

CANADA / JUDGMENT

Dhillon v. Robertson

2020 BCSC 641

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 641 Dhillon v. Robertson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhillon v. Robertson,

2020 BCSC 641

Date: 20200424

Docket: S174187

Registry: New Westminster

Between:

Satinder Paul Singh Dhillon and Surjit Kaur Dhillon

Plaintiffs

And

Michael Vincent Morancie Robertson,

Parmjeet Singh Aujla,

Shantel Lamons, Mandeep Dhillon, and Harpreet Dhillon

Defendants

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

The Plaintiff, Satinder Paul Singh Dhillon appearing in person:

S.P.S. Dhillon

Appearing on behalf of the Plaintiff, Surjit Kaur Dhillon:

S.P.S. Dhillon

Counsel for the Defendants, Michael Vincent Morancie Robertson, Parmjeet Singh Aujla, Shantel Lamons, and Mandeep Dhillon

M. Davies

T. Chan

The Defendant, Harpreet Dhillon appearing in person:

H. Dhillon

Place and Date of Trial:

New Westminster, B.C.

July 8-12, 15-19, 2019

Oral Submissions:

October 23-24, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 24, 2020

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I. INTRODUCTION

- [1] This action concerns the October 2009 transfer of property located at 33474 Kingsley Terrace in Abbotsford (the "Property") from plaintiff, Surjit Kaur Dhillon, to defendant, Shantel Lamons Dhillon. At issue is whether the transfer was a bona fide purchase and sale, was subject to a constructive trust, verbal buy-back agreement, or option to re-purchase, or was in effect a disguised mortgage.
- [2] A number of parties in this action share a surname. In this decision, I will refer to them by their first names. In doing so, I intend no disrespect.
- [3] The Property was subject to foreclosure under a CIBC mortgage, originally held in Shantel's name and subsequently assumed by her father, Michael Robertson. In May 2019, Surjit bought the Property from CIBC. After payment of the principal, interest, and costs on foreclosure, CIBC paid the \$270,000 excess sale proceeds into court. The parties' current dispute centres on entitlement to those funds, which equal the Property's increase in value from October 2009 to May 2019.

- [4] The defendants advance counterclaims for \$95,573.70, plus accrued interest, in unpaid rent from October 2009 to May 2019, when the plaintiffs occupied the Property until Surjit bought it under foreclosure.

II. THE TRIAL

- [5] There were a number of procedural difficulties which arose as a result of Satinder representing his mother, Surjit, at trial. Although a named plaintiff, Satinder agreed that he was not advancing a claim on his own behalf. Through an interpreter, Surjit confirmed she wanted Satinder to represent her at trial.
- [6] Although Surjit was represented earlier in this action, and received some legal advice during the trial, Surjit was not represented at trial. She would have benefited from a lawyer.
- [7] The parties did not have an agreement regarding the documents that would be admissible at trial or for what purpose. Satinder attempted to introduce documents not included in the plaintiffs' list of documents. He requested amendments to the amended notice of civil claim at trial without notice to the defendants and attempted to call witnesses not disclosed to the defendants before trial. Addressing those procedural matters consumed almost two days of trial time. Satinder's cross-examinations of the defendants prompted frequent objections. The plaintiffs did not adhere to pre-trial time estimates. For all these reasons, the trial did not conclude within the allotted time.
- [8] Following completion of the evidence, Satinder requested and was granted a lengthy adjournment, to give him time to order transcripts of the evidence given at trial and to obtain legal advice and assistance in preparing written closing submissions. Final oral submissions proceeded on October 23 and 24, 2019. Satinder submitted an eight-page argument containing two references to the transcribed evidence at trial and no authorities to support any of the legal bases for Surjit's claim as pleaded. He argued this case turns on its facts.
- [9] Following the defendants' closing submissions, Satinder requested and was denied an additional month to prepare reply submissions. He had been given a comprehensive memorandum from the Court on the first day of trial, setting out basic trial procedures, including the delivery of closing submissions. He received the defendants' written submissions on October 23, 2019, and was advised he would be invited to make reply submissions the following day if he wished to do so. He made extensive oral reply submissions on October 24, 2019.

III. THE PARTIES

- [10] Satinder and Mandeep Dhillon are cousins; their late fathers were brothers and business partners. Satinder's parents met in India. His father immigrated to Canada in 1967; Surjit joined him in about 1976. Satinder was born in 1977.

- [11] Satinder described himself as a businessman, entrepreneur, and President of the National Justice and Equality Party of Canada. He said he is the single largest creditor in the longest-running bankruptcy proceeding in Canada's history and that he and long term friend, Emmet Pierce, have formed an international anti-corruption coalition to battle against inequality in the system. According to Satinder, he is playing an instrumental role in reforming India's legal system. Satinder has a background in mortgages and financing; his current occupation is unclear.
- [12] Surjit gave evidence at trial through a certified Punjabi interpreter. She has a grade 3 education, speaks no English, and recognises only numbers and some written words in English.
- [13] Mandeep described himself as a mining consultant and commodities broker. He has completed some post-secondary education in the area of business administration.
- [14] Shantel is Mandeep's wife. She works as a regional Canada Border Services officer. Mr. Robertson is Shantel's father and a youth counsellor with the Surrey School District. Parmjeet Singh Aujla is Mr. Robertson's friend. Harpreet Dhillon is a real estate agent and Mandeep's and Satinder's cousin. Surjit discontinued her claim against Harpreet at the opening of trial.

IV. PROCEDURAL HISTORY

- [15] This litigation has a lengthy history.
- [16] On September 17, 2014, the defendants, Mr. Robertson, Mr. Aujla, and Shantel, filed a petition seeking vacant possession of the Property and payment of rental arrears.
- [17] On November 20, 2014, Justice MacKenzie ordered the plaintiffs to deliver up vacant possession of the Property and Surjit to pay Shantel, Mr. Robertson, and Mr. Aujla specified amounts for the use and occupation of the Property (the "November 2014 Order").
- [18] The plaintiffs appealed the November 2014 Order to the Court of Appeal which found the record raised triable issues. The court set it aside, without prejudice to the defendants' right to bring further proceedings, and remitted the matter back to the Supreme Court: *Robertson v. Dhillon*, 2015 BCCA 469 [Robertson].
- [19] On September 18, 2015, the plaintiffs filed this notice of civil claim. In October 2016, the defendants filed responses and Mr. Robertson, Mr. Aujla, Harpreet, and Shantel filed counterclaims.
- [20] On March 29, 2017, the defendants applied to dismiss the action against them; on April 10, 2017, the plaintiffs filed an application for judgment by summary trial (collectively, the "Applications"). On April 18, 2017, Justice Bowden ordered the Applications be adjourned to October 11 and 12, 2017. They did not proceed as scheduled.

[21] On June 20, 2018, the defendants filed an application seeking summary judgment dismissing the plaintiffs' claims against them. This application was scheduled to proceed on July 12, 2018. On July 3, 2018, the plaintiffs filed an amended pleading substantially revising their claim. On October 24, 2018, plaintiffs Amarjeet Kaur Jhand, Navneet Kaur Jhand, and Inder Kaur Chandi discontinued their claims. On January 9, 2019, June 7, 2019, and June 19, 2019, Trial Management Conferences took place to address pre-trial procedural matters.

V. BACKGROUND FACTS

The Transfer

The Property

[22] Surjit's late husband built the Property. It holds significant sentimental value for Surjit who has lived there with Satinder and other family members since 1989.

Pre-Transfer Discussions

- [23] According to Satinder, this story begins with him and Mandeep joining forces in an effort to raise funds to invest in the Martin Mine, a Placer gold mining opportunity in northern British Columbia. Both agreed they were close as children, had become estranged as adults, and reconnected in the late summer or early fall of 2009.
- [24] In 2009, Mr. Robertson was introduced to Joe and Mike Hirc, brothers who were looking for investors in the Martin Mine. Mr. Robertson testified that while he did not have the funds to invest in that kind of project, he told the Hirc brothers his son-in-law, Mandeep, might know someone who would be interested.
- [25] Mandeep and Satinder discussed the Martin Mine investment opportunity. They agree they explored various means of raising money in 2009; their stated reasons for doing so differ. Satinder says he and Mandeep were working together to raise funds to invest in the Martin Mine and that those efforts included a transfer of the Property from Surjit to Shantel in October 2009 (the "Transfer"). Mandeep disputes that evidence; he says Satinder told him he was in financial difficulty and needed money to fund the multibillion-dollar bankruptcy litigation in which he was involved. Satinder admitted he was in debt and owed a substantial amount of money.
- [26] Satinder and Mandeep agree they initially explored accessing the equity in Mandeep's mother's home in an effort to raise funds and that they rejected this option when they discovered this property was already subject to a substantial mortgage. Both agree they subsequently discussed accessing Surjit's equity in the Property and the Transfer. Satinder suggested Shantel purchase the Property, as she was a salaried government employee who would qualify for high-ratio financing.

- [27] Satinder maintains he and Mandeep were working together to raise investment funds for their mutual benefit and to create generational wealth for the common good of the extended Dhillon family. Surjit testified she agreed to the Transfer because Satinder told her that he and Mandeep needed money to invest in a mining project, evidence which closely mirrored that of Satinder. Surjit described both Satinder and Mandeep as her trusted sons whom she could not refuse.
- [28] Mandeep rejected any suggestion the Transfer was intended to facilitate a joint investment in the Martin Mine. He said he agreed to the Transfer because he decided to help Satinder who was in a difficult financial situation and needed money to fund his litigation. Mandeep denied he was directly involved in any of Satinder's businesses or that they were working together as part of a group.
- [29] Although Mandeep was initially reluctant to proceed with the Transfer, he agreed to speak to Shantel about it. He told her Satinder needed money to fund his ongoing litigation and had suggested accessing Surjit's equity in the Property for that purpose. Mandeep told Shantel the Transfer would be a safe investment because she would own the Property; he grew up at the Property and was familiar with it. Shantel corroborated Mandeep's evidence regarding their discussions before the Transfer. She did not speak to Satinder or Surjit about the Transfer and left it to Satinder and Mandeep to work out the details.
- [30] Shantel ultimately agreed to the Transfer. She said she considered her purchase of the Property to be a good investment. She and her sister had previously purchased a different property which they had rented and flipped, thereby earning a modest profit; Shantel did so without ever having viewed this other rental property before her purchase.

Agreement to Transfer the Property

- [31] Satinder (on behalf of Surjit) and Mandeep (on behalf of Shantel) (collectively, the "Central Parties") agreed to the Transfer. They disagree about the nature of the Transfer agreement and its terms. That dispute is at the heart of this lawsuit.
- [32] Shantel was chosen to purchase the Property because she had the credit required to qualify for a high-ratio mortgage. Satinder acted as Surjit's agent on the Transfer; Mandeep acted as Shantel's agent. The purchase price was \$370,000, which represented the Property's fair market value at the time of the Transfer.
- [33] Satinder obtained an appraisal of the Property. He emailed an agreement of purchase and sale to Mandeep and Shantel. He engaged a mortgage broker and helped to facilitate the CIBC mortgage Shantel required to purchase the Property (the "Mortgage").

- [34] The Central Parties agree they contemplated Satinder and Surjit would remain in the Property and pay Shantel \$1,587/month following the Transfer. The plaintiffs describe these as "mortgage payments"; the defendants describe them as rent. According to Satinder, he and Mandeep agreed to work together to ensure the Mortgage was paid following the Transfer. Mandeep disputes that evidence and denies he ever assumed that responsibility.
- [35] Shantel understood several Dhillon family members, in addition to Surjit and Satinder, lived at the Property in October 2009, wanted to remain after the Transfer, and could afford to pay rent. She had no recollection of ever visiting the Property before the Transfer. She understood there was some urgency associated with the Transfer as Satinder needed money for his litigation. To her knowledge, Satinder and Mandeep did not discuss her purchase of the Property being a loan or anything other than a transfer.

Buy-Back Agreement or Option to Repurchase

- [36] The Central Parties disagree about whether or not the Transfer included a verbal buy-back provision or option to repurchase. There is no such agreement in writing.
- [37] Satinder testified it was agreed Surjit could buy back the Property on demand for \$370,000, the price Shantel paid to acquire it. According to him, the plan was for Surjit to buy back the Property once he and Mandeep had achieved financial success with the Martin Mine and sufficient funds were available for that purpose. Satinder later adjusted that evidence and said Surjit's buy-back of the Property was not tied to the success of the Martin Mine but rather the plan was for her to buy it back once he and Mandeep "hit it" with one of their various "projects". He thought the Martin Mine would "hit first", noting it was the one not in litigation at the time. Satinder admitted he needed money in 2009 to fund his litigation, invest in the Martin Mine, and for "all of our other projects". He and Mandeep disagree about whether they were working together on the Martin Mine investment or any other projects. Satinder admitted he thought the Martin Mine would generate millions in returns and, in the excitement of the big numbers, said the parties did "not paper every inch" of their buyback agreement. Satinder conceded he did not consider the possibility that the Martin Mine investment would not succeed.
- [38] Mandeep admitted there was some discussion about Surjit's repurchase of the Property but denied they reached any agreement. He rejected the suggestion put to him by Satinder in cross-examination that they agreed Surjit would buy back the Property within three months of the Transfer if the money was available, failing which that would occur whenever she had the necessary funds.
- [39] Mandeep and Shantel both anticipated Surjit would buy back the Property within about three months of the Transfer, by which time they understood Satinder expected to be in receipt of settlement funds from his litigation. They deny the Transfer included any buyback provision or option to repurchase or that any consensus was reached regarding a buyback price or completion date.

