
CANADA / JUDGMENT

Kawana v. Shemal

2011 BCSC 377

COURT

Supreme Court of British Columbia

DECIDED

31 March 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 377 Kawana v. Shemal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kawana v. Shemal,

2011 BCSC 377

Date: 20110331

Docket: E28952

Registry: New Westminster

Between:

I-Chun Lee Kawana

also known as Micki Kawana

Plaintiff

And:

Reyadh Kadhim Shemal

Defendant

Corrected Judgment: The text of this judgment was corrected on page 79 at paragraph 336, and on page 82, paragraph 344, sub-paragraph 5. (a) on August 17, 2011

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff:

J. Thorsteinsson

Counsel for the Defendant:

T. Hoover

Place and Date of Trial:

New Westminster, B.C.

January 11-15, 18-21,

February 9-10, 2010

Place and Date of Judgment:

New Westminster, B.C.

March 31, 2011

INTRODUCTION

- [1] The plaintiff, I-Chun Lee Kawana, also known as Micki Kawana, claims for a declaration that the consent order made by the Honourable Mr. Justice McKinnon at a Judicial Case Conference ("JCC") heard in this family law proceeding on March 18, 2008, resolved all issues in dispute between the parties, other than the defendant Reyadh Kadim Shemal's claim for an interest in the retail shoe business known as Just for Feet owned by the plaintiff, but operated by both parties. The plaintiff seeks an order that except as provided in the consent order, and in any order the court makes concerning the interests of each party in Just for Feet, each party will retain the assets in their possession.
- [2] The consent order awarded the parties joint custody and joint guardianship on the Joyce model of the two children of the marriage, Maryam Reyadh Shemal, born August 1, 2005, and Yusuf Reyadh Shemal, born January 4, 2007. The consent order also provided for the plaintiff to have the primary residence of the children, and for the defendant to have reasonable access, including overnights, subject to the defendant obtaining child car seats, a crib, and a mattress for Maryam. Based on the defendant's 2008 annual income of \$41,400, the consent order required Mr. Shemal to pay Ms. Kawana monthly child support of \$631 commencing April 1, 2008. Mr. Shemal was also required to pay the plaintiff monthly spousal support of \$869, again commencing on April 1, 2008, and continuing on the first day of each and every month thereafter.
- [3] The consent order provided for the sale of the family home located at 3330 Robson Drive, in Coquitlam, British Columbia ("the Robson Drive property"); for payment of the first \$380,000 from the net proceeds of sale to the plaintiff's brother Jessy Lee; and for the equal division of the balance of the net proceeds between the plaintiff and the defendant. The remaining terms of the consent order were that the defendant "shall be responsible for the Bank of

Montreal Line of Credit under his name", and that the plaintiff had no interest in a strata unit purchased by the defendant and located in the Millennium Water development in Vancouver, British Columbia.

- [4] In the alternative, the plaintiff claims that she is entitled to one-half interest in the Robson Drive property, notwithstanding its registration in the name of the defendant only. Ms. Kawana says that the parties agreed that the Robson Drive property would be owned by the plaintiff and the defendant equally. In the further alternative, the plaintiff claims that by an express, constructive, or resulting trust, the defendant holds an interest in the former matrimonial home in trust for her, and seeks a determination of the extent of that interest.
- [5] The defendant says that the consent order should be set aside because it is unconscionable and does not reflect the entire agreement made between the parties for the settlement of their differences prior to the JCC on March 18, 2008. Mr. Shemal counterclaims for declarations that the plaintiff holds her interest in Just for Feet, and in the proceeds of the sale of her interest in a strata unit known as the Obelisk property in trust for him, and seeks compensation for unjust enrichment.

BACKGROUND

The Parties

- [6] The plaintiff is 37 years old. In 1986, she immigrated to Canada from Taiwan to live with her uncle and aunt, who adopted her. Ms. Kawana completed grade 12 and later obtained a diploma in marketing management from the British Columbia Institute of Technology in 2000. The plaintiff was employed in a variety of retail or service industry positions that paid her a salary at or near the minimum wage until her graduation from BCIT. When she met Mr. Shemal in 2001, Ms. Kawana was employed as a corporate sales representative for a hotel and earned between \$1,600 and \$1,900 a month.
- [7] In 1989, the plaintiff's natural parents and her older brother Jessy Lee immigrated to Canada. The plaintiff's parents purchased investment properties in Richmond and Surrey, and established lumber milling and exporting businesses.
- [8] Jessy Lee is a self-employed businessman with more than 15 years experience in the forest products industry. Mr. Lee presently resides in Taiwan. While he lived in Canada, Jessy Lee operated Richland Forest Products Ltd. ("Richland"), a company which exported forest products to Asia from a specialty sawmill located in Mission, British Columbia.
- [9] The plaintiff has another brother, Wilson Lee, also known as Li Chien Hsun, who resides in Taiwan.
- [10] The defendant Reyadh Kadhim Shemal is 37 years old. In 1996, Mr. Shemal immigrated to Canada as a refugee from Iraq; he has been a citizen of this country since 1999. The defendant has a degree in mechanical engineering from the University of Baghdad;

however, his qualifications were not recognized here. When Mr. Shemal met the plaintiff, he was employed as a door man at a night club and earned additional income through his employment with a security company and by purchasing, reconditioning and selling motor vehicles. The defendant had declared bankruptcy on May 12, 2000, and was discharged from bankruptcy on March 21, 2001. At the time of his bankruptcy, Mr. Shemal declared assets of \$300 and liabilities of \$46,638, consisting primarily of credit card debt.

[11] For each of the years 2000 through 2008, Mr. Shemal declared the following amounts as his total income in the income tax returns he filed with the Canada Revenue Agency:

2000

\$18,363.00

(includes \$6,066 in social assistance payments)

2001

\$22,763.00

2002

\$11,673.00

2003

\$ 7,956.00

2004

\$35,071.00

2005

\$ 9,725.00

2006

\$23,510.00

2007

\$22,500.00

2008

\$19,440.00

The Parties' Relationship

- [12] The parties began to cohabit on March 15, 2002; the plaintiff moved into the defendant's apartment. At that time, the plaintiff had just been involved in a motor vehicle accident and was off work. About six months later, the parties moved to another apartment. The defendant's evidence is that he paid the rent by providing money to the plaintiff each month, which she then deposited to her account before making the rental payments. Mr. Shemal says this arrangement continued until the parties were able to draw upon funds from the retail shoe business, which they launched in December 2002, to pay the rent and other household expenses. The plaintiff testified that her brother Jessy Lee provided cash to her from time to time, and that she deposited sufficient amounts in her bank each month in order to pay the rent.
- [13] Despite the apparently modest means and limited earning capacities of the plaintiff and the defendant, each claimed to have had large amounts of cash available to them from family or friends. The plaintiff claims that her brother Jessy Lee, while he remained in Canada, held between \$450,000 and \$475,000 of family money in cash. Ms. Kawana says that her brother, before returning to Taiwan, entrusted this family money to her, to be held and disbursed on her brother's instructions.
- [14] For his part, Mr. Shemal testified at trial that in 2002 he received \$75,000 in cash from a former business partner to whom he had sold his one-half interest in a restaurant in 1999. The defendant also claims that in 2004 he was able to borrow large sums of cash from family members and friends to finance the down-payment on the purchase of the Robson Drive property and for other purposes. Later in these reasons I assess the credibility of each of the parties respecting their financial circumstances and their respective contributions to the various assets in dispute in this proceeding.
- [15] In December 2002, the parties opened Just for Feet, a shoe store located in the Coquitlam Centre mall. The plaintiff is the sole shareholder and director of Just for Feet Orthotics and Orthopaedic Shoes Ltd. ("Just for Feet"). Initially, the plaintiff operated the business on her own. However, following another motor vehicle accident in December 2003, she left the day-to-day operation of the business primarily to the defendant. The plaintiff returned to work at the shoe store on a part-time basis in the spring of 2004, but stopped working there before the birth of Maryam in August 2005.
- [16] The defendant was responsible for the day-to-day operations of the business from February 2004, until May 8, 2008, when the plaintiff terminated his employment. Since she dismissed Mr. Shemal, the plaintiff has operated Just for Feet.
- [17] On July 13, 2004, the plaintiff and the defendant participated in a Muslim religious ceremony of marriage in Vancouver, but did not apply for a marriage certificate. They are not lawfully married because their marriage did not comply with the requirements of the Marriage Act, R.S.B.C. 1996, c. 282.

- [18] Because the parties were not lawfully married, neither has a claim against the other for an equal division or reapportionment of assets under Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128.

Purchase of the Robson Drive Property

- [19] On July 31, 2004, Mr. Shemal completed the purchase of the Robson Drive property for \$475,000. The Robson Drive property remained the family home until the parties separated in January 2008. Title was registered in the name of Mr. Shemal only. Mr. Shemal paid the deposit of \$10,000 and financed the purchase of the Robson Drive property by a first mortgage in favour of the Bank of Montreal in the amount of \$332,500. The defendant says that he paid the balance due on completion, after adjustments, of \$139,651 from his own funds and monies borrowed from his friends and family.
- [20] Ms. Kawana did not pay any part of the purchase price for the Robson Drive property. At the time of purchase of the Robson Drive property, in July 2004, the plaintiff was only working in the shoe store on a casual, occasional basis, and was not earning any remuneration from the business. However, the plaintiff says that she made an indirect contribution to the down-payment because \$21,000 of the funds applied by Mr. Shemal to the down-payment came from the account of Just for Feet.
- [21] Ms. Kawana also testified that neither she nor the defendant had sufficient income or capital to purchase the Robson Drive property themselves. The plaintiff says that she and Mr. Shemal requested financial assistance from her brother, Jessy Lee, and that Jessy Lee, through Richland, loaned the plaintiff and the defendant \$57,200 toward the down-payment on the family home.
- [22] Mr. Shemal acknowledges that he received three cheques totalling \$57,200 from Richland. However, the defendant maintains these funds were not a loan, but rather payment for work he performed, at night, in assisting Mr. Lee to load logs into containers for export to Asia, without the requisite export permits.

Payout of the Mortgage Registered Against the Robson Drive Property

- [23] By June 5, 2006, Mr. Shemal had fully paid out the mortgage registered against title to the Robson Drive property. On March 24, 2006, the balance owing on the mortgage was just over \$300,000. The plaintiff and Mr. Lee both testified that Mr. Lee loaned the parties \$300,000 for the purpose of paying out and discharging the mortgage. On March 23, 2006, Jessy Lee transferred \$110,000 from his account to the defendant's bank account. Mr. Lee made a further transfer of \$190,000 to Mr. Shemal's account on May 2, 2006.
- [24] Mr. Shemal maintains that the \$190,000 wire transfer was a payment from Jessy Lee for services he rendered in assisting Richland to secure a lucrative contract with Japanese clients. The defendant testified that until the trial of this action, he understood that the \$110,000 transfer was a loan to him from the plaintiff that he subsequently repaid to her. Mr.

Shemal testified that he never understood the \$110,000 advance to be a loan to the plaintiff and himself from Mr. Lee. Mr. Shemal agreed that he applied the \$190,000 transferred to him by Mr. Lee to the payout of the mortgage on the Robson Drive property, and that he had used \$66,500 of the earlier \$110,000 payment for the same purpose.

- [25] Mr. Lee denies that he engaged or paid Mr. Shemal to perform any services for Richland, or that he or Richland engaged in the illegal export of logs.

The Line of Credit

- [26] Following the discharge of the mortgage from title to the matrimonial home, Mr. Shemal took out a line of credit secured against the Robson Drive property. The Defendant registered a mortgage securing the line of credit for up to \$200,000 against title to the matrimonial home on July 18, 2006.
- [27] Although they were both still living in the matrimonial home, the plaintiff and the defendant had ceased to live together as man and wife by late November 2007. At that time, the outstanding balance on the line of credit was about \$36,000. The plaintiff left the matrimonial home on January 30, 2008.
- [28] By late March 2009, the amount owed by Mr. Shemal on the line of credit was almost \$200,000. As of September 26, 2009, the account balance was \$199,940. Mr. Shemal incurred that debt on his own account. The plaintiff received no benefit from the line of credit after the parties separated.
- [29] The fair market value of the Robson Drive property as of November 9, 2009, was \$590,000.
- [30] In June 2006, Jessy Lee made a sudden departure from British Columbia to Taiwan. Mr. Lee gave evidence that he was abducted at gun-point and later released. He said nothing about the identity of his abductors or the circumstances of his abduction. On the advice of the Royal Canadian Mounted Police that he should leave Canada for his own safety, he did so and immediately returned to Taiwan.

A Suitcase Full of Cash

- [31] Mr. Lee testified that before he departed for Taiwan, he left with the plaintiff a suitcase containing between \$450,000 and \$470,000 in cash, which he described as "family money" that his father had entrusted to him, as the eldest son, before returning to Taiwan in 1994. Both Mr. Lee and the plaintiff say that the defendant was present when Mr. Lee delivered the suitcase of cash to Ms. Kawana at the Robson Drive property. The plaintiff testified that she kept the suitcase and its contents in a walk in closet in the family home.
- [32] In August 2006, the plaintiff, the defendant, their daughter Maryam, and various members of the defendant's family from Toronto and Iraq, vacationed together for several weeks in Turkey. The plaintiff claims that the cost of the vacation, including travel costs for the defendant's relations, totalled \$50,000, and that the vacation was paid for with funds drawn

from the family money. The defendant says that his relations paid their own way; that the total cost of the vacation for the plaintiff, the defendant, and Maryam was \$12,000; and that he paid that amount.

- [33] Mr. Shemal denies any knowledge of Jessie Lee leaving a suitcase of family money in the plaintiff's care.

The Wire Transfers to Taiwan

- [34] Between March 8 and June 6, 2007, the plaintiff and the defendant made seven wire transfers of funds totalling \$363,800 to Taiwan. In six cases, the plaintiff or the defendant wired funds to the account of Wilson Lee. One wire transfer went to Jessie Lee.
- [35] According to the plaintiff and Jessie Lee, in early 2007, Jessie Lee requested the return of about \$360,000 from the family funds, and instructed the plaintiff to send the funds to his brother Wilson because he was still concerned about his safety. Jessie Lee used \$300,000 of these funds to pay for the purchase of a home in Taiwan. The plaintiff maintains that Mr. Shemal made two of the seven transfers for the purpose of assisting in the return of the family monies to Taiwan.
- [36] Mr. Shemal says that the two transfers he made on March 9 and March 28, 2007, in the amounts of \$55,000 and \$50,000, were repayments of amounts that he understood at the time to be due to the plaintiff for her loan to him of \$110,000, which he had used to pay out the mortgage on the Robson Drive property.

The Separation and the March 2008 Agreement

- [37] In January, 2008, the plaintiff, after learning that the defendant was having an affair with another woman, moved out of the family home and took the children with her. The plaintiff has had the primary care of the children since the separation.
- [38] In March, 2008, prior to the JCC, the parties met with Sheik Younus Kathrada, a respected Muslim cleric, with whose assistance they concluded and later signed an agreement. The agreement purported to resolve ownership of the Robson Drive property, division of the proceeds of its sale, payment of debt owed to Jessie Lee, the assumption by the defendant of responsibility for the line of credit charging the Robson Drive property, custody, child support and spousal support.

- [39] The executed agreement provides:

Matrimonial Home: 3330 Robson Drive, Coquitlam, B.C.

- The matrimonial home located on 3330 Robson Drive, Coquitlam, B.C. is owned jointly by Micki Kawana and Reyadh Kadhim Shemal.

· Both Micki Kawana and Reyadh Kadhim Shemal have agreed that once the house is sold, the debt owed to Micki Kawana's brother - Jessy Lee in the amount of \$380,000 is to be paid off and the remaining proceeds will be divided equally between Micki Kawana and Reyadh Kadhim Shemal.

· Reyadh Kadhim Shemal is fully responsible for any line of credit taken against the house.

Child Support and Support

· Reyadh Kadhim Shemal has agreed to pay Micki Kawana \$1,500 per month for both spousal and child support (combined).

Custody

· Reyadh Kadhim Shemal and Micki Kawana have both agreed to have joint custody of their children (Maryam Shemal and Yusuf Shemal).

Micki Kawana - Reyadh Kadhim Shemal - Witnessed by: Younus Kathrada

[40] The plaintiff, the defendant and Sheik Younus Kathrada each signed the agreement.

The Consent Order

[41] The consent order pronounced by the Honourable Mr. Justice McKinnon on March 18, 2008, provided for the plaintiff and the defendant to have joint custody and joint guardianship of the children of the marriage on the Master Joyce model.

