equal shares regardless of (and in contradiction to) the registered legal title in assets. The Sangha Defendants seek to assert a regime which has no legal counterpart in Canada. A family collective may well be a cultural concept shared by many South-Asian families and there is nothing to prevent families from conducting their affairs in that manner. But if, for whatever reason, that collective arrangement is challenged by one of the family members, that regime will not be given special recognition by Canadian courts. If the result is that they are hoist on their own petard, so be it.

[225] The Court reached a similar conclusion in Chera v. Chera, 2008 BCSC 465:

[76] As earlier noted, communal family living is not uncommon in the parties' culture. A contrary ruling in circumstances such as these could only lead to confusion and even chaos in trying to determine the extent of any enrichment and corresponding deprivation for family members who follow this practice of having parents provide room and board to extended family members.

[125] As noted in the above quotation, such concerns are more pertinent where a plaintiff wields the concept of a joint family venture as a form of cause of action. Judge and Sidhu were both matrimonial cases. In both Judge (successfully) and Sidhu[7] (unsuccessfully), the plaintiffs argued for the existence of a joint family venture in order to claim a proprietary interest in an asset owned by another family member. The plaintiffs claimed that their familial contributions indirectly allowed the defendants to acquire those properties: they were thus deprived and the defendants correspondingly enriched.

[126] In contrast, in the present case, as in De Angelis, the notion of family enterprise is provided as a juristic reason for any enrichment that might have occurred: a communal expectation and practice of mutual contribution and receipt, that also takes into account Sukhdev's critical contributions to the family whilst he worked in Canada and they remained in Punjab, and specifically his role at the genesis of the Nursery Property and Business. The

family enterprise explains why equity declines to intervene to remove Sukhdev's one-third interest in the Nursery Property registered on title, through the imposition of a constructive trust. It reflects the contextual analysis of the alleged unjust enrichment, as urged by Kerr at paras. 34 and 44. It also does not provoke the same policy concerns discussed in Sidhu: the daily give and take of family life serves as a shield against claims of unjust enrichment, rather than a serving as a confusing and chaotic cause of action seeking an impossible ex post facto accounting of every contribution and receipt by every family member, after a family rift such as the present arises.

[127] To conclude, in the context of the Chohan family, it was not inequitable for the younger brothers to contribute more to the Nursery Property. As set out above, Sukhdev's considerable prior contributions to the welfare of the family, both in Punjab and Canada, were integral to the acquisition of the Nursery Property in the first place, and the Chohan family's opportunities for a better and richer life in Canada. From the 1986 acquisition of the Nursery Property until the 2000 arrival of Sukhdev and his family, the younger brothers enjoyed the benefit of the properties: living in the Home, and operating the Nursery Business. From 2000, Sukhdev directly contributed to each of the Nursery Business, Nursery Property, and Home, while he lived and work on site.

VI. The defendants' counterclaim: expulsion of Sukhdev

[128] Sukhdev argues that while Justice Milman's decision in the Oppression Proceeding laid a clear path forward for the buyout of the other side's shares in the Nursery Business, it left undecided the issue of damages. In his counterclaim, Sukhdev seeks punitive and aggravated damages based on the oppressive conduct of his younger brothers in ousting him from the Nursery Business. He notes that the plaintiffs admit that River Nursery 2018 Ltd. was incorporated for the sole purpose of excluding Sukhdev from the Nursery Business. He argues that since Sukhdev's ouster, Kulwant and Kulbir have acted as "wolves in the chicken coop and have found creative ways to wrongfully extract money from the Nursery Business to Sukhdev's exclusion." In addition to damages for oppressive behaviour, Sukhdev seeks to reverse the following specific payments effected by Kulwant and Kulbir:

- a) \$96,300 for "wrongful loan repayments and payments" to Kulbir's son Peter;
- b) \$15,000 for "wage overpayments" paid to the wives of Kulbir and Kulwant in 2018;
- c) \$4,307 for "wrongful travel/entertainment expenses" in 2018;
- d) \$24,300 for "wage overpayments" paid to the wives of Kulbir and Kulwant in 2019;
- e) \$37,200 for "wage overpayments" paid to the wives of Kulbir and Kulwant in 2020;
- f) \$50,200 for "wage overpayments" paid to the wives of Kulbir and Kulwant in 2021;
- g) \$53,700 for "wage overpayments" paid to the wives of Kulbir and Kulwant in 2022;

h) \$31,500 for the value of the Honda Odyssey minivan transferred to Kulbir or Kulwant, personally, without Sukhdev's consent.

