

CANADA / JUDGMENT

Dhaliwal v. Ollek

2010 BCSC 1524

COURT

Supreme Court of British Columbia

DECIDED

29 October 2010

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2010 BCSC 1524 Dhaliwal v. Ollek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhaliwal v. Ollek,

2010 BCSC 1524

Date: 20101029

Docket: S91749

Registry: New Westminster

Between:

Kuldip Singh Dhaliwal

Plaintiff

And

Joginder Olleck, also known as Joginder Olleck

also known as Joginder Ollek, and

Jaswinder Olleck, also known as Jaswinder Kaur Olleck

also known as Jaswinder Ollek

Defendants

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff:

Janet J. Wingson

Aleksandra S. Rennebohm

Counsel for the Defendants:

David A. McMillan

Place and Date of Trial:

Vancouver, B.C.

June 21-25, 2010

June 28-30, 2010

October 15, 2010

Place and Date of Judgment:

New Westminster, B.C.

October 29, 2010

Introduction

- [1] The plaintiff, Kuldip Dhaliwal, contributed money towards the purchase of property registered in the names of the defendants, Joginder and Jaswinder Ollek[1]. He claims an interest in the property. The defendants, who are husband and wife, say the money they received was a gift from Mr. Dhaliwal's wife, since deceased, Balwinder Dhaliwal. Balwinder Dhaliwal was the sister of Mrs. Jaswinder Ollek. The Olleks also contributed money towards the purchase of the property.
- [2] The arrangement between the parties was entered into absent written contract or prior legal advice, as is all too common amongst close friends and relatives. Unfortunately as is also too common, this has led to this litigation and no doubt has ruined the relationships.

Uncontroversial Facts

- [3] The evidence establishes the following facts, which, for the most part, are uncontroversial.
- [4] Mr. Dhaliwal and his wife, Balwinder, married in June 1977. They were married for approximately 25 years before Balwinder died on June 7, 2003. She was 44 years of age when she died. In 1980, Mr. Dhaliwal bought his present home located on Cambie Road in Richmond. This home was purchased together with a partner, Mr. Cheema. In 1987, Mr. Dhaliwal bought out his partner's share.

- [5] In around 1996, the Dhaliwals started the business DBK Enterprise. This business was owned solely in Mrs. Dhaliwal's name. However, both husband and wife worked in the business, which supplied labour to local farmers. Only Mrs. Dhaliwal had signing authority in the company. This business became the primary source of income for both of them.
- [6] Over time, the couple also purchased investment property: a house in Delta and a property on 133rd Ave. in Surrey, BC. The Dhaliwal's used the same realtor for both purchases, Mr. Hammit Sekhon.
- [7] Mrs. Ollek is the younger sister of Mrs. Dhaliwal. She and her husband live near Kamloops, B.C. They have a nursery and landscaping business.
- [8] In around 2000, the Olleks became interested in purchasing investment property. Mrs. Ollek discussed it with Mrs. Dhaliwal and Mrs. Dhaliwal began looking for properties for them in the Vancouver area. The Olleks went so far as to put an offer on a property in 2001. However, they did not follow through with that offer because the rent payments did not cover the required mortgage payments.
- [9] In June 2001, the Olleks' oldest son, Sandeep, passed away at age 13. Mrs. Ollek was emotionally crushed by her son's death and had a difficult time coping. Her sister, Mrs. Dhaliwal, tried to help her cope.
- [10] By contract of purchase and sale dated May 5, 2002, Mr. Dhaliwal put in an offer to purchase the property that is the subject of this lawsuit. The property address is 17267 - 64th Avenue, Surrey, B.C., V3N 1Y6 (the "Property"). The legal description is Lot G, LD 36, Section 18, Township 8, Plan 12603. Mr. Hammit Sekhon was the realtor.
- [11] An addendum to the contract of purchase and sale of the Property stated: "seller is aware that there will be other family members on title at completion time".
- [12] The purchase price for the Property was \$318,000. A deposit of \$20,000 was required upon removal of subject conditions. The subject conditions were to be met by May 25, 2002. The purchase of the Property was to complete on July 15, 2002.
- [13] As of the date of the offer to purchase the Property, the Dhaliwals had very little cash in their bank accounts. However, the Olleks had received insurance funds of approximately \$60,000 in October 2001, related to their son's death.
- [14] On May 25, 2002, Mr. Dhaliwal signed an addendum to the contract of purchase and sale of the Property, removing the subject conditions from the earlier purchase contract. This was faxed to Mr. Ollek and he signed it as well.
- [15] On May 25, 2002, the same date, Mrs. Dhaliwal wrote a cheque to the realtor for \$20,000 as the deposit for the purchase of the Property. At the time, she only had approximately \$400 in the bank account on which she wrote the cheque. However, before the cheque cleared, on May 27, 2002, she received a transfer of funds of \$20,000 from her sister, Mrs. Ollek. The money was transferred from an account held by Mrs. Ollek and her son, Bevan. The money

was transferred to an account held by Mrs. Dhaliwal and her mother, and then transferred to the account on which Mrs. Dhaliwal had written the cheque. One of the issues in this case is who contributed the \$20,000 towards the purchase of the Property.

- [16] In June 2002, Mrs. Dhaliwal became seriously ill and was admitted to hospital for four or five weeks. Eventually her illness was diagnosed as terminal liver cancer.
- [17] In early June, Mr. Dhaliwal cashed in three investments held in his name by Manulife Financial, totalling \$28,056.08, which he deposited into his bank account. As well, in early July, Mr. Dhaliwal cashed in another Manulife investment for \$24,955.79 and also deposited it into his bank account.
- [18] On the same day as the deposit of the Manulife cheque in July, Mr. Dhaliwal deposited \$25,000 worth of cheques into his same bank account. Three of these cheques were from the family business, DBK. One of these cheques, in the amount of \$3,000, was from the joint account of his wife and mother. All of these cheques were signed by Mrs. Dhaliwal.
- [19] With all of these deposits in his bank account, as of July 12, 2002 Mr. Dhaliwal had just over \$70,000 in his bank account. He then obtained a bank draft in the amount of \$65,000 from the funds in his account, payable to Naib Brar. Mr. Brar was the notary who was taking care of the purchase of the Property.
- [20] In the meantime, the Olleks had arranged for mortgage financing. This mortgage financing was in part based on the fact that there was a tenant in the Property paying rent of \$1,200 per month.
- [21] On July 10, 2002, the Olleks' bank made a mortgage loan commitment to them for the amount of \$205,000, due on July 15, 2002. The monthly payment on that mortgage was to be \$1,233.46.
- [22] Apparently the Olleks' bank knew that the Olleks did not have the cash to complete the purchase and would be obtaining funds from another source. I say "apparently" because no witness from the bank was called. However, the Olleks say that the bank gave them a form letter entitled "gift letter" to have completed.

[23] The gift letter stated as follows:

GIFT LETTER

TO WHOM IT MAY CONCERN

This letter confirms that the undersigned is making a financial gift of \$_____ to Joginder S. Ollek for use toward the purchase of the property located at 17267 - 64 Avenue, Surrey, B.C., V3W 1Y6.

We, the undersigned Recipients and Donors hereby certify that:

- a) these funds are a genuine gift from the Donors, and don't ever have to be repaid, and

- b) no part of the financial gift is being provided by any third party having any interest (direct or indirect) in the sale of the subject property, and
- c) the Donor is an immediate family member.

Recipients

Name Joginder S. Ollek

Signature [signed]

Date July 6, 2002

Donors

Name Balwinder Dhaliwal

Signature [signed]

Date July 6, 2002

[24] The gift letter was signed by Mr. Ollek on July 6, 2002.

[25] Mrs. Ollek took the letter to Mrs. Dhaliwal, where she was in the hospital, and had her sign it also on July 6, 2002. The amount of the purported gift was never filled out and Mr. Dhaliwal was never shown or given a copy of the letter.

[26] By the date of the closing of the purchase of the Property, July 15, 2002, the Olleks had calculated that they could reduce the mortgage loan to \$190,000, which was done. They provided cheques to Mr. Brar in the amounts of \$22,000.00, \$500.00 and \$28,000.00 respectively, totalling \$50,500.00.

[27] The purchase of the Property completed on July 15, 2002 with the Property being registered in the names of Mr. and Mrs. Ollek. Funds used to purchase the Property included the \$20,000 deposit; the \$65,000 cash from Mr. Dhaliwal; the \$50,500 cash from the Olleks; and the mortgage proceeds. The total cost to purchase, including adjustments for taxes, was \$324,702.

[28] A joint account was set up in the name of the Dhaliwals' son, Mandip Dhaliwal, and Mrs. Ollek. Mandip was enlisted to collect the rent from the tenant each month and deposit it in the account. This account was then used to meet the monthly mortgage payments, which were in the amount of \$1,143.21.

[29] In September 2002, a realtor, Bob Dhaliwal (no relation to the plaintiff), contacted the Olleks to see if they were interested in selling the Property. Mr. Ollek directed him to speak to Mr. Dhaliwal about it.

