

CANADA / JUDGMENT

De Cotiis v. Hothi

2019 BCCA 472

COURT

British Columbia Court of Appeal

DECIDED

23 December 2019

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2019 BCCA 472 De Cotiis v. Hothi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

De Cotiis v. Hothi,

2019 BCCA 472

Date: 20191223

Dockets: CA45861; CA45863;

CA45865

Docket: CA45861

Between:

Vito De Cotiis

Respondent

(Plaintiff)

And

Gurdaver Singh Hothi

Appellant

(Defendant/Third Party)

And

Paramjit Singh Hothi

Respondent

(Defendant/Third Party)

And

Ghassan Batal also known as Gus Batal,
Angell, Hasman & Associates Realty Ltd.,
and Davinder Hothi

Respondents

(Third Parties)

- and -

Docket: CA45863

Between:

Paramjit Singh Hothi

Appellant

(Plaintiff)

And

Ghassan Batal also known as Gus Batal, and
Angell, Hasman & Associates Realty Ltd.

Respondents

(Defendants)

- and -

Docket: CA45865

Between:

Vito De Cotiis

Respondent

(Plaintiff)

And

Gurdaver Singh Hothi

Respondent

(Defendant/Third Party)

And

Ghassan Batal also known as Gus Batal,
Angell, Hasman & Associates Realty Ltd.,
and Davinder Hothi

Respondents

(Third Parties)

And

Paramjit Singh Hothi

Appellant

(Defendant/Third Party)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia,
dated December 20, 2018 (De Cotiis v. Hothi, 2018 BCSC 2271,
Vancouver Dockets S145068 and S158124).

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Place and Date of Hearing:

Vancouver, British Columbia

November 20 and 21, 2019

Place and Date of Judgment:

Vancouver, British Columbia

December 23, 2019

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

Summary:

This was a fact-intensive appeal from an order of specific performance made by a Supreme Court judge after a 50-day trial concerning an alleged agreement for the sale of a piece of real estate to the plaintiff by the defendants. The land had been registered in the name of the defendant "G" at the time of sale but the sale had been negotiated and (the trial judge found) agreed to by the defendant "P". P was found to be head of a family business of buying and selling real estate and to have acted as the agent of the adult family members who were the beneficial owners of the property under a resulting trust found at trial. The family appealed on several bases, none of which succeeded. Trial judge had not erred in making her findings of fact and credibility, nor in her application of the law of agency to the facts. Order of specific performance upheld.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] There are three appeals before the Court. They all concern what should have been a simple agreement for the sale of a piece of real property in West Vancouver in 2014. The sale never closed because the vendor(s) refused to close, denying the existence of a binding agreement of sale with the purchaser, Mr. De Cotiis. He is the plaintiff/respondent in the appeals brought in file nos. CA45861 and CA45865 and was awarded specific performance of the alleged agreement after a 50-day trial before Madam Justice Burke in the Supreme Court of British Columbia. The trial was obviously fact- and document-intensive, and the trial judge's findings of credibility were crucial to her conclusions. Some, but not all, of these findings are challenged on appeal. The balance of the grounds of appeal focus on the trial court's

application of the law of agency to the unusual facts of this case.

Factual Background

- [2] Mr. Paramjit Singh Hothi, the plaintiff/appellant in file no. CA45863, and Mr. Gurdaver Singh Hothi, the defendant/respondent in CA45865, are brothers. Without meaning any disrespect, I will refer to them as "Paramjit" and "Gurdaver" respectively. Both of them are defendants/third parties in file no. CA45861.
- [3] As the trial judge found, the Hothi family came to Vancouver from India in 1991. They have all lived in the same house since arriving here. Paramjit has a grade 10 education and speaks English; Gurdaver has a grade 3 education and does not speak or read English. The trial judge described the business activities of the family as follows:

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. [At para. 24.]

- [4] Ms. Davinder Hothi is Paramjit's wife. She was called to testify at trial as an adverse witness on behalf of the plaintiff. She has a full-time job at the University of British Columbia but also does bookkeeping and administrative business duties for the family business. She often acts as a 'go-between' between her busy husband and others dealing with him. She has much greater computer skills than Paramjit, and monitors his email account. The trial judge found that on occasion, she signed emails "Paramjit" on his behalf.
- [5] In the lead-up to trial, Ms. Hothi purported to have very little documentary evidence, specifically emails, relevant to the proceedings. The trial judge wrote at the outset of her reasons, however, that:

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.

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. [At paras. 28-9; emphasis added.]

[6] Indeed, the trial judge found that each of the "Hothi defendants" had difficulty in telling the truth at trial. In her analysis:

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. [At para. 31.]

Marine Drive Property

[7] The property in issue was purchased in April 2013 by Paramjit, who dealt with the original owner (the District of West Vancouver) directly. The trial judge referred to this property as the "Marine Drive Property" and I will call it the "Property". The judge found that, contrary to Paramjit's testimony, he had been in Merritt, British Columbia at the time the original offer was made and that it was his wife who had signed it on his behalf. (See paras. 61-2.) Ultimately, the District accepted a revised offer of \$1,050,000 for the Property. The purchaser was listed as Paramjit, but he assigned his interest to Gurdaver before closing and it was registered in Gurdaver's name at that time.

[8] As noted by the trial judge at para. 55, in the course of the negotiations, an email, purportedly signed by Paramjit, indicated that his family had "\$7,000,000 in the bank", that the family had been "pulling their money out of [India] to invest in Canada", and that "[i]t is family money from [the excavation] company operated by 4 [sic] brothers." Paramjit also told the District's representative, Mr. Reid, that this was a "family purchase" and at one point said he would have to consult his brother before responding to a question asked by Mr. Reid.

[9] Evidently, it was not until after the District had accepted Paramjit's offer of \$1,050,000 that he became aware of certain restrictions on the Property which severely limited the height and square footage of any building that could be erected on it. He began immediately to try to sell the Property. (At para. 70.) In August 2013, he signed a form of agency agreement entitled "Working with Realtor" with Mr. Batal of Angell, Hasman & Associates Realty Ltd. ("AH"), who are third parties in files CA45861 and CA45865, and defendants in CA45863. The Property was listed on the MLS, advertised in the North Shore News, and a "for sale" sign was put up at some point in 2013. (At trial, Paramjit denied having signed the agency agreement, but this testimony was found not to be believable: see paras. 74-5.) One offer was

received from a Mr. Khalil in August 2013, but when Paramjit counter-offered at \$1.7 million, Mr. Khalil walked away.

- [10] Paramjit engaged a design consultant, Ms. Azarm, to design a house for the Property in order to assist in selling it, but her efforts to obtain a variance from the District for a larger house were not successful. In December 2013, Paramjit attended at the City's office along with Ms. Azarm and refused to leave until they met with a representative of the planning department. When Paramjit through Ms. Azarm finally brought the matter to City Council in December, the Council stood firm: the zoning restrictions remained in force. Paramjit insisted in his testimony that he was not disappointed in this result. (At para. 88.)