- [40] Shantel recalled some discussion about Surjit's possible buy-back of the Property after the Transfer. She understood settlement of Satinder's lawsuit was "approaching" in October 2009, and that Surjit would likely want to buy back the Property within about three months of the Transfer. She said she was prepared to consider selling the Property back to Surjit then if she could make a profit by doing so. She testified Satinder told her he would buy her a new truck which Shantel said would represent a profit; both agree they discussed no specifics in that regard. In cross-examination, Satinder admitted he told Shantel he or Surjit would buy her a truck when the Property was transferred back to Surjit, not as a profit but as a gesture of gratitude.
- [41] To Shantel's knowledge, there were no discussions of Surjit or Satinder buying back the Property within three months of the Transfer. She said she extended the proposed three-month buy-back period several times and considered the matter closed when neither Surjit nor Satinder made any offer to buy back the Property.
- [42] Satinder denied the Central Parties contemplated Surjit would buy back the Property within three months of the Transfer. He denied Surjit planned to do so once he received settlement funds from his litigation, noting that event was too uncertain. Ultimately, Satinder admitted he and Mandeep discussed no definite date when Surjit would buy back the Property.
- [43] When asked in cross-examination about her possible buy-back of the Property, Surjit questioned why she would buy it back, suggesting it would simply be transferred back to her for no consideration. Her evidence on this point was inconsistent with that given by Satinder. Surjit testified there is a big difference between "buying" and "transferring". She observed that, instead of "giving" the Property back to her, Shantel "gave" it to Mr. Robertson. When asked about her possible re-purchase of the Property within three months of the Transfer, Surjit said it was impossible to make money from anything in that timeframe, evidence which mirrored Satinder's on that point. Ultimately, Surjit admitted she did not know how the Property would be transferred back to her and that no agreement was reached regarding a specific date for that purpose.
- [44] Mr. Cobbett, the lawyer who acted for Shantel on the Transfer, testified he was not aware of any discussions about including a buy-back provision in the contract of purchase and sale dated November 13, 2009 (the "Contract") or as part of the Transfer. He said this topic did not arise and if it had, he would have made notes about it. His file contains no reference to a buy-back provision or option to repurchase.

Transfer Documents

- [45] Before the Transfer, Satinder prepared the Contract. He witnessed Surjit's signature on it. He wrote "subject to financing" on the first page. He translated the Contract into Punjabi for Surjit's benefit and assisted her in retaining notary public, Gurpreet Minhas, to effect the Transfer. He was present when Surjit met with Mr. Minhas and signed the Transfer documents.

[46] The Contract included the following notable provisions:

- i. In section 3 under the heading "Terms and Conditions", the only condition is "subject to financing";
- ii. In section 5 under the heading "Possession", there is no reference to any existing tenancies or any tenancy for the rental of a basement suite at the Property;
- iii. In section 9, under the heading "Title", title to the Property is noted to be "free and clear of all encumbrances . . . except as otherwise set out herein"; and
- iv. In section 18, under the heading "Representations and Warranties", it is noted there are "no representations, warranties, guarantees, promises or agreements other than those set out in this Contract".

[47] Surjit corroborated Satinder's evidence regarding her review and execution of the Transfer documents. Satinder informed her about the Transfer. She believed everything he told her and did not speak to Mandeep or Shantel directly. Notary, Mr. Minhas, spoke to Surjit in Punjabi and explained the Transfer. Surjit agreed she signed the Contract willingly, without pressure, knowing its contents. She said she agreed to the Transfer so Satinder and Mandeep could invest in the mining business.

[48] Once signed by Surjit, Satinder emailed the Contract to Mandeep. Satinder asked Shantel to sign and return it to him by email. Shantel testified the Contract she received from Satinder had no schedules or attachments. The Contract confirms the completion date was changed from November 27, 2009 to December 11, 2009.

[49] On December 9, 2009, Shantel met with Mr. Cobbett to sign the Transfer documents. Mandeep was present when she did so. She paid a 5% down payment of \$19,000 and closing costs of \$5,713.34 (inclusive of property transfer tax ("PTT") of \$5,400) by certified cheque. She denied Surjit or Satinder ever refunded her any of those costs. Mr. Cobbett said he considered the Transfer to be a routine one, which raised no red flags.

[50] The Transfer was completed on December 11, 2009. Surjit swore a statutory declaration stating she agreed to sell to Shantel "all of [her] right, title and interest in and to the Property". Satinder translated this document to Surjit who raised no issue with its contents.

Distribution of Net Sale Proceeds

[51] The Central Parties disagree about how the sale proceeds payable on closing of the Transfer (the "Proceeds") were distributed. The plaintiffs say a significant portion was used to repay Shantel's deposit and closing costs and to invest in the Martin Mine and "various other projects" for the Dhillon family's shared benefit; Mandeep and Shantel dispute that evidence.

- [52] Mr. Minhas' December 10, 2009 reporting letter, with enclosures, and Mr. Cobbett's seller's statement of adjustments of the same date, were in evidence. The order to pay directed to Mr. Minhas indicates Surjit's niece, Navneet Jhand, who held a mortgage on title to the Property, was paid \$180,000 to discharge this mortgage and Surjit was paid \$2,456.53 of the total sale proceeds of \$350,567.73, after payment of all other charges and fees owed. The revised order to pay in Mr. Cobbett's file indicates \$350,567.73 was received from Shantel as buyer and the balance due and owing to Ms. Jhand, effective December 4, 2009, after payment of all prior charges and fees, was \$182,370.92, representing the amount required to discharge the mortgage registered in her name on October 30, 2009. According to this document, Surjit netted \$0 after payment of those costs.
- [53] Satinder testified Ms. Jhand's mortgage was registered on title to the Property as a "safety measure" to channel the Proceeds following the Transfer; neither he nor Surjit explained why Surjit and Ms. Jhand agreed to this arrangement, why it was necessary, or whether Mandeep or Shantel were aware of it. Ms. Jhand did not testify at trial.
- [54] The \$167,638.82 balance of the Proceeds was required to discharge the multiple other mortgages registered on title to the Property and to pay discharge, courier, and other charges, legal fees, and disbursements. In cross-examination, Satinder admitted the discharge of these multiple debts was for Surjit's sole benefit.
- [55] The plaintiffs admit Satinder received and distributed all of the Proceeds paid to Ms. Jhand. His evidence about how he did so was muddled, inconsistent, and uncorroborated by any reliable documentary evidence.
- [56] According to Satinder, he gave about \$100,000 of the Proceeds to Mandeep and the Hirac brothers. He initially said he and Mandeep intended to use the Proceeds to invest in the Martin Mine; he later said they were doing many things in an effort to create wealth, often on a handshake, in the "spirit of collectivism", and that the Martin Mine was not their sole focus. He provided no details about any of these other projects.
- [57] The defendants admit that \$69,000 of the roughly \$180,000 received by Ms. Jhand on closing of the Transfer was paid to Mandeep's company, D & L Industries Inc., on December 14, 2009. Satinder said this \$69,000 comprised repayment to Shantel of her \$19,000 deposit, \$30,000 to Mr. Robertson (for repayment of a \$20,000 loan Satinder said Mr. Robertson had made to the Hirac brothers, plus a \$10,000 profit), and another \$20,000 to the Hirac brothers to pursue the Martin Mine opportunity. Satinder also suggested \$20,000 of the \$69,000 payment to D & L Industries Inc. was intended to repay Shantel for the PTT and closing costs she incurred on the Transfer (which Satinder said he "rounded up" from "11 or 12 grand").
- [58] Satinder testified he paid \$20,000 to the Hirac brothers by two cheques dated October 22, 2009 and December 15, 2009 in pursuit of the Martin Mine investment. On their face, the documents produced do not corroborate this evidence. The October 22, 2009 Scotiabank "customer voucher" pre-dates the Transfer and has a handwritten notation on it stating "Bld Parking Deposit". This notation was not explained at trial. It is unclear on the face of the

December 15, 2009 customer voucher to whom the money was paid or for what purpose. Satinder suggested one voucher referenced an account of the Hirc brothers, neither of whom testified at trial.

- [59] Satinder also introduced a handwritten note he wrote which purports to record, in part, two \$10,000 payments to Joe and Mike Hirc in October and December 2009. There is no date on this document and it is not clear when, why, or by whom it was written, or the meaning of the recorded information, which is largely incomprehensible. This document was not listed in the plaintiffs' list of documents and was produced by Satinder for the first time at trial. While the defendants did not object to its admissibility, I found it unhelpful and give it minimal weight.
- [60] The plaintiffs produced no other documents to corroborate Satinder's accounting of the Proceeds. Satinder did not account for the balance of the Proceeds. When asked in cross-examination about other documents to support his distribution of the Proceeds, he said he had not yet found them.
- [61] When asked about how much he invested in the Martin Mine, Satinder testified the answer was "not that simple". He later said he did not remember. He also said he invested \$10,000 in October 2009 and another \$10,000 in December 2009. He later qualified this answer, saying if he "had to guess" he would "call it less than \$20,000 or \$25,000".
- [62] Surjit said she spent two to four thousand dollars of the Proceeds on personal items. She appeared confused when asked in cross-examination if she had received a \$19,000 down payment from Shantel. An RBC bank draft dated November 30, 2009, payable from Shantel to Surjit was in evidence. Surjit denied keeping this \$19,000 down payment but ultimately admitted she had no documentation to confirm it was ever repaid to Shantel. The seller's statement of adjustments in Mr. Cobbett's file indicates the seller (i.e., Surjit) retained this deposit.
- [63] According to the buyer's statement of adjustments contained in Mr. Cobbett's file, PTT payable on the Transfer was \$5,400. Shantel incurred total closing costs of \$5,713.34 (comprising PTT of \$5,400 and various other costs), as set out in the trust reconciliation statement contained in Mr. Cobbett's file. Shantel denies ever receiving repayment of those costs. She testified she has no involvement in D & L Industries and never received any payment from that company after the Transfer. Mandeep corroborated that evidence.
- [64] Mandeep testified that Ms. Jhand's \$69,000 cheque represented repayment of a \$60,000 loan made by D & L Industries to Satinder and Erwin Braich, Satinder's former business colleague. Mandeep understood Satinder and Mr. Braich required these funds in connection with urgent legal matters regarding settlement of their pending litigation with KPMG. Mandeep understood Ms. Jhand's cheque was not signed by Mr. Braich as he was then an undischarged bankrupt. While Satinder said he thought the "D" and "L" of D & L Industries referred to "[Mandeep] Dhillon" and "[Shantel] Lamons", Mandeep testified the "D" in his company name stands for Dhillon and the "L" is for Luangkhemdeng, his best friend and

business partner.

- [65] Mr. Robertson admitted that, following discussions in late 2009 with his son-in-law, Mandeep, he loaned Mr. Braich \$30,000, thereby earning a \$5,000 profit within about three weeks of doing so. Mr. Robertson testified he did not know why Mr. Braich needed this money or whether he shared it with Satinder.

Arrears of Monthly Payments

- [66] Satinder and Mandeep agree they did not intend Shantel to be out-of-pocket on the Mortgage following the Transfer. They disagree about how that goal was to be accomplished.
- [67] Satinder testified Surjit paid him or Mandeep \$1,587/month, representing a mortgage payment and not rent, after the Transfer and he and Mandeep then decided where to direct those funds. Mandeep disputes that evidence. Surjit said she posted \$1,587 every month to Shantel's account. She later said she sometimes deposited this amount and sometimes she gave it to Satinder. She admitted she did not expect to live at the Property free of charge after the Transfer. At some point, Satinder told her to stop making payments to Shantel.
- [68] According to Shantel, the \$1,587 Surjit owed to her was payable before the 9th day of each month (when the Mortgage payment was due) once Shantel became the registered owner of the Property. Shantel made the Mortgage payments to CIBC from the Coast Capital account she shared with Mandeep. She made her first payment on December 11, 2009 and her last payment on March 28, 2014. Shantel said Satinder either deposited this monthly payment directly into her Coast Capital account or gave it to Mandeep. These payments did not remain current.
- [69] Satinder testified that problems began when money became tight. He said the Martin Mine project did not complete as quickly as expected, that he and Mandeep were working collectively to make the Mortgage payments, and that sometimes this money was "used for more pressing things" intended to "further what the group was doing collectively". He did not clarify what other matters took precedence over the Mortgage or how those matters benefited the parties as a group. He said he and Mandeep were spending tens of thousands of dollars, often on a handshake, to "uplift" their shared enterprises; Mandeep disputes that evidence and denies he ever assumed responsibility for paying the Mortgage.
- [70] Mandeep and Shantel testified that neither Surjit nor Satinder consistently made the required monthly payments following the Transfer. Shantel recalls Satinder began making partial payments in January 2010; she continued to make the Mortgage payments. She started to keep a log of missed and partial payments. She spoke to Mandeep about the matter; he, in turn, spoke to Satinder. Mandeep says Satinder consistently told him he was "just about settled" and would "make arrangements", or words to that effect. Mandeep testified he and Satinder had this kind of conversation many times; he said Satinder always gave him the runaround and that trying to get a straight answer was like pulling teeth. Shantel agreed, noting that while Mandeep is very patient, she was getting frustrated with

Satinder's excuses and delay.