[129] Sukhdev seeks an order that either River Nursery 2018 Ltd. or Kulbir and Kulwant's estate either repay these amounts to the company (the more appropriate remedy for alleged defalcation of funds from that company), or pay one third of these amounts (\$104,000 of \$312,000) directly to its shareholder, Sukhdev. He also seeks \$50,000 for aggravated damages; and \$50,000 for punitive damages, personally.

[130] The counterclaim suffers from several difficulties.

[131] First, reflecting the multiplicity of proceedings, and the overlapping and unparticularised pleadings in each, it is not clear whether Sukhdev's oppression remedy claim and relief is appropriately considered at the trial of this action commenced by a notice of civil claim. Presumptively, oppression relief must be pursued in the form of a petition. In *Mason v. Mansion House Estates Ltd.*, 2021 BCSC 2465 at para. 50, Justice Schultes confirmed that a party may not bypass the legislative requirement to start such proceedings by petition, by sliding such relief into a notice of civil claim:

Mr. Mason has advanced no real basis other than convenience to include the oppression claim in this action. If that were sufficient, there would be little need for Rule 22-1(7). In fact, an application to have a trial of a petition pursuant to the Rule is not a foregone conclusion, depending as it does on the identification of "bona fide triable issues" of fact or law, unless the applicant is "bound to lose": *British Columbia (Milk Marketing Board) v Saputo Products Canada G.P./ Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at paras. 45-46. It is not appropriate to anticipate the outcome of such an application in the course of deciding the present one, and proportionality, important as it is, is not a licence to circumvent legislative requirements. Accordingly, paras. 44-47 are struck, with leave to bring them in the form of a petition .

[emphasis added]

[132] Sukhdev did in fact pursue oppression relief in the proper form of a petition, in the Oppression Proceeding, that was the subject of a final order by Milman J in 2021, albeit one suspended until resolution of this proceeding. The oppression pleadings in the present action are largely copied and pasted from those in the Oppression Proceeding petition, already adjudicated: these issues could and should have been adjudicated in that proceeding, rather than being duplicated in this proceeding.

[133] Further, Sukhdev did previously attempt to have his oppression claims pursued in the form of an action, when he applied in March 2021 to convert the Oppression Proceeding into an action. That application was specifically rejected by Master Taylor: *Chohan v. Chohan*, 2021 BCSC 577. Sukhdev did not appeal that order. This prior rejection may provide some explanation for Sukhdev's attempt to advance his oppression claims at the trial of this present action.

[134] However, as the plaintiffs did not pursue these arguments with vigour, either as a matter of mootness or abuse of process, on one hand, or on the basis of improper pleadings and a failure to convert the oppression proceeding claims into an action, on the other, I will consider the oppression aspects of the counterclaim.

[135] Starting with the above list of improper payments, these claims had the air of a last-minute trial balloon. There was scarce mention of these issues at trial. While there were some questions about the family wages, they were limited to confirmation of their increases, not the reasons for them. Similarly, the defendants did not confront Kulbir and Navjit/Susan with the proposition that Kulbir was wrongfully withdrawing shareholder loans from River Nursery 2018 Ltd.; that the 2018 travel/entertainment expenses were inappropriate; or that the Honda Odyssey minivan was wrongfully transferred or improperly valued at transfer. I share the *Browne v. Dunn* (1893), 6 R 67 (HL) concerns of Madam Justice Francis expressed in *Lowney v. Yung*, 2022 BCSC 1918 at paras. 5-6, *aff'd Yung v. Matheson*, 2023 BCCA 447, that the failure to put these issues to the plaintiffs is not only unfair to those witnesses, but also deprives the trier of fact of the ability to assess these issues.