Mr. De Cotiis' Purchase

- [11] The trial judge described the background of Mr. De Cotiis' involvement with the Marine Drive Property at paras. 89-99 of her reasons. Mr. De Cotiis had hoped to purchase the Property to build a home for his mother. The zoning had made the Property eminently suitable for her, since she wanted a small house on one level, with a possible basement suite for any future caregiver. She already lived in the area and wanted to downsize without leaving it.
- [12] The trial judge described the events of April 29-May 1, 2014 at paras. 100-118. I will not recount those here except as necessary to highlight the judge's findings concerning the events of May 1, 2014 when, she found, a binding agreement was reached. Prior to this date, various email communications had passed between Mr. De Cotiis and Mr. Batal (referred to as "Gus" in the correspondence), who also acted for Mr. De Cotiis. Various phone calls had also taken place between Paramjit and Mr. Batal. Paramjit had authorized a counter-offer to Mr. De Cotiis and on April 30, Mr. De Cotiis had told the agent that his "final offer" was \$1.2 million. Mr. Batal tried to get the two to "meet in the middle" at \$1.25 million and on May 1, Mr. De Cotiis initialled a counter-offer at that price. The trial judge recounted what happened next:

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.

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.

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)

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.

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.

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.

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."

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. [At paras. 111-118; emphasis added.]

[13] Under the heading "Post-Contract Communications Between the Parties", the trial judge described various communications among Mr. Batal, Paramjit, his wife, the agent and Mr. De Cotiis. Paramjit contended that these indicated that Mr. Batal had not had Paramjit's authority to accept the offer for \$1.25 million on May 1 and thus no agreement was reached on that date. Again, I will not recount all the detailed factual questions considered and addressed by the trial judge. I do note, however, that she disbelieved Paramjit's denial that Mr. Batal told him he was meeting with Mr. De Cotiis on May 1 and that Paramjit's attempts during this period to "renegotiate an already agreed upon arrangement" accorded with a pattern of behaviour that was familiar to Mr. Batal. The judge also disbelieved Ms. Hothi's testimony that she had not received a copy of the signed agreement emailed to her by Mr. De Cotiis on May 12, nor brought the email to her husband's attention. (At paras. 136-7.) In cross-examination, Paramjit admitted that the May 12 email may have been brought to his attention. The trial judge continued:

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. [At para. 139; emphasis added.]

[14] There then ensued an exchange of emails concerning Paramjit's plans for the Property and related documents which Mr. De Cotiis wanted before the date for removal of the 'subjects' in the agreement. The trial judge stated:

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.

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.

On June 30, 2014, an action was commenced by Mr. De Cotiis to enforce the agreement for other damages.

In July 2014, Mr. 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. [At paras. 149-152; emphasis added.]

[15] The judge addressed a change in the position of the defendants concerning a meeting that had allegedly taken place at Nelson Avenue between Mr. Batal and Paramjit. At trial, both Paramjit and Gurdaver took the position that the meeting occurred on April 29; however, in closing submissions they adopted what the plaintiffs referred to as a "revisionist theory" that it took place on May 1 and that Paramjit in fact rejected the offer at that meeting. The trial judge noted that this theory was never put to Mr. Batal in cross-examination and ruled that it

offended the rule in *Browne v. Dunn* (1893) 6 R. 67 (H.L.). (At para. 157.) There was, she said, "essentially no evidence given on this point"; rather, the argument had been "reconstructed entirely from phone records. Without more, phone records on their own are insufficient." The judge continued:

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.

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[es] 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. [At paras. 162-3.; emphasis added.]

[16] After reviewing the evidence in detail, the trial judge agreed with the plaintiff that a contract of purchase and sale had been formed on May 1, 2014. (At para. 166.) This finding, she said, was informed by the history of the interactions between Mr. Batal and the Hothis before and after May 1, the fact that Paramjit was perennially very busy and "computer illiterate", the fact he had previously authorized his wife to initial important documents on his behalf, and the judge's expressed doubts concerning his credibility and that of his wife: see paras. 173-5. Finally, the defendants could not explain why Mr. Batal would have fabricated an agreement -- a possibility that would clearly not have advanced his relationship with Mr. De Cotiis or with Paramjit. (At para. 176.) Instead, Paramjit continued to deal with Mr. Batal in June 2014; in the judge's words:

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.

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. [At paras. 178-9; emphasis added.]

- [17] At the end of the day, the trial judge found at para. 180 that the evidence supported the conclusion that Paramjit had provided instructions to Mr. Batal to sell at \$1.25 million and that "[a]n 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."

Legal Issues

- [18] The Court then turned to address the larger issues of law or mixed fact and law that arose from the parties' pleadings and her findings of fact. The first questions concerned the beneficial ownership of the Marine Drive Property. The judge began with the statutory presumption created by s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250, that the person registered on title is the legal and beneficial owner of real property, subject to equitable principles, including the presumption of resulting trust. She correctly described the applicable law:

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. [At para. 182.]

It followed that Gurdaver was presumed to be the legal and beneficial owner of the Marine Drive Property unless he held it in trust. In that event, the presumption in s. 23(2) would be rebutted.

- [19] The purchase of the Marine Drive Property had been financed predominantly with proceeds from the sale of a previous property, "Westport", which had been held in the name of Paramjit's mother, Balbir. Paramjit testified that her intention had been to distribute the Westport proceeds as "gifts" to her sons so that they could each build separate homes. The judge rejected this argument, noting that the proceeds from the Westport sale had not been "gifted" to the mother's three sons; rather the proceeds remained in Balbir's bank account until investment opportunities had arisen -- a proposition affirmed by Gurdaver's testimony that his mother relinquished the funds only upon the purchase of the Property. (At para. 187.)
- [20] Nor was Gurdaver's position that he was the beneficial owner of the Property consistent with the Hothi family's pattern of living together for the past 27 years in one house and carrying on business together. Although Gurdaver contended that the Property was 'his house' and that he had directed Paramjit to buy it, he had not been aware of any of the negotiations or purchase details and conceded that it was Paramjit with Ms. Azarm and the other consultants who had dealt with the District of West Vancouver in trying to have the zoning changed. Gurdaver was not aware of the features of the Property itself, did not recognize it in the North Shore News ad and was unable to describe the kind of house he intended to build. In the end, the trial judge said, his testimony was "problematic and contradictory. His constant refrain was 'what do I know'. Overall, he was not believable." (At para. 193.)

[21] In these circumstances, the trial judge found that Gurdaver held legal title to the Marine Drive Property as a "bare trustee" for the Hothi family -- i.e., that he was obliged to convey the Property to the beneficiary or beneficiaries on demand; see Donovan Waters, Mark Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada* (4th ed., 2012) at pp. 33-4. This conclusion was bolstered by a consideration of transactions carried out by Diamond 11, the family company, and by Paramjit on behalf of the family over the years, as well as the family's pattern of placing legal title to properties in the name of an individual member so as to claim the principal residence exemption from income tax when the properties were sold. For example, the family had earned a gross profit exceeding \$2 million on the sale of the so-called Lonsdale property, yet the registered owner (Paramjit) had declared no such income and did not even disclose the sale in his income tax return. (At para. 197.) The judge also found that:

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.

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.

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. [At paras. 200-1, 203; emphasis added.]

In the end, she concluded that the funds for the Marine Drive Property had come entirely from the family enterprise and that accordingly, the Property was held for the family's benefit.

[22] This being the case, Gurdaver argued that Mr. De Cotiis' claim had to fail because the Court could not make orders affecting the beneficial interests of people who were not parties to the litigation. The trial judge rejected this argument, finding that Rule 20-3(10) of the Supreme Court Civil Rules permits the Court to make orders binding on beneficiaries where the trustees are named as parties in the litigation. The judge found that both Gurdaver and Paramjit represented the Hothi family in this litigation as their trustees. (At para. 211.)

