

CANADA / JUDGMENT

Randhawa v. Khaira

2025 BCSC 542

COURT

Supreme Court of British Columbia

DECIDED

25 March 2025

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

2025 BCSC 542 Randhawa v. Khaira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Randhawa v. Khaira,

2025 BCSC 542

Date: 20250325

Docket: S239716

Registry: New Westminster

Between:

Jasvir Kaur Randhawa

Plaintiff

And

Mohinder Singh Khaira, Joginder Singh Khaira and

GN Motors Sale "N" Rentals Limited

Defendants

And

Jasvir Kaur Randhawa and Mr. Randhawa

Defendants by Counterclaim

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Virk

Counsel for Defendant Mohinder Singh Khaira:

Corry A. Clark

G. Khosa

The Defendants Joginder Singh Khaira and GN Motors Sale "N" Rentals Limited Appearing in Person:

No Appearance

Place and Dates of Trial:

Port Coquitlam, B.C.

April 29 - May 3, 2024

May 6-10, 2024

May 13-17, 2024

Place and Date of Judgment:

New Westminster, B.C.

March 25, 2025

TABLE of CONTENTS

INTRODUCTION.. 4

FACTS. 7

History of Proceedings. 7

Background of the Parties. 8

Loan Agreements. 10

Promissory Notes and Share Transfer 13

ISSUES. 16

ANALYSIS. 17

1. Credibility of the Parties. 17

2. Is a Portion of Mrs. Randhawa's Claim Time-Barred?. 20

Relevant Facts. 20

Position of the Defendants. 22

Position of the Plaintiff 22

Legal Principles. 22

Applying Legal Principles to the Facts of this Case. 24

3. Are the 2011 Agreement and 2012 Amendment Valid Contracts?. 26

Relevant Facts. 26

The October 2011 Agreement 27

The May 2012 Amendment 29

Loan Repayment 31

Position of the Defendants. 32

Position of the Plaintiff 33

Legal Principles. 35

Meeting of the Minds (Consensus ad idem) 35

The Defence of Non Est Factum.. 37

Sufficient Consideration. 38

Applying Legal Principles to the Facts of this Case. 40

Meeting of the Minds (Consensus ad idem) 40

The Defence of Non Est Factum.. 42

Sufficient Consideration. 43

What about the Promissory Notes?. 47

Conclusion on the Valid of the Loan Agreements. 47

4. How Much Money, if Any, Does Joginder Owe Mrs. Randhawa?. 48

Relevant Facts. 49

Position of the Defendants. 51

Position of the Plaintiff 53

Legal Principles. 54

Loan #1 and Loan #2. 55

Loan #3. 55

Is Loan #3 Void per the Doctrine of Ex Turpi Causa?. 56

The Repayment of Loan #3. 60

Severance of Loan #1 and Loan #2 from Loan #3. 63

Conclusion on the Amount of Debt Owning. 64

5. Did the 2012 Amendment Establish an Express Trust?. 64

Relevant Facts. 64

Legal Principles. 66

Position of the Plaintiff 67

Position of the Defendants. 68

Applying Legal Principles to Express Trust Argument 68

Certainty of Intention. 68

Certainty of Subject Matter 70

Certainty of Objects. 73

Conclusion on Express Trust 74

6. Was Joginder's Transfer of his Shares in 653 a Fraudulent Conveyance?. 74

Relevant Facts. 74

Legal Principles. 78

Does the Share Transfer Violate s. 1 of the FCA?. 82

Position of Defendant 83

Position of the Plaintiff 84

Applying Principles to Facts of Case. 85

Should the Court Uphold the Validity of the Share Transfer Under s. 2 of the FCA?. 87

Good Consideration. 87

Good Faith and Lack of Fraudulent Intent 89

Were the Signatures and/or Dates on the Promissory Notes Forged?. 90

Position of the Defendants. 90

Position of the Plaintiff 90

Analysis of the Legitimacy of the Promissory Notes. 90

Dr. Kaur's Report 91

Dr. Ospreay's Report 93

Do the Circumstances Surrounding the Share Transfer Indicate Bad Faith or Fraudulent Intent?. 96

Conclusion on Whether the Share Transfer is a Fraudulent Conveyance. 100

7. Did Joginder and Mohinder conspire to harm Mrs. Randhawa's interest through the Share Transfer?. 101

Legal Principles. 101

Position of Defendant 103

Position of Plaintiff 104

Relevant Facts. 104

Applying Principles to Facts of Case. 105

Conclusion on Conspiracy Arguments. 108

IV. CONCLUSION.. 108

V. RELIEF / REMEDY. 109

VI. COSTS. 111

INTRODUCTION

[1] This case stems from a contentious dispute between former business partners whose relationship unraveled amidst their involvement in a joint real estate venture. The real estate venture involved three families: the Randhawa family, the Khaira family, and the Sangha family.

[2] The plaintiff in this case is Mrs. Jasvir Kaur Randhawa ("Mrs. Randhawa"). Together, her and her late husband, Mr. Singh Randhawa ("Mr. Randhawa") have four children:

- a) Harinder Sall ("Ms. Sall");
- b) Rajbir Kaur Randhawa ("Rajbir");
- c) Ajeetpal Singh Randhawa ("Ajeetpal"); and
- d) Tejpal Singh Randhawa ("Tejpal").

[3] For clarity, and without intending any disrespect, I will refer to the Randhawa children who share the same surname by their first names. I also note that, sadly, Mr. Randhawa passed away in 2019.

- [4] The defendants in this case are members of the Khaira family. Namely, Joginder Khaira ("Joginder") and Mohinder Khaira ("Mohinder"). For clarity, and without intending any disrespect, I will refer to the Khaira brothers by their first names.
- [5] The company GN Motors Sale "N" Rental Limited ("GN Motors") is also named as a defendant in this case. At the time the lawsuit began, this company was owned and operated by Joginder, but the company no longer exists.
- [6] Mr. Palminder Sangha ("Mr. Sangha") was also involved in the real estate venture, but he is not named as a party in this dispute.
- [7] While there have been multiple legal disputes between the above three families, in the present matter, Mrs. Randhawa asserts that between 2002 and 2009 she lent Joginder and GN Motors over a million dollars. She claims that Joginder still owes her \$1,014,000 and she requests the repayment of this amount.
- [8] The loans advanced between 2002 and 2009 were arranged informally through oral agreements. Various members of the Randhawa family both contributed to the loaned amount and/or received repayments related to the loans.
- [9] The money appears to have moved between the parties without clear documentation or defined repayment terms. This lack of formal record-keeping has complicated the court's effort to determine the total amount loaned and repaid. The lack of documentary evidence is exacerbated by the fact that Mr. Randhawa played a pivotal role in structuring and facilitating these loans, and he is now deceased.
- [10] The informal financial arrangements were eventually formalized into written loan agreements. The first loan agreement was signed in October of 2011 (the "2011 Agreement") and rolled several smaller, pre-existing sub-loans into a single written loan agreement. The 2011 Agreement included the following term:
- A. The Lender has loaned the following amounts to the Borrower, receipt of which the Borrower hereby acknowledges:
- a) \$100,000.00 (hereinafter referred to as "Loan #1")
 - b) \$200,000.00 (hereinafter referred to as "Loan #2"); and
 - c) \$800,000.00 (hereinafter referred to as "Loan #3")
- [11] The 2011 Agreement identified Mrs. Randhawa as the Lender, and Joginder as the Borrower. Joginder failed to make consistent payments towards this debt. It is undisputed that Joginder's last payment occurred in December 2011.

- [12] As a result of Joginder's missed payments, the October 2011 Loan Agreement was amended in May of 2012 (the "2012 Amendment"). The 2012 Amendment is labelled "Addendum to Loan Agreement made October 10, 2011", but reads more like a new, stand-alone contract as it provides new terms without noting or explaining how they amend the 2011 Agreement. I will collectively refer to the 2011 Agreement and the 2012 Amendment as the "Loan Agreements."
- [13] The 2012 Amendment contained the following terms:
1. After paying the payments of \$1,160.00 per month (Principal and interest) for 84 months for loan #1 and paying the payments of \$2,363.00 per month (Principal and interest) for 95 months for loan #2. The combined balance of the principle of loan #1 and loan #2 is \$214,000.00 on December 20th, 2011.
 2. The Borrower agrees that he will pay the amount of \$5,833.33 per month (interest only) for the amount of \$1,000,000.00 (\$800,000.00 for loan #3 plus \$200,000.00 from loan #1 and loan #2) with the interest rate of 7% since December 20th, 2011 and start the first payment on July 20th, 2012.
- []
4. The Borrower agrees that all his shares in 653294 BC Ltd will be held in trust.
- [14] 653294 BC Ltd. ("653") is the corporation established for the purpose of developing a three-phase townhouse project (the "Townhouse Project"). A representative from each family owned a third of the shares in 653 and were responsible for a third of the expenses associated with the development.
- [15] Joginder never made any repayments towards the debt outlined in the 2012 Amendment. Mrs. Randhawa therefore claims that, in accordance with the 2012 Amendment, Joginder owes her a total of \$1,014,000 and she requests that the courts enforce this debt. She also claims that, in accordance with the 2012 Amendment, \$1,000,000 of the debt was secured against Joginder's shares in 653, as Joginder agreed to hold his shares in trust for her.
- [16] However, Joginder is no longer in control of his shares in 653. On November 10, 2016, Joginder transferred his shares in 653 to his brother, Mohinder (the "Share Transfer"). Mrs. Randhawa claims that this Share Transfer was illegal and fraudulent as it undermined her ability to recover the debts owed to her.
- [17] On July 20, 2022, Joginder also made an assignment into bankruptcy, complicating Mrs. Randhawa's ability to recover her debts. The defendants are also contesting the validity of the Loan Agreements and arguing that the debts are not enforceable.