- [71] In 2011, Mandeep made inquiries of a mortgage broker to see if he could facilitate Surjit's repurchase of the Property. Based on those inquiries, he understood Surjit had a horrible credit rating, would have been required to make substantial mortgage payments, and private lenders would not be interested in loaning her money. Satinder agreed Surjit did not qualify for credit given her low income, poor credit rating, and outstanding debt. He conceded frustration was building, noting a lack of money can produce interesting circumstances.
- [72] In August 2012, the Mortgage was up for renewal. The interest rate on the Mortgage changed and Shantel's monthly payments to CIBC increased to \$1,693.43/month. Thereafter, neither Surjit nor Satinder made increased monthly payments. Shantel testified she did not demand them as neither was paying her the \$1,587/month, contrary to what had been agreed.
- [73] In January 2013, Mandeep and Shantel learned she was pregnant. Shantel said she was stressed about finances and the plaintiffs' arrears of monthly payments owed to her (the "Arrears"). She told Mandeep he needed to address the matter or she would do so. Mandeep said he contacted Satinder who avoided direct answers to his questions. Mandeep told Satinder that Shantel was not prepared to negotiate a price for Surjit's buy-back of the Property until Satinder took steps to address the Arrears.
- [74] Shantel prepared a schedule of the Arrears by cross-referencing her Coast Capital account with the full and partial payments received from the plaintiffs. Satinder admitted it was "relatively accurate" but suggested, without explaining why, the amount claimed by Shantel ought to be reduced by \$5,000 or \$10,000. The plaintiffs did not provide their own schedule of the Arrears. They deny owing anything to Mr. Robertson, describing Shantel's transfer of the Property to him in 2014 as a "sham".
- [75] Shantel calculated the Arrears owed by the plaintiffs to the end of 2017 in the amount of \$82,212, as follows:
- i. 2010: \$15,997 Owing (representing one full, two partial, and no payments for nine months);
 - ii. 2011: \$16,057 Owing (representing one full, one partial, and no payments for 10 months);
 - iii. 2012: \$1,274 Owing (representing six full, two partial, and no payments for four months);
 - iv. 2013: \$7,622 Owing (representing one full, one partial, and no payments for 10 months);
 - v. 2014: \$17,457 Owing (representing no payments for 11 months and one full payment made in December 2014 pursuant to court order);
 - vi. 2015: \$0 Owing (representing full payments for 12 months pursuant to court order);
 - vii. 2016: \$7,935 Owing (representing seven full payments and no payments for five months); and
 - viii. 2017: \$15,870 Owing (representing no payments for 10 months).

Breakdown in the Parties' Communications

Text Messages between Satinder and Mandeep

- [76] Multiple text messages between Satinder and Mandeep from December 28, 2012 to July 9, 2013 were in evidence. They indicate Mandeep was upset Surjit was not making the monthly payments Shantel required to pay the Mortgage. According to Satinder, Mandeep began to refer to the Arrears as rent, something which upset Satinder, who said he had not seen that coming.
- [77] Satinder asked Mandeep to send him a purchase agreement for a re-transfer of the Property to Surjit; in response, Mandeep said Shantel first required payment of the Arrears. Satinder asked Mandeep why he was making matters so complicated, noting the Arrears would be paid when the Property was re-transferred. Mandeep replied the matter was not complicated and that Shantel required payment of the Arrears as a sign of good faith before the Property could be re-transferred to Surjit. On July 9, 2013, Satinder sent an angry, somewhat incoherent, text message to Mandeep referencing hacked emails, hitmen, and lawsuits and noting he had tried to spare Mandeep from suffering the indignity of Canada's "atrocious legal system".
- [78] A review of the text messages between Satinder and Mandeep indicates:
- i. No references to the purchase price to be paid by Surjit on retransfer of the Property to her from Shantel;
 - ii. No references to the expected completion date for Surjit's buy-back of the Property, although Satinder and Mandeep both indicated they wanted the matter resolved before the end of May 2013;
 - iii. Satinder and Mandeep both asked the other to prepare a contract; neither did so;
 - iv. On April 5, 2013, Satinder texted "I want to go in and just pay that mortgage down and take it over. It will be easier and faster to do the tranfer [sic] of the house back that way." He noted the plaintiffs would pay all outstanding amounts at the "same time as the transfer of the house"; and
 - v. Mandeep replied that Shantel needed "the past monies you owe for the mortgage first", before she was willing to enter into a purchase and sale agreement.

Sale of Martin Mine and Related Litigation

- [79] On or about April 11, 2013, 1708852 Alberta Ltd., a company owned by Mandeep and two of his business associates, purchased the Martin Mine. According to Mandeep, it proved to be an unprofitable investment. He testified none of the substantial funds he invested in the Martin Mine came from the Proceeds.

- [80] In April or May 2013, Satinder learned 1708852 Alberta Ltd. had purchased the Martin Mine. This news made him angry and the parties' relationship deteriorated further thereafter. Satinder said Mandeep "heisted" the Martin Mine and left him with the "wreckage". He told Surjit that Mandeep had stolen the Martin Mine investment opportunity.
- [81] On April 12, 2013, Tianli Resources Corporation ("Tianli"), Mr. Pierce's company, and Mr. Braich, in his capacity as "Trustee of the trust that is the beneficial owner, via agency, of Tianli" commenced an action against the Martin Mine Limited (the "First Tianli Action"). Mr. Pierce confirmed he owns all the shares in Tianli. On April 25, 2013, Tianli and Mr. Braich sued 1708852 Alberta Ltd. in a separate action (the "Second Tianli Action"). No steps have been taken in connection with the Second Tianli Action since May 2013. Mandeep is not a named defendant in either the First or Second Tianli Actions.
- [82] Satinder did not commence legal action against Mandeep or 1708852 Alberta Ltd. in connection with the Martin Mine. There was no evidence at trial to suggest Satinder and Mandeep ever had a partnership, joint venture, non-competition, or confidentiality agreement regarding the Martin Mine. In cross-examination, Satinder admitted he had no recollection of having any non-competition or confidentiality agreement with Mandeep. Mandeep testified DHB Resources Inc. ("DHB"), the company in which he, Satinder, and the Hirc brothers were all shareholders, had no shareholders' agreement. That evidence was not disputed. It is unclear to Mandeep why Satinder alleges he stole the Martin Mine. He said Satinder was unable to secure the funds necessary to purchase the Martin Mine and Mandeep made a decision to work with different business partners in an effort to do so.
- [83] According to Mandeep, investment in the Martin Mine was always speculative. He denied ever guaranteeing Satinder a profit from this investment. Mandeep said he made two non-refundable \$50,000 deposits through DHB in an attempt to purchase the Martin Mine for the price of \$1.2 million. He testified none of this money came from the Proceeds. According to Mandeep, DHB was unable to put together the required funds to purchase the Martin Mine and failed to complete this transaction.
- [84] I make no findings in connection with the Martin Mine dispute which the parties agree is not before me.

Formal Notices and RTB Hearing

April 2013: Notice of Arrears of Rent

- [85] On April 26, 2013, Shantel wrote Satinder and Surjit a letter based on a template she had obtained from the Residential Tenancy Branch ("RTB") website. She said her letter was not an eviction notice but rather a notice regarding the Arrears.
- [86] Shantel received a lengthy email reply from Satinder tying the Transfer to the Martin Mine. Shantel said she felt somewhat threatened by it; she did not discuss the matter with Satinder. In their email exchanges, Satinder repeatedly asked her to transfer the Property back to

Surjit; in response, she told him he needed to pay the Arrears before the parties could move forward. At trial, Satinder conceded Shantel had been placed under an unfair amount of stress following the Transfer. Although he admitted Shantel's calculation of the Arrears was "probably mostly accurate", neither he nor Surjit paid them.

- [87] Mandeep testified Satinder became upset whenever the word "rent" was used in their discussion of the Arrears. However, Mandeep also recalled Satinder saying once that it was funny his sister-in-law was his landlord. Satinder admitted having made this statement but said he did so only after Mandeep "heisted" the Martin Mine. Mandeep appreciated the word "rent" made Satinder uncomfortable and accordingly said he agreed to this "word play" and avoided referring to rent in their discussions. In his text messages to Mandeep about the Arrears, Satinder referenced the "heist" (which he clarified at trial meant the lost Martin Mine opportunity); Mandeep told Satinder that was a separate issue and to stop putting the two together.

May 2013: Notice to End Tenancy

- [88] On May 11, 2013, Satinder wrote an email to Shantel, requesting she "abide by [their] original agreement and transfer the [Property] back to [Surjit]" and "just sign the contract and take the money that is owed to you". Satinder sent neither Mandeep nor Shantel an offer to purchase the Property or a contract.
- [89] In May 2013, Shantel and Harpreet delivered a 10-day notice to end tenancy to Satinder and Surjit for unpaid rent of \$43,798 to May 10, 2013. A discussion ensued. Harpreet said Surjit and Satinder could not continue to live at the Property free of charge and they needed to address the Arrears. She remembers Satinder being unhappy with her use of the word "rent". She recalls he agreed at the end of this discussion to start making payments towards the Arrears. The Arrears were not paid and Shantel delivered another notice.

June 2013: RTB Hearing

- [90] The plaintiffs disputed Shantel's notices for arrears of rent and the RTB scheduled a dispute resolution hearing on June 13, 2013 (the "RTB Hearing"). It proceeded by conference telephone call. Satinder spoke for Surjit; Mandeep spoke for Shantel. Mandeep and Shantel were in Los Angeles at the time.
- [91] Satinder admitted he did a lot of talking at the RTB Hearing and that he and Mandeep occasionally resorted to speaking in Punjabi. Satinder testified he told Mr. Lam, the RTB arbitrator, that:
- i. Surjit had transferred the Property to Shantel, subject to a buy-back agreement;
 - ii. The Property was being held in trust for Surjit and was to be transferred back to her;

- iii. He and Surjit were not tenants at the Property paying rent but were instead making mortgage payments;
- iv. He and Mandeep were cousins and had used the equity in the Property following the Transfer to fund their various projects;
- v. He wished to avoid a court action; and
- vi. This matter was not properly before the RTB.

[92] In cross-examination, Satinder admitted he used the phrase "constructive trust" at the RTB Hearing. He testified the Central Parties agreed Shantel and Surjit did not have a landlord/tenant relationship and that Surjit was the beneficiary of a constructive trust. Mandeep and Shantel dispute this evidence.

[93] In cross-examination, Satinder conceded he may have been involved in another lawsuit where the phrase "constructive trust" might have come up but said he could not recall that detail for certain. When shown the decision of the Court of Appeal in *Dhillon v. Pannu*, 2008 BCCA 514 [Dhillon], he agreed that looked like the case in question. He admitted he was ordered to pay the opposing parties' legal fees in that action after his efforts to appeal the dismissal of his claim to the B.C.C.A. and the S.C.C. were unsuccessful. Satinder was the sole plaintiff in *Dhillon* and had requested relief in the form of a constructive trust over the property which was the subject of that claim.

[94] Surjit testified she remembered the words "constructive trust" being used at the RTB Hearing. She said Satinder explained to her this meant they were not tenants and that the Property would "come back to us". She understood the Central Parties agreed on "this constructive thing" and then tried to sort matters out. Thereafter, she said Satinder dealt with it on his own.

[95] Mandeep was upset Satinder had ignored his previous messages but chose to dispute the Arrears at the RTB Hearing. He and Shantel both remember Satinder being quite irate at the RTB Hearing, especially when the word "rent" was used. Mandeep said Satinder dominated the conversation, interrupted frequently, and would not let him get a word in edgewise. Mandeep remembers Satinder repeatedly using the phrase "constructive trust" and referring to "his mortgage" rather than rent payments. He said he did not understand what a "constructive trust" was and thought Satinder was saying Mandeep trusted his cousin and that they had agreed to meet in an effort to resolve the matter informally. In cross-examination, Satinder admitted he told Mandeep at the RTB Hearing that Mandeep could trust him to put an end to the matter, or words to that effect. According to Mandeep, Satinder never explained what he meant by constructive trust. Mandeep denied the Central Parties agreed there was a constructive trust and no landlord tenant relationship.

[96] Shantel agreed Satinder was argumentative, interrupted often, and used legal terms she did not understand. She remembers being outside in a parking lot at the time and hearing a lot of background noise. It was her impression the RTB arbitrator seemed frustrated. Satinder admits the RTB arbitrator suggested the Central Parties' dispute was not a matter for the RTB and that they sort it out between them.

