

CANADA / JUDGMENT

Gill v. Bassi

2014 BCSC 1972

COURT

Supreme Court of British Columbia

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2014 BCSC 1972 Gill v. Bassi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Bassi,

2014 BCSC 1972

Date: 20141021

Docket: S096680

Registry: Vancouver

Between:

Shangara Gill, Harmail Romana, Banta Singh Dhillon,

Nirmal Singh Pagely, Jaspreet Kaur Gill,

Taranjit S. Pagely, Gurdeep Kaur Romana

Plaintiffs

And

Jagjit Singh Bassi, Medallion Realty Ltd.

doing business as Sutton Group_Medallion Realty,

Garrett Rather, Veerpal Dhillon and Avtar Singh Gill

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

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doing business as Sutton Group_Medallion Realty, Garrett Ratther, Avtar Singh Gill

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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October 21, 2014

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I. Introduction

- [1] The plaintiffs separately bought five undeveloped lots near the site of a new private school. They say they were fraudulently induced to pay more than \$200,000 for each lot when the actual price paid to the vendors was much lower--in most cases less than half. The rest of their money, the plaintiffs say, went directly or indirectly to the defendants, including the purchase of lots by two of the defendants.
- [2] Although the plaintiffs signed documents that disclosed the true price of the lots, they say they signed those documents without reading them because they trusted the principle defendant, Jagjit Bassi, and accepted whatever he told them. In some cases, the plaintiffs say they continued to make payments they believed to be for the lots even after they had obtained title.

- [3] The defendants say the plaintiffs knew what they were paying for the lots and any additional payments arose from unrelated debts and transactions.
- [4] In addition to the alleged misrepresentation of the purchase price, the plaintiffs allege fraudulent or negligent misrepresentation of the lots' development potential and resale value. The alleged misrepresentations include failure to disclose the existence of a sewer right of way that crosses some of the lots and limits the area of the lots that can be built on.
- [5] This case turns entirely on credibility, made more difficult by the fact all parties have given some evidence that, on its face, seems improbable. Attempts to base findings of credibility on consistency of the parties' evidence with contemporaneous documents are often frustrated by the fact that documents one would expect to exist apparently do not.

II. The Parties

- [6] Many of the parties and witnesses have the same surnames. For clarity, some of them must be referred to by their first names.
- [7] The plaintiffs Shangara Gill ("Shangara"), Banta Dhillon ("Dhillon"), Nirmal Pagely ("Pagely"), and Harmail Romana ("Romana"), were all born in India and came to Canada as adults -- Pagely in 1974, the others in the early 1990s. Romana is a cousin of Shangara's wife. They all say they have limited ability to speak and read English.
- [8] Shangara has worked primarily as a framer while in Canada. Dhillon operates a painting business that also does some renovation work. He was briefly president and director of a company that bought property for the purpose of building and selling houses. Pagely is a retired sawmill worker. Romana owns and operates a driving school.
- [9] The plaintiff Jaspreet Gill ("Jaspreet") is Shangara's daughter, the plaintiff Taranjit Pagely ("Taranjit") is Pagely's son and the plaintiff Gurdeep Romana ("Gurdeep") is Romana's wife.
- [10] The defendants Jagjit Bassi ("Bassi") and Avtar Gill ("Avtar") are realtors with the defendant Medallion Realty Ltd. doing business as Sutton Group Medallion Realty ("Sutton Group") (collectively the "realtor defendants"). Bassi and Avtar work as partners and equally share all commissions earned by either of them. The defendant Veerpal Dhillon ("Veerpal") is Avtar's sister.
- [11] Shangara, Dhillon, and Pagely were all friends of Bassi. They say they met each other through Bassi about five years before the events at issue, but did not know each other well.
- [12] The defendant Garrett Ratther ("Ratther") was, at the relevant time, a mortgage broker and former realtor. He did not defend this action at trial and appeared only as a witness called by the plaintiffs.
- [13] The law firm of Buckley Hogan has its office in Surrey. It is not a party to the action but acted as the conveyancing solicitor for the purchasers in all of the transactions at issue.

III. The Property

- [14] The Khalsa School is a private school that teaches the Punjabi language and Sikh religion along with the BC educational curriculum. On December 30, 2005, the society that operates the school entered into an agreement to buy property for a second campus at 124th Street and Old Yale Road in Surrey. Bassi and Avtar acted as realtors for the school and found the property. The transaction earned them the largest commission of their real-estate careers. The agreement was subject to the property being rezoned and the City of Surrey approved the necessary rezoning on May 29, 2006.
- [15] The lots at issue in this action are across 124th Street from the Khalsa School site. After the Khalsa School agreed to buy its property, but before its rezoning was approved, three different owners entered into agreements to sell a total of 12 neighboring lots. Subject clauses were removed and sales completed only after the Khalsa School rezoning was approved. In most cases, the original contracting purchaser was not the ultimate buyer.
- [16] Throughout the trial the lots were generally referred to by number and that is how they will be referred to in these reasons. The plaintiff Dhillon acquired Lot 1. The plaintiff Pagely bought Lot 3 in the name of his son Taranjit. The plaintiffs Romana and Gurdeep acquired Lot 4. The plaintiff Shangara bought Lot 5 in the name of his daughter, Jaspreet, and Lot 16 in his own name.
- [17] Meanwhile, the defendant Ratther became the registered owner of Lot 2 and the defendant Veerpal the registered owner of Lot 15. In each of those cases, a plaintiff's money was used to complete the transaction.
- [18] Lots 6 through 10 were acquired by buyers who are not parties to this action and are not directly at issue, but the plaintiffs say they are relevant because they allege the buyers were effectively fronts for the defendants Bassi and Avtar.
- [19] A statutory right of way for the Greater Vancouver Sewerage and Drainage District crosses Lots 1 through 5. That is a major reason, according to the appraisal evidence, that any development of those individual lots is unlikely and they would probably have to be assembled for a single project. They are currently zoned for agricultural use; although Surrey's official community plan contemplates residential development. Lot 16 is zoned for light industrial use, but any development will have to be set back from a fish bearing creek at the edge of the property. The appraisal report also says soft soil will require pre-loading on all of the lots before any development takes place.

IV. Agreements of Purchase and Sale

- [20] Intercapital Financial Corp. ("Intercapital") owned Lots 1, 2 and 6 through 10 (the "Intercapital Lots"). Alex Taub, the president of Intercapital, testified that Bassi approached him in early February 2006, saying he had a client who was interested in buying the lots. They were not listed for sale at the time, although they had been listed the year before.

- [21] On February 14, 2006, Intercapital entered into three agreements to sell its lots to Ratther-- one for Lots 1 and 2 at a total price of \$176,700, another for Lots 6, 7 and 8 at price of \$259,160 and a third for Lots 9 and 10 at a price of \$153,140. The total price in the three contracts was \$589,000, with Intercapital to receive \$550,000 after real estate commissions.
- [22] According to unchallenged appraisal evidence at trial, the fair market value of Lot 1 in September 2006 was \$82,000. One half of the total purchase price for Lots 1 and 2 was \$88,350, or less than 10% higher than the appraiser's value. Given the retrospective nature of the appraisal and the scope for some range of opinion, I find the contracted price reasonably reflected the fair market value of the lot.
- [23] The sale prices of the other lots were similar to that of Lot 1 and there is no appraisal evidence of their value at the time. There is no evidence to suggest that the contracted prices were not a reasonable reflection of market value.
- [24] Each of the three contracts for sale of the Intercapital Lots to Ratther was to be completed on July 14, 2006. Each contract was subject to rezoning of the property by June 30, 2006, with no deposit to be paid until subject removal. In fact, no efforts were made to rezone the lots. The effect of the contracts was to tie up the property at no cost to the buyer until after the city approved the rezoning of the neighboring Khalsa School property.
- [25] When asked why he drew up three contracts instead of a single contract for Ratther's purchase of all of the Intercapital Lots, Bassi said the space for land title office Property Identification Numbers ("PIN") on the standard form contract was not large enough to include the numbers for all of the lots.
- [26] Ratther testified that he never intended to complete the purchase. He said that although he believed the value of the property would increase when the Khalsa school property was rezoned, he did not have the money to complete and made no attempt to secure financing. According to Ratther, Bassi and Avtar were to find the money to complete the purchase and the three of them would share the profit on a subsequent resale.
- [27] Bassi agreed that he thought property values around the Khalsa School property would go up if the re-zoning was approved, but said Ratther asked him to look for property. He denied the alleged arrangement with Ratther to share profits.
- [28] Lots 3 and 4 were owned by Rajendra and Manjula Mishra and Lot 5 by their son, Richard (the "Mishra Lots"). After being approached by Bassi the Mishras entered into agreements, dated May 12, 2006, to sell the three lots to a Gurinder Saini. The purchase price was \$80,000 each for Lots 3 and 5 and \$67,000 for Lot 4. The three contracts had identical subject clauses to be removed by July 30, 2006, and a completion date of September 27, 2006.
- [29] The subject clauses included the purchaser receiving and being satisfied with an inspection report "from an inspecting body, concerning environmental." There is no evidence of any effort by anyone to obtain such an inspection.