[30] Sometime in the early fall of 2002, Mrs. Dhaliwal went to the Mayo clinic with her daughter and Mrs. Ollek. Her health did not improve.

- [31] After negotiations with Mr. Dhaliwal, the potential purchaser represented by the realtor, Bob Dhaliwal, made an offer on the Property on April 9, 2003. A deposit of \$5,000 was made payable to the Olleks but given to Mr. Dhaliwal to deliver to them, and he signed a receipt for it. The offer to purchase the Property was made by Oak Park Homes Ltd. ("Oak Park").
- [32] Mrs. Dhaliwal died on June 7, 2003. On June 13, 2003, the day of Mrs. Dhaliwal's funeral, the Olleks provided to Mr. Dhaliwal a cheque payable to Mrs. Dhaliwal for \$5,000. There is a dispute about what this cheque represented.
- [33] For reasons which are the subject of a separate lawsuit by Oak Park against the Olleks and Mr. Dhaliwal, the sale of the Property to Oak Park did not complete. In relation to the failed sale, Oak Park filed a lawsuit against Mr. and Mrs. Ollek, the defendants in this action, on November 3, 2003, in the British Columbia Supreme Court, New Westminster Registry, Action No. S83011. In the Oak Park action, the plaintiff seeks specific performance of the contract of sale of the Property.
- [34] The lawyer retained to defend the Olleks was Mr. Thomas Russell of Pryke Lambert Leathley Russell in Richmond, B.C. He was first retained after a meeting with Mandip Dhaliwal and Kuldip Dhaliwal in September 2003. Mandip Dhaliwal told him that Kuldip Dhaliwal was a silent owner with the Olleks.
- [35] Mr. Russell obtained instructions from Mr. Ollek to accept service of the writ.
- [36] Mr. Russell prepared and filed a statement of defence in the Oak Park action on behalf of Mr. and Mrs. Ollek. In the statement of defence, he pleaded on their behalf:
3. The property described in paragraph 4 of the Statement of Claim (the "Property") is registered in the names of the Defendants and beneficially owned as follows:
 - (a) The Defendants as to an undivided one-half interest;
 - (b) Kuldip Dhaliwal ("Kuldip") as to an undivided one-half interest.
 4. The Defendants say that at all materials times Kuldip acted as the agent of the Defendants with respect to the proposed sale of the Property to the Plaintiff.
- [37] Mr. Russell did not review the statement of defence with the Olleks prior to filing it, but he did send it to them in January 2004.
- [38] Mr. Russell believed he was representing the Olleks as well as Mr. Dhaliwal in the Oak Park lawsuit. The Olleks say they did not know this. There was no joint retainer letter. The Olleks say they thought that Mr. Russell was representing only them and that Mr. Dhaliwal was simply assisting them as a witness.
- [39] The Oak Park offer to purchase the Property was in the amount of \$480,000.

- [40] In April 2004, Mr. Dhaliwal transferred \$5,000 to the Olleks. There is a dispute about whether this represented repayment of the amount paid by the Olleks in June 2003, or represented a contribution towards the expenses of the Property.
- [41] In August 2004, the City of Surrey commissioned an appraisal of the Property as it was expropriating a small piece to allow for the widening of 64th Avenue. The appraisal valued the Property at \$700,000 per acre. Given that the Property size was 1.45 acres, this meant the total value of the Property was approximately \$1,015,000. By at least this time, the parties were aware that the Property was worth a lot more than had been paid to purchase it.
- [42] In the fall of 2004, Mr. Dhaliwal sought to have the Olleks sign a transfer of one-half interest in the Property to him. Mr. Russell made this request on his behalf. The Olleks refused. Ultimately, Mr. Russell resigned from representing either Mr. Dhaliwal or the Olleks in March of 2005.
- [43] This lawsuit was commenced in April 2005.

The Plaintiff's Position

- [44] Mr. Dhaliwal's position is that he contributed \$85,000 towards the purchase of the Property. He says this was made up of the \$20,000 deposit and the \$65,000 payment. He says that when this is weighed against the defendants' cash contribution towards the purchase price of the Property, his pro rata share of the Property entitles him to a 66.4% interest in the Property.
- [45] He claims that it was the agreement or intention of both the plaintiff and the defendants that the defendants should hold the plaintiff's interest in the Property in trust for him. He says this was the 66.4% interest, or alternatively, it was based on his contribution towards the purchase price, or alternatively, it was their agreement or intention that the defendants should hold an undivided one-half interest in the Property in trust for him.
- [46] Mr. Dhaliwal seeks a declaration that the defendants hold a 66.4% interest in the Property in trust for him, or such other interest in the Property as determined by the Court, and in the alternative, a declaration that the defendants hold his interest on an express, resulting, or constructive trust for him.

The Defendants' Position

- [47] The Olleks say that Mr. Dhaliwal assigned his interest in the purchase of the Property to them. They deny that he made the financial contributions he alleges, and deny that they had any common intention that Mr. Dhaliwal would acquire a beneficial interest in the Property.
- [48] The Olleks say that Mr. Dhaliwal and his wife, Balwinder, agreed to gift sufficient funds to the Olleks to enable them to qualify for mortgage financing and to complete the contract of purchase and sale as sole purchasers of the Property.

Issues

[49] The following are central factual issues on the evidence:

1. Who contributed the \$20,000 deposit paid towards the purchase of the Property?
2. What sum of money, if any, did Kuldip Dhaliwal contribute towards the purchase of the Property?
3. What was Mr. Dhaliwal's intention with respect to any contribution he made to the purchase of the Property?
4. What were the Olleks' intentions with respect to any contribution made by Mr. Dhaliwal to the purchase of the Property?

[50] From the determination of these key factual issues will flow the remaining issues in this case. The last issue can be described as:

5. Is the plaintiff entitled to any remedy, and if so, what?

[51] The last issue may involve considering competing presumptions and burdens of proof, namely the equitable presumption of resulting trust and the statutory presumption pursuant to s. 23 of the Land Title Act, R.S.B.C. 1996, c. 250 [Land Title Act].

1. Who contributed the \$20,000 deposit paid towards the purchase of the Property?

[52] Mrs. Ollek testified that she made arrangements to transfer the \$20,000 payment to Mrs. Dhaliwal to pay for the deposit for the purchase of the Property. She said that she used a TD Bank account and transferred the money to a TD Bank account in the name of Mrs. Dhaliwal and her mother as she thought it would be easier to transfer within the same bank. The documents support this evidence.

[53] Mr. Dhaliwal's evidence was that he believed the \$20,000 paid by Mrs. Ollek to Mrs. Dhaliwal was probably repayment of a loan that Mrs. Dhaliwal or her mother had previously made to Mrs. Ollek.

[54] It was clear on Mr. Dhaliwal's evidence that he did not contribute any part of the \$20,000 deposit. He also had no direct knowledge of any loan and was just speculating that the funds represented repayment of a loan.

[55] The whole of the evidence, including the timing of the transfer from Mrs. Ollek to Mrs. Dhaliwal and the payment of the deposit, persuades me that the source of the deposit money was the defendant Jaswinder Ollek.

2. What sum of money, if any, did Kuldip Dhaliwal contribute towards the purchase of the Property?

- [56] The evidence is clear that Mr. Dhaliwal delivered a bank draft for \$65,000 to Naib Brar, the notary who was handling the purchase of the Property. This bank draft was comprised of funds from Mr. Dhaliwal's bank account.
- [57] The Olleks suggest that some of these funds were Mrs. Dhaliwal's or her mother's. However, they too are merely speculating. They cannot dispute the fact that ultimately the funds came from Mr. Dhaliwal's bank account.
- [58] The source of funds in Mr. Dhaliwal's account included Manulife investments held in his name only and totalling \$53,011.79. He also deposited cheques from DBK Enterprises payable to him of \$5,000 and \$12,000. This was more than enough to fund the \$65,000 bank draft that he provided to Mr. Brar. I conclude that Mr. Dhaliwal contributed \$65,000 towards the purchase of the Property.
- [59] In October 2003, DBK Enterprises paid \$2,000 to Mr. Russell, as his retainer to defend against the claim in the Oak Park action. It is clear that this money was not the Ollek's money. It had to have been advanced on behalf of Mr. Dhaliwal, who was seen by Mr. Russell as a co-owner in the Property.
- [60] Mr. Dhaliwal also claims that the \$5,000 he paid to the Olleks in April 2004 was meant to be a contribution towards the expenses of the Property. His evidence on this point was inconsistent and vague. I do not accept his claim in relation to this \$5,000 payment. I accept Mrs. Ollek's evidence that the \$5,000 she paid to Mr. Dhaliwal in June 2003 was a loan to help pay his wife's funeral expenses, and the April 2004 payment from Mr. Dhaliwal was simply repayment of that loan.
3. What was Mr. Dhaliwal's intention with respect to any contribution he made to the purchase of the Property?

