

CANADA / JUDGMENT

De Cotiis v. Hothi

2018 BCSC 2271

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 2271 De Cotiis v. Hothi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Cotiis v. Hothi,

2018 BCSC 2271

Date: 20181220

Docket: S145068

Registry: Vancouver

Between:

Vito De Cotiis

Plaintiff

And

Gurdaver Singh Hothi and Paramjit Singh Hothi

Defendants

And

Paramjit Singh Hothi, Ghassan Batal, also known as

Gus Batal, and Angell, Hasman & Associates Realty Ltd.,

Gurdaver Singh Hothi and Davinder Hothi

Third Parties

And

Paramjit Singh Hothi and Gurdaver Singh Hothi

and Davinder Hothi

Fourth Parties

- and -

Docket: S158124

Registry: Vancouver

Between:

Paramjit Singh Hothi

Plaintiff

And

Ghassan Batal also known as Gus Batal and

Angell, Hasman & Associates Realty Ltd.

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

November 28-30, 2016

December 1, 2, 5, 6-9, 12-16, 2016

July 4-7, 10-14, 17-20, 2017

February 5-9, 13-16, 2018

April 18-20, 2018

May 14-18, 2018

June 5, 7, 11-13, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2018

INTRODUCTION

- [1] In this action filed June 30, 2014, the plaintiff Mr. De Cotiis seeks to enforce a contract for the purchase of the building lot at 2599 Marine Drive, West Vancouver (the "Marine Drive Property"), against both defendants Mr. Gurdaver Hothi and Mr. Paramjit Hothi.
- [2] Mr. Paramjit Hothi filed a second action on March 6, 2015 against Mr. Gus Batal, his realtor, and Angell, Hasman & Associates Realty Ltd. ("AH Realty") for any damages payable as a result of the first action launched by Mr. De Cotiis. Mr. Paramjit Hothi also claims damages against Mr. Batal and AH Realty for Mr. Batal's alleged negligence. On August 19, 2015, Mr. Gurdaver Hothi filed third party proceedings against his brother, Mr. Paramjit Hothi. Mr. Batal and AH Realty further filed an action on October 27, 2016 joining Mr. Paramjit Hothi, Mr. Gurdaver Hothi, and Ms. Davinder Hothi (Mr. Paramjit Hothi's wife) as fourth parties in the first action involving Mr. De Cotiis.

ISSUES

- [3] A number of issues arise in this case. These include:
1. Was there a binding contract to sell the Marine Drive Property?
 2. Who is the owner of the Marine Drive Property?

3. Did Mr. Paramjit Hothi have actual or extensible authority to market or sell the Marine Drive Property?
 4. Was Mr. Batal authorized to sell the Marine Drive Property?
 5. If Mr. De Cotiis is successful, what is the appropriate remedy?
 6. Was Mr. Batal negligent?
- [4] Mr. De Cotiis argues that the bare legal title, which lists Mr. Gurdaver Hothi as the owner, does not reflect the beneficial ownership of the property. Rather, the plaintiff maintains that the entire Hothi family has beneficial ownership and that Mr. Gurdaver Hothi is merely the trustee. He argues that Mr. Paramjit Hothi's role is to direct the trustee, Mr. Gurdaver Hothi, and to act as his agent. Mr. De Cotiis says the Hothi family operates a family business enterprise and that the market and sale of this property is just one instance of that enterprise.
- [5] Alternatively, the plaintiff argues that if Mr. Gurdaver Hothi is the beneficial owner, he gave authority and control to Mr. Paramjit Hothi.
- [6] The defendants' main argument in this case is that a contract of purchase and sale for the Marine Drive Property has not been established. The defendants say that because no contract can be made out on the evidence, many of the other issues in this case do not need to be dealt with.
- [7] Alternatively, the defendants argue that if Mr. Paramjit Hothi is found to have authorized a contract, that the contract is invalid because Mr. Gurdaver Hothi (as holder of legal title) never authorized his brother Mr. Paramjit Hothi to market or sell the property.

OVERVIEW

- [8] In 2013, the District of West Vancouver created a parcel of land for sale at 2599 Marine Drive. Due to neighbourhood concerns about green space and the preservation of scenic views, the District imposed very specific height and density restrictions including limiting the square footage of any building on the parcel to 2,552 square feet. Mr. Gordon Reid, the land and property agent in the District, testified that there was a limit to the allowable roof height of 14.4 feet (as opposed to the 25 feet normally allowable by the District) and a 10-foot reduction to the front setback.
- [9] In January 2014, Mr. Vito De Cotiis began looking for accommodations for his mother, Ms. Velia De Cotiis. Ms. De Cotiis wanted to downsize and sought a location close to family and amenities in Dundarave, West Vancouver.

- [10] Ms. De Cotiis also wanted a house on one level that would be manageable in her senior years. The possibility of a basement suite for potential future live-in care was important. Ms. De Cotiis wanted amenities close by so that she could walk, do her shopping and banking, go to church, and have some ability to exercise.
- [11] One of the first properties to appear in a Google search was the Marine Drive Property. Mr. De Cotiis also saw the property advertised in the North Shore News and Homes and Land. Mr. De Cotiis reviewed the agent and broker website and drove by the property to get a sense of the location. He noted the "for sale" sign on the property with Mr. Batal as the agent. Mr. De Cotiis reviewed the MLS listing and ultimately called Mr. Batal.
- [12] In the course of his investigation into the property, Mr. De Cotiis became aware of the stringent zoning restrictions on the property. Nevertheless, Ms. De Cotiis liked this property due to its very desirable location in Dundarave. It had a nice view and was very close to the amenities she desired. The restrictions on building for the lot did not cause any concern as she was looking for a smaller one-level house in any event.
- [13] Over the course of a few months, emails were exchanged between Mr. De Cotiis and Mr. Batal about the property. On April 25, 2014, Mr. De Cotiis met with Mr. Batal to write a formal offer. According to Mr. De Cotiis' testimony, after an exchange of offers, Mr. Batal as agent for Mr. Paramjit Hothi ultimately accepted his offer to purchase. The offer had "subject to" conditions to be removed on June 5, 2014. Mr. Batal still needed to finalize the contract with a signature, but it was Mr. De Cotiis' understanding that a binding contract was in place at this time.
- [14] This is the contract that Mr. De Cotiis now seeks to enforce.
- [15] As noted by the defendants, if there was no binding contract, the other issues raised by the plaintiff need not be dealt with. It is therefore helpful to first deal with whether a binding contract was in place to sell the Marine Drive Property.
- [16] I turn to that matter now.

Was There a Binding Contract to Sell the Marine Drive Property?

Parties' Positions

- [17] The plaintiff says that the interactions in the last week of April 2014 between both Mr. Paramjit Hothi, Mr. Batal, and Mr. De Cotiis are demonstrative of an intent to form a binding contract of purchase and sale. In particular, emails exchanged between these parties over the course of four months function as documentary evidence of the negotiations taking place.

- [18] The defendants say, however, that on the key date of May 1, 2014, the plaintiff cannot prove that a clear offer was made nor can he prove that there was an unequivocal acceptance of that offer. The defendants point out that this is foundational to the plaintiff's argument that a contract existed. They further point out that the onus is on the plaintiff to establish that a contract was entered.

Credibility of the Parties

- [19] Credibility is a significant issue in this case both in viva voce and documentary evidence.
- [20] The plaintiff argues that the Hothis deliberately concealed relevant documents, swore false affidavits, and wilfully breached court orders. The plaintiff also asks the Court to draw an adverse inference on the basis that the Hothis refused to disclose material documents contrary to their legal obligations. The plaintiff argues on these bases that none of the Hothis' evidence should be accepted.
- [21] The defendants rightly point out the plaintiff must establish positive evidence that a contract was made between Mr. Paramjit Hothi and Mr. De Cotiis. The plaintiff cannot simply rely on adverse findings of credibility concerning the witnesses to establish that a contract was formed.
- [22] The defendants, Mr. Paramjit Hothi and Mr. Gurdaver Hothi were born in India in 1965 and 1969 respectively. They came to Vancouver with their family in 1991. Mr. Paramjit Hothi has a Grade 10 education. He was a farmer in India but entered into the construction industry when he arrived in Canada. Mr. Gurdaver Hothi has a Grade 3 education and does not speak or read English.
- [23] The family initially lived at 4th and Rupert in Vancouver, but later moved to Surrey for two to three years before moving to Burnaby, where they currently reside, at 3548 Piper Street. The Hothi family (Gurdaver, Paramjit, their brother Harneck, and their parents, spouses, and children) all live together at the Piper address.
- [24] The Hothis have a family business, "Diamond 11." The company is in the business of demolishing and building houses as well as excavating and installing drain tiles. According to Mr. Paramjit Hothi, his father is the owner of Diamond 11, but the three brothers who work in the company (Paramjit, Gurdaver, and Harneck) help him with major decisions. Mr. Paramjit Hothi testified that he and Mr. Gurdaver Hothi do the excavating and trucking work whereas Mr. Harneck Hothi does the drain tile. While all three deal with customers, Mr. Paramjit Hothi mostly takes on this role.
- [25] Both Mr. Paramjit Hothi and Mr. Gurdaver Hothi were witnesses in this case. Both gave contradictory and incredible evidence on many points that will be outlined in more detail later in this decision. Most notably, they refused to make even the most obvious of admissions against their interests.

- [26] Ms. Davinder Hothi, the wife of Mr. Paramjit Hothi, testified as an adverse witness on behalf of the plaintiff. Born in 1972, she was educated in England, completing high school and an approximately two-year business and finance course. Ms. Hothi came to Canada in 1992. In 1993, she began her career working for UBC. At the time of her testimony, she had been employed there for 24 years, starting as a receptionist in the Faculty of Education and advancing within that faculty to become the assistant to the Associate Dean. In and around this time, she also completed courses at BCIT in business, finance, and human resources. After completing these courses in approximately 2007-2008, Ms. Hothi moved into her current role in the General HR department at UBC as an administrative assistant in the employee relations section. Her duties include scheduling, organizing meetings, and dealing with collective bargaining. She takes pride in her organizational skills and believes she is a careful person.
- [27] Ms. Hothi's role in the Hothi family business, Diamond 11, is to help take care of the administrative parts of the business. She and her husband Mr. Paramjit Hothi are the primary family members in charge of record-keeping and management. Mr. Paramjit Hothi does much of the manual labour whereas Ms. Hothi does bookkeeping and administrative duties. Ms. Hothi is the record keeper and go-between for communications with her husband. She monitors the email account but gave inconsistent testimony as to whether she actually reads the emails or not.
- [28] The plaintiffs have alleged that the defendants have concealed relevant documents. These appear to be valid concerns. For example, as part of a request for disclosure in this case, Ms. Davinder Hothi claims to have searched her inbox in and around January 2016 without finding any emails concerning the Marine Drive Property. In her examination, however, numerous pertinent emails concerning the Marine Drive Property and the family business were brought to her attention. These were organized email in various folders including: "2599 Marine Drive"; "Pooran"; "Gus Batal". When asked why she did not come across these emails in her search, she said she had only searched her "inbox" folder and did not realize that it would not search the separate folders.
- [29] Ms. Hothi's explanation as to why she was unable to find the emails is difficult to believe. Ms. Hothi's job at UBC requires keen organization skills. She was aware the emails existed and has no real explanation as to why she did not investigate further when none appeared in her initial search of the "inbox" folder. The folders were plainly visible in her personal email inbox as well as in the Diamond 11 business inbox. In the former, the "2599 Marine Drive" folder was third from the top. It could be seen every time she opened her email.
- [30] In assessing credibility, the Court will refer to the "preponderance of probabilities" evident in the surrounding circumstances as per *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).
- [31] Each of the Hothi defendants had difficulty telling the truth. This unfortunately occurred throughout their evidence, especially on critical points. None of the defendants were able to make admissions adverse to their positions even when confronted with plainly

condemnatory evidence. This did not appear to be just a lack of recall but rather a wholesale revision of events, particularly with respect to Mr. Paramjit Hothi's evidence. The evidence of the Hothi family is inconsistent with the preponderance of probabilities and, especially on critical points, is unbelievable.

- [32] Ms. Davinder Hothi denied the suggestion from counsel that her husband Mr. Paramjit Hothi was telling her what to say in evidence. She further denied that she was trying to help him or his brothers in giving her testimony. This denial was not believable for a number of reasons, including her unwillingness to admit anything adverse to her husband's interest.
- [33] The defendants, however, argued that Mr. Batal, the realtor, was the most unreliable witness in this case. The Hothis, through their counsel, say that Mr. Batal's evidence was not credible and that he made up his story after the events.
- [34] A significant difference exists, however, when comparing Mr. Batal's evidence with that of the Hothi family. Namely, Mr. Batal provided admissions against interest. The Hothis did not. While it is clear that Mr. Batal did not follow all the safeguards and norms of his profession, he did not engage in the wholesale revision of events reflected in the Hothi family testimony. I will deal with Mr. Batal's credibility as necessary throughout my analysis.
- [35] On critical points, I am cognisant of the comments of Mr. Justice N. Smith in *Gill v. Bassi*, 2014 BCSC 1972, at para. 149:

The defendants' credibility, or lack of it, is an important factor, but it cannot be allowed to obscure the burden of proof. The plaintiffs must prove the alleged representations and their own reliance on them. They cannot prove those facts simply by showing the defendants lack credibility because there is no burden on the defendants to disprove the allegations against them.