- [30] According the appraisal evidence, Lots 3 and 4 had a fair market value in 2006 of \$65,000 and \$66,000, respectively, while Lot 5 had a fair market value of \$84,000. It therefore appears that only Lot 3 was significantly overpriced, although the total price for the three lots was close to the total fair market value.
- [31] As with the Intercapital Lots, the contracts put the buyer in a position where he could simply refuse to remove the subjects and walk away from the transaction at no cost if the Khalsa School rezoning was not approved.
- [32] Saini, the buyer named in the contracts, did not testify. The evidence indicates that he was a recent immigrant who worked in a convenience store and had previously known Avtar in India. He never became the owner of any of the lots, although he signed subject removals on July 26, 2006.
- [33] Bassi testified that he had expected Ratther and Saini to complete on their purchases and was surprised when both of them were later unable to. However, there is a similar pattern between the two sets of agreements.
- [34] The properties were not listed for sale, but Bassi approached the vendors, saying he had a client interested in the property. In each case, the agreements were subject to the buyers acquiring something they made no effort to obtain--a rezoning of the property in the case of the Intercapital lots and a site inspection in the case of the Mishra Lots.
- [35] In each case, the agreements say nothing about the Khalsa School rezoning, but were structured so that the purchaser did not have to pay anything--not even a deposit--until after the date the rezoning was expected to be approved and could refuse to complete for other reasons if the rezoning was not approved.
- [36] Bassi's explanation for dividing the transaction with Intercapital into three separate agreements, all with the same purchaser and with identical terms, is not credible. The problem of insufficient space for all of the PIN numbers could have been solved simply by reference to an additional page in a single agreement. The Mishra Lots were also the subject of three separate agreements, although two of them had the same vendors and could have been dealt with in single agreement.
- [37] I find that those similarities make it more likely than not that Bassi used Ratther and Saini as purchasers of convenience, knowing they were not likely to complete. The multiple agreements made it possible to assign contracts to a larger number of ultimate purchasers.
- [38] I find that Bassi expected to find assignees for the agreements after he knew the Khalsa School project was going to proceed. That allowed him and Avtar to obtain real estate commissions on the purchase of all of the lots and gave them a chance to earn further commissions when and if the ultimate purchasers resold the lots.

- [39] Lots 15 and 16 were owned by a Jarnail Rai and were listed for sale in April 2006 at a price of \$174,900 each. The listing realtor was Major Sahota who, like Bassi and Avtar, worked at Sutton Group.
- [40] Shangara signed an offer dated May 31, 2006, to buy Lot 16 for \$137,500, a price that, according to appraisal evidence, accords with fair market value at the time. This is the only lot purchased by a plaintiff who was the original contracting buyer. Meanwhile, Ratther signed an offer on the same day to purchase Lot 15 for the same price. The offers were accepted by the vendor two days later.
- [41] Shangara testified that either Bassi or Avtar had told him that two lots were available near the site of the new Khalsa School and that Avtar told him he was buying one for his sister. He said he signed a number of blank documents that Avtar brought to his door. At the time he signed those documents, Shangara said he had not yet been told the purchase price and had not seen the property.
- [42] Bassi's version of events is that Ratther and Shangara approached him together, saying they had seen a for sale sign on the property. Ratther identified his signature on the Lot 15 contract, but denied any knowledge of that transaction. This evidence makes no sense in light of Ratther's experience as a realtor. I find that, as with the Intercapital Lots, Ratther was a contractual placeholder on Lot 15 until Bassi could find another purchaser.

V. Deposits and Assignments

A. The Intercapital Lots

- [43] Ratther removed the final subject clauses on the Intercapital Lots on June 16, 2006--two and a half weeks after the Khalsa School rezoning was approved. A \$30,000 deposit then became payable within 24 hours. Although Sutton Group issued a receipt for that deposit in the name of Ratther, the deposit was actually paid with a draft drawn on the plaintiff Pagely's bank account.
- [44] Pagely testified that Bassi brought him two sequentially numbered cheques for \$15,000, dated June 15, 2006, and asked him to deposit the cheques into his account before obtaining a draft for \$30,000. The cheques were made out to Pagely and drawn on the account of Bassi's wife, Jagroop Bassi ("Jagroop"). The draft drawn on Pagely's account says "re Garrett." Pagely testified that he did not know Ratther at the time. He said he met Bassi at the bank and simply told the teller to make out the draft on Bassi's instructions.
- [45] Bassi said he received the draft from Ratther and was not aware the money came from Pagely. He said his wife's cheques to Pagely related to a separate transaction in which Pagely had asked to borrow \$30,000. Pagely denied there was any such loan, saying he had no need to borrow money because he had recently sold his house and had \$400,000 in the bank.

- [46] The bank records are consistent with Pagely's evidence, including the lack of any reason for him to be borrowing money. I therefore find that Bassi provided the money for the deposit, although it is not clear why he could not have simply provided the money directly to Ratther, the named purchaser.
- [47] Richard Garcia ("Garcia"), the managing broker for Sutton Group, gave evidence that it would not be acceptable to issue a receipt to anyone other than the person who provided the funds, but Sutton Group relied on the salesperson to provide the necessary information.
- [48] The plaintiff Dhillon said that Bassi told him in late June 2006 that there was property available near the new Khalsa School site and that a lot that was actually worth \$300,000 could be acquired for only \$200,000. Dhillon said that, after viewing a plan and without seeing the property, he selected Lot 1 and gave Bassi a \$30,000 deposit in cash.
- [49] On July 5, 2006, Ratther assigned a one half interest in the contract to purchase Lots 1 and 2 to Dhillon. An earlier draft assignment, signed by Ratther but not by Dhillon, called for assignment of Ratther's full interest in both lots for one dollar. Bassi said Ratther and Dhillon came to him together with this document.
- [50] The completed assignment document refers to two lots and a purchase price of \$176,700. Dhillon agreed that his signature appears on that assignment, but said he has no recollection of seeing or signing it. Neither his signature nor Ratther's was witnessed, although the form of document calls for signature by witnesses.
- [51] Bassi said that he never saw the completed assignment and believes there was a separate arrangement between Dhillon and Ratther. But the assignment was in a Sutton Group's file and a copy was faxed from Sutton Group to the conveyancing solicitors.
- [52] On the same day he assigned half of his interest in Lots 1 and 2, Ratther assigned the contract to purchase Lots 6, 7 and 8 to Rajwinder Janda ("Janda"), a friend of Bassi, and the contract to purchase Lots 9 and 10 to Jasbir Nahal ("Nahal"), Bassi's sister-in-law. Neither Janda nor Nahal gave evidence.
- [53] Bassi said that Ratther was desperate to assign the purchase contracts because he had been unable to obtain a mortgage. As with Lots 1 and 2, Ratther said he had made no attempt to get financing and he never intended to complete. He said he never met Janda and signed the assignments at Avtar's direction.
- [54] Although Ratther was in many respects not a credible witness, I prefer his evidence on this point because of the way the contracts were structured and the similar pattern to what happened with the Mishra Lots. There is no evidence that Ratther had the means to purchase all of these lots or that Bassi had any reason to think he did.

B. The Mishra Lots

- [55] A \$15,000 deposit required for the Mishra Lots was paid on July 27, 2006, with a draft from Dhillon, who testified that he had borrowed \$20,000 from Bassi about two weeks earlier. Dhillon said Bassi asked him to come with him to the bank, where they obtained a draft in the amount of \$15,000 made out to Sutton Group. Dhillon said he understood this was part repayment for the \$20,000 loan but did not know why the draft was made out to Sutton Group. Sutton Group issued a receipt in the name of Saini.
- [56] Bassi said Dhillon verbally agreed to take an assignment of the lots, but later assigned the contract back to Saini, also verbally. Dhillon said that at one point he was interested in one of the lots, but denied that he ever wanted to buy all three.