The Gift Letter

- [61] Mr. and Mrs. Ollek say that the money contributed by Mr. Dhaliwal was a gift from him and Mrs. Dhaliwal. Mr. Dhaliwal denies this. The Olleks admit they never had any discussions with Mr. Dhaliwal about the money being a gift. However, they rely heavily on the gift letter signed by Mrs. Dhaliwal and conversations between Mrs. Dhaliwal and Mrs. Ollek. They say this evidence establishes that Mrs. Dhaliwal intended to make a gift and therefore the inference should be drawn that Mr. Dhaliwal intended to make a gift as well.
- [62] I am not satisfied that the inference suggested by the Olleks can be drawn on the evidence, even if it could be established that Mrs. Dhaliwal intended to make a gift (which is far from certain). While Mr. Dhaliwal admitted that he and Mrs. Dhaliwal made all major financial decisions together, he denied knowing about the gift letter, and on the defendants' own evidence, they never discussed the subject with him.

The Dhaliwals' Financial Circumstances

- [63] Furthermore, the circumstances of Mr. and Mrs. Dhaliwals' financial position at the time makes it extremely unlikely that Mr. Dhaliwal would be giving \$65,000 away. At the time, Mrs. Dhaliwal was very sick. She was a key person in the DBK family business. Mr. Dhaliwal did not have a driver's license although he played a role in the business as well. Mr. Dhaliwal said that their business was not doing well at the time. Even in good times, the Dhaliwals did not make a lot of money from the family business. Mr. Dhaliwal's earnings from the business in 2002 were \$30,000.
- [64] Moreover, the DBK business often required injections of cash from the Dhaliwals which they usually had to make by borrowing against a line of credit secured against their home. This usually happened when the nurseries or farmers to whom they supplied labour were late in paying and the Dhaliwals had to pay for the labour.
- [65] In addition, the Dhaliwals were funding the higher education of their two children.
- [66] As noted above, the Dhaliwals did not have much cash on hand at the time of the purchase of the Property. They did not have cash to pay the \$20,000 deposit. Mr. Dhaliwal had to cash in some investments he held at Manulife in order to come up with the total sum of \$65,000 which he contributed towards the purchase price.
- [67] I find it quite improbable that Mr. Dhaliwal would intend to gift such a large sum as \$65,000 to the Olleks, given his financial situation at the time. For all of the above reasons, I conclude that Mr. Dhaliwal did not intend his financial contribution towards the purchase of the Property to be a gift.

Was it a loan?

- [68] Since Mr. Dhaliwal's contribution towards the Property was not a gift, what else could the advance of \$65,000 have been? There are two possibilities on the evidence: either it was a loan, or it was an investment in the Property.
- [69] Neither Mr. Dhaliwal nor the Olleks assert that his contribution was a loan. However, when describing her conversations with Mrs. Dhaliwal at the hospital, when she obtained Mrs. Dhaliwal's signature on the gift letter, Mrs. Ollek said that she told Mrs. Dhaliwal that she was really scared if she was not able to return the money soon enough and asked "what if Kuldip wanted it back soon?". She said that while Mrs. Dhaliwal said "don't worry about it, I won't ask you", Mrs. Ollek always had it in her own mind that she would return the money some day, and that in some way she would give the money back. I will return to this point when I discuss the Olleks' intention in receiving the money. Nevertheless, this evidence is not sufficient to establish that Mr. Dhaliwal's intention was to simply loan the money.

Prior conduct

- [70] I find that Mr. Dhaliwal's conduct, both prior to and subsequent to the purchase of the Property, demonstrated his intention to make an investment in the Property.
- [71] Mr. and Mrs. Dhaliwal took the lead in finding and negotiating the terms of purchase of the Property. The Olleks had no role in this.
- [72] When the Property was first discussed as a potential opportunity, Mr. Dhaliwal wanted to purchase it himself. However, he realized that he would not qualify for a mortgage. He says that he then approached others to invest in the Property with him.
- [73] One of the people approached by Mr. Dhaliwal was Amarjhit Hayre. Mr. Hayre is a cousin of Mr. Dhaliwal. He was called as a witness by the plaintiff at trial. He testified that he became aware of the Property when Mr. and Mrs. Dhaliwal called him to get in touch with the realtor, Mr. Sekhon, to look at the Property and to see whether it was worth buying it. Mr. Hayre says he has experience as a developer and builder. He testified that he looked at the Property and thought it was a good property that could be developed.
- [74] Mr. Hayre testified that the Dhaliwals then asked him if he would like to share in buying the Property together. He told them he had enough land at the time but not enough money to participate. The discussions did not progress beyond that and there are no discussions about how the Property would be held and who would be on title if he did become a partner.
- [75] The Olleks were approached by the Dhaliwals after Mr. Hayre.
- [76] Mr. Dhaliwal testified that he had specific conversations with the Olleks where they agreed that they would be 50-50 partners in the Property: the Olleks and Mr. Dhaliwal would each put in an equal amount of cash, and the Olleks would obtain a mortgage that would be paid for by the rent. Mr. Dhaliwal's evidence as to these discussions was vague. He was unable to point to any details as to when and where the discussions occurred and who was present.
- [77] The Olleks deny having these discussions. The Olleks' position is that any discussions about the Property took place between Mrs. Ollek and Mrs. Dhaliwal.
- [78] There were a number of propositions which the defendants' counsel put to Mr. Dhaliwal in cross-examination, which were meant to suggest that Mr. Dhaliwal was not credible in his assertions that he thought he was an investor in the Property. It was suggested that Mr. Dhaliwal had no valid reason for not being on title. Mr. Dhaliwal's stated reason was that he did not qualify for mortgage financing. The defendants point out that there was no evidence that it was a precondition of mortgage financing that the registered owners be the mortgagees. However, I find that this point is not significant. I accept that Mr. Dhaliwal simply assumed that if he was not qualified to obtain a mortgage, he could not be on title. I find it credible that someone in his position would make that assumption.

- [79] The defendants also suggested that Mr. Dhaliwal did not have any reason for not attending at the notary public's office when the deal was closed, if he was to be a part beneficial owner in the Property. I also do not find this point significant. Mr. Dhaliwal explained that he was the one who introduced the Olleks to Mr. Brar. He said he told Mr. Brar that he had bought a property and will be giving his share of the money towards it, combined with his brother-in-law's share, and the title would be in the name of the defendants because he was unable to get a mortgage. Mr. Dhaliwal explained that he delivered the bank draft to Mr. Brar's office on the way to the hospital to see his wife.
- [80] In addition, Mr. Dhaliwal admitted in cross-examination that he did not know the mortgage amount obtained by the Olleks. He also did not know they would take care of subsequent expenses. However, Mr. Dhaliwal said that he was relying on the Olleks to let him know what was required on his part. He said the Olleks told him that if he brought \$65,000, that would amount to a 50% contribution.
- [81] The fact that Mr. Dhaliwal did not attend at the notary's office, know the mortgage amount, or concern himself with paying subsequent expenses in relation to the Property, is not inconsistent with him believing that he was a co-investor in the Property together with the Olleks. In my view, his conduct was consistent with his belief that as his relatives, the Olleks would treat him fairly and would let him know what was required in order to contribute to this investment.
- [82] Although I am not certain whether Mr. Dhaliwal spoke directly to the Olleks or learned it from his wife, it is clear that the Olleks told either Mr. Dhaliwal or Mrs. Dhaliwal that they required \$65,000 to be able to complete the purchase. As noted, Mr. Dhaliwal cashed in other investments in order to come up with the \$65,000 contribution. This behaviour is consistent with Mr. Dhaliwal's belief that he was making a better investment.
- [83] In summary, Mr. Dhaliwal's conduct leading up to the purchase of the Property is consistent with his intention to make a co-investment in the Property: he investigated the Property; searched for a co-investor; negotiated the offer to purchase; and drew on his resources, including cashing in other investments, to come up with \$65,000 which he contributed towards the purchase.

Subsequent conduct in relation to the Property

- [84] Mr. Dhaliwal's conduct subsequent to the purchase of the Property was also consistent with the belief that he was an investor in the Property.
- [85] The Dhaliwals' son, Mandip, was the one who collected the rents and managed the bank account in connection with the Property, once the purchase closed. All the bank statements, which recorded the deposit of rent from the tenant and the mortgage payments, were sent to the Dhaliwals' home address. This is consistent with the notion that the purchase of the Property was a joint family enterprise. The Olleks did not ask to see the bank statements for a couple of years, until the spring of 2004 when Mrs. Ollek was contacted by the bank about

there being non-sufficient funds in the account.

- [86] Mr. Dhaliwal's subsequent conduct in negotiating the Oak Park offer to purchase the Property, and in dealing with the lawyer, Mr. Russell, in relation to defending the Oak Park action, is consistent with him thinking he was an investor in the Property. He took the lead on these matters, just as he and his wife had taken the lead in initially finding the Property and negotiating its purchase.
- [87] Mr. Dhaliwal's instructions to Mr. Russell, including in relation to drafting the Statement of Defence in the Oak Park action, were consistent with Mr. Dhaliwal thinking that he had a 50% interest in the Property. This fact was included in the Statement of Defence drafted by Mr. Russell, as it provided a useful contextual explanation as to why the purchaser, Oak Park, had been directed by the Olleks to deal with Mr. Dhaliwal in connection with the sale of the Property, and confirmed that Mr. Dhaliwal had the complete authority to conduct those negotiations, which he did. At the time the Statement of Defence was filed, Mr. Dhaliwal and the Olleks were getting along and he had no reason to exaggerate his interest in the Property. While I appreciate that a party's prior consistent statements cannot be used by that party as oath-helping, these prior assertions put to rest any suggestion that Mr. Dhaliwal's evidence in this case was a recent fabrication, and show consistency in Mr. Dhaliwal's conduct.