- [18] In order to determine what amount, if any, is owed to Mrs. Randhawa, the court must determine the enforceability of the Loan Agreements, the validity of the Share Transfer, and whether the Share Transfer was intended to hinder Mrs. Randhawa's ability to recover the outstanding debt.

FACTS

History of Proceedings

- [19] Mrs. Randhawa commenced proceedings against Joginder and GN Motors on August 18, 2016. She alleged a breach of contract and requested to be repaid in accordance with the Loan Agreements. Three months later, and prior to a judgment being rendered, Joginder transferred his shares in 653 to his brother Mohinder.
- [20] The Court file reveals that GN Motors commenced a counterclaim against Mr. and Mrs. Randhawa however, there is no indication on the record that the counterclaim was advanced or pursued. It was neither raised during the proceedings before me nor is it addressed in these reasons.
- [21] Over three years later, on November 25, 2019, Mrs. Randhawa filed an Amended Notice of Civil Claim, which added Mohinder as a defendant. Mrs. Randhawa alleges that the Share Transfer constituted a fraudulent conveyance, a fraudulent preference, and a civil conspiracy. In addition, Ms. Randhawa argues that, in accordance with the 2012 Amendment, Joginder was required to hold the 653 shares in trust for her.
- [22] On July 20, 2022, Joginder filed for bankruptcy, which resulted in a stay of proceedings against him in this case. On October 27, 2023, Justice Brongers issued a court order which lifted the stay of proceedings.
- [23] Neither Joginder nor GN Motors have directly participated in this case since September of 2021, when Joginder's lawyer withdrew from the proceedings. At trial, Joginder did not appear as a defendant, although he did testify as a witness in support of Mohinder. This is significant as, following his bankruptcy, Joginder was granted leave to participate in these proceedings.
- [24] I also note that Joginder's trustee in bankruptcy neither participated in these proceedings nor have I been provided with any evidence indicating an attempt to do so, despite having authority under s. 96 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 to challenge the alleged fraudulent transfer.

Background of the Parties

- [25] It is necessary to briefly discuss the relationship between the Randhawa, Khaira, and the Sangha families, as the conflict between these groups underlies many of the issues in this case.

- [26] The three families all held equal interest in 653. Initially, they collaborated well on the Townhouse Project and successfully completed phase 1, which involved building 12 townhouse units.
- [27] From 2005 onward, the Randhawa family's involvement in 653 was managed through their family-owned corporation, 0888490 BC Ltd. ("088"). 088 was the entity that held one-third of the shares in 653. Mr. Randhawa, while not officially a shareholder or a director of either 653 or 088, was the leader and decision-maker for the Randhawa family, and oversaw all matters related to 088 until his passing. The evidence also indicates that he was a controlling force within 653.
- [28] In 2010, Nirmal Thakar ("Mr. Thakar") and his company were hired by 653, to manage the construction of the townhouses. Each of the three families transferred a relatively equal number of their 653 shares to Mr. Thakar with the understanding that the shares would be transferred back once Mr. Thakar's work was done. Specifically, Mr. Sangha gave 100 shares, 088 gave 100 shares, and Joginder gave 101 shares. Mr. Thakar did not pay for these shares. Mr. Thakar was also appointed a director of 653.
- [29] By December 2012, Mr. Sangha, Joginder, and Mohinder began voicing concerns about the close relationship between Mr. Thakar and Mr. Randhawa. The two were collaborating closely on the Townhouse Project and were making decisions, such as hiring contractors and tradespeople, without consulting the other shareholders. Specifically, 088, under the control of Mr. Randhawa, and Mr. Thakar collectively held 534 out of the 1000 issued shares in 653. The other shareholders therefore feared that the unilateral decision-making would sideline them.
- [30] In response to these concerns, Mr. Thakar transferred 90 shares to Mr. Randhawa and 90 to Mr. Sangha. No shares were returned to Joginder.
- [31] Around mid-2015, Mr. Randhawa discovered that Mr. Thakar had been taking money from the Townhouse Project and shared this information with the others. Following this revelation, the shareholders removed Mr. Thakar as a director and attempted to manage the project independently. 653 also pursued litigation against Mr. Thakar, though both Mohinder and Mr. Sangha strongly opposed initiating legal proceedings.
- [32] By late 2015, the relationship between the shareholders of 653 became strained. The shareholders were divided into two opposing factions about how the Townhouse Project should proceed.
- [33] The first group comprised of the Randhawa family. The Randhawa family wanted to move forward with phases 2 and 3 of the townhouse development. In contrast, the second group consisted of the Sangha and Khaira families including Joginder and Mohinder. The Sangha and Khaira families opposed continuing with the Townhouse Project, citing financial concerns, a breakdown in trust, and ongoing shareholder disputes.

- [34] By 2016, the financial situation of 653 was dire. 653 owed money to creditors and was paying for litigation against Mr. Thakar. In addition, the shareholders were struggling to agree on a price to sell the 12 townhomes which had been built in phase 1. The units were eventually sold between May and July 2016. However, the shareholders remained deadlocked regarding the future of the Townhouse Project.
- [35] Mohinder testified that on or about March 1, 2016, he and Mr. Randhawa had a highly contentious meeting where it was agreed that the two factions needed to separate. On March 2, 2016, Mohinder drafted a confidential selling proposal (the "Proposal") on behalf of the Sangha and Khaira families and presented the Proposal to the Randhawa family.
- [36] This began a protracted shareholder dispute between the parties and resulted in multiple lawsuits. I will not address the shareholder dispute further as they are not relevant to the claim before the court. Currently, 653 is owned on a 50/50 basis by Mohinder and Mr. Sangha.

Loan Agreements

- [37] Mrs. Randhawa bases her claim on two documents: the October 2011 Loan Agreement and the May 2012 Amendment. She asserts that these agreements establish that Joginder and GN Motors owe her \$1,014,000 plus 7% interest, which began to accrue on May 23, 2012, in accordance with the 2012 Amendment. She further asserts that the May 2012 Amendment creates a trust in her favour in relation to Joginder's shares in 653.
- [38] The Randhawa family had been lending money to Joginder and GN Motors for many years without any written documentation and Joginder had been repaying these loans on a regular basis. In 2011, Joginder started missing payments. In response, the Randhawa family took steps to formalize the loans.
- [39] Mrs. Randhawa asserts that meetings were held between Mr. Randhawa and Joginder to discuss the accounting and outstanding loans. These discussions culminated in the 2011 Agreement, signed October 10, 2011, at Mr. Thakar's office in the presence of Mr. Thakar, Mr. Randhawa, Mrs. Randhawa, and Joginder. Mr. Thakar signed the 2011 Agreement as a witness. Mrs. Randhawa asserts that Mohinder was also present, but the corroborating evidence does not support this claim.
- [40] As stated above, the 2011 Agreement stated that Mrs. Randhawa had lent Joginder a total of \$1,100,000, which was divided into three loans. The 2011 Agreement stated that Joginder would repay these loans as follows:

1. The Borrower agrees to repay Loan #1 by consecutive monthly instalments payable to the Lender on the 20th day of each month in the amount of \$1,160.00. The Lender acknowledges that the Borrower has already been making payments prior to the execution of this Agreement and that, provided the Borrower does not default on any future payments, the full amount of Loan #1 will be completed upon payment of the instalment due on January 20, 2020.
 2. The Borrower agrees to repay Loan #2 by consecutive monthly installments payable to the Lender on the 20th day of each month in the amount of \$2,363.00. The Lender acknowledges that the Borrower has already been making payments prior to the execution of this Agreement and that, provided the Borrower does not default on any future payments, the full amount of Loan #2 will be completed upon payment of the installment due on February 20, 2019.
- [41] Joginder's last payment to the Randhawa family occurred in December of 2011. In response to Joginder continuing to miss payments, the parties entered into the 2012 Amendment.
- [42] The 2012 Amendment, dated May 23, 2012, acknowledges a reduction in the combined principal balance of Loan #1 and Loan #2 from \$300,000 to \$214,000, and confirms the principal amount of Loan #3 as \$800,000, resulting in a total acknowledged principal indebtedness of \$1,014,000. The agreement provides for the restructuring and consolidation of the three loans into a single principal obligation of \$1,000,000, with the remaining \$14,000 designated as a separate obligation to be recovered independently.
- [43] The Borrower, Joginder, agrees to make monthly interest-only payments of \$5,833.33, based on the consolidated principal of \$1,000,000, commencing with the first payment due on July 20, 2012.
- [44] The Amendment further stipulates that Joginder shall pay arrears comprising six missed interest payments of \$5,833.33 each, covering the period from January 20, 2012, to June 20, 2012, together with the \$14,000 excess principal, all bearing interest at a rate of 7% per annum, with full payment to be made no later than December 31, 2012. The agreement then sets out the terms governing the repayment of the consolidated principal, including the interest rate, payment schedule, and other repayment conditions.
- [45] The 2012 Amendment was signed at Mr. Thakar's office, in the presence of Mr. Thakar, Mr. Randhawa, Mrs. Randhawa, Joginder, and Mr. Sangha. Mr. Thakar signed the 2012 Amendment as a witness. Mrs. Randhawa asserts that Mohinder was also present, but the corroborating evidence does not support this claim.
- [46] Ranee Khaira ("Ms. Khaira"), Joginder's ex-wife attended the signing of one of the two Loan Agreements, but it is unclear which.