[23] The Court next turned to the question of whether Paramjit had been authorized (by the Hothi family) to sell the Marine Drive Property. She correctly summarized the types of agency -- actual agency (which may be express or implied), which results from a "manifestation of consent" that the agent should represent or act for the principal, expressly or impliedly made by the principal to the agent himself; or apparent agency, which results from a "manifestation" made by the principal to third parties. After summarizing other basic features of the law of agency at para. 217, she considered whether Paramjit had been the agent for Gurdaver or for the Hothi family. The plaintiff argued that on the evidence, it was

clear that Paramjit had had actual authority from the family to sell the Property on May 1. (At para. 219.) Gurdaver submitted on the other hand that there was "no evidence" to support the plaintiff's claim that he, Gurdaver, had given express authority to Paramjit to enter the agreement of sale. However, the trial judge had already found that the Hothi family were the beneficial owners of the Property. Paramjit, the trial judge said, was also a principal, as well as the decision-maker and general spokesperson for the family in its business dealings.

[24] The judge concluded that in the circumstances of this case, Paramjit had had "either express or implied actual authority" to sell the Property on behalf of the family. As Mr. Griffin also pointed out, she stated in her summary of conclusions at para. 280 that Paramjit had had "both express and implied actual authority" to do so. (At para. 280(c); my emphasis.) In the Court's words:

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.

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.

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.

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 . 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. [At paras. 221-4; emphasis added.]

[25] In addition, the judge found that Paramjit had had apparent authority, which she noted can be found where the principal "creates a situation, by words or conduct, in which a reasonable inference of authority will be drawn and relied upon." (My emphasis; quoted by the trial judge at para. 227 from *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.* 2009 BCSC 1303 at para. 348.) Again as we have seen, the Hothi family had allowed the Property to be marketed by Paramjit, and consented to his placing a for sale sign on the property. He had entertained the offers and made counter-offers on at least two other occasions and handled zoning matters with the District and retained and instructed consultants with respect to the Property. (At para. 241.) Gurdaver admitted that he "left his brother to deal with the purchase in its entirety" and he himself took no action in respect of

the Property. (At para. 244.)

- [26] Paramjit's role was also corroborated by outside parties such as Mr. Yan, who had been a prospective buyer of the Property; and Ms. Azarm, who had taken all her instructions from him. In addition, this conclusion was consistent with the "ownership structure" normally used by the Hothis in order to avoid paying income tax when the property was resold. (At para. 247.)
- [27] In the result, the Court ruled that Paramjit had also had apparent authority and had been acting within the scope of that authority when he entered into the contract for the sale of the Property to Mr. De Cotiis. "He had done this before and was doing it again." (At para. 248.)
- [28] Another argument advanced by Paramjit and Gurdaver was based on the principle that a third party cannot hold a principal liable for the representations of an agent where the third party "was put on inquiry by the facts of the transaction." (See *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.* 2015 BCSC 787 at para. 81.) The defendants submitted that Mr. De Cotiis should have been put on notice when Mr. Batal told him in an email on the evening of April 29, 2014 that the "Seller late last night told me his brother said they now don't want to Sell." (My emphasis.) Further, prior to removing the "subject" clauses on June 5, Mr. De Cotiis had carried out a title search that indicated the Property was registered in Gurdaver's name. Nevertheless, the defendants contended, the plaintiff had proceeded to commence the litigation and sought to compel Gurdaver to sell, knowing there was "no contract to enforce". (At para. 256.)
- [29] Again, the trial judge did not accept this argument. For one thing, she found that the April 29 email was not by itself enough to put the plaintiff on notice. In her words:

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. [At para. 257.]

The judge distinguished *Coutinho* on the basis that the purchaser in that case had known it was dealing with a fraudulent seller "from the outset" and was prepared to go along. In the trial judge's analysis, the same evidence of bad faith "simply does not exist in this case." (At para. 258.)

- [30] The final issue in Mr. De Cotiis' action was whether specific performance of the agreement of purchase should be ordered in his favour. The judge confirmed that an offer, acceptance and consideration with sufficient terms had existed and that the agreement complied with s. 59(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. She accepted the plaintiff's argument that this was a "classic case" for the remedy of specific performance: no substitute was readily available and its unique features made it ideal for Mr. De Cotiis' mother. The zoning limitations, which required that any building be less than 2,500 square feet and on one level, made it very attractive to her, and by the same token, made it unattractive to others in the market. (Hence the comparatively low price.) Mr. De Cotiis' mother had looked at various

other areas in West Vancouver but none contained the same combination of attributes as the Marine Drive Property did.

- [31] Since at all material times, Mr. De Cotiis was ready, willing and able to perform the contract, the judge concluded that an order for specific performance should be made.

Claims of Negligence Against Realtor

- [32] Allegations of negligence were made against Mr. Batal and his agency ("AH") by Gurdaver in his responsive pleading to Mr. De Cotiis' claim and in a third-party notice; by Paramjit in a third-party notice; and in a separate notice of claim filed in October 2015 by Paramjit against Mr. Batal and AH. The judge stated that the "nub" of Gurdaver's claim in negligence against Mr. Batal was that the agent had "prepared and executed an unenforceable contract" -- an assertion the Court found not to be true. In addition, Paramjit claimed that Mr. Batal's retainer had been restricted to posting a sign on the Property and that he had breached his duty of care by signing documents without Paramjit's authority and misrepresenting to Mr. De Cotiis that he had the authority to do so.
- [33] The trial judge acknowledged that Mr. Batal had "not necessarily" followed all the norms of his profession; but after an extensive review of the documentary evidence and testimony, she concluded that Mr. Batal had been authorized by Paramjit to sell and initial the contract of sale. (At para. 273.)
- [34] In closing submissions, Gurdaver and Paramjit also alleged that Mr. Batal had "fabricated" an email and thus committed fraudulent misrepresentation and forgery. The trial judge noted that the forgery of an email would be a "highly technical exercise" generally requiring expert evidence and that no such evidence had been provided. The email in question, she observed, appeared to have been "sent in a normal manner. Without more, it was not possible to conclude that it had been forged. (At para. 275.)

Realtor's Claims

- [35] The judge turned finally to the fourth-party claims advanced by Mr. Batal and AH against the defendants -- that Paramjit, Gurdaver and Ms. Hothi had owed him a duty to exercise a reasonable standard of care in making representations to him about the Property. The judge agreed that some inaccurate information had been provided and that the Hothi defendants had "engaged in misleading activities." However, since she had found that Paramjit had had the authority to list and market the Property and that a valid contract had been formed with Mr. De Cotiis, she concluded that neither Mr. Batal nor AH had suffered any loss as a result of any misrepresentation. Accordingly, the Court dismissed these claims.
- [36] At para. 280, the trial judge summarized her findings as follows:
- 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. [Emphasis added.]

On Appeal

Paramjit's Appeal

[37] As mentioned earlier, three separate appeals arising out of the trial judge's orders were brought. Paramjit was the appellant in file nos. CA45865 and CA45863, and Gurdaver in CA45861. Paramjit raised two issues in his factum, namely:

1. Whether the trial judge, after hearing all the evidence, made any reviewable error in finding as a fact that Paramjit agreed to the sale of the Marine Drive Property to Mr. De Cotiis at a price of \$1.25 million.
2. Whether the trial judge's findings of fact and credibility are incompatible with evidence that was not otherwise contradicted or rejected by the trial judge such that the reasons are not sufficient.