[136] Similarly, and more fundamentally, none of these claims were set out in the counterclaim to any extent. Part 1, para. 34 provides the unparticularised assertion that:

From 1999 through to the present Kulwant and Kulbir breached their duties to River and additionally to Sukhdev and perpetrated a scheme to abuse their power and position in respect of the partnership, with the intent and resultant effect of appropriating partnership income, assets and property for their own account and benefit, as well as for the benefit of their immediate family members.

[137] Part 2, para. 1(a) pleads an unparticularised claim for "damages including damages for fraud, conversion, misappropriation, breach of fiduciary duty and other duties owed including but not limited to breach of duties to River and to its shareholders".

[138] Particulars were included with respect to personal pocketing of profits from flea market sales, and alleged payments for the rental of the storage building and parking spaces located on the Nursery Property. But neither of these issues were pursued in final argument (although the flea market was the subject of lengthy cross-examination).

[139] These allegations of fraud, breach of fiduciary duty, and conversion ought to have been properly pleaded with particulars: *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343 at paras. 31, 34, 39; *Wolseley Canada Inc. v. Emco Corporation*, 2007 BCSC 1929 at para. 12 (leave to appeal *ref'd* 2008 BCCA 18); *Robertson v. Stang*, 1997 CanLII 2122 (BCSC) at paras. 29-30; *Lucarino v. Rast*, 2022 BCSC 1019 at para. 10. Rule 3-7(18) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, expressly requires particulars of fraud. A pleading should also provide particulars supporting a claim for aggravated and punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 86-87; *Sidhu v. Hiebert*, 2020 BCSC 418 at para. 34; *Sommerard v. I.B.M. Canada Ltd.* (2006), 265 DLR (4th) 484 (ONCA) at paras. 25-26; *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.*, 2005 BCSC 371 at paras.

59-63. The defendants' failure to provide such particulars is especially pronounced, given that they applied for and the Court issued an exceptional order to permit extensive amendments mid-trial.

- [140] The counterclaim is silent on the alleged "wage overpayments" which comprise the bulk of the counterclaim. It is not clear why. Sukhdev has known what Kulbir and Kulwant's wives were receiving in compensation for their nursery work since 2020. After Justice Milman's July 30, 2021 decision, Sukhdev had unrestrained access to River Nursery 2018 Ltd.'s books and records in its accountant's possession. Justice Milman's Oppression Proceeding reasons expressly referred to the wives' wages (as well as the Honda Odyssey minivan):
- [26] After learning of this, Kulbir and Kulwant lost trust in Sukhdev. Kulbir says that, for that reason, they formed RN 2018 on December 27, 2017, without Sukhdev. RNL had few tangible assets, although one of its vehicles was transferred to RN 2018. Since then, RNL has not been operating. Kulbir's and Kulwant's wives have continued to work full-time for RN 2018 as they did for RNL. In 2018, they received just under \$60,000 in wages. Kulbir's son received \$25,000 from RN 2018 for contracting work that he is said to have performed for the company. In 2019, RN 2018 paid \$79,842 in wages to Kulbir's and Kulwant's wives. Neither Sukhdev nor his wife have been permitted to work for RN 2018 as they had for RNL.
- [141] Further, after Justice Milman's decision in the Oppression Proceeding, Sukhdev was offered an opportunity to become a director or otherwise communicate his objections to the wages and other expenditures, but declined. At the time, Sukhdev's counsel acknowledged that:

Justice Milman's Interim Orders do not prohibit your client from making decisions on behalf of River Nursery 2018 Ltd. That are necessary to operate the nursery business in the ordinary course of business - of course such decisions must be made by your client in his fiduciary capacity as a director of the company.