- [47] The 2012 Amendment states that Joginder "agrees that all his shares in 653294 BC Ltd will be held in trust." Joginder further agreed that "when the development is complete and sold (For the properties at 6156 and 6138 - 138th Street, Surrey, BC) up to \$1,000,000.00 (One million dollars) goes first directly to the Lender from the value of all his shares in the company."
- [48] The Amendment also states that if Joginder's "shares are not worth \$1,000,000.00 whatever the shortfall is he will make an arrangement for that so that the Lender will get her loan of \$1,000,000.00 as a whole." Specifically, in the case of a shortfall, Joginder agreed to "secure the shortfall by way of mortgage on his residential property".
- [49] Mrs. Randhawa is the sole listed Lender on both Loan Agreements. She maintains that she was the sole lender of the funds; however, Joginder disputes Mrs. Randhawa's role in the loans as all his dealings regarding the loans were with Mr. Randhawa. The evidence does indicate that it was Mr. Randhawa who organized and managed the loans between Joginder and the Randhawa family.
- [50] Additionally, Joginder acknowledges signing the 2012 Amendment but denies agreeing to the terms and disputes the accuracy of the outstanding amount owed. He admits that he owed the Randhawa family some money but asserts that between 2002 and 2011 he repaid members of the Randhawa family a total of \$1,927,852.38 and that this money should be put towards reducing his indebtedness.

Promissory Notes and Share Transfer

- [51] Between October 2006 and June 2016, Mohinder lent Joginder and GN Motors \$727,802 (the "Mohinder Loans"). The defendants allege that these terms of the loans were recorded in two promissory notes; however, Mrs. Randhawa disputes the legitimacy of the promissory notes. Mrs. Randhawa argues that the notes were forged after the Share Transfer to justify the brother's actions.
- [52] Mohinder and Joginder both testified that the Mohinder Loans were generally given to support the business of GN Motors and/or to pay Joginder's proportionate contribution towards the expenses of 653.
- [53] Mohinder also testified that, at all times, Joginder was the owner and controlling mind behind GN Motors. Therefore, Mohinder did not distinguish between Joginder and GN Motors when lending money and that it was understood that any money lent to GN Motors would be repaid by Joginder. Joginder confirmed that he was personally responsible for the re-payment of the Mohinder Loans, regardless of whether the cheques were written to him, personally, or to GN Motors.

- [54] Joginder testified that in 2010, Mohinder asked Joginder to sign a promissory note to solidify the Mohinder Loans in writing. Mohinder told the court that he asked Joginder to formalize the loans due to the financial challenges of the Townhome Project. Due to the financial challenges, Mohinder began to get anxious about Joginder's ability to pay him back the money he owed.
- [55] On August 21, 2010, Joginder and Mohinder allegedly signed a promissory note (the "2010 Note") to secure the outstanding loans Mohinder provided. The 2010 Note stated that Joginder owed Mohinder a principal amount of \$343,777, with an annual interest rate of 3.50%. Joginder pledged his shares in 653 as security for the loan. The 2010 Note specified that if Joginder defaulted, the shares would be immediately transferred to Mohinder. Additionally, the 2010 Note stated that any future loans Mohinder made to Joginder would also be secured against the shares.
- [56] Both Mohinder and Joginder testified that the loan was secured against the shares because Joginder was using part of the loaned funds to pay the money he owed to 653.
- [57] On September 18, 2015, Joginder allegedly signed an updated promissory note to account for additional amounts loaned by Mohinder to Joginder (the "2015 Note"). The 2015 Note stated that the principal amount owed had increased to \$727,802. The 2015 Note reaffirmed that Joginder's shares in 653 secured the loan.
- [58] At the time when the 2010 Note and the 2015 Note (together, the "Promissory Notes") were signed, Mohinder asserts that he did not know about any loans between Mrs. Randhawa and Joginder. He also asserts that he had not read either the 2011 Agreement or the 2012 Amendment. He testified that he was unaware of their existence until he was added as a party to this proceeding in 2019.
- [59] It is Mohinder's position that in the fall of 2016, he grew concerned about his financial situation and demanded that Joginder either repay the Mohinder Loans or transfer him the 653 shares as outlined in the Promissory Notes.
- [60] As a result, on November 10, 2016, Joginder transferred 122 shares and assigned Mohinder the rights to an additional 101 shares that were being held by Mr. Thakar. The terms of the Share Transfer were outlined in a Share Transfer Agreement which was drafted and witnessed by Joginder's lawyers.
- [61] Mohinder testified that Joginder transferred his shares in consideration for the \$727,802 Joginder owed him pursuant to the Promissory Notes. This contradicts the Share Transfer Agreement which states "it is agreed that the shares shall be transferred for the price of \$1.00 CAD."
- [62] The Share Transfer Agreement also included the following relevant terms:

2. The transfer is absolute and includes all rights and obligations connected to the Shares including but not limited to all rights to dividends, capital and voting rights and for avoidance of doubt and dividends which are due but not yet paid will become due and be paid to the transferee.

[]

7. The Transferor warrants that he is not acting as a nominee or trustee and that no other rights exist in connection with the Shares.
8. The Transferor warrants that no charge or other obligation exists over the shares whether or not registered and they are completely unencumbered (excepting any obligation to payment of capital in the case of part paid shares).

[63] The evidence suggests that Mrs. Randhawa was neither aware of the Promissory Notes nor that Joginder had secured the loan from Mohinder against the same shares which she believed Joginder was holding in trust for her.

[64] Mrs. Randhawa therefore challenges the validity of the Promissory Notes and of the Share Transfer. Specifically, she alleges that the signatures on the Promissory Notes were not executed on the dates stated.

[65] However, if the Promissory Notes were signed on the dates set out therein, Mrs. Randhawa argues that Mohinder intentionally hid the fact that he was entitled to Joginder's shares by virtue of the Promissory Notes and that this silence amounts to misrepresentation.

ISSUES

[66] The following are the relevant issues in this case:

1. Is the testimony of the parties credible?
2. Is a portion of Mrs. Randhawa's claim time-barred based on the limitation period?
3. Without determining how much is owed, are the Loan Agreements made between Mrs. Randhawa and Joginder valid and enforceable?
4. If the loan agreements are valid, how much money does Joginder owe Mrs. Randhawa?
5. Are the Promissory Notes between Joginder and Mohinder valid and enforceable?
6. Did the Loan Agreements establish an Express Trust over Joginder's shares in 653?
7. Was the Share Transfer a fraudulent conveyance?
8. Did Mohinder and Joginder conspire to harm Mrs. Randhawa's interests when they completed the Share Transfer?
9. If the court finds in favour of Mrs. Randhawa, what is the appropriate remedy?

ANALYSIS

1. Credibility of the Parties

- [67] The parties present starkly contrasting accounts of their understanding of the loans and the amounts left owing. This is complicated by the fact that Mr. Randhawa managed the loan arrangements and is now deceased.
- [68] Mrs. Randhawa asserts that she was the sole lender of the funds and requests the repayment of loans that date back as far as February 2002. That being said, she could not provide the court with details about the terms of these loans, as she admits that the discussions regarding the loans occurred exclusively between Mr. Randhawa and Joginder.
- [69] Joginder disputes Mrs. Randhawa's claim and testified that the loans were provided by or on behalf of Mr. Randhawa. Joginder argues that he was never informed that Mrs. Randhawa was the actual lender and that he did not discuss the loans, or their terms, with Mrs. Randhawa.
- [70] These discrepancies are not simply differences in perspective or interpretation; they strike at the heart of the case. Resolving the claims therefore requires a thorough assessment of the credibility and reliability of the testimony and the documentary evidence provided by all relevant witnesses.
- [71] This is a civil case therefore the burden of proof rests with the plaintiff, Mrs. Randhawa. To be successful, she must establish her claim on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53 at para. 49. Where the burden shifts away from Mrs. Randhawa, the shift will be identified and addressed in the legal analysis that follows.
- [72] At the outset, it is important to distinguish between witness credibility and witness reliability. Credibility refers to the truthfulness or honesty of the witness's testimony, while reliability concerns the accuracy of their testimony. In this way, they are "related but distinct concepts": *L.M. v. K.M.*, 2022 BCSC 689 at para. 275.
- [73] Credibility and reliability are not "all or nothing concepts." The trier of fact may accept some, all, or none of a witness's evidence and may assign different weights to different parts of their testimony: *L.M.* at para. 276, citing *R. v. R.(D.)*, [1996] 2 S.C.R. 291, 1996 CanLII 207 (S.C.C.) at para. 93.
- [74] The trier of fact must therefore carefully evaluate the witness's evidence and determine whether the evidence aligns with the probabilities suggested by the surrounding circumstances and the entirety of the other admissible evidence: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), 1951 CanLII 252 (B.C.C.A.) at p. 357.