[38] Mr. Underhill on behalf of Paramjit focussed on the Court's central finding in the case -- that as Mr. Batal testified, Paramjit had instructed him on May 1, 2014 to accept Mr. De Cotiis' offer to buy the property for \$1.25 million and that a binding agreement was thus created. Counsel submits that the trial judge failed to grapple with the question of Mr. Batal's credibility and that without having done so, she did not have adequate evidence to support the finding. Thus Paramjit sought an order that the issue be remitted back to the Supreme Court.

[39] Mr. Underhill took us to the trial judge's comments near the beginning of her reasons in response to the defendants' argument that Mr. Batal was "the most unreliable witness in this case". The Court responded thus:

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.

[At para. 34; emphasis added.]

[40] As seen above, the trial judge reviewed in detail the events of April 29, April 30 and May 1, 2014 leading up to Mr. De Cotiis' agreement to make an offer for \$1.25 million, the addition of another 'subject' clause, and Mr. Batal's conversation with Paramjit after Mr. De Cotiis left his office to give them privacy. It was at that time, the trial judge found, that Paramjit had authorized Mr. Batal to sign Paramjit's initials to the agreement on his behalf, and to initial the change in purchase price and the time of acceptance to May 1, 2014. Mr. Batal then sent an email to Mr. De Cotiis that evening and forwarded the initialed contract to him. The email ended, "Look forward to Subject Removal June 5, 2014." An hour later, Paramjit called Mr. Batal, following which Mr. Batal emailed Mr. De Cotiis asking him to let Mr. Batal know if he was able to remove the subjects earlier than June 5.

[41] The trial judge discussed various emails between Mr. Batal and Ms. Hothi on her husband's behalf in which it appears Paramjit said "he was still not changing his mind and that he wanted to build and then sell." (At para. 120.) Mr. Batal was anxious to assure the Hothis that \$1.25 million was the highest price possible and on May 5, he emailed Mr. De Cotiis stating, "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." (My emphasis.) As the trial judge observed, this email said that Paramjit would not "close", not that he would not "sell" at \$1.25 million. She accepted Mr. Batal's evidence that he had been trying to reassure Paramjit about the price and that he was familiar with Paramjit's "past behaviour of attempting to renegotiate an already agreed upon arrangement." For his part, Mr. De Cotiis, when asked by Mr. Batal if he could pay more, replied, "As you are aware, the property is under contract." (At para. 133.) Mr. Batal apologized for Paramjit's behaviour.

[42] The trial judge noted at para. 178 that Paramjit had continued to deal with Mr. Batal in May and June of 2014 -- something he would not likely have done if he were "upset or angry" with Mr. Batal or disputed the existence of the contract. Nor was there evidence that any of the other members of the Hothi family had denied the contract or provided notice to Mr. De Cotiis that Mr. Batal had not had the authority to sign it.

[43] Mr. Underhill submits that given the centrality of these findings, it was incumbent on the trial judge to "return" specifically to the issue of Mr. Batal's credibility, as she suggested she would at para. 34. Paramjit asserts in his factum, for example, that there were

inconsistencies between Mr. Batal's examination for discovery and his testimony at trial. In discovery he said he had received authorization from Paramjit on April 25 to sign the contract, but at trial he resiled from that position, explaining that he had reviewed the documentary record prior to trial and not before. There is no doubt that there was much confusion about the date on which the offers, counter-offers and final acceptance actually took place -- although clearly acceptance did not take place on April 25. But the judge went through the testimony and the various emails and phone call records, arriving at the May 1 date. In my view, she did "deal with Mr. Batal's credibility as necessary" throughout her analysis. That analysis was not uncritical and I do not agree that the judge was "distracted" by Paramjit's clear lack of credibility. Nor do I see any error in her rejection of the argument that Mr. Batal "fabricated" the agreement, taking a "calculated risk" in order to get more business from Mr. De Cotiis. I agree with the judge that a fabricated agreement would not have closed and that perpetrating such a fraud would not have advanced Mr. Batal's relationship with the plaintiff -- or with Paramjit.

[44] In summary, I am not persuaded the trial judge ignored, overlooked or misconceived evidence that bore on the question of whether an agreement was entered into, or that her reasons were insufficient to explain her findings of fact or of credibility. To the contrary, the judge carefully explored all the evidence and all the arguments that were put to her. As such, her findings are entitled to the deference reflected in the high standard of review expounded in *Housen v. Nikolaisen* 2002 SCC 33. I see no palpable or overriding error in the trial judge's findings or inferences of fact; nor am I persuaded that her reasons were inadequate or failed to deal with the important question of Mr. Batal's credibility. I would not accede to Paramjit's appeal.

Gurdaver's Appeal

[45] I turn next to the five grounds of appeal advanced by Gurdaver in his appeal, namely:

1. The trial judge erred in law in holding that Rule 20-3(10) of the Supreme Court Civil Rules permitted her to make an order binding on the sixteen trust beneficiaries where (i) all but two were not defendants, (ii) the bare trustee was not named in a representative capacity, and (iii) at least two of the beneficiaries were minors.
2. The trial judge erred in law in finding, in the absence of evidence, that the sixteen trust beneficiaries bestowed actual authority on Paramjit to sell their interests in the Marine Drive Property or, alternatively, in fact in making a finding not reasonably supported by the evidence.
3. The trial judge erred in law by failing to apply guiding authority from this Court and instead invoking apparent authority to enforce against undisclosed principals - the sixteen beneficial owners of the Marine Drive Property - a contract purportedly made by an agent lacking actual authority.

4. The trial judge erred in law by relying on extrinsic evidence to permit enforcement of the Contract against undisclosed principals in circumstances where Paramjit contracted as owner and not as agent.
5. The trial judge erred in law and in principle in dismissing Gurdaver's third party claim against Batal and AH Realty on a basis - that Gurdaver's complaint was that Batal made an unenforceable contract - that did not address the claim as pleaded.

Rule 20-3(10) of the Supreme Court Civil Rules

- [46] The first ground -- that the trial judge erred in her interpretation of Rule 20-3(10) -- rests on the assumption that the bare trust on which Gurdaver was found to be holding the Marine Drive Property had 16 beneficiaries -- i.e., Balbir, the three brothers, plus their spouses and children, most of whom were not parties to the litigation and some of whom (we are now told) are minors.
- [47] I note first that Mr. De Cotiis in his notice of civil claim had pleaded that Paramjit was the beneficial owner of the Property and that Gurdaver held title in trust for him; in the alternative, that Paramjit was the beneficial owner of the Property "along with other members of the Hothi family including Paramjit as part of the Hothi family business enterprise"; and in the further alternative, that Gurdaver was the beneficial owner and had given authority and control over the Property to Paramjit. In his Response to the claim, Paramjit pleaded that Gurdaver "was the sole legal and beneficial owner of the property," as did Gurdaver in his Response. Gurdaver also denied there was a Hothi family business enterprise of buying and selling real property subject to the control of Paramjit, and said he had permitted Paramjit to communicate with third parties only to assist Gurdaver in purchasing the Property.
- [48] The trial judge accepted Mr. Griffin's submission on behalf of the plaintiff that the Marine Drive Property was held on a resulting trust following what counsel aptly described as a "follow-the-money" analysis. She noted at para. 185 that the purchase of the Property (in Gurdaver's name) had been financed largely with proceeds from the sale of another property, "Westport". The funds were held in the bank account of Balbir, the mother of Paramjit and Gurdaver, until another investment opportunity came along. There was no evidence to suggest that family members other than Balbir and the three brothers had held any interest in the Westport property, or indeed that such members participated in the business of buying and selling real estate. Nor was there evidence that any of these members ever disclosed in a tax return any profit on the sale of real property held beneficially by them, or that their consents were required and obtained prior to a sale or purchase.
- [49] The trial judge found that the evidence "overwhelmingly" supported a finding that "the family acts as a collective through the eldest son [Paramjit]. Despite legal title being in [Gurdaver's] name, [Paramjit] clearly resumed this role as the family representative