[42] Paragraph 2 of the consent order reads as follows:

The Plaintiff shall have primary residence of the children, and the Defendant shall have reasonable access to include overnights, subject to the Defendant obtaining two car seats, a crib, and mattress for Maryam.

[43] The consent order also provided that based on the defendant's income of \$41,400 per annum, the defendant was required to pay to the plaintiff \$631 per month in child support commencing on April 1, 2008, and continuing on the first day of each month thereafter, and to pay spousal support to the plaintiff in the amount of \$869 per month, also commencing on April 1, 2008.

[44] With respect to property, the consent order contained the following terms:

5. The matrimonial home has been listed for sale and:
 - a. any ultimate sale price will be subject to the agreement of the parties;
 - b. after all payments of commission and all adjustments, the proceeds will be divided as follows:
 - i. the first \$380,000 will be paid to Jessy Lee, and

- ii. the balance will be divided equally between the parties.
- 6. The defendant shall be responsible for the Bank of Montreal Line of Credit under his name.
- 7. The plaintiff has no interest in the property located at Unit 902 Strata Lot 93 181 W. 1st Avenue, Vancouver, B.C.
- [45] The plaintiff maintains that the consent order of McKinnon J. finally disposes of all matters in issue in this action, other than the dispute concerning the parties' interests in Just for Feet.

The Defendant's Counterclaim

- [46] By his amended counterclaim filed January 22, 2010, the defendant seeks orders that both the agreement signed by the parties before the JCC and the consent order of Mr. Justice McKinnon be set aside for unconscionability. Mr. Shemal says that he was in an unequal bargaining position and that both the agreement and the consent order were substantially unfair to him.
- [47] The defendant also counterclaims for a declaration that the plaintiff holds her interest in the proceeds of sale of the right to purchase a strata title unit located at 1907 - 1178 Heffley Crescent in Coquitlam, British Columbia (the "Obelisk property"), and her shares in Just for Feet, in trust for the defendant. Mr. Shemal requests an order transferring to him those shares and the plaintiff's interest in the proceeds of sale of the Obelisk property.
- [48] Alternatively, the defendant claims monetary compensation for unjust enrichment based on his alleged contributions, both direct and indirect, to the acquisition of the Obelisk property and the acquisition, preservation, maintenance and improvement of Just for Feet.
- [49] The defendant also claims against the plaintiff for the repayment of monies he claims to have loaned to her in the amounts of \$10,000 on November 28, 2006, \$18,140.23 on January 20, 2007, and \$35,000 on May 17, 2007.
- [50] Finally, the defendant counterclaims for an order that a bank account held by the plaintiff at TD Canada Trust for the benefit of the children, to which each party has contributed funds, be transferred into the parties' joint names.

Custody, Guardianship and Access

- [51] All issues relating to custody, guardianship and access for the children were resolved at the conclusion of the trial.
- [52] Maryam, who is five and a half years old, and Yusuf, who is four years old, reside with their mother and have done so since she left the matrimonial home in January 2008.

- [53] Mr. Shemal has a very strong emotional bond with his two children. He is undoubtedly a devoted father and wishes to have as much contact as possible with Maryam and Yusuf. He loves his children.
- [54] Both parents agree that the children should be raised in the Muslim faith.
- [55] As a result of their parents' different backgrounds, the children speak English, Mandarin and Arabic.
- [56] Since the children were born, the plaintiff has been the primary caregiver. After the birth of the children, the plaintiff stayed home to look after them. The plaintiff has played the lead role in arranging for the children's medical care and schooling, in purchasing clothing and other necessities for the children, and in arranging many of their recreational activities and visits with their friends.
- [57] Prior to the separation, the defendant worked in the shoe store and was frequently there from opening to closing time, which meant that on weekdays he had relatively little time with the children.
- [58] During the trial, the parties agreed that they should continue to have joint custody and joint guardianship of the children on the Joyce model, as provided in the consent order of Mr. Justice McKinnon. By oral reasons delivered at the conclusion of the trial, I ordered that the primary residence of the children continue with the plaintiff and that the plaintiff have the primary responsibility for the day-to-day care of the children. The plaintiff has the obligation to discuss with the defendant significant decisions concerning the children's health (except emergency decisions), education, religious instruction and general welfare.
- [59] With respect to access, I found that it was in the children's best interest that they have increased and sustained contact, with their father, including overnight time, in order to develop a strong bond with him and to receive all the benefits of a close relationship with their father. Because the children had not yet had overnight access, I held that there should be a transitional period. I varied the order pronounced at the JCC on October 2, 2008, to provide that the defendant shall have reasonable and generous access to include:
- (a) Fridays from 9:45 a.m. to Saturday at 6:00 p.m. each week commencing on Friday, February 12, 2010, and continuing each week up to and including the weekend of March 5 and 6, 2010;
 - (b) During this transition period, the defendant would continue to have access on Mondays with a 9:45 a.m. pick-up of the children at the plaintiff's residence, dropping off Maryam at pre-school at 1:45 p.m. and returning Yusuf to the plaintiff's place of employment at 3:00 p.m. The defendant's Monday access to continue from Monday, February 15 through Monday, March 1, 2010;

- (c) Commencing Thursday, March 11, 2010, and continuing each week thereafter, the defendant has access to the children on Thursdays from 5:00 p.m. to Saturdays at 6:00 p.m. On Thursdays, the defendant picks up the children at 5:00 p.m. at the plaintiff's residence and on Saturday evenings at 6:00 p.m. he returns them to the plaintiff at the Just for Feet store in the Coquitlam mall.
 - (d) The defendant's Monday daytime access continues.
 - (e) During each of the Muslim religious holidays of Eide, the defendant shall have the children on the first day of Eide, including overnight, and the plaintiff will have the children on the second day of Eide, including overnight.
 - (f) Neither the plaintiff nor the defendant shall remove the children from the Province of British Columbia without the express written permission of the other party, or further order of the court.
 - (g) The defendant will not apply for a passport for the children without the plaintiff's consent.
- [60] I made no order respecting access during school holidays because the children were not yet of school age, If the parties are unable to work out arrangements respecting access during school holidays, my order provided that they have liberty to apply to the court for directions.

ISSUES

[61] The following issues remain for determination in this action:

- (a) The credibility of each party concerning their financial affairs.
- (b) Did the consent order of March 18, 2008 and the agreement executed by the parties prior to the JCC of March 18, 2008 constitute a binding resolution of all issues in dispute between the parties, other than the defendant's claim to an interest in the business of Just for Feet, and if so, should the consent order and the agreement be set aside for unconscionability?
- (c) What is the interest, if any, of the defendant in Just for Feet?
- (d) What is the interest, if any, of the defendant in the proceeds of sale of the Obelisk property?
- (e) If the consent order is set aside,
 - i. what is the interest, if any, of the plaintiff in the Robson Drive property? and
 - ii. are the plaintiff and the defendant jointly indebted to the plaintiff's brother, Mr. Jessy Lee from the proceeds of sale of the Robson Drive property, and if so, in what amount?
- (f) Is the plaintiff indebted to the defendant, and if so, in what amount?
- (g) What child support is payable by the defendant to the plaintiff for the benefit of the two children of marriage?

- (h) Should there be an order that the bank account held by the plaintiff at TD Canada Trust for the benefit of the children be transferred into the joint names of the plaintiff and the defendant, and what directions, if any, should the court give respecting the management of that account?

DISCUSSION AND ANALYSIS

(a) The Credibility of the Parties

[62] Because there are material conflicts between the evidence of the plaintiff and the defendant on many of the issues in dispute, it is necessary to make findings concerning the credibility of both the plaintiff and the defendant. Many of the conflicts relate to diametrically opposed evidence of the parties concerning their financial arrangements and the sources of their respective finances. For example, the defendant denies that Jessy Lee loaned money to the parties for the purchase of the Robson Drive property and to pay out the mortgage on that property. Mr. Shemal contends the monies he received from Richland were payments for services he provided to Mr. Lee's sawmill enterprise.

[63] In determining issues of credibility arising in this case, I bear in mind the test stated by Mr. Justice O'Hallaran in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility I based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[Emphasis added.]

- [64] Testing the truth of many of the stories told by the parties for their harmony with the preponderance of the probabilities involves particular challenges in this case. Many of the disputed transactions are said to have involved large cash payments. By their nature, such transactions are not readily verifiable by reference to banking records. Further, the banking records that were produced were not always complete. For example, the bank statements for the Just for Feet corporate account only go back to June 2004, and none of the banking records for Richland, other than copies of various cheques issued by Richland to Mr. Shemal, were available to the court.
- [65] In assessing Mr. Shemal's credibility, I also take into account the fact that English is his third language, after Arabic and Turkish. Over the course of the trial, Mr. Shemal demonstrated a solid command of spoken English. On those occasions when he required clarification of questions, he asked for and obtained that clarification from counsel. When documents and discovery extracts were put to him, the defendant took the time to read the material before responding to counsel's questions. I am satisfied that Mr. Shemal was able to read and understand all of the written material on which he was examined and cross-examined at trial.
- [66] For the reasons that I explain below, I have found that neither the plaintiff nor the defendant is an entirely reliable witness. I have accepted some parts of their evidence and have found that other portions of each of their testimonies are not credible.
- [67] On occasion, Mr. Shemal showed an unfortunate propensity to make statements that he thought would best serve his immediate interests, and to then change his story when confronted with inconvenient facts.
- [68] In support of his application for mortgage funding for the purchase of the Robson Drive property, Mr. Shemal made a statutory declaration in which he declared that the balance of \$142,500 required to complete the purchase of that property came from his own resources and was not borrowed. In cross-examination, he admitted that some of the monies required for the down-payment were borrowed from his sister and family, although he denied that any part of the down-payment was loaned to him by Jessy Lee. When asked why he had declared that all of these funds were from his own resources, Mr. Shemal answered that he "did not have to explain every little detail." The defendant also denied that he knew the information he provided to the bank was incorrect.
- [69] In January 2006, while Mr. Shemal was employed with Just for Feet, he completed an application for employment insurance benefits in which he attested to the truth of the information he provided in support of his application. That document also included the defendant's acknowledgement that false statements made on an application for benefits constituted fraud. On the application, Mr. Shemal answered "no" to the question "Are you related to any of your employers or to one or more of their majority shareholders, by blood, marriage (including common law) or adoption?" At the time, Mr. Shemal believed that he was lawfully married to the plaintiff, who he knew to be the sole shareholder in Just for Feet.

When confronted with the false information in his application for employment insurance benefits, Mr. Shemal responded by saying that he must have made a mistake.

Did Mr. Shemal have \$75,000 in cash at his disposal, and where did it come from?

- [70] Mr. Shemal gave evidence at trial that his partner Tony bought out his interest in the Sinbad Restaurant in 1999, but that he did not receive the \$75,000 payment from Tony for his interest until July or August of 2002.
- [71] On his examination for discovery of November 26, 2009, at question 77, Mr. Shemal testified that his partnership with Tony ended in 1999. On his examination for discovery of December 4, 2009, at page 193, questions 1346 to 1348, Mr. Shemal testified that Sinbad's Restaurant was sold in the late 1990s. He was asked where he kept the money during that period of time. The defendant said that he had found a friend with whom he could leave his money. Mr. Shemal's evidence on discovery, which conflicts with his evidence at trial, was to the effect that he received payment for his interest in Sinbad's Restaurant in the late 1990's, and then had a friend hold the payment for him.
- [72] Mr. Shemal was shown a letter dated December 30, 2009, from his solicitor to the plaintiff's solicitor, which set out the defendant's responses to outstanding discovery questions from his November 26, 2009, discovery. One of those questions concerned the source of funds for the down-payment on the Robson Drive property. Mr. Shemal's response, as set out in his solicitor's letter, was that the source was \$75,000 in cash from his share of the restaurant that he received in 2001. At trial, Mr. Shemal testified that was a mistake and that he did not receive the money until 2002. He said that in July 2002 his partner sold the restaurant and he then received \$75,000 as his share of the proceeds of sale. Mr. Shemal testified that he kept this money in cash because he was bankrupt at the time and it was therefore "easier" for him to keep the cash.
- [73] Mr. Shemal did not at any time between his assignment in bankruptcy on May 12, 2000, and his discharge on March 27, 2001, disclose his half interest in Sinbad's Restaurant in the bankruptcy proceedings.
- [74] During his examination for discovery of November 26, 2009, Mr. Shemal was unable to recall where he met his partner Tony to receive the \$75,000 payment. On his November 26, 2009, discovery, at page 12, questions 100 to 103, the defendant said that he and Tony were the only persons present and that there was no record documenting the payment.
- [75] At trial, Mr. Shemal testified that he received payment at his partner's house and that Tony's mother was also present. Mr. Shemal also said that he had kept notes; that he checked his notebook after the November 26 examination for discovery; and then he probably still had the notebook at home but had not produced it. He did not explain his failure to produce the notebook and made no effort to produce it before the conclusion of the trial. Mr. Shemal also testified that although his notebook contained entries relating to business transactions, it did not contain any entries regarding the many private or personal loans that he claims to

have made or received. Mr. Shemal testified that he was unable to call his friend Tony as a witness to verify his evidence respecting the \$75,000 payout because he now lives in Australia.

- [76] Mr. Shemal disclosed his resume in which he states that between 1997 and 1999 he was employed as a waiter at Sinbad's Restaurant. When cross-examined about why his resume made no reference to an ownership interest in that restaurant, the defendant maintained that he received advice not to disclose his entrepreneurial experience lest he appear to be overqualified to prospective employers. I do not accept Mr. Shemal's explanation for the omission of his ownership interest in Sinbad's Restaurant from his resume. The defendant is proud of his business acumen to the point of claiming that he provided valuable business advice to Jessy Lee for which he says he received \$300,000 in compensation. If Mr. Shemal was part owner of a restaurant that generated a \$75,000 payment to him on the sale of his interest in that business, I find it unlikely that he would not proclaim his success as an entrepreneur to potential employers.
- [77] Mr. Shemal testified that although he received the \$75,000 payment for his interest in Sinbad's Restaurant in 2002, he paid no tax on that amount. It will be recalled that Mr. Shemal reported total annual income of \$11,673 for 2002 and \$7,956 for 2003. Mr. Shemal says that during 2003 he worked at Just for Feet but was not drawing a salary. Until her accident in December, 2003, the plaintiff ran the shoe store, largely on her own. The defendant helped out in the store from time to time, and did not receive a salary in 2003. Ms. Kawana and Mr. Shemal were building a new business and were reinvesting sales revenues in the purchase of stock. For 2004, Mr. Shemal reported an annual income of \$35,071, which consisted primarily of his salary of \$30,000 from Just for Feet, and wages from his part time work for Maverick's night club.
- [78] Mr. Shemal's evidence regarding his receipt of \$75,000 in cash from the sale of his interest in Sinbad's Restaurant is contradictory and unsatisfactory. However, I am persuaded that in 2002, and later, Mr. Shemal did have cash available in an amount which substantially exceeded both his declared income and any amounts of undeclared income he may have earned from reconditioning and reselling used motor vehicles. In 2002, Mr. Shemal was able to contribute \$30,000 to the start-up of the retail shoe business, which became Just for Feet. The defendant was also able to provide the plaintiff with approximately \$1,500 per month to make the monthly mortgage and loan payments between July 2002 and October 2003 on the Delta property, discussed below. Whether the source of Mr. Shemal's cash was the sale of an interest in Sinbad's Restaurant, as the defendant claims, or some other enterprise, I find that Mr. Shemal probably had about \$75,000 in cash available to him in 2002.

Mr. Shemal's access to bank records for Just for Feet

- [79] From February 2004 until the termination of his employment in May 2008, Mr. Shemal managed the day-to-day operations of Just for Feet, worked in the store, and dealt with suppliers although the plaintiff retained sole signing authority on the company's bank

account. From July 2004 onward, all of the monthly statements for the bank account of Just for Feet were mailed to the store. Mr. Shemal denied that he ever opened or read the monthly bank statements, or that he attended meetings with the accountant who prepared the financial statements for the business. He said that he took the bank statements home unopened, where he gave them to the plaintiff. Mr. Shemal asserts that, because he did not examine those statements, he relied upon whatever information the plaintiff provided to him regarding the amount of funds that Just for Feet had on deposit from time to time and was unaware of withdrawals made by the plaintiff from the account Just for Feet. The plaintiff says that Mr. Shemal opened the bank statements before bringing them home and that she kept Mr. Shemal fully informed of the finances of Just for Feet. It is most unlikely that Mr. Shemal could have operated the business and dealt with suppliers without accurate information regarding the corporate bank account and the monthly accounts payable and receivable.