- [75] Courts may also consider factors such as the witness's ability to resist the influence of personal interest in altering their recollection, the consistency of the witness's evidence when compared to other independent and reliable evidence and when compared to other statements given by the witness, the general plausibility of the witness's account, and their demeanor in the witness box: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [76] Applying these principles to the facts of this case, I find that Joginder is neither credible nor reliable. His narrative frequently lacked coherence and plausibility. His testimony is also inconsistent with documentary evidence and is contradicted by the testimony of other witnesses and, therefore, does not align with the probabilities suggested by the surrounding circumstances.
- [77] Moreover, he repeatedly attempted to shift blame, deflect responsibility, and obscure his involvement in the financial and legal disputes at issue. In my opinion, his testimony displayed a clear pattern of self-preservation and was heavily influenced by his personal interest in avoiding liability.
- [78] These contradictions and inconsistencies significantly diminished the probative value of Joginder's evidence.
- [79] Mohinder, in contrast, was generally credible and reliable, though not without exceptions. His testimony was forthright and straightforward. On more than one occasion he provided candid admissions that were not in his self-interest. This honesty enhanced the court's confidence in his evidence, particularly regarding his financial contributions and involvement with Joginder and with 653.
- [80] Documentary evidence also supports Mohinder's claims that he loaned Joginder a substantial amount of money, and that doing so required personal sacrifices and borrowing from his in-laws.
- [81] That being said, Mohinder testified that he had no knowledge of the Loan Agreements between Joginder and the Randhawa family. I do not find this testimony to be credible as it lacked both consistency and plausibility. Further analysis of Mohinder's credibility will be addressed, below.
- [82] I find that Mrs. Randhawa's testimony was credible and that she is an honest witness; however, she is not wholly reliable as she has limited knowledge of the events surrounding the Loan Agreements. The evidence overwhelmingly indicates that Mr. Randhawa was the mastermind behind the family's financial dealings and that he provided Mrs. Randhawa with limited information, particularly concerning the details of Loan #3, which make up a significant part of the Loan Agreements.

- [83] Nevertheless, Mrs. Randhawa was honest and candid about what she personally observed and what she learned from her husband. This added to her credibility. In sum, while I do not question Mrs. Randhawa's honesty, her reliance on second-hand information impacted the overall reliability of her evidence.
- [84] The testimony of the secondary witnesses, while useful to provide additional context and some corroboration for the primary accounts, did not materially impact the court's findings on the primary issues.
- [85] I have relied on evidence from secondary witnesses only where their testimony was consistent with the broader factual framework and was corroborated by independent and reliable sources; therefore, additional observations on the credibility or reliability of secondary witnesses will be discussed where relevant in the legal analysis that follows.

2. Is a Portion of Mrs. Randhawa's Claim Time-Barred?

- [86] Based on the facts before the court, it is appropriate to first assess the defences put forward by the defendants.
- [87] The defendants argue that a portion of Mrs. Randhawa's claim is time-barred as the claim was brought after the statute of limitations had elapsed. I will address this argument first because if the claim is time-barred, then further analysis is unnecessary.

Relevant Facts

- [88] Mrs. Randhawa seeks to recover money that was originally lent to Joginder and GN Motors between 2002 and 2006.
- [89] The 2011 Agreement states that Mrs. Randhawa loaned Joginder the following amounts:
- (a) \$100,000.00 (hereinafter referred to as "Loan #1");
 - (b) \$200,000.00 (hereinafter referred to as "Loan #2"); and
 - (c) \$800,000.00 (hereinafter referred to as "Loan #3").
- [90] However, in Mrs. Randhawa's Affidavit #1, she states that the loans were comprised of a series of sub-loans.
- [91] She asserts that Loan #1 was made up of four separate sub-loans, given between July 2, 2002, and March 5, 2004, as follows:

Date

Recipient

Amount

July 3, 2002

Joginder Khaira

\$49,000

February 11, 2003

GN Motors

\$50,000

February 28, 2003

GN Motors

\$14,500

March 5, 2004

GN Motors

\$25,000

TOTAL:

\$138,500

[92] In the same Affidavit, she states that Loan #2 was made up of the following eight sub-loans:

Date

Recipient

Amount

February 24, 2002

GN Motors

\$3,000

February 24, 2002

GN Motors

\$22,000

March 8, 2002

GN Motors

\$22,000

March 8, 2022

GN Motors

\$8,000

July 3, 2002

Joginder Khaira

\$16,000

January 14, 2003

Joginder Khaira

\$60,000

February 12, 2003

GN Motors

\$50,000

February 13, 2003

GN Motors

\$50,000

TOTAL:

\$231,000

[93] Notably, while the above amounts and dates are included in Mrs. Randhawa's Affidavit #1, she admitted in her testimony that she does not really know which sub-loans comprised either Loan #1 or Loan #2. She stated that these amounts were calculated by Mr. Randhawa and Joginder in meetings prior to the signing of the 2011 Agreement; however, Joginder denied that these meetings took place.

[94] Counsel for Mrs. Randhawa indicated that Mr. Randhawa assisted in the drafting of Mrs. Randhawa's Affidavit #1 but, due to his passing, he is not here to corroborate this evidence.

Position of the Defendants

[95] Relying upon s. 3(5) of the former Limitation Act, R.S.B.C. 1996, c. 266 [Limitation Act], the defendants argue that Loan #1 and Loan #2 are statute barred.

[96] They argue that the limitation periods expired six years after the date on which the original sub-loans were granted. They also assert that given Mrs. Randhawa's inability to provide conclusive details about the sub-loans, she is unable to prove that any payments were being made against the sub-loans which would have renewed the limitation period.

Position of the Plaintiff

[97] Mrs. Randhawa did not make any substantial submissions on this issue other than to state that the limitation period was renewed by Joginder's continued payments and that the limitation period has therefore not expired.

Legal Principles

[98] The New Limitation Act, S.B.C, 2012, c. 13 [New Act], came into force on June 1, 2013, after both the Loan Agreements were executed.

[99] Section 30 of the New Act is crucial for understanding how limitation periods apply to debts incurred before the New Act came into force. Section 30 of the New Act reads as follows:

30 (1) In this section:

"effective date" means the day on which this section comes into force;

"former Act" means the Limitation Act, R.S.B.C. 1996, c. 266, as that Act read immediately before the effective date;

"former limitation period" means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date;

"pre-existing claim" means a claim

- (a) that is based on an act or omission that took place before the effective date, and
- (b) with respect to which no court proceeding has been commenced before the effective date.

(2) A court proceeding must not be commenced with respect to a pre-existing claim if

- (a) a former limitation period applied to that claim before the effective date, and
- (b) that former limitation period expired before the effective date.

(3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.

[Emphasis added.]

[100] The former Limitation Act therefore applies to the above-referenced loans as Mrs. Randhawa discovered the cause of action, at the latest, on July 20, 2012, when Joginder failed to make payments in accordance with the 2012 Amendment. Mrs. Randhawa's cause of action was therefore discovered prior to the New Act coming into force on June 1, 2023.

[101] Section 3(5) of that former Limitation Act therefore governs the limitation period for these debts. Section 3(5) reads as follows:

Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

[102] Mrs. Randhawa therefore had six years after the date on which the right to bring an action arose to bring a claim. That being said, this limitation period can be extended pursuant to s. 5 of the former Limitation Act, which reads as follows:

5 (1) If, after time has begun to run with respect to a limitation period set by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action only if the person

(i) acknowledges a cause of action, right or title of another, or

(ii) makes a payment in respect of a cause of action, right or title of another,

(b) an acknowledgment of a judgment or debt has effect

(i) whether or not a promise to pay can be implied from it, and

(ii) whether or not it is accompanied by a refusal to pay,

[Emphasis added.]

[103] Accordingly, Mrs. Randhawa was entitled to bring a claim for the repayment of Joginder's debt up to six years after the debt was incurred, a payment was made on the debt, or the debt was acknowledged - whichever of these actions came last.

Applying Legal Principles to the Facts of this Case

[104] Based on the former Limitation Act, the limitation period for the loans began running on the day the loans were made. The limitation period was then re-set every time Joginder either confirmed the existence of the debts or made payment towards the loan.

[105] Although, we do not have evidence about the exact payment terms of the sub-loans which were later consolidated into Loan #1 and Loan #2, these debts were acknowledged by both the 2011 Agreement and the 2012 Amendment. The 2011 Agreement stated that "The Lender acknowledges that the Borrower has already been making payments [towards both Loan #1 and Loan #2] prior to the execution of this Agreement".

[106] Although the sub-loans, which later became Loan #1 and Loan #2, were oral agreements with minimal documentation, the court reviewed both testimonial evidence and cheque records, which demonstrate that Joginder made at least 84 monthly payments toward Loan #1 and 95 monthly payments toward Loan #2.