- [142] In any case, the family enterprise theme emphasised by Sukhdev works both ways. Whilst the family was united in working harmoniously for the greater good, what family members gave and received bore little relation to market realities, and was the subject of fluid and imprecise accounting and documentation. For their work at the Nursery Business, Kulwant and Kulbir received no salary or hourly payments; their respective wives as well as Sukhdev received nominal hourly payments (\$10-\$14 an hour) for many years. Once the spirit of communal family venture was ruptured, as it was after the Green Room Meeting, it was not inappropriate to pay the wives market wages: \$16 an hour, then \$20 an hour, and now \$23 an hour. The "wage overpayments" claimed above, split between the two wives, for their near full-time, albeit seasonally cyclical, work, were not unreasonable market rates, particularly considering their over 30 years' experience in these positions; their past decades of work at sub-market wages; and their increased duties after Sukhdev's ouster and Kulwant's death. I also accept that their tasks expanded during this time, in that the pandemic required greater preparation and longer hours. The \$30,000 paid to Peter in 2018 similarly represents his assumption of many of Sukhdev's work duties, particularly seeding.

At trial, Sukhdev acknowledged the work these three performed for the nursery and provided no evidence to establish that the payments were illegitimate or exorbitant.

- [143] Nor has Sukhdev established that the \$4,307 amount for "wrongful travel/entertainment expenses" in 2018 was illegitimate or exorbitant. This modest amount would not stand out on the balance sheets of a similar corporate enterprise.
- [144] As for the transfer of the 2014 Honda Odyssey minivan, the \$31,500 claimed was its value when it was purchased, used, in 2016. Sukhdev provided no evidence of its value at the time of the transfer in 2018; as a depreciating asset, it could well be of de minimis value. Further, Sukhdev did not put any questions to Kulbir regarding the validity of the transfer of this minivan or the value of the minivan. In contrast, Kulbir provided affirmative evidence that the minivan was transferred into Kulwant's name in 2018 in exchange for Kulwant forgiving his \$20,000 shareholder loan: a transaction duly recorded in the nursery financial records.
- [145] Sukhdev has not established that any of these transfers were outside of the ordinary course of business or breached the plaintiffs' fiduciary duties towards the River Nursery Ltd., much less that they constitute lupine rapacity in a poultry domicile. This aspect of the counterclaim is dismissed.
- [146] I also dismiss the claim for punitive and aggravated damages. I agree with the plaintiffs that the present facts do not warrant the unusual orders of punitive or aggravated damages, in a corporate context or otherwise.
- [147] In final argument, Sukhdev reviewed oppression remedy jurisprudence, including *Canex Investment Corporation v. 0799701 B.C. Ltd.*, 2020 BCCA 231, leave to appeal to SCC ref'd, 39419 (6 May 2021), confirming that a court may find a director personally liable for oppression, and impose punitive damages. In *Canex*, the Court of Appeal ordered the oppressive directors in a small closely held family corporation to pay \$50,000 in punitive damages:
- [105] It is clear that the respondents pleaded a claim for punitive damages that did not depend on their contract claim. Moreover, I agree that providing a remedy for oppressive conduct does not exclude punitive damages. The judge fell into error in reasoning that an award of damages would be inconsistent with the principles of remedying oppression. Punitive damages may be awarded where a party's conduct is offensive to the court's sense of dignity, for example because it is malicious, oppressive, or highhanded: *H.O. v. MacDougall*, 2006 BCSC 180 at paras. 14, 19. The judge ought to have independently assessed whether the defendants' conduct met that test. An award of punitive damages serves a different purpose to the oppression remedy. Punitive damages are punitive and intended to deter the party and others from improper conduct in the future.
- [106] I agree that on the facts found by the judge, an award of punitive damages was called for. I agree that the defendants engaged in a coordinated effort to misappropriate the plaintiffs' investment. They did so by using the Company to their personal financial benefit. They

used the Company as if it were their own personal asset. They took money from the Company for their own personal benefit. They attempted to justify their conduct by falsifying financial records. They advanced defences the judge effectively found to be bogus, such as that the plaintiffs had not made their required contributions, that they should pay interest on their under-contributions, and that they owed money on other projects. Mr. Familamiri effectively admitted that the financial records were falsified to allow collection on these other debts without having to prove them or pursue proper processes to establish them.