- [80] Mr. Shemal is a confident and assertive individual who I find would have no hesitation in opening and reviewing the bank statements for a business that he and the plaintiff jointly operated prior to their separation. I find that it is probable that the defendant reviewed the monthly bank statements for Just for Feet and kept himself well informed of transactions on its bank account.

Mr. Shemal's Mortgage Application

- [81] In 2004, Mr. Shemal completed a written application to his bank for the mortgage on the Robson Drive property. In that application he disclosed annual income of approximately \$30,000 from Just for Feet, as well as part-time income from Maverick's nightclub of \$225 per week. Mr. Shemal claims to have received \$57,200 from Richland in 2004 for services allegedly provided to that company. He used those funds to assist with the purchase of the house. However, the defendant made no reference in his mortgage application to income from Richland. The defendant testified that he was not aware when he performed the work in 2004 that he was assisting with the unlawful export of logs to Asia, and that it was not until Mr. Lee told him in 2007 that he learned Richland had not obtained the necessary log export permits. If that is so, Mr. Shemal had no reason to conceal a lucrative source of income from the bank.
- [82] Mr. Shemal never reported any of the payments he received from Richland on his income tax returns. Quite incredibly, the defendant testified that he understood that if he received a T4, then he had to report income, but not otherwise.

The Payments from Jessy Lee to the Defendant

- [83] I turn now to the conflicts between the evidence of the plaintiff and the defendant concerning the source and purpose of the payments to Mr. Shemal of \$110,000 on March 23, 2006, and \$190,000 on May 2, 2006.

- [84] Ms. Kawana and Jessy Lee testified that Mr. Lee agreed to loan the sum of \$300,000 to the plaintiff and the defendant, repayable on demand, for the purpose of paying out the mortgage on the Robson Drive property, and that Mr. Lee transferred the funds to Mr. Shemal's account in two instalments.
- [85] Mr. Shemal applied \$66,500 from the \$110,000 he received on March 23, 2006, and all of the \$190,000 he received on May 2, 2006 toward paying out the mortgage. On May 27, 2006, Just for Feet issued a cheque to Mr. Shemal for \$36,000. Mr. Shemal deposited that cheque to his account on May 29, 2006. On June 5, 2006, he applied those funds to the final payment of the mortgage, in the amount of \$38,522.58. According to Mr. Shemal, the \$36,000 cheque he received from Just for Feet was in repayment of monies he had put into the business.
- [86] Mr. Shemal testified he understood the \$110,000 transferred to his account on March 23, 2006, and used in part for the purpose of paying out the mortgage on the Robson Drive property, came from the plaintiff, rather than from Jessy Lee. The March 2006 statement for Mr. Shemal's bank account identifies the transferor of the \$110,000 as Li Chung Hsun, who is Jessy Lee. Ms. Kawana's Chinese name is I- Chun Lee Kawana. According to Mr. Shemal, it was not until just before the trial that he learned that Jessy Lee had transferred these funds to his account. Until then, the defendant says that he believed that the plaintiff had contributed \$110,000 toward paying out the mortgage, and that he had repaid her in March 2007. On March 9 and March 28, 2007, the defendant made wire transfers of \$55,000 and \$50,000 respectively to a Taiwan account of Li Chien Hsun, who is the plaintiff's brother Wilson Lee. Mr. Shemal testified that at the time he made these transfers, he thought he was repaying the plaintiff's loan, and that Li Chien Hsun was the Chinese name of his spouse.
- [87] The plaintiff testified that the two wire transfers were part of a series of seven transfers made by the plaintiff and the defendant at the request of Jessy Lee for the purpose of returning \$363,800 of family money from British Columbia to Taiwan. I return to the wire transfers later in these Reasons.
- [88] I find that Mr. Shemal's evidence that he believed the plaintiff made a \$110,000 loan to him, in 2006, and that he repaid it in 2007, is not credible; it is inconsistent with the probabilities of the situation that existed at the time in question. By 2006, Mr. Shemal was well acquainted with Jessy Lee and must have known that he, rather than the plaintiff, had the means to advance \$110,000 to him.
- [89] Further, Mr. Shemal did not explain how the plaintiff, who was not working in 2006, could have financed a \$110,000 loan to him. Nor did Mr. Shemal offer any explanation for his understanding that the plaintiff had loaned him \$110,000 in March 2006, other than his misapprehension of his spouse's Chinese name. If Ms. Kawana had contributed \$110,000 toward the retirement of the mortgage charging the family home in March 2006, one would have expected an event of that significance to have been discussed by the plaintiff and the defendant at that time. Further, it would have been sufficiently memorable for the defendant to have recalled the details of any such discussion.

- [90] The defendant's evidence at trial about Ms. Kawana being the source of the \$110,000 he received in March 2006, conflicts with his Affidavit No. 1 sworn June 19, 2008. There, Mr. Shemal deposed at paragraph 21 that "Jessy Lee did pay me \$300,000 in 2006 in two payments however that was not a loan". When cross examined on that portion of his affidavit at trial, Mr. Shemal said "I agree I said that on June 19, 2008 but I was wrong".
- [91] Mr. Shemal claimed that the payment of \$190,000 on May 2, 2006, was not a loan from Jessy Lee; rather it represented part of the total of \$300,000 that Mr. Lee paid to him for business advice and assistance to Richland. Initially, in his direct examination, Mr. Shemal said that he was paid \$300,000 for his assistance in concluding a lucrative contract with Japanese clients of Richland. According to Mr. Shemal, he provided advice to Mr. Lee which enabled Richland to obtain work that the Japanese initially intended to place with a sawmill in Victoria, and to then earn a very substantial return on the milling of specialty woods required for the construction of a large Shinto temple in Japan. Later, in his direct examination, and again in cross-examination, Mr. Shemal said that the \$190,000 payment was his "cut" for the deal with the Japanese.
- [92] Whether the amount was \$190,000 or \$300,000, Mr. Shemal's evidence that Jessy Lee paid him so generously for assistance provided to Richland in securing a contract for the processing of specialty woods for a large Shinto temple in Japan is highly improbable. Mr. Shemal knew nothing about any aspect of the forest industry and had no special skills or knowledge to contribute to the negotiation of this contract. The defendant's assertion that Mr. Lee agreed to pay him either \$300,000 or \$190,000 for his assistance at a number of meetings held over a period of about one month with the Japanese businessmen defies common sense and is not believable. While Richland did obtain a contract to mill timber for a Shinto temple in Japan, I find that Mr. Shemal played no role in securing that contract. Further, I find that none of the monies advanced to Mr. Shemal by Jessy Lee in March and May of 2006 were in payment for services rendered to Richland.
- [93] Mr. Shemal also claimed that he provided valuable services to Mr. Lee during a trip to China in May 2007. The defendant claimed that while in China he was instrumental in putting together a deal between Mr. Lee's Chinese forestry company and a Turkish customer. The defendant said that his "cut" for this deal was between \$100,000 and \$120,000. Mr. Shemal also testified that he had helped Jessy "a little bit" to set up his mill in China to satisfy Canadian and Chinese standards. Again, I do not find this evidence to be credible. Mr. Shemal knew nothing about timber milling standards. He was unable to recall the names of other persons allegedly involved in the negotiation with the Turkish customer.
- [94] Mr. Shemal went to China to attend a footwear trade show. Mr. Lee accompanied him as an interpreter and to show him around the cities they visited. I accept Mr. Lee's evidence that he did not transact any business with Mr. Shemal during the trip, and that the defendant did not assist him in negotiating any deals in China, or elsewhere.

- [95] In April 2007, on his way to China, Mr. Shemal was detained at the Vancouver International Airport by officials of the Canadian Border Services Agency ("CBSA") who seized \$25,000 in cash from him. The defendant retained and instructed counsel to make representations on his behalf to the CBSA on October 29, 2007, to explain why he was carrying cash and to attempt to obtain the return of the monies seized. In his letter to the CBSA, counsel for Mr. Shemal wrote that his client was travelling to attend a trade show in China and that his brother-in-law, Mr. Jessy Lee, would be accompanying him there to assist him as a translator. Mr. Shemal's solicitor also stated that his client owned a residence on Robson Drive, which was subject to a mortgage granted privately to his brother-in-law Jessy Lee. Although Mr. Shemal never granted a mortgage to Jessy Lee, his solicitor's letter to CBSA is consistent with the defendant having received a loan from Jessy Lee related to the Robson Drive property.
- [96] I find that Mr. Shemal knew when he received each of the transfers of \$110,000 and \$190,000 that Jessy Lee had advanced those funds to him for the purpose of paying out the mortgage on the Robson Drive property.

The Mortgage Repayment

- [97] I accept the evidence of Ms. Kawana and Mr. Lee that in early 2006 the plaintiff and the defendant approached Mr. Lee, said they were under some financial pressure, and requested his assistance. Mr. Lee agreed to loan the plaintiff and the defendant \$300,000 to pay off the mortgage charging the Robson Drive property. The loan was repayable on demand. The parties agreed that Mr. Lee would be repaid when he requested the return of the \$300,000, and that they would take out a mortgage on the Robson Drive property in order to repay the debt to Mr. Lee.
- [98] There is no contemporaneous written agreement recording the loan of \$300,000 by Jessy Lee to the plaintiff and the defendant. However, it is noteworthy that in March 2008, the defendant signed the settlement agreement acknowledging that Jessy Lee had advanced a total of \$380,000 to the plaintiff and the defendant, which was to be repaid from the proceeds of sale of the former matrimonial home.
- [99] The plaintiff and Mr. Lee both testified that Mr. Lee had demanded repayment of the \$300,000 prior to the separation and that there had been no repayment.
- [100] In light of the amount advanced by Mr. Lee, I am satisfied that Mr. Lee, the plaintiff, and defendant shared an expectation of repayment of the monies advanced.
- [101] I prefer the evidence of Ms. Kawana and Mr. Lee to that of Mr. Shemal concerning the \$300,000 transferred by Jessy Lee to the defendant's account in March and May 2006. I find that Mr. Shemal's claim that he received these funds as payment for services rendered to Mr. Lee or Richland is not credible. I find that Mr. Lee made an interest free loan of \$300,000 to Ms. Kawana and Mr. Shemal for the purpose of assisting them to pay out the mortgage on the Robson Drive property, and that Mr. Lee advanced those funds to Mr.

Shemal, who used them to pay out and discharge the mortgage.

The Plaintiff's Credibility

- [102] There are also credibility issues affecting the plaintiff. Initially, the parties lived in rented accommodation. The plaintiff claims that while they were living in their first apartment, she paid the rent; that whenever she needed financial help, Mr. Lee provided it to her. The plaintiff's bank account statements from 2002 show deposits to her account on the first of each month in the amount of \$1,000, just before the plaintiff made the monthly rent payments of \$1,150. Mr. Shemal says that he provided the funds to the plaintiff for her to pay the rent. The plaintiff maintains that these funds came from her brother, who from time to time provided her with lump sums of cash, and that each month she deposited \$1,000 to her account from this source before paying the rent.
- [103] Before the plaintiff and Mr. Shemal shared an apartment, Ms. Kawana lived with her brother, who had substantial financial resources available to him. Ms. Kawana and Jessy Lee have a close relationship. I find that it is probable that when the plaintiff and Mr. Shemal began to live together, Ms. Kawana asked for and received some financial assistance from her brother, and used the funds she received to help pay the rent and other household expenses until the couple were able to draw funds from Just for Feet to defray living expenses.

The Delta Property

- [104] Shortly after the parties began to cohabit, Mr. Shemal decided to acquire a house in Delta, which, with the assistance of friends, he intended to renovate and then resell in order to earn money to remit to his family in Iraq. Because Mr. Shemal had only recently been discharged from bankruptcy, and was concerned about his ability to obtain bank financing, he asked for the plaintiff's assistance in purchasing the house in Delta.
- [105] Ms. Kawana agreed to help. She successfully applied for a mortgage and a personal bank loan of \$35,000 to put toward the down-payment. In July 2002, the plaintiff purchased the Delta property for \$169,000. Title was registered in her name. The purchase price was financed by the mortgage for \$126,750, obtained by Ms. Kawana, and by a down-payment of \$39,000, paid from Ms. Kawana's \$35,000 bank loan and a \$4,000 contribution from Mr. Shemal.
- [106] The monthly payments on Ms. Kawana's personal bank loan were \$782. Again, Mr. Shemal says that he put up the money to cover the monthly loan payments and that he gave the plaintiff the cash necessary to make these payments each month.
- [107] The monthly mortgage payments for the Delta property were \$760. Mr. Shemal says he also provided Ms. Kawana with the funds for the monthly mortgage payments.

- [108] The plaintiff's bank statements do show a pattern of deposits in amounts equivalent to the monthly loan and mortgage payments immediately before each loan and mortgage payment.
- [109] The plaintiff says that the funds she used each month to deposit \$785 to one account for the loan payment and \$760 to another account for the mortgage payment came from her brother. The plaintiff's evidence is that she received several thousand dollars in cash at a time from her brother. However, Ms. Kawana said that, rather than deposit the full amount she received on each occasion, she would take the exact amount required for the monthly loan or mortgage payment to her bank and then deposit that amount shortly before she made each payment.
- [110] On a balance of probabilities, I find it more likely that Mr. Shemal, rather than Mr. Lee, provided the funds for the monthly loan and mortgage payments on the Delta property. In cross-examination, the plaintiff was unable to say how much she had borrowed from her brother in order to fund the loan and mortgage payments on the Delta property. Further, Mr. Lee gave no evidence to corroborate Ms. Kawana's testimony that he provided such funds.
- [111] Mr. Shemal testified that he drew upon the \$75,000 he had received for his interest in Sinbad's Restaurant, together with funds from an \$18,000 ICBC settlement he had received in 1997 or 1998, his earnings from Maverick's, and from reconditioning and selling used cars to make the monthly mortgage and loan payments on the Delta property. While I have found that Mr. Shemal's evidence respecting the sale of his interest in Sinbad's Restaurant for \$75,000 is unsatisfactory, I am satisfied that the defendant did have funds available to him, in excess of his declared income. I find that it is probable that Mr. Shemal put up the funds required to make the monthly mortgage and loan payments on the Delta property. This was a project the defendant undertook in an attempt to raise funds to send to his family in Iraq. Neither party intended that the plaintiff would share any profit earned on the re-sale of the Delta property. In the absence of any benefit to his sister, it seems unlikely that Mr. Lee would advance funds for this project.
- [112] The Delta property was sold on October 1, 2003, for \$173,838. After the pay out of the mortgage, the plaintiff received the net sale proceeds of \$47,521, and then paid off the outstanding balance on her personal loan in the amount of \$28,797. I am not asked to make any finding about the ultimate disposition of the remaining proceeds of the sale of the Delta property and do not do so.

Cheques from Richland to the Defendant

- [113] Between May 7, 2004, and December 30, 2005, Richland issued cheques in the following amounts to Mr. Shemal:

May 7, 2004

\$27,000

May 18, 2004

\$ 8,000

July 21, 2004

\$22,200

December 30, 2004

\$ 4,000

December 30, 2005

\$15,000

Total

\$76,200

[114] The plaintiff and Mr. Lee testified that the three cheques issued by Richland on May 7, May 18 and July 21, 2004, totalling \$57,200, were funds loaned by Jessy Lee through Richland to the plaintiff and Mr. Shemal to assist with the purchase of the Robson Drive property.

[115] Mr. Shemal claims that he received the first three cheques from Richland, totalling \$57,200, in payment for services he provided in assisting Mr. Lee to load containers of softwood logs for which export permits had not been obtained for shipment to Asia.

[116] The plaintiff has not produced bank statements for Just for Feet for any month prior to June 2004. However, the bank statements she has produced do show the following transactions on the account of Just for Feet:

July 20, 2004

\$23,000 cash withdrawal;

December 27, 2004

Just for Feet cheque number 299 for \$10,500 payable to Richland for "display units";

December 30, 2005

Just for Feet cheque number 423 for \$15,000 payable to Richland for "display units".

[117] The "display units" were small finished softwood logs milled by Richland. As depicted in photographs produced at trial, each display unit has a flat upper surface and appears to be about the size of a small bench or stool. On her examination for discovery, Ms. Kawana testified that she wrote Just for Feet cheque 423 for the purchase of a display unit for the shoe store. However, at trial, the plaintiff gave contradictory evidence that this cheque was written to repay a loan from her brother.