C. Lot 3

- [57] Pagely said Bassi told him in mid-September 2006 about an opportunity to purchase property near the new Khalsa School. According to Pagely, Bassi told him there were five lots available, that he was going to give his friends an opportunity to buy one each and that one lot could be purchased for \$200,000 and resold \$300,000. Pagely agreed, without seeing the property in person, to purchase Lot 3 in the name of his son Taranjit, who at the time was living in Williams Lake.
- [58] Bassi said Dhillon, Shangara and Pagely came to him and said Dhillon had assigned Lots 3, 4 and 5 to Shangara and Pagely. In fact, Dhillon could not have assigned anything at that point because Saini was still the buyer under the agreements of purchase and sale.
- [59] An assignment of Lot 3 from Saini to Pagely is dated September 13, 2006. Pagely identified his signature on the document, but said he had no knowledge of it. Assignments of Lots 4 and 5 to Shangara are dated the same day. Shangara also recognized his signature, but said he had no recollection of seeing the document at the time. Bassi witnessed the signatures of both Pagely and Shangara on the assignments, all of which refer to the true purchase price as set out in the agreements of purchase and sale.

D. Lots 15 and 16

- [60] The plaintiff Shangara paid a \$5,000 deposit for Lot 16 by cheque dated June 18, 2006. He said he signed that cheque at the same time that he signed other documents that Avtar brought to his door. The \$5,000 deposit for Lot 15 was paid by the defendant Veerpal, Avtar's sister. The contract of purchase and sale of Lot 15 showed Ratther as the buyer and there is no evidence of a written assignment. Bassi said there was a verbal assignment when Veerpal paid the deposit, but Veerpal said she did not know Ratther.

- [61] Veerpal said she was approached by Shangara and his wife, with whom she had once worked, about buying Lot 15. She said they told her the seller wanted to sell Lots 15 and 16 together and a friend (presumably Ratther) with whom they were going to buy both lots was unable to proceed.

VI. completion

- [62] In all of the transactions at issue, Buckley Hogan acted as the conveyancing solicitors for the purchasers, although none of the plaintiffs had any previous dealings with that firm. In all cases, the initial instructions to Buckley Hogan came with information on the transaction, commonly called a "deal sheet," from Sutton Group. I find it unlikely that the plaintiffs independently instructed Sutton Group to contact the same firm and find it more likely that Bassi or Avtar either recommended Buckley Hogan or simply took it upon himself to send the files there.
- [63] Sean Hogan, a partner in the firm, gave evidence but, as would be expected in the circumstances, had no independent recollection of these transactions. He could only give evidence of the firm's usual practice. That usual practice included reviewing the statement of adjustments with the client, including the purchase price and the balance needed to complete, and reviewing the title documents, including the existence of any encumbrances such as a right of way. A typical meeting for those purposes would last 15 to 20 minutes.
- [64] Because the firm has a large Indo-Canadian clientele, Hogan said he would typically have a casual conversation to assess the client's fluency in English. If he thought the client was having difficulty, the firm had employees who could act as interpreters.
- [65] Hogan said that if the person taking title was not the contracting party under the agreement of purchase and sale, he would want documents verifying an assignment, except perhaps in cases involving close family members. He also said that if trust funds were being transferred from one transaction to another, the firm would have to get instructions from the client, although the practice in 2006 did not require those instructions to be in writing.

A. Lots 1 and 2

- [66] Dhillon said that Bassi called him on July 11, 2006, to say the purchase of Lot 1 was to complete the following day and told him how much money he needed to take to Buckley Hogan. Dhillon obtained a draft for \$170,036 the following day after he said he received numerous calls from Bassi and Avtar.
- [67] Bassi denied that he contacted Dhillon to tell him the balance owing or that he obtained that information from Buckley Hogan, but his phone records confirm 11 calls to Dhillon on July 11 and 12, 2006. Bassi said the calls to Dhillon were about an unrelated project that he and Dhillon were working on at the time. This suggestion was not put to Dhillon on cross-examination.

- [68] Ratther and Dhillon went to Buckley Hogan's offices on July 12, 2006, and signed a purchaser's statement of adjustments indicating they were buying Lots 1 and 2 together for a purchase price of \$176,700. That was in accordance with the assignment document they had both at signed. But the transfers were registered with Dhillon as the sole owner of Lot 1 and Ratther as the sole owner of Lot 2. There is nothing in the Buckley Hogan file to indicate how that change came about.
- [69] The statement of adjustments credits a deposit of \$10,000--part of the money that had been paid through Pagely's bank account. It said nothing about the \$30,000 cash deposit Dhillon said he gave Bassi. The total amount needed to complete, including adjustments and legal fees, was \$170,035.49, which was provided through Dhillon's draft.
- [70] The end result was that Dhillon paid for two lots but became the registered owner of only one, while Ratther, who paid nothing at all, acquired the second lot.
- [71] In a letter to plaintiffs' counsel dated June 19, 2011, before he was added as a defendant, Ratther said he had agreed to hold one lot in his name for Dhillon because Dhillon had certain tax problems and did not want too many properties in his own name. That is consistent with the defendants' theory of what happened, and with Dhillon's evidence that he in fact owed a tax debt of about \$200,000. But Ratther said at trial that he had lied in the letter to counsel and had simply provided the answers Bassi and Avtar told him to.
- [72] At trial, Ratther testified that he knew Bassi had sold lot one for \$200,000, but he did not know that Dhillon was the buyer until they saw each other at Buckley Hogan on the day of completion. But Ratther had signed the removal of the final subject when he did not have the funds to complete. As a former realtor he must have known that he was putting himself at financial risk by making the agreement final and binding and would be unlikely to remove the subject unless he was confident the contract would be assigned.
- [73] He denied assigning half an interest in his contract to Dhillon, although he admitted that his signature is on the assignment document. He said he became aware of the fact that Dhillon was buying one lot for \$200,000 but, again, as a former realtor, he had to have known that any purchase by Dhillon required an assignment from him.
- [74] Ratther admitted that he signed the statement of adjustments that disclosed the purchase price of \$176,700 for both Lots 1 and 2. He therefore knew that the \$200,000 Dhillon was supposedly paying for one lot was in excess of the purchase price for two lots.
- [75] When cross-examined at trial, he repeatedly maintained that Dhillon had agreed to pay \$200,000 for Lot 1 and that is what Dhillon got. He offered no coherent explanation for his own acquisition of Lot 2 at no cost to himself. He also testified that Dhillon did not know he was paying for two lots but in view of his earlier false statement on this point, I can place no weight on that evidence.

- [76] Ratther and Dhillon say they met together with Hogan, but both deny there was any previous arrangement between them. Dhillon said he had the impression that Ratther was signing documents because Ratther was also purchasing a lot. He said there was no discussion about the documents before he and Ratther started signing them and he did not read them. He said the lawyer did not point out to him the purchase price or the balance owing and said Bassi had told him the purchase price. Ratther said Hogan went through the statement of adjustments and explained that the purchase price was \$176,000.
- [77] In addition to signing the statement of adjustments, Ratther and Dhillon also signed property transfer tax returns that referred to a purchase price of \$88,350 for each lot. Dhillon and Ratther both signed each other's tax form, which Hogan admitted was an error.
- [78] After completion, Buckley Hogan revised the vendor's statement of adjustments to add Goods and Services Tax ("GST") to the purchase. There was no revised purchaser's statement of adjustments in Buckley Hogan's file. The GST was ultimately paid with funds from Jagroop and Avtar. Bassi and Jagroop said this was done because Dhillon refused to pay it. Dhillon said he did some painting and renovation work for Bassi in lieu of what was owed for GST.
- [79] The completion of the sale of Lots 6, 7 and 8 to Janda and Lots 9 and 10 to Nahal took place on July 12, 2006, the same day as the completion on Lots 1 and 2. The funds used to purchase Lots 9 and 10 came from Jagroop's line of credit. Jagroop said she loaned the money to her sister without telling her husband. The Buckley Hogan records show receipt of a \$200,000 draft from Janda on July 13, 2006.
- [80] The plaintiffs allege that Lots 6 to 10 were subsequently resold to a Mr. Malik, with profits on the resale flowing to Bassi and Avtar. The evidence of this resale is hearsay and no findings of fact can be made about it.
- [81] Dhillon said that about a month after he purchased Lot 1, he told Bassi that Mukhtiar Tumber ("Tumber"), Dhillon's partner in the home building business, was interested in purchasing a lot for a friend and Bassi said Lots 3, 4, and 5 were available for \$200,000 each. He said he and Tumber reviewed documents at Surrey City Hall, where they learned about the right of way. Tumber decided to buy Lot 5, which was the least affected.
- [82] Dhillon said Tumber wanted to see the purchase documents and he asked Bassi for them on Tumber's behalf. He said Bassi told him they would only show the purchase price as \$80,000, not \$200,000. Tumber was not willing to purchase under those conditions and suggested to Dhillon that he review his own purchase documents for Lot 1.
- [83] When he reviewed those documents with his bookkeeper, Dhillon learned that his money had been used to buy two lots. He said he questioned Bassi, who told him not to worry because they would be selling the lot shortly. Dhillon said he accepted that explanation because Bassi was his friend.