[97] Following the RTB Hearing, the RTB arbitrator issued a decision dated June 18, 2013 (the "RTB Decision"), which provided, in part:

"During the hearing both parties agreed that this was a "constructive trust". The property was sold from the Tenant to the Landlord with the understanding that the Tenant would continue to live in the residence and pay for the the [sic] mortgage and any maintenance, utilities and property taxes while maintaining an ownership interest in the rental property. The property was to eventually be sold back from the Landlord to the Tenant. Both parties confirm that this was a verbal agreement with no conditions of a tenancy. Both parties agreed that this was not a Landlord/Tenant relationship, but were trying to avoid any action in the Courts".

[98] Mandeep understood he and Satinder had agreed to meet after the RTB Hearing in an effort to resolve matters and avoid further escalation; Shantel shared that understanding. According to Mandeep, Satinder promised to meet him at a notary's office the following Tuesday but never provided the address and accordingly, this meeting never took place. Satinder admitted they had agreed to meet but said Mandeep did not attend. He later questioned aloud why Mandeep would meet him since he "had the mine and was going to throw [his] family out on the street". Satinder and Surjit did not offer to purchase the Property following the RTB Hearing.

Involvement of Harpreet Dhillon

[99] By January 2013, Shantel said she felt frustrated and trapped and did not know what to do. She and Mandeep testified the Arrears caused them both stress and prompted arguments between them. Shantel was worried about her credit, concerned about her expenses, and annoyed that many people she considered capable of working were living free of charge at the Property while she made the Mortgage payments. It seemed to her that Satinder did not care about her situation and was making no apparent effort to address the Arrears.

[100] Shantel approached her sister-in-law, Harpreet, to see if she would speak to Satinder on her behalf. Shantel told Harpreet she was "done" dealing with Satinder and wanted the Arrears paid, a purchase price agreed on, and the Property sold. She said she did not trust Satinder and was not prepared to sell the Property to Surjit until the Arrears were paid.

- [101] Harpreet understood Shantel was then paying rent on her own home and making the Mortgage payments for the Property while Surjit and Satinder were paying nothing for their use and occupation of the Property. She agreed to speak to Satinder. She testified she told him he needed to sort out his finances and pay the Arrears, noting he and Surjit were essentially squatting at the Property; in reply, Satinder said he was willing to sort it out but needed a written contract. He did not prepare one.
- [102] Text messages from May 27, 2013 to July 8, 2013 between Harpreet, Satinder and Mandeep were in evidence. They indicate Harpreet attempted to mediate the Central Parties' dispute. While Satinder subsequently made one payment to an intermediary designated by Harpreet, her efforts were ultimately unsuccessful. In one of her text messages to Satinder, Harpreet explained that tax on capital gains would be payable by Shantel if the Arrears were included in the purchase price on a transfer of the Property to Surjit, noting that would be inappropriate as they did not represent a capital gain.
- [103] None of Satinder's text messages reference a purchase price of \$370,000. Harpreet and Satinder never agreed on a price for Surjit's purchase of the Property. Harpreet told Satinder the price would be fair market value (which she estimated was then about \$400,000). Neither Surjit nor Satinder made an offer to purchase the Property.

Tenants at the Property

- [104] Satinder testified that Surjit collected about \$1,000/month for the rental of a 3-bedroom basement suite at the Property before the Transfer until sometime in late 2013. Satinder said he informed Mandeep there were tenants at the Property; he admitted in cross-examination he could not remember exactly when he did so but said it was sometime in 2009.
- [105] Mandeep and Shantel both denied being aware there were tenants at the Property before the Transfer. Mandeep testified he learned there were tenants at the Property in July 2013, and that he was shocked the plaintiffs were receiving rental income while they owed Shantel the Arrears. Shantel corroborated that evidence. In cross-examination, she said she learned from Neena Dhillon, Mandeep's aunt, in about July 2013 that there were tenants at the Property.
- [106] Shantel said she, Mandeep, and two other family members attended at the Property in July 2013 to speak to the basement tenants and to ask them to enter into a rental agreement with her, the Property owner. Sometime thereafter, these tenants vacated the Property; none testified at trial. In cross-examination, Surjit admitted she did not advertise for new tenants thereafter as the Property was not in her name and she was unable to do so. Neither Satinder nor Surjit said they ever requested Shantel's permission to rent the basement suite at the Property after the Transfer. Surjit said she stopped receiving rent in July 2013.

- [107] The defendants say the plaintiffs directed approximately \$44,000 (44 months x \$1,000/month) of rental income to their own benefit during Shantel's ownership of the Property. At the close of the defendants' case, Satinder sought to introduce reply evidence from Neena about whether and, if so, when, she advised Mandeep and Shantel that there were tenants at the Property. Satinder advised the Court Neena was unavailable to attend at the trial. The parties agreed this evidence would be set out in a sworn affidavit and served on defence counsel who agreed to notify the plaintiffs and the Court within a specified deadline if they required an opportunity to cross-examine on it. A July 31, 2019 court date was subsequently scheduled for that sole purpose. The witness did not attend.
- [108] Mr. Pierce, who is neither a lawyer nor a party in these proceedings, attended to speak to the matter, purportedly as agent for Satinder and on Surjit's behalf. Satinder was contacted by conference telephone call. He advised the court that Neena was unavailable, despite the July 31, 2019 date having been set to accommodate her unavailability at trial. Satinder advised the Court that introduction of this evidence was relevant only to an assessment of the defendants' credibility. Sufficient evidence was adduced at trial to permit such an assessment. It was open to the plaintiffs to subpoena this witness. Her affidavit was not admitted into evidence.

Involvement of Mr. Robertson and Mr. Aujla

- [109] In or about July 2013, Mr. Robertson became involved in attempting to facilitate payment of the Arrears. Text messages from July 14 to 23, 2013 between him and Satinder were in evidence. Mr. Robertson said Satinder never replied in a satisfactory manner. He advised Satinder that, if the matter could not be resolved, he might purchase the Property. He told Satinder the only solution was for Surjit to pay Shantel what she was owed and that the time for talking was over.
- [110] On July 23, 2013, Mr. Robertson texted Satinder to offer the sale of the Property for \$459,000, inclusive of the Arrears. He told Satinder to quit stalling; Satinder did not respond. Ultimately, Mr. Robertson said communications with Satinder broke down. The plaintiffs neither paid the Arrears nor made an offer to purchase the Property. Satinder said he and Mr. Robertson had no reason to deal with each other and that he did not tender an offer because Mr. Robertson was "playing games" and "asking for a different price".

August 2013: Listing of the Property for Sale

- [111] By email dated August 12, 2013, Shantel wrote Satinder to tell him this was his "last chance" to purchase the Property or she would move forward with selling it.

- [112] By August 2013, Harpreet understood Shantel was unable to collect rent or to evict the plaintiffs and had decided she had no choice but to list the Property for sale. Shantel testified she was in debt, worried about her credit, and paying for the Property, which she could not afford. Because she had heard nothing from the plaintiffs, she asked Harpreet to list the Property for sale.
- [113] On August 12, 2013, Harpreet listed the Property for \$465,000, a price she determined by reference to recent comparable sales in the area. The listing agreement extended from August to December 2013. Harpreet testified many prospective buyers called to inquire about the Property. She was unable to show it as Surjit refused access. Accordingly, Harpreet received no offers.

April 2014: Sale to Mr. Robertson and Mr. Aujla

- [114] In or about September 2013, Mr. Robertson offered to assume the Mortgage and deal with Satinder directly. He required a guarantor or co-signor given his age and income. Family friend, Mr. Aujla, became involved for that purpose. On April 8, 2014, Shantel transferred the Property to Mr. Robertson and Mr. Aujla who assumed the Mortgage, which then had a principal amount owing of \$337,861.36. They owned the Property from April 2014 until May 2019.
- [115] Mr. Robertson testified he had no interest in either purchasing the Property or assuming the Mortgage. He confirmed he did not want Surjit's house; he had his own. Similarly, he had his own mortgage and did not want another one. Mr. Robertson testified he acquired the Property for one reason only: to alleviate the financial stress he understood Shantel was experiencing while pregnant with her first child. Mr. Robertson said he decided to put his own "neck in the noose" so Shantel would not have to worry.
- [116] On April 8, 2014, Mr. Robertson assumed the Mortgage with co-defendant, Mr. Aujla, as co-signor. He paid \$11,062.16 as follows:
- a) PTT of \$5,200.00;
 - b) Outstanding property taxes for the Property in the amount of \$4,200.00;
 - c) Outstanding utilities for the Property in the amount of \$179.89; and
 - d) Legal fees and disbursements in the amount of \$716.90.
- [117] Mr. Robertson's monthly payments on the Mortgage were \$1,693. He made these payments until December 2016 when he could no longer afford them and the Mortgage went into default.

[118] Mr. Robertson does not believe he requested rent from the plaintiffs after he assumed the Mortgage. He said he was aware Shantel's efforts to collect rent from them were unsuccessful. Instead, he hired a bailiff to serve the plaintiffs with a demand to pay rent or vacate the Property. Mr. Robertson did not inform Satinder or Surjit when his payments on the Mortgage increased or when he fell behind on them. He considered the Mortgage to be his and Mr. Aujla's and that doing so was unnecessary.

[119] On April 17, 2014, Harpreet re-listed the Property for \$399,000. The plaintiffs refused to allow access to the Property. The listing expired on December 31, 2014.

[120] On September 17, 2014, the defendants filed a petition which, according to Satinder, proceeded to a hearing with no consideration of the materials he attempted to file. In the November 2014 Order, MacKenzie J. ordered, in part, that:

- i. The plaintiffs surrender vacant possession of the Property on the terms set out in his order;
- ii. Surjit pay Shantel \$60,786.89; and
- iii. Surjit and Satinder pay Mr. Robertson and Mr. Aujla \$12,800 for their use and occupation of the Property from April 8, 2014 to date.

[121] The plaintiffs appealed the November 2014 Order. Satinder testified he reached an understanding with the defendants' former lawyer, pursuant to which he and Surjit agreed to make the Mortgage payments directly to CIBC pending their appeal of the November 2014 Order.

[122] According to Mr. Robertson, Satinder did not start paying rent for the plaintiffs' use and occupation of the Property until December 2014. Mr. Robertson received payments, mostly by cheque from Mr. Pierce payable to Mr. Robertson's lawyer, until August 2016.

[123] On November 18, 2015, the Court of Appeal set aside the November 2014 Order on procedural grounds and referred the matter back to the Supreme Court: Robertson.

[124] The defendants say the plaintiffs paid Mr. Robertson \$31,986 in rent as follows:

Year

Rent Received

May to December 2014

\$1,600

2015

\$19,174

2016

\$11,122

2017

\$0

2018

\$0

January to May 2019

\$0

Total:

\$31,896

[125] Satinder testified that following the July 13, 2018 entry of the April 18, 2017 order of Bowden J., the plaintiffs began making payments on the Mortgage directly to CIBC. The plaintiffs gave no evidence about how much they paid towards the Mortgage after July 13, 2018.

[126] Mr. Robertson and Mr. Aujla say the plaintiffs owed them rent for their use and occupation of the Property from May 2014 to May 2019 in the amount of \$96,807.00 (\$1,587/month x 61 months). After deducting the amounts the plaintiffs paid them, they say the balance owing is \$64,911.00, plus accrued interest.

[127] After his assumption of the Mortgage, while he and Mr. Aujla owned the Property, Mr. Robertson says he paid \$62,857.05, calculated as follows:

- a) \$57,113.58 towards the Mortgage; and
- b) \$4,050.00 for home insurance on the Property.

Payment of Utilities, Property Tax, and Maintenance

[128] According to the plaintiffs, Surjit paid property taxes, utilities, and various other expenses related to the Property after the Transfer and April 2014 assumption by Mr. Robertson of the Mortgage. The plaintiffs argue those payments indicate the parties intended Surjit to remain the beneficial owner of the Property after the Transfer.

[129] Surjit gave evidence about various Home Depot and other receipts introduced into evidence at trial (the "Receipts"). The Receipts record purchases made in 2016 totalling \$2,499.52. Surjit was unable to explain them in any detail. She said "everyone knows we buy things for the house", noting that, if she purchased items for the Property, they would be on "the bill". She agreed in cross-examination that some items in the Receipts (including, for example, lint rollers, clip mirrors, and Sunlight dish detergent) did not relate to maintenance or renovation of the Property. Surjit described a roof repair completed at the Property but admitted this work occurred before the Transfer. She did not keep a log of any renovations to the Property after 2009 and said that, without a log, she could not recall the details of any renovations. Neither she nor Satinder gave evidence about any renovations having taken

place at the Property after the Transfer. Surjit did not explain how the itemised expenses in the Receipts contributed to the value of the Property. None reference the Property or Surjit as payor. The plaintiffs made no contemporaneous notes relating to these purchases. Surjit did not explain why all were incurred in 2016.