- [118] The plaintiff was shown the cheque dated December 30, 2005, issued by Richland to Mr. Shemal in the amount of \$15,000. Ms. Kawana referred to this cheque as an extension of a loan from Jessy Lee to herself and Mr. Shemal. The plaintiff testified that she and Mr. Shemal required these funds to meet personal living expenses and for the repair of a vehicle. According to Ms. Kawana, the defendant also needed to repay monies that he borrowed from his friends. Ms. Kawana claimed that her brother had loaned the plaintiff and the defendant \$15,000 in September or October of 2005, and that she or Mr. Shemal had given Mr. Lee a post-dated cheque for the amount of the loan. The plaintiff said that by the time she and the defendant realized that they needed more money, Mr. Lee had deposited the post-dated cheque. According to Ms. Kawana, Mr. Lee then issued the December 30, 2005 Richland cheque to Mr. Shemal for \$15,000.
- [119] The plaintiff has no recollection of the repayment of this "loan" from her brother. Ms. Kawana also testified that Mr. Shemal told her to write "display units" on the cheque. Mr. Shemal denied that he did so.
- [120] During the months of September and October 2005, when the plaintiff claims that Mr. Lee loaned her and Mr. Shemal \$15,000 to pay living and other expenses, the balance in Just for Feet's bank account never fell below \$17,000. The plaintiff and defendant were not under any particular financial pressure at any time between September and the end of December 2005. Further, the monthly bank statements for Just for Feet for the period October through December 2005, record all of the cheques drawn on the account of Just for Feet in numerical sequence, which is inconsistent with the evidence of the plaintiff and Mr. Lee respecting his cashing a post-dated cheque from Just for Feet on or about December 30, 2005.
- [121] Mr. Shemal deposited the cheque from Richland to his account on December 30, 2005. On the same date, Mr. Shemal made a payment of \$20,000 on the mortgage then charging the Robson Drive property. Again, the state of Mr. Shemal's bank account at this time, and his ability to make a large extra payment on the mortgage on the family home, suggests that the plaintiff and the defendant had no need for a loan from Mr. Lee or Richland at that time.
- [122] The plaintiff has failed to provide any credible explanation of why she and the defendant required a loan from Jessy Lee in late December 2005.
- [123] Almost a year before, by cheque dated December 27, 2004, Just for Feet had also paid \$10,500 to Richland for "display units". The plaintiff testified that this cheque was a repayment for a cash advance from her brother for monies borrowed about one month previously for "personal use". The plaintiff was unable to recall the particular purpose for this loan. The bank statement for Just for Feet for the month ended November 30, 2004, shows balances in that account ranging from \$6,000 to \$24,000, again suggesting that the plaintiff and the defendant had sufficient funds at their disposal to meet their living expenses.

- [124] The plaintiff has not established on the balance of probabilities that the monies paid by Richland to Mr. Shemal on December 30, 2004 and December 30, 2005, were loans from either Mr. Lee or Richland to the plaintiff and the defendant.
- [125] Nor do I accept that the cheques issued by Richland to Mr. Shemal represented payment for the services he claims to have provided to Richland. The defendant's evidence that Richland paid him \$57,200 for assisting Mr. Lee to load logs into containers two or three evenings per week during the two or three months preceding the purchase of the Robson Drive property, and that he accepted without question the large sums that Richland paid him for this part-time work, is simply not believable.
- [126] Although I have not accepted Mr. Shemal's evidence that the cheques he received from Richland were payments for work he performed for that company or Jessy Lee, I am also not persuaded that the \$57,200 advanced by Richland to Mr. Shemal in May and July 2004 can be characterized as a loan from Jessy Lee to the plaintiff and the defendant. I say this for two reasons.
- [127] First, Richland, rather than Mr. Lee, advanced the monies to Mr. Shemal.
- [128] Second, for those payments from Richland to Mr. Shemal for which we have contemporaneous banking records from Just for Feet, there is a pattern of funds being withdrawn from Just for Feet, or being paid by Just for Feet to Richland shortly before Richland issued cheques to Mr. Shemal. On July 20, 2004, the plaintiff withdrew \$23,000 in cash from the account of Just for Feet and on July 21, 2004, Richland paid \$22,200 to Mr. Shemal. Similarly, on December 27, 2004, Just for Feet issued cheque number 299 to Richland for \$10,500 and on December 30, 2004, Richland paid \$4,000 to Mr. Shemal. Finally, on December 30, 2005, Just for Feet issued cheque number 423 to Richland for \$15,000, purportedly for "display units"; on the same day, Richland paid \$15,000 to Mr. Shemal.
- [129] In cross-examination, Ms. Kawana said that she withdrew \$23,000 in cash from the Just for Feet account on July 20, 2004, and gave it to Mr. Shemal to repay monies he had borrowed from Iraqi friends. It seems unlikely that, coincidentally, Richland would issue a cheque to Mr. Shemal for a similar amount the following day. Mr. Shemal applied the \$22,200 he received from Richland on July 21, 2004, to the down-payment on the Robson Drive property. The completion date for the purchase of the matrimonial home was July 26, 2004. The parties' financial priority in late July 2004 was the purchase of the Robson Drive property, rather than the repayment of any funds borrowed by Mr. Shemal from friends in his community. If Ms. Kawana had withdrawn \$23,000 from Just for Feet, and had provided those funds directly to Mr. Shemal on July 20, 2004, it is most likely that she would have done so to assist him in paying the purchase price for Robson Drive property. Further, the payment from Richland to Mr. Shemal on July 21, 2004, would have been unnecessary.

- [130] In the absence of any other plausible explanation for the cash withdrawal from Just for Feet on July 20, 2004, I find it probable that the plaintiff provided \$23,000 in cash to Richland, which then paid \$22,200 to Mr. Shemal on the following day. I infer from the timing and the amounts involved in each of the transactions of July 20 - 21, 2004, December 27 and 30, 2004, and December 30, 2005, that in each case the plaintiff moved funds from Just for Feet to Richland, which Richland then used to make the payments of July 21, 2004, December 30, 2004, and December 30, 2005, to Mr. Shemal.
- [131] Each of these transactions served as a means of withdrawing monies from Just for Feet and providing those funds to Mr. Shemal without the withholding of income tax, or the issuance of T4s. Just for Feet, rather than Richland or Jessy Lee, was the source of the \$22,200 that Mr. Shemal received on July 21, 2004, and applied to the down-payment on the Robson Drive property.
- [132] While the banking records for Just for Feet for May 2004 have not been produced, I find it probable that the funds paid by Richland to Mr. Shemal on May 7 and May 18, 2004, also originated from Just for Feet. The plaintiff as the sole signing authority for Just for Feet, Mr. Lee as the signatory on each of the Richland cheques, and Mr. Shemal as the recipient of the funds, must each have been aware of the nature and purpose of these transactions.
- [133] Mr. Lee testified that he endorsed the May 7, 2004 Richland cheque with the Chinese characters for "loan" to remind himself of the purpose for which he issued that cheque. Neither the May 18 nor the July 21 cheques were so marked. Mr. Lee's "loan" notation on the May 7, 2004 cheque was no more indicative of the true nature of that payment than were Ms. Kawana's notations that the Just for Feet cheques of December 27, 2004, and December 30, 2005, were issued to pay for "display units".

Cash Transactions

The Family Trip to Turkey

- [134] In August and September 2006, the plaintiff, the defendant, and Maryam vacationed for six weeks in Turkey, where they were joined by the defendant's sister and niece from Toronto, and the defendant's mother and three sisters from Iraq.
- [135] The plaintiff claims that, with Jessy Lee's approval, she used \$50,000 from the supply of family money left in her care to pay all of the costs of this vacation for both her own family and Mr. Shemal's relatives. Ms. Kawana says that the \$50,000 spent on the family trip to Turkey forms part of the \$380,000 that she and Mr. Shemal jointly owe to Jessy Lee.
- [136] In her direct examination, Ms. Kawana testified that Mr. Shemal told her the total cost of the trip to Turkey was \$50,000 and that she gave that amount of money to the defendant. However, in cross-examination, the plaintiff claimed to have sent cash to Mr. Shemal's sisters in Iraq to pay for their travel to Turkey.

- [137] The defendant says that his family paid their own airfare from Iraq to Turkey, as did his sister who lived in Toronto. According to Mr. Shemal, Just for Feet paid the airfare for the plaintiff, the defendant and Maryam. Mr. Shemal said the total cost of the holiday for himself, the plaintiff and Maryam was about \$10,000 to \$12,000 and that he paid that amount. The defendant denies telling the plaintiff that the trip cost \$50,000, or that the rest of his family required financial assistance in order to make the trip to Turkey.
- [138] The plaintiff did not produce any banking records showing that she had wired funds to Iraq at the relevant time. For that matter, neither party identified any bank records from either their own accounts, or the account of Just for Feet relating to the family trip to Turkey.
- [139] Furthermore, the plaintiff's own evidence about the disposition of the \$450,000 to \$475,000 in family money left with her by Jessie Lee does not support the expenditure of \$50,000 for the family trip to Turkey. On August 2 and November 1, 2006, Ms. Kawana, at Jessie Lee's request, applied \$23,000 and \$25,416 respectively to pay two trade accounts of Richland. Ms. Kawana testified that she used between \$10,000 and \$15,000 of the family money to pay her own expenses and, at the request of Jessie Lee, held back \$20,000 from the money he instructed her to return to Taiwan in 2007. Between February and June 2007, \$363,800 of the family money was returned to Taiwan. Thus, before taking into account the trip to Turkey, the total amount of the family money disbursed by Ms. Kawana on her brother's instructions was between \$442,216 and \$449,216. I accept that when Jessie Lee returned to Taiwan, he left behind between \$450,000 and \$475,000. Based on the plaintiff's evidence respecting the use of those funds, which is supported by Mr. Lee's testimony, the maximum amount available to finance the trip to Turkey (or for any other purpose) would be in the range of \$25,000 to \$33,000.
- [140] The plaintiff, who bears the burden of proof, has failed to establish on the balance of probabilities that she used \$50,000 of the family money to pay for the trip to Turkey. The question remains whether some lesser amount of family money was used for this purpose.
- [141] It is improbable that Mr. Shemal, who reported an income of \$23,510 in 2006, had \$12,000 of his own money available to pay for the family holiday. By August 2006, Mr. Shemal had expended his \$75,000 cash reserve for various purposes, including his \$30,000 contribution to the start-up costs for Just for Feet in 2002, mortgage and loan payments on the Delta property, and the purchase of the Robson Drive property in July 2004.
- [142] Further, Mr. Shemal's effort to raise funds to remit to his family in Iraq through the purchase and re-sale of the Delta property suggests that his mother and sisters likely required financial assistance for their vacation in Turkey. Mr. Shemal has not shown that any part of the cost of the trip to Turkey was paid by Just for Feet.
- [143] In these circumstances, I find that the most likely source of the funding for the trip to Turkey was the "family money", and that the plaintiff likely used about \$30,000 from this source to pay the costs of the trip, for both their own family and Mr. Shemal's relatives.

Wire Transfers to Taiwan

[144] Between February 9 and June 6, 2007, the plaintiff and the defendant wired a total of \$363,800 to Jessy Lee and Wilson Lee in Taiwan in seven instalments as follows:

February 9, 2007

Plaintiff wires \$84,000 to Lee Chung Hsun (Jessy Lee)

March 8, 2007

Plaintiff wires \$60,000 to Li Chien Hsun (Wilson Lee)

March 8, 2007

Plaintiff wires \$15,000 to Li Chien Hsun

March 9, 2007

Defendant wires \$55,000 to Li Chien Hsun

March 23, 2007

Plaintiff wires \$44,800 to Li Chien Hsun

March 28, 2007

Defendant wires \$50,000 to Li Chien Hsun

June 6, 2007

Plaintiff wires \$55,000 to Li Chien Hsun

Total

\$363,800

[145] According to the plaintiff, these funds came from the suitcase of funds left behind by her brother Jessy Lee. The plaintiff says that she took cash to the bank when she made the wire transfers. Ms. Kawana also testified that on occasion she gave cash to Mr. Shemal for him to deposit and then wire to her brother, Wilson Lee. She described Mr. Shemal as a willing participant in facilitating the return of these monies to Taiwan. Although six of the seven wire transfers went to an account of Wilson Lee, the ultimate recipient of all of the funds was Jessy Lee, who used most of this money to pay for a new home in Taiwan.

[146] In cross-examination, the plaintiff acknowledged that she had never had any problem depositing cash to her bank accounts. The plaintiff testified that after she received the suitcase of cash from her brother in June 2006, there were a number of reasons why she did not deposit the cash to her bank account. She said that she was in shock after her brother's abduction and speedy departure for Taiwan. Furthermore, she was pregnant with her second child and was having some difficulties with the pregnancy. In August 2006, the family went to Turkey for about six weeks. The plaintiff said that from the time she received

the money from her brother until she left for Turkey there was a great deal going on in her life. After she came back, she continued to have difficulties with her pregnancy. Once Yusuf was born, she had her hands full looking after the children.

[147] The plaintiff testified that she enlisted Mr. Shemal's assistance to return some of the family money to Taiwan. Ms. Kawana said that she provided cash to Mr. Shemal and that he then gave some of this cash to his friends or family members who would then issue cheques back to him. Mr. Shemal then deposited these cheques to his account and made the wire transfers of March 9 and March 28, 2007 to Taiwan. According to the plaintiff, Mr. Shemal told her that he did not want the bank to ask too many questions about his financial dealings. Exchanging cash for cheques from his friends reduced the number of large cash deposits Mr. Shemal made to his bank account.

[148] I have found that before Jessy Lee returned to Taiwan, he left between \$450,000 and \$475,000 with the plaintiff. Ms. Kawana had ready access to this "family money", and disbursed it on Mr. Lee's directions. It does seem improbable that Ms. Lee kept these funds in a suitcase stored in the Robson Drive property, particularly when one recalls that she, Mr. Shemal and Maryam all left the family home for their six-week trip to Turkey in August and September 2006. However, whether Ms. Kawana kept the family money in a suitcase, as she says, or in some other repository, she did hold a large sum of cash for Mr. Lee until the spring of 2007 when he directed that she return all but \$20,000 of the family money to Taiwan.

Wire Transfers by Defendant to Taiwan

[149] On March 9, 2007, Mr. Shemal wired \$55,000 to an account that he says he then believed to be in the plaintiff's name in Taiwan. He made a second wire transfer, in the amount of \$50,000 to the same account on March 28, 2007. According to the defendant both of these transfers were in repayment of the \$110,000 that he understood the plaintiff had advanced to him, and he had used as part of the funds required to pay and discharge the mortgage on the Robson Drive property. Mr. Shemal identified cash deposits to his account on March 8, 2007, totalling \$24,900, a deposit on March 9, 2000, of \$8,700, a cheque dated March 16, 2007, in the amount of \$10,000 from his sister in Toronto, and two cheques issued to him by a Mr. and Mrs. H. on March 18, 2007, for \$9,900 and \$10,400 as funds loaned to him by family members and friends to assist him in making the two payments of \$55,000 and \$50,000 to the plaintiff's account in Taiwan.

[150] Mr. Shemal has not produced any documents that would support his evidence that the payments he received from his sister and Mr. and Mrs H. were loans. While it is possible, and perhaps likely that his sister would make an undocumented loan to him, Mr. and Mrs. H. are not members of his family or his faith community, nor are they otherwise closely connected to the defendant. It is unlikely that acquaintances of the defendant would loan \$20,300 to him on the strength of his request, without creating some record of the transaction and terms for repayment. On the balance of probabilities, I find that Mr.

Shemal's transaction with Mr. and Mrs. H involved the defendant exchanging cash provided to him by the plaintiff from the family money for the two cheques that he deposited to his account before making the March 28, 2007 wire transfer to Taiwan.

February 2007 Cash Loan from Sam A.