Conclusion as to Mr. Dhaliwal's intentions

- [88] Considering all of the evidence as a whole, including the Dhaliwals' financial circumstances and Mr. Dhaliwal's conduct prior and subsequent to the purchase of the Property, I am persuaded on a balance of probabilities that Mr. Dhaliwal's intention was to contribute \$65,000 as an investment in the Property, and not as a gift or loan.
- [89] It appears that the theory of Mr. Dhaliwal's claim is that he was to receive a percentage interest in the Property proportionate to his relative financial contribution.
- [90] The original statement of claim by Mr. Dhaliwal alleged that
11. At all material times it was the intention of the Plaintiff and the Defendants that the Defendants should hold the Plaintiff's 66.4% interest in the property in trust for the Plaintiff.
- [91] Mr. Dhaliwal admitted in cross-examination that he never discussed with the defendants the fact that he would have a 66.4% interest. What happened, he said, was that he instructed Mr. Russell to seek a transfer of a 50% interest in the Property from the defendants to him, to reflect what he believed was his beneficial interest. When they refused to do so, he then brought this lawsuit. Only then, he said, did he realize that his contribution, of which he counted the \$20,000 deposit, was greater than 50% and that is why he advanced the claim of a 66.4% interest. He reached this conclusion based on his calculations as to their respective cash contributions, and ignoring the mortgage proceeds.

- [92] The statement of claim was amended at trial to reflect Mr. Dhaliwal's evidence that both parties originally intended that he would have a one-half interest in the property.
- [93] As for subsequent expenses in maintaining the Property, Mr. Dhaliwal alleges in his Statement of Claim that he paid the Olleks \$6,000 in 2004 for property taxes and maintenance associated with the Property. It is clear from this allegation that his intention was that each would receive credit for any money they spent towards purchasing or maintaining the Property.
- [94] I am not persuaded on a balance of probabilities that the discussions between Mr. Dhaliwal and the Olleks were ever that specific as to assign a precise interest to each side's investment in the Property.
- [95] However, I do conclude that Mr. Dhaliwal's intention, when he contributed the \$65,000, was that he was investing in the Property together with the Olleks and that he would share in any increase in the Property's value. I also conclude that it was his intention that each would treat the other fairly, recognizing the relative financial contributions at the time of purchase and afterwards, by way of a proportionate split in any increase in value of the Property. I therefore accept Mr. Dhaliwal's evidence to this extent: that he intended that the fair way they would split the investment would be on the basis of their respective cash contributions.
- [96] I conclude that Mr. Dhaliwal's intention in contributing money towards the purchase of the Property, was that it would be a joint investment held in the name of the Olleks, and that he would be entitled to a share of the Property based on his financial contributions to the purchase and maintenance of the Property, relative to the Olleks' financial contributions.
4. What were the Olleks' intentions with respect to any contribution made by Mr. Dhaliwal to the purchase of the Property?

The Background and Gift Letter

- [97] Mrs. Ollek came to Canada from India in 1983 and married Mr. Ollek in 1986.
- [98] Mrs. Ollek was the youngest of three sisters, and also had an older brother. She said that when she moved to Canada she lived with the Dhaliwals, and after she married, maintained a close relationship with Balwinder Dhaliwal.
- [99] Mrs. Ollek was devastated by the death of her son, Sandeep, in June of 2001. Mrs. Dhaliwal knew the Olleks had received just over \$60,000 as an insurance benefit on their son's death. According to Mrs. Ollek, her sister, Mrs. Dhaliwal, repeatedly suggested to her that she should invest in property as a way of using the money from her son's death to help them.

- [100] Ultimately, in the spring of 2002, according to Mrs. Ollek, her sister told her that she had found a good property in Surrey for the Olleks to invest in. Mrs. Ollek said she had complete trust in her sister, and just told her to do what she needed to do, and did not pay attention to the details. According to Mrs. Ollek, she was not in good shape to travel to Vancouver and so she told her sister "you guys just do it for us".
- [101] Mrs. Ollek said that she told her sister she was nervous about the purchase price of \$318,000, but her sister told her not to worry about it and "I'll help you if you're ready". Mrs. Ollek said she had no discussions with Mr. Dhaliwal about the purchase of the property.
- [102] Mrs. Ollek said she later received a telephone call from her sister who told her everything was done, but "we now have to give the money". Her sister told her she did not have any money, and so asked Mrs. Ollek to transfer money to her account. This was the \$20,000 deposit, which Mrs. Ollek transferred to Mrs. Dhaliwal's TD bank account.
- [103] Mrs. Ollek says she was not involved in any discussions about the mortgage, which she left to her husband. However, she arranged to gather bank drafts from their other resources, in the amounts of \$22,000, \$500, and \$28,000 respectively. She knew there was a shortfall and said that "my sister said she'd help me with whatever money we'd need". Mrs. Ollek's evidence on this was vague and she often looked puzzled when asked questions about raising the money to purchase the property. She admits that at the time she was still distraught about the death of her son and not even capable of travelling from Kamloops to Vancouver. I thus find that her memory is not entirely reliable. It often appeared that her testimony as to what she remembered was more of a self-serving reconstruction than an accurate recollection of events.
- [104] For example, when asked in direct examination about the gift letter, she claimed to have presented it to her sister in hospital and that her sister first said that she had spoken to Kuldeep Dhaliwal about this notion and that both he and she knew that the Olleks would require a gift letter. This seemed an obvious self-serving reconstruction and I do not accept it as true. She retreated from this version of events, however, and the rest of Mrs. Ollek's evidence made it clear that the gift letter was something initiated by the Ollek's mortgage company, and not by the Dhaliwals.
- [105] The gift letter is a key piece of evidence relied on by the Olleks, but I find that at the time it was not expected nor given a great deal of thought by either of them.
- [106] In cross-examination, Mrs. Ollek said that she had never talked to her sister about where her sister would get the money to help them close the purchase, despite knowing that her sister did not have the money to help pay the deposit.
- [107] Indeed, as of July 6, 2002, the date of the gift letter, Mrs. Ollek did not know how much money was required to close the purchase. Mrs. Ollek admitted she did not even read the gift letter. She just told her sister to sign it because the mortgage broker asked for it. She did not explain what was written in it. She told her sister nothing beyond the fact that it was a

gift letter to give to them to give to the mortgage broker. She did not know whether the money was coming from Mrs. Dhaliwal alone, or Mr. Dhaliwal, or both of them. Mrs. Ollek admitted she never talked to her sister about what her sister was doing to get money from her end. This is despite the fact that they talked frequently.

[108] Mr. Ollek was the one dealing with the mortgage broker. He said the mortgage broker was the one who requested that they get a gift letter signed by Mrs. Dhaliwal. According to Mr. Ollek, the mortgage broker filled out all of the information on the form, other than the signatures. With respect to the gift letter, Mr. Ollek said because the mortgage broker filled it out, he did not pay any attention to it, including the fact that the gift amount was left blank.

[109] Mr. Ollek confirmed that his understanding of the purpose of the gift letter was so that the mortgage broker would know that they were not borrowing funds from elsewhere as the mortgage broker did not want another liability on the title. He also agreed that he had no discussions with Mrs. Dhaliwal about the gift letter, even though it was directed from her to him.

[110] Mr. Ollek's memory was also not very reliable. For example, he testified that he signed the gift letter in Kamloops B.C. However, he was taken to his examination for discovery of August 10, 2006 when he testified that he signed the gift letter at the Dhaliwals' house in Richmond. He then changed his evidence to say his recollection was wrong and that he did sign it in Richmond. While this is a small detail, it does illustrate that Mr. Ollek does not have a good memory of events, and did not pay much attention to the arrangements.

[111] I conclude that the gift letter is not entitled to any weight in establishing either the Olleks' intentions or the Dhaliwals' intentions with respect to the contributions by the Dhaliwals towards the purchase of the Property.

[112] Further, as will be seen by my review below, the evidence of both Mr. and Mrs. Ollek falls well short of persuading me that either one had an understanding, at the time of the purchase of the Property, that monies contributed by Mr. Dhaliwal were a gift.

Discussions with Mr. Dhaliwal prior to the purchase of the Property

[113] Mr. and Mrs. Ollek say that the majority of the discussions regarding the purchase of the Property took place between Mrs. Ollek and Mrs. Dhaliwal.

[114] Mr. Ollek claimed to rely on what his wife had told him about the arrangements to purchase the Property. He said that he had no discussions with Mr. Dhaliwal about the purchase of the Property. Mrs. Ollek also said she had no discussions with Mr. Dhaliwal in this regard.