- [36] I agree that the defendants' lack of credibility is not sufficient to establish a contract: just because I reject their testimony does not mean the plaintiff is relieved of his onus to prove his case on a balance of probabilities. Rather, positive evidence of a contract must be established. Where there is a conflict in evidence, however, the weight ascribed to the defendant Hothis' evidence is affected in an adverse way.
- [37] I have considered all of the evidence, which is voluminous. I will, however, only highlight the significant portions. I turn now to the question of whether a contract was concluded in this matter.

Business Relationship with Gus Batal

- [38] The key time period regarding the alleged contract for purchase and sale of the Marine Drive Property is from mid-April 2014 to May 1, 2014. While the defendants argue that May 1, 2014 is the only day that really matters, it is necessary to set out some background prior to that date to put this matter into proper context.

- [39] Mr. Gus Batal, the realtor who participated in the sale of the Marine Drive Property, worked for AH Realty from 2006 to 2016.
- [40] Mr. Batal met Mr. Paramjit Hothi in 2007 when Mr. Paramjit Hothi called to inquire about properties in West Vancouver. Over the years, Mr. Paramjit Hothi continued to contact Mr. Batal to inquire about West Vancouver properties for sale.
- [41] In 2011, Mr. Paramjit Hothi asked Mr. Batal to assist with the sale of two properties in West Vancouver: 5671 Westport and 5679 Westport. Mr. Paramjit Hothi told Mr. Batal that his mother owned the Westport properties. As a result, Mr. Batal obtained from Mr. Paramjit Hothi a power of attorney.
- [42] Mr. Batal testified that despite having met Mr. Paramjit Hothi's two brothers, Gurdaver and Harneck, it was Mr. Paramjit Hothi who he dealt with primarily and who gave him instructions with respect to the sale of properties.
- [43] Mr. Batal testified that throughout his dealings, Mr. Paramjit Hothi was often difficult to reach due to regularly being on job sites and working long hours. Mr. Paramjit Hothi's preferred method of communication was by phone. Mr. Batal would also email his wife, Ms. Davinder Hothi, who would often assist in providing requested documentation. Mr. Paramjit Hothi was not comfortable with computers and email. When facilitating the sale or purchase of a property, he relied on his wife to provide information or documents by email.
- [44] Mr. Batal was ultimately successful in selling the Westport properties. He testified, however, that Mr. Paramjit Hothi was uncooperative and did not honour his obligations in respect of the sale of the Westport properties. Mr. Paramjit Hothi refused to sign final documentation unless Mr. Batal significantly reduced his commission. This Mr. Batal ultimately did because he wanted the deal to close.

Purchase of the Marine Drive Property

- [45] At the end of April 2013, Mr. Paramjit Hothi purchased the Marine Drive Property at issue from the District of West Vancouver.
- [46] Mr. Gordon Reid, a land and property agent, was the representative of the District of West Vancouver in the sale of the property. The property was marketed over February to April 2013, with a deadline to receive offers of April 12, 2013. Mr. Reid is an independent witness in this matter.
- [47] Mr. Paramjit Hothi testified at trial that his brother Mr. Gurdaver Hothi discovered the Marine Drive Property and asked him to contact the City on his behalf. He said Mr. Gurdaver Hothi wanted to purchase the property and build a house for his family to live in.
- [48] In contrast, however, Mr. Reid's evidence suggested that Mr. Gurdaver Hothi had no real role in acquiring the property and that he dealt with Mr. Paramjit Hothi and his wife Ms. Davinder Hothi exclusively.

- [49] On April 11, 2013, Mr. Reid sent an information package to Mr. Paramjit Hothi's Diamond 11's email address, as per his request. This package included a PDF document detailing the restrictive zoning attached to the property. Mr. Reid said he dealt with both Mr. Paramjit Hothi and his wife Ms. Davinder Hothi during the sale of the property. He said that it was Ms. Hothi who would send and reply to documents by email, though he conceded that he could not be absolutely sure as to whether the emails were sent by Mr. Paramjit Hothi or Ms. Hothi.
- [50] Though some of the email communications were "signed" by Mr. Paramjit Hothi, the reality is that many of these communications were actually from Ms. Davinder Hothi.
- [51] At 1:05 p.m. on April 12, 2013, Mr. Reid received an email from Mr. Paramjit Hothi's email address attaching an offer for \$1,011,000.11 signed by "Paramjit Hothi." Mr. Reid's evidence was that he thought this offer was signed by Mr. Paramjit Hothi.
- [52] Mr. Reid emailed Mr. Paramjit Hothi back at 2:22 p.m. that day to advise that the signature on the offer had to be witnessed by a notary and that the District needed a cheque with the deposit. Mr. Reid followed up over email on April 15, 2013 with Mr. Paramjit Hothi and later with Ms. Davinder Hothi. Mr. Reid inquired as to the whereabouts of the missing information and advised that the matter was time sensitive. He confirmed in his email that he would meet Mr. Paramjit Hothi that day at 4:00 p.m., whereby Mr. Paramjit Hothi would provide a certified cheque and notarized signature.
- [53] Mr. Reid did not receive the notarized signature page. He again followed up with Mr. Paramjit Hothi and Ms. Davinder Hothi at 2:49 p.m. on April 16, 2013 to confirm the cheque and notarized signature would be received by 4:00 p.m. that day. Mr. Paramjit Hothi provided a \$2,000 Toronto Dominion bank draft to the District shortly thereafter.
- [54] Mr. Reid presented Mr. Paramjit Hothi's offer of \$1,001,000.11 to the District at a Council meeting on April 22, 2013. He understood the purchaser at this time to be Mr. Paramjit Hothi.
- [55] On April 23, 2013, Mr. Reid emailed the head of the real estate department of the District, Mr. Mark Chan, advising that he believed Mr. Paramjit Hothi would accept a counteroffer. In explaining to Mr. Chan the reason for this belief, Mr. Reid referenced a conversation in which Mr. Paramjit Hothi expressed interest in buying property in the US and said he was part of a prosperous family business. That email reads in part:

I am writing this email to highlight the points that the purchaser made to me that makes me believe we will be able to increase the price.

- We have \$7 million in the bank.
- Just let me know when I can write you a cheque - he was anxious to just buy the lot - not understanding that we were entertaining bids.

- Talked about his 18 year old son purchasing a Porsche but his father advising to rent one for the weekend instead for \$1500.
- They drove to Alberta in the rented Porsche.
- They travel to Alberta where their excavation company works (likely in the tar sands).
- They have 10 excavators and 7 dump trucks.
- "In West Vancouver there are the rich and the super rich".
- West Vancouver is a very good investment where real estate will always go up in value.
- There is room to increase the price - a little bit.
- They are considering purchasing a small strip mall in Tacoma but the economy is slow in the US and they like Canada.
- They could invest in India but they have been pulling their money out of there to invest in Canada.
- It is family money from this company operated by 4 brothers. [sic]

[Emphasis added.]

[56] Mr. Reid took handwritten notes on April 23, 2013 documenting his discussions with Mr. Paramjit Hothi about the offer and price. These handwritten notes were produced as evidence and indicate that Mr. Paramjit Hothi said he would have to ask his "brothers" and that he would call back. He also told Mr. Reid that it was a family purchase.

Signing of the April 12, 2013 Purchase of Sale

- [57] Despite vigorous cross-examination, Mr. Paramjit Hothi insisted throughout his testimony that he personally signed the April 12, 2013 offer to purchase the Marine Drive Property.
- [58] While this point would not appear to be of significance, the contract at issue in this case (for the sale of the Marine Drive Property) was initialed by Mr. Batal on Mr. Paramjit Hothi's behalf. Mr. Batal said that because Mr. Paramjit Hothi was busy and hard to reach, he would authorize Mr. Batal or his wife Ms. Davinder Hothi to sign or initial documents on his behalf, including the contract for the sale of Marine Drive Property.
- [59] Mr. Paramjit Hothi disputes this assertion and said at one point in his testimony that he never authorizes anyone else to sign for him, including his wife. Mr. Paramjit Hothi confirmed his signature on the April 12, 2013 offer to purchase and insisted that he drove to UBC in Vancouver to sign the document by 12:43 p.m., when it had to be sent off. He said he was "absolutely sure" he did so, despite his evidence in discovery where he stated that he could not remember whether he signed the offer.

- [60] Cell phone records, however, indicated Mr. Paramjit Hothi was in the Merritt area at 12:00 p.m. on April 12, 2013, the day of the alleged signature. While Mr. Paramjit Hothi quarrelled with the accuracy of these records, he ultimately agreed he was in Hope at 12:44 p.m. that day. When asked for an explanation as to how he could have signed the document by 12:43 p.m. at UBC, he simply said: "it is not coming to my memory." He continued to insist that the signature was his, even when taken to a number of other documents with his signature (including those signed before a notary public), in which his signature is different and starts with a capital "P" as opposed to the smaller "p" provided on the contract of sale.
- [61] This reflects adversely on Mr. Paramjit Hothi's credibility. His phone records clearly establish that he was in the Merritt area at the time he supposedly was signing the offer at UBC. His evidence is completely unbelievable on this point. It is clear that Ms. Davinder Hothi--who is employed at UBC and thus, was already there--signed the offer in his name.
- [62] Indeed, Ms. Davinder Hothi often signed on her husband's behalf. On Mr. Paramjit Hothi's own evidence, he said he rarely sent emails at all in 2013, insisting that Ms. Davinder Hothi sent them. Mr. Paramjit Hothi said at one point that he dictated his emails to Ms. Davinder Hothi in English. He later admitted that Ms. Hothi sent them in his name saying "it was the same thing whether I wrote it down or Davinder wrote it down."
- [63] On April 24, 2013, the District accepted a revised offer of \$1,050,000 to purchase the Marine Drive Property. The purchaser was listed as Paramjit Hothi at the 3548 Piper Avenue address in Burnaby, with an email address of diamond.eleven@hotmail.com, his Diamond 11 business account. The closing date was May 15, 2013. The Marine Drive Property was ultimately assigned on May 14, 2013 and held in the name of Gurdaver Hothi.

Putting the Marine Drive Property Back on the Market

- [64] Shortly after the acceptance of the offer on April 24, 2013, Mr. Reid had a discussion with Mr. Paramjit Hothi in which Mr. Paramjit Hothi expressed a desire to develop the site much more than was permitted. As a result, on May 1, 2013, Mr. Reid sent Mr. Paramjit Hothi an email referring to the specific zoning for the property and the fact that the square footage was limited to an amount less than the surrounding lots. It read as follows:

Hi Paramjit

I am forwarding the email that I sent to you some time ago. Included in the email is the link to our information package and the form of offer that relate to the lot at 2599 Marine Drive.

Please have a look at the section that deals with zoning. As this site has site specific zoning it is important to know what can be constructed on this lot.

Please let me know if you have any questions. If you have any technical questions regarding what can be built on this lot please contact James Allan, Community Planner at

- [65] Mr. Paramjit Hothi denies being upset upon realizing these zoning restrictions.
- [66] That evening, however, he called Mr. Batal three separate times. I find that those telephone calls were likely related to his displeasure upon realizing the zoning restrictions.
- [67] Mr. Batal said Mr. Paramjit Hothi called him and asked him to sell the property to free up some cash as he had some "very interesting property in the USA." While Mr. Batal encouraged him to put it as a MLS listing, Mr. Paramjit Hothi said he wanted to keep it as an exclusive listing as he "knew a lot of realtors and this might affect his trucking/excavating business." The two discussed the price and Mr. Paramjit Hothi agreed to a possible selling price of \$1.388 million.
- [68] In contrast, Mr. Paramjit Hothi says the reason Mr. Batal phoned him was to congratulate him on the purchase of Marine Drive Property. He testified that a few days later, Mr. Batal called again, this time asking if he could put a sign up on the property. Mr. Paramjit Hothi said he told Mr. Batal that "there is no point as it belongs to my brother and he is not selling it." He then said that "Mr. Batal phoned him many times" and then one day he finally said "okay you can put up your sign." In his evidence, Mr. Paramjit Hothi said that he only allowed Mr. Batal to put a sign up because he was "bothering" him. I take this to mean pestering him about putting said sign up on the property.
- [69] This testimony is not believable. The documentary evidence, the pleadings, and Mr. Paramjit Hothi's own actions make clear that he intended to and did give Mr. Batal his permission to market the property for sale. In fact, Mr. Gurdaver Hothi even alleges as much in his third party notice lawsuit where he contends that Mr. Paramjit Hothi did, in fact, give verbal authority to Mr. Batal to erect a sign on the Marine Drive Property. The evidence is clear that Mr. Paramjit Hothi wished to sell it for the right price.
- [70] Mr. Paramjit Hothi did not fully appreciate the zoning restrictions. Once he did, he immediately sought to sell the property. The May 1, 2013 email from Mr. Reid to Mr. Paramjit Hothi resending the zoning information is independent documentary evidence supporting this conclusion.
- [71] Other evidence (in particular, the MLS listings, advertisements, and extensive communication records between Mr. Paramjit Hothi and Mr. Batal) also support the conclusion that the Marine Drive Property was for sale.
- [72] The property was advertised in the North Shore News on May 21, 2013, with Gus Batal as the realtor. The advertisement said "seller can build your dream house." Mr. Paramjit Hothi had built houses in the past.
- [73] Mr. Batal kept Mr. Paramjit Hothi updated as to inquiries about the property from interested buyers. When Mr. Batal asked if Mr. Paramjit Hothi had building plans for the property, he referred Mr. Batal to a design consultant named Ms. Pooran Azarm. Ms. Azarm provided Mr. Batal with the plans.