- [107] These payments were made consistently over a period of seven or eight years, beginning at the approximate time the sub-loans were first loaned until December 2011, shortly after the signing of the 2011 Agreement. The amount of these regular payments remained consistent and unchanged throughout the years. Each of these payments effectively renewed the limitation period for the respective sub-loans, which was later consolidated into Loan #1 and Loan #2. Entering into the 2011 Agreement also constitutes an acknowledgement of the loan that resets the limitation period.
- [108] Joginder failed to make payments after December 2011. This precipitated the parties entering into the 2012 Amendment. As stated above, the 2012 Amendment acknowledged that Joginder had made 84 payments towards Loan #1 and 95 of payments towards Loan #2.
- [109] It is important to note that the repayment schedule set out in the 2012 Amendment was different than the payment schedule in the 2011 Agreement. In the 2012 Amendment, Loan #1 and Loan #2 were grouped together while the repayment terms for Loan #3 remained separate. Conversely, in the 2011 Agreement each of the three loans were addressed separately.
- [110] As stated above, the limitation period for claiming relief was renewed every time Joginder either acknowledged the loan or made a payment towards it - whichever action occurred last. Joginder's last relevant action occurred on May 23, 2012, when he signed the 2012 Amendment. This acknowledgement is sufficient to restart the limitation period.
- [111] In accordance with the 2012 Amendment, Joginder was required to make his first payment on July 20, 2012, but failed to do so. On July 20, 2012, he therefore breached the 2012 Amendment. This created a cause of action upon which Mrs. Randhawa could claim relief.
- [112] In accordance with s. 3(5) reads of the Limitation Act, Mrs. Randhawa had "6 years after the date on which the right to do so arose" to bring a claim. The limitation period to advance this claim would therefore be July 20, 2018, which is six years after her right to bring an action so arose.
- [113] Mrs. Randhawa commenced this proceeding on August 18, 2016, as a simple debt claim against Joginder and GN Motors.
- [114] Given the above, I reject the defendants' argument that Loan #1 and Loan #2 are time-barred. I find that the limitation periods for Loan #1 and Loan #2 were extended through Joginder's continual payments and acknowledgments of the debt, and that Mrs. Randhawa commenced proceedings within this extended limitation period.
3. Are the 2011 Agreement and 2012 Amendment Valid Contracts?
- [115] In their submissions, the defendants made several arguments that relate to the validity of the 2011 Agreement and the 2012 Amendment.

[116] Joginder eventually acknowledged signing both documents, in his testimony before the court, but he said that he did not agree to their terms. As a result, Mohinder argues that there was no consensus ad idem (meeting of the minds). Mohinder also argues that based on Joginder's testimony, it was clear that Joginder so fundamentally misunderstood the contents of the documents that the defence of non est factum applies. Lastly, he argues that the documents improperly attempt to formalize debts retroactively without offering any new, fresh, consideration.

Relevant Facts

[117] Both Mrs. Randhawa and Joginder testified that from approximately 2002, the Randhawa family informally lent money to Joginder and GN Motors. Generally, Mr. Randhawa would orchestrate these loans and would either transfer funds himself or have other immediate family members transfer the funds. The transactions were informal, agreed to orally, and most were not formally documented.

[118] While Mr. Randhawa managed the loan arrangements, Mrs. Randhawa claims she was the sole lender of the funds. As mentioned previously, Joginder disputes this, stating he only dealt with Mr. Randhawa and that he did not know Mrs. Randhawa was the source of the funds.

[119] As set out above, when Joginder started missing payments, the Randhawa family formalized the loans and entered into the October 2011 Loan Agreement and the subsequent May 2012 Amendment.

The October 2011 Agreement

[120] The parties agree that the 2011 Agreement was signed by Mrs. Randhawa and Joginder on October 10, 2011, at Mr. Thakar's office, in the presence of Mr. Thakar and Mr. Randhawa.

[121] As stated above, this agreement consolidated previous sub-loans, which had already been advanced to Joginder and GN Motors. It is undisputed that no new loans were advanced at the time the 2011 Agreement was signed.

[122] That being said, aspects of the 2011 Agreement are unclear. Notably, the agreement fails to expressly set out the interest rate payable on the loans; however, the payment amounts, and payment duration suggest that interest was owed.

[123] For clarity, Loan #1 was listed as being \$100,000. However, the agreement required a repayment of \$1,160 per month for 99 months. This means that the total repayment amount for Loan #1 was \$114,840. Similarly, Loan #2 was listed as being \$200,000, but required the repayment of \$2,363 per month for 88 months. The total repayment amount payable on Loan #2 was therefore \$207,944.

[124] Mrs. Randhawa testified that while she signed the 2011 Agreement, she also stated she:

- a) Did not know who drafted the agreement.
 - b) Could not identify the specific sub-loans which made up Loan #1, Loan #2, and Loan #3. Mrs. Randhawa asserts the amounts were calculated by Mr. Randhawa and Joginder in prior meetings, but Joginder denies that these meetings occurred.
 - c) Did not fully understand the agreement, as it was not fully translated to her, and she does not fluently read English.
 - d) Did not provide Joginder with anything of value at the time of signing.
- [125] During his testimony, Joginder admitted that he signed the 2011 Agreement, but stated he did so only because Mr. Randhawa threatened to halt the Townhouse Project if he refused to sign.
- [126] Joginder testified that he first saw the 2011 Agreement at Mr. Thakar's office and that it had been unilaterally prepared by Mr. Randhawa. He claimed he could not recall what transpired at the meeting but recalls expressing surprise at the contents of the document. He stated that he did not agree with the loan amounts and insisted on an accounting to determine what was owed. He testified that Mr. Randhawa assured him that an accounting would be conducted later, but such accounting was never performed.
- [127] Ms. Khaira corroborated Joginder's testimony and testified that she recalls attending a meeting at Mr. Thakar's office where Joginder signed a document under pressure. She stated that she recalls Mr. Randhawa threatening to delay or halt the Townhouse Project if Joginder did not sign. She stated that Joginder signed because "he had no option."
- [128] That being said, Ms. Khaira could not confirm whether the document signed was the 2011 Agreement or the 2012 Amendment. Mr. Thakar also noted that Ms. Khaira attended either the signing of the 2011 Agreement or the 2012 Amendment, but he was unsure which one. In either case, Ms. Khaira's evidence supports Joginder's claim that Mr. Randhawa acted coercively.
- [129] This claim is also supported by the testimony of Mohinder and Mr. Sangha, who both testified that Mr. Randhawa had a pattern of leveraging progress on the Townhouse Project to secure signatures on documents that he prepared. While both Mohinder and Mr. Sangha admitted to being on good terms with Mr. Randhawa, they also told the court that they had signed documents to avoid project delays.
- [130] Conversely, Mr. Thakar testified that he was present at both the meetings where the 2011 Agreement and the 2012 Amendment were signed. He confirmed that Joginder, Mr. Randhawa, and Mrs. Randhawa were in attendance, and that he witnessed Joginder and Mrs. Randhawa sign the agreement. He also stated that the terms of the agreement were discussed prior to signing.

- [131] Importantly, Mohinder testified that he was not aware of the terms, or even the existence, of the 2011 Agreement until he was added as a party to this proceeding in 2019. While Mrs. Randhawa says Mohinder was present when the 2011 Agreement was signed, Mr. Thakar did not include him in the list of attendees.
- [132] Mr. Thakar, Mohinder, and Mr. Sangha's evidence also confirms that Mohinder was largely absent from the business affairs of 653 in 2011. Mohinder's involvement did not increase until mid-2015. Based on the evidence, I accept that Mohinder did not attend the signing of the October 2011 Loan Agreement.

The May 2012 Amendment

- [133] The 2012 Amendment is dated May 23, 2012, and was signed by both Mrs. Randhawa and Joginder. It is unclear who drafted the agreements, but the defendants believe Mr. Randhawa is the likely author.
- [134] Mrs. Randhawa testified that the 2012 Amendment was signed at Mr. Thakar's office and that Mr. Sangha, Mr. Thakar, Mr. Randhawa, and Mohinder were also present. Mrs. Randhawa explained that the Randhawa family believed it was essential for all directors and shareholders of 653 to attend the meeting, so that everyone was fully informed about the amount Joginder owed her. They also wanted to ensure that all parties understood that, in case of default, Joginder's shares in the Townhouse Project would be used to repay the debt.
- [135] Mohinder disputes he was at this meeting and reiterated that he was unaware of either of the Loan Agreements until he was added as a party to this legal proceeding in 2019.
- [136] Mr. Thakar confirmed that he witnessed the signing of the 2012 Amendment. He clarified that Joginder, Mr. Randhawa, and Mrs. Randhawa were in attendance, but that Mohinder did not attend. He again noted that Ms. Khaira was present at one of the two signing meetings, but he was unable to specify which.
- [137] Similar to above, I accept that Mohinder was not present at the signing of the 2012 Amendment.
- [138] Mrs. Randhawa also testified that:
1. She does not know who drafted the May 2012 Amendment.
 2. The May 2012 Amendment was drafted because Joginder stopped making payments under the October 2011 Loan Agreement in December 2011.
 3. Joginder agreed to repay Mr. Randhawa and Mrs. Randhawa from his shares in 653.
 4. She did not provide Joginder with anything of value at the time of signing.