- [107] The judge's findings included "formulating" financial records "to justify the Company paying off the Flame Mortgage and allocating the entirety of the Proceeds of Sale to Flame for the benefit of the personal [appellants]" (at para. 12); intentionally keeping the Flame Mortgage off the books (at paras. 143-48); dishonesty (at para. 178); egregious conduct (at para. 209); false claims about signing and authorizing the Building Contract; and taking advantage of the plaintiffs' trust (at paras. 273-74, 277-79).
- [108] In my opinion, had the judge approached the issue of the availability of an award of punitive damages on correct principles, given her findings of fact, she would have awarded punitive damages. I consider an award of \$100,000 to be a reasonable award in these circumstances and would so award.
- [148] As indicated by Harris JA's recitation of the facts found by the Court below, Canex is distinguishable from the present case. In Canex, the defendants misappropriated money, used corporate funds for their own personal benefit, and falsified financial records in an attempt to hide and justify their actions. As set out above, I have dismissed Sukhdev's claims based on the specific allegations that Kulwant and Kulbir "used the Company as if it were their own personal asset." Further, as set out above, the plaintiffs offered Sukhdev a seat back at the board of directors' table, which he declined.
- [149] I return to the family enterprise theme emphasised by Sukhdev. To paraphrase Von Clausewitz, the corporate dispute is a family squabble by other means. It does not fit tidily into the typical oppression remedy scenario where a majority of insiders exclude a minority shareholder or director, and plunder the company. Rather, the exclusion of Sukhdev has its genesis in, and is a manifestation of, each party's expectations about communal sharing of family assets, specifically, Sukhdev's Prince George properties. While the ouster of Sukhdev was unkind, oppressive, and unwarranted, it was an extension of a family disagreement to which Sukhdev himself partially contributed. Sukhdev acknowledges that his ouster does not flow from specific corporate malfeasance by his brothers, but is directly linked to the disagreement about the Prince George properties. As stated in Sukhdev's Closing Submissions at para. 374:

Kulbir's and Kulwant's unceremonious ouster of Sukhdev from the Nursery Business he founded roughly 30 year prior came as a direct result of the disagreement they had with him over his shares in 330 and the subsequent breakdown in the family that was caused and perpetuated by Kulbir and Kulwant. Their conduct had a very personal nature to it and can in no way be argued to have been appropriate or in the best interests of the Nursery Business.

[150] As indicated above, Sukhdev may have earlier indicated an openness or intention to share in the proceeds of the Prince George properties, in 2014 or otherwise. Even if he deflected his brothers' request in an attempt to avoid conflict, he contributed to the brewing dispute. The fact that this family's business affairs are marked by a lack of documentation, with fluid expectations and obligations, further fostered this squabble, and led to his ouster.

[151] While the family's ostracization of Sukhdev in family and thus corporate matters may have been cruel, and indeed ungrateful, and while his ouster from the family business violated his reasonable expectations, the Court declines to impose a further corporate remedy under the Business Corporations Act, SBC 2002, c 57, s. 227(3). Subsection 227(3) provides the court with a long list of potential remedies for oppressive action, including, as noted by Sukhdev: "(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person." The court's discretion under s. 227(3) is wide: it may "make any interim or final order it considers appropriate". That said, the focus and objective of s. 227(3) is not punitive, but is rather "with a view to remedying or bringing to an end the matters complained of". As stated in *Wilson v. Alharayeri*, 2017 SCC 39:

[53] .any order made under s. 241(3) should go no further than necessary to rectify the oppression (*Nanef*, at para. 32; *Ballard*, at para. 140; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (C.A.) ("*Themadel*"), at p. 754). This follows from s. 241's remedial purpose insofar as it aims to correct the injustice between the parties.

[emphasis added]

[152] I am satisfied that the corporate remedies ordered by Justice Milman in the Oppression Proceeding provide an appropriate remedy for any corporate wrongs. In that petition hearing, Sukhdev sought and obtained an order for a buyout mechanism to separate the ownership of the Nursery Business. This buyout process will occur after the issuance of these reasons for judgment.