throughout the course of the Marine Drive Property dealings." (At para. 200.) Indeed Mr. Griffin on behalf of Mr. De Cotiis argued, and the trial judge accepted, that the Hothi family's dealings with the Property was consistent with a "template" that involved financing property purchases by the family "collective", including the excavation company Diamond 11; placing the property in the name of one of the sons or their mother; and avoiding the payment of tax on the profits -- often substantial -- made on the resale.

[50] As to the identity of the members of the "collective" who were the beneficiaries of the resulting trust, and thus the principals to Paramjit's agency, we were referred to closing submissions made by counsel for Gurdaver in the court below. He said that even if Paramjit had had the authority to sell the Property "on Gurdaver's behalf" the agreement could not be "rectified" because there were too many alternatives for the Court to choose from in terms of the identity of Gurdaver's principals. In his words:

I simply point out that there are, in addition to Gurdaver and Paramjit, there's Balbir, who we say gifted the money to her various sons for different projects, but she's, on the plaintiff's theory, an additional beneficial owner; Harneck, the father; the company, Diamond 11, and some combination, as I understand the plaintiff's arguments, it's one or any combination of those or all of them that have the beneficial interest

[Emphasis added.]

Neither in the pleadings, nor in argument made below, nor in the trial judge's reasons were the spouses or minor children of the Hothi family mentioned as beneficiaries of any trust or as a source of any of the funds that were used to purchase the Marine Drive Property. In these circumstances -- and quite apart from the prejudice that the plaintiff would undoubtedly suffer -- I am not persuaded that we should entertain this new theory advanced by the defendants at this late stage of the litigation.

[51] Returning to Gurdaver's first ground of appeal, we are thus left with the assertion that the bare trustee was not named in a representative capacity, such that the trial judge could not have properly applied Rule 20-3(10) of the Supreme Court Civil Rules. That Rule provides:

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.

Gurdaver also cites Rule 3-1(2)(e), which provides that if a plaintiff is suing or a defendant is sued in a representative capacity, his or her notice of civil claim must show in what capacity the party is suing or is being sued. In Gurdaver's submission, there was nothing on the face of Mr. De Cotiis' notice of civil claim that purported to sue him or Paramjit in a representative capacity.

[52] With respect, I cannot agree. As we have seen, Mr. De Cotiis' pleading is replete with references to the Hothi family business enterprise, Paramjit's management and control thereof, and the existence of a trust for which title to the Marine Drive Property was held, either for the benefit of Paramjit, or the Hothi family. Questions of agency and trust occupied much of the trial judge's factual findings and legal analysis. I can see no error in her conclusion at para. 211 that Gurdaver and Paramjit represented the Hothi family in the litigation "as their trustees".

[53] I would not accede to Gurdaver's first stated ground of appeal.

Gurdaver's Second, Third and Fourth Grounds - Undisclosed Principal

[54] The second, third and fourth grounds of appeal advanced by Gurdaver all involve the trial judge's application of the law of agency to the facts of the case. It is said that the trial judge erred in finding that Paramjit had been given actual authority to sell the beneficiaries' interest in the Property or that that finding was not reasonably supported; that the trial judge erred in law by failing to apply guiding authority from this court which precluded invoking apparent authority to enforce against "undisclosed principals" (the beneficial owners of the Property); and that she erred in law by relying on extrinsic evidence to permit the enforcement of the agreement of sale and purchase against undisclosed principals "in circumstances where Paramjit contracted as owner and not as agent." These arguments were all formulated in Gurdaver's factum with reference to the existence of 16 trust beneficiaries, but I will nevertheless consider them as they apply to Paramjit, Gurdaver, Balbir and Harneck as the beneficiaries of the trust and as principals of Paramjit as agent. The arguments are also new insofar as they are based on a proposition that the Hothi family was an undisclosed principal of Paramjit.

The Finding of Actual Authority

[55] It is worth repeating here that the trial judge found that Paramjit had had both "express and implied actual authority", and in the alternative, apparent authority, to sell the Property on behalf of the Hothi family. (See para. 280 of the trial judge's reasons.) The finding that Paramjit had actual authority to sell the Property was based largely on the fact that without objection from the others and as "the eldest son of a family enterprise", he had been responsible for managing and negotiating contracts on behalf of the family; for managing the affairs of Diamond 11; and with the assistance of his wife had kept all business and financial records relating to the property transactions of the family. Indeed he had been the face of the family in its dealings with the Marine Drive Property. (See paras. 221-224.) As noted earlier, the trial judge found that in all the circumstances it was "inconceivable" that the other "close-knit members" of the Hothi family, all of whom live together in the same house, had not known about or provided actual authority to Paramjit to sell the Property. (At para. 224.)

- [56] The trial judge referred to this court's decision in *Keddie v. Canada Life Assurance Co.* 1999 BCCA 541 regarding both actual and apparent authority. The Court in that instance echoed the principle advanced in *Bowstead on Agency* (15th ed., 1985) at 92, that while actual authority (which may be express or implied) results from "a manifestation of consent" made by the principal to the agent himself, apparent authority results from such a manifestation made by the principal to third parties. (At para. 226.)
- [57] The trial judge also referred to *Rockland Industries, Inc. v. Amerada Minerals Corporation of Canada* [1980] 2 S.C.R. 2, which in turn had referred to *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480 (C.A.). In *Rockland Industries*, the Supreme Court of Canada went on to adopt this passage from *Freeman*:

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. [At p. 15 of *Rockland*; emphasis added.]

- [58] The defendants argued that mere acquiescence by family members in the purported agents' conduct of business does not amount to a grant of apparent authority and that it is common for family members to assist other members with the purchase or sale of a property. The judge found, however, that these arguments did not reflect the reality of Paramjit's "instrumental role as the primary representative within the family business", which was most clearly demonstrated by his involvement in the purchase and sale of Hothi family properties in the past. (At para. 234.) The judge reviewed his dealings with the Marine Drive Property, including the evidence of independent witnesses such as Mr. Yan and Ms. Azarm. Paramjit's conduct contrasted with Gurdaver's complete inaction -- notwithstanding that he was the registered owner. Again, the judge referred to the "ownership structure" utilized by the family to avoid the payment of tax. As I read her reasons, she therefore found apparent authority arising from the family's creation of a situation, by words or conduct, from which an inference of authority could reasonably be drawn. (See *Le Soleil*, quoted at para. 227 of the judge's reasons.)
- [59] The defendants submit that the facts here do not support a finding of either actual or apparent authority and that the Court's statement to the effect that it was inconceivable that the other members of the family did not provide actual authority, was "speculation" (in the sense of arising only out of the imagination) or conjecture. Gurdaver says that at the least, this was an error of fact that was grounded only in the judge's adverse credibility findings against the defendants. In counsel's submission, there were simply no "positive proven facts (from documents or testimony)" that showed the beneficiaries had been aware of and authorized Paramjit to enter into the agreement of sale.