- [74] In August 2013, Mr. Paramjit Hothi signed a new "Working with Realtor" form but denied in his evidence that he signed this form in relation to the Marine Drive Property. Rather, he said he signed it with respect to the sale of the Westport properties two years prior.
- [75] This evidence is not believable. The Westport properties were sold in and around 2011-2012 and the document was created in 2013. It is apparent that Mr. Paramjit Hothi's new Working with Realtor form was signed on or about August 30, 2013 and was in relation to the Marine Drive Property. At that time, Mr. Paramjit Hothi met Mr. Batal at his office, completed a FinTrac form and signed the Working with a Realtor form all at once. While the latter appears to have been backdated to May 31, 2013, the form itself has a July 2013 copyright indication. This lends further credence to the form being created and signed in August of 2013. It cannot possibly have been related to the sale of a property in 2011-2012.
- [76] This documentary evidence again demonstrates the clear intention of Mr. Paramjit Hothi to sell the property.

The Khalili Offer

- [77] In further support that the property was for sale, Mr. Mohammed Khalili, an independent witness and prospective buyer of the Marine Drive Property, confirmed that he had seen the property advertised in the North Shore News. He testified that he made an offer in August 2013 which Mr. Paramjit Hothi declined, instead counteroffering \$1.7 million (much more than Mr. Khalili was prepared to pay). Mr. Khalili was offended by the counteroffer of \$1.7 million and did not buy the property.
- [78] In cross-examination, Mr. Paramjit Hothi agreed that at the time Mr. Batal presented the Khalili offer, he gave Mr. Batal information about the cost of the acquisition of property. He wrote this out on a piece of paper that indicated as follows: the purchase price of the Marine Drive Property was \$1,050,000; GST was \$52,500; the property transfer tax was \$22,500, and lawyers' fees were \$2,000. Mr. Paramjit Hothi also agreed that he made the counteroffer of \$1.7 million.

Other Indicia That the Marine Drive Property Was For Sale

- [79] A "for sale" sign was on the Marine Drive Property for some time throughout 2013 and 2014 that listed Mr. Batal as the real estate agent.
- [80] While Mr. Paramjit Hothi agreed in cross-examination that he allowed Mr. Batal to put a "for sale" sign on the property, he said this was because Mr. Batal kept phoning, bothering, and harassing him. This was a constant refrain. He insisted he did not sign any documents authorizing Mr. Batal to sell the property nor did he ever authorize him to do so.

- [81] In his examination for discovery, however, Mr. Paramjit Hothi agreed that if Mr. Batal sold the property he would get a commission. At trial, when pressed if this was true, he said it was "possible" it was true. Mr. Paramjit Hothi said he continued to make plans to build the house for his brother, Mr. Gurdaver Hothi. As indicated, he contacted Ms. Azarm to undertake this task. He also sought a change in zoning to build a larger structure.
- [82] Ms. Azarm testified that in discussing the designs with Mr. Paramjit Hothi, they contemplated whether it would be beneficial or appealing to have a second suite. She advised him to contact a realtor for advice. He contacted Mr. Batal. She had never met Mr. Batal prior to being introduced to him by Mr. Paramjit Hothi but knew at that time that he was a realtor. She confirmed in her testimony that Mr. Paramjit Hothi authorized her to send the plans to Mr. Batal. She also confirmed that in August 2013, Mr. Khalili, a prospective buyer of the Marine Drive Property, contacted her advising that he was hoping to purchase the property with her design plans. Ms. Azarm confirmed that she was not the one who provided him with the plans. She was not sure whether he was given them by Mr. Paramjit Hothi or Mr. Batal. This evidence all supports the proposition that the property plans were being prepared for the purpose of a sale.
- [83] Further, in an email sent to Mr. Paramjit Hothi in October 2013, Ms. Azarm indicated that she was designing the house for the "aging population of West Vancouver." Ms. Azarm sought to obtain a variance from the District for a larger house, in particular a basement with a 2,000 square footage. This was ultimately unsuccessful. The District maintained that the zoning restrictions provide for only 600 square feet and the square footage of the lot remained the same.
- [84] Mr. Paramjit Hothi agreed that he authorized Ms. Azarm to send the plans to Mr. Batal and was aware that she did so. Once again, he said he only granted this authorization because Mr. Batal kept phoning him about it.
- [85] By October 2013, emails between Ms. Azarm and other third parties indicate that the building of the house was "at a standstill" because the Hothis were waiting for permission to build a larger house. This permission was denied by the city planner in November 2013.
- [86] Mr. Batal testified that after numerous discussions with Mr. Paramjit Hothi, the Marine Drive Property was finally listed on MLS on November 1, 2013 for \$1.388 million with a fixed commission of \$20,000 for Mr. Batal. Despite being taken to independent evidence of a business relationship--namely, a series of phone calls between himself and Mr. Batal in and around this time--Mr. Paramjit Hothi denied providing permission for this sale of the property and characterized it as "fraud." He also denied the amended MLS listing of December 9, 2013 in which the price for the property was reduced \$50,000 to \$1.328 million.

- [87] On December 10, 2013, Mr. Paramjit Hothi attended at the city office, along with Ms. Azarm, and refused to leave until they met with someone from the planning department. The Director of Planning, Mr. Bob Sokol, drafted a memo dated December 10, 2013 to the Mayor and others outlining this incident.
- [88] Ultimately, the Hothi family through Ms. Azarm brought the matter to city council on December 16, 2013. On December 19, 2013, however, the mayor and council confirmed the limitations on the lot. Mr. Paramjit Hothi insisted in his testimony that he was not disappointed in this result.

The Involvement of Mr. De Cotiis

Background

- [89] As noted earlier, the property came to the attention of Mr. De Cotiis in January 2014 when he began corresponding with Mr. Batal. During this time, Mr. Batal and Mr. Paramjit Hothi exchanged many phone calls. In January and February of 2014, there were over 30 calls between the two of them.
- [90] On February 17, 2014, Mr. De Cotiis and Mr. Batal met at Mr. De Cotiis' office. Mr. De Cotiis wished to provide an offer in writing. At that meeting, the two entered into a Limited Dual Agency agreement with respect to the Marine Drive Property. Mr. Batal said he signed this document on behalf of Mr. Paramjit Hothi as the seller as per his authorization. Mr. De Cotiis also signed a Working with Realtor form at this meeting.
- [91] Mr. De Cotiis made an offer for the purchase of the property slightly under \$1.2 million. Mr. Batal called Mr. Paramjit Hothi to advise of the offer. Mr. Paramjit Hothi did not accept the offer. Mr. Batal said he continued to discuss the price with Mr. Paramjit Hothi. At one point Mr. Batal advised Mr. De Cotiis that he had "got the seller to 1.2 [million]." Mr. Batal described this as a negotiating technique. As Mr. Paramjit Hothi was at \$1.3 million and Mr. De Cotiis was almost at \$1.2 million, he hoped the parties could split the difference and arrive at an agreed price of \$1.25 million.
- [92] In March 2014, there were 23 calls between Mr. Paramjit Hothi and Mr. Batal. Negotiations intensified in April 2014. During the month of April, Mr. Batal and Mr. Paramjit Hothi had 28 calls.
- [93] On April 14, 2014, Mr. Batal emailed Mr. De Cotiis to say he had a long talk with the seller and was "99% sure he will sign off at \$1.25M my man."
- [94] On April 23, 2014, Mr. Paramjit Hothi called Mr. Batal at 8:03 p.m. for an 11-minute conversation. The two discussed the price. In that phone call, Mr. Batal said that Mr. Paramjit Hothi said he was agreeable to sell at \$1.25 million if such an offer was made. According to Mr. Batal, this only came after a long talk with Mr. Paramjit Hothi. Mr. Batal told him that traditionally the gap in price is resolved by splitting the difference.

- [95] Mr. Batal emailed Mr. De Cotiis at 8:16 p.m. on that same day (only three minutes after his call with Mr. Paramjit Hothi ended), to ask if he was still interested in the lot. At 8:26 p.m., Mr. De Cotiis responded: "Yes, what is the status?" Mr. Batal emailed Mr. De Cotiis saying the seller was finally at \$1.25 million and asked Mr. De Cotiis if he could provide an offer higher than \$1.2 million. While Mr. De Cotiis said he was in the \$1.1 range, Mr. Batal indicated to Mr. De Cotiis at 8:41 p.m. that if he was able to get to \$1.2 million, "I might be able to push him last \$50K. Let me know please."
- [96] Through a series of email exchanges on April 24, 2014, Mr. De Cotiis and Mr. Batal arranged to meet so that Mr. De Cotiis could put an offer in writing. Mr. Batal asked Mr. De Cotiis to bring an offer for \$1.2 million but when the two met the following afternoon on April 25, 2014, Mr. De Cotiis wrote up an offer of purchase and sale for \$1.150 million. This was frustrating to Mr. Batal but he said he just had to keep negotiating.
- [97] On April 26, 2016 at 9:39 p.m., Mr. Batal called Mr. Paramjit Hothi to tell him about the offer. Mr. Paramjit Hothi said he was still at \$1.3 million and told Mr. Batal to counter at that price.
- [98] Mr. Batal said he did not formally send Mr. De Cotiis' offer of \$1.150 million to Mr. Paramjit Hothi because they discussed it verbally instead. When cross-examined as to why it took him so long to provide the offer and counter, he reiterated that it was a period of ongoing negotiation between the parties, and therefore discussions took place over an extended period of time.
- [99] On April 28, 2013, Mr. Batal had a late night conversation with Mr. Paramjit Hothi in which he indicated he no longer wished to sell the Marine Drive Property.

April 29, 2014

- [100] Mr. Batal relayed this message by email to Mr. De Cotiis on April 29, 2014 at 9:30 a.m.:

Vito, I am speechless. Seller late last night told me his brother said now they don't want to Sell after I have worked on trying to sell the property for a year.

Please let me know if there is any other property I can assist you with my man.

- [101] This situation, however, appeared to change. At 11:41 a.m. on that same morning, Ms. Davinder Hothi forwarded the plans of property to Mr. Batal. Mr. Batal forwarded those plans to Mr. De Cotiis and then phoned Mr. Paramjit Hothi at 11:46 a.m. The two arranged to meet at Mr. Paramjit Hothi's job site at Nelson Avenue that day.
- [102] Mr. Paramjit Hothi said Mr. Batal called him and told him he had a "hot buyer" and that this is why he told Ms. Hothi to send the plans. There is, however, no phone call between Mr. Paramjit Hothi and Mr. Batal between 9:30 a.m. (when Mr. Batal emailed Mr. De Cotiis) and 11:41 a.m. (when Ms. Hothi forwarded the plans) to account for this alleged communication.

- [103] Upon his arrival, he presented the latest offer of \$1.15 million from Mr. De Cotiis. Mr. Batal said he did so as he considered this an "ongoing offer." As part of his negotiating strategy, he explained to Mr. Paramjit Hothi that acceptance of this offer could lead to more business for him as Mr. De Cotiis was part of a well-respected building family. He called Mr. De Cotiis from the job site at 12:32 p.m., 12:36 p.m., and 12:41 p.m. Mr. Batal asked Mr. De Cotiis if he could offer work for the Hothis' trucking and excavating business. Mr. De Cotiis said he would definitely look at a proposal. Mr. Batal also called Ms. Azarm, the design consultant, at 12:33 p.m. and 12:38 p.m.
- [104] Despite this, Mr. Paramjit Hothi wanted a higher offer. He did not authorize a counteroffer at this time nor did he authorize the provision of District documents to Mr. De Cotiis. Mr. Batal left again feeling frustrated with this turn of events.
- [105] After Mr. Batal left the job site, he testified that he called Mr. Paramjit Hothi at 3:56 p.m. who instructed him to counteroffer \$1.3 million. This call is corroborated by independent phone records. Mr. Batal says he signed this \$1.3 million counteroffer on Mr. Paramjit Hothi's behalf with his authorization, initialling "PH" on the changes. Mr. Batal also changed the date of acceptance from April 25, 2013 to April 30, 2013 and the closing date from June 17, 2013 to July 30, 2013. Mr. Batal testified that he discussed these changes with Paramjit that day. At 5:39 p.m., Mr. Batal provided the counter of \$1.3 million to Mr. De Cotiis by email.
- [106] Mr. Paramjit Hothi's evidence differs. He testified that Mr. Batal arrived at the Nelson Avenue job site that day with his son, Matt Batal. This much is true. In fact, Mr. Batal testified that Matt was in training to become a realtor and Mr. Batal was letting him shadow. Where Mr. Paramjit Hothi's testimony differs, however, is in his claim that during the meeting, Matt Batal physically pushed him and Mr. Gus Batal grabbed his hand and "forced" him to sign the offer. This was denied by both Mr. Gus Batal and his son. I conclude this did not occur. Rather, it is part of the largely fictional narrative related by Mr. Paramjit Hothi in this matter.