[130] According to Shantel, the Central Parties did not discuss who would pay the costs associated with owning the Property before the Transfer. She understood Surjit or Satinder would pay the utilities while they lived at the Property and she would pay the Property taxes. Shantel paid insurance of \$1,200/year for the Property for four years after the Transfer.

[131] Sometime in 2012, Mandeep contacted the City of Abbotsford about property taxes, in response to a letter Shantel had received. As a consequence, he learned Surjit had paid the Property taxes in 2012. He said he was looking for a way out of the nightmare he and Shantel were in and that, if the plaintiffs were willing to pay property taxes in lieu of rent, he and Shantel were happy to take whatever money they could get from whatever source. Shantel corroborated that evidence. She admitted she did not pay utilities or property taxes for the Property when she owned it. She was unaware of any repairs needed at the Property during that time.

[132] Surjit testified she paid \$14,224.30 for property taxes and municipal utilities for the Property as follows:

Date

Property Tax Payment

Utilities Payment

January 3, 2012

\$9,628.19

January 3, 2012

\$272.88

February 6, 2012

\$294.57

July 12, 2012

\$1,500

February 12, 2013

\$2,255.19

\$152.83

April 3, 2013

\$120.64

[133] Mr. Robertson paid no taxes for the Property after 2014. CIBC paid them in 2016 and thereafter increased his monthly payments on the Mortgage. The plaintiffs offered no evidence to suggest either paid the Property taxes after Mr. Robertson and Mr. Aujla became the owners.

[134] The defendants admit the plaintiffs are entitled to a credit of \$14,224.30 towards their obligation to pay rent for their use and occupation of the Property.

Foreclosure Proceedings

[135] CIBC commenced foreclosure proceedings with respect to the Property and, on May 30, 2019, the Property was sold under foreclosure. Title was transferred to Surjit for \$645,000.

[136] Satinder maintained the defendants caused the Property to go into foreclosure because their lawyer would not sign a court order allowing him to make the Mortgage payments directly to the bank. Mr. Robertson testified this order required Satinder to pay the Arrears, which did not occur. Mr. Robertson said neither Satinder nor Surjit paid him and he was therefore unable to pay the bank. Mr. Robertson confirmed he received no offer from the plaintiffs to purchase the Property or to rent the basement suite at the Property once he and Mr. Aujla became owners.

[137] The April 18, 2017 order of Bowden J., as settled by Registrar Cameron, as he then was, and entered on July 13, 2018, provides as follows:

- i. The defendants' summary trial application, filed April 10, 2017, was reset to proceed on October 11 and 12, 2017;
- ii. Until the hearing of that application, the plaintiffs were to bring and maintain current the monthly payments to CIBC on the Mortgage registered on title to the Property;
- iii. The plaintiffs were directed to make those payments to CIBC or to the defendants directly;
- iv. All further communications between the parties were to be made through counsel; and
- v. Costs of the application were awarded in the cause.

The Arrears

[138] Coast Capital transaction receipts from June 2010 to August 2013 were in evidence. Satinder testified these documents represent as many receipts as he could find to account for the plaintiffs' payments to Shantel following the Transfer. He said he had incomplete documentation because he and Mandeep had intended to work together and not end up in litigation.

- [139] Satinder could not recall how much he or Surjit paid to Shantel in 2010 after the Transfer. He had no recollection of how much he or Surjit paid to Shantel in 2011. When asked about 2012, Satinder said he had "some calculations somewhere". He admitted the plaintiffs made no monthly payments to Shantel from July 2013 to April 2014, after Shantel ceased to be the owner of the Property. He said communications had then broken down.
- [140] Surjit admitted she made no payments to Shantel, Mandeep, or Mr. Robertson after July 2013. In cross-examination, Satinder said he and Surjit stopped making payments after July 2013 because Mandeep "broke their deal" and called him a tenant. He admitted Shantel's schedule of the Arrears was not "completely off base"; suggesting he and Mandeep had been sorting out financial matters "on the fly".
- [141] According to Satinder, he and Surjit made monthly payments to Mr. Robertson's lawyer from approximately January until July 2016, following which Mr. Robertson's lawyer stopped accepting them. Mr. Robertson said lawyers are not cheap and he decided to stop paying a lawyer for the sole purpose of accepting Satinder's monthly payments. Thereafter, neither Satinder nor Surjit made any monthly payments to Mr. Robertson directly. Satinder said he decided not to trust Mr. Robertson and he was not going to pay someone who "took our house". He maintained Mandeep and Shantel had "broken their deal" and should have kept the lawyer in place.
- [142] Shantel claims unpaid rent from the plaintiffs, calculated as follows:
- i. Total rent for January 2010 to April 2014: \$82,524.00 (\$1,587/month x 52 months); and
 - ii. After deduction of the monthly amounts paid by the plaintiffs and the Property tax and utility payments made by Surjit, the defendants say Shantel is owed \$30,662.70 in unpaid rent, plus accrued interest.
- [143] Shantel says she contributed \$88,114.08 towards the Property (excluding her cost to purchase the Property) while she was the owner, calculated as follows:
- a) \$82,930.08 towards the Mortgage; and
 - b) \$5,184.00 for home insurance on the Property.
- [144] According to Shantel, if the plaintiffs had made their monthly payments as agreed (i.e., \$82,524.00), she would only have been out-of-pocket \$5,590.08 after the Transfer. If the fair market value of the Property had increased by more than this amount during the course of her ownership, she says she would have enjoyed a return on her investment.

VI. ISSUES

- [145] This action gives rise to the following issues:
- a. Was the Transfer a bona fide purchase and sale?
 - b. Was the Transfer a trust settlement?

- c. Have the defendants been unjustly enriched?
- d. Could the Central Parties agree to a constructive trust?
- e. Are the defendants bound by statements made in the RTB Decision?
- f. Do equitable principles apply to deprive the plaintiffs of equitable relief?
- g. Did the Transfer include a verbal buy-back agreement or option to re-purchase?
- h. Did the defendants benefit from the Proceeds?
- i. Was the Transfer a disguised mortgage?
- j. Who is entitled to the excess sale proceeds paid into court on foreclosure?
- k. Are the defendants entitled to damages on their counterclaims?

[146] Surjit abandoned her claim for damages for the loss of rental income at the close of trial. Accordingly, I will not address that issue.

VII. CREDIBILITY AND RELIABILITY OF EVIDENCE

[147] Satinder and Mandeep are the main players in this dispute. The irreconcilable discrepancies in their evidence require me to assess credibility.

[148] Justice Dillon summarised the factors relevant to a court's assessment of credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 aff'd 2012 BCCA 296 paras.186-188, as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a

reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993)*, 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

- [188] Most helpful in this case has been the documents created at the time of events, particularly the statements of adjustments. These provide the most accurate reflection of what occurred, rather than memories that have aged with the passage of time, hardened through this litigation, or been reconstructed. It should also be remembered that the parties used documentation to accomplish undisclosed purposes here, particularly in the Peachland contract. The inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility. As well, I have relied upon the evidence of the two lawyers involved, Dhindsa and Hordal, who were independent, professional witnesses who gave their evidence in a fair and objective manner and whose evidence forms a reasonable base for analysis.

Satinder Dhillon

- [149] While the plaintiffs were advised to retain counsel before trial, they attended at trial without a lawyer. Satinder placed the September 22, 2015 transcript of the oral proceedings before the Court of Appeal in evidence. After being advised to do so, Satinder assured the Court of Appeal he would be able to retain a lawyer so the trial of this action would proceed properly and focus on relevant evidence, suggesting that be a "stipulation" of allowing his appeal. Ultimately, it is unclear why the plaintiffs elected not to retain a lawyer who could appear at trial.
- [150] Satinder's evidence was not persuasive. It was vague, scattered, inconsistent, and permeated by an element of grandiosity. He treated the Property as if it were his own. His answers to questions were frequently unresponsive. He often made arguments in lieu of asking or answering questions. He was occasionally smug, sarcastic, and disrespectful in his tone and demeanour. He periodically directed his questions or submissions to opposing counsel rather than the Court. He suggested it was "mind-numbing" to him that he was unable to introduce certain documents and use the truth to defend himself. It was clear this dispute is a personal one for him.
- [151] Neither Satinder's evidence nor his conduct was transparent. Many of his answers and explanations, much like his business dealings, seemed unduly complicated. Most of his testimony was uncorroborated by any reliable documentary evidence. The Transfer documents did not support his evidence that the parties reached collateral agreements. He did not adequately explain the curious mortgage registered in Ms. Jhand's name on title to the Property in late October 2009. He said this step was taken "just in case some other lien or something crazy showed up". That answer was unhelpful. In cross-examination, he denied this was a false mortgage and suggested Ms. Jhand had "invested along the way as

well". That uncorroborated assertion was not established on the rest of the evidence. While I am not required to find Ms. Jhand's mortgage was a fraudulent conveyance, I found Satinder's evidence about why it was registered to be obscure. It was, however, consistent with his unconventional approach to doing business. No explanation was given for Ms. Jhand did not testify. I infer her evidence would not have been helpful to the plaintiffs.

- [152] Satinder's self-described "freestyle" approach to business dealings similarly defines his litigation style. It was my general impression that much of his evidence was contrived to fit a pre-conceived narrative. While he testified that business is often done on a handshake in his culture and within his family, it was apparent on the evidence that he and Mandeep did not enjoy the same level of trust their late fathers once did. Satinder rarely provided simple, clear, direct answers to questions, an observation which is consistent with the defendants' description of his response to their attempts to collect the Arrears. At trial, Satinder made frequent excuses, consistently deflected responsibility for the legal quagmire which resulted in this protracted lawsuit, and failed to acknowledge the risks inherent in his freewheeling approach to doing business.
- [153] Satinder's approach to this lawsuit has been similarly fluid. He prepared and filed the plaintiffs' notice of civil claim on September 18, 2015. On July 3, 2018, following service by the defendants of their application for summary judgment filed June 18, 2018, he filed a substantially amended notice of civil claim, significantly altering the basis for the plaintiffs' claims. In this amended pleading, the plaintiffs asserted for the first time that the parties had a buyback agreement pursuant to which Surjit could repurchase the Property for \$370,000 on demand.
- [154] Apart from referencing the Martin Mine investment, Satinder was consistently vague about the various projects he said he and Mandeep were jointly pursuing for their mutual benefit in 2009. He provided no reliable documentation to corroborate this evidence. Despite being asked to produce an accounting of the Proceeds in this action, he failed to do so, suggesting almost ten years after the Transfer and more than four years after starting this lawsuit, that he had not yet found the relevant documents. That answer was not believable. I infer the more likely explanation is there are no documents which support Satinder's loose accounting of the Proceeds. Ultimately, I found Satinder's evidence to be largely unreliable and give it minimal weight when uncorroborated by other credible evidence or by reliable documents.

Surjit Dhillon

- [155] Surjit was an unsophisticated witness who demonstrated an obvious lack of understanding about the precise nature of the Transfer. She admitted she has a very poor memory of the events of 10 years ago. She frequently deferred to Satinder when asked questions, saying he would know the answer and "handled all of this". She often used the same language as Satinder to describe events. For example, like Satinder, she said Mandeep "stole" the Martin Mine and then the Property. It was my general impression much of Surjit's evidence was

practiced, described matters she did not understand well, and relied heavily on information from Satinder.

- [156] I accept that Surjit was not deliberately attempting to mislead the court. It was apparent Surjit trusted Satinder, her only child, without hesitation or qualification, and that her evidence was heavily influenced by his views of the parties' dispute. I view it through that lens.

Emmet Pierce

- [157] Mr. Pierce described himself as Satinder's long-term friend and business associate. It is clear their personal interests are closely aligned. On the evidence, both share a common world view and are united in their commitment to the international anti-corruption coalition they have formed together. In cross-examination, Mr. Pierce admitted he gave evidence at trial to help out his friend.
- [158] Mr. Pierce was not directly involved in the negotiation of the Transfer nor was he a party to it. In my view, his evidence strained the bounds of personal knowledge and it was not helpful to me.
- [159] Mr. Pierce was Satinder's constant helper throughout the trial, providing assistance in the form of notetaking, photocopying, organising, obtaining, and copying documents. He attended the RTB Hearing and appeared in this action on July 31, 2019, purportedly as agent for the plaintiffs in Satinder's absence. Mr. Pierce is the sole principal behind Tianli, the corporation involved in outstanding litigation arising from the Martin Mine dispute, a matter of obvious interest to Satinder. Ultimately, I am unable to conclude Mr. Pierce was an independent witness. I found his evidence to be of limited assistance and give it minimal weight.

Michael Robertson

- [160] I found Mr. Robertson to be a refreshingly candid witness. He consistently gave clear and direct answers to questions. He readily acknowledged the limits in his understanding of certain events. He did not mince words and made it clear when he considered things being put to him in cross-examination were getting "twisted". I found him to be straightforward and credible.