- [115] Because Mr. Ollek relied so much on his wife's understanding, and because neither one of them claims to have had any discussions with Mr. Dhaliwal about the purchase of the Property, it is hard to understand why either one would be so confident in their assertions that Mr. Dhaliwal's contribution was a gift.
- [116] Mr. Ollek admitted in cross-examination that his understanding from his wife was that the money they needed to complete the purchase of the Property was to be obtained from both Mrs. Dhaliwal and Mr. Dhaliwal. Despite this, he claims to have never spoken to Mr. Dhaliwal about it, even though he was visiting them and staying in their house while Mrs. Dhaliwal was in hospital. Further, when he did realize that Mr. Dhaliwal had given them the \$65,000 to complete the purchase of the Property, he says he did not even thank him. I do not believe the thrust of Mr. Ollek's evidence that he received a gift of \$65,000 from Mr. Dhaliwal yet never spoke to him about it or thanked him.
- [117] Mr. Ollek insistence in his evidence that he never spoke to Mr. Dhaliwal about the purchase of the Property is in contrast to evidence he gave when he was examined for discovery in the Oak Park action. There he was asked this question and gave this answer:

Q. Why was Kuldip Dhaliwal involved in the purchase of the Surrey property?

A. He was in Vancouver and we live up here so he had, this property came up and he had mentioned it to us so we purchased it.

- [118] However, at this trial under cross-examination, Mr. Ollek said that the above evidence he had given on discovery was not true. I have concluded that Mr. Ollek has tried to shape his evidence to suit his interests and not necessarily to accord with the true facts.
- [119] What I do believe is Mr. Ollek's evidence that at the time of the purchase of the Property, he had a lot of trust in each of the Dhaliwals and that trust was reciprocated. He did not see or care to see the contract for the purchase of the Property when he signed the subject removal clause, he simply trusted the Dhaliwals. This degree of trust would make sense if Mr. Ollek knew that the Dhaliwals were co-investors in the Property. If they were co-investors, and the deal was good enough for the Dhaliwals, then it made sense for Mr. Ollek to trust that the deal was good enough for the Olleks.
- [120] I find that it is more likely than not that Mr. or Mrs. Ollek, or both, did speak to Mr. Dhaliwal about the purchase of the Property, prior to its purchase. Although I do not believe that the discussions were as detailed as Mr. Dhaliwal asserted in his claim, I find that it is more likely than not that he and Mr. or Mrs. Ollek talked generally about being co-investors in the purchase of the Property before the purchase was completed.

The request for exactly \$65,000

- [121] I find support in the above conclusion by reason of the fact that Mr. Dhaliwal was asked to contribute exactly \$65,000 towards the purchase of the Property.

- [122] The Olleks were vague and at times evasive in their evidence as to why Mr. Dhaliwal contributed exactly \$65,000 towards the purchase of the Property. Mr. Dhaliwal had some additional funds in his bank account at the time and so could have contributed a different amount.
- [123] The proposition was put to each of the Olleks in cross-examination that they did not know they needed \$65,000 from Mr. or Mrs. Dhaliwal until they decided that the mortgage would be \$190,000. With the purchase price being \$318,000, the balance after deducting mortgage of \$190,000 would be \$128,000. That would mean half of the balance would be around \$64,000. Allowing for some expenses, that would fit with Mr. Dhaliwal's version of events that he thought he was contributing half of the cash needed to purchase the Property. Since he did not know the amount of the mortgage, the \$65,000 figure had to have come from the Olleks.
- [124] Mr. Ollek was adamant that this is not how the \$65,000 was calculated, but I did not find his evidence credible in this regard, and it was contradicted by Mrs. Ollek's evidence. Mrs. Ollek admitted in cross-examination that she did not figure out how much money she would need from her sister to help close the purchase of the Property until after the Olleks had obtained the mortgage and saw how much money they had and how much the rents were going to be. She figured this out because on July 10, 2002 the mortgage commitment was \$205,000, and the monthly payments were \$1,233, just over the rent of \$1,200. Mrs. Ollek told her husband she was not comfortable with this arrangement. By the time they attended at Mr. Brar's office on July 12, 2002, they arranged to have the mortgage amount reduced to \$190,000.
- [125] It is clear that the Olleks originally obtained a mortgage commitment for \$205,000, and only around July 12, 2002 did they decide to reduce it to \$190,000. That date, July 12, 2002, is the date Mr. Dhaliwal obtained the bank draft for \$65,000.
- [126] Mrs. Ollek admitted that this meant that sometime between July 10 and July 12, 2002, she figured out how much was required from her sister to help close the purchase and she passed this information on to her sister. This was the figure of \$65,000.
- [127] I conclude that the amount requested of Mr. Dhaliwal was roughly half the amount the Olleks figured they needed to complete the purchase, after taking into account mortgage funds. This is consistent with Mr. Dhaliwal's evidence that he thought he was putting in half the cash amount required to purchase the Property, and may be why he concluded that he was a 50% owner.

Subsequent Conduct

- [128] Once the property was purchased, Mr. and Mrs. Ollek were content for the bank account statements dealing with the rent and mortgage payments to go to the Dhaliwals' residence. Although the bank account was in the joint names of Mandip Dhaliwal and Mrs. Ollek, the Olleks did not check the bank statements or monitor the account's activity.
- [129] Consistent with the notion that the purchase of the Property was a joint investment is the fact that when a realtor on behalf of Oak Park called Mr. Ollek to inquire about purchasing the Property, Mr. Ollek referred him to Mr. Dhaliwal.
- [130] Mr. Ollek admitted in cross-examination that when Bob Dhaliwal called him in September 2002, with respect to Oak Park's interest in purchasing the Property, he asked Mr. Ollek if he was interested in selling the Property. Mr. Ollek's response was to tell him to contact Kuldip Dhaliwal. Thereafter, Mr. Dhaliwal did everything with respect to negotiating the terms for the sale of the Property to Oak Park. This was over a period of time from September 2002 through to March 2003. Once the terms were negotiated, the contract to sell the Property to Oak Park was faxed to the Olleks for them to sign, which they did.
- [131] Mr. Ollek's explanation of this was that he was not interested in the Oak Park inquiry and had other things on his mind. He said he would normally have asked Mrs. Dhaliwal to take care of it, but since she was not well, the next progression was to ask Mr. Dhaliwal. He admitted that he expected Mr. Dhaliwal to negotiate a sale price and indeed left him to have all the dealings with the realtor and Oak Park.
- [132] In my view, Mr. Ollek's behaviour is most consistent with Mr. Ollek having an understanding that Mr. Dhaliwal had an interest in the Property and was equally interested in seeing a profit on its sale. That meant that Mr. Ollek felt he could trust Mr. Dhaliwal to make decisions regarding the Property, knowing that it would be in furtherance of Mr. Dhaliwal's interest as well as the Olleks' interest.
- [133] Sometime in February or March 2004, Mrs. Ollek began to get calls from the bank and learned that the account receiving the rent payments and mortgage payments with respect to the Property had occasionally not had sufficient funds to make payments. Mrs. Ollek became concerned that Mandip Dhaliwal was not depositing all of the rent into the bank account. Around this time Mrs. Ollek decided to close the bank account and deal with the rents and mortgage payments in a new account operated in her name only.
- [134] It was in approximately April of 2004 that Mr. Dhaliwal made it known that he was in a new romantic relationship. This caused upset in the family. It was around the same time that the Olleks began to take a more active role with respect to the Property.
- [135] Mr. Ollek claims to have not paid any attention to the statement of defence filed on his behalf in the Oak Park action which was sent to him by Mr. Russell in January 2004. He says he did not learn what was in that statement of defence until the present lawsuit. I do not believe this, given the context of Mr. Ollek's increasing involvement in the lawsuit in the

spring of 2004. Mr. Ollek told Mr. Russell in May 2004 that he wanted to become more involved in giving instructions on the file. Mr. Ollek also met with Mr. Russell later in May 2004, together with Mandip Dhaliwal. Mr. Ollek paid Mr. Russell's account in July 2004 in the amount of \$5,184.62.