- [139] Regardless of who drafted it, there are some notable inconsistencies in the document. For example, the 2012 Amendment states that the "combined balance of the principal of loan #1 and loan #2 is \$214,000.00 as of December 20th, 2011."
- [140] In her testimony, Mrs. Randhawa stated that this amount was based on the 2011 Agreement; however, the 2011 Agreement states that the combined principal of Loan #1 and Loan #2 is \$300,000. Joginder made only a few payments between the signing of the 2011 Agreement and the signing of the 2012 Amendment, yet the combined principal balance supposedly decreased by \$86,000 during that period.
- [141] During cross-examination, Mrs. Randhawa was questioned about the discrepancy between the two documents. Mrs. Randhawa was unable to provide clarification but insisted that the matter had been discussed between Mr. Randhawa and Joginder.
- [142] During Joginder's cross-examination, he acknowledged that the language of the 2012 Amendment suggests that the amounts outstanding for Loan #1 and Loan #2 must have been less than \$100,000 and \$200,000, respectively, when the 2011 Agreement was drafted.
- [143] Initially, Joginder swore that he had not signed the 2012 Amendment and that the first time he saw the document was during litigation. However, he later admitted that he had signed it. Joginder now states that while his signature appears on the 2012 Amendment, he does not recall signing the Amendment and does not recall attending a meeting where the document was discussed.
- [144] He also takes the position that he did not agree to the terms of the 2012 Amendment, and more specifically that he did not agree to hold his shares in trust for Mrs. Randhawa or anyone else.
- [145] Conversely, Mr. Thakar confirmed that the 2012 Amendment was discussed between the parties before the document was signed, and that he witnessed Joginder and Mrs. Randhawa sign it. I therefore find that Joginder did attend the meeting and that he signed the 2012 Amendment.

Loan Repayment

- [146] There is a great deal of evidence before the court regarding the amount of money allegedly loaned and repaid; however, both parties agree that this evidence is not exhaustive.
- [147] Mrs. Randhawa was not able to provide evidence about the exact quantum or purpose of the sub-loans made to GN Motors and Joginder and I find that there is insufficient documentary evidence to fill that gap. However, the parties agree that additional loans may have been provided and that additional repayments were made, neither of which is reflected in the evidence before the court.

- [148] The lack of clear evidence is largely the result of the undocumented loan arrangements organized by Mr. Randhawa whereby money was inexplicably exchanged between Joginder and members of the Randhawa family. For example, in 2004, GN Motors made three cheques, totalling nearly \$7,000, payable to Mr. Randhawa's 13-year-old son. Ms. Sall and Ajeetpal also both testified that they would receive loan payments and sign cheques as instructed by their father.
- [149] In her testimony, Mrs. Randhawa acknowledged that Joginder repaid a significant amount of the money that was loaned to him and GN Motors.
- [150] Based on the evidence before the court, including a number of cheques and cheques stubs adduced by Joginder, I find that between 2002 and 2011 Joginder and / or GN Motors paid approximately \$1,900,000 to individuals and organizations at Mr. Randhawa's direction.
- [151] Joginder testified that in 2011, he and Mr. Randhawa discussed the amounts of the loans. Joginder told the court that during these meetings he requested clarification of the amounts he owed. He estimated that the overall debt owing was approximately \$100,000 to \$200,000 but stated that a full accounting was necessary due to the substantial flow of money between parties over the years.

Position of the Defendants

- [152] The defendants maintain that neither the 2011 Agreement nor the 2012 Amendment are valid contracts.
- [153] Specifically, Joginder argues that he signed the 2011 Agreement under pressure from Mr. Randhawa, who allegedly threatened to halt progress on the Townhouse Project if the agreement was not signed.
- [154] Joginder also claims to have no recollection of signing the 2012 Amendment, though he acknowledges that his signature appears on the document. Nevertheless, he states that the terms of the agreement were not discussed with him, and that he believed that the exact amount owing would be determined through a later accounting.
- [155] Lastly, Joginder told the court that he did not receive any tangible benefit in exchange for signing the 2011 Agreement or the 2012 Amendment, nor did he incur any new obligation that would constitute valid consideration. As a result, the defendants argue that the sub-loans were past consideration, and that any funds previously advanced could not properly serve as fresh consideration for either of the Loan Agreements.
- [156] As part of their argument concerning consideration, the defendants submit that the 2011 Agreement and the 2012 Amendment improperly sought to formalize contractual terms that were not agreed upon at the time the sub-loans were initially advanced. Specifically, the defendants argue that these later written agreements introduced repayment conditions and obligations that could not have been anticipated or contemplated by either party when the original loans were disbursed.

- [157] As part of their argument concerning consideration, the defendants submit that the 2011 Agreement and the 2012 Amendment improperly sought to formalize contractual terms that were not agreed upon at the time the sub-loans were initially advanced. Specifically, the defendants argue that these later written agreements introduced repayment conditions and obligations that could not have been anticipated or contemplated by either party when the original loans were disbursed.
- [158] To illustrate this point, the defendants highlight paragraph 3 of the 2011 Agreement, which requires Joginder to repay Loan #3 using proceeds from his proportionate share of each townhouse sold in the development project. They assert that, at the time the original loans were provided, neither party could have reasonably foreseen or intended that the loan repayments would depend on future real estate sales.

Position of the Plaintiff

- [159] Mrs. Randhawa argues that the 2011 Agreement and the 2012 Amendment are valid and enforceable contracts.
- [160] In response to the defendants' argument of lack of consensus ad idem and the defence of non est factum, Mrs. Randhawa contends that Joginder's claim that he misunderstood the agreements lacks credibility, particularly given the corroborating testimony from other witnesses and the presence of third parties who witnessed the signing of the documents. Mrs. Randhawa contends that the evidence presented by herself, and her witnesses, shows Joginder's clear understanding of the Loan Agreements and his intention to be bound by them.
- [161] Mrs. Randhawa further points to Joginder's testimony as proof that, regardless of his claims that he didn't know the quantum that he owed, he was aware that he owed money to the Randhawa family.
- [162] Mrs. Randhawa also directly disputes the defense of non est factum raised by Joginder. Mrs. Randhawa's position is that Loan Agreements were discussed, reviewed, and signed in meetings where Joginder was present.
- [163] Mrs. Randhawa highlights that despite Joginder's claim that he did not agree with the terms of the Loan Agreements, he acknowledged signing both documents.
- [164] She also alleges that the loan quantum listed in the Loan Agreements is the outcome of a thorough accounting process undertaken by Mr. Randhawa and Joginder. Mrs. Randhawa asserts that Joginder had ample opportunity to review the Loan Agreements and raise any concerns, but instead, he willingly signed the documents. Thus, confirming the debts and the parties mutual understanding of the amount owed.
- [165] On the issue of consideration, Mrs. Randhawa argues that both the Loan Agreements were supported by valid consideration, namely:

1. The sub-loans were merely formalized in the 2011 Agreement and 2012 Amendment, these agreements were therefore supported by the valid considerations of the funds which had already been advanced to Joginder.
 2. Mrs. Randhawa's decision to refrain from demanding immediate repayment of the outstanding amounts when Joginder began missing payments and her decision to grant Joginder time to repay the loan via a structured repayment term also constitutes valid consideration. Notably, upon signing the 2011 Agreement, the \$800,000 loan changed from a demand loan to a term loan, meaning it was not immediately payable but would be paid upon the occurrence of another event, such as the sale of townhouses.
 3. The release of GN Motors and Ms. Khaira from a separate promissory note that was agreed to by Joginder in February 2003 and constituted valid consideration.
 4. When Joginder signed the 2012 Amendment, Mrs. Randhawa reduced the interest on Loan #1 and Loan #2 from 12% to 7%. This reduction constituted fresh consideration.
- [166] Mrs. Randhawa therefore argues that the Loan Agreements were supported by fresh consideration and are therefore legally enforceable.
- [167] Nevertheless, in the alternative, Mrs. Randhawa relies upon *Rosas v. Toca*, 2018 BCCA 191, to assert that the parties' intention to be bound by an agreement, even without fresh consideration, is sufficient to create a valid contract, given that the Loan Agreements provided a practical benefit for both parties and did not result in unfairness. Therefore, even in the absence of fresh consideration, Mrs. Randhawa argues that the Loan Agreements are still valid and enforceable contracts.

Legal Principles

Meeting of the Minds (Consensus ad idem)

- [168] Consensus ad idem, or a "meeting of the minds," is a foundational principle in contract law that states, in order for a contract to be valid, both parties to a contract must have a mutual understanding and agreement on the essential terms.
- [169] The party asserting the existence of a binding agreement must prove, on a balance of probabilities, that there was the requisite meeting of the minds.
- [170] The test for whether there is a meeting of the minds does not focus on the parties' subjective intentions, but rather on whether the parties objectively conveyed their intention to contract to the outside world. As explained by the British Columbia Court of Appeal ("BCCA") in *Berthin v. Berthin*, 2016 BCCA 104:

[46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

The test for determining consensus ad idem at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term" [] The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23

[171] If a reasonable person would conclude that the parties agreed on a contract and its terms, then a contract is established at common law: *Witzke (Guardian ad litem of) v. Dalgliesh*, [1995] B.C.J. No. 403, 1995 CanLII 625 (B.C.S.C.), also indexed as *Witzke (Guardian of) v. Gliesh* at para. 59.

[172] In *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70 at paras. 17 and 18, the BCCA emphasized that while the primary tool for contractual interpretation is the language used in the agreement itself, the language should be considered in the context of the surrounding circumstances prevailing at the time of contracting.