April 30, 2014

- [107] On 1:28 p.m. on April 30, 2014, Mr. De Cotiis emailed what he described as his "final offer" of \$1.2 million. Mr. Batal called Mr. Paramjit Hothi at 1:50 p.m. to advise of the offer. According to Mr. Batal, Mr. Paramjit Hothi verbally agreed to counter at \$1.25 million and authorized him to initial the offer at that price. The phone records indicate that the call lasted for three minutes.
- [108] At 3:02 p.m., Mr. Batal emailed Mr. De Cotiis indicating that he had "pushed" the seller down to \$1.25 million and asked Mr. De Cotiis to let him know by 8 p.m.:

I know you said \$1.2M was your highest but its my duty to email you Sellers lowest price my man. I honestly Pushed and grinded him down \$50K to \$1.25M. Lets get it done. Let Me know please by 8 PM.

[109] At 7:45 p.m., Mr. Batal phoned Mr. Paramjit Hothi and they spoke again for three minutes. At 7:58 p.m., Mr. Batal sent another email to Mr. De Cotiis saying that "[the seller] is going to build if he doesn't get 1.25M my man." This, Mr. Batal said, was to "emphasize the urgency" of the matter.

May 1, 2014

[110] Mr. De Cotiis and Mr. Batal met in the afternoon of May 1, 2014 at Mr. De Cotiis' office "to finalize the contract" and get the initials. Mr. De Cotiis said they were either going to "do the deal" or it was "done" (i.e. over with). At the meeting, Mr. Batal brought the contract with the counteroffer at \$1.25 million. Though somewhat reluctant, Mr. De Cotiis agreed to the \$1.25 million and initialed the change in price.

[111] During the meeting, Mr. Batal made a number of phone calls to Mr. Paramjit Hothi because Mr. De Cotiis wanted to add another subject, that being: "Buyer to receive ownership of all plans, architectural, engineering, survey etc. to full building permit." Mr. Batal said he needed confirmation from the seller on the addition of this condition. Accordingly, Mr. De Cotiis stepped outside while Mr. Batal called Mr. Paramjit Hothi to discuss.

[112] Mr. Batal testified that he discussed the ownership of the plans with Mr. Paramjit Hothi who said that the receipt of plans was not a problem. When Mr. De Cotiis returned, Mr. Batal confirmed acceptance of the offer and advised that he would obtain the formal signature from Mr. Paramjit Hothi at a later time.

[113] The phone records on May 1, 2014 show the following communications between the parties:

- Mr. Batal phones Mr. Paramjit Hothi at 2:18 p.m. (1 minute)
- Mr. Paramjit Hothi phones Mr. Batal at 2:44 p.m. (2 minutes)
- Mr. Batal phones Mr. Paramjit Hothi at 2:49 p.m. (1 minute)
- Mr. Batal phones Mr. Paramjit Hothi at 2:49 p.m. (2 minutes)
- Mr. Batal calls Mr. Paramjit Hothi at 3:11 p.m. (3 minutes)
- Mr. Batal calls Mr. Paramjit Hothi at 3: 46 p.m. (1 minute)
- Mr. Paramjit Hothi calls Mr. Batal at 3:48 p.m. (1 minute)
- Mr. Batal calls Mr. De Cotiis at 4:00 p.m. (1 minute)
- Mr. Batal calls Mr. Paramjit Hothi at 4:37 p.m. (1 minute)

- Mr. Batal calls Mr. Paramjit Hothi at 5:19 p.m. (1 minute)
- Mr. Batal calls Mr. Paramjit Hothi at 5:54 p.m. (1 minute)

[114] Mr. De Cotiis testified that based on his meeting and dealings with Mr. Batal that day, he believed they had a binding contract. The provision of Mr. Paramjit Hothi's signature was to formalize--not finalize--the contract. Mr. De Cotiis called his mother after the meeting to say that there was an agreement in place at \$1.25 million.

[115] Mr. Batal testified that despite the series of calls made to Mr. Paramjit Hothi, he was unable to arrange a meeting to get him to initial the final version of the contract. He was, however, able to speak to him by phone where Mr. Paramjit Hothi authorized him "to initial the final version for him." Accordingly, Mr. Batal placed Mr. Paramjit Hothi's initials under the change in purchase price. He also changed the time of acceptance to May 1, 2014 with both parties' approval. He handwrote the new subject condition that "Buyer to receive ownership of all plans." This condition enabled Mr. De Cotiis to reach the \$1.25 million price. Mr. Batal then forwarded the initialed contract onto Mr. De Cotiis by email at 6:33 p.m. That email read:

Please find attached contract. He did not sign docs from District, but said you can get what you need from them. While I was there we called Pooran the Designer as well and she will give you what you need my man. Look forward to Subject Removal June 5, 2014.

[116] At 6:38 p.m., Mr. Batal forwarded forms to Mr. De Cotiis including a Request to Obtain House Plans and an Owner's Authorization to Obtain Housing Plans from the District of West Vancouver.

[117] At 6:46 p.m., Mr. De Cotiis forwarded Mr. Batal's email to his mother Ms. Velia De Cotiis confirming: "It's under contract. Subject removal is June 5. Closing is July 30."

[118] At 7:12 p.m., Mr. Paramjit Hothi called Mr. Batal. The call lasted 12 minutes. Subsequent to this call, Mr. Batal emailed Mr. De Cotiis at 8:29 p.m. asking for Mr. De Cotiis to let him know if he decides to remove subjects earlier than June 5, 2014.

Post-Contract Communications between the Parties

[119] A number of emails are referenced by the Hothis to argue that Mr. Batal did not have Mr. Paramjit Hothi's authorization to sell the property and that a contract was not agreed to on that date. These include emails between Mr. Batal and Ms. Davinder Hothi on the day of the contract, May 1, 2014. The first email was sent at 6:11 p.m. where Mr. Batal asks Ms. Hothi to reiterate to Mr. Paramjit Hothi that the agreed price of \$1.25 million was the best price that they could get:

Please tell Param, I swear to God Eric Christensen just called me and he said Param can not make money if he builds on the Lot. Lets please give Vito Di Cotiis a chance. Highest he will pay is \$1,250,000. I got same price for Param long time ago and Param admits he should of taken it.

[120] At 10:44 p.m., Ms. Hothi replied to Mr. Batal's 6:11 p.m. email, stating that she read Mr. Batal's email to her husband and that he was still not changing his mind and that he wanted to build and then sell.

[121] At 10:49 p.m., Mr. Batal emailed Ms. Hothi saying:

I text him twice a few minutes ago. Family buying the Lot is going to give him lots of work on many properties.

Much more than Iranian small builders he is working on now. Please pass on as well.

[122] At 11:00 p.m., Ms. Hothi replied to Mr. Batal:

I just passed this on to him, he is on the computer right now... sometimes I wish I never taught him how to use the internet .He is glued to it as soon as he has any free time lol.

[123] Mr. Batal consistently maintained on cross-examination that these emails concerned the subject removal stage. His view was that the parties had reached the first step of an accepted offer for purchase and sale. Until the subjects were removed, however, they did not have a completed deal.

[124] Through these emails, Mr. Batal said he wanted to assure the Hothis that \$1.25 million was the highest price possible.

[125] With respect to the 11 calls between Mr. Batal and Mr. Paramjit Hothi on the May 1, 2014 date, Mr. Paramjit Hothi admits that they talked, but denies that Mr. Batal ever told him that he was meeting with Mr. De Cotiis that day. Mr. Paramjit Hothi said he cannot remember what they talked about but was sure that they did not discuss the offer nor did they even discuss the Marine Drive Property. When asked what they were talking about, he either said he did not remember or that they were just talking about "general things." While some of these calls were very short, indicating a voicemail or missed call, some were longer including one call lasting 12 minutes at 7:12 p.m.

[126] Mr. Batal said the email from Ms. Hothi that "he is still not changing his mind" and wants to "build and sell" reflects what Mr. Batal characterized as Mr. Paramjit Hothi's constant irrational and unpredictable behaviour. Mr. Paramjit Hothi had, however, already agreed to the price and the contract. Mr. Batal said he tried to keep him focused so that they could deal with the subject removal phase.

[127] One of the documents relied upon by the Hothis in arguing that Mr. Paramjit Hothi did not agree to the sale was an email from Mr. Batal to Mr. De Cotiis on May 5, 2014 at 7:18 p.m. stating as follows: "Now he wants me to increase the asking price to \$1,398,000. He will take \$1,388,000. He will not close at \$1,250,000. Sorry my man. He is very difficult."

[128] This, however, appears to support the plaintiff's case. The email does not say he would not "sell" at \$1.25 million; it says he would not "close" at \$1.25 million thereby indicating a contract of sale as per the norm with a closing date and removal of subjects.

- [129] I accept Mr. Batal's evidence that in sending the emails, he was seeking to assure Mr. Paramjit Hothi about the \$1.25 million purchase price. As Mr. Batal said, he was familiar with Mr. Paramjit Hothi's past behaviour of attempting to renegotiate an already agreed upon arrangement. Mr. Batal was trying to ensure the deal closed.
- [130] On May 2, 2013, Mr. De Cotiis emailed Ms. Azarm for the plans. Ms. Azarm called Mr. Paramjit Hothi that day and received authorization to forward the plans, which she did at 6:07 p.m. that evening. Mr. Batal followed this up with an email to Ms. Hothi that same day with a subject line "Re: 2599 Marine Drive. Contract." and a request for authorization for Mr. De Cotiis to view the documents at the West Vancouver District. The email response from Ms. Hothi to Mr. Batal at 10:09 p.m. that evening read in part, "Parm said the City would not like this". The response did not dispute that a contract was in effect.
- [131] On May 5, 2014 at 7:02 p.m., Mr. Batal sent an email to Mr. De Cotiis saying: "Vito, seller just called me to say he got full offer of \$1,328,000. Wondering if you can pay that? His brother is yelling and screaming as well."
- [132] Mr. Batal said he sent this to Mr. De Cotiis as was required due to his limited dual agency status. He also called Mr. Paramjit Hothi that evening to explain there was an accepted price, saying "let's work hard to remove subjects."
- [133] Mr. De Cotiis responded at 7:24 p.m. on May 5, 2014 as follows: "As you are aware, the property is under contract."
- [134] Mr. Batal then responded on May 6, 2014 at 1:43 a.m.:
- I sincerely apologize about Param's behaviour. Unfortunately he is not running on a full tank. It would be an honor to work with you not just this deal but more deals in the future my man.
- Please proceed to get information you require on your own. I will keep on Param. I never give up.
- [135] Despite a variety of assurances by Mr. Paramjit Hothi reflected in emails sent Mr. Batal, difficulties were encountered with respect to the subject removal in the following weeks. A variety of dates were provided but ultimately the subject removal was not done.
- [136] Mr. De Cotiis emailed the contract to Mr. Batal and Ms. Davinder Hothi on May 12, 2014. Despite having earlier agreed to creating these folders in her inbox to keep things organized and her email account clear, she consistently said that she "was not sure" if she had read the emails. She said she had no interest in the property and that she was just a helper so had no reason to read the emails. At other times, she said her usual practice was to bring all property-related emails to her husband's attention or that she only advised her husband of emails if they needed responding to. These are two completely contradictory positions. I find that Ms. Hothi's evidence on critical points is largely unbelievable.
- [137] Indeed, her insistence that she did not read the emails and did not bring Mr. De Cotiis' May 12, 2014 email to her husband's attention is not believable.

[138] Further, Mr. Paramjit Hothi admitted in cross-examination that this May 12, 2014 email may have been brought to his attention. I find that this was clear notice to Mr. Paramjit Hothi of the existence of the contract.

[139] More likely than not, the lack of response is consistent with Mr. Paramjit Hothi trying to resile from a contract he knew had been signed. If he genuinely had no knowledge of having made an offer through Mr. Batal, he would have immediately communicated with Mr. De Cotiis to protest the document.