[153] Further, and specifically with respect to punitive damages in an oppression context, *Multiguide GmbH v. Broer*, 2022 BCSC 852, aff'd 2023 BCCA 134 provides useful guidance. There, Madam Justice Blake summarises the principles governing a punitive damages award:

[210] Punitive damages are limited to exceptional circumstances where defendants engage in "malicious, oppressive and high handed" misconduct that "offends the court's sense of decency". Awards of punitive damages are limited to circumstances where there is a

"marked departure from the ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36. The objective of punitive damages is to punish the defendants rather than to compensate a plaintiff: *Whiten* at para. 36. In *Whiten* (at para. 113) the Supreme Court of Canada identified a number of factors to consider when assessing the level of blameworthiness, including:

- a) whether the misconduct was planned and deliberate;
- b) the intent and motive of the defendant(s);
- c) whether the defendant persisted in the outrageous conduct over a lengthy period of time;
- d) whether the defendant concealed or attempted to cover up the misconduct;
- e) the defendant's awareness that what he or she was doing was wrong;
- f) whether the defendant profited from the misconduct; and
- g) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff, or was something that was irreplaceable.

[154] While noting that the defendants engaged in high-handed, oppressive, and unfairly prejudicial conduct, and breached their fiduciary obligations, Blake J found that her order requiring the directors to repay the disputed invoices and shareholder loan personally provided a sufficient corrective remedy. She declined to order punitive damages personally against the directors:

[214] For the reasons set out above, I find that the behaviour of Mr. Broer, when viewed in light of the totality of the evidence, was high handed and very poor conduct. However, in the circumstances, I am satisfied that my award for the oppressive and unfairly prejudicial conduct, and the breaches of fiduciary duty, and in particular the imposition of personal liability upon Messrs. Broer and Rummeny, is sufficient penalty for his impugned conduct. In my view it is neither necessary nor appropriate to also impose punitive damages..

[155] I also reach a conclusion similar to that of Justice M Taylor in *Chung v. Chung*, 2022 BCSC 1592, a commercial dispute between brothers, with some parallels to the present case (although it was not an oppression remedy proceeding). The plaintiff brother claimed punitive damages against the defendant brother for his misappropriation of funds from two investment properties in which they both had a beneficial interest, in breach of fiduciary duties. The Court declined to award punitive damages:

[121] In my view, an award of punitive damages is not merited in this case for a number of reasons.

[122] First, I am conscious of the fact that punitive damages are considered to be very much the exception rather than the rule.

[123] Second, in my view Won's conduct did not meet the threshold standard for "high-handed, malicious, arbitrary, or highly reprehensible misconduct" required to impose punitive damages. While there is no question that Won breached his fiduciary obligations and concealed this fact from Jae, his behaviour must also be understood in the family context in which it took place. It was Won who first identified the Properties as a business opportunity, and Won who managed all aspects of the business, while Jae remained merely a passive investor. Won made it clear in his testimony that he resented Jae's lack of contribution to the business, and also testified that he regularly made contributions of his own money to keep the business afloat, particularly in the early years. While this does not excuse the breach of trust, his prior intermingling of his own money with corporate money does at least provide an explanation as to why Won also felt comfortable withdrawing money from the corporate accounts, without consulting with Jae. Won also testified that he could have obtained financing for the purchase of the Marine Drive Property on his own but chose to use the GIC funds because they offered a favourable interest rate advantage (that accrued to both brothers). Thus this was not a situation involving theft, but merely convenience with respect to access to funds.

[emphasis added]

[156] As in *Chung*, the fact that Sukhdev ultimately suffered no losses and continues to benefit as a shareholder of the corporation briefly hijacked by his brothers also militates against awarding punitive damages: paras. 124-125. Conversely, and in contrast to *Canex* and other oppression cases where punitive damages were imposed, the plaintiffs did not profit from their actions, either at the expense of the aggrieved shareholder or the corporation itself.

[157] Finally, I agree that the plaintiffs' behaviour since the events in question further weighs against a punitive damages award: see *Rioux v. Smith* (1983), 43 BCLR 392 (SC) at 395, aff'd 48 BCLR 126 (CA). Kulbir admitted that it was wrong to withdraw \$1.3 million from the line of credit, and expressed remorse; the full amount was returned, with Kulbir and Kulwant covering all interest payments. Apart from an initial shock, neither Sukhdev nor the corporation have suffered damage as a result of this action. Further, the plaintiffs have complied with the orders of Justice Milman, and undertook not to draw any dividends from *River Nursery 2018 Ltd.*: see *Oppression Proceeding* reasons at para. 27. Finally, again, the plaintiffs offered to let Sukhdev return as director, which offer Sukhdev declined.