[173] If the words of the contract, in their ordinary and natural sense, have only one reasonable interpretation, the inquiry ends there. However, if there are multiple reasonable interpretations, other factors, may be considered. For example, the court may consider the parties' conduct before and after the alleged agreement, any conversations between them, and any supporting or contradictory documentation: *Salminen v. Garvie*, 2011 BCSC 339, at para. 28; *Voitchovsky v. Gibson*, 2022 BCCA 428 at paras. 32-34.

[174] A contract can also be established if the outward actions and expressions of the parties indicate agreement, even if one party has a mistaken belief about the subject matter, provided there is no misrepresentation or concealment by the other party. In this way, the court's analysis focuses on an objective assessment of the parties' intentions and actions: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, 1969 CanLII 2 (S.C.C.).

The Defence of Non Est Factum

[175] Non est factum is a legal defense, which translates to "this is not my deed." If successful, the defence permits a person to disown a contract where they were fundamentally and genuinely mistaken about the essential nature of the document they signed, due to misrepresentation, deception, or a lack of understanding.

[176] The leading case on non est factum relied upon in British Columbia is *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 1982 CanLII 63 (S.C.C.).

[177] In *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752 at para. 100, the British Columbia Supreme Court ("BCSC") summarized the principles of non est factum as follows:

1. The burden of proving non est factum rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.
2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

[178] As expected, if a party is found to be careless and chooses not to fully or carefully read a contract, they may be disqualified from successfully invoking the defence of non est factum. For example, if a party is literate, capable, and had the opportunity to review the contract, it will be difficult for them to advance this defence: *Bank of Montreal v. Fraser*, 2013 BCSC 2328 at para. 44.

Sufficient Consideration

[179] Traditionally, a contract will not be found to exist unless some sort of consideration has been exchanged between the contracting parties.

[180] A frequently cited definition of consideration is set out in *Currie v. Misa* (1875), L.R. 10 Exch. 153 (Eng. Exch.), *aff'd* (1876) 1 App. Cas. 554 (U.K.H.L.): The definition reads as follows:

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given suffered, or undertaken by the other.

[181] The defendants rely upon the case of *Hawrish* to argue that neither the 2011 Agreement or the 2012 Amendment included the exchange of fresh consideration. For our purposes, *Hawrish* dealt with the enforceability of an oral agreement which was collateral to an existing written contract. In *Hawrish*, the appellant signed a written guarantee for Crescent Dairies Ltd.'s debts but alleged that an oral agreement purportedly limited his liability under that guarantee. The Supreme Court of Canada ("SCC") held that the oral agreement was unenforceable because it contradicted the clear terms of the written contract and lacked fresh consideration.

- [182] The SCC also determined that in order for a contract to be valid, fresh consideration must exist at both the time of contract formation and at the time of any subsequent contractual modifications. Therefore, any party seeking to modify a contract must be prepared to demonstrate fresh consideration to support the modification, or otherwise the original terms will prevail. This is the traditional approach to consideration.
- [183] However, in the landmark case *Rosas*, the BCCA modified the approach to consideration in the context of contractual modifications.
- [184] In *Rosas*, Ms. Rosas won a significant lottery prize and loaned \$600,000 interest-free to her friend, Ms. Toca, to help her and her husband purchase a home. They originally agreed that the loan would be repaid within one year; however, after the first year, Ms. Toca requested several extensions for repayment. Each time Ms. Toca promised "I will pay you next year."
- [185] Ms. Rosas agreed to these extensions and refrained from taking legal action each time. Despite repeated promises, Ms. Toca never repaid the loan. After seven years, Ms. Rosas filed a lawsuit seeking repayment.
- [186] The trial judge ruled that the original loan term was for one year and that the subsequent promises to extend the repayment deadline were unenforceable as Ms. Toca was already obligated to repay the loan and the modifications therefore lacked fresh consideration. Given this ruling, the judge held that the limitation period had expired before Ms. Rosas filed her claim.
- [187] The BCCA overturned the trial decision and found that the law of consideration should be adapted to reflect the parties' intentions. The BCCA concluded that modifications to existing agreements, such as extensions in repayment timelines, should be enforceable without the need for fresh consideration, provided there is no evidence of duress, unconscionability, or unfairness.
- [188] In short, the BCCA held that, in the context of modifying an existing agreement, the requirement for fresh consideration could be relaxed if:
1. The parties mutually agree to the modification.
 2. The modification is intended to be binding.
 3. There is no evidence of coercion or unfairness.
- [189] Following *Rosas*, Canadian courts have shown flexibility regarding consideration for contract modifications, especially when parties seek to adapt their agreements to changing circumstances, but do not renegotiate every term.
- [190] The flexibility allows courts to uphold contract modifications if one party receives a practical benefit, even if it is not technically fresh consideration. For example, a court may uphold an agreement whereby a creditor accepts a lesser sum of money in exchange for timely payment, even though the creditor is not providing fresh consideration.

[191] Rosas is the leading authority in British Columbia, and I am bound to follow it.

Applying Legal Principles to the Facts of this Case

Meeting of the Minds (Consensus ad idem)

[192] As explained above, courts use an objective test to determine whether there was consensus ad idem. The focus is on what a reasonable person would understand the parties' intentions to be, based on their words and actions, rather than on the parties' subjective state of mind.

[193] This court must therefore evaluate whether a reasonable person, considering the external expressions and conduct of both parties, would have believed that a binding agreement existed between them. To do this, I will examine the key events and interactions surrounding the disputed Loan Agreements.

[194] Joginder eventually acknowledged signing both the 2011 Agreement and 2012 Amendment but claimed that he did not agree to their terms.

[195] The mere act of signing a document typically signifies acceptance of its terms, unless evidence suggests otherwise. Joginder signed the documents in the presence of witnesses. These witnesses confirm that Joginder did not immediately dispute the terms set out within either of the Loan Agreements.

[196] If Joginder had legitimate concerns about the terms or lacked understanding, it would have been reasonable for him to voice those objections before signing the document and to not sign the documents. A reasonable person observing the situation would therefore conclude that he intended to be bound by the Loan Agreements.

[197] The evidence establishes that Mr. Randhawa and Joginder maintained a longstanding financial relationship involving multiple loans granted over the course of many years. I also accept Mrs. Randhawa's testimony that Mr. Randhawa and Joginder met to determine the outstanding balance on these the Loan Agreements prior to signing. This indicates a shared understanding of the key terms.

[198] After signing the 2011 Agreement, Joginder also made some payments according to its terms. Joginder's partial performance of the contract would lead a reasonable observer to believe that he accepted the terms of the 2011 Agreement.

[199] Joginder stopped making payments in December 2011. To get the arrangement back on track, the parties signed the 2012 Amendment, which reaffirmed Joginder's obligation to repay Mrs. Randhawa. Joginder also committed to repaying her from the first sale proceeds he received as a shareholder of the Townhouse Project, based on his proportionate share of each lot sold in the development. This reaffirming of outstanding loans would also lead a reasonable bystander to believe that there was a binding agreement between the parties that required Joginder to repay Mrs. Randhawa.

- [200] After applying the objective test to the facts of this case, I find that a reasonable person would conclude that there was a binding agreement between the parties. Despite Joginder's assertions of misunderstanding, his conduct in signing the 2011 Agreement, making partial payments in accordance with its terms, and then reaffirming the loans in the 2012 Amendment, demonstrates outward behavior that is consistent with accepting the contractual terms.
- [201] The objective evidence points towards the existence of consensus ad idem, and I therefore find that the parties had a meeting of the minds at the time of contracting. This supports the enforceability of the Loan Agreements.

The Defence of Non Est Factum

- [202] Joginder acknowledged in his testimony that he signed both Loan Agreements. He contends that while he did not misunderstand the nature of these documents, he did not agree to the specific loan amount set out therein.
- [203] I find that the testimony of other witnesses contradicts Joginder's claim. For example, Mr. Thakar testified that the terms of the 2011 Agreement were discussed in detail during the meeting, and Joginder confirmed the debt owing before signing.
- [204] Additionally, Mrs. Randhawa testified that the Loan Agreements were intended to formalize pre-existing loans, and her evidence indicates that the loan amounts were calculated and agreed upon by Mr. Randhawa and Joginder prior to the meeting's discussions.
- [205] In this case, there is also no evidence of misrepresentation or coercion to support Joginder's claim. His signature on the documents was a deliberate and voluntary act. While Joginder claims he was unaware of the terms of the agreements, his failure to read the documents or seek clarification before signing them demonstrates carelessness, not misunderstanding.
- [206] The Court must also consider Joginder's lack of credibility. He originally denied signing the Loan Agreements, but later changed his position. This undermines his claim. Moreover, the fact that he continued to make payments under the 2011 Agreement contradicts his assertion that he did not agree to its terms.
- [207] In addition, courts have consistently held that non est factum does not apply when a party understands the general nature of the document but disagrees with its specific terms. As an example, in *Farrell Estates Ltd.*, the BCSC emphasized that to invoke non est factum, the document must be fundamentally different from what the signatory believed they were signing. A signatory cannot simply evade their obligation to perform by raising a disagreement with the terms or conditions of the contract.

[208] Joginder's objection relates to the amount owed, not to the fundamental nature of the documents. Even if there was proof to support his claim, which there is not, the claim does not meet the criteria for non est factum.

[209] Based on the above, I find the defense of non est factum is not available.

Sufficient Consideration

[210] The defendants assert that Mrs. Randhawa did not provide any fresh consideration when executing the Loan Agreements. They rely upon Hawrish to support the argument that any modification to a written agreement must be supported by fresh consideration and cannot rely on past obligations.