[140] On Monday, May 19, 2014, Mr. Batal forwarded an email to Mr. De Cotiis at 10:51 a.m. saying:

Great News. Seller is going to build you the house as per approved plans. You don't have to worry about Survey's, Documents, Permit. I will send you Addendum to Contract. Of course new house price will be in effect.

[141] Once again Mr. Batal said he had to relay this message due to the limited dual agency contract. He stated that he was "blown away." He knew Mr. De Cotiis would have no interest in it as he was part of a building family.

[142] On May 21, 2014, he emailed Mr. De Cotiis indicating that he was "speechless about Param's behaviour" and that Mr. Paramjit Hothi was "honestly the most difficult client of hundreds I have had over the year[s] ."

[143] In addition, on May 27, 2014, Mr. Batal forwarded Mr. De Cotiis' email regarding the contract to Ms. Hothi and the Diamond 11 email account. The subject line was "Fwd: RE: 2599 Marine Drive Contract."

[144] By May 30, 2014, Mr. De Cotiis retained counsel and forwarded correspondence by email to Mr. Batal attaching a letter requiring the seller to provide the plans or he would "pursue all of [his] legal rights and remedies."

[145] Meanwhile, Mr. Batal sent an email to Ms. Davinder Hothi on May 30, 2014 at 5:25 p.m. about the document and noted:

I just spoke to Param he said call him in a bit he was in a good mood it seems thank God. Vito it seems wants to remove subjects June 5 and buy the Lot thank God...

[146] Mr. Batal testified as per the phone records that in a call at 7:07 p.m., Mr. Paramjit Hothi specifically told him: "if I get a good enough deal on the property in the US I wouldn't care if I sold to Mr. De Cotiis for \$900,000.00."

[147] He emailed Ms. Hothi the attached letter from Mr. De Cotiis' counsel at 7:24 p.m. on that Friday evening.

- [148] On May 31, 2014 at 10:47 a.m., Mr. Batal emailed Mr. De Cotiis saying that "he had just got off the phone with Param 'The Seller'" and assured him that Mr. Paramjit Hothi would authorize "Neema from West Vancouver District to issue you all Documents needed on Monday June 2 2014."
- [149] This exchange of emails amongst all parties over May and June demonstrates a significant effort to close the deal. It is highly unlikely Mr. Batal fabricated these details to establish a contract for sale of the property.
- [150] Mr. Paramjit Hothi did not ultimately authorize the release of documents to Mr. De Cotiis. On June 5, 2014, Mr. De Cotiis' lawyers removed all subjects, all of which were to the purchaser's benefit, as part of the process of completing the sale.
- [151] On June 30, 2014, an action was commenced by Mr. De Cotiis to enforce the agreement for other damages.
- [152] In July 2014, My. Batal sent texts to Mr. Paramjit Hothi saying that he would "collapse the deal." I conclude that these texts sent by Mr. Batal reflect his reaction to the difficult behaviour of Mr. Paramjit Hothi and his frustration in realizing that the Marine Drive Property was held in the name of Mr. Gurdaver Hothi.

The Nelson Avenue Meeting

- [153] In final argument, the defendants' counsel spoke about what he claimed was an assumption at trial that the Nelson Avenue meeting between Mr. Batal and Mr. Paramjit Hothi occurred in the early afternoon on April 29, 2014. In fact, the defendants now maintain that this meeting took place on May 1, 2014 and that at that time, Mr. Paramjit Hothi rejected Mr. De Cotiis' offer in person. Mr. Gurdaver Hothi through his counsel characterizes Mr. Batal's email to Ms. Hothi on 6:11 p.m.--17 minutes after his final call with Mr. Paramjit Hothi at 5:54 p.m. that day--as pleading with Ms. Hothi in an attempt to get her to convince her husband to accept Mr. De Cotiis' final offer. At 6:33 p.m.--22 minutes after this email to Ms. Hothi--Mr. Batal emailed a fully executed contract to Mr. De Cotiis. As there were no phone calls or emails between Mr. Batal and the Hothi family during those 22 minutes, Mr. Gurdaver Hothi's submission is that there was no opportunity for Mr. Batal to receive instructions to accept Mr. De Cotiis' \$1.25 million offer during that time.
- [154] Accordingly, the defendants Hothi say that May 1, 2014 is the only day that really matters. They maintain that during the afternoon of May 1, 2014, Mr. Batal attended Mr. De Cotiis' office and drew an offer on behalf of Mr. De Cotiis that was open for acceptance by Mr. Paramjit Hothi until 8:00 p.m. that night. They submit that Mr. Batal at this point had already decided that \$1.25 million was the price he would sell the property for. After leaving Mr. De Cotiis' office with that offer, he attempted to convince Mr. Paramjit Hothi to accept. The defendants say when Mr. Paramjit Hothi refused to sign, Mr. Batal enlisted the assistance of his wife, Ms. Hothi, to persuade him to accept.

- [155] Defendants' counsel says it is most consistent with the documentary evidence that the Nelson Avenue meeting was on May 1, 2014 and at this meeting, Mr. Paramjit Hothi decisively rejected the offer and refused to sign a written authorization to make a counteroffer. Defendants' counsel submits that therefore, the only offer Mr. Batal could have brought to show Mr. Paramjit Hothi was Mr. De Cotiis' first offer of \$1.15 million, which had been "emphatically rejected" the night prior. They submit that it does not make sense that Mr. Batal would have gone to meet Mr. Paramjit Hothi with the same offer on April 29, 2014.
- [156] The plaintiff and Mr. Batal say the Hothi defendants' argument that the Nelson Avenue meeting took place on May 1, 2014 and not April 29, 2014 is a new revisionist theory. It is not borne out by the evidence nor was it tested at trial due to it being raised for the first time in submissions.
- [157] At trial, the evidence of Mr. Paramjit Hothi and the position of Mr. Gurdaver Hothi was that the meeting at Nelson Avenue was on April 29, 2014. At no time did either party make any attempt to challenge this. Furthermore, this theory was never put to Mr. Batal in cross-examination and offends the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).
- [158] The jurisprudence establishes that the rule in *Browne v. Dunn* is not an exclusionary rule of evidence. Rather, it is a caution about the weight of evidence. As noted in para. 29 of *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913, the rule requires that:
- [29] The Rule in *Browne v. Dunn* (the "rule") is not an absolute or inflexible rule of evidence. Rather, it is something which goes to the fairness of the proceedings and which must be assessed within the context of the particular case. The rule requires that:

the alternative version of events of one witness should be suggested to a witness during cross-examination. This is done so as to allow the witness an opportunity to explain or deny that version. The rule does not say that the alternative version must be ignored, but a judge may consider the absence of cross-examination as a factor in assessing the credibility of the evidence given on the point: *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd.*, 2008 BCSC 848 at para 9.

- [159] Counsel submits that this date issue only crystallized after two elements of Matt Batal's evidence (Mr. Batal's son) caused them to revisit the issue, namely:
1. That no calls were made to Mr. De Cotiis or Ms. Azarm from the Nelson Avenue work site; and,
 2. That the meeting took place "later" in the afternoon. Counsel for the defendants say that the phone records supporting this proposition are reliable documentary evidence that must be reviewed by the Court. The fact that Mr. Batal was not cross-examined on whether the meeting took place on May 1, 2014 does not mean the evidence should be excluded; rather, it goes to weight.

- [160] There is, however, essentially no evidence given on this point--rather, this argument was reconstructed entirely from phone records. Without more, phone records on their own are insufficient.
- [161] Counsel also makes much of what he says is a "doctored" email on May 2, 2014 whereby Mr. Paramjit Hothi is said to have provided authorization to Mr. De Cotiis to view the District documents pursuant to the subject clauses of the contract. Counsel argues that Mr. Batal doctored this email by altering an earlier email he received from Ms. Hothi and then forwarding it on to Mr. De Cotiis. The plaintiff and Mr. Batal say once again that this is a new allegation not based in evidence, including no expert evidence to establish forgery. Further, it was not put to Mr. Batal.
- [162] What the defendants seek to do is rely on a theory that is totally dependant on phone records and has not been put to the witnesses. Further, the theory is contrary to the evidence of Mr. De Cotiis, Mr. Batal, and even their own witnesses. It is a stretch to rely solely on these documents. Not only is this theory untested, but it appears to be an after-the-fact construct, perhaps prompted by the fact that almost the entirety of the defendants' viva voce evidence cannot be relied upon.
- [163] To accede to that point would require me to conclusively determine that May 1, 2014 was the date of the Nelson Avenue meeting. That is impossible to do by the mere existence of the phone records. More importantly, a review of those records do not even definitively establish that point in any event. The defendants point to the cell phone records of Mr. Paramjit Hothi on April 29, 2014 to say that the meeting could not have occurred on that date because Mr. Paramjit Hothi was on the phone continuously from 12:22 p.m. to 12:52 p.m. and at 12:36 p.m. his cell phone records put him in Squamish. The timeframe could have been somewhat different and the parties could have still been meeting about Mr. De Cotiis' offer on April 29, 2014. Based on this evidence alone, I can make no definitive conclusions that the Nelson Avenue meeting took place on a different date altogether.
- [164] Regarding the defendants' argument that it would not have made sense for Mr. Batal to have taken Mr. De Cotiis' \$1.15 million offer to Mr. Paramjit Hothi on April 29, 2014 because it had been "emphatically rejected" the day before, this is explained by Mr. Batal's evidence as to his negotiating strategy. Mr. Batal explained that part of his strategy was to get the parties to "split the difference." He is persistent in this strategy and as indicated in emails to Mr. De Cotiis, he "never gives up." Mr. Batal could easily have been meeting in an attempt to elicit a counteroffer. While he was not successful in this, that pattern was consistent with his behaviour as he sought to have the parties reach a deal.
- [165] Essentially, Mr. Batal's view was that he had "an ongoing offer with Vito" that he wished to present. He was trying to persuade Mr. Paramjit Hothi by pointing to future opportunities that might arise after doing business with Mr. De Cotiis' family. In cross-examination, Mr. Paramjit Hothi admitted that Mr. Batal told him he had a big buyer and that he directed Ms. Hothi to respond to this email by sending the plans for the house, which she did on the

morning of April 29, 2014. This, in addition to the rest of the evidence, supports the proposition that the meeting was on April 29, 2014.

Conclusion

- [166] Ultimately, I agree that a contract of purchase and sale for the Marine Drive Property was formed on May 1, 2014.
- [167] As pointed out by the plaintiff, Mr. Batal met with Mr. De Cotiis at his office in downtown Vancouver on the afternoon of May 1, 2014 to finalize the written contract. Mr. De Cotiis initialed the square box agreeing to the change in purchase price. During this meeting, Mr. De Cotiis left Mr. Batal alone in the boardroom so that he could call Mr. Paramjit Hothi in private. When Mr. De Cotiis arrived back in the boardroom, he was told that "they had accepted the offer."
- [168] The history of the interactions between Mr. Batal and the Hothis before and after May 1, 2014 informs my finding that a contract was reached: in particular, the emails exchanged between them over the course of four months detailing the negotiations as well as a series of phone calls made between Mr. Batal and Mr. Paramjit Hothi.
- [169] Furthermore, as noted earlier, Mr. Paramjit Hothi worked long hours and was difficult to get hold of. It makes sense that he would provide verbal instructions to sign offers on his behalf. As Mr. Batal testified, in order to accommodate a very busy and "computer illiterate" client, he signed for Mr. Paramjit Hothi as per his request, instruction and authority.
- [170] This is very similar to the situation that occurred at the time Mr. Paramjit Hothi purchased the Marine Drive Property on April 12, 2013 whereby Ms. Hothi signed "Paramjit Hothi" on his behalf due to him being out of town and on the road. The evidence sets out clearly that Mr. Paramjit Hothi worked long hours at various job sites and was often not available to provide a signature in person.
- [171] I find that the initial offer to purchase the Marine Drive Property on April 12, 2013 was prepared and signed by Ms. Davinder Hothi on her husband's instructions and using her husband's name on the signature line. This demonstrates a pattern of conduct whereby Mr. Paramjit Hothi instructs others to sign contracts on his behalf. Unfortunately, the initial offer to purchase the Marine Drive Property on April 12, 2013 was not provided as part of disclosure. As indicated, non-disclosure of important documents have been an issue throughout this litigation.
- [172] In addition, Mr. Paramjit Hothi and Ms. Hothi went to great lengths in their respective evidence on this point to maintain the fiction that Mr. Paramjit Hothi drove to UBC to personally sign the April 12, 2013 document. It is clear that they did so to avoid the conclusion that Mr. Paramjit Hothi had authorized others to sign on his behalf.