- [151] Mr. Shemal testified that in February 2007, he borrowed \$55,000 in cash from a friend, Sam A., in order to repay \$55,000 of the \$110,000 that he then understood the plaintiff had loaned to him, but now realizes was advanced by Jessy Lee. The defendant described Sam A. as a family friend who he knew in Iraq. The defendant said he told Sam A. that he needed some cash; that his friend gave him \$55,000 in cash in \$100 bills; and that he deposited the cash to his Bank of Montréal account in three or four transactions. Mr. Shemal's Bank of Montréal account statements show deposits of \$6000 in cash on February 26, 2007, and cash deposits totalling \$24,900 on March 8, 2007.
- [152] In cross-examination, Mr. Shemal testified that the March 8, 2007 transaction records his deposit of some of the money Sam A. loaned to him. That document shows that the cash deposited consisted of ninety-eight \$50 bills and one hundred \$100 bills. When confronted with that evidence, Mr. Shemal changed his testimony to say that most, rather than all of the money he received for Sam A. was in \$100 bills.
- [153] Although Mr. Shemal described Sam A. as a trusted family friend, on cross-examination he was unable to recall how frequently he saw or communicated with Sam A..
- [154] According to Sam A., it was his brother who knew Mr. Shemal in Iraq. Sam A. testified that the two families knew each other, but he was unable to say how close they were. He described Mr. Shemal's family as a middle-class family, like his own. That evidence conflicted with Mr. Shemal's testimony that his family was well off until the first Gulf War, and that his father, who died in 1998, was an architect and a general who had served Saddam Hussein and had controlled northern Iraq.
- [155] Mr. Shemal said that when Sam A. gave him the cash, he did so at his apartment and that Sam A. handed all of the cash to him in an envelope two or three inches thick.
- [156] According to Sam A., Mr. Shemal came to his apartment to pick up the money. No one else was present. Sam A. said that he had packaged the \$100 bills in about four envelopes and then placed them in a regular shopping bag, which he gave to Mr. Shemal. Sam A. testified that he gave Mr. Shemal \$55,000 cash. He said that he had the cash available, that Mr. Shemal needed the cash urgently, and so he gave it to him. Mr. Shemal did not explain and Sam A. did not ask why he urgently needed the money.
- [157] Sam A., who earns an annual salary of \$80,000 as a business systems consultant employed by a bank, claims that he kept a large sum of cash in his apartment for emergencies.

- [158] While Mr. Shemal recalled counting the cash when he met with Sam A. to receive the \$55,000, Sam A. said that neither he nor Mr. Shemal counted the bills, either when Sam A. loaned the money, or when it was repaid.
- [159] Sam A. said that the arrangement was that he was to be repaid without interest when Mr. Shemal had the money available. According to Sam A., when Mr. Shemal repaid the \$55,000, he did so by giving Sam A. a bag of cash.
- [160] In cross-examination, Sam A. denied that he had discussed his evidence with Mr. Shemal before he testified. He said that Mr. Shemal had phoned him and asked him to come to court, but that they did not discuss his evidence during that conversation. On re-examination, Sam A. admitted that he and the defendant had met at a Starbuck's coffee shop the day before Sam A. testified. I infer from the timing of that meeting that they met for the purpose of discussing the evidence that Sam A. would give at trial.
- [161] On June 2, 2008, Mr. Shemal withdrew \$55,000 on his line of credit. The defendant said that he ordered these funds in \$100 bills, and paid the money to Sam A. in early June 2008. The defendant's evidence is belied by his own banking records. The June 2008 monthly statement for Mr. Shemal's chequing account shows a cash advance of \$55,000 to the chequing account from Mr. Shemal's line of credit on June 2, 2008. On the same date, Mr. Shemal purchased a bank draft for \$55,000. There is no record of the payee. All that Mr. Shemal could say when confronted with the bank statement was that the entry concerning the \$55,000 bank draft was a mistake.
- [162] The numerous discrepancies between the evidence of the defendant and Sam A. concerning both the purported loan and its repayment, and the inconsistencies between Mr. Shemal's banking records and the transaction as he described it in his testimony lead me to conclude that Sam A. was not the source of the \$55,000 that Mr. Shemal wired to Taiwan on March 8, 2007.
- [163] I have found that Ms. Kawana did not loan \$110,000 to Mr. Shemal. The defendant made the two wire transfers to Wilson Lee's account in Taiwan at the same time that the plaintiff was transferring large sums of money to Taiwan that were ultimately received by Jessy Lee. If, as I have found, Mr. Shemal did not make the wire transfers of March 7 and 18, 2007 to repay a loan from Ms. Kawana, then, on the evidence adduced at trial, the only plausible explanation for the transfers is that the defendant was assisting Ms. Kawana to return funds to Taiwan that she held for Jessy Lee.
- [164] I do not accept Mr. Shemal's evidence that he was unaware that the plaintiff was also wiring money to Taiwan.
- [165] I find that Mr. Shemal assisted Ms. Kawana in transferring those funds to Taiwan, and that the amounts the defendant wired from his account to the account of Wilson Lee on March 9 and March 28, 2007, formed part of the monies left by Jessy Lee with the plaintiff before his hasty departure for Taiwan.

- (b) Did the Consent Order and the Agreement resolve all issues between the Parties, other than the Defendant's claim to an interest in Just for Feet, and should they be set aside as Unconscionable?

[166] Mr. Shemal says that there was inequality in the parties' positions during the discussions leading up to the signing of the March 2008 Agreement and the attendance at the JCC on March 18, 2008. The defendant maintains that he was suffering from distress due to the breakdown of his relationship with the plaintiff and because he was not able to see his children as frequently as he wished. Mr. Shemal claims that the plaintiff, knowing that he wanted to be reconciled with her, took the position that reconciliation would be conditional upon the defendant agreeing to the payment of \$380,000 to Jessy Lee. According to Mr. Shemal, the plaintiff told him that if he did not make that payment, she would return to Taiwan and take the children with her.

[167] The defendant also says that he did not have the opportunity to carefully read the agreement before he signed it and did not have legal advice before signing the agreement or attending the JCC. Mr. Shemal also contends that the plaintiff misled him about her financial affairs by failing to disclose that she had withdrawn \$35,000 from the account of Just for Feet and had deposited those funds to her personal account.

[168] The defendant argues that the agreement was unfair because it failed to allocate to him the profits from the sale of the Obelisk property, did not permit him to retain the Robson Drive property, and did not provide for the transfer of ownership of Just for Feet to him.

Applicable Legal Principles

[169] In *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) at para. 4, the court defined unconscionability:

The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Aylesford (Earl) v. Morris* (1873) 8 Ch App 484, 42 LJ Ch 546, per Lord Selborne at p. 491, or perhaps by showing that no advantage was taken: See *Harrison v. Guest* (1855) 6 De GM & G 424, at 438, affirmed (1860) 8 HL Cas 481, at 492, 493, 11 ER 517.

[170] In *Romank v. Achtem*, 2009 BCSC 1757 at para. 15, the court held that:

[15] It is settled law that a consent order, being the formal expression of an underlying agreement reached between the parties, may be set aside or varied only if the underlying agreement is subject to being set aside or varied (*Shackleton v. Shackleton* (1999), 1 R.F.L. (5th) 459, 1999 BCCA 704 at para. 12; and *Rick v. Brandsema*, 2009 SCC 10 at para. 64).

[171] The Court in *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, dealt with unconscionability in the context of the breakdown of a spousal relationship, and at para. 42 cited the following passage from its judgment in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303:

[W]here the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. [para. 4]

[172] At paras. 43 and 44, the court said this:

Miglin represented a reformulation and tailoring of the common law test for unconscionability to reflect the uniqueness of matrimonial bargains:

[W]e are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. [para. 82]

[44] Where, therefore, "there were any circumstances of oppression, pressure, or other vulnerabilities", and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the Court in *Miglin* concluded that the agreement need not be enforced (paras. 81-83).

[173] In *J.A.H. v. J.A.H.*, 2005 BCSC 1713 at para. 115, Madam Justice Lynn Smith, citing her earlier decision in *W.P.N. v. B.J.N.*, 2002 BCSC 53 at paras. 55-56, stated the test for unconscionability in the family law context in these terms:

The test is stringent: (1) was there an "inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger"; and (2) is there "proof of substantial unfairness in the bargain"? (See *Klassen v. Klassen*, 2001 BCCA 445.) The burden is on the party applying to set aside the agreement with respect to both parts of the test. If that burden is met, it falls to the other party to demonstrate that the bargain was fair, just and reasonable, or that no advantage was taken.

The policy of the law is to enforce agreement made by adult persons. Cases in which separation agreements have been set aside for unconscionability have involved substantial inequality of bargaining positions with the relative unsophistication or vulnerability of one party being exploited by the other party. Usually there are factors such as asymmetrical access to financial information or undervaluation of family assets...; a party who was depressed or otherwise seriously incapacitated at the time of execution of the agreement...; hastily executed agreements without the opportunity for independent legal advice...; or threats, manipulation or deception.

[174] Mr. Shemal must show: first, that there was an inequality in the positions of the parties that left him vulnerable to the power of the plaintiff; and second, that the bargain made by the parties and incorporated in the consent order was substantially unfair.

Was there Inequality in the Positions of the Parties?

[175] The first ground of vulnerability asserted by the defendant is that he was severely distressed by the separation. The plaintiff and the children left the Robson Drive property on or about January 30, 2008. Mr. Shemal testified that he was devastated when he returned from working at the shoe store, sometime after 9:00 p.m., to find that his wife and children were not there and that the plaintiff had removed most of the furniture from the home.

[176] These events took place after the plaintiff discovered that the defendant was having an affair with another woman and more than a month before the parties met with Sheik Kathrada in early March 2008. It is common ground that by the time the plaintiff and the defendant made their agreement, the defendant was seeing his children on almost a daily basis at the plaintiff's residence.

[177] Mr. Shemal was able to work throughout March 2008.

[178] Mr. Shemal did experience chest pains following the separation. On February 22, 2008, the plaintiff arranged for him to see her physician. Mr. Shemal was treated with aspirin for his chest pain. Although the defendant may have experienced some chest pain after February 22, he did not receive any further medical treatment. There is no medical evidence that he was suffering from debilitating stress, anxiety or chest pain during the negotiation of the agreement, or when he attended the JCC of March 18, 2008.

[179] Both parties undoubtedly experienced stress during and after the separation. However, I am not persuaded that Mr. Shemal was so incapacitated by stress that he was placed in a position of vulnerability. The fact that persons going through a separation suffer from stress and anxiety does not give rise to a presumption that they are incapable of making a binding agreement: *McGregor v. Tilborg*, 2005 BCCA 217 at para. 17.

- [180] The defendant also alleges that the plaintiff threatened to take the children away from British Columbia and told him that he would never see them again if he did not accede to her demands. The plaintiff denies this allegation. Ms. Kawana says that she did tell Mr. Shemal that she wanted to visit her family in Taiwan and take the children with her; he would not agree to her taking the children out of the country. The plaintiff says that it was and is her intention to live in Canada, but to visit her family in Taiwan from time to time.
- [181] I accept the plaintiff's evidence that before the separation, she had decided to make her permanent home in Canada and that she did not threaten Mr. Shemal with the removal of the children to Taiwan in order to compel him to accept her terms for settlement. I find it improbable that the plaintiff, who was willing to permit the defendant almost daily access to the children from shortly after she left the matrimonial home and throughout the time the parties negotiated and signed the March agreement, would simultaneously threaten to cut him off from any access to the children. Furthermore, if Ms. Kawana had attempted to use the threat of removal of the children to compel Mr. Shemal to accept terms of agreement that he found repugnant, I am sure that he would have raised the matter with Sheik Kathrada. There is no suggestion that the defendant did so.
- [182] Mr. Shemal also claimed that Ms. Kawana held out the prospect of reconciliation, conditional upon his acceptance of her terms for settlement, including the payment of \$380,000 to Jessy Lee. Mr. Shemal said that the plaintiff's real purpose in insisting upon the payment to Mr. Lee was not to repay debt, but rather to create a fund that would assure her own financial security. The defendant says that he was prepared to do whatever was necessary to reunite the family and, therefore, accepted Ms. Kawana's terms.
- [183] The plaintiff says that she and Mr. Shemal agreed that \$380,000 was the amount they owed to Mr. Lee for all of the financial assistance he had provided to them, and that Mr. Lee agreed to accept that amount in satisfaction of the parties' indebtedness to him. Ms. Kawana says that she did consider reconciliation, but never promised to return to Mr. Shemal if he accepted her terms for settlement.
- [184] I accept that, following the separation and during the negotiation of their agreement, there were discussions between Ms. Kawana and Mr. Shemal about the possibility of reconciliation. However, it was not a term of the settlement agreement that Ms. Kawana would return if Mr. Shemal met her conditions. The plaintiff did no more than state that she would consider returning to Mr. Shemal.
- [185] Mr. Shemal's allegations that the agreement was unconscionable, that the plaintiff induced him to accept her demands by promising to reconcile if he did so, and that he was coerced by the plaintiff's threats to move with the children to Taiwan if he did not accept her demands, were only raised at the commencement of this trial.

- [186] Prior to the trial, Mr. Shemal swore three affidavits in which he set out, in identical language, the terms of the agreement that he says he made with the plaintiff at the meeting with Sheik Kathrada before the JCC on March 18, 2008. The defendant's affidavit number three was sworn on March 23, 2009, more than a year after the JCC. By then, Mr. Shemal had ample time for careful reflection regarding the terms of his agreement with the plaintiff.
- [187] In each of his affidavits, Mr. Shemal deposed that the terms of his agreement with the plaintiff were as follows:
- (a) I would have the children with me for three days a week,
 - (b) The plaintiff would transfer ownership of Just for Feet Orthotics & Orthopedics Shoes Ltd. (Just for Feet) to me by May 1, 2008,
 - (c) I would give her family \$380,000 from the sale proceeds of the Robson Drive house,
 - (d) I would give her half the balance of the net sale proceeds of the Robson Drive house, and
 - (e) She would consider coming back to me after the financial arrangements listed above were carried out.
- [188] Mr. Shemal does not offer evidence that the agreement was unfair or unconscionable in any of his affidavits. Rather, he deposes to terms of agreement different than those set out in the settlement agreement that he, Ms. Kawana, and Sheik Kathrada each signed.
- [189] Mr. Shemal's affidavit evidence that the plaintiff would consider returning after the financial arrangements, which he describes (and to which I will return later in these reasons), were carried out falls short of establishing that he was in an unequal bargaining position arising from his need or distress, or that the agreement was substantially unfair.
- [190] I find that Ms. Kawana did not insist that Mr. Shemal accept her terms of settlement as a condition for reconciliation. The defendant has not shown that the plaintiff adopted a coercive bargaining position to which he was vulnerable, or that the plaintiff enjoyed superior power in the negotiations leading to the settlement agreement.

The Settlement Agreement

- [191] In early March 2008, the parties met for settlement discussions assisted by Sheik Kathrada. The plaintiff and the defendant had previously met with Sheik Kathrada in June and November 2007, but were unable to resolve their differences at that time.
- [192] According to the plaintiff, the meeting with Sheik Kathrada lasted between four and five hours. The defendant estimated that the meeting took between one and two hours. Taking into account the issues in dispute, their importance to both parties, and the involvement of Sheik Kathrada as a mediator, I find that the plaintiff's estimate of the length of the meeting is the more accurate. According to the plaintiff, throughout the meeting the defendant was

very firm in stating his own position, and displayed anger when the plaintiff voiced her own opinions. The fact that the meeting lasted four hours or more leads me to infer that Mr. Shemal did not meekly accede to the plaintiff's demands.

- [193] At their meeting with Sheik Kathrada, the parties discussed custody, access and support for the children, spousal support, the ownership and sale of the matrimonial home and the division of the proceeds of sale, the debt owed to Jessy Lee, and what they would do with Just for Feet.
- [194] The plaintiff and the defendant were unable to reach any agreement on the transfer or the disposition of the business of Just for Feet. There were some discussions about attempting to sell Just for Feet. The parties also discussed a transfer of ownership of Just for Feet from Ms. Kawana to Mr. Shemal. Those discussions reached an impasse because Mr. Shemal was not prepared to assume personal liability for the lease of the commercial space occupied by Just for Feet at the Coquitlam Centre mall.
- [195] When the parties attended before Mr. Justice McKinnon at the JCC on March 18, 2008, the disposition of Just for Feet remained in limbo. The defendant advised the court that Just for Feet might be sold, or might be shut down.
- [196] Neither the settlement agreement concluded by the parties with the assistance of Sheik Kathrada nor the consent order determined the parties' rights respecting Just for Feet.
- [197] In this context I turn to Mr. Shemal's submission that the plaintiff's failure to disclose her withdrawal of \$35,000 from Just for Feet in October 2007 provides grounds for the court to set aside the settlement agreement and consent order as unconscionable. In her form 89 financial statement sworn March 11, 2008, Ms. Kawana did not disclose either the \$35,000 withdrawal, or the existence of the account in which she held those funds.
- [198] I have found that Mr. Shemal read the bank statements for Just for Feet, which were delivered to the store. It is probable that the defendant was aware that the plaintiff had withdrawn \$35,000 from the account of Just for Feet in October 2007 well before he met with Ms. Kawana and Sheik Kathrada to negotiate the settlement agreement in March 2008.
- [199] However, the fact remains that Ms. Kawana did not disclose the existence of this asset in the financial statement that she swore after the parties had negotiated the settlement agreement, but before the March 18, 2008 JCC, where McKinnon J issued the consent order.
- [200] In *Rick v. Brandsema* at paras. 45-49, the Court held that parties negotiating a separation agreement are under a duty to make full and honest disclosure of all financial information, and explained that such disclosure protects the integrity of the bargaining process and promotes finality of agreements. Depending on the circumstances of each case, deliberate failure to make full disclosure may result in judicial intervention. The extent of the defective disclosure, the degree to which it was deliberate, and whether the agreement complies with statutory objectives are all relevant circumstances.