B. Lots 15 and 16

- [84] The completion date on the Lots 15 and 16 was August 15, 2006, later extended to September 20, 2006.
- [85] Although Lot 15 was ultimately purchased by Veerpal, the Buckley Hogan file was opened in the name of Avtar's other sister, Navdeep Gill. Veerpal said this was because her husband was opposed to her purchase of the lot. Sutton Group internal documents show Bassi and Avtar as realtors in the transaction, but Veerpal said that she did not know that her brother and Bassi were involved. The purchaser named in the contract was Rather and there is no written assignment.
- [86] On September 19, 2006, Shangara attended at Buckley Hogan for the completion of his purchase of Lot 16. Bassi's telephone records show that he called Shangara once on that day, six times over the preceding two days and twice on the following day.
- [87] Shangara brought a bank draft in the amount of \$203,000--about \$60,000 more than was needed to complete the purchase. By this time, Shangara said he had also had discussions with Bassi about Lots 4 and 5 and he testified that either Avtar or Bassi told him the extra money would be adjusted against the purchase of those lots.
- [88] Shangara said he met with a lawyer for about five minutes to sign the necessary documents. He said there was no discussion about the extra \$60,000. He does not recall if the purchaser's statement of adjustments was discussed, but said it might have been.
- [89] In fact, the extra \$60,000 was applied to Veerpal's purchase of Lot 15. There is nothing in the Buckley Hogan file indicating who gave instructions to transfer those funds, but Hogan said the firm's standard practice would have required Shangara's instructions or confirmation.
- [90] On September 20, 2006, the day the funds were transferred, Bassi made two calls, five minutes apart, to Buckley Hogan. Garcia, Bassi's employer, said it would be unusual for a realtor to be dealing with the purchaser's conveyancing solicitor at the time of completion.
- [91] The \$88,000 balance of the purchase price for lot 15 came from Veerpal, who testified that she borrowed the money from her mother and other brother Jaswinder. The money came from an account that Avtar shared with his brother. Veerpal said she understood she was buying a half interest in the lot, but the documents she signed at Buckley Hogan show that she was purchasing the whole of Lot 15.

C. Lot 3

- [92] Pagely's name and signature, witnessed by Bassi, appear on the assignment of Lot 3 from Saini to Pagely dated September 13, 2006. That was the assignment date for all three Mishra Lots and a date on which, according to his phone records, Bassi called Buckley Hogan. Hogan testified the forms look like forms prepared by his office.

- [93] On September 23, 2006, Taranjit Pagely signed documents, including a purchaser's statement of adjustments showing that the purchase price for Lot 3 was \$80,000. The documents were prepared by Buckley Hogan, but they were signed at a home in Williams Lake where Taranjit was staying. No lawyer was present although Taranjit, his father and Kuldip Saini, whose home it was, all say Bassi was present. Taranjit said he signed where Bassi told him to. He and his father both said they didn't read the documents because they trusted Bassi.
- [94] Bassi denied being present when the documents were signed, although he agreed he travelled to Williams Lake with Pagely on that day. He said he was going to Williams Lake to visit relatives and understood Pagely was going to get signatures on documents, but denied that he had brought the documents. Phone records show that he called Buckley Hogan two days before the trip to Williams Lake. I find the idea that Bassi happened to have other reasons for visiting Williams Lake on that day to be too much of a coincidence to accept and find that he was present when the documents were signed.
- [95] On September 26, 2006, Pagely obtained two bank drafts payable to Buckley Hogan in trust. He said Bassi had called him that day to tell him the amount needed to complete the purchase of Lot 3. Bassi denied that, but his phone records show a call to Buckley Hogan followed by one to Pagely three minutes later.
- [96] One of the drafts that Pagely obtained was for \$76,535.97--the amount needed to complete the purchase of Lot 3. The second was for \$63,405.97, which Buckley Hogan applied to the contemporaneous purchase of Lot 4 by Romana. Pagely said he obtained both drafts at Bassi's request and gave them to Bassi, believing they were both needed for the purchase of Lot 3.
- [97] Buckley Hogan revised the purchaser's statement of adjustments for Lot 3 on or about September 26, 2006 to add GST of \$4,800, which Buckley Hogan realized should be applied after the documents had been signed. Pagely obtained a draft for \$4,800 payable to Buckley Hogan, but said he thought this was a further payment for the lot, along with \$5,000 in cash he said he gave Bassi at about the same time.

D. Lots 4 and 5

- [98] Shangara said that in late August or early September 2006, Bassi told him that Lots 4 and 5 were available at prices of \$210,000 and \$200,000 respectively. He understood these were among ten lots, the majority of which would be owned by Bassi, which could be developed jointly or resold for \$300,000 each. Shangara said he told his wife's cousin Romana about the lots and Romana agreed to take one of them. Shangara's signature appears on two documents, both dated September 13, 2006, assigning Lots 4 and 5 to him from Saini. Those assignments refer to the true purchase prices of \$67,000 for Lot 4 and \$80,000 for Lot 5. Shangara recognized his signature on the assignments, but said he did not see them before litigation began.

- [99] At some point before the completion, Shangara said Bassi requested \$50,000 towards the purchase of the two lots. According to Shangara and Romana, this was paid in cash, which Romana said he had accumulated over the years from the rent on two suites in his house. Romana said he gave the money to Shangara, who said he gave it Bassi. Bassi denied receiving this money.
- [100] Shangara decided to purchase Lot 5 in the name of his daughter, Jaspreet, but she was attending university in Ontario and not available to sign documents. On September 26, 2006, a day on which he received three telephone calls from Bassi, Shangara went to Buckley Hogan with his younger daughter, Inderbeer, who was only 17 at the time. He brought a draft for \$76,535.97, which he said was the amount Bassi told him to bring.
- [101] Inderbeer produced her sister Jaspreet's driver's licence, and signed her sister's name to a purchaser's statement of adjustments showing a total purchase price of \$80,000. Jaspreet testified that there is a considerable physical resemblance between her and her sister. Shangara said he and Inderbeer were in the room with a lawyer for about five minutes and that he did not notice the price indicated on the documents.
- [102] Romana went separately to Buckley Hogan and signed a statement of adjustments for Lot 4, showing a purchase price of \$67,000. Romana said he did not read the document and thought he was buying the lot for \$210,000, not all of which had to be paid immediately. He said that the lawyer may have gone over and explained the purchaser's statement of adjustment, but he either did not understand or did not pay attention.
- [103] Buckley Hogan applied Pagely's draft for \$63,405.97 against Romana's purchase of Lot 4. Nothing in Buckley Hogan's file records instructions from either Pagely or Romana for this. Pagely and Romana say they had no knowledge of it and did not know each other at the time. Bassi's phone records indicate that he called Buckley Hogan three times on September 26 and 27.
- [104] Buckley Hogan subsequently revised the purchaser's statement of adjustment for Lots 4 and 5 to include GST. Hogan said the revised statement would typically be mailed to the client, but the client would not be asked to sign the revision.
- [105] Shangara said did not become aware of the GST until the evening of completion when Bassi called him and told him that he would have to pay an additional \$8,820 for GST, which he understood it was for Lots 4 and 5. The following day Shangara left a cheque for \$8,820 at Buckley Hogan's reception desk.
- [106] Shangara said that, shortly after completion, he received copies of documents, including the statement of adjustments, in the mail from Buckley Hogan. He noticed that the price for Lot 5 was \$80,000 but said that when he questioned Bassi about this, he was told that the vendor wanted the documents to show a low price for tax reasons.