- [136] Mr. Russell gave evidence at trial. He candidly admitted that he had neglected to obtain a joint retainer letter setting out clear terms of his engagement by both the Olleks and Mr. Dhaliwal. He also admitted that he had not reviewed the statement of defence with the Olleks and had simply prepared it relying on the information he had obtained from Mandip and Kuldip Dhaliwal. This, of course, means that, in the context of the present lawsuit, what was in the statement of defence in the Oak Park action cannot be treated as an admission made by the Olleks. Nonetheless, their conduct in failing to raise any issue about the statement of defence pleading that Mr. Dhaliwal had an undivided one-half interest in the Property, after they received it from Mr. Russell in January 2004, is probative.
- [137] Mr. Russell said that in September 2004 he was asked by Mr. Dhaliwal to request that Mr. Ollek sign a transfer of Mr. Dhaliwal's beneficial interest so that Mr. Dhaliwal would have an interest registered on title. Mr. Russell then had a telephone call with Mr. Ollek on September 14, 2004 and took notes of that telephone call. He testified that he mentioned in that call that Mr. Dhaliwal had asked Mr. Ollek to sign a transfer of one-half interest in the Property back to Mr. Dhaliwal. These notes confirm Mr. Russell's evidence that Mr. Ollek's response was that he was not prepared to sign the transfer because he had been paying money for the Dhaliwals' children to go to school and this was his way of ensuring he would get reimbursed. Mr. Ollek did not offer any other reason for refusing to sign the transfer.
- [138] In his direct examination, Mr. Ollek denied ever discussing with Mr. Russell the request by Mr. Dhaliwal to transfer a one-half interest to him, prior to December 2004 when Mr. Russell wrote to the Olleks, making the request and enclosing a transfer. However, in cross-examination, Mr. Ollek conceded that he did have a telephone conversation with Mr. Russell about this subject in September 2004. He conceded that the note that Mr. Russell made in his file dated September 14, 2004 accurately records that telephone discussion.
- [139] When Mr. Ollek was cross-examined about the conversation in September 2004 with Mr. Russell, he admitted that he recalled saying that he was paying for the Dhaliwal children to go to school and was using the property for security. He testified that he did say that because he was mad. He then said that "I always knew if they came into hardship we'd pay the money back". He repeated this later in his evidence, that when they received the money from Mr. Dhaliwal they always thought they would repay it back in some way.
- [140] I consider Mr. Ollek's response to Mr. Russell, in their telephone conversation of September 14, 2004, to be very telling. I find that his response was inconsistent with the notion that up to that point Mr. Ollek believed that Mr. Dhaliwal's contribution towards the purchase of the Property was a gift. Rather, his response was consistent with the notion that he owed Mr. Dhaliwal something in respect of Mr. Dhaliwal's contribution to the Property, but he was

reluctant to give it to him, and so he invented a liability to "set-off" against what he owed to Mr. Dhaliwal. This invention was the suggestion that Mr. Ollek had paid for the plaintiff's children to go to school.

- [141] In cross-examination, Mr. Ollek admitted that the Olleks had not paid for the plaintiff's children to go to school. Rather, Mrs. Ollek, from time to time, gave the Dhaliwal children cash gifts which they could use how they pleased, but Mr. Ollek understood that these gifts were simply in the small hundreds of dollars.
- [142] Mr. Russell followed up the September 14 telephone call with a letter to Mr. Ollek dated December 9, 2004. That letter stated that Mr. Dhaliwal had instructed him to request that Mr. Ollek transfer title of an undivided one-half interest in the Property into Mr. Dhaliwal's name. The letter explained that Mr. Russell's understanding was that although title to the Property was registered in the Olleks' names, Mr. Dhaliwal was the beneficial owner of an undivided one-half interest. A draft transfer was enclosed.
- [143] I digress briefly from the analysis of the facts to comment on new evidence discovered soon after the trial of this case was considered complete in June 2010. Mr. Russell discovered notes of conversations he had with the Olleks that had been filed in another file in his office. These notes had not been produced in this proceeding and were potentially relevant to the issues. Mr. Russell had not recalled a conversation with Mrs. Ollek recorded in newly discovered notes dated December 10, 2004, nor had Mrs. Ollek recalled it, when they gave evidence at trial. Upon discovering the misfiled notes, Mr. Russell promptly notified the parties' counsel, and the plaintiff promptly notified the court of the plaintiff's wish to apply to re-open the trial to call evidence from Mr. Russell in respect of the newly found notes. When I learned of the situation, I had not yet rendered my reasons for judgment in the case. Some time passed before counsel were able to come before me for the hearing of the plaintiff's application. By that time, they had exchanged affidavits on the newly discovered note. Counsel for the defendants did not oppose the application to re-open.
- [144] On the plaintiff's application on October 15, 2010, I allowed the trial to be re-opened so that the plaintiff could call evidence from Mr. Russell in relation to the note of December 10, 2004. Counsel for the defendants conducted cross-examination of Mr. Russell, and called Mrs. Ollek as a witness in response.
- [145] There were several reasons I exercised my discretion to allow the trial to be re-opened. It was clear that the evidence could not have been discovered by the parties before: it had not formed part of the file that Mr. Russell had produced in this proceeding. Furthermore, both sides of this case were arguing that the note was fresh evidence that strongly supported their version of the facts. If I did not hear evidence in relation to the telephone conversation recorded in the note, there was a possibility of a miscarriage of justice. It was clear that this was not an abuse of process and there was no suggestion that Mr. Russell had manufactured the note. The circumstances were such that I concluded this was one of the rare cases where the discretion should be exercised to re-open the trial, in accordance with

the authorities summarized in *Zhu v. Li*, 2007 BCSC 1467 at para. 20; see also *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257 (B.C.C.A.) and *Sykes v. Sykes* (1995), 6 B.C.L.R.(3d) 296 (C.A.).

[146] I have therefore incorporated the new evidence in these reasons for judgment.

[147] Mr. Russell testified that his notes record that on December 10, 2004 Mr. Russell made a telephone call to Mrs. Ollek. He has no independent recollection of the call other than as recorded in his contemporaneous notes. His notes indicate:

"I advised Mr. Dhaliwal wants title to ½ of the property transferred to him. She says it was her sister's property. She died and Mr. Dhaliwal remarried, therefore the Olleks want to make sure the ½ interest goes to children of deceased sister."

[148] Mrs. Ollek denied that the conversation was as recorded in Mr. Russell's notes. In her direct evidence called in the re-opening of the trial, Mrs. Ollek claimed that although she had not remember the conversation with Mr. Russell when she gave evidence earlier in the trial, these notes now helped her recall that they did have a conversation. She asserted that she talked to Mr. Russell about the money her sister gave her, not about property, that Mr. Dhaliwal had remarried and wasn't supporting his kids properly, and that her intention was to support her sister's kids with the money her sister gave her. She emphatically denied that there was any discussion about a half-interest in the Property.

[149] When Mrs. Ollek was cross-examined, it became clear to me that in her direct evidence she had fabricated her version of the conversation with Mr. Russell. She was quite evasive, refusing to answer questions about what she could recall, and instead emphatically stated over and over again that she would not have said what was recorded in the note because the Property was not her sister's property. Her counsel did concede in closing submissions that Mrs. Ollek could not recall the December 10, 2004 conversation and could only say that she would not have said what was recorded in the notes. This concession does not diminish the impact of Mrs. Ollek's attempt to fabricate the conversation in a self-serving way.

[150] Mrs. Ollek admitted under cross-examination that on December 10, 2004 Mr. Russell called her about Mr. Dhaliwal wanting a half-interest in the Property transferred to him; that she did tell him her sister had died; and she did tell him that Mr. Dhaliwal had remarried -- to this extent, she agreed that the notes of the phone conversation were accurate. Of course, the suggestion in the notes that she indicated to Mr. Russell that she wanted the Dhaliwal children to benefit from whatever had been given by her sister towards the Property (whether money or a property interest) must also have been said by her, based on Mrs. Ollek's evidence in chief.

[151] I find that the message that Mrs. Ollek was communicating to Mr. Russell on December 10, 2004 was consistent with the message Mr. Ollek had given him in the September 14, 2004 phone call: they were coming up with excuses not to transfer the one-half interest in the Property to Mr. Dhaliwal, and using the Dhaliwal's children as the basis for their excuses.

But these excuses were not consistent with their position presented in this case, namely, that Mr. Dhaliwal's contribution towards the purchase of the Property was a gift. The inconsistency in the Olleks' positions leads to the natural inference that the gift story is a more recent fabrication.

- [152] The December 10, 2004 phone conversation records what may be the motive for the Olleks' reluctance to transfer one-half interest to Mr. Dhaliwal: they did not like that Mr. Dhaliwal had remarried, and so they had convinced themselves that what they were doing was out of principle because they were doing it for the Dhaliwal's children, Mrs. Ollek's blood relatives.
- [153] Subsequently, Mr. Dhaliwal contacted new counsel who wrote a letter to Mr. Russell requesting the transfer of an undivided one-half interest in the Property and enclosing a transfer. This letter was dated March 10, 2005. Mr. Russell forwarded this letter to the Olleks.
- [154] In response, Mrs. Ollek called Mr. Russell on March 18, 2005. In their phone call, Mrs. Ollek told Mr. Russell that Mr. Dhaliwal did not have an interest in the Property. Mrs. Ollek told Mr. Russell, by way of explanation, as recorded in Mr. Russell's note, that "Kuldip does not trust anyone and he would not put property in her and Joe's name if he'd put up half the money to purchase it". In other words, she did not assert that money had been gifted or that money had been loaned, but that money had not been provided at all. This assertion of course was untrue.
- [155] Mrs. Ollek's argument, that Mr. Dhaliwal would not have trusted them enough to give them money, was contrary to the actual facts admitted by both the Olleks, namely that they trusted the Dhaliwals, and that this trust was reciprocal at the time the Property was purchased. Mr. Dhaliwal did trust them enough to give them a substantial sum of money, while at the same time allowing the Property to be registered in the Ollek's name alone.
- [156] Mr. Russell then realized his conflict of interest and resigned. Despite that, Mr. Ollek tried to persuade Mr. Russell to continue to act for them, but he refused.
- [157] Counsel for the Olleks was very critical of Mr. Russell's role as legal counsel. But in my view, it is important not to let those criticisms cloud the issues in this case. It is fair to say that Mr. Russell was careless: he did not clarify terms of a joint retainer; he did not clarify terms of Mr. Dhaliwal's authority to give him instructions; he did not review the statement of defence in the Oak Park action with the Olleks before filing it; and he put himself in a conflict of interest by acting on behalf of one client in seeking something from other clients, by putting forward Mr. Dhaliwal's request to the Olleks for a transfer of a one-half interest in the Property. All of these mistakes were based on Mr. Russell believing representations made to him by Mr. Dhaliwal and Mandip Dhaliwal regarding Mr. Dhaliwal's one-half interest in the Property. However, I found Mr. Russell to be an honest and credible witness. He did not attempt to evade uncomfortable questions about his professionalism, nor did he fabricate evidence or exaggerate evidence so as to attempt to

justify his actions.