- [201] In *Rick v. Brandsema*, the Court restored the trial judge's order setting aside a separation agreement as unconscionable where the husband had exploited his wife's mental instability, and knew the negotiations were based on false financial information, resulting in an agreement by which the wife received less than the equal share of family assets to which she was entitled under the Family Relations Act.
- [202] Here, I have found that Mr. Shemal was probably aware of Ms. Kawana's withdrawal of \$35,000 from Just for Feet. Even if that is not the case, the non disclosure does not go to the heart of the settlement agreement that the parties actually negotiated. Their agreement did not include any division or disposition of Just for Feet. That matter was left for another day. If Mr. Shemal is entitled to compensation for an interest in monies withdrawn by the plaintiff from the business, his claim may be addressed when the court determines his interest in Just for Feet. In these circumstances, the plaintiff's non disclosure of her withdrawal of funds from Just for Feet was not material to the agreement that the parties did make, did not render that agreement substantially unfair, and does not justify an order setting aside the parties' agreement.
- [203] According to the plaintiff, at their meeting with Sheik Kathrada, the parties agreed that they were joint owners of the Robson Drive property, which would be sold, and that the parties would pay \$380,000 from the proceeds of sale to Jessie Lee to repay debt they owed to him. The defendant agreed to pay child and spousal support in the combined amount of \$1,500 per month, and the parties agreed that they would have joint custody of the children. Ms. Kawana's evidence was consistent with the terms of the agreement signed by the parties and Sheik Kathrada.
- [204] Following this meeting, the plaintiff typed up the settlement agreement and sent it to Sheik Kathrada. He signed the agreement, scanned it, and returned it by e-mail to the plaintiff. Sheik Kathrada's role was to assist the parties in reaching an agreement. He was a respected religious advisor to both parties. I infer that, before he signed the document and returned it to the plaintiff, Sheik Kathrada was satisfied that the agreement reflected the terms agreed by both parties in his presence.
- [205] Mr. Shemal signed the agreement at the plaintiff's apartment following an evening visit with the children. According to Ms. Kawana, he read the agreement, told the plaintiff he had no questions about it, and then signed it, as did the plaintiff.
- [206] The plaintiff testified at trial that the parties signed the agreement about a week before the March 18, 2008 JCC. However, in two affidavits sworn prior to the trial, the plaintiff deposed that Mr. Shemal signed the agreement the night before the JCC. That is consistent with Mr. Shemal's testimony. I find that the settlement agreement, although negotiated more than a week earlier, was signed the night before the March 18, 2008 JCC.
- [207] The defendant did not seek legal advice, or consult with Mr. Kathrada before he signed the agreement.

[208] For ease of reference, I repeat here the terms of the executed agreement:

Matrimonial Home: 3330 Robson Drive, Coquitlam, B.C.

- The matrimonial home located on 3330 Robson Drive, Coquitlam, B.C. is owned jointly by Micki Kawana and Reyadh Kadhim Shemal.
- Both Micki Kawana and Reyadh Kadhim Shemal have agreed that once the house is sold, the debt owed to Micki Kawana's brother - Jessy Lee in the amount of \$380,000 is to be paid off and the remaining proceeds will be divided equally between Micki Kawana and Reyadh Kadhim Shemal.
- Reyadh Kadhim Shemal is fully responsible for any line of credit taken against the house.

Child Support and Support

- Reyadh Kadhim Shemal has agreed to pay Micki Kawana \$1,500 per month for both spousal and child support (combined).

Custody

- Reyadh Kadhim Shemal and Micki Kawana have both agreed to have joint custody of their children (Maryam Shemal and Yusuf Shemal).

Micki Kawana - Reyadh Kadhim Shemal - Witnessed by: Younus Kathrada

[209] Mr. Shemal says that although he reads and writes English, he needs to take time to understand everything that he reads. The defendant maintains that he did not have the opportunity to review the agreement or to fully understand it before he signed it. Mr. Shemal testified at trial that he only spent two or three minutes looking at the agreement after he had put the children to bed, and that he read only the second and third parts of the document, which dealt with child support, spousal support, and custody. The defendant claims that he did not read the first part of the document dealing with the sale of the matrimonial home and the repayment of \$380,000 to Jessy Lee.

[210] Mr. Shemal's testimony at trial regarding the limited attention he paid to the agreement before signing it conflicts with his examination for discovery evidence of December 18, 2009. At page 295, questions 2036 and 2037, the defendant said that he did not even look at the paper. His evidence on discovery was that he had a lot of pain in his chest, did not want to fight, and wanted peace, "so I signed it. I didn't even look at it".

[211] None of the defendant's evidence on this point is credible. Mr. Shemal and the plaintiff had enlisted the assistance of Sheik Kathrada to work out an agreement to resolve their differences following a bitter separation. The defendant knew that a document recording the agreement they had reached with the assistance of Sheik Kathrada was to be prepared and then signed by both parties. The defendant was certainly aware that one of the most important topics addressed at the meeting with Sheik Kathrada concerned the sale of the

matrimonial home and the disposition of the proceeds of sale.

- [212] Mr. Shemal demonstrated a good command of the English language at trial. When documents were put to him, he took time to read them, and grasped their meaning.
- [213] Mr. Shemal claims to have considerable business acumen. The defendant's most valuable asset was his interest in the matrimonial home. He knew that the agreement he had negotiated with the plaintiff dealt with that interest. It is most unlikely that Mr. Shemal would not take the time to read and fully comprehend the one-page settlement agreement before he signed it. If Mr. Shemal had any questions concerning the content or meaning of the document, it was open to him to consult with Sheik Kathrada. Alternatively, Mr. Shemal could have obtained legal advice. He did neither.
- [214] The defendant filed his notice of intention to act in person on March 7, 2008. The meeting with Sheik Kathrada must have occurred on or before March 7, 2008. At that point, the defendant must have understood that he had a satisfactory agreement with the plaintiff. Mr. Shemal then made his own decision that he no longer required the services of his lawyer. Accordingly, at paragraph 4 of his affidavit sworn March 23, 2009, Mr. Shemal deposed that he and the plaintiff came to an agreement before the JCC, he dismissed his lawyer and attended the JCC on his own.
- [215] If Mr. Shemal had reservations about the terms of the agreement as drafted by the plaintiff and signed by Sheik Kathrada, there was nothing to prevent him from seeking legal advice, or from raising any concerns he had about the fairness of the agreement at the JCC. He did neither.
- [216] The plaintiff attended the March 18, 2008 JCC with her solicitor. Mr. Shemal attended in person. The plaintiff's solicitor provided the settlement agreement to Mr. Justice McKinnon, who asked Mr. Shemal if he agreed with its terms. Mr. Shemal responded in the affirmative. In response to another question from the court, the defendant agreed that the amount of debt owed to Jessy Lee was \$380,000, payable from the proceeds of sale of the Robson Drive property.
- [217] Before the JCC concluded, the court asked the parties whether there was anything more for them to address. In response to that invitation, Mr. Shemal did not assert that the settlement agreement was unfair or unconscionable; nor did he raise the claims he now advances respecting his entitlement to the profits from the sale of the Obelisk property, or Ms. Kawana's alleged indebtedness to him for monies he loaned to her. At Mr. Shemal's request, the court did make the order, which went by consent, that the plaintiff had no interest in the Millennium Water strata lot.

[218] None of Mr. Shemal's three affidavits containing his description of the terms of the settlement agreement make any reference to the Obelisk property forming part of that agreement or to the repayment by the plaintiff of loans from the defendant. I find that Mr. Shemal did not make any claim respecting the Obelisk property during the negotiations assisted by Sheik Kathrada, and for that reason, the Obelisk property formed no part of the settlement agreement.

[219] The consent order made by Mr. Justice McKinnon on March 18, 2008 was based on the terms of the agreement negotiated by the parties with the assistance of Sheik Kathrada and executed by them prior to the JCC. The consent order resolved all issues between the parties, other than the defendant's claim to an interest in Just for Feet.

Were the Agreement and Consent Order substantially unfair to the Defendant?

[220] Mr. Shemal bears the onus of showing that the terms of settlement, as incorporated in and modified by the consent order, are substantially unfair to him. Here, because the parties were not lawfully married, the only applicable legislative standards are those relating to custody, guardianship, access and child and spousal support. The terms relating to the sale of the Robson Drive property, the payment of \$380,000 to Jessie Lee, and the equal division between the plaintiff and the defendant of the net proceeds of sale must be assessed having regard to common law principles of contract and unjust enrichment.

[221] The defendant does not assert that the terms of the consent order providing that the plaintiff have the primary residence of the children, and that the plaintiff and the defendant have joint custody and joint guardianship on the Joyce model are unfair.

[222] Contrary to Mr. Shemal's affidavits, the parties did not agree that Mr. Shemal would have the children three nights a week. At the JCC, the parties agreed that Mr. Shemal should have reasonable access, including overnights. The consent order incorporated their agreement on access and served the best interests of the children by increasing their contact with their father.

[223] The consent order required Mr. Shemal to pay child support in the Guideline table amount of \$631 per month commencing April 1, 2008, based on his Guideline income at that time of \$41,400. Mr. Shemal's annual income of \$41,400 at the time of settlement included both his annual salary of \$30,000 from Just for Feet and annual revenue of \$11,400 he was then earning from the rental of the Robson Drive property. Although the plaintiff later terminated the defendant's employment with Just for Feet, at the time of the agreement the amount of child support payable by Mr. Shemal was based upon his total income and was consistent with the Guidelines.

[224] The consent order also provided for the payment of spousal support by the defendant to the plaintiff in the amount of \$869 per month, commencing April 1, 2008. The amount of spousal support exceeded the amount payable under the Spousal Support Advisory Guidelines (SSAG) "with children" formula, which would result in monthly spousal support

in the range of \$380 to \$584. The consent order also provided for the sale of the Robson Drive property. The parties knew that upon the sale of the former matrimonial home Mr. Shemal would no longer collect the rent that formed a part of his Guideline income of \$41,400. The parties must have contemplated the amount of monthly spousal support that would be subject to adjustment, or to variation in the event of a material change of circumstances. Although the agreed amount of spousal support substantially exceeded the amount payable under the SSAG, I am not persuaded that this term, when considered in the context of the agreement as a whole, gave rise to substantial unfairness.

[225] In any event, the plaintiff has abandoned her claim for spousal support, and makes no claim for any arrears of spousal support payable pursuant to the agreement or consent order.

[226] I turn now to the most contentious provisions of the agreement and consent order. Mr. Shemal agreed that from the net proceeds of sale of the Robson Drive property, \$380,000 would be paid to Jessy Lee, and that the remaining balance would be divided equally between himself and the plaintiff. At the JCC, he confirmed his assent to the terms of agreement that he and the plaintiff had negotiated with the assistance of Sheik Kathrada. The consent order incorporated the terms agreed by the parties concerning the division of the former matrimonial home and the disposition of the proceeds of its sale.

[227] I have found that Jessy Lee loaned \$300,000 to the plaintiff and the defendant for the purpose of paying out the mortgage then registered against title to the Robson Drive property, that Mr. Shemal received those funds, and that he used most of the loan monies to pay out the mortgage. I have also found that Mr. Lee advanced \$15,000 toward the start-up costs for Just for Feet and that the plaintiff used \$30,000 of the funds her brother had left in her care to pay for the family trip to Turkey. In addition, Mr. Lee provided funds to Ms. Kawana to pay rent and other living expenses when she and Mr. Shemal first shared an apartment. Both parties benefitted from the monies advanced by Mr. Lee. It was open to the plaintiff and the defendant to reach their own agreement on the total amount of their indebtedness to Jessy Lee. They did so. I find that the plaintiff and the defendant agreed that the sum of \$380,000 was the full amount for which they were indebted to Jessy Lee, and that he should be repaid that amount from the proceeds of sale of the Robson Drive property.

[228] I also find that Mr. Shemal and Ms. Kawana each contributed to the acquisition and the preservation of the Robson Drive property, and that their agreement that the plaintiff should receive an equal share of the net proceeds of sale was neither unfair nor unconscionable.

[229] The Robson Drive property was purchased in Mr. Shemal's name on July 31, 2004, for \$475,000.

- [230] Initially, the plaintiff and the defendant both contemplated that Ms. Kawana would likely qualify for the mortgage, due to Mr. Shemal's recent bankruptcy. The parties each made mortgage applications. Anticipating that the plaintiff would qualify for the mortgage and he would not, Mr. Shemal transferred \$93,000 to the plaintiff's account. Had the plaintiff qualified for the mortgage, she would have purchased the Robson Drive property in her name. In the result, the defendant qualified for the mortgage and on June 4, 2004, Ms. Kawana returned the \$93,000 to the defendant's account. Mr. Shemal paid the deposit of \$10,000 and obtained the mortgage for \$332,500.
- [231] While Mr. Shemal made the down-payment of \$139,651, Ms. Kawana made an indirect contribution to the purchase of the Robson Drive property. Just for Feet contributed \$21,000 to the down-payment by a cheque issued to Mr. Shemal. I have also found that a further \$57,200, notionally paid by Richland to Mr. Shemal, also came from Just for Feet. The funds from Just for Feet were the product of the joint efforts of the plaintiff and the defendant. Ms. Kawana made her contribution by running the business for its first year of operation. Mr. Shemal took on the day-to-day operation of Just for Feet about five months before he purchased the Robson Drive property.
- [232] Although Mr. Shemal made the monthly mortgage payments on the Robson Drive property, he was able to do so because Just for Feet generated sufficient revenues to pay his salary of \$2,500 per month and to provide additional funds to pay the parties' household expenses.
- [233] Ms. Kawana made additional contributions to the preservation and maintenance of the matrimonial home. It was the plaintiff's relationship with her brother that enabled the parties to obtain the \$300,000 loan from Jessy Lee, which in turn enabled Mr. Shemal to pay off the mortgage charging the Robson Drive property by early June 2006. In addition, Ms. Kawana was the primary homemaker. After the births of the children, the plaintiff stayed home to care for them, which enabled Mr. Shemal to continue to work full-time at Just for Feet.
- [234] It is also noteworthy that the plaintiff and the defendant went through a ceremony of religious marriage shortly after they purchased the Robson Drive property. They believed they were married and regarded the Robson Drive property as their family home; they raised their children there until the separation.
- [235] Taking into account the respective contributions of each party to the Robson Drive property, their agreement that each was entitled to an equal interest in the net proceeds of sale is not unfair or unconscionable.
- [236] The consent order also required Mr. Shemal to assume responsibility for the line of credit. The defendant used the line of credit for his own benefit and ran it up to its limit following the separation. In these circumstances, it was not unfair that Mr. Shemal be wholly responsible for the payment of the line of credit.

- [237] Finally, the plaintiff and the defendant both agreed that the plaintiff had no interest in the Millennium Water strata unit. Mr. Shemal had paid the first deposit under a contract for the purchase and sale of his property, but subsequently failed to complete the contract. There is no allegation of unfairness relating to this term of the consent order.
- [238] I conclude that the agreement and consent order were not substantially unfair to Mr. Shemal.
- [239] The defendant's counterclaim for an order setting aside the agreement and the consent order as unconscionable is dismissed.
- (c) The Defendant's Counterclaim for an Interest in Just for Feet
- [240] Neither the settlement agreement nor the consent order resolved the question of the respective interests of the parties in Just for Feet.
- [241] The defendant says that the plaintiff was unjustly enriched by his contributions to Just for Feet. He invokes the remedy of constructive trust to seek a declaration that Ms. Kawana holds the whole of her interest in Just for Feet in trust for him.
- [242] In *Kerr v. Baranow*, 2011 SCC 10 at paras. 24, Cromwell J., for the Court, stated that the common intention resulting trust has no further role to play in the resolution of domestic cases. He described the law of unjust enrichment as "the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship": at para. 30.
- [243] In any unjust enrichment claim, the plaintiff must establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834.
- [244] The Court in *Kerr* explained these elements as follows at paras. 38-40:
- [38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money...
- [39] Turning to the second element -- a corresponding deprivation -- the plaintiff's loss is material only if the defendant has gained a benefit or been enriched... That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered...
- [40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case...