[60] In terms of law, Mr. Dennis referred us to three cases dealing with actual authority and three dealing with apparent authority -- although not surprisingly, these cases overlapped somewhat. Beginning with actual authority, Mr. Dennis cited *Crampsey v. Deveney* [1969] S.C.R. 267, which reversed a decision of the Ontario Court of Appeal reported at [1967] 1 O.R. 547. The defendant in that case was a widow who together with her three children as joint tenants had inherited certain property from her husband in 1943. She assumed management of the property by collecting rents and paying taxes, etc., and on occasion distributed some rent proceeds she had collected, to her children. In 1960, she listed the property for sale and eventually signed an agreement to sell to the plaintiff Mr. Deveney. When she sent the agreement to her lawyer to "carry through" the transaction, he discovered that she had only a one-quarter interest. He prepared a deed for signature by the all four joint tenants. The children refused to sign. In the Court of Appeal, the majority agreed with the trial judge that the conduct of the three children, who had "abstained from showing any interest in the property", had in the words of *Spencer Bower and Turner in Estoppel by Representation* (2d ed., 1966), justified the purchaser's believing that "a certain state of facts existed" and that the purchaser had acted on that belief to his prejudice. In these circumstances the children were "not permitted to affirm against [the purchaser] that a different state of facts existed at the same time." (At 5.)

[61] On further appeal, however, the dissenting opinion of McGillivray J.A. was adopted: Judson J. stated for the Supreme Court of Canada:

When Deveney made his offer, all that he knew was that a certain person had listed for sale a 14-acre property at a price of \$4,000 per acre. He knew nothing of three other persons who were interested in the property and whom he seeks to bind by his contract. They made no representations to him. I agree with McGillivray J.A. that their silence and inaction after all three had learned of the contract cannot be built up into a representation by them to the purchaser that their mother had authority to sell their interest in the property. Silence and inactivity in the circumstances of this case are not a representation to a third party that their mother had authority to sell.

It was also argued that the silence of the three children amounted to ratification of their mother's act. Only the trial judge made a finding of ratification. I agree with the Court of Appeal that ratification cannot be found on the facts of this case. The silence and inactivity are not evidence of approval and adoption of the contract but rather of disquiet disapproval and ignorance of rights and, in the case of one of them, lack of knowledge that a contract had been made. [At 271; emphasis added.]

[62] *Mason Estate v. Mason* 1999 NSCA 63 concerned a deed of land granted in 1875 by Peter and William Mason in favour of one Barton. The heirs of the Masons claimed that no title had passed by virtue of the 1875 deed. It was then argued that the Masons had had the power to manage the lands on behalf of all the Mason heirs and that because of the "leadership role" taken on by Peter Mason, it was reasonable to infer he had had the power to sell to Barton. The trial judge found there was sufficient evidence to draw this inference, but the Court of

Appeal disagreed. In the words of Flinn J.A. for the Court:

Absent any written, and signed, authorization, I know of no judicial authority which permits the court to infer - in circumstances such as these - that Peter Mason had the authority to convey away the legal title of the other heirs at law. Without written documentation it cannot be determined if all of the heirs gave the authorization, when that authorization was given, and the precise terms of that authorization. Further, in this particular deed, Peter Mason does not even purport to be dealing with the interests of the other heirs. He is not described in the deed as acting in any representative capacity, and did not sign the deed other than as "Peter Mason". [At para. 16; emphasis added.]

I note that these comments seem to run contrary to the notion, ensconced in various texts regarding agency, that actual authority can be inferred from conduct and does not necessarily require a written document or even an explicit representation: see G.H.L. Fridman, *Canadian Agency Law* (3rd ed., 2017) at §. 3.10-3.13; C. Harvey and D. MacPhersin, *Agency Law Primer* (4th ed., 2009) at 19; Fridman's *Law of Agency* (7th ed., 1996) at 62-3; Bowstead and Reynolds on *Agency* (2018) at §. 3.041-3.042.

[63] A more recent case to which we were referred was *Swift v. Tomecek Roney Little & Associates Ltd.* 2014 ABCA 49. There, the plaintiffs Mr. and Ms. Swift, the owners of certain property on Vancouver Island, engaged an architectural firm to design a home for them. Mr. Swift entered into an agreement with the architectural firm which contained a limitation of liability clause for any claims the "Client" might have against the "Designer". Ms. Swift was not a party to the agreement. When the home was built, concerns arose concerning the seismic aspects of the architect's design and the architect was asked to redo the design in compliance with the applicable building code including seismic design requirements. Unfortunately, there were "serious deficiencies" in the seismic design and the Swifts filed claims against both the architects and the engineers, with Mr. Swift claiming in contract and tort and Ms. Swift claiming only in tort. The trial judge held that Ms. Swift as well as her husband were bound by the limitation clause, on the basis that in signing the architectural agreement, Mr. Swift had been acting "both on his own behalf and on behalf of Ms. Swift".

[64] The Court of Appeal found, however, that the trial judge had erred in law. In the Court's analysis:

No argument on apparent authority was advanced. It was not suggested that Ms. Swift had held out to the Architects that her husband was acting as her agent, and no evidentiary basis for that argument can be found in the record.

Having concluded that there was no express authority one can only assume that the trial judge found there was implied authority based on the parties' conduct. This is an error in law. As noted above, implied authority is normally incidental to express authority. Implying this type of authority based on conduct is inherently problematic in the absence of clear and unequivocal evidence to support it. Why this is so is highlighted by considering the conduct used to establish the purported agency relationship here. [At 29-30; emphasis added.]

The Court went on to note that marriage and/or cohabitation could not without more give rise to an agency relationship and that any argument to the contrary was anachronistic. Nor was there clear evidence of Mr. Swift's "typically" signing documents on his wife's behalf; indeed the evidence contradicted the existence of a "practice". (At para. 34.) The Court concluded on this point:

From a policy perspective, relying on equivocal conduct to impose legal liability in the face of a contract is problematic. Inferences are subjective and lead to uncertain results, all the more so when inferences are used to contradict the express terms of an agreement. [At para. 36.]

Analysis of Actual Authority

[65] Gurdaver relies on Crampsey, Mason and Swift to argue that the trial judge's finding of actual authority revolved around Paramjit's role in the family business, prior property transactions, and his relationship with Mr. Batal as the listing agent for the Marine Drive Property. Counsel describes as "speculation" the judge's conclusion that it was "inconceivable" the other members of the Hothi family did not know about or provide actual authority to Paramjit to sell the Property. (Since I have already concluded for these purposes, the "Hothi family" meant Gurdaver, Paramjit, Balbir and Harneck rather than the 16 beneficiaries contended for by Gurdaver, it is not necessary to include those others in this analysis.) It is said the judge's finding relies on unsupported assumptions regarding "family dynamics" just as occurred in Swift, and is unreasonable or unsupported by the evidence.