VII. Post-completion payments

A. Payments by Pagely

- [107] On October 4, 2006, a week after completion of the Lot 3 sale, Pagely obtained an \$18,000 draft payable to Bassi and a \$22,000 draft payable to Bassi's wife, Jagroop. Pagely said he was told this money was needed for a further payment on Lot 3. Both Bassi and Jagroop said the \$22,000 draft was repayment of the loan they say Jagroop had made to Pagely in June 2006. I have already rejected their evidence of that loan because Pagely had no need or reason to borrow money at the time.
- [108] Bassi said the \$18,000 was a loan that he requested from Pagely in order to engage in stock trading without the knowledge of his wife. He said he repaid Pagely two years later on October 15, 2008, with a cheque for \$20,000. Pagely said that cheque was partial payment of another loan that he had made to Bassi in April 2008.
- [109] Pagely gave Bassi a further \$15,000 on November 8, 2006. He said Bassi told him that was the final payment for Lot 3, but Bassi said the two of them had made offers on property in Washington State and the \$15,000 was to go toward a deposit if any of the offers were accepted. No Washington property was ever purchased and no deposits were paid. Bassi said he returned some of this money to Pagely in 2008 by endorsing over one of his Sutton Group commission cheques, while further payment came in the form of services assisting Pagely with an insurance claim.

B. Payments by Shangara

- [110] Between October 24, 2006, and May 29, 2007, Shangara provided seven cheques totalling \$118,100, which he said Bassi told him were needed for further payments on Lots 4 and 5. The first of these cheques was for \$20,000, which he signed with the name of the payee blank. Bassi used the cheque to buy a car, but said the money had nothing to do with this transaction. He said he had acted as construction supervisor when Shangara built a house three years earlier and \$8,000 was a payment for that work. The other \$12,000, he said, was money owed to him by Dhillon that Shangara was paying on Dhillon's behalf. He said that debt also dated back to 2003.
- [111] Aside from one small payment of \$100, Shangara's next three cheques were written on March 28, 2007. He said he signed all of them with the payee's name left blank and gave them to Bassi.
- [112] One of these cheques, for \$25,000, was again used to buy a car, this time for Avtar's brother Jaswinder Gill. Avtar admitted at trial to filling in the payee's name on the cheque. A second cheque for \$21,000 was ultimately made payable to Nasib Gill ("Nasib"), Avtar and Veerpal's mother. Bassi denied knowledge of either of these cheques.
- [113] Shangara's third cheque on March 28, 2007, was for \$30,000 and was ultimately made out to Dhillon, a fact Shangara said he didn't learn until after this action was commenced. Dhillon said Bassi brought him the cheque and asked him to deposit it, then later got the money

back from him. He said he did not know Shangara at the time. Bassi said he was at Shangara's home when Dhillon arrived and Shangara asked him to complete the cheque, writing in the amount in words and the payee's name. After he completed the cheque, Bassi said, Dhillon took it and left. Bassi said he did not know what the payment was for and could not explain why Dhillon and Shangara needed him to fill out part of this cheque when it was already partially filled out.

[114] On May 29, 2007, Shangara signed another cheque that was made payable to Nasib, this time for \$7,000. Once again, Shangara said he signed the cheque before the payee's name was written in and Bassi denied any knowledge of it

[115] Veerpal said the payments to her mother and brother related to an agreement under which Shangara and Romana had agreed to buy out her interest in Lot 15. She said she needed to sell her interest because her husband was unhappy about the purchase and she wanted to use the sale proceeds to repay the loans she had received from her mother and brother. But as of the date of trial, she had not transferred title or any portion of her interest and has continued to pay property taxes on the lot.

[116] The plaintiffs allege that the money paid to Nasib was used to help fund Avtar's share of a short-term mortgage investment that he made with Bassi and Pagely in May 2007.

[117] On May 28, 2007, Jagdip Romana, Shangara's brother in law, signed a cheque for \$15,000. Shangara said he filled Pagely's name on the cheque and gave it to Bassi because he had borrowed money to make a further payment Bassi was requesting for Lots 4 and 5. He said he did not owe Pagely any money at the time.

[118] Pagely testified that Bassi brought the cheque to him and asked him to deposit it temporarily into his account. Pagely deposited the cheque then, 11 days later, gave Bassi a cheque in the same amount of \$15,000. He said he did not know why Bassi wanted him to deposit the cheque, but did it because Bassi was his friend.

[119] Bassi said the cheque he received from Pagely was for the purpose of investing in property in California. Pagely agreed that he and Bassi were looking at properties, but said he was not aware of any offers and denied the cheque was given towards purchase of property.

[120] Shangara said that he also gave Bassi \$8,000 in cash in May, 2007.

C. Payments by Romana

[121] On November 8 and 29, 2006, Romana wrote two cheques totalling \$50,000, payable to Nasib. He said he gave these cheques to Shangara, who said he passed them on to Bassi, believing them to be payments for Lots 4 and 5. Bassi denied knowledge of these cheques and Veerpal testified they were part of the buyout of her Lot 15 interest.

- [122] On November 8, 2006, Romana provided a \$20,000 cheque and a \$30,000 draft, both payable to Pagely. As with the cheques to Nasib, Shangara said he obtained the cheques from Romana and passed them on to Bassi, who had asked for more money toward the purchase of Lots 4 and 5.
- [123] The evidence about what happened to this money is convoluted, even by the standards of this case. Bassi denied knowledge of the cheque and draft, but Pagely said Bassi brought them to him, asked him to deposit them and then write a \$50,000 cheque to his cousin Manjit Baughan ("Baughan"). According to Pagely, Bassi told him he needed to lend the money to his cousin, but was afraid he would not be paid back if he lent it directly.
- [124] Bassi and Baughan said Baughan asked for and received a \$50,000 loan directly from Pagely. Bassi said he was present at Baughan's office when Pagely gave the cheque to Baughan and said that he wanted to be repaid with interest in cash. Baughan said he signed a note promising to pay \$500 a month, half of which was to be interest, but did not make a copy of it. Pagely denied loaning any of his own money to Baughan or receiving any payments from him.
- [125] Romana also gave four cheques to Shangara, totalling \$46,000 at or shortly after the completion for Lot 4 and said he gave Shangara a further \$19,425 in cash over the next two years. Shangara said he included those amounts in the payments he was making from time-to-time to Bassi for Lots 4 and 5.
- [126] In total, Shangara said he paid \$206,030.97 for Lot 5, more than half of which was paid after his daughter signed a statement of adjustments showing a purchase price of only \$80,000. Romana said he paid \$215,425 for Lot 4, with more than half being paid after he signed a statement of adjustments showing a purchase price of \$67,000.

VIII. Subsequent Events

- [127] Shangara testified that, sometime in the second half of 2007, he learned about the sewer right of way and its potential impact on the development potential of Lots 4 and 5. He said he first asked Bassi to sell Romana's Lot 4 and Bassi responded by suggesting Shangara try to sell Lots 1 through 10 himself. He said he sought assistance from another realtor, but in approximately mid-2008 told Bassi that the lots had not sold.
- [128] Through title searches, Shangara said he identified Dhillon as the owner of Lot 1 and Taranjit as the owner of Lot 3. He said he contacted Dhillon and Pagely and told them both about the right of way. As noted above, Dhillon had, in fact, learned about the right of way shortly after he purchased Lot 1.
- [129] Romana, Shangara, Pagely and Dhillon said that in March 2009, they met with Bassi and Avtar and gave them two months to sell the lots. Bassi and Avtar deny that this meeting occurred. A Mr. Sohal, who is said to have arranged the meeting and acted as a "middle man," was not called.

[130] A writ of summons and statement of claim under the former Rules of Court was filed in September 2009.

IX. Analysis

A. Fraudulent Misrepresentation

1. The purchase price of Lots, 1, 3, 4 and 5

[131] The necessary elements of the tort of civil fraud are set out in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21:

- (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss. .