[Citations omitted.]

- [245] At the first stage of the juristic reason analysis, the plaintiff must show that none of the established categories of juristic reasons for the enrichment apply to deny recovery. The established categories of juristic reasons include: contract, a disposition by law, donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, the plaintiff has established a *prima facie* case for the no juristic reason element of the test for unjust enrichment. The onus then shifts to the defendant to show that there is another reason to deny recovery. At the juristic reason stage of the analysis, the court may consider the legitimate expectations of the parties. See: *Pettkus* at 849; and *Kerr* at para. 44.
- [246] Here, Mr. Shemal conferred a benefit on the plaintiff and experienced a corresponding deprivation through his contributions of capital, labour, and enterprise to the development of the business of Just for Feet. Ms. Kawana does not suggest that there is any juristic reason that would entitle her to enjoy the benefits of Mr. Shemal's participation in the business, and to retain her 100 per cent interest in Just for Feet. The plaintiff proposes that Just for Feet be sold, and that after the payment of expenses, the net profits, if any, be divided equally. Where the parties differ is not on whether there has been an unjust enrichment, but rather on the extent of their respective contributions to Just for Feet, and the appropriate remedy.
- [247] Remedies for unjust enrichment are restitutionary and may take the form of either a monetary award or a proprietary remedy, the remedial constructive trust. There must be a sufficiently substantial direct link or nexus between the plaintiff's contributions and the property which is the subject matter of the trust. See: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 988 and 997; and *Pettkus* at 852.
- [248] In *Kerr* at para. 47, Cromwell J. emphasized that the first remedy a court should consider is a monetary award, which will provide a sufficient remedy for unjust enrichment in most cases. However, where a monetary award is inappropriate or insufficient, the proprietary remedy of a remedial constructive trust may be required. Accordingly, the Court described the constructive trust as a "broad and flexible equitable tool used to determine beneficial entitlement to property": at para. 50. Where the claimant is able to establish demonstrate a "sufficiently substantial and direct" link or "nexus" between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour. See: *Pettkus* at 852-53; and *Kerr* at para. 50-51.
- [249] The Court in *Kerr* identified three areas of the law of unjust enrichment requiring clarification: the approach to the assessment of a monetary award, how and where to address mutual benefit, and the role of the parties' reasonable or legitimate expectations.

- [250] With respect to the monetary remedy, the Court held that it is not restricted to a fee for services calculation: at para. 58. As Cromwell J. noted at para. 59, domestic unjust enrichment claims are not restricted to cases where the enrichment arises either from the provision of unpaid services or an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. He then stated at paras. 60 and 62:
- [60] At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.
- ...
- [62] Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.
- [251] In the case of a joint family venture to which both partners contributed, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth: at para. 81. As stated by Cromwell J. at para. 81:
- [81] In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life"... In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the

accumulation of the wealth.

[Citation omitted.]

[252] Cromwell J. then concluded, at para. 85:

[85] ...the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

[253] In Kerr, the Court discussed the identification of unjust enrichment arising from a joint family venture at paras. 87-89:

[87] My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

[88] It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship... A joint family venture can only be identified by the court when its existence, in fact, is well-grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their ex post facto assertions or the court's view of how they ought to have done so.

[89] In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

[Emphasis added.]

- [254] The pooling of effort and teamwork, the decision to have and raise children together, the length of the relationship, and joint contributions are factors that may provide evidence of joint effort toward a common goal. Additionally, the court will consider the economic integration of the parties. At para. 92, the Court in Kerr stated that "[t]he more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having engaged in a joint family venture." Indicia of economic integration include the existence of a joint bank account and the operation of a business by the family unit.
- [255] Further, in considering whether there is a joint family venture, actual intentions of the parties must be given considerable weight: Kerr at para. 94. A court may infer from the parties' conduct that they intended to share in the wealth they jointly created. The intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" or where the parties held themselves out to the public as married. The stability of the relationship and the length of the cohabitation may be relevant factors: Kerr at para. 95.
- [256] On the issue of monetary awards, Cromwell J. reached the following conclusions at para. 100:
1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.
 2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.
 3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.
 4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.
- [257] Where the court finds that mutual benefits have been conferred, the respective contributions of each party will be taken into account in determining the claimant's proportional share based on "the reasoned exercise of judgement in light of all of the evidence": Kerr at para. 102.

The Contributions of the Parties to Just for Feet

- [258] Mr. Shemal came up with the idea of starting an orthotic and orthopaedic shoe business after a friend introduced him to Mr. Brendan Au, who owned a shoe store in Richmond, as well as the franchise for All about Feet.
- [259] Mr. Shemal and Ms. Kawana discussed opening a shoe business. They jointly decided to do so.
- [260] Mr. Shemal negotiated a contract with Mr. Au to open an All about Feet store in Coquitlam. The defendant paid \$30,000 from his own funds to Mr. Au for advertising, stock, and other start up costs.
- [261] The plaintiff and the defendant looked for a location for the shoe store together and ultimately settled upon the location in the Coquitlam Centre mall.
- [262] Mr. Shemal contributed \$25,000 to renovate the store in late March 2006. These funds came from the \$110,000 Mr. Shemal received from Jessy Lee on March 23, 2006.
- [263] Mr. Shemal was involved in the business from the outset. He did some of the renovation work before the store opened, arranged for publicity for the opening, and oversaw the change of name of the business to Just for Feet once it became apparent that it would be difficult to deal with Mr. Au, the owner of the All about Feet franchise. Mr. Shemal also found other suppliers for orthotics, learned to make custom orthotics himself, negotiated a successful relationship with a major supplier, Mephisto, and coordinated another renovation of the store in 2005 with Mephisto. In 2007, Mr. Shemal added the Ecco brand to the lines of shoes carried by Just for Feet.
- [264] During the first year of operation, Mr. Shemal provided occasional relief to Ms. Kawana, who was then working full-time in the store. When Mr. Shemal began to work in the store on a full-time basis, in February 2004, he received a salary of \$1,000 per month for the first five or six months. At that stage, Ms. Kawana and Mr. Shemal were building the business and wanted to reinvest the store's revenues in the business and the purchase of more stock. Later, Mr. Shemal's salary increased to \$2,500 per month.
- [265] From February 2004 onwards, the plaintiff retained sole signing authority on Just for Feet's business account with Vancity Credit Union, while Mr. Shemal was involved in all other aspects of the operation of the shoe store.
- [266] From February 2004 until the plaintiff terminated his employment in May 2008, Mr. Shemal was the primary person working in the shoe store. He frequently worked long hours in the store, which was open 62 hours a week, with some assistance from casual or part-time employees. The defendant continued to receive a gross salary of \$2,500 per month until the termination of his employment.

- [267] The financial statements of Just for Feet for the years ending March 31, 2004 through March 31, 2008, show increases in annual sales revenues from \$166,000 to \$231,000. Mr. Shemal was largely responsible for building the business of Just for Feet during this period.
- [268] Ms. Kawana also made significant contributions to Just for Feet. The plaintiff applied for and negotiated the lease for Just for Feet and she is the sole guarantor for Just for Feet's liabilities under the lease. Ms. Kawana contributed \$15,000 toward the start-up costs for Just for Feet; Jessie Lee provided those funds to her in three instalments. The plaintiff produced banking records showing deposits totalling \$15,000 to her business account. Ms. Kawana's testimony that these deposits came from the "family money" controlled by Mr. Lee, and were advanced to assist with the start-up for Just for Feet, was confirmed by Mr. Lee's evidence.
- [269] Ms. Kawana worked full-time in the Just for Feet store from December 2002 through December 2003. Initially, she did so without drawing any salary. Ms. Kawana did receive a salary of \$4,000 a month for the period October through December 2003.
- [270] Beginning in December 2003, Just for Feet paid the rent for the parties' apartment. Until the parties separated, Just for Feet also paid the household utilities, car insurance and some other living expenses.

Monies Received by Plaintiff and Defendant from Just for Feet

- [271] On October 10, 2007, the plaintiff withdrew \$35,000 from Just for Feet and deposited those funds to her personal account with Vancity Credit Union. In cross-examination, Ms. Kawana said that at the time she anticipated that her situation would be difficult. She anticipated separation, expected to be a single mother, and was preparing herself for that eventuality.
- [272] The plaintiff swore her first Form 89 Financial Statement on March 11, 2008. She did not disclose the Vancity bank account or her deposit of \$35,000 to that account in that financial statement. The plaintiff does not deny that she deposited \$35,000 to her Vancity account in October 2007 or that she retained these funds when she swore the Form 89 Financial Statement in March 2008. She testified that she did not think about this account when she swore her financial statement. I find it improbable that the plaintiff, after withdrawing \$35,000 from the corporate account of Just for Feet and depositing those funds to her own account as a hedge against future financial difficulties, would forget about this transaction when she swore her Form 89 Financial Statement approximately six months later. The plaintiff's failure to disclose this asset, or the account in which it was held, in her Form 89 was deliberate.

- [273] I have previously found that Mr. Shemal was probably aware of the plaintiff's October 2007 withdrawal of \$35,000 from Just for Feet because at that time he had access to the corporate bank statements. However, Mr. Shemal did not know what the plaintiff had done with the funds after she withdrew them from Just for Feet, and had not agreed to the plaintiff retaining them.
- [274] On May 2, 2008, Ms. Kawana withdrew a further \$25,000 from Just for Feet. In August 2008, the plaintiff re-invested \$12,000 of these funds in Just for Feet in order to pay suppliers.
- [275] The plaintiff made the May 2008 withdrawal shortly before she terminated Mr. Shemal's employment with Just for Feet. Ms. Kawana did not inform Mr. Shemal of this withdrawal.
- [276] The net amount withdrawn by the plaintiff from Just for Feet is \$48,000. At paragraph 288 of these Reasons, I address Mr. Shemal's claim for compensation respecting the funds withdrawn by the plaintiff from Just for Feet in October 2007 and May 2008.
- [277] On May 14, 2004, Just for Feet issued a cheque to Mr. Shemal for \$21,000. This was a partial repayment of the money that Mr. Shemal had previously invested in the company. The defendant applied these funds toward the purchase price of the Robson Drive property.
- [278] On May 29, 2006, Just for Feet issued a cheque to Mr. Shemal for \$36,000. The defendant used these funds to make the final payment on the mortgage then charging the Robson Drive property. As Mr. Shemal says, this was a repayment of monies he had invested in Just for Feet.
- [279] Mr. Shemal testified that he invested somewhere between \$55,000 and \$60,000 in Just for Feet. He received a total of \$57,000 from Just for Feet by the two payments of May 14, 2004 and May 29, 2006. I find that Just for Feet repaid to Mr. Shemal all of the monies that he contributed to the business.

Just for Feet a Joint Family Venture

- [280] I find that the plaintiff and the defendant operated Just for Feet as a joint family venture from December 2002 until their separation. Each contributed to the business and each derived benefits from it. The plaintiff and the defendant pooled their resources and their labour to launch the business. After the children were born, the plaintiff stayed home to care for them, freeing up Mr. Shemal to work full-time in the store.
- [281] With respect to economic integration, the plaintiff and the defendant did maintain separate bank accounts throughout their relationship. However, the plaintiff, the defendant and their family relied upon the income generated by Just for Feet to pay family expenses, including rent, and later, monthly mortgage payments, utilities and other family living expenses. Although Ms. Kawana remained the sole shareholder, officer and bank signatory for Just for Feet, the company provided funds to Mr. Shemal both to assist with the purchase of the family home and to pay out the mortgage charging the Robson Drive property.

- [282] I infer from the parties' joint contributions to the establishment and operation of Just for Feet and from their use of the revenues generated by the business to pay family expenses that they intended to share the wealth they jointly created. The parties shared a marriage-like relationship. From July 2004 until they separated, they held themselves out to friends and family as a married couple.
- [283] Before the children were born, the plaintiff performed most of the household chores. When the children were born, Ms. Kawana assumed the lion's share of the domestic responsibilities, and the primary care of the children. Aside from continuing to look after the banking for Just for Feet, the plaintiff left the day-to-day operation and management of Just for Feet to Mr. Shemal. Her responsibilities for the care of two young children left her largely dependent upon Mr. Shemal, particularly after Jessy Lee had returned to Taiwan and had arranged for the repatriation of the remaining family money.
- [284] Taking into account all of these factors, I find that the parties operated Just for Feet as a joint family venture and that their respective contributions to the success of that venture were roughly equal.
- [285] Neither party has obtained a valuation of the business of Just for Feet. It is therefore not possible make a monetary award to compensate Mr. Shemal for his contributions to Just for Feet. However, there is a direct link between the defendant's contributions and the acquisition, maintenance, and improvement of this joint family enterprise.
- [286] The plaintiff and the defendant are each entitled to a half interest in the business. Accordingly, I would grant a declaration that one half of the plaintiff's interest in Just for Feet is impressed with a constructive trust in favour of Mr. Shemal.
- [287] Just for Feet will be listed for sale and sold; the profit, if any, will be shared equally between the parties.
- [288] I have found that Ms. Kawana's failure to disclose in her Form 89 Financial Statement her withdrawal of \$35,000 from Just for Feet in October 2007 was deliberate, and that she also failed to disclose the further withdrawal of \$25,000 in May 2008. I have found that the plaintiff and the defendant operated Just for Feet as a joint family venture to which they each made roughly equal contributions, and that they intended to share the wealth that they created through their combined efforts.
- [289] After taking into account her reinvestment of \$12,000, the net amount of the plaintiff's withdrawals is \$48,000. That amount substantially exceeds the plaintiff's direct financial contribution to Just for Feet of \$15,000, borrowed from Jessy Lee. It would be unjust to permit the plaintiff to retain a disproportionate share of these monies, which were the product of the joint family venture. Where an unjust enrichment arises from the unjust retention of a disproportionate share of assets accumulated during the course of a joint family venture to which both parties have contributed, a monetary remedy should reflect that fact: Kerr, para. 80.

- [290] For his one-half interest in the monies withdrawn from Just for Feet by Ms. Kawana in 2007 and 2008, the defendant is entitled to equitable compensation in the amount of \$24,000.
- (d) The Defendant's Claim to the Proceeds of Sale of the Obelisk Property
- [291] The defendant counterclaims against the plaintiff for the net proceeds of the sale of her right to purchase of the Obelisk property.
- [292] Mr. Shemal began to take an interest in real estate in 2003 after Vancouver was awarded the Winter Olympics. The defendant says that he located a unit in the Obelisk condominium project with an attractive purchase price of \$270,000 and encouraged Jessy Lee to buy the unit. On June 11, 2005, Mr. Shemal entered into a contract of purchase and sale for the Obelisk property, and made a refundable deposit in the amount of \$10,000 to hold the property while Mr. Lee determined whether he would acquire the unit.
- [293] Mr. Shemal claims he made an agreement with Jessy Lee and the plaintiff by which Mr. Lee agreed to pay the purchase monies for the Obelisk property, title would be registered in the name of the plaintiff, and Mr. Shemal would receive the profit from any sale of the Obelisk property or indemnify Mr. Lee for any loss on the sale.
- [294] Mr. Lee agreed that Mr. Shemal encouraged him to purchase the Obelisk property, but says that he made his own decision to acquire the unit. Mr. Lee decided that although he would occupy the unit, the Obelisk property would be registered in the plaintiff's name because Mr. Lee travelled a lot and anticipated that he would eventually return to Taiwan. Mr. Lee wanted his sister to look after the Obelisk property and, if necessary, to be able to sell it on his behalf.
- [295] Mr. Lee arranged to have the plaintiff sign a new agreement to purchase in her name, also dated June 11, 2005, which replaced the initial offer to purchase signed by Mr. Shemal. The purchase price for the Obelisk property was \$269,800. Mr. Lee paid each of the three deposits totalling \$67,450.
- [296] Mr. Shemal made no financial contribution to the purchase of the Obelisk property.
- [297] Mr. Lee and the plaintiff deny that they had made any agreement to pay Mr. Shemal the profit realized upon the sale of the Obelisk property. Mr. Lee also denied the defendant's claim that he was to receive the profits realized from the sale of the Obelisk property as compensation for work he had performed for Mr. Lee or Richland.
- [298] In August 2007, the plaintiff sold the Obelisk property by assignment of the contract for purchase. The sale price was \$349,000 and the net profit was \$71,700.
- [299] In November 2007, the plaintiff paid \$17,000 to Mr. Shemal from the proceeds she had received from the purchaser of the Obelisk property. Mr. Shemal claims against the plaintiff for payment of the balance of the net profit, in the amount of \$54,700.