Mandeep Dhillon and Shantel Lamons

- [161] Mandeep and Shantel were responsive and respectful witnesses whose evidence was consistent on all material points. By contrast, there were notable discrepancies in the evidence given by Satinder and Surjit including, for example, the terms of the alleged buyback agreement. Mandeep and Shantel made admissions against interest; their willingness to do so enhanced their credibility. For example, they conceded the Central Parties had no discussions before the Transfer about the payment of property taxes,

utilities, or maintenance costs for the Property. While this dispute is also a clearly a personal one for Mandeep, he maintained his composure throughout the trial and, despite vigorous cross-examination by Satinder, his evidence remained consistent.

Summary of Credibility Findings

- [162] For the reasons set out herein, to the extent there is conflict, I generally prefer the defendants' evidence to that given by the plaintiffs. Given what I consider to be inherent frailties in the plaintiffs' evidence, I give it minimal weight when uncorroborated.
- [163] While Harpreet was not a party to the Transfer and played a limited role in attempting to mediate the Central Parties' dispute, I found her to be a responsive witness who gave clear and direct answers to questions and whose evidence I found to be credible and reliable. It was not seriously challenged in cross-examination.
- [164] Mr. Cobbett gave evidence as an officer of the court. He was an objective and fair witness whose evidence I accept without question.

VIII. LAW AND ANALYSIS

Burden of Proof

- [165] In civil proceedings, it is trite law that the plaintiff bears the burden of proof, subject to certain limited exceptions. This means that it is the plaintiff who must prove the essential facts of her claim on a balance of probabilities; if she fails to meet this burden, the claim must fail.
- [166] Proving a claim on a balance of probabilities means that the trier of fact must be more satisfied than not that a particular fact is true. Although less onerous than the criminal standard, the civil "more likely than not" standard is not insignificant. It is against this yardstick that I assess the parties' evidence.

Was the Transfer a Bona Fide Purchase and Sale?

- [167] The defendants say the Transfer was a bona fide purchase and sale. The plaintiffs disagree and say it was subject to a verbal buyback agreement and/or a constructive trust in favour of Surjit as beneficial owner.
- [168] The test for determining consensus ad idem at the time of contract formation is objective: *Salminen v. Garvie*, 2011 BCSC 339 at para. 27. It involves a consideration of whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract, the terms of such contract, and whether a reasonable person in this position would have believed and understood that the other party was consenting to the identical term. The actual state of mind and personal knowledge or understanding of the promisor are not relevant to this inquiry; if a reasonable person would find the parties were in agreement as to a contract and its terms, a contract exists at common law.

- [169] The focus regarding contested contractual terms is on the parties' actual communications and not their understandings. Construing a contract and its terms is based on an objective assessment: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 48.
- [170] On its face, the Contract is a straightforward one. Mr. Cobbett confirmed he was aware of nothing unusual about it. Based on all the evidence, including the Contract itself, the Central Parties reached consensus on all material terms (including the Property to be sold, the identity of the contracting parties, the purchase price, relevant financing terms, and the completion date) before the Transfer. The Transfer documents are unremarkable and reflect a simple conveyance. The Contract makes no reference to a collateral buyback agreement or to Surjit retaining any beneficial ownership interest in the Property after the Transfer. On the evidence, Shantel and Surjit had met on only one previous occasion and the Transfer appears to be an arms length transaction, albeit among distant family members, involving the payment of fair market value consideration.
- [171] Surjit had the benefit of independent professional advice from notary, Mr. Minhas, who spoke to her in Punjabi and translated and explained the Transfer documents to her before she signed them. Surjit confirmed she signed them voluntarily, knowing their contents. She executed a statutory declaration indicating she agreed to transfer all her right, title and interest in the Property to Shantel on the Transfer.
- [172] The defendants ask me to draw an adverse inference from the plaintiffs' failure to call Mr. Minhas at trial. In *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at para. 1, the Court of Appeal reviewed the circumstances in which an adverse inference is appropriately drawn when a witness is not called without explanation, citing *Donald Brown*, Civil Appeals (looseleaf):
- ... An adverse inference may be drawn when, without explanation, a party does not give evidence or fails to call a witness who in the circumstances would be expected to favour the party and the witness would have knowledge of the facts in dispute. In such circumstances, the failure to call the witness or give testimony is seen as akin to an admission that the evidence would have been contrary to the party's case, or at least would not support it. [At 13.2131.]
- [173] The plaintiffs offered no explanation for why Mr. Minhas, who was involved in advising Surjit and effecting the Transfer, gave no evidence. In the circumstances, I infer it would not have been helpful to the plaintiffs.
- [174] Ultimately, the question I must ask is whether the Transfer was what it purported to be on its face. On all the evidence and for the reasons that follow, I conclude the answer to that question is yes.

Did a Constructive Trust Exist?

Was the Transfer a Trust Settlement?

[175] In their notice of civil claim filed September 18, 2015, the plaintiffs alleged a constructive trust claiming Shantel agreed "to transfer the Property back to Surjit and no one else". This pleading makes no reference to the terms of the alleged constructive trust agreement or the basis for this equitable relief.

[176] In their substantially amended notice of civil claim filed on July 3, 2018, the plaintiffs alleged the Central Parties agreed:

- i. Shantel "would hold the Property as bare trustee for Surjit" and "agreed to transfer the Property back to Surjit for \$370,000 on demand";
- ii. Mandeep and Satinder would use the Proceeds from the Mortgage for the Martin Mine "among other things";
- iii. Satinder and Surjit would continue to reside at the Property and to accept rental income for the basement suite and Mandeep and Shantel would provide any assistance required to permit them to do so;
- iv. Surjit, Satinder, and Mandeep agreed to pay the Mortgage; and
- v. Satinder and Mandeep "contemplated" the Property would be transferred back to Surjit after the Martin Mine opportunity "put them in sufficient funds to be able to do so".

[177] The plaintiffs say Surjit remained the beneficial owner of the Property after the Transfer because:

- i. She had a strong sentimental attachment to the Property and would never have agreed to sell it outright for any reason;
- ii. She paid property taxes, utilities, and other expenses for the Property after the Transfer; and
- iii. The parties agreed there was a constructive trust, as set out in the RTB Decision.

[178] For a trust to be settled, the three certainties of intent, subject matter, and object must be satisfied: Donovan W.M. Waters, Q.C., *Waters' Law of Trusts in Canada*, 4th ed, (Toronto: Carswell, 2012) at p. 140.

[179] The defendants say that, if a trust were found to exist in this case, Surjit would be its object. However, they deny the plaintiffs have established the existence of an express trust or certainty of intention and subject matter. They maintain the alleged trust fails because:

- i. There is no evidence of clear communication of Surjit's intention and Shantel's obligations as trustee or Shantel's acceptance of those obligations;
- ii. Shantel never intended to hold the Property as trustee and testified she intended to purchase the Property;
- iii. Mandeep never communicated to Satinder that Shantel agreed to hold the Property as trustee;

- iv. Completion of the speculative Martin Mine venture or any of Satinder's other business projects as a condition precedent for return of the Property to Surjit would violate the rule against perpetuities;
- v. An agreement to retransfer the Property to Surjit on demand would similarly violate the rule against perpetuities;
- vi. Surjit gave no evidence about whether she:
 - i. intended the Property to be returned to her with free and clear title or subject to the Mortgage; or
 - ii. was willing or able to assume Shantel's obligations under the Mortgage;
- vii. Surjit's suggestion that the Property would be returned to her for no consideration is untenable and inconsistent with Satinder's evidence;
- viii. Holding the Property in trust for Surjit would likely have breached Shantel's agreement with CIBC which advanced the Mortgage funds on the basis Shantel was the legal and beneficial owner of the Property;
- ix. If Shantel had been bare trustee for Surjit, she would not have continued to pay the Mortgage without instructions from Surjit to do so in the absence of monthly payments from the plaintiffs; and
- x. On the evidence, Surjit paid taxes only sporadically and no home insurance for the Property, payments which are insufficient to support the imposition of a constructive trust.

[180] The defendants cite the analysis of Justice Dillon in *Bradshaw*, where the court found the settlor clearly communicated that the transferee would take title to the subject property "on paper", with a view to ending a foreclosure and the settlor paying for the property until she could assume another mortgage. The transferee paid nothing for the property, the vendor's statement of adjustments indicated the settlor paid all transfer costs, and the settlor paid for all costs related to the property in the following years.

[181] By contrast, Shantel paid fair market value for the Property in 2009. The defendants argue a transaction will not give rise to a constructive trust if the purchase price is not substantially less than the property's value, citing *Wong v. Wong-Koroluk*, 2009 BCSC 545 at para. 142. They say that when an individual identifies herself as a purchaser to a seller and pays fair market value for the property in question, she is not acting as a fiduciary of the seller and there is no basis for a declaration that the property is held in trust: *Nafuran v. Tiojanco*, 2010 BCSC 1726 at para. 67.

Could the Central Parties Agree to a Constructive Trust?

[182] The defendants say a constructive trust is an equitable remedy imposed by the court and that it was not open to the Central Parties to agree to a constructive trust. They say the plaintiffs have not properly pleaded the facts or adduced the evidence necessary to support a trust.

[183] Significantly, none of the extensive text messages exchanged by Satinder and Mandeep from December 2012 to July 2013 in an effort to resolve the Central Parties' dispute (regarding the Arrears and retransfer of the Property to Surjit) make reference to a trust. Satinder admitted he was familiar with the notion of a constructive trust because of his previous litigation in Dhillon. I conclude he incorporated that concept into his substantially amended pleading in July 2018 in an attempt to bolster the plaintiffs' claims, without fully understanding the meaning or legal significance of this concept.

Are the Parties Bound by Statements Made in the RTB Decision?

[184] The plaintiffs allege in Part 1, para. 38 of their further amended notice of civil claim, filed with leave after the commencement of this trial on July 9, 2019, that the Central Parties reached a factual agreement at the RTB Hearing that the Property:

- i. was held by Shantel for Surjit in a constructive trust;
- ii. was sold from Surjit to Shantel on the understanding Surjit would continue to live there and pay the Mortgage, maintenance costs, taxes and utilities; and
- iii. was eventually to be sold back to Surjit.

[185] The plaintiffs rely on the RTB Decision to support their argument the parties had a constructive trust agreement. They say what is most significant about the RTB Decision (i.e., that the RTB did not have jurisdiction to resolve the parties' dispute) is why the RTB arbitrator reached his decision. They argue the RTB Decision was based on the Central Parties' agreement about the underlying facts, as set out therein.

[186] The plaintiffs say Shantel is bound by Mandeep's admission made on her behalf at the RTB Hearing. The plaintiffs provided no law to support their position. In assessing it, I have considered the doctrines of issue estoppel and res judicata.

Issue Estoppel

[187] The defendants deny the Central Parties reached an agreement at the RTB Hearing that Shantel owned the Property subject to a constructive trust, arguing any such agreement would lack sufficient certainty to be enforceable. They note Surjit, by her own actions, breached the very agreement on which she purports to rely when she stopped making monthly payments to Shantel. Further, the defendants say the plaintiffs suffered no detriment by relying on Mandeep's statements at the RTB Hearing and, in fact, gained an opportunity to purchase the Property before Shantel listed it. They argue it is Shantel who was deprived of an opportunity to evict the plaintiffs as tenants.

- [188] While the RTB Decision purports to record the Central Parties' agreement that the Transfer was subject to a constructive trust, it is inconsistent with the evidence at trial.
- [189] Satinder admitted he dominated the discussion at the RTB Hearing and that he and Mandeep occasionally spoke in Punjabi. Neither Mandeep nor Shantel was present in person. Both said Satinder was irate and interrupted often. Mandeep said Satinder often spoke over him which made talking difficult. Shantel said Mandeep spoke on her behalf and she did not hear much of what was said due to background noise.
- [190] Mandeep testified he did not understand the phrase "constructive trust" and thought Satinder was referring to the trust between them as cousins and their agreement to meet informally in an effort to resolve matters outside the legal context. Mandeep thought they had agreed the matter should be resolved between them, the RTB had no jurisdiction, and Surjit would have an opportunity to repurchase the Property. The Central Parties reached no agreement about the price to be paid by Surjit before the Property was retransferred to her, or whether the Arrears would need to be paid first. The defendants note that when Mr. Robertson offered to sell Surjit the Property for \$459,000, inclusive of the Arrears, in July 2013, neither plaintiff responded by saying the agreed purchase price was \$370,000.
- [191] Arbitrator Lam declined jurisdiction and did not decide the Central Parties' dispute on the merits. The RTB lacks jurisdiction to find or impose a constructive trust. It is not a court, but rather, an administrative tribunal that can only exercise the jurisdiction it is given under the Residential Tenancy Act [SBC 2002] c. 78 (the "RTA"). The defendants say that, because the RTB lacked jurisdiction to hear claims in equity, the plaintiffs cannot rely on res judicata to advance their claim in this action, citing *Burke v. Arab*, No. [1981] N.S.J. No. 521 at para. 20.
- [192] The defendants also say an informal admission does not bind a party if it can be overcome by other evidence: *Bayer Inc. v. Apotex Inc.*, 2016 FC 1013 at para. 289. Mandeep and Shantel say that, if this Court finds an admission was made at the RTB Hearing, they ought to be permitted to withdraw it. Both say they lacked the legal knowledge to understand what they purportedly agreed to and on that basis, ought to be permitted to withdraw any such admission: *Sidhu v. Hothi*, 2014 BCCA 510 at para. 25.