[66] In response, Mr. Griffin on behalf of the plaintiff argued that determining whether actual authority has been given is a fact-specific exercise. As stated in *Keddie v. Canada Life*, the scope of the authority is 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." (At para. 23; quoting from the 15th edition of Bowstead.) Counsel referred to the most recent edition of Bowstead (2018) where the authors state:

The types of authority indicated in Articles 27 to 31 do not exhaust the notion of implied authority, for it is clear that over and above authority to do incidental acts, the acts usually performed by a person holding the positions in question, the acts usually performed by a person following the agent's particular profession or occupation, and authority to follow usages customary in the place, market or business concerned, an agent may have an authority peculiar to himself implied from the circumstances of the particular case. The question as to implication

does not stop at the matters previously mentioned, but goes on to consider action of the whole circumstance's of the agent's position. [At §. 3-042.) [Emphasis added.]

[67] Further, it is said that in contrast to the authorities relied on by Gurdaver, there was in the case at bar ample evidence from which the trial judge could infer that Paramjit had actual authority. In Mr. Griffin's submission, the trial judge did not find actual authority merely because Paramjit and Gurdaver were brothers; nor was that fact the basis of the bare trust she found for the benefit of the Hothi family. In the case at bar, a family business existed which was actively carried on for the benefit of the family by the eldest son, who spoke English and was able to deal with the complexities of an operating enterprise and the buying and selling of real estate. Paramjit's actual authority was manifested by the fact that he had bought the Property, dealing with the seller (the District of West Vancouver) directly, seeking the rezoning changes, and making offers and responding to counter-offers. This was not, then, the "silence and inactivity" that had been present in Crampsey. It was also Paramjit who directed that the Property should be assigned to Gurdaver to hold for tax purposes, in accordance with the tax-avoidance mechanism used in connection with other properties, including Westport and Lonsdale. (See paras. 196, 203.)

[68] I agree with counsel for Mr. De Cotiis that there was evidence from which actual authority could reasonably be inferred, and that this case is qualitatively different from cases such as Crampsey, Mason and Swift. Here we have positive evidence of Paramjit's acting as the 'head' of the family business in many transactions and many contexts aside from the sale of the Marine Drive Property. I see no error in the judge's conclusion that Paramjit had actual authority from the Hothi family (i.e., Gurdaver, Balbir and Harneck as well as Paramjit himself) to deal with the Property, including by agreeing to sell it to Mr. De Cotiis as he did on May 1, 2014. As Mr. De Cotiis states at para. 74 of his factum:

As set out in paragraph 25, above, every other person who put money into the purchase (Balbir and Harnek) not only knew about the litigation, but were also active participants in it. Regardless, there would have been no difference in the outcome had they been named parties - all would have denied that they had any interest in the property, and peddled the false narrative that it was Gurdaver's alone. There would have been no difference in the evidence as to whether there was a contract.

Apparent Authority

[69] I turn next to the case authorities cited by Mr. Dennis on behalf of Gurdaver on the issue of apparent authority. All of them involved a so-called "undisclosed principal", a concept that was not raised at trial, and that counsel did not attempt to define on the appeal. Professor Fridman in *The Law of Agency* (7th ed., 1996) suggests that an undisclosed principal exists only where neither the identity of the principal nor the fact the agent is acting on someone's behalf, is known by the third party.

- [70] The first case was *Sign-O-Lite Plastics Ltd. v. Metropolitan Life Insurance Co.* (1990) 73 D.L.R. (4th) 541 (B.C.C.A.) lve to app. ref'd. [1990] S.C.C.A. No. 466. It was a breach of contract case which was complicated by the fact that various corporate parties had purported to sign a rental agreement and then assigned rights to other related corporate parties. Ultimately, the cross-appeal turned on whether an undisclosed principal could be held liable for the unauthorized acts of its agent.
- [71] The authority usually relied on for an affirmative answer was *Watteau v. Fenwick* [1893] 1 Q.B. 346, which contradicted a decision of the Judicial Committee of the Privy Council in *Miles v. McIlwraith* [1883] 8 A.C. 120. *Watteau* had been the subject of academic criticism and had been described as "dubious" by the authors of *Bowstead on Agency* (15th ed., 1985). Speaking on behalf of this court in *Sign-O-Lite*, Mr. Justice Wood suggested that it was time to "end any uncertainty which may linger as to its proper place in the law of agency". (At 548.) The Court endorsed the rule applied in *Miles v. McIlwraith* to the effect that an undisclosed principal is "not bound by a contract entered into by his general agents, who acted in excess of their authority, because there is no evidence to show that the third party knew of the existence of the agency." (At 546.)
- [72] As counsel pointed out, *Sign-O-Lite* was not mentioned by this court in a very different case, *Willoughby Residential Development Corp. v. Bradley* 2002 BCCA 321. It involved a family property that the defendant, Ms. Bradley, had purported to sell to the plaintiff Willoughby. Her brother, however, had filed a CPL prior to the sale, and purported to be a half-owner of the property. As the Court noted at para. 24, the brother had concealed his contribution to the purchase of the property for 20 years and had allowed his sister to take the registered title in her name alone after the death of their parents and had let her manage the property "as if she were the only owner". Willoughby had relied on her apparent authority to his prejudice. The Court held that the balancing of the equities estopped the brother from denying his sister's authority to make a binding contract with Willoughby. Speaking for the Court, Mr. Justice MacKenzie) reasoned:

The principle in *Rimmer v. Webster* [[1902] 2 Ch. 163] was approved in the context of a Torrens System by the Privy Council in *Abigail v. Lapin*, [1934] 3 W.W.R. 689. Lord Wright quoted with approval (at 694) the conclusion of Gavin-Duffy and Stark JJ. in the court below as follows:

In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons and they ought to be postponed to the equitable rights of [the transferee]

That conclusion is apposite here. The appellant armed his sister with "the power to go into the world as the absolute owner of the lands." He is thereby estopped from denying a contract for the sale of the property negotiated by the purchaser in good faith and thereafter acted upon by the purchaser to his prejudice without knowledge of the appellants claimed interest. The judgment of this Court in *Stonehouse v. A.G.B.C.* (1960), 26 D.L.R. (2nd) 191 accords with this conclusion. The

result will be that the appellant's interest in the property is converted to an interest in the proceeds of sale. [At para. 27; emphasis added.]

[73] Finally under this rubric, we were referred to *Sihota v. Soo* 2010 BCSC 886, in which Bruce J. noted that this court had not followed Sign-O-Lite in *Willoughby*. She reasoned that:

The principle of apparent authority relied upon in *Willoughby* is consistent with *McLaughlin*, a decision of the Ontario Supreme Court relied upon by Mr. Soo. While in that case the undisclosed principal was not liable on the agent's contract, there was no evidence that the undisclosed principal held out the agent in any way as having the authority to enter into the contract on his behalf. Evidence of a "holding out to the world" is really the distinguishing factor between these two B.C. Court of Appeal judgments. In *Sign-O-Lite Plastics Ltd.*, the undisclosed principal did nothing to clothe the agent with the indicia of authority to enter into the contract whereas in *Willoughby* the opposite was true. [At para. 42; emphasis added.]

In the result, the defendant Mr. Soo was found to have clothed his co-defendant with "all the indicia of ownership and thus the ostensible authority to deal with the property as its sole owner." (At para. 46.)