- [173] Mr. Paramjit Hothi's credibility is severely undermined by documents and phone records reflecting the numerous communications between himself and Mr. Batal at critical junctures in this case. When taken to the 11 calls on May 1, 2014, Mr. Paramjit Hothi denied even talking about the Marine Drive Property with Mr. Batal. As indicated, he said they were just talking about "general things." It is very unlikely that the number of calls as well as the length of many of these calls reflect conversations of a general nature. The only thing new to talk about at 7:12 p.m. that day was the recently made deal to sell the Marine Drive Property to Mr. De Cotiis.
- [174] Mr. Paramjit Hothi was motivated to sell the Marine Drive Property. It is clear that when he purchased it he did not appreciate the limitations of the site-specific zoning. He tried unsuccessfully several times to get the zoning limitation changed. His insistence that he was "happy" after this adverse decision demonstrates his lack of credibility. Subsequent events demonstrate that Mr. Paramjit Hothi had regrets and sought to derail the arrangement.
- [175] As indicated, Ms. Davinder Hothi's credibility is also severely undermined. Most difficult to believe is her insistence that Mr. Paramjit Hothi signed the offer to purchase the Marine Drive Property back on April 12, 2013. Phone records clearly showed that he was out of town yet she continued to deny that she ever signed or was instructed to sign anything on his behalf. I find that she was clearly concerned about saying anything adverse to her husband's case.
- [176] Fundamentally, the defendants are not able to explain why Mr. Batal would fabricate an agreement and send this contract to Mr. De Cotiis if he knew Mr. Paramjit Hothi had rejected the offer. The defendants say this was because he hoped to get more business from Mr. De Cotiis. That proposition is not sound; a deal that does not close would not advance this relationship and certainly, if he had fabricated the authorization of Mr. Paramjit Hothi, the deal would not close.
- [177] The defendants argue that the transactions of the Westport properties are to be used as a template. If so, we know that when Mr. Batal was told that Mr. Paramjit Hothi's mother owned the Westport properties, he asked for and obtained a power of attorney. He also prepared both an MLS contract and Working with Realtor form in the mother's name. The fact that he did not do that in this case lends credence to his testimony that Mr. Paramjit Hothi never told him the Marine Drive Property was in the name of his brother, Mr. Gurdaver Hothi.
- [178] Mr. Paramjit Hothi continued to deal with Mr. Batal in June 2014 after being aware (through emails from Mr. De Cotiis referencing the contract) that Mr. Batal had signed a contract for the sale of the Marine Drive Property on his behalf. If Mr. Batal had truly not been authorized to sell the property, Mr. Paramjit Hothi provided no adequate explanation as to why he kept working with him. There is also no evidence that Mr. Paramjit Hothi was upset or angry with Mr. Batal or disputed the contract at that time.

- [179] There is also no evidence that he, or any of the other Hothis for that matter, contacted Mr. De Cotiis at any time to deny the contract or to provide notice to Mr. De Cotiis that Mr. Batal did not have the authority to sign the contract.
- [180] This evidence all supports a finding that Mr. Paramjit Hothi provided instructions to Mr. Batal to sell the Marine Drive Property at \$1.25 million. An offer was made and accepted on May 1, 2014. The contract was between Mr. Paramjit Hothi (acting as trustee for the beneficial owner) and Mr. De Cotiis.

Who is the Owner of 2599 Marine Drive? Is Mr. Gurdaver Hothi a Bare Trustee for the Hothi Family?

Legal Principles

- [181] Section 23(2) of the Land Title Act creates a statutory presumption that the person named on the title of a property is the legal and beneficial owner of said property.
- [182] Section 23(2) is subject to several equitable principles, including but not limited to the presumption of resulting trust. Put simply, when a transfer of property is made for no consideration, the law presumes that the transferor retains a beneficial interest in that property. The burden is then on the transferee to demonstrate that a gift was intended. There is also no longer a presumption of advancement in respect of a transfer from a parent to his or her adult children: *Pecore v. Pecore*, [2007] 1 S.C.R. 795, at para. 36.
- [183] Legal principles regarding the ownership of property was helpfully set out by Fenlon J., as she then was, in *Demir v. Peyman*, 2009 BCSC 445:
- [9] I turn first to a preliminary matter, which is the burden of proof in these proceedings. James Peyman and Seylan Demir are registered as the owners of the property and, under the Land Title Act, R.S.B.C. 1996, c. 250, s. 23(2), such title is conclusive at law and in equity 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 title. In short, the law begins with the presumption that if your name is on the title in the Land Title Office, you own that property. That statutory presumption is, however, subject to equitable principles, one of which is the enforcement of an agreement between the parties in order to prevent unjust enrichment if the face of the title is upheld.
- [10] In a case such as this where property is purchased with funds provided by a third party without consideration the law presumes that the person receiving the funds holds the property in trust. This is known as a resulting trust. As stated by the Supreme Court of Canada in *Pecore v. Pecore*, [2007] 1 S.C.R. 795, the presumption of a resulting trust is rebuttable. The effect of the presumption, though, is to alter the general rule that in a civil case the person who wants to challenge the names on title in the Land Title Office bears the legal burden of proof.

[11] In the case at bar Ms. Peyman challenges the legal title to the property on the basis that she made a gratuitous transfer of funds to her son and daughter-in-law so that they could purchase the property. A resulting trust is presumed with respect to the portion of the property paid for with those funds. It follows that Ms. Demir bears the burden of rebutting that presumption, that is, she bears the burden of proving that the money was a gift.

[Emphasis added.]

[184] Mr. Gurdaver Hothi's name is registered on title for the Marine Drive Property and therefore he is presumably the legal and beneficial owner. The question raised in this case, however, is whether he holds that property in trust for the Hothi family. If so, the s. 23(2) Land Title Act presumption is rebutted.

Evidence of the Hothi Family

[185] The Marine Drive Property is in Gurdaver Hothi's name. This purchase was predominantly financed with proceeds from the sale of the Westport properties.

[186] Mr. Paramjit Hothi claimed that his mother's intention was to distribute the Westport properties proceeds as gifts to her sons so that they each could build separate homes. Neither Mr. Gurdaver nor Mr. Paramjit Hothi have established on the facts, however, that such a gift was intended. None of the sons live in the homes they built and sold. In fact, all three live together in the Piper Street residence with their parents in Burnaby.

[187] The Westport properties proceeds were not "gifted" to the three sons. Rather, the funds remained in their mother's bank account until investment opportunities arose at which time the funds would be distributed accordingly. Mr. Gurdaver Hothi confirmed as much when he testified that only upon the purchase of the Marine Drive Property did his mother relinquish the funds.

[188] Mr. Gurdaver Hothi has lived with his extended family since he came to Canada in 1991--some 27 years. He lives on the same floor as Mr. Paramjit and Ms. Davinder Hothi and works with Mr. Paramjit Hothi in the family business, Diamond 11. He said that his income in 2014 was \$30,000 to \$40,000. Income tax returns, however, reflect a lower amount of \$21,000. When asked about how he would have been able to afford to build a house on the Marine Drive Property, he said either his parents would give him money and/or he would get a loan to cover costs when necessary. He also said that his wife worked and had an income.

[189] While Mr. Gurdaver Hothi claims that the Marine Drive Property was "my house" and that he directed Mr. Paramjit Hothi to buy the property, it is evident that he was not aware of any of the financial negotiations or purchasing details with respect to this property. In fact, he conceded that Mr. Paramjit Hothi was the one who dealt with Ms. Azarm and the other consultants. He also did not participate in family efforts to have the restrictive zoning changed.

- [190] Furthermore, Mr. Gurdaver Hothi was unaware of many of the features of the property itself. He did not recognize the view from the property in the North Shore News advertisement nor did he know the address. He was also unable to describe the kind of house he intended to build.
- [191] While Mr. Gurdaver Hothi admits to seeing a "for sale" sign on the property, he claims to have taken it down. This testimony is at odds with his own pleadings, particularly in paragraph three of his third party notice filed August 19, 2015 where he alleges that "Paramjit in or about late 2013 gave verbal authority to plaintiff's agent, Mr. Batal, to erect a 'For Sale' sign at the property and bring any offers to Paramjit if the offer was high enough."
- [192] He was not able to explain this allegation. In fact, he said he disagrees. He said he "does not know" and could not remember giving instructions to his lawyer. He also did know his present lawyer's name.
- [193] His testimony throughout the trial was problematic and contradictory. His constant refrain was "what do I know." Overall, he was not believable.

Was There a Bare Trust?

- [194] According to Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith in *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at pages 33-34, a "bare trust" can be described as:

... a trust where the trustee holds property without any duty to perform except to convey it to the beneficiary or beneficiaries upon demand.

This definition of the bare, naked or simple trust assumes two things: (1) that the beneficiary is able to call for the property on demand; and (2) either that no active duties were ever required by the settlor or that the active duties have been performed.

- [195] In this case, I find that the test has been met. I find that Mr. Gurdaver Hothi holds legal title as bare trustee for the Hothi family. I will elaborate on this finding in the paragraphs below.
- [196] As part of the family enterprise, Diamond 11 purchased and sold properties and had certain tax strategies that maximized their profits. One such instance was the Westport properties transaction. The two Westport houses were both registered in their mother's name and though the family purported to live there, Ms. Davinder Hothi's testimony made clear that a significant profit was made from these transactions with no income having been declared from either of the sales. The Westport properties were clearly purchased as part of the family enterprise.
- [197] Another such instance was the sale of another property on Lonsdale Avenue in 2016 which was in Mr. Paramjit Hothi's name. While Mr. Paramjit Hothi said he financed the purchase of that Lonsdale property with his share of the money from the Westport sales, this is not established on the facts. Rather, Lonsdale was built with money from Diamond 11. Building services were paid for by cash and/or obtained by barter. A gross profit of over \$2 million

was made on the sale of Lonsdale, yet Mr. Paramjit Hothi's tax return for that year declares no such income. Nor was a Schedule 3 filed with the return, which would require him to set out the address, the acquisition and the proceeds of disposition (in this case, \$3.4 million). The Schedule 3 would have been required if he was designating that property as a "principal residence."

- [198] While Mr. Paramjit Hothi claimed to have moved into the Lonsdale property, Lonsdale was not his principal residence. He continued to reside with the extended family at Piper Avenue in Burnaby. In addition, his wife, Ms. Davinder Hothi, admitted she had never lived at Lonsdale.
- [199] Ms. Hothi also confirmed that she did not live at the Westport address, though claimed she stayed there on weekends over a period of two years. Ms. Hothi said her primary place of residence was at Piper Street in Burnaby but that Mr. Paramjit Hothi lived in between Westport and the Piper Street house. This testimony is clearly contrived to avoid scrutiny as to why Westport was sold without being taxed.
- [200] The evidence overwhelmingly supports a finding that the Hothi family acts as a collective through the eldest son Mr. Paramjit Hothi. Despite legal title being in Mr. Gurdaver Hothi's name, Mr. Paramjit Hothi clearly resumed this role as the family representative throughout the course of the Marine Drive Property dealings.
- [201] With respect to the business, Ms. Hothi agreed that Mr. Paramjit Hothi had the most responsibility out of the family. He was the oldest brother and his command of English was much better than that of his brothers Mr. Gurdaver and Mr. Harneck Hothi.
- [202] Ms. Hothi provided clear answers in her examination for discovery that it was only Mr. Paramjit Hothi (as opposed to any of his brothers) who gave her instructions regarding the Marine Drive Property. At trial, this testimony shifted when she said that Mr. Gurdaver Hothi "may also have" given her instructions but that she could not remember when or what they were. It is clear that she was trying to avoid the inevitable inference that Mr. Gurdaver Hothi had no control over the transactions and was merely a bare trustee.
- [203] The Hothi family registered title for their properties--including the Westport and Lonsdale properties--into the names of individual family members for tax and financial reasons. The Marine Drive Property transaction was similar with title having been put into Mr. Gurdaver Hothi's name.
- [204] The transfer of title was not a gift to Mr. Gurdaver Hothi. Rather, he was a bare trustee with title to the property. The money came entirely from the family enterprise and thus, the property was for their benefit.
- [205] Ms. Azarm, the design consultant, provided testimony confirming that the property was beneficially owned by either the Hothi family or Mr. Paramjit Hothi. On June 10, 2014, Ms. Azarm sent an email to both Ms. Davinder and Mr. Paramjit Hothi, asking Mr. Paramjit Hothi to sign a sworn document that he was "the registered owner of the property." Neither

Ms. Davinder nor Mr. Paramjit Hothi corrected this information. In an email dated June 17, 2014, sent from Ms. Azarm to "Tony" and copied to Ms. Davinder and Mr. Paramjit Hothi, Ms. Azarm said that "the owner of the property is Paramjit Hothi, Diamond Eleven Excavating." This was also not corrected.