Res Judicata

- [193] The doctrine of res judicata prevents the re-litigation of issues that have been determined with finality in previous litigation between the same parties: *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621. This doctrine provides litigants with the certainty that once a matter has been before the court, the court's determination is final, subject only to appellate review.
- [194] The three requirements for cause of action and issue estoppel are well known:
- i. The claim or issue was (or, in the case of cause of action estoppel, ought to have been) decided in a previous litigation;

- ii. The previous litigation or decision was final; and
- iii. The parties in the current litigation, or their privies, were parties to the previous litigation or decision.

[195] I am not satisfied *res judicata* applies to the RTB Decision. It was not a final determination of the Central Parties' dispute on its merits. It generated no evidentiary record. On the evidence before me, the Central Parties reached no consensus regarding whether there was a trust settlement in Surjit's favour.

Have the Defendants been Unjustly Enriched?

[196] Equity will impose a constructive trust to remedy unjust enrichment or to condemn a wrongful act: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 43.

[197] For a court to find unjust enrichment, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason, such as a contract or disposition of law, for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834. An individual is not unjustly enriched if he did not receive more than what he contributed: *Forbes v. Chen et al*, 2003 BCCA 540 at para. 12.

[198] While a constructive trust may arise if an individual substantially contributes to a property so as to entitle them to a beneficial interest, payment of rent by an occupant does not constitute an ownership contribution to the property: *Pettkus; T.D.W. v. I.A.A.*, 2004 BCSC 1465 at paras. 44 and 53.

[199] In support of their argument that the defendants were unjustly enriched by Surjit's contributions to the Property, the plaintiffs introduced the Receipts for expenses they say Surjit incurred in 2016. This was not compelling evidence. Neither plaintiff explained why no comparable expenses were incurred in the years 2009 to 2015 or 2017 to May 2019, when they assert Surjit remained the beneficial owner of the Property. None of the Receipts identify the purchaser. It is unclear precisely what items were purchased or how they relate to the Property. Some clearly do not. I conclude this evidence is insufficient to support finding the plaintiffs made a substantial contribution to the Property after the Transfer.

[200] The plaintiffs paid no home insurance after the Transfer and property taxes only sporadically. Neither explained why they paid no home insurance for the period when they assert Surjit remained beneficial owner and no property taxes before 2012 or after 2013. The defendants argue Surjit paid some property taxes and utilities payments after the Transfer, not because she believed she continued to maintain an ownership interest in the Property, but because she feared that, if such payments were not made by Shantel, she would be unable to continue living at the Property. On all the evidence, I conclude that is the most likely explanation for why Surjit did so.

[201] The plaintiffs made sporadic monthly payments to Shantel after the Transfer for their use and occupation of the Property. I conclude there is no basis for construing such payments as an ownership contribution to the Property: Pettkus; T.D.W. at paras. 44 and 53. Ultimately, I conclude the evidence is insufficient to support a finding of unjust enrichment.

Can the Plaintiffs Seek Equitable Relief?

[202] The defendants say it is not open to the plaintiffs to seek equitable relief when they have not acted equitably themselves. They rely on the following equitable principles.

[203] Laches is established when there is unreasonable delay in the commencement or prosecution of proceedings, and delay renders the granting of equitable relief unreasonable or unjust: Ahone v. Holloway (1988), 30 B.C.L.R. (2d) 368 (C.A.) at para. 43. There are two distinct branches to the laches doctrine: prejudice and acquiescence; each suffices as a defence to a claim based in equity.

[204] Prejudice is a defence when a plaintiff's delay caused the defendant to alter her position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb: M.(K.) v. M.(H.), [1992] 3 S.C.R. 6 at para. 98. Acquiescence consists of delay by a plaintiff despite knowledge that her rights have been violated. Such delay gives rise to an inference that the plaintiff's rights have been waived. A plaintiff's conduct will be measured objectively.

[205] The clean hands doctrine serves to justify a refusal of equitable relief when "there is such an 'immediate and necessary relation' between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief: First Majestic Silver Corp. v. Davila Santos, 2012 BCCA 5 at para. 35.

[206] Under the abuse of process doctrine, the court has inherent power to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute: Behn v. Moulton Contracting Ltd., 2013 SCC 26 at para. 40.

[207] The plaintiffs did not honour the agreement they seek to enforce. Although they disputed the precise amount, they admitted owing the Arrears but did not pay them. On my evidentiary findings, they failed to reimburse Shantel for her deposit or closing costs despite having agreed to do so. They accepted rental income from tenants at the Property while defaulting on the Arrears.

[208] I agree that to invoke equitable principles the plaintiffs must have clean hands; their conduct does not satisfy me they do. I decline to award any equitable relief.

Did the Transfer Include a Verbal Buyback Agreement or Option to Repurchase?

[209] The plaintiffs allege the Central Parties had a verbal buyback agreement which permitted Surjit to repurchase the Property on demand for \$370,000. Mandeep and Shantel admit they had discussions about Surjit's possible repurchase of the Property but deny they reached any agreement. For the reasons that follow, I am not persuaded the evidence supports the conclusion the Central Parties reached consensus regarding a verbal buyback agreement or option to repurchase the Property.

[210] The plaintiffs' claim evolved over the course of these proceedings. On July 3, 2018, following the defendants' June 20, 2018 application for summary judgment, almost three years after starting this action, they amended their pleading to allege Shantel agreed to transfer the Property to Surjit for \$370,000 on demand.

[211] The defendants say a reasonable person in Shantel's position would, based on the Contract and the Transfer documents, have concluded Surjit was selling all her legal and beneficial interest in the Property. They argue the alleged buyback agreement lacks certainty and say, on the evidence, a reasonable bystander would conclude:

- i. it would be unreasonable for Shantel to:
- i. agree to hold the Property as bare trustee, without compensation, while exposing herself to indefinite liability on the Mortgage; and
- ii. to pay a \$19,000 deposit and \$5,713.34 in closing costs to be an owner in name only;
- ii. The Central Parties reached no consensus about how the Proceeds would be spent including, in particular, as between:
 - i. Satinder's ongoing litigation;
 - ii. The Martin Mine investment opportunity; and/or
 - iii. One or more of Satinder's various other projects;
- iii. There was no certainty the Martin Mine would put Surjit in a position to buy back the Property; and
- iv. One would not expect a buyer in the context of a bona fide purchase and sale (as here) to make inquiries about what use the seller planned to make of the net sale proceeds.

[212] The defendants also note that:

- i. Mandeep testified:
- i. he was not involved in Satinder's various business dealings;
- ii. he never agreed to assume liability for paying the Mortgage; and

iii. he and Shantel were unaware there were tenants at the Property before the Transfer and, accordingly, could not have agreed to assist the plaintiffs in renting the basement suite at the Property, contrary to what the plaintiffs allege;

ii. The Contract expressly provides it comprised the entire agreement between Surjit and Shantel; and

iii. While their fathers may have had a history of engaging in verbal "handshake" agreements, that was not true of Satinder and Mandeep.

[213] Based on Satinder's description of the Central Parties' alleged buyback agreement:

i. Satinder, Surjit, and various other family members would continue to reside at the Property;

ii. Shantel could make no personal use of the Property while she owned it;

iii. She remained liable to pay the Mortgage;

iv. She would derive no benefit from any increase in the Property's market value during her ownership;

v. She would have no control over when the Property would be retransferred to Surjit; and

vi. Her profit, if any, would be limited to Satinder's possible purchase of a truck for her on an uncertain date, the particulars of which were not specified.

[214] In those circumstances, it is difficult to see what might have prompted Surjit to buy back the Property. She effectively enjoyed all the benefits of home ownership with none of the liabilities. Once she and/or Satinder stopped making monthly payments to Shantel, she and her family had exclusive use and occupation of the Property at no cost. She had no obligation to CIBC on the Mortgage, which was in Shantel's name alone. If she ever wished to buy back the Property, the purchase price would never increase, despite what might occur with market trends. Neither Surjit nor Satinder was a tenant pursuant to any written tenancy agreement and they could not therefore be readily evicted. The only risk Surjit assumed is the one which ultimately materialised: namely; that because the plaintiffs stopped making monthly payments, Shantel might default on the Mortgage and the bank would foreclose. It is also difficult to see why Shantel would have accepted a verbal buyback agreement on the terms alleged by the plaintiffs, particularly when she had no direct familial relationship with, or obligations to, either Surjit or Satinder. I accept Shantel's evidence that she agreed to the Transfer because she thought it would be a good investment.

[215] On all the evidence, Satinder orchestrated the Transfer. He was the one with a background in mortgages and financing. He brought the Central Parties together. He persuaded Surjit to agree to the Transfer, knowing her sentimental attachment to the Property. He convinced Mandeep to discuss it with Shantel. He prepared the Contract, translated it to Surjit, arranged for her retainer of a notary, and facilitated her execution of the Transfer

Documents. By his own admission, Satinder was engaged in multiple lawsuits in 2009, was significantly in debt, and needed money, whether to fund his ongoing litigation, invest in the Martin Mine (which he said he thought would net millions in returns), or to finance one of his other undescribed projects. He was a creditor in a longstanding bankruptcy proceeding and had been ordered to pay costs in Dhillon. He admitted he was involved in a "bunch of litigation". I infer Satinder was the party most keenly motivated to complete the Transfer. His own actions support that conclusion.

Monthly Payments following the Transfer

- [216] The Central Parties agree they intended Shantel to receive \$1,587 per month following the Transfer so she would not be out of pocket on the Mortgage, despite never drawing up a rental agreement. While they disagree about how those payments are properly characterised, I consider that distinction to be less important than the fact the Central Parties agreed they would be made to Shantel after the Transfer. It is common ground they did not remain current.
- [217] Satinder suggested he and Mandeep shared the responsibility of making the Mortgage payments while they worked together on their shared business ventures. That evidence was vague, uncorroborated, and disputed. Ultimately, it was not persuasive. It is unclear why Mandeep would agree to share responsibility for paying the Mortgage or why he would agree with Satinder to divert money paid by Surjit for that purpose while Shantel remained liable to CIBC for the Mortgage payments. Satinder conceded the Arrears were a source of stress for Shantel, particularly once she learned she was pregnant. In my view, the theory advanced by Satinder at trial (namely, that he and Mandeep both accepted responsibility for paying the Mortgage) is only plausible if the Proceeds were used for the Central Parties' shared benefit. For the reasons set out herein, I am not persuaded the evidence supports that conclusion.

Accounting of the Proceeds

- [218] While Satinder submitted in closing that the evidence about how the Proceeds were spent was clear, he agreed that conclusion is dependant on his own evidence being accepted, something I have declined to do for the reasons set out herein. In fact, it was impossible to trace all the Proceeds with sufficient precision to determine who derived benefit from them. Satinder's evidence and his accounting were similarly convoluted.
- [219] Satinder testified he paid about \$100,000 of the Proceeds to Mandeep and the Hirac brothers to pursue their shared investment in the Martin Mine and various other unspecified projects. That broad assertion was uncorroborated, unconvincing, and ultimately unproven. The parties agree \$69,000 of the Proceeds was paid by Ms. Jhand to D & L Industries. Satinder said \$19,000 of that amount was intended to repay Shantel's down payment. Shantel and Mandeep dispute that evidence which is not corroborated by Ms. Jhand's cheque on its face. Surjit was unable to confirm Shantel's down payment was

repaid. The seller's statement of adjustments in Mr. Cobbett's file indicates the seller (i.e., Surjit) retained this deposit. Ultimately, I find that is the most reliable evidence of what occurred.