[132] The burden is on the plaintiff to prove these elements on a balance of probabilities, "having due regard to the seriousness of the allegations made" *Wellesley Lake Trophy Lodge Inc. v. BLD Silviculture Ltd.*, 2006 BCCA 328 at para. 10. The court in *Wellesley* referred to the words of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.):

[In a civil case] the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. [Emphasis in Original].

[133] Where fraud is alleged, the evidence must be clear and convincing. In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 29, Mackenzie J.A. said

Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

[134] The plaintiffs have made extensive and detailed efforts to trace the flow of money in and out of various bank accounts in order to prove that Bassi and Avtar received money in relation to the alleged fraud. On the other hand, the realtor defendants argue that there is no evidence, or insufficient evidence, that they benefitted from the alleged fraud.

- [135] Both of these arguments miss the point that while fraud almost always involves some benefit gained by the fraudster, proof of that benefit is not a necessary element of the tort. The court in Hryniak referred to the classic statement of the House of Lords in *Derry v. Peek* (1889), 14 App. Cas. 337 at 374 that: "if fraud be proved, the motive of the person guilty of it is immaterial."
- [136] The key misrepresentations alleged by the plaintiffs in relation to Lots 1, 3, 4, and 5 are:
- Bassi represented to Dhillon that the price for Lot 1 was \$200,000, when the real price was \$88,000.
 - Bassi represented to Pagely, and through him to Taranjit, that the price for Lot 3 was \$200,000, when the real price was \$80,000.
 - Bassi represented to Shangara, and through him to Romana, that the price for Lot 4 was \$210,000, when the real price was \$67,000.
 - Bassi represented to Shangara, and through him to Jaspreet, that the price of Lot 5 was \$210,000, when the real price was \$80,000.
- [137] There can be no doubt that, if these representations were made, they were false and Bassi knew they were false. The real purchase prices were clearly stated on contracts that Bassi drafted. The question is whether the plaintiffs have proved that the representations were made.
- [138] There is also no doubt that, on or after the completion of their purchases, the plaintiffs advanced money in excess of the true purchase prices and at least some of that money found its way to one or other of the defendants or their family members. Leaving aside for the moment the credibility issues surrounding the alleged cash payments, the plaintiffs have produced cheques and bank drafts indicating substantial excess payments. What the plaintiffs must prove is that those funds were advanced in reliance on the alleged representations.
- [139] The only direct evidence of these representations--what Bassi said, when and to whom--comes from the plaintiffs. There is no supporting documentation or evidence from independent witnesses who may have heard the statements. If the plaintiffs' evidence is to be accepted, that acceptance must be based in part on inferences drawn from the surrounding circumstances and on an assessment of the plaintiffs' general credibility.
- [140] On the plaintiffs' own evidence, they acted foolishly and failed to take reasonable steps to protect their own interests. They said they did not bother to read the documents they or their children were signing and paid no attention to anything the conveyancing solicitors might have told them about the documents. But foolish or improvident behaviour by the victim is crucial to the success of many fraudulent schemes. Contributory negligence is not a defence to fraud.

- [141] One potentially important circumstance is that this case does not involve a single transaction. The plaintiffs entered their respective transactions separately and at different times, but give relatively consistent evidence about the content of the alleged representations. That consistency is capable of supporting the plaintiffs' case, provided there are no other issues that raise doubts about their credibility. If their credibility is in doubt, the consistency of their evidence may just as easily be the result of collusion.
- [142] To a large extent, the plaintiffs rely on the defendants' failure to provide credible or consistent evidence about various events or reasonable explanations for the money they received. There are certainly a number of points on which I have already rejected evidence of the defendants, primarily Bassi.
- [143] I have found that Bassi, contrary to his own evidence, initiated the plan to tie up lots near the Khalsa School site, using Ratther and Saini as nominal buyers with the intention of arranging for the purchase and sale contracts to be assigned after the school obtained the necessary rezoning. That in itself does not amount to fraud. In fact, there was nothing to stop Bassi from entering into those contracts in his own name.
- [144] If Bassi intended or hoped that the ultimate buyers who took assignments would pay substantially more than the purchase price, that premium could have been openly incorporated into price of the assignments. The difference could have been explained as the increased value attributable to the Khalsa School rezoning having been approved. If the plaintiffs' trust in Bassi was as complete as they say it was, they would have been just as likely to accept that explanation. The fact that the same end could have been accomplished so much more simply weighs against the alleged fraud.
- [145] I have also rejected Bassi's explanation of the \$30,000 given to Pagely at the same time Pagely provided an equal amount for the deposit on the Intercapital Lots that was paid in the name of Ratther. The suggestion that this was a coincidental loan to Pagely is refuted by the fact Pagely had no need to borrow money at the time. If there was no loan to Pagely, there is no other explanation for the \$22,000 Pagely paid to Jagroop Bassi a week after the completion of the purchase of Lot 3.
- [146] Other portions of Bassi's evidence that I find difficult to accept include:
- The suggestion that the \$15,000 Pagely gave him shortly after the completion of the Lot 3 purchase was for possible offers on Washington State property. No such offers were ever made and there is no clear documentary evidence of Pagely getting the money back. The transactions that Bassi claims to have amounted to repayment occurred two years later.
 - The claim that \$20,000 Shangara paid him only a month after the completion on Lots 4 and 5 was for unrelated debts dating back to 2003, including a debt that was owed not by Shangara but by Dhillon.

- The assertion that Pagely loaned \$50,000 to Baughan on terms that would have extended repayment over more than 16 years, with nothing to document the existence of the loan.
- Bassi's assertion that he did not know that \$200,000 was used from his wife's mortgage line of credit to pay for Lots 9 & 10 until "much later."
- Bassi's evidence that Shangara and Dhillon asked him to fill in the payee on a cheque even though other items on the cheque were completed.
- Bassi's evidence that there was a verbal assignment between Saini and Dhillon for the Mishra Lots when there was also an assignment in writing between Saini and Pagely.

- [147] In general, I agree that the defendants' attempt to link payments to other transactions requires belief in an improbable series of co-incidences, although the evidence does at least demonstrate that there were other financial dealings involving Bassi and/or Avtar with Pagely, Shangara and Dhillon, including some dealings after the transactions at issue.
- [148] The plaintiff's also point to numerous instances in which Bassi and Avtar gave evidence at trial that contradicted their evidence at discovery. These include Avtar agreeing that he witnessed some signatures and forwarded some documents to Buckley Hogan, when he had said on discovery that he had no direct involvement in the transactions at issue.
- [149] The defendants' credibility, or lack of it, is an important factor, but it cannot be allowed to obscure the burden of proof. The plaintiffs must prove the alleged representations and their own reliance on them. They cannot prove those facts simply by showing the defendants lack credibility because there is no burden on the defendants to disprove the allegations against them.
- [150] The realtor defendants rely on the fact that for each of Lots 1, 3, 4 and 5 one of the plaintiffs signed documents that are inconsistent with the alleged representations having been made or that clearly showed the representations to be untrue if they had been made. Dhillon, Pagely and Shangara all signed the assignment documents that showed the true purchase price. Dhillon and Romana signed statements of adjustments and property transfer tax return forms that referred to the true prices of their lots. Shangara was present when his daughter, Inderbeer, signed her sister's name to similar documents and Pagely was present when his son Taranjit signed them.
- [151] Although the principal plaintiffs were not highly sophisticated investors, they all had experience buying and selling real estate. By 2006, Dhillon had owned six properties since coming to Canada in 1992, including his current residence. He was also a partner in the business that, in 2006, bought three lots with the intention of building houses and selling them, although he said his partner handled all the real estate dealings.