Beneficial Ownership

- [206] The plaintiff's primary argument, as indicated above, is that Mr. Paramjit Hothi was the beneficial owner and that Mr. Gurdaver Hothi held title to the property as bare trustee. Alternatively, if this is not the case, they say that Mr. Paramjit Hothi was one of the beneficial owners (along with other members of the Hothi family) and subject to his direction and control, Mr. Gurdaver Hothi held title as bare trustee. In the further alternative, Mr. Gurdaver Hothi was the legal and beneficial owner and gave authority and control over the property to Mr. Paramjit Hothi.
- [207] Mr. Gurdaver Hothi argues that if the beneficial owner of the property is the Hothi family enterprise, then the claim must fail because the Court cannot make orders affecting the beneficial interest of non-parties.
- [208] The plaintiff points out, however, as per Rule 20-3(10) of the Supreme Court Civil Rules, the Court can make binding orders on beneficiaries when their trustees are named parties in the litigation":

Rule 20-3 - Representative Proceedings

Representation of beneficiaries by trustees

- (10) A proceeding may be brought by or against trustees or personal representatives without joining a person having a beneficial interest in the trust or estate and, unless the court otherwise orders on the ground that the trustees or personal representatives could not or did not represent the interest of the person having the beneficial interest, an order granted or made in the proceeding is binding on that person.
- [209] The plaintiff argues in this regard that the interests of the Hothi family beneficiaries are represented by trustees Mr. Gurdaver and Mr. Paramjit Hothi--both named in their notice of civil claim.

Conclusion

- [210] Mr. Gurdaver Hothi holds legal title to 2599 Marine Drive and is the bare trustee for the benefit of the Hothi family. He is subject to Mr. Paramjit Hothi's direction and control as the representative for the Hothi family.
- [211] On the issue of representative proceedings, I agree with the plaintiff's submissions that Mr. Gurdaver and Mr. Paramjit Hothi represent the Hothi family in this litigation as their trustees.

Was Mr. Paramjit Hothi Authorized to Sell the Marine Drive Property?

Principal and Agent Relationships

[212] The applicable principles of agency are outlined in *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541. The authority of an agent may be:

[22]

- (a) actual (express or implied) where it results from a manifestation of consent that [s/]he should represent or act for the principal expressly or impliedly made by the principal to the agent himself; or
- (b) apparent, where it results from such a manifestation made by the principal to third parties.

[213] At para. 23 of that decision, citing *Bowstead on Agency*, 15th ed. (London: Sweet & Maxwell, 1985), the Court of Appeal made the further comments about actual authority:

[23]

Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (called here express authority) or is regarded by the law as having given him because of the interpretation put by the law on the relationship and dealings of the two parties (called here implied authority). "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties "

[Emphasis added by Rowles J.A.]

[214] The Court of Appeal went on to say at para. 24:

[24] Actual authority turns on the relationship between the principal and agent. Apparent or ostensible authority is concerned primarily with representations and manifestations made by the principal to third parties such as the appellant in this case.

[215] Actual express authority may be made out by the terms of an oral or written agreement.

[216] Trustees, acting as such, cannot subject beneficiaries to liability. An agent, however, can and normally does expose the principal to liability in contract and in tort: *Halsbury's Laws of Canada, Agency* (2015 Reissue) at para. HAY-8 ("Halsbury's").

[217] A number of other basic principles regarding agency are set out in *Halsbury's* and are useful in the context of this case. I will briefly summarize them below:

- The existence of the agency relationship does not arise from the terms used by the parties to describe the relationship, but from the true nature of the agreement or the exact circumstances of the relationship between them.

- Even though an agreement makes no reference to terms such as "agent", "agency", "principal" or similar words, an agency relationship may nevertheless arise on a true construction of the relationship.
- Whether an agency relationship exists is a question of fact that requires proof from the party alleging the relationship.
- Agents, like trustees, are fiduciaries. When they act, they affect the fortunes of other persons. Whereas a trustee obligation is owed to the beneficiaries, an agent's obligations are owed to the principal.
- An agent is the representative of the principal and is able to contract and legally bind the principal to the other contracting party. This is not necessarily true of trustees and beneficiaries.
- A person may act as both agent and trustee. In a time of conflict, rules of agency rather than trust will prevail.

Was Mr. Paramjit Hothi the Agent for Gurdaver Hothi or the Hothi Family?

- [218] To establish actual agency, Mr. Gurdaver Hothi submits that the plaintiff must prove that he gave express authority to his brother Mr. Paramjit Hothi to enter the Marine Drive Property contract. He maintains that there is simply no evidence to support this claim.
- [219] I have found that the Hothi family were the beneficial owners of the property. As the plaintiff points out, because Mr. Paramjit Hothi is a member of the family, he is also a principal. Furthermore, he was the decision-maker and spokesperson for the family. He was therefore vested with authority to sell the property at the material time. Accordingly, the plaintiff argues that the evidence overwhelmingly supports a finding that Mr. Paramjit Hothi had actual authority.
- [220] Actual authority between principal and agent may be express or implied. Actual implied authority is inferred from the usual practices or customs in the relationship. Implied authority arises when the principal's pattern of conduct leads the agent to reasonably believe that he or she has the authority to act on the principal's behalf. The scope of the authority is also determined with reference to the relationship and what the agent has been permitted to do in the past.
- [221] In this case, I conclude that Mr. Paramjit Hothi had either express or implied actual authority to sell the Marine Drive Property on behalf of the Hothi family. Mr. Paramjit Hothi is the eldest son of a family enterprise and is essentially fully responsible for managing and negotiating contracts on behalf of the family.
- [222] I note that Diamond 11 paid for and claimed many expenses related to the family properties, including the Marine Drive Property. Mr. Paramjit Hothi is also the person who deals primarily with Diamond 11's affairs. He and his wife Ms. Davinder Hothi kept track of all the business and financial records relating to the property transactions, including payments for the Marine Drive Property building permit applications in 2013-2014. Mr.

Paramjit Hothi exercised this responsibility without question or objection from other family members.

[223] Mr. Paramjit Hothi also arranged for the initial purchase and transaction of the Marine Drive Property. He provided instructions to the realtor, the design consultant, and the variety of other businesspeople involved. He also actively took part in the efforts to have the District relax the zoning.

[224] Mr. Paramjit Hothi was also in constant contact with Mr. Batal over the 2013-2014 period where the property was publicly advertised as being for sale. He authorized a "for sale" sign on the property and made offers to sell to two independent parties, Mr. Khalili and Mr. Eric Yan (a.k.a. Hua Fung Yan). It is inconceivable that the other close-knit members of the Hothi family, all living together in the same house--Mr. Gurdaver Hothi included--did not know about or provide actual authority to Mr. Paramjit Hothi to sell the property.

Was Mr. Paramjit Hothi the Apparent Agent of Mr. Gurdaver Hothi or the Hothi Family?

[225] In the interests of completeness, I will go on to answer the question about whether he had "apparent" or "ostensible" authority to act on behalf of Mr. Gurdaver Hothi and/or the Hothi family.

[226] In *Keddie*, the British Columbia Court of Appeal noted that apparent authority is concerned with the external representations made by the principal to third parties, not the internal agreements with the agent:

28 A finding of apparent authority depends on some representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question. Apparent authority is a product of the principal's outward conduct with respect to third parties, not of the principal's internal agreements or arrangements with its agent.

29 *Bowstead on Agency*, *supra*, at p. 284, defines the nature of apparent authority as follows:

Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority.

[227] As noted in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303, at para. 348, the representation made by the principal need not be express:

348 Apparent authority does not require an explicit representation of authority. Rather, it is found where the principal creates a situation, by words or conduct, in which a reasonable inference of authority will be drawn and relied upon. [citations omitted]

[228] In discussing apparent authority, the Supreme Court of Canada in *Rockland Industries, Inc. v. Amerada Minerals Corporation of Canada*, [1980] 2 S.C.R. 2 at 13-14 made reference to the influential English Court of Appeal case, *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480 (Eng. C.A.):

Having disposed of the issue of actual authority, Moir J.A. went on to find that, in relation to apparent authority, the evidence did not meet the tests defined by Diplock L.J. (as he then was) in *Freeman & Lockyer*:

If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown:

- (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
- (2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect to those matters to which the contract relates;
- (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
- (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

[229] The Supreme Court of Canada at 15 further adopted the view as stated in *Bowstead on Agency*:

The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has normally 'actual' authority to enter into.

[230] In *Tecson v. Bang Tian Complete Auto Services Ltd. et al*, 2002 BCSC 1183, Mr. Justice Parrett found that in addition to having actual authority on the basis of an express written communication, Xinsheng Yi, an agent of the defendant company, had both actual and apparent authority to act for that company with respect to the purchase of real property. This apparent authority was based on a pattern of conduct indicating that the agent would presumably have such authority.

- [231] The defendants argue that there is no evidence of any representation or act made by Mr. Gurdaver Hothi to either Mr. Batal or Mr. De Cotiis to support a finding of apparent authority. Furthermore, none of Mr. Paramjit Hothi's actions can rightly be viewed as having induced Mr. De Cotiis to enter into the contract. Mr. Batal had a copy of the title and should have known that Mr. Gurdaver Hothi was the actual owner.
- [232] The defendants say that at most, Mr. Gurdaver Hothi knew that Mr. Paramjit Hothi was having discussions with Mr. Batal about trying to find a buyer. They argue that any acquiescence displayed by Mr. Gurdaver Hothi in that regard must be considered in the circumstances: Mr. Gurdaver Hothi knew that he held title to the property and placed trust in the fact that Mr. Batal was a trained real estate agent. The inference is that Mr. Batal knew or ought to have known that Mr. Paramjit Hothi did not have ultimate authority to sell the house.
- [233] The defendants also point out that it is common for family members to assist other family members with the purchase or sale of a property. Contacting a realtor on someone's behalf is not the same as having the legal authority to contract on that person's behalf. That would be an exceptional expansion of the law of agency.
- [234] These arguments do not take into account the reality of Mr. Paramjit Hothi's instrumental role as the primary representative within the family business. This is most clearly demonstrated by the numerous emails sent by the Diamond 11 family business account under Mr. Paramjit Hothi's name. This is also evidenced by his involvement in the purchase and sale of Hothi family properties in the past.
- [235] Ms. Davinder Hothi was cross-examined extensively on the emails sent by the Hothi family business company Diamond 11 under her husband's name. She was taken through numerous emails apparently sent by Mr. Paramjit Hothi whereby his name was appended to the end of the email. She insisted that each email, with the exception of one, was typed by her but on his instructions. She testified that he was not computer literate, and was therefore unable to send emails until he obtained his smartphone in 2015/2016. She claimed that she had the authority to send emails per his instructions but denied that she was his agent. Rather, she was just "helping him." When pressed on the issue, Ms. Davinder Hothi said that from time to time, Mr. Paramjit Hothi may have sent emails that she did not know about.
- [236] Ms. Davinder Hothi described a process of sending emails late at night when Mr. Paramjit Hothi got home. He would dictate and she would type and sign his name. When taken to emails sent by Mr. Paramjit Hothi during the day, she insisted that at those times, he would call her and dictate or would tell her in the morning.
- [237] Ms. Davinder Hothi also wrote many cheques on behalf of Diamond 11 as per her husband's instructions.

- [238] The defendants maintain that Mr. Batal's negligence and unreasonable assumptions cannot provide a basis for apparent authority. Mr. De Cotiis led no evidence showing that Mr. Paramjit Hothi misled Mr. Batal at any time. Even if Mr. Batal's asserted belief that Mr. Paramjit Hothi was acting for a family enterprise is accepted, the defendants submit that Mr. Batal needed to do something more than just assume that Mr. Paramjit Hothi had authority, especially when Mr. Gurdaver Hothi had done nothing to contribute to that assumption.
- [239] The defendants submit that because Mr. Paramjit Hothi had previously provided a power of attorney in his dealings with Mr. Batal (to sign the Westport contracts on his mother's behalf), it was reasonable for him to believe that he would need to provide another power of attorney for Mr. Gurdaver Hothi, the registered owner, before Mr. Batal would allow him to legally bind his brother.
- [240] I have already concluded that Mr. Paramjit Hothi had actual authority and that the Hothi family held him out as their agent for the purpose of dealing with the Marine Drive Property, but now I also conclude that Mr. Paramjit Hothi had apparent authority.
- [241] The Hothi family allowed the Marine Drive Property to be marketed by Mr. Paramjit Hothi. They consented to him placing a "for sale" sign on the property, entertaining offers and making counteroffers on at least two other occasions. Further, Mr. Paramjit Hothi handled the zoning issues and retained and instructed all consultants with respect to the property. It is clear that Mr. Paramjit Hothi was held out as the agent of the Hothi family.
- [242] Furthermore, the evidence of independent witnesses in this case confirm that Mr. Paramjit Hothi was the person dealing with the Marine Drive Property sale. Mr. Yan, an independent witness and at one point a prospective buyer of the property, testified that Mr. Paramjit Hothi told him that it was his property and that he would sell it for around \$1.8 million.
- [243] Mr. Yan also testified that he attended the courthouse on the second day of this trial to observe because he was curious to see what happened. He testified that at that time, Mr. Paramjit Hothi was not happy to see him and told him "don't come here" and "never show up here again" or words to that effect. Mr. Yan was upset by these comments.
- [244] Mr. Gurdaver Hothi also admitted that he left his brother Mr. Paramjit Hothi to deal with the purchase in its entirety including the zoning efforts, the building designs, and the retaining of and liaising with professionals. Mr. Gurdaver Hothi admitted that he took no action in respect of the Marine Drive Property.
- [245] Ms. Azarm testified that she took all of her instructions from Mr. Paramjit Hothi and understood that he was the owner. She designed the house for the West Vancouver market, specifically for seniors looking to downsize. She never had any conversations with Mr. Gurdaver Hothi. In fact, she had only met him on "one or two occasions." She also did not recall, as Mr. Paramjit Hothi testified, meeting with the three brothers and serving coffee at her house.