[158] Turning to aggravated damages, the defendants have not provided any precedent for such an award to an ousted shareholder in a corporate dispute. Aggravated damages are compensatory; they cannot be presumed, but must be proven in the same manner as damages for any other psychological injury: *Chung v. Quay Pacific Property Management Ltd.*, 2020 BCSC 714 at paras. 62-63. As stated in *Bronson v. Hewitt*, 2011 BCSC 102, aff'd 2013 BCCA 367:

- [24] Aggravated damages are an augmentation of an award of compensatory damages and are measured by the plaintiff's suffering, including such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant that cannot be said to be fully compensated in an award for pecuniary losses. Aggravated damages must be sufficiently significant in depth or duration, or both, that they represent a significant influence on the plaintiff's life. The award is for aggravation of the injury caused by the defendant's high-handed conduct: *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.) at 299.
- [25] True aggravated damages occur out of aggravated circumstances arising as a result of a breach of an independent cause of action. To succeed, the plaintiff must establish mental duress arising from the breach that has given rise to the cause of action: *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 at para. 52.
- [159] While Sukhdev was no doubt profoundly upset by his treatment at the hands of his brothers, he has failed to establish the necessary degree of mental distress attributable to the plaintiffs' actions. While not strictly necessary, there was no evidence of psychological injury or treatment, or specific emotional or behavioural effects on Sukhdev specifically inflicted by any tortious actions of the plaintiffs. He provided no proof of compensable mental distress flowing from the creation of River Nursery 2018 Ltd., his exclusion from corporate or commercial activities, the increase in family members' salaries, or the transfer of the Honda Odyssey minivan. Any mental distress that he has suffered, rather, flows from the manifestations of his alienation from the rest of the family. His exclusion from Kulwant's funeral was the most piercing act of cruelty by the family, and the one that inflicted the most profound mental distress; but that is not an actionable tort grounding a compensatory award of aggravated damages in the framework of an oppression proceeding.

VII. The resolution of the corporate dispute

- [160] In the Oppression Proceeding reasons, Justice Milman sets out how the decisions in these reasons would affect the corporate division:
- [62] Once the outcome of the Trust Action is known, that buyout will occur in one of two ways, depending on whether Sukhdev retains an interest in the Trust Property or has otherwise secured the right to operate the business there in the future.
- [63] If Sukhdev does have that right, then the buyout will occur in the manner set out in *Lee*, and for similar reasons. In that case, the Court of Appeal upheld Justice Warren's decision in this Court requiring the respondents, who had been operating a restaurant business to the exclusion of the petitioners for some time, to make a shotgun offer to acquire the petitioners' shares in the operating company. Justice Warren explained the remedy he was granting as follows:

[18] Turning now to the shares of the company, I consider that the better approach for the purchase of the shares of the company is that used by Southin J.A. in *Safarik*, supra. While acknowledging that in matters of this kind there was no right answer, Southin J.A. placed the onus on the "insiders" to fix a fair price. She wrote at paras. 23-24:

I know of no better way to have a man put a fair value on what he owns, he knowing all the facts about its worth, than to require him to say what he will sell it for.

Thus, the principle of the order here is that the individual respondents are to fix the price at which they will sell.

[19] In the case at bar, the respondents have been operating the restaurant for a considerable period of time and they are in a far better position than the petitioners to fix a fair price.

[20] Accordingly, the respondents shall deliver to the petitioners' solicitor within 60 days of this judgment, or within such time as the parties may agree upon, a written sealed "shotgun" offer to sell the shares in the company. The petitioners shall then have 30 days from delivery of the offer to unconditionally accept the offer and the price shall be payable in cash within 45 days. If the petitioners decline to accept the offer then they shall purchase the shares of the respondents at the price they were offered.