- [220] In my view, if the Central Parties had agreed that Shantel would be repaid her \$19,000 deposit from Ms. Jhand's mortgage proceeds on completion of the Transfer, that would undoubtedly have been included as a material term of the Contract and/or as an item in the buyer's and seller's respective statements of adjustments on closing. Notably, it was not.
- [221] Satinder testified he understood the "L" in D & L Industries stood for [Shantel] "Lamons"; his evidence about how he distributed the Proceeds was dependant on that assumption. Mandeep and Shantel disputed that evidence. Both denied Shantel received any money from this company after the Transfer. I prefer their evidence on this point as Satinder's was based wholly on unsubstantiated conjecture. In my view, this is one example of Satinder construing documents as convenient to suit his narrative.
- [222] Satinder suggested a further \$20,000 of the \$69,000 paid by Ms. Jhand to D & L Industries was intended to repay Shantel for her closing costs, inclusive of PTT. It is unclear why Satinder would pay Shantel \$20,000 to reimburse her for costs which totalled only \$5,713.34, leaving aside Shantel's evidence that she received no money from D & L Industries. In my view, this uncorroborated rough accounting does not withstand detailed scrutiny of the evidence as a whole. Ultimately, I conclude the plaintiffs have not established on a balance of probabilities that Shantel was repaid the \$5,713.34 she incurred for PTT and closing costs on the Transfer.
- [223] Satinder says the remaining \$30,000 of the \$69,000 paid by Ms. Jhand to D & L Industries was intended to repay Mr. Robertson for a \$20,000 loan he made to Mr. Braich, inclusive of a \$10,000 profit. Mr. Robertson admitted loaning Mr. Braich \$30,000 following a discussion with Mandeep and receiving a \$5,000 profit within about three weeks of doing so. Mr. Robertson said nothing about receiving any money from D & L Industries. The documents Satinder introduced on this point which I noted in my review of the facts, were not compelling. The customer vouchers did not corroborate Satinder's evidence on their face. His handwritten notes were unclear and appeared self-serving. Satinder ultimately testified he invested less than \$20,000 or \$25,000 in the Martin Mine. Assuming that to be true, it is unclear on the evidence whether any of those funds came from the Proceeds. The Transfer did not complete until December 11, 2009. One of the Scotiabank customer vouchers pre-dates the closing of the Transfer. In my view, these documents did not mesh well with Satinder's evidence at trial.
- [224] I accept Surjit's evidence that she spent two to four thousand dollars of the Proceeds for personal items. It was clear she had no idea what happened to the balance of the Proceeds and deferred to Satinder in that regard. On all the evidence, I conclude Satinder determined how this money would be spent. I find the evidence does not support the conclusion he did so for the Central Parties' collective benefit.

- [225] Satinder's loose accounting of the Proceeds was not persuasive. It did not total \$182,370.92. It was not corroborated by any reliable documentary evidence. Satinder struggled to reconcile the plaintiffs' evidence with an incomplete documentary record. When asked in cross-examination about documents to support his accounting, Satinder said he had not yet found them and that they were "somewhere". That assertion overlooks the fact he started this lawsuit and Surjit bears the burden of proving her claim.
- [226] On all the evidence, I conclude the Central Parties engaged in informal discussions around the time of the Transfer about Surjit's repurchase of the Property. The buyback agreement alleged by the plaintiffs would not have been a commercially efficacious one for Shantel or Mandeep, particularly given my finding the evidence does not support the conclusion either benefited from the Proceeds.
- [227] By Satinder's own admission, the alleged buyback agreement included no definite date for Surjit's repurchase. He admits the parties reached no agreement about the price, year, model, or make of the truck he said he would buy Shantel once retransfer of the Property occurred. At best, I conclude the Central Parties reached an agreement to agree about Surjit's possible repurchase of the Property. An agreement to agree is not sufficiently certain to constitute an enforceable contract: *Moberg v. Cleveland*, 2010 BCSC 1303 at paras 81 - 82.
- [228] The plaintiffs adduced no evidence to support the conclusion the Central Parties agreed Surjit was entitled to a right of first refusal or a right of first offer. Satinder made no reference to this argument in his closing submissions. Accordingly, I find the plaintiffs have not proven the Central Parties agreed to either a right of first refusal or right of first offer.

Law and Equity Act, s. 59

[229] Section 59 of the Law and Equity Act, R.S.B.C. 1996, c. 253 states, in part, as follows:

59 (1) In this section, "disposition" does not include

- (a) the creation, assignment or renunciation of an interest under a trust, or
 - (b) a testamentary disposition.
- (3) A contract respecting land or a disposition of land is not enforceable unless
- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
 - (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

- (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
- (4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.
- (5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of
 - (a) restitution of a benefit received, and
 - (b) compensation for money spent in reliance on the gift or contract.

[230] In the absence of a trust settlement, the defendants say the application of s. 59 renders any verbal buy-back agreement or option unenforceable. They say the defendants neither acted nor acquiesced in any act which indicates Surjit had a valid and enforceable buy-back option. They argue the plaintiffs did not change their position, thereby leading to an inequitable result. In fact, they say the plaintiffs lived free at the Property for an extended period while collecting rent from the basement tenants.

[231] The defendants rely on *Sumal v. Gill Estate*, [1999] B.C.J. No. 2979 (S.C.), a case they say is similar to this one on its facts. In *Sumal*, the plaintiff sought a declaration that the defendant estate held a home in trust for his benefit. When Mr. Sumal needed funds for his floundering trucking business, he raised \$25,000 by selling his home to his friend, Gill. Mr. Sumal said he and Gill verbally agreed that Mr. Sumal could reacquire the home when his fortunes improved. Mr. Sumal's family remained in the home and he made monthly payments to Gill to cover Gill's mortgage on the home. The solicitor who handled the conveyance knew nothing of the alleged trust agreement. Gill died about three and a half years after buying Mr. Sumal's home; his estate refused to acknowledge the alleged agreement.

[232] In dismissing the plaintiff's claim, Justice Collver observed he did not believe Mr. Sumal when he disingenuously replied, "I'm not that smart", to the question about his failure to have the alleged trust agreement reduced to writing. Justice Collver noted at para. 21:

Balancing Mr. Sumal's account of the Halston Road transaction against the documentary and other evidence which survives the late Sarwan Gill, the existence of an agreement that Sarwan Gill would hold the property in trust for Suramjeet Sumal simply has not been proven. While Mr. Sumal may very well have hoped that he could eventually reacquire the Halston Road home, the late Sarwan Gill's continuing pattern of dealing with both the expenses and the benefits associated with ownership (including his two attempts to sell), establish that Mr. Sumal was only a tenant when Sarwan Gill died.

[233] I find those comments apply equally here.

- [234] Given his optimistic views about the likely financial success of the Martin Mine, I infer Satinder believed he would be able to put Surjit in a position to repurchase the Property shortly after the Transfer. Mandeep and Shantel both testified they anticipated Satinder would be in receipt of settlement funds within about three months of the Transfer. On all the evidence, I conclude the Central Parties expected money would not be an issue and Surjit would buy the Property back promptly after the Transfer. When that did not occur and they fell out over the Martin Mine dispute, I infer Satinder either withheld the payments he knew Shantel required to pay the Mortgage or was not financially in a position to make them. It is only once the bank became involved and Satinder understood his mother's cherished home might be sold under foreclosure that I infer desperation motivated him to act with dispatch, securing \$649,000 to permit Surjit to repurchase the Property.
- [235] I am not persuaded on the evidence that Mr. Robertson is to blame for the foreclosure proceedings; Satinder could have directed the payments he previously forwarded to Mr. Robertson's lawyer to Mr. Robertson directly if he had wished to avoid foreclosure. The order of Bowden J. required Surjit to pay the Arrears; neither she nor Satinder did so.
- [236] I accept Satinder was upset when he learned that Mandeep's numbered company had purchased the Martin Mine. It is clear his relationship with Mandeep soured thereafter. In contrast to the single-minded initiative Satinder demonstrated in orchestrating the Transfer and later in purchasing the Property following the foreclosure, he found reasons to delay addressing and resolving the Arrears. He insisted on a written contract which combined payment of the Arrears in the purchase price, despite the adverse tax consequences that would result for Shantel. He took no steps to prepare the written agreement he insisted on. Neither he nor Surjit made any offer to repurchase the Property. Notably, his text messages with Mandeep make no reference to the terms of the buyback agreement he now alleges the Central Parties reached including, in particular, Surjit's ability to buy back the Property on demand for \$370,000. I find those omissions to be significant.
- [237] Ultimately, I conclude the plaintiffs have not met the burden of establishing on a balance of probabilities that the Central Parties reached a binding buyback agreement on the terms they allege.

Was the Transfer a Disguised Mortgage?

- [238] In its reasons for judgment in Robertson at para. 66, the Court of Appeal raised the possibility that the Transfer was a disguised mortgage. Whether a transaction is a disguised form of mortgage is a question of fact: Falconbridge on Mortgages, 5th ed (Toronto: Canada Law Book, Loose-leaf) at 3:30.
- [239] The plaintiffs first introduced the concept of a disguised mortgage in their amended pleading filed in July 2018, specifically noting in paragraph 5 of Part 3 that the Transfer was a disguised mortgage, "as was stated by the Court of Appeal". The plaintiffs adduced no

evidence to support that claim. Satinder made no reference to the Transfer being a disguised mortgage in his closing submissions. He and Mandeep both testified they discussed accessing Surjit's equity in the Property in the form of a transfer for which Shantel paid fair market value.

[240] Mandeep and Shantel both denied the Transfer was a loan. There was no evidence at trial about the Central Parties ever discussing repayment of the Transfer purchase price or the payment or non-payment of interest on this amount as the principal of a loan agreement. Surjit's evidence that she understood the Property would be retransferred to her for no consideration is inconsistent with the Transfer being a loan.

[241] Unlike the facts in *Creswell v. Raven Bay Holdings Ltd.* (1984), 53 B.C.L.R. 183 (S.C.), cited in Robertson at para. 66, Shantel paid fair market value to purchase the Property. Mr. Cobbett testified, and I accept, there was nothing unusual about the Transfer documents. There is therefore no need to look to evidence of the surrounding circumstances to determine the real nature of the agreement.

[242] As in *Gill v. Dhillon*, [1989] B.C.J. No. 752, the Transfer was discussed as the purchase and sale of a residential property. There was nothing in the Contract or elsewhere in writing to indicate the Central Parties understood the transaction to be a loan. While I have considered the possibility raised by the Court of Appeal that the Transfer was, in effect, a disguised mortgage, I conclude that finding is not supported by the evidence.

Who is entitled to the funds paid into Court on foreclosure?

[243] Given my finding that Surjit did not remain a beneficial owner of the Property after the Transfer, I conclude she has no legal entitlement to the excess funds paid into court following sale of the Property under foreclosure in May 2019. I find Mr. Robertson and Mr. Aujla, the owners of the Property at the time it was sold under foreclosure, are entitled to the excess proceeds paid into court.

Defendants' Counterclaims

[244] Shantel, Mr. Robertson, and Mr. Aujla seek damages for the loss of rental income during the plaintiffs' use and occupation of the Property, following the Transfer until the Property was sold under foreclosure.

[245] While the plaintiffs take issue with characterization of the Arrears as "rent", they do not dispute they agreed to make monthly payments while they occupied the Property after the Transfer. They suggested the defendants' calculations ought to be adjusted downwards slightly, but offered no alternative calculations or law to support that assertion.

[246] Section 1 of the RTA defines "rent" as follows:

Money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a) a security deposit;
- (b) a pet damage deposit; or
- (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees].

[247] Following the Transfer, the plaintiffs occupied the Property which, based on my evidentiary findings, they did not then own.

[248] I am satisfied the Arrears (taking into account the credit owed to Surjit for her payment of utilities and property taxes in the amount of \$14,224.30, as set out in paragraph 132 herein) total \$95,573.37 to be paid as follows:

- i. To Shantel in the amount of \$30,662.70 (for the period December 2009 to April 2014); and
- ii. To Mr. Robertson and Mr. Aujla in the amount of \$64,911 (for the period April 2014 to May 2019).

[249] While the Central Parties agreed Surjit would make monthly payments to Shantel after the Transfer, on his own evidence, Satinder agreed to ensure these payments were made each month and that Shantel would not be out of pocket. On that basis, I find both plaintiffs are liable for the Arrears.

[250] These defendants are entitled to pre-judgment interest on the Arrears owed pursuant to the Court Order Interest Act, R.S.B.C.1996, c. 79, payable by the plaintiffs.

IX. SUMMARY

[251] My conclusions are summarised as follows:

- i. The Transfer was a bona fide purchase and sale;
- ii. The Transfer was not a trust settlement;
- iii. The Central Parties could not agree to a constructive trust which is an equitable remedy imposed by a court;
- iv. The defendants are not bound by res judicata or issue estoppel to statements made in the RTB Decision;
- v. The defendants were not unjustly enriched;
- vi. The plaintiffs are entitled to no equitable relief;
- vii. The Transfer did not include a verbal buyback agreement or option to purchase;

- viii. The Transfer was not a disguised mortgage;
- ix. Mr. Robertson and Mr. Aujla are entitled to the excess sale proceeds paid into court on foreclosure; and
- x. The defendants are entitled to damages for payment of the Arrears, plus accrued interest.

[252] I make the following orders:

- i. Funds in the amount of approximately \$270,000, paid into court following sale of the Property under foreclosure in May 2019, are to be paid to counsel for the defendants, in trust for Mr. Robertson and Mr. Aujla;
- ii. Shantel is entitled to damages from the plaintiffs in the amount of \$30,662.70, representing payment for their use and occupation of the Property from October 2009 to April 2014, together with accrued pre-judgment interest pursuant to the Court Order Interest Act;
- iii. Mr. Robertson and Mr. Aujla are entitled to \$64,911, representing payment for the plaintiffs' use and occupation of the Property from April 2014 to May 2019, together with accrued pre-judgment interest pursuant to the Court Order Interest Act; and
- iv. Surjit's claim is dismissed.

[253] Unless there are matters of which I am unaware, the defendants are entitled to their costs, payable by the plaintiffs, on scale B. If there is anything which might alter that view, the parties are at liberty to apply to speak to this issue as necessary with 30 days.

"Douglas J".

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