[246] On April 19, 2018, more than halfway through the trial and following Ms. Azarm's direct examination, counsel for Mr. Gurdaver Hothi introduced new disclosure--a building permit document dated August 16, 2013 noting "G. Hothi" as the property owner--purportedly submitted to the city by Ms. Azarm. Counsel reported that he only received the document that day during an afternoon recess. Submissions were made and I ultimately admitted the document but permitted plaintiff's counsel to recommence their direct examination on May 14, 2018. At that time, Ms. Azarm was presented with the document but did not resile from the critical point that she took all instructions from Mr. Paramjit Hothi. She had no memory of submitting the building permit document, though she did confirm it was in her writing identifying the owner as "G. Hothi."

[247] I also note that the ownership structure utilized by the Hothis--namely, registering title in Mr. Gurdaver Hothi's name--was done to avoid paying income tax when the property was resold. In *Sihota v. Soo*, 2010 BCSC 886, this type of strategy was considered in determining whether a vender should be estopped from asserting that he was not bound by the actions of an unauthorized agent. In balancing the equities between the parties, Bruce J. placed weight on the fact that the purchasers had a special interest in the property whereas the vendor's interest was financial: paras. 42-53. In this way, apparent authority operates as an estoppel and a protection for third parties.

[248] Clearly, Mr. Paramjit Hothi had apparent authority to deal with the Marine Drive Property and I find that he was acting within the scope of that apparent authority when he entered into the contract for the sale of the Marine Drive Property. He had done this before and was doing it again. Once again, this is a tight-knit family, all living under the same roof and working in the same family business. Mr. Paramjit Hothi, as the eldest son, who spoke the best English, was the designated authority for the family in all business, including contractual matters.

Conclusion

[249] Ultimately, I conclude that Mr. Paramjit Hothi had authority to enter into a contract on behalf of the defendants. As such, the contract should be enforced.

Was Mr. Batal Authorized to Sell the Marine Drive Property?

Discovery of Name Discrepancy in Title

[250] Mr. Batal testified that he was not aware that Mr. Paramjit Hothi was not the registered owner until June 5, 2014 when Mr. De Cotiis called to tell him that the name on the contract did not match the name on title.

- [251] Mr. De Cotiis told him: "we have a problem. The name on the title search does not match the name of the seller and please email the power of attorney." He further stated that he would not have continued with the listing had he known this. Mr. Batal had a power of attorney in his records and emailed it from his phone. This, however, was the power of attorney signed by Mr. Paramjit Hothi's mother used previously to sell the two Westport houses.
- [252] After Mr. Batal learned that Mr. Gurdaver Hothi was on title, he called Mr. Paramjit Hothi and tried to get an explanation. Mr. Paramjit Hothi responded "it is a family matter." Mr. Batal was "blown away" and could not believe it. Mr. Batal then called Mr. De Cotiis to express his shock and suggested not removing the subjects until the issue was resolved. Mr. De Cotiis said to leave it with him and he ultimately did remove the subjects.
- [253] Mr. Batal was cross-examined extensively on his knowledge of the name on title and about the power of attorney. He said he asked for a power of attorney for the Westport properties because Mr. Paramjit Hothi told him they were owned by his mother. Mr. Paramjit Hothi did not tell him, however, that Mr. Gurdaver Hothi was the registered owner of the Marine Drive Property. Mr. Paramjit Hothi presented himself throughout as the decision-maker with respect to the Property.

Mr. Batal and Mr. De Cotiis "Put on Inquiry"

- [254] The defendants say that even if the Court accepts that it was reasonable for Mr. De Cotiis and Mr. Batal to believe up until the time of the transaction that Mr. Paramjit Hothi had apparent authority, the facts surrounding the transaction itself ought to have made them suspicious as to the legitimacy of that authority. Such suspicion invalidates any apparent authority they may have perceived. This point is made clearly by Voith J. in *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.*, 2015 BCSC 787, where the Court accepts that a third party cannot hold a principal liable for the representations of an agent in circumstances where the third party "was put on inquiry by the facts of the transaction": para. 81.
- [255] They submit that Mr. De Cotiis should have become suspicious when Mr. Batal told him via email on April 29, 2014 that "Seller late last night told me his brother said now they don't want to Sell."
- [256] The defendants submit that as a member of the De Cotiis real estate family, Mr. De Cotiis is an experienced buyer and seller of real estate. They submit that prior to removing subject clauses on June 5, 2014, he had the title searched and would have been aware at that point that he was not dealing with the registered owner of 2599 Marine Drive. Despite this knowledge, they submit, Mr. De Cotiis "proceeded to commence this litigation and attempt to compel Gurdaver to sell" knowing that there was no contract to enforce.

Conclusion

[257] I reject that the plaintiff was put on inquiry. The April 29, 2014 email--which is essentially the only evidence relied on for this argument--is not enough on its own to have put the plaintiff on notice. Mr. De Cotiis was dealing with a family enterprise. It is not inconceivable that a seller would consult and take advice from family members. The indication that "now" his brother did not want to sell also suggests that the seller's family was being kept apprised of Mr. Batal's ongoing negotiations, as opposed to the back-door dealings that have been suggested.

[258] I agree with the plaintiff that this case is distinguishable from Coutinho. In that case, the consumer knew it was dealing with a fraudulent seller from the outset and was prepared to go along. That same evidence of bad faith simply does not exist in this case.

Specific Performance Should Be Ordered

[259] In this case, I find that there is a legal and binding contract capable of specific performance. There is no dispute that the Hothis have repudiated that contract.

[260] There was offer, acceptance and consideration with sufficient terms. This agreement also complied with the requirements of s. 59(3) of the Law and Equity Act:

Enforceability of contracts

59

- (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.

[261] With respect to s. 59(3)(a), no formal document is required beyond identifying the essential and material terms to the agreement: *Harvie v. Gibbons*, 1980 ABCA 38; *Hustad v. 594971 B.C. Ltd*, 2008 BCSC 1441 at para. 61. In this regard, draft agreements memorializing the terms of an oral agreement have been held to comply with similar legislation in other jurisdictions: *Bublish v. Turanich*, 2017 SKQB 240 at para. 49-52.

- [262] In this case, the evidence of an oral agreement is even stronger. The terms have been memorialized in a formal agreement and have been agreed to by the vendor. Additionally, the formal document met the s. 59(3)(a) requirement per that there was "in a writing signed by the party's agent, both an indication that [a contract] has been made and a reasonable indication of the subject matter."
- [263] The plaintiff submits that this is a classic case for the remedy of specific performance. The property is unique to the extent that "a substitute would not be readily available and there is a fair, real, and substantial justification for the decree that is sought": *Ali v. 656527 B.C. Ltd.*, at para. 23.
- [264] The Marine Drive Property is ideal for Mr. De Cotiis' mother. It meets many of her needs including but not limited to:
- Being walking distance from amenities such as her bank, her church, a community centre, a medical clinic, and a bakery where she meets with her friends each Monday;
 - Being close to the seawall providing her with an opportunity to remain active by riding her bike; and,
 - Having sufficient public transit routes.
- [265] The size of the property is also well suited to Mr. De Cotiis' mother's needs. The zoning limitations require that any building on the property be less than 2,500 square feet and on one level. Although this factor makes it unattractive to many, it is ideal for Mr. De Cotiis' mother, who sought a home that would be a manageable property in her senior years. After the contract was executed, Mr. De Cotiis' mother retained an architect whom she met with on several occasions to finalize floor plans for her new home.
- [266] Each of these unique features of the Marine Drive Property are important to the plaintiff's mother in terms of her everyday living. That is what prompted Mr. De Cotiis to accept the \$1.25 million counteroffer, despite concerns about the price, when Mr. Batal said the defendants would not sell for less.
- [267] This case is analogous to *Sihota*, referenced above, whereby Bruce J. granted specific performance for the purchasers with respect to a sale agreement of a property. This property was unique to the plaintiffs for many of the same reasons, including its location and proximity to amenities.
- [268] There is no other property readily available with substantially the same combination of features. Mr. De Cotiis' mother has looked at a number of properties in Edgemont, Pemberton Heights, Lower Lonsdale, and Ambleside--none of which contained the same combination of attributes as the Marine Drive Property. They were all also either too large or too expensive.
- [269] At all material times, Mr. De Cotiis was ready, willing and able to perform the contract.

NEGLIGENCE OF REALTOR

- [270] As I have already determined that a contract for purchase and sale is in existence, I will briefly deal with the allegations of negligence against the realtor, Mr. Batal, and the real estate company, AH Realty.
- [271] The defendant Mr. Gurdaver Hothi says that as a licensed and qualified real estate agent in British Columbia, Mr. Batal owed him a duty of care. Further, that Mr. Batal's brokerage, AH Realty, is vicariously liable for his actions. The nub of the negligence argument, however, is that Mr. Batal prepared and executed an unenforceable contract for purchase and sale. As I have concluded, that is not the case. Thus, the action in negligence is dismissed.
- [272] The defendant Mr. Paramjit Hothi also claims in his action that Mr. Batal's retainer was restricted to posting a sign on the property and that Mr. Batal owed him a duty of care to act within this restricted retainer. He maintains that Mr. Batal breached his duty of care by signing and initialing documents without authority and misrepresenting to Mr. De Cotiis that he had the authority to do so.
- [273] Given my finding that Mr. Paramjit Hothi did, in fact, provide Mr. Batal with his authority to sign and initial the contract, Mr. Paramjit Hothi's claim of negligence against Mr. Batal is dismissed. While Mr. Batal did not necessarily follow all the norms of his profession, I have concluded after an extensive review of the documentary evidence and testimony that Mr. Batal obtained authority from Mr. Paramjit Hothi to sign and initial the contract in dispute.
- [274] In addition to these claims, both Mr. Gurdaver and Mr. Paramjit Hothi in their closing submissions alleged both fraudulent misrepresentation and forgery in relation to an allegedly "fabricated" email. As Mr. Batal and AH Realty point out, an allegation of fraud or dishonesty must be scrupulously pleaded and fully particularized: *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 168; Rule 3-7(18) of the Supreme Court Civil Rules. That was not done in this case. In fact, this argument was only raised in final argument after the parties had closed their respective cases.
- [275] In any event, the defendant Hothis have not established that this email was forged. Proving forgery of an email is a highly technical exercise generally requiring the expert evidence of a computer analyst. There was no such expert evidence on this point. The email appears to have been sent in a normal manner. Without more, it is simply not possible to conclude otherwise.
- [276] In conclusion, both Mr. Gurdaver and Mr. Paramjit Hothi's negligence claims against Mr. Batal and AH Realty are dismissed.
- [277] With respect to the fourth party claims advanced by Mr. Batal and AH Realty whereby Mr. Batal claimed that as the realtor and agent, he was owed a duty of care by Mr. Paramjit, Mr. Gurdaver and Ms. Davinder Hothi to exercise reasonable standards of care in providing representations to him about the property.

[278] Though it is clear that inaccurate information was provided and that the Hothi defendants engaged in misleading activities, I have also concluded that Mr. Paramjit Hothi had authority to market, list and sell the property and that there was a valid contract in existence with Mr. De Cotiis. As a result, Mr. Batal and AH Realty did not suffer any loss as a result of the misrepresentations. Those claims are also therefore dismissed.

COSTS

[279] The parties have leave to make submissions regarding costs in this matter and are at liberty to schedule a date to make their submissions.

SUMMARY

[280] With respect to these actions, I find the following:

- a) There was a binding contract to sell the Marine Drive Property formed on May 1, 2014.
- b) The legal owner of the Marine Drive Property is Mr. Gurdaver Hothi as trustee for the benefit of the Hothi family.
- c) Mr. Paramjit Hothi had both express and implied actual authority to sell the Marine Drive Property. In the alternative, he had apparent authority to sell the Marine Drive Property. I also find that he gave Mr. Batal authority to sell the property. Accordingly, Mr. Gurdaver Hothi's third party proceedings against Mr. Paramjit Hothi are dismissed.
- d) The claim advanced by Mr. Batal and AH Realty joining members of the Hothi family as fourth parties is also dismissed--as a result of my findings, neither Mr. Batal and AH Realty suffered a loss.
- e) In terms of remedy, Mr. De Cotiis shall have an order for specific performance as set out in the May 1, 2014 contract.
- f) With respect to the action of Mr. Paramjit and Mr. Gurdaver Hothi against Mr. Batal and AH Realty, I find that Mr. Batal did obtain authority from Mr. Paramjit Hothi to sign the contract on his behalf. Accordingly, the action is dismissed.
- g) Costs will be dealt with at a date to be scheduled upon the request of the parties.

The Honourable Madam Justice E. Burke

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