- [158] I find that Mr. and Mrs. Ollek's credibility on the issues in this case is damaged by the way in which they responded to Mr. Russell.
- [159] I find that the Ollek's dealings with Mr. Russell, including their statements to him in response to Mr. Dhaliwal's request for a transfer of a one-half interest in the Property, are consistent with Mr. Dhaliwal's evidence that he was a co-investor in the Property, and are inconsistent with the Ollek's asserted defence that Mr. Dhaliwal had made them a gift. At no time did they say to Mr. Russell anything to indicate that they believed that Mr. Dhaliwal had given them money towards the purchase of the Property as a gift. The circumstances were such that, had this allegation been true, it would have been irresistible for them to assert it. I find that the reason they did not assert this is because it was not true: at no time did the Olleks think that Mr. Dhaliwal's contribution towards the purchase of the Property was a gift.
- [160] The Olleks argue that they paid subsequent expenses in relation to the Property, and Mr. Dhaliwal did not, and this shows that he was not a co-investor in the Property. I am not persuaded by this argument. At no time did the Olleks ask Mr. Dhaliwal to pay any additional expenses related to the Property. Mrs. Ollek agreed that her and her husband did not take an active role with respect to the property until approximately the spring of 2004. In mid-July 2004, the Olleks paid the property taxes on the Property for the first time since its purchase. It is not likely a coincidence that in the spring of 2004, Mrs. Ollek was upset at learning that Mr. Dhaliwal had entered into a new romantic relationship and was planning to remarry.

Conclusion as to the Olleks' intentions

- [161] I find that Mr. and Mrs. Ollek knew that when Mr. Dhaliwal gave them \$65,000 towards the purchase of the Property, it was not a gift. They have failed to prove this allegation, advanced in their Statement of Defence.
- [162] While not pleaded by the Olleks, I will nevertheless consider the next obvious question: did they consider Mr. Dhaliwal's money a loan, or an investment in the ownership of the Property?
- [163] Mr. Ollek testified in cross-examination that when he received the money from Mr. Dhaliwal, he felt at the time that if he could he would try to pay it back.
- [164] In cross-examination, Mrs. Ollek was asked about the specifics of what her sister said to her, beyond simply that she would help her. Mrs. Ollek replied that she told her sister that she did not have enough money and her sister said she would help her with the money. They did not go into details about whether it was going to be on the basis of a loan or a gift or a part ownership. Mrs. Ollek simply asked what if she could not pay back the money soon enough, and all Mrs. Dhaliwal said was that she would not ask her. This is inconsistent

with the money being a loan payable on demand.

- [165] In cross-examination, Mrs. Ollek was asked whether her initial impression was that the money from Mrs. Dhaliwal was a loan. Mrs. Ollek replied "you could say that because in the back of her mind she was always going to return the money to her". She agreed that they did not talk about the specifics of how Mrs. Dhaliwal would help her with the money.
- [166] Mrs. Ollek agreed that she trusted both her sister and Mr. Dhaliwal at the time.
- [167] It is hard to align the suggestion that Mr. and Mrs. Ollek's understanding was that the contribution by Mr. Dhaliwal was a gift or that it might have been a loan, with their knowledge of the Dhaliwals' financial circumstances and with their subsequent conduct.
- [168] Mr. Ollek said in his direct evidence that previous financial dealings between the families, apart from the gift letter, included occasions when the Dhaliwals would have financial difficulty due to the fact they had to await payment on their farming contracts. Because of this, from time to time, the Olleks would forward them money and whenever the Dhaliwals got paid on their contracts, they would pay the Olleks back.
- [169] Mrs. Ollek admitted that the Dhaliwals borrowed money from them from time to time when their business, DBK, was short of cash due to overdue payments from the nurseries. Mrs. Ollek admitted that she knew nothing about Mrs. Dhaliwal's financial situation when the property was being purchased.
- [170] But the Olleks knew that Mrs. Dhaliwal was very sick at the time the Property was purchased, and that Mr. and Mrs. Dhaliwal were so short of immediate cash that they needed the Olleks to pay the \$20,000 deposit.
- [171] Further, in November 2002, the Olleks loaned DBK \$30,000. This was treated as a loan to be repaid once DBK got paid on its contracts for supplying labour to farms. The \$30,000 was subsequently repaid by DBK.
- [172] Later, when Mrs. Dhaliwal died, the Olleks wrote a cheque to Mr. Dhaliwal for \$5,000 in June 2003. They say this was a loan for funeral expenses, which Mr. Dhaliwal subsequently repaid.
- [173] Surely if the \$65,000 was a gift, the Olleks would have felt some moral obligation to provide a substantial cash gift back to the Dhaliwals when they were in financial need, rather than simply loaning them money.
- [174] Likewise, if the Olleks thought that Mr. Dhaliwal's payment of \$65,000 was a loan, then why would they not treat the \$35,000 worth of loans they provided to Mr. and Mrs. Dhaliwal within a one year period, as partial repayment of Mr. Dhaliwal's earlier loan? Common sense suggests that the reason the Olleks treated their cash payments to Mr. and Mrs. Dhaliwal, in November 2002 and June 2003, totalling \$35,000, as loans was because they had not received any gift or loan from the Dhaliwals. Rather, they treated these cash payments as loans because they understood that the \$65,000 they had received from Mr. Dhaliwal in

July 2002 was an investment tied up in the Property.

[175] The Olleks had no explanation as to why Mr. Dhaliwal caused DBK to pay \$2,000 to Mr. Russell as a retainer with respect to defending the Oak Park action. Clearly the Olleks did not object to this payment. I conclude that at the time they considered this just one of the expenses related to the Property that would be sorted out between them and Mr. Dhaliwal at a future date.

[176] I find that when the Property was purchased, Mr. and Mrs. Ollek intended that the \$65,000 paid by Mr. Dhaliwal would give him an interest in the Property as a co-investor with them. They did not spell out details of their arrangement, because they were close family members who trusted each other, but they thought Mr. Dhaliwal was contributing close to half of the cash required to complete the purchase. Their intention must have been to have their own cash contributions recognized, as well as Mr. Dhaliwal's, in the expected future growth in value of this investment. I conclude that the Olleks intended that they and Mr. Dhaliwal would treat each other fairly, and this would mean sharing in any increase in value over time on a basis that would be fair given their proportionate financial contributions to the Property.

5. Is the plaintiff entitled to any remedy, and if so, what?

[177] Mr. Dhaliwal advances claims for a declaration that the defendants hold a 66.4% interest in the Property in trust for him, or in the alternative, for a determination of his interest in the Property based on an express, resulting or constructive trust.

[178] The leading academic authority on the law of trusts in Canada is Donovan Waters, Q.C. In Waters' Law of Trusts in Canada, 3rd ed. (Toronto: Thomson Carswell, 2005) [Waters] he explains that a trust can come into existence as a matter of the party's intention to create a trust, or by operation of law, at p. 19:

A trust can come into existence in one of two ways. It is either clear from a person's words or acts that there is an intention to settle property by way of a trust, or the law imposes trust machinery in a given situation to ensure that property passes from one party to another. What we are therefore concerned with is discovering the intention of a person, or the circumstances under which the law will deem a trust to arise in order to secure some result the law considers equitable.

[179] An express or implied trust requires finding an intention to create a trust. A constructive trust is imposed by law, and does not require a finding of intention to create a trust.