- [300] The defendant used the \$17,000 he received from the plaintiff toward payment of the deposit for his purchase of a condominium at Millennium Water in False Creek. The defendant says the \$17,000 payment from the plaintiff was money that she and Jessy Lee had agreed to pay to him from the sale of the Obelisk property.
- [301] The plaintiff testified that she had no discussions with her brother about loaning the \$17,000 to Mr. Shemal, although Mr. Lee had put up all of the purchase money and, according to the plaintiff, she was holding the proceeds of sale for him.
- [302] Ms. Kawana did pay \$17,000 from the proceeds of sale of the Obelisk property to Mr. Shemal without consulting her brother. Nonetheless, I find Mr. Shemal's evidence of the agreement he claims to have made with Mr. Lee and the plaintiff concerning the Obelisk property to be implausible. It is not probable that a businessman of Mr. Lee's sophistication, who was putting up all of the money to purchase the Obelisk property, would promise to pay the whole amount of any profit realized on the sale of his investment to the defendant, who had no expertise in the real estate market, in consideration for him recommending the purchase of the strata unit.
- [303] I have found that Mr. Shemal's claims that he performed services for Richland, and that Mr. Lee paid or promised him substantial compensation for those services, are not credible. I do not accept the defendant's assertion that Mr. Lee promised him the proceeds of sale of the Obelisk property as compensation for any of the services Mr. Shemal claimed to have performed for Mr. Lee or Richland.
- [304] I find that the defendant has not established on the balance of probabilities that he has any interest in the proceeds of sale of the Obelisk property.
- (e) The Plaintiff's alternate claims to the Robson Drive property in the event that the Consent Order is set aside
- [305] In light of my conclusion that the agreement and consent order should not be set aside, it is unnecessary address the plaintiff's alternative claims for an interest in the Robson Drive property, or for an order for payment of debt owed to Jessy Lee from the proceeds of sale of the former matrimonial home.
- (f) The Defendant's Counterclaim for Monies Loaned to the Plaintiff
- [306] Mr. Shemal claims that the plaintiff is indebted to him for \$10,000 that he loaned to her on November 28, 2006; \$18,040 that he loaned to her on January 20, 2007; and \$35,000 that he loaned to her on May 15 2007.
- [307] The defendant did issue cheques or transfer funds to the plaintiff for the amounts claimed. However, Mr. Shemal had little or no recollection of the circumstances in which he made the advances of November 28, 2006, and January 20, 2007. In cross-examination, all he could recall about the second transaction was that the plaintiff "asked for help and I gave her that cheque".

- [308] Mr. Shemal first made the claim that he had loaned the plaintiff \$35,000 in May 2007, in his amended counterclaim filed at the commencement of the trial. The defendant testified that he understood that the loan of May 15, 2007, was to assist the plaintiff with the purchase of an apartment in Taiwan. The plaintiff was not cross-examined about this transaction; however, she did give evidence that following a trip to Taiwan some years earlier, she had decided to make her permanent home in Canada and only return to Taiwan to visit her family from time to time. There is no evidence that the plaintiff purchased property in Taiwan.
- [309] More importantly, there is no contemporaneous documentation to support the defendant's claim that these advances were loans rather than gifts, no evidence respecting the manner of repayment, and no evidence of the defendant making any demand for repayment before the parties separated.
- [310] The defendant says that repayment of the loans by the plaintiff was part of the agreement he concluded with the plaintiff before the March 18, 2008 JCC. There is no reference to any of the alleged loans in the agreement signed by the plaintiff, the defendant and Sheik Kathrada, or in the consent order of March 18, 2008. Nor did Mr. Shemal, in any of his several affidavits describing his understanding of the agreement, depose that Ms. Kawana agreed to repay to him the debts he now claims. In cross-examination, Mr. Shemal was unable to explain why, if the loans were part of the settlement agreement, he had not referred to them in any of his affidavits. I do not accept the defendant's claim that, in March 2008, the plaintiff agreed to repay the amounts he now claims she owes to him or agreed that she was indebted to him in any amount.
- [311] The defendant has not met the onus of establishing, on the balance of probabilities, that the amounts he advanced to the plaintiff were loans, or that the plaintiff is indebted to him in the amounts claimed, or at all. Accordingly, the defendant's counterclaim for debt is dismissed.

(g) Child Support

- [312] At the March 18, 2008 JCC, Mr. Shemal consented to orders requiring him to pay the plaintiff child support of \$631 per month and spousal support of \$869 per month. For April, the defendant paid both the child support and the spousal support required by the consent order.
- [313] On May 8, 2008, the plaintiff terminated the defendant's employment with Just for Feet.
- [314] Mr. Shemal made no further payment of spousal support. However, he did pay Ms. Kawana child support of \$631 for each of the months of May, June, July and August 2008. The defendant then terminated his payments of child support, and made no further child support payments between August 2008 and the conclusion of the trial of this action.

- [315] The plaintiff submits that after the termination of his employment with Just for Feet, Mr. Shemal chose to be under-employed, and that the court should impute to him an annual Guideline income of \$40,000, and based on that imputed income, order that he pay basic child support in the table amount of \$610 per month from September 2008 onward.
- [316] The defendant does not dispute that he has an obligation to pay child support. Mr. Shemal said that once his times for access to the children were defined (as they were at the conclusion of the trial), he would find new employment and resume payment of child support. The defendant has not sought an order cancelling or varying arrears of child support.
- [317] From the termination of his employment at Just for Feet in May 2008, until the trial of this action, Mr. Shemal made no sustained effort to find and keep employment. He had only two brief periods of employment, and devoted some time to an unprofitable business venture.
- [318] In 2008, Mr. Shemal worked for approximately two weeks for a friend's roofing company, but quit because the hours of work interfered with his access time with his children. In the summer of 2008, Mr. Shemal travelled to Saudi Arabia for religious observance in Mecca. Between February and June 2009, Mr. Shemal engaged in an unsuccessful business venture involving the purchase of several motor vehicles in Florida for resale in Iraq. According to the defendant, the vehicles were destroyed by Iraqi insurgents.
- [319] In April 2009, Mr. Shemal made an unsuccessful application to vary the access terms of the consent order. On that application, the court informed the defendant that his access schedule was not an excuse for unemployment.
- [320] In late July 2009, Mr. Shemal found employment as a commission salesperson with a Nissan automotive dealership. The defendant was employed there until October 1, 2009, when he again resigned because his work did not provide him with the flexibility to fully exercise his Monday, Thursday and Saturday access with his children. During the two months he was employed with the Nissan dealership, Mr. Shemal earned \$2000 per month.
- [321] Mr. Shemal gave evidence that he had numerous friends and contacts through whom he could easily secure employment. In cross-examination, the defendant admitted that since October 2009, he had not made efforts to find new employment. The defendant testified that he decided to wait until the court determined custody and access before finding employment, or embarking upon another business venture, so that he could structure his work schedule to accommodate whatever custodial and access arrangements the court ordered.
- [322] Following the separation and the termination of his employment with Just for Feet, Mr. Shemal financed his own living expenses through his line of credit. Between January 2008, and September 2009, he spent over \$140,000 on the line of credit. After August 2008, Mr. Shemal did not use the funds available to him through his line of credit to pay child support to the plaintiff.

- [323] By requesting that the court impute an annual income of \$40,000 to Mr. Shemal, and order that the defendant pay monthly child support based upon that imputed income in the Guideline amount of \$610, the plaintiff seeks a variation of the child support required by the consent order.
- [324] Under s. 96(1.1) of the Family Relations Act, to vary a child support order, a court must be satisfied that a change of circumstances as provided for under the Child Support Guidelines has occurred since the order was made. Section 14(a) of the Child Support Guidelines provides that the following constitutes a change of circumstances permitting the variation of a child support order:
- 14(a) In the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof.
- [325] Mr. Shemal's loss of employment with Just for Feet in May 2008 was a material change in his economic circumstances falling within s. 14(a) of the Child Support Guidelines.
- [326] The court may impute income where a spouse is intentionally under-employed or unemployed: Child Support Guidelines, s. 19(a).
- [327] Mr. Shemal has chosen to be under-employed, or unemployed pending the outcome of this trial. This is therefore an appropriate case for the court to exercise its discretion to impute income to the defendant for the purposes of determining his obligation to pay child support to the plaintiff for Maryam and Yusuf.
- [328] The obligation of a parent to pay child support is based on his or her capacity to earn income. In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.) at para. 14, Martinson J. identified the following principles applicable to the determination of a parent's capacity to earn an income:
1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para 30.)
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[329] In *Windle v. Windle*, 2010 BCSC 18 at para. 86, the court held that when imputing income in a case of under-employment, the court will consider the amount of income a spouse could earn if working to capacity, and that the payor spouse is expected to take reasonable steps to obtain employment commensurate with such factors as his age, health, education, skills, and work history.

[330] Mr. Shemal, at 37, is still a relatively young man. He is in good health. The defendant is intelligent and has a creative mind. Mr. Shemal successfully built up the business of Just for Feet and has mechanical skills. While the parties co-habited, the defendant demonstrated an ability to earn income by various means, ranging from working for a private security firm and reconditioning and reselling automobiles, to managing the family retail shoe store. Throughout the parties' relationship, the income at Mr. Shemal's disposal often exceeded the income he declared in his annual tax returns. I find that following the loss of his employment with Just for Feet, Mr. Shemal had, and continues to have, the capacity to earn an annual income of \$40,000. I impute to the defendant an annual Guideline income of \$40,000 for September through December 2008, for 2009 and 2010.

[331] The plaintiff seeks an order requiring Mr. Shemal to pay child support of \$610 per month from September 2008 to the present.

[332] As the Court explained in *S.(D.B.) v. G.(S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 at paras. 67 and 68, where, as here, there is an existing court order for child support, a subsequent order is not truly retroactive. Mr. Shemal always had the obligation to pay and the children always had the right to receive child support in an amount commensurate with the defendant's income.

- [333] To the extent that retroactivity is engaged here, the plaintiff gave effective notice of her claim for child support when she filed her writ and statement of claim in January 2008. Delay is not a factor. Furthermore, the order sought by the plaintiff would vary the consent order pronounced by McKinnon J. on March 18, 2008, by reducing rather than increasing the amount of basic child support payable from September 2008 onward.
- [334] Further, by choosing to be under-employed, and by drawing lavishly upon his line of credit to pay his own living expenses while failing to pay child support, the defendant preferred his own interests to those of the children, and thereby engaged in blameworthy conduct.
- [335] The two very young children of the parties are in need of support. In 2009, although Ms. Kawana had resumed the day-to-day operation of Just for Feet, she only drew a salary of \$1,000 per month from the former family business.
- [336] Based on his imputed Guideline income of \$40,000, for the period September 1, 2008 through March 1, 2011 inclusive, the defendant will pay to the plaintiff child support of \$610 per month, in the lump sum amount of \$18,910 (31 months x \$610). If Mr. Shemal has paid any monthly child support to the plaintiff for the children since the trial, the amount of the lump sum child support payment will be reduced accordingly.

Ongoing Child Support

- [337] Based on the defendant's imputed Guideline income of \$40,000 per annum, the defendant will pay to the plaintiff child support at \$610 per month commencing on the first day of April 2011 and continuing on the first day of each month thereafter.
- [338] The defendant and the plaintiff will each pay any special and extraordinary expenses for Maryam and Yusuf, including child care expenses, in proportion to their respective incomes.
- [339] Commencing in May 2011, the defendant and the plaintiff will each provide the other with a copy of their Canada Revenue Agency T1 General Tax Return by no later than May 15 in each year, together with a summary of any income earned in the previous taxation year which has not been reported to the Canada Revenue Agency. In addition, in each year the plaintiff and the defendant will each provide the other with a copy of the Canada Revenue Agency Notice of Assessment within 14 days of receipt of same. The plaintiff and the defendant will exchange this information in order to review and, if necessary, adjust the amount of child support payable by the defendant to the plaintiff in accordance with the Child Support Guidelines by May 31 of each year.

(h) The Children's Bank Account

- [340] The plaintiff and the defendant both agreed that they intended that the TD Canada Trust value account held in the name of the plaintiff would be used for the benefit of the children. Prior to their separation, both parties deposited funds to that account for the children. In September 2007, before the plaintiff deposited funds received from the sale of the Obelisk property to the TD Canada Trust account, the balance held in the account for the benefit of the children was \$12,636.23.
- [341] In September 2007, the plaintiff deposited \$33,725 to the TD Canada Trust account from the sale of the Obelisk property. In April 2008, the plaintiff deposited a further \$71,700 from the sale of the Obelisk property to this account.
- [342] Since the parties separated, the plaintiff has transferred funds from the TD Canada Trust account to both Jessy Lee and to her mother. The latest statement for the TD Canada Trust account produced at trial showed a balance remaining in the account of \$3,170.94.
- [343] In order that the children will have the benefit of the funds deposited to that account, the plaintiff will restore the account balance to \$12,636.23. The TD Canada Trust account will be held in the names of both plaintiff and defendant, who will jointly manage that account for the benefit of the children.

SUMMARY

[344] In summary, this court orders as follows:

1. This court declares that the consent order made by Mr. Justice McKinnon at the JCC held on March 18, 2008, which consent order was based on the terms of the agreement executed by the parties prior to the JCC, was an effective resolution of all issues between the parties, other than the defendant's claim to an interest in the business of Just for Feet.
2. One-half of the plaintiff's interest in Just for Feet is impressed with a constructive trust in favour of the defendant. The parties will sell Just for Feet. The plaintiff and the defendant will have joint conduct of the sale of Just for Feet and, after payment of all proper costs of sale and all debts of Just for Feet, the net profit, if any, will be divided equally between the plaintiff and the defendant.
3. The plaintiff will pay to the defendant \$24,000 as compensation for the defendant's one-half interest in the funds withdrawn by the plaintiff from Just for Feet in October 2007 and May 2008. The plaintiff will pay that amount, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996 c. 79 to the defendant from her share of the net proceeds of sale of the Robson Drive property.
4. Pursuant to the consent order, the plaintiff and the defendant will sell the Robson Drive property, and after payments of commission and all adjustments, the proceeds will be divided as follows:
 - (a) the first \$380,000 will be paid to Jessy Lee; and

- (b) the balance will be divided equally between the parties;
 - (c) the defendant will be responsible for payment of the Bank of Montreal Line of Credit under his name;
5. The consent order as it relates to child support is varied as follows:
- (a) the defendant will pay to the plaintiff \$18,910 for child support from September 1, 2008 to March 1, 2011 inclusive, less any amount of child support actually paid by the defendant to the plaintiff since the trial of this action;
 - (b) based on the defendant's imputed Guideline income of \$40,000, commencing on April 1, 2011, and continuing on the first day of each and every month thereafter, the defendant will pay to the plaintiff for the children basic child support of \$610 per month;
 - (c) the plaintiff and the defendant will pay any special or extraordinary expenses for the children, including the costs of child care, in proportion to their respective incomes;
 - (d) commencing in May 2011, the defendant and the plaintiff will each provide the other with a copy of their Canada Revenue Agency T1 General Tax Return by no later than May 15 in each year, together with a summary of any income earned in the previous taxation year which has not been reported to the Canada Revenue Agency. In addition, in each year the plaintiff and the defendant will each provide the other with a copy of their Canada Revenue Agency Notice of Assessment within 14 days of receipt of same.
6. The plaintiff will restore the balance in the children's bank account with TD Canada Trust to \$12,636.23, and that account will be held in the names of both the plaintiff and the defendant, who will jointly manage the account for the benefit of the children.
7. Except as provided in this order, the plaintiff and the defendant will each retain the assets in their possession.
8. The counterclaim of the defendant for orders that the consent order and the settlement agreement be set aside for unconscionability is dismissed.
- [345] Except for the relief granted to the defendant in relation to Just for Feet and the children's bank account, all of the remaining counterclaims of the defendant are dismissed.
- [346] Should the parties require further directions relating to the sale of Just for Feet, or the disposition of the proceeds of sale of the Robson Drive property, they have liberty to apply.

COSTS

[347] The parties may make written submissions on costs through the registry. The written submissions of the plaintiff will be due 21 days after the date of release of these reasons for judgment. The defendant will have 21 days from the delivery of the plaintiff's submission to file and deliver his written submissions. Any reply submission from the plaintiff will be due 7 days after delivery of the defendant's submission on costs.

"PEARLMAN J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/03/2011BCSC0377cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kawana-v-shemal-2011-bcsc-377>

Prepared on 29 October 2026 · Esheria