[74] Mr. Dennis submits that *Willoughby* and *Sign-O-Lite* are conflicting authorities of this court and that accordingly, the later of the two, *Willoughby*, should be regarded as having been decided *per incuriam* -- a result also favoured by academic comment concerning *Sign-O-Lite*. Professor Fridman, for example, in *Canadian Agency Law* (3d ed., 2017) suggests:

The better view would appear to be that neither implied nor apparent authority can be invoked and made to apply where an agent acts for an undisclosed principal. As previously noted, an undisclosed principal cannot validly ratify an unauthorized contract made by the agent so as to entitle the principal to sue on it. All of this would seem to indicate that an undisclosed principal will only be bound by, or be able to claim under, a contract entered into by an agent acting with express authority. [At §. 6.50; emphasis added.]

[75] Given the trial judge's conclusion that *Paramjit* had actual authority, it is not necessary for us to rule on whether the trial judge was also correct in finding apparent authority in this instance. This is not the best case in which to attempt to reconcile *Sign-O-Lite* and cases such as *Sihota* and *Willoughby*, *supra*. I will say, however, that I have considerable doubt as to whether *Paramjit* was an "undisclosed principal" in the usual sense. For one thing, the Property was registered not in *Paramjit*'s name, but in *Gurdaver*'s; thus some form of trust or agency was to be expected. The family business was obviously not secret, since all its adult members were involved in it. *Paramjit* himself had told outside parties on occasion that he had to consult his brother before making a particular decision, and he worked regularly with the other brothers in the family business.

[76] The existence of the resulting trust for the benefit of the Hothi family was one way to characterize the family's inter-related dealings, and was consistent with the law of resulting trust, but the relationship might also have been described as a partnership to which each of the four members contributed labour and money. In any event, the facts of this case are quite different from (and more complicated than) the facts in the authorities to which we were referred. In particular, none of the foregoing cases involved any "holding out" by the principal of the agent's authority; and as noted in the plaintiff's factum, there are strong equities in this case that militate in favour of the enforcement of the contract of sale against the Hothi principals (and beneficiaries).

Parol Evidence Rule

[77] Another argument raised at this late point in the litigation is that the trial judge should not have relied on extrinsic evidence "to permit enforcement of the Contract against undisclosed principals in circumstances where Paramjit contracted as owner and not as agent." As best I can unpack this ground, it is that since Paramjit did not indicate in the written document that he was signing (via Mr. Batal) as the agent of the Hothi family, external evidence cannot be used to add a term to that effect. Put another way, the plaintiff is precluded from adducing extrinsic evidence to prove the existence and identity of the principals, thus contradicting the written document.

[78] In support, counsel cited *Katzman v. Ownahome Realty* [1924] S.C.R. 18, where at the highest appellate level the appellant raised a similar argument. The Court acceded to it with some reluctance. Mignault J. stated, for example, that

The appellant, for the first time, raised the objection in this court that the respondent cannot by parol evidence contradict the agreement in writing produced by it in support of its action and shew that the appellant's wife made this contract on the appellant's behalf.

To my regret, because this objection should have been made earlier, I find myself constrained to hold that it is well taken. In other words, where a plaintiff produces and relies upon an agreement which was entered into by a third person as principal, parol evidence is not admissible to shew that such person contracted merely as the defendant's agent. *Humble v. Hunter* (1); *Formby Brothers v. Formby* (2).

There is no possible doubt that the appellant's wife signed the agreement as principal, and only by contradicting it could the respondent establish its right of action against the appellant. This it cannot do. [At paras. 33-5.]

- [79] Again, it seems to me, with respect, that Katzman does not apply, given the trial judge's finding that the "agreement" here was an oral one that was later "memorialized" in writing and signed by the vendor. (At para. 262.) As observed in *King v. Operating Engineers Training Institute of Manitoba Inc.* 2011 MBCA 80, "[i]f the Court finds that the contract is partly in writing and partly oral, the problem of the parol evidence rule does not arise because the rule is not applicable." (At para. 38.)
- [80] In addition, many exceptions to the parol evidence rule have received judicial blessing since Katzman was decided. Most notably, this court in *Gallen v. Nunweiler* [1984] 9 D.L.R. (4th) 496, lve. to app. ref'd S.C.C.A. No. 171, observed that there is a "myriad of exceptions" to the rule, including where the evidence is necessary to "demonstrate the factual matrix of a thing" or to "support a claim for an equitable remedy such as specific performance on any ground that supports such a claim in equity, including misrepresentation of any kind." (At para. 35.) I would suggest that evidence of the relationship between Paramjit and his family may be legitimately considered on both bases -- assuming that it is open to Paramjit to advance the parol evidence rule in defence to a claim for enforcement of the agreement when it was he who purported to be the owner of the Property in the first place. Here, unlike the situation in Katzman, it cannot be said that Mr. De Cotiis must contradict the written document in order to establish his right of action. Rather, the document is explained by the extrinsic evidence of agency.
- [81] It follows that I would dismiss the second, third and fourth grounds of appeal advanced in Gurdaver's factum.

Claim Against Mr. Batal and AH Realty

- [82] Finally, Gurdaver submits that the trial judge erred in law and in principle in dismissing his third-party claim against Mr. Batal and his agency on a basis that did not address his claim as pleaded. It will be recalled that the trial judge, at paras. 274-5 dismissed claims advanced in closing submissions at trial of fraudulent misrepresentation and forgery as against Mr. Batal and AH. As she noted, the parties by this time had closed their respective cases and in any event, without expert evidence of some kind, it was not possible on the evidence to conclude that the allegedly forged email was anything but normal.
- [83] With respect to Gurdaver's claims of negligence against the third parties, the trial judge observed that the nub of that argument was that Mr. Batal had prepared and executed an unenforceable contract for purchase and sale. She had found this was not the case and therefore dismissed the claim in negligence. (At para. 271.)
- [84] Gurdaver argues in his factum, however, that even though the trial judge found the contract to be enforceable, there still remained allegations that required adjudication. Gurdaver stated in his third-party notice:

9. Neither Paramjit, Batal or any other agent or representative of Angell Hasman had any authority from Gurdaver to offer the Property for sale, accept offers for the purchase of the Property from De Cotiis or from any other potential buyer, or to negotiate a price or any terms for the sale of the Property, nor has Gurdaver ever communicated with De Cotiis.
10. If De Cotiis is entitled to specific performance of the purported Purchase Agreement, which is denied, or in the alternative, if Gurdaver is liable in any way in respect of damages, that liability results from the actions of Batal and Angell Hasman.

It is said that Gurdaver is entitled to damages as against the third parties, which could be measured by the loss of value of the Property as well as wasted expenditures on the Property and carrying costs.

[85] It does not appear that these claims are advanced by Gurdaver as the bare trustee of the property, nor as a representative of the Hothi family (of which, of course, Gurdaver is one). It seems to me that on the facts as found by the trial judge -- i.e., her conclusions that Gurdaver was simply a bare trustee of the Property in accordance with the family's tax-avoidance scheme and that the Property was held in trust for the Hothi family as represented by Paramjit -- there is no basis on which Gurdaver could advance a personal claim for damages against the agent. Again, it is clear on the facts that Gurdaver had been aware of Paramjit's purchase of the Property, his listing it for sale and authorizing the erection of a for sale sign, and his dealings with Mr. De Cotiis through the agent. It will also be recalled that the trial judge found it was "inconceivable" that the beneficiaries of the trust (who were also the principals of the agency of Paramjit) would have been unaware of what was going on. Neither defendant has shown any palpable or overriding error in the trial judge's conclusions on this point; nor has any error of fact have been shown that would affect the outcome of the case.

Disposition

[86] In the result, I would dismiss the appeals, with thanks to all counsel for their able submissions.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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