[180] The law on whether or not a finding of intention is required to find a resulting trust, however, is somewhat more ambiguous. In a resulting trust case, the intention to create a trust is presumed from one party's gratuitous financial contribution to the other, as equity assumes bargains, not gifts (see: Waters at 362-63). The Supreme Court of Canada explained the concept of a resulting trust, albeit in a matrimonial setting, in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289 at paras. 28-34:

Resulting trusts are as firmly grounded in the settlor's intent as are express trusts, but with this difference - that the intent is inferred or is presumed as a matter of law from the circumstances of the case. [...] The presumption of a resulting trust is sometimes explained as the fact of contribution evidencing an agreement; [] The courts are looking for a common intention manifested by acts or words that property is acquired as a trustee .. [...] If there is a contribution in money or money's worth, but absence of evidence of an agreement or common intention as to the quantum of the interest, doubts may arise as to the extent of the share of each spouse in the property [] the respective share might be determined in this manner: " you ask what reasonable people in the shoes of the spouses would have agreed if they had directed their minds to the question of what claim the contributing spouse ought to have." [...] Some of these situations may be analyzed as agreement or common intention situations. Such intention is generally presumed from a financial contribution. The doctrine of resulting trust applies.

[181] Concerning circumstances involving multiple contributors to the purchase of property, where it can be shown that the claimant did in fact advance the money and acted as purchaser throughout, the commentary in Waters is apt:

What is the position if two persons advance the money for the purchase of certain property, which is taken in the name of one of them? If the amount subscribed by each is determinable, it is clear that the transferee holds on a proportionate resulting trust.

(p. 370)

[...] the other party is entitled to a resulting trust order in his favour proportionate to the amount he contributed. The result will be secured by declaring that the title holder holds on resulting trust for both parties in proportionate shares as tenants in common.

(p. 372)

[182] In circumstances involving gratuitous transfers, there exists a presumption of resulting trust. The presumption of resulting trust can be rebutted by evidence of a contrary intention, on a balance of probabilities. The onus is on the transferee to rebut the presumption: Waters at 375; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C. R. 795 (S.C.C.) at paras. 24, 25, 44.

- [183] Both sides to this lawsuit rely on legal presumptions. Mr. Dhaliwal says that the equitable presumption of resulting trust applies: he made a transfer of \$65,000 plus assigned his interest in the purchase of the Property to the Olleks, therefore the law presumes that the Olleks hold a share of the Property in trust for him. This presumption can be rebutted if the Olleks can prove their allegation in their Statement of Defence that Mr. Dhaliwal intended to make a gift to them.
- [184] A loan will also rebut a presumption of resulting trust as it implies a re-payment is to be made, as well as an intention to confer beneficial interest on the recipient. In the loan context, the relationship is one of debtor and creditor: *Waters* at 368.
- [185] The Olleks say the statutory presumption pursuant to s. 23 (2) of the Land Title Act, applies, namely, that as the only registered owners on title, they are exclusive owners of the Property:
- s. 23 (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title [...]
- [186] This statutory presumption can be rebutted by the presumption of advancement (which does not apply here as it operates only as between parents and dependent minor children or between spouses), or by evidence of a contrary agreement or common intention: *Skender v. Skender*, 2005 BCSC 418 [Skender], aff'd 2006 BCCA 162. In *Skender* and in *Phung v. Feng*, 2009 BCSC 374 at para. 30, it was held that the second of these principles includes the concepts of resulting and constructive trust. In other words, a court may find on the facts that a person holds part or all of his or her registered interest on title in trust for another person, due to a common agreement or intention between them.
- [187] The Olleks say that Mr. Dhaliwal has failed to prove an agreement or common intention that they hold any part of their registered interest on title in trust for him.
- [188] If this was a case where the evidence was evenly balanced, I would more thoroughly discuss the two presumptions and who has the burden of proof of challenging each, a subject that was touched on in *Demir v. Peyman*, 2009 BCSC 445 at paras. 9-10. But both presumptions - resulting trust and indefeasible title -- are rebuttable by evidence as to the parties' actual intentions. In this case, the parties' intentions can readily be discerned from a consideration of the totality of the evidence.
- [189] I have concluded based on the whole of the evidence, on a balance of probabilities, that Mr. Dhaliwal and Mr. and Mrs. Ollek had a common intention that Mr. Dhaliwal's financial contribution towards the purchase of the Property would be treated as an investment in the Property. Neither side believed or intended that Mr. Dhaliwal's contribution of \$65,000 towards the purchase of the Property was a gift. Neither side believed or intended that Mr. Dhaliwal's contribution was a mere loan. When Mr. Dhaliwal made this contribution, both

he and Mr. and Mrs. Ollek intended that Mr. Dhaliwal would have an interest in the Property as a co-investor with the Olleks. As such, while the presumption of resulting trust has not been rebutted, the statutory presumption found in s. 23 (2) of the Land Title Act, as relied upon by the Olleks, has been displaced.

[190] I find that Mr. Dhaliwal and the Olleks did not expressly discuss what Mr. Dhaliwal's fair share in the Property would be. Nevertheless, I infer on the evidence that both sides intended that they would have their financial contributions recognized by a share in the Property proportionate to their respective contributions.

[191] As a result of the findings I have made, I conclude that Mr. Dhaliwal has an interest in the Property, which the defendants hold in trust for him. The interest of Mr. Dhaliwal is that percentage interest that reflects his contribution to the Property, relative to the net contribution made by Mr. and Mrs. Ollek.

[192] Mr. Dhaliwal's contribution towards the purchase of the Property was \$65,000. He made no further contributions towards the ongoing expenses of the Property, except for the provision of \$2,000 in October 2003 to Mr. Russell, as a retainer for defending the Oak Park action. This retainer was paid by a cheque from DBK but I find that it was a contribution on behalf of Mr. Dhaliwal. The expenses incurred in defending the Oak Park claim to the Property are expenses that relate to preserving the value of the Property, and can properly be considered contributions to the Property.

[193] Mr. and Mrs. Ollek's contribution to the Property is a little more difficult to calculate. I conclude that neither side made a significant non-financial contribution to the Property. While the Olleks did take on a risk associated with their mortgage debt used to finance the purchase of the Property, it appears that risk was mitigated significantly by the fact that a tenant rented the Property throughout, providing rental income just slightly in excess of the mortgage payments. Furthermore, the evidence appears uncontradicted that the Property is worth considerably more than the mortgage. There was no evidence that the Olleks faced a real risk of having to personally make up a shortfall if they lost rental income and there was a foreclosure on the mortgage.

[194] The Olleks made a \$70,500 financial contribution to the initial purchase of the Property, made up as follows:

- a) \$20,000 deposit; and
- b) \$50,500 payment to Naib Brar, the Notary who acted on the purchase.

[195] Mr. Ollek testified that certain documents he and Mrs. Ollek filed with Canada Revenue Agency, namely, annual Statements of Real Estate Rentals, accurately set out what he and Mrs. Ollek earned from the Property by way of rent and paid by way of expenses on the Property. These statements included as expenses: interest on the mortgage, property taxes, insurance, utilities, and legal and accounting fees. These statements set out that the Olleks incurred the following net expenses in each of the following years in relation to the

Property:

2004:

\$291.50 X 2 =

\$583

2005:

\$386.00 X 2 =

\$772

2006:

\$1,771.50 X 2 =

\$3,543

2007:

\$2,808 X 2 =

\$5,616

2008:

\$1,128.50 X 2 =

\$2,257

TOTAL:

\$12,771

[196] The Olleks did not provide evidence as to making any net financial contributions to the Property in 2002 or 2003. The evidence was that property taxes on the Property were ignored by them until 2004. They have therefore failed to prove making additional financial contributions towards the Property in 2002 or 2003.

[197] As for 2009 and 2010, the Olleks also did not provide evidence as to making any financial contributions to the Property, net of rental income, after 2008. I conclude therefore that in 2009 and 2010 as of the date of this judgment, the rent received on the Property covered all additional expenses and the Olleks made no additional contributions other than the \$12,771.

[198] It is unclear whether or not the Olleks have included in their calculations the legal fees they have paid to defend the Oak Park action, but I must assume they have done so given the quantity of those fees claimed in the Statements of Real Estate Rentals. This would be an appropriate expense to take into account.

Conclusion

[199] I have therefore concluded that Mr. Dhaliwal contributed \$65,000 plus \$2,000 for a total of \$67,000 towards the Property purchase and subsequent expenses. Mr. and Mrs. Ollek contributed \$70,500 plus \$12,771 towards the Property purchase and subsequent expenses for a total of \$83,271. I find, therefore, as of the date of this judgment, Mr. Dhaliwal's respective financial contributions amount to 45% and Mr. and Mrs. Ollek's respective financial contributions amount to 55% of the total respective financial contributions to the Property.

[200] I conclude that Mr. Dhaliwal has a beneficial interest of a 45% share in the Property. Mr. and Mrs. Ollek hold a 45% interest in the Property in trust for Mr. Dhaliwal.

[201] The Property is subject to the Oak Park action and so I will not make any immediate orders with respect to disposition of the Property. If the parties are not able to sort out by agreement an appropriate method of dividing the equity in the Property given my conclusions, they may bring applications for relief before me.

[202] If the parties cannot come to agreement on costs, they may direct written submissions to me or request a further hearing before me.

"S. Griffin, J."

The Honourable Madam Justice S. Griffin

[1] The defendants' last name was misspelled on the title of the property as "Olleck" and therefore spelling alternatives are shown in the style of proceedings.

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