- [152] Pagely had bought and sold at least five properties, as well as buying his current residence. On at least one occasion, he sold property without the assistance of a realtor. Shangara had been involved in at least ten real estate transactions over the years, including the purchase of lots for the purpose of building and resale, and also had experience acting without a realtor. Romana had owned three houses, two of them jointly with Shangara, and a commercial property with another partner.
- [153] I accept that Shangara, Dhillon and Pagely all trusted Bassi and that Romana was prepared to trust him based on Shangara's recommendation. The number of telephone calls from Bassi to plaintiffs and to Buckley Hogan on and around the completion dates is also consistent with Bassi giving advice or providing information about the transactions.
- [154] I also accept that Shangara, Dhillon, Pagely and Romana had limited ability to read and understand English. In those circumstances it is possible they paid less attention to the documents and relied more on any explanation of the transactions they previously received from a trusted friend.
- [155] Language difficulties may have also affected the value of any explanations or information received from the conveyancing lawyer. Mr. Hogan testified that, as a matter of standard practice, he would assess the clients understanding of English and, if necessary, obtain the assistance of a Punjabi speaking employee. But there is no specific evidence of that assessment being made or translation assistance being provided in these cases.
- [156] I cannot simply assume that Buckley Hogan's standard practice was followed because there are too many other instances when it clearly was not. For example, Romana and his wife, Gurdeep, purchased Lot 4 as joint tenants, although only one of them signed the completion documents and Buckley Hogan had received no assignment in favour of either. Lot 15 was purchased by Veerpal although there was no evidence on file that Ratther had assigned the contract to her. Most glaringly, Taranjit was allowed to sign the completion documents for Lot 3 with no lawyer present and without having ever met a lawyer to review those documents.
- [157] However, the evidence is clear that Dhillon, Shangara and Romana each met with Mr. Hogan or another lawyer in the firm when their respective transactions completed. While it is possible that the purchasers didn't fully understand or didn't fully pay attention to what was being said, their evidence goes further than that and describes their meetings with the solicitor as extremely short and perfunctory.
- [158] Dhillon said Hogan put the purchase documents on the table, asked him for identification and asked if he knew he had purchased a lot. He said Hogan then told him the documents pertained to the lot that he was purchasing, after which he and Ratther started signing them with no further discussion. Shangara said his and Inderbeer's meeting with a male lawyer to sign documents lasted only about five minutes and Romana described his meeting as being of a similar length.

- [159] Mr. Hogan said that simply asking for signatures without explaining the documents "absolutely would not happen." Although there are numerous shortcomings in the conveyance files that indicate certain standard practices were not followed, the plaintiffs' evidence amounts to an allegation that Buckley Hogan was consistently and repeatedly negligent in performing the most basic function of a conveyancing solicitor.
- [160] I cannot ignore the fact that Buckley Hogan was in the best position to protect the plaintiffs from the alleged fraud and had a duty to do so, yet the plaintiffs have chosen not to sue Buckley Hogan, leaving the firm unable to fully defend itself against that allegation.
- [161] I also cannot ignore the question of why someone in the position of Bassi and/or Avtar would risk embarking on a fraudulent scheme that was so dependent for its success on the conveyancing solicitors failing, in every case, to draw the plaintiffs' attention to the purchase price and on the assumption that not a single plaintiff would see the price on the documents.
- [162] Whatever language difficulties the plaintiffs may have had and whatever shortcomings there may have been in the explanations they received, I return to their previous real estate experience. I find it unlikely that all of them failed to even look at the numbers set out in the documents they were signing or failed to notice that the number most important to them--the purchase price allegedly stated by Bassi--was nowhere to be seen on those documents.
- [163] The credibility of the plaintiffs Dhillon, Shangara and Romana is further weakened by their assertion that the alleged excess payments included a total of \$93,000 in cash, for which they have produced no reliable supporting evidence, other than to speculate on the source of various deposits into Bassi's bank account.
- [164] I have particular difficulty with Romana's evidence that he made a payment of \$50,000 in cash, using money that he kept in a closet in his home. He said the cash represented accumulated rent from the suites in his house but, on his evidence of the monthly rent he received, it would have taken him approximately four years to collect this money, assuming none was ever spent or deposited in a bank. The amount of the allegedly accumulated cash was more than what he said was his and his wife's combined annual income.
- [165] Dhillon said he provided \$30,000 in cash to Bassi as a deposit on Lot 1. His evidence as to the source of this money was inconsistent. In examination in chief, he said most of it came from his painting business and was kept in a safe. On cross-examination, he adopted discovery evidence to the effect that it had all been collected from three or four different relatives.

- [166] More significantly, Dhillon gave evidence that shortly after the purchase of Lot 1 he learned the true details of the transaction after reviewing it with his bookkeeper. He said he was not concerned after learning he had bought a lot for Ratther because Bassi assured him he could still sell his lot at a profit. That does not explain how he could have failed to also realize that \$30,000 in cash had not been accounted for or applied to the purchase, yet there is no evidence of him asking about it or demanding it back.
- [167] Dhillon's evidence about the re-assurance he received from Bassi after learning what he had really bought affects his credibility in another way. If his evidence is to be believed, he learned that crucial facts about the transaction had been withheld from him. One would expect that revelation to weaken his blind trust in Bassi, but he said he accepted Bassi's explanation.
- [168] The same concern arises from the evidence of Shangara, who said he learned the true purchase price of Lot 5 when he received copies of the closing documents in the mail. He said the fact that he had not previously been told the true price not only did not cause him to question his trust in Bassi, but did not prevent him from continuing to hand money over to Bassi with no questions asked. That evidence is particularly troubling in light of the explanation Bassi supposedly gave him--that the vendor wanted to hide the true purchase price for tax reasons. I do not believe that Shangara would so willingly or easily accept that fact that his trusted friend was making him a party to the vendor's fraud.
- [169] In relation to Lot 3, Pagely said that at Bassi's request he obtained two drafts, one for \$76,535.97 and the other for \$63,405.97, and believed both were for the purchase of Lot 3. He said he was unaware that one of his drafts was used for the purchase of Lot 4. But the two drafts are sequentially numbered, with same date, drawn on the same bank and apparently the same account, and both payable to Buckley Hogan in trust. It is difficult to believe that Pagely would not have at least asked why two drafts were necessary if the law firm to which they were being given was applying them to the same transaction.
- [170] Pagely also admitted that he received copies of the closing documents for Lot 3 sometime in October 2006 and understood that the purchase had completed. He had enough experience to know that meant the lot had been paid for and to question why Bassi was asking for more money. Even if he accepted without question Bassi's statements that further payments were owed, it is not reasonable to believe he failed to at least look at the closing documents in order to reconcile the amount of these further payments with the total purchase price and the amounts previously paid.
- [171] I return to the need for clear and convincing evidence to support an allegation of fraud. The plaintiffs' evidence of the alleged verbal representations is not sufficiently credible or reliable to be accepted on its own as clear and convincing. The evidence of surrounding circumstances is often ambiguous and not sufficient to overcome that basic credibility problem. Some of the defendants' conduct and evidence arouses suspicion, but as said above, the case is one for the plaintiffs to prove, not for the defendants to disprove. Where

the evidence of all parties is unconvincing in significant ways, the consequences must fall on those who bear the onus of proof.

[172] I am therefore not satisfied on a balance of probabilities that the alleged misrepresentations about the purchase prices of Lots 1, 3, 4 and 5 were made by the defendants or relied upon by the plaintiffs.

2. Lot 16

[173] The plaintiffs' allegations in respect of Lot 16 are different from the others. There is no suggestion that the purchase price of \$137,500 was misrepresented. The allegation is that Shangara was induced to pay \$60,000 in excess of that price by a representation that the additional money would be applied to Lots 4 and 5 when in fact it went to subsidize Veerpal's purchase of Lot 15. Any such misrepresentation would result in a loss to Shangara only if Buckley Hogan in fact transferred the funds to Veerpal's file without his instructions.

[174] There is no allegation that Veerpal made any representations to Shangara. The claim against her is essentially one of unjust enrichment. Not only was Shangara's money applied to her purchase, but the balance of the purchase price that she borrowed from her mother and brother was, on her evidence, later repaid with money from Shangara and Romana.

[175] As with the other defendants, Veerpal's evidence is unconvincing on a number of points. She said she thought she was buying a half interest in Lot 15 for \$88,000 although the documents she signed clearly showed it was a full interest and that a half interest would have cost only \$68,000. She or members of her family received amounts in excess of the purchase price.

[176] She still holds title to the lot although she said she regards it as Shangara's and Romana's property and is willing to transfer title to them. But she gave no clear explanation as to why she has continued to pay property taxes for seven years on a lot she said she doesn't own, while, on her evidence, her and her husband have limited resources.

[177] But the frailties in Veerpal's attempts to explain the transaction do little to assist Shangara in proving the crucial fact he must prove--that \$60,000 was transferred for the benefit of Veerpal without his knowledge or instructions.

[178] The further amended statement of claim alleges that Bassi and/or Avtar "applied, or gave instructions to apply" the additional money to the purchase of Lot 15. Clearly, neither Bassi nor Avtar directly applied the funds to anything. The money was paid into Buckley Hogan's trust account.