[64] Assuming Sukhdev retains an interest in the Nursery Property (or otherwise has the right to use it in the future to operate the business there) after the conclusion of the Trust Action, the buyout will occur in a similar manner, as follows:

- a) Kulbir and Kulwant's estate will deliver to Sukhdev's solicitor within 60 days of any settlement or receipt of final judgment in the Trust Action, or within such time as the parties may agree upon, a written "shotgun" offer to purchase Sukhdev's one-third interest in RNL [River Nursery Ltd.] and RN 2018 [River Nursery 2018 Ltd.] from him;
- b) Sukhdev shall then have 30 days from receipt of that offer to accept it without condition and, if he does, then Kulbir and Kulwant's estate must purchase that interest from him at that price within 45 days; and
- c) if Sukhdev does not accept the offer, then he will within 45 days of the conclusion of that 30-day period, purchase Kulbir and Kulwant's two-thirds interest in the two companies at twice the price he was offered for his one-third interest in them.

[65] In the event that Sukhdev has no right to operate the business on the Nursery Property following the conclusion of the Trust Action, a different mechanism for the buyout will be required. In that event, the parties will agree upon a valuator (or failing agreement, they will apply to the Court to select one among those proposed) to determine the value of Sukhdev's one-third shareholding in RNL and RN 2018. Within 45 days of the parties' receipt of the resulting valuation report, Kulbir and Kulwant's estate will purchase those shares from Sukhdev for the amount indicated.

[emphasis added]

[161] This Court confirms Justice Milman's directions, as set out in his para. 64 above. The dates and deadlines may be adjusted by written agreement or future order of the Court.

VIII. Conclusion

[162] Neither side has been successful: both the claim and the counterclaim have been dismissed. The Chohan family's six years of costly and acrimonious litigation have been for nothing. Presumptively, each side shall bear its own costs.

[163] If either side wishes to dislodge this presumption, that side will advise the other within 15 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter. Each side will provide a written argument to the other side and to the Court at least seven days before the hearing date. Each side is encouraged to strive for a negotiated settlement to the costs issue prior to the costs hearing.

[164] The Court is grateful for the constructive and courteous cooperation between counsel, which avoided what could have been an arduous consumption of court time ploughing through binders of receipts. The Court is also grateful for the comprehensive arguments advanced by counsel in this hard-fought and unhappy litigation saga. Finally, the Court is grateful for the services of the Punjabi interpreter, Mr Sarb Sandhu, who exhibited particular care and endurance in this long and difficult trial.

"Crerar J"

[1] On October 9, 2020, a grant of administration was issued to Kulwant's wife, Navjit "Susan" Chohan, who continues this action in her capacity as the administrator of the estate of Kulwant (pursuant to the Wills, Estates and Succession Act, SBC 2009, c 13, s. 150).

[2] Given that most of the dramatis personae are members of the same family, many of whom share the same surnames, these reasons will follow counsel's lead in referring to most persons by their first names; of course, no disrespect is intended.

[3] Appraisals obtained by each side are close, and rely on several identical comparator properties, reaching values of \$4.3 and \$4.5 million.

[4] Most of the younger generation has now moved out of the house.

[5] See also *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 at paras. 70-73.

[6] And, again, if Kulbir did in fact contribute financially to the Prince George properties, it would further undermine his conception of the pooling agreement: why contribute, if under the agreement Sukhdev was solely responsible for the Prince George acquisition?

[7] Apart from the distinction of family enterprise as a sword rather than a shield, the facts in *Sidhu* also differed considerably from those of the present case. *Sidhu* was matrimonial litigation: the *Sidhu* plaintiff was the former spouse and daughter-in-law of the defendants.

She claimed an entitlement to 25 percent of her parents-in-law's assets based on her indirect contributions to the family. While acknowledging that the plaintiff had made some familial contributions that assisted the defendants in acquiring and maintaining their real estate holdings, the Court noted that but for the parents' significant contributions, the Sidhu family assets would not exist to their present lucrative extent: para. 122. Those contributions, coupled with the dramatic rise in real estate values generally, dwarfed any indirect contributions by the plaintiff.

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