[179] There is no evidence that either Bassi or Avtar gave instructions to Buckley Hogan to transfer the money, nor evidence of any basis on which Buckley Hogan could have accepted such instructions in the absence of Shangara's confirmation of them. The plaintiffs ask the court to infer Bassi and Avtar must have given those instructions because Shangara said he did not.

- [180] The only evidence that Shangara gave those instructions is Mr. Hogan's evidence that, as a matter of general practice, such instructions had to come from or be confirmed by the client. Aside from general practice, the need for the client's instructions before transferring trust funds goes to the fundamental duty of a solicitor.
- [181] The various errors elsewhere in the relevant files, which Mr. Hogan conceded were contrary to the firm's practice, do not prove misappropriation of trust funds--the most serious breach of duty that a solicitor can commit short of outright theft of the client's money. Here the plaintiffs are implying that Buckley Hogan was not only grossly negligent, but perhaps an active participant in the alleged fraud. Once again, the firm is not a party and has been given no opportunity to defend itself against this allegation.
- [182] The suspicion and speculation put forward by the plaintiff falls far short of the clear and convincing evidence of fraud. I therefore find that Shangara has failed to prove that he was unaware of his additional \$60,000 being applied to Veerpal's purchase of Lot 16.
- [183] However, it is clear that the funds that were applied to Lot 15 from Shangara's trust account combined with cheques paid to or to the benefit of Veerpal's family total \$163,000--more than the purchase price of Lot 15. On Veerpal's own evidence, she can have no beneficial interest in the property. The evidence would support a declaration that Veerpal holds Lot 15 in trust for Shangara or for Shangara and Romana together, but I will not make that declaration because I do not understand the plaintiffs to have asked for it. They are at liberty to speak to that matter if they wish.

B. Other Representations

- [184] The plaintiffs also claim fraudulent or negligent misrepresentation as to the development and resale value of the lots. Those alleged representations are:
- That the Lots 1, 3, 4 and 5 could each be resold for more than \$300,000.
 - That those lots were suitable for commercial or residential development.
 - That Lot 16 was an excellent prospect for future development and was worth between \$270,000 and 280,000.
 - That all of those lots would increase in value because the development of the Khalsa School would increase the value of all the surrounding property.
- [185] The plaintiffs also allege that a failure to disclose the existence of the right of way constituted a misrepresentation by silence.
- [186] The test for negligent misrepresentation is set out by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110:
- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;

- (2) that the representation in question must be untrue, inaccurate or misleading;
- (3) the representor must have acted negligently in making said misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[187] Whether alleged to be fraudulent or negligent, a representation must normally be one of existing or past fact: *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at paras. 14-15. Promises or opinions about future events are normally not actionable, but may be if the person making a prediction about matters, such as future profitability or future value, has special skill or knowledge. Lord Denning's words in *Esso Petroleum v. Mardon*, [1976] 2 All E.R. 5 (C.A.) at 16 are referenced by the Court of Appeal in *PD Management* and cited in *Hayes v. Schimpf*, 2005 BCCA 568 at para 19:

... It seems to me that *Hedley Byrne* [[1963] 2 All E.R. 575, [1964 AC 465]] properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be it advice, information or opinion - with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable.

[188] In *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72, the court says at para. 43:

Sometimes representations are made about the future that depend on the facts as they exist at the time of the representation. If those existing facts are inaccurately and negligently stated, the words may be actionable, as in *Cognos*. Sometimes people are retained to give opinions about the future, and if those predictions are negligent (having due regard that perfection in future projections cannot be expected) they may be actionable

[189] As a realtor, Bassi was expected to have knowledge about the real estate market in the area where he worked. When a realtor gives an opinion about the price or value of a property, he or she can expect that to be relied on as a knowledgeable statement based on the market at the time the statement is made.

[190] The realtor cannot be expected to predict future prices, but can offer a reliable opinion as to how value may generally be increased or decreased by certain events, such as a school being built across the street.

[191] The representation alleged by the plaintiffs was not merely that the value of the property was likely to increase because of the Khalsa School; it was that each lot already had a value in the range of \$300,000. If such a representation was made, I would consider it to be a representation of current fact, rather than an opinion about the future.

- [192] Whether or not such a representation can be found to be false would normally depend upon expert evidence of what a reasonably competent realtor would have believed at the time. No such evidence was presented in this case, but the difference between the actual purchase price of most of the lots and the value that was allegedly represented is so large that the court may at least be able to draw an inference of recklessness.
- [193] The question is whether the plaintiffs have proved on a balance of probabilities that those representations were in fact made. The alleged representation about the resale value is inextricably linked to alleged representation of the purchase price. On the plaintiffs' evidence, they were made at the same time.
- [194] I have already found that the plaintiffs have failed to prove the alleged representation of the purchase price, largely due to adverse findings of credibility. In the absence of credible supporting evidence, I cannot find the representations of very high market values to have been made.
- [195] As for alleged representations of development potential, there is no evidence of what level of knowledge a realtor can be expected to have about what can or cannot be built on specific piece of property beyond basic information about what the zoning permits. There no evidence, for example, that Bassi knew or ought to have known about the soil and other technical building problems identified in the appraisal evidence.
- [196] The alleged non-disclosure of the sewer right of way raises somewhat different issues. Pagely said he was shown a hand-drawn plan of the lots that had no indication of the right of way. A similar plan, or a portion of the same one, appears in the Buckley Hogan file and Shangara said it was shown to him when the completion documents were signed. Dhillon said Bassi showed him a more professional looking plan that shows an unlabeled right of way crossing some lots, but not Lot 1, and does not show the true width of the right of way.
- [197] Based on the nature of the transactions, with properties being acquired through assignments with expectations of a neighboring development, I do find it more likely than not that there was no discussion or disclosure of the right of way when the plaintiffs agreed to take assignment of the affected lots.
- [198] The realtor defendants rely on *Cardwell v. Perthen*, 2007 BCCA 313 at paras. 44-48 for the proposition that there can be no liability to a purchaser for failure to disclose patent, as opposed to latent, defects. Patent defects are those the purchaser could have discovered on reasonable inspection or inquiry. The defendants argue that the right of way was such a patent defect because it could have been discovered by a title search.
- [199] I do not need to decide whether the right of way constitutes a patent or a latent defect because *Cardwell* was an action against a vendor, not against a realtor. Nothing said in that case detracts from what I would consider to be a self-evident duty on a realtor to know what he or she is selling.

- [200] Having said that, however, I am not persuaded that knowledge of the right of way would have made any difference to the plaintiffs. It certainly made no difference to Dhillon when he learned about it within weeks of his purchase. The plaintiffs were prepared to buy these lots sight unseen and I conclude the only characteristic of the lots they cared about was their proximity to the Khalsa School site.
- [201] Further the plaintiffs' own appraisal evidence showed that actual price paid to vendors was fair market value at the time, even with any problems the right of way may cause. It is common ground that the proper measure of damages is the difference between the price paid and the actual value of the property: *Sorenson v. Kaye Holdings Ltd.* (1979), 14 B.C.L.R. 204 at 216-217 (C.A.).
- [202] I have found that the plaintiffs have failed to prove they were misled about the price. It follows that they must be taken to have acquired the lots for the prices stated in the agreements for purchase and sale and the statements of adjustments. Having found those prices to have been at or near fair market value, I must find that the plaintiffs have failed to show any damage arising from reliance on the alleged representations.
- [203] The plaintiffs' claims, whether based on fraud or negligence, relating to the alleged additional representations, must therefore be dismissed.
- [204] I would add that, even if I had been prepared to find negligent, as opposed to fraudulent misrepresentations, I would have attributed the majority of fault to the contributory negligence of the plaintiffs in failing to read or obtain an explanation of the documents they were signing.

X. Summary and Order

- [205] The plaintiffs have failed to prove the alleged misrepresentations and misappropriation of funds on a balance of probabilities. Their claims against the defendants Jagjit Bassi, Avtar Gill and Sutton Group must be dismissed.
- [206] The plaintiffs have proved that the defendants Veerpal Dhillon and Garrett Rather were unjustly enriched by receiving and retaining property that the plaintiffs paid for. I did not understand the plaintiffs to be seeking a declaration that those properties are held in trust or any orders flowing from such a declaration, but the plaintiffs have liberty to speak to such orders.
- [207] As requested by the realtor defendants, I will hear further submissions on costs.

"N. Smith, J."

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