[211] The evidence establishes that the sub-loans between Joginder and the Randhawa family were based on oral agreements. It is undisputed that money was lent and repayments were made through a steady exchange of cheques. These oral agreements were later formalized via the 2011 Agreement, which acknowledged the existing debts and outlined repayment terms.

[212] The evidence, including Joginder's testimony, confirms that the written 2011 Agreement was not intended to alter the terms of the original oral agreements. Rather, it served to document and structure the obligations that had already been established. There is no indication that the 2011 Agreement introduced new obligations beyond what was previously agreed upon.

[213] Since the sub-loans were based on actual money lent by the Randhawa family, valid consideration was clearly exchanged at the time of the oral agreements. The written 2011 Agreement did not change this consideration but merely recorded and formalized the debt. Under the Rosas principle, a written agreement that acknowledges a pre-existing debt does not require fresh consideration, as it simply reaffirms the parties' prior obligations.

[214] This proposition is also supported by *Wilburn Properties Inc. v. Silver Peak Resources Ltd.*, 2001 BCSC 1084 [Wilburn]. In this case, the BCSC found that a written contract which was executed after funds were advanced was still enforceable because the subsequent written document was understood to be part of the original agreement. Similarly, in this case, the written 2011 Agreement merely documented the pre-existing loan obligations.

[215] At para. 80 of Wilburn, when discussing the distinction between past consideration and executed consideration, the BCSC relied on the following passage from *Fridman, The Law of Contract*, 4th Ed. at p. 118:

Consideration is said to be executory when it consists of a promise to do, pay, or give something in the future as, for example, if A agrees that he will pay B in return for something from B.

Consideration is said to be executed when it consists of the performance of some act by a party, for example, when there is a promise which is given in consideration of A's services to B. From these, valid kinds of consideration must be distinguished past consideration which will not

suffice to support a promise and create an enforceable contract. Hence, executed consideration must be differentiated from past consideration (although the two appear to resemble each other). The test would seem to be whether the act, which is the consideration, and the promise dependent upon such act are part and parcel of the same transaction. Thus, if A promises to pay B if and when B produces A's lost dog, the consideration, namely, the production of the dog by B, is executed; but if B first produces the dog and then A promises to pay B in consideration of B's having already produced the dog, the consideration is past.

The point at issue here is that, if there is to be a valid, enforceable contract, the promises, or the promise in the act, must have been exchanged in return for each other. If something is done first and then there is a promise relating to such act or a performance, the two are not tied together by the notion of agreement. One thing has not necessarily been done in consideration of the other. In consequence, anything promised as a result of the past performance of the act in question is simply promised gratuitously not in a binding contractual way. There is no mutuality between the act of performance and the subsequent promise from the recipient of the benefit of the act of performance.

[Emphasis added.]

- [216] The key legal principle is that if an act (such as lending money) and the promise (such as repayment) are part of the same overall transaction, then no additional fresh consideration is needed when an oral agreement is later documented in writing.
- [217] Given the circumstances, I find that the 2011 Agreement is distinguishable from the strict requirements for fresh consideration articulated in *Hawrish*. As the written formalizing of an oral agreement, the 2011 Agreement is legally enforceable in accordance with the precedent set in *Wilburn*. The absence of fresh consideration does not render the contract unenforceable.
- [218] Mrs. Randhawa also argues that in *Rosas* the BCCA decided that fresh consideration is not necessary to modify an existing contract unless there are factors such as duress, unconscionability, or other public policy concerns. While she argues that the Loan Agreements were supported by fresh consideration, she also states that the Loan Agreements would still be enforceable absent fresh consideration.
- [219] In *Rosas*, the BCCA found that parties who are already in a contractual relationship and choose to modify their contract to adapt to changing circumstances are able to do so without the requirement of additional consideration. Bauman C.J.B.C. stated:
- [183] When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative.

- [220] Joginder asserts that he signed the Loan Agreements under duress. Mrs. Randhawa disputes this assertion.
- [221] The test for duress was established in *Pao On v. Lau Yiu Long*, [1979] 3 All. E.R. 65 (P.C.), [1980] A.C. 614, and was recognized and adopted as the standard for duress in British Columbia in *Bell v. Levy*, 2011 BCCA 417.
- [222] In *Pao On*, duress is defined as coercion of the will that invalidates consent. He emphasized that mere commercial pressure is not enough to establish economic duress. Factors such as the absence of protest, the availability of alternative courses of action, independent advice, and subsequent steps taken to avoid the contract are relevant in determining whether there was true consent.
- [223] Mrs. Randhawa argues that, in alignment with Mr. Thakar's testimony, Joginder did not protest, disagree, or make any notation indicating disagreement during the signing of the Loan Agreements. As further evidence, she argues that Joginder did not take any action to disown the Loan Agreement for more than five years and that he only raised the issue of duress after she initiated litigation.
- [224] In his testimony, Mr. Thakar gave evidence indicating that there was no pressure placed upon Joginder when he signed either the 2011 Agreement or 2012 Amendment. He testified that there was no protest or disagreement at the time of signing and that Joginder explicitly confirmed to him that he did owe the money.
- [225] Mr. Thakar stated that, if Joginder had not wanted to sign the documents, he could have left the meeting without signing them. According to Mr. Thakar, the Randhawa family held a minority share in the Townhouse Project and would not have been able to stop the development even if Joginder had refused to sign.
- [226] In his evidence, Joginder acknowledged that he owed money to the Randhawa family, although he stated he is unsure of the exact amount.
- [227] Given the evidence before the court, I find that Joginder did not sign the contract under duress. The issues of unconscionability, or other public policy concerns were not raised by the parties.
- [228] The 2012 Amendment provided Joginder with a practical benefit by reducing the combined amount owing under Loans #1 and #2, as well as offering a more favourable interest rate on his repayment obligations. In turn, Mrs. Randhawa benefited from having Joginder's debt clearly formalized and secured within a structured repayment plan.
- [229] Accordingly, I find that, in accordance with *Rosas*, the modifications to the contract which occurred in the 2012 Amendments did not require fresh consideration and if it did, the mutual practical benefits constitute sufficient consideration.

[230] While I have found that the 2011 Agreement merely documented pre-existing obligations rather than introducing new ones, if I am wrong and additional terms were introduced in the 2011 Agreement, I would nevertheless find that, in accordance with Rosas, the contractual modification did not require fresh consideration.

[231] Consequently, I find that both Loan Agreements were supported by proper consideration.

What about the Promissory Notes?

[232] In response to the defendants' arguments, Mrs. Randhawa challenged the consideration for Mohinder's alleged Promissory Notes.

[233] The defendants assert that the Promissory Notes do not suffer from the same frailties because Promissory Notes are governed by the Bills of Exchange Act, R.S.C., 1985, c. B-4, [BEA]. Section 52(1)(b) of the BEA states that an antecedent debt, other wise known as a pre-existing debt, may constitute valuable consideration.

[234] While the BEA may govern the Promissory Notes, it does not alter the consideration analysis for the Loan Agreements, which are governed by general contract law. The validity of the Promissory Notes therefore does not impact the analysis of the Loan Agreements and is not relevant at this stage of analysis.

Conclusion on the Valid of the Loan Agreements

[235] Based on the evidence and legal principles discussed, I find that:

1. The oral loan agreements were supported by valid consideration in the form of money lent by the Randhawa family to Joginder and/or GN Motors.
2. The 2011 Agreement did not introduce new obligations but merely formalized the pre-existing debt, thus making the agreement enforceable under Wilburn.
3. Both the 2011 Agreement and the 2012 Amendment are enforceable within the Rosas framework.
4. Joginder's claim of duress is not supported by the evidence, as he neither protested at the time of signing nor raised any objections for several years. Witness testimony further confirms that he was not coerced into signing.
5. Both the 2011 Agreement and 2012 Amendment are valid and enforceable.
6. The validity of the Promissory Notes is a distinct legal question that does not impact the validity of the Loan Agreements.
4. How Much Money, if Any, Does Joginder Owe Mrs. Randhawa?

[236] Given that I have found both the Loan Agreements to be valid and enforceable, Joginder's failure to make the required payments constitutes a breach of contract.

- [237] The Loan Agreements required Joginder to make regular payments against the debt; however, they also anticipated the possibility that Joginder might be unable to repay the amount owed. The Loan Agreements provided that, in such an event, the outstanding debt would be repaid from his other assets and/or his proportionate share of the sale proceeds for the Townhouse Project.
- [238] Despite this structured repayment plan, Joginder has not made any payments to Mrs. Randhawa since December 2011. Joginder's failure to fulfill his repayment obligations--whether via scheduled payments, his other assets, or his profits from the Townhouse Project--constitutes a clear breach of contract.
- [239] The 2012 Amendment specifies that Joginder owed \$1,014,000, with interest accruing at a rate of 7%. This interest began accruing on May 23, 2012, when the 2012 Amendment was signed. Mrs. Randhawa seeks the repayment of this amount.

Relevant Facts

- [240] The evidence indicates that, the Randhawa family began loaning money to Joginder and GN Motors in 2002. Despite this, Mr. Randhawa showed no interest in formalizing the sub-loans until 2010.
- [241] Mrs. Randhawa testified that in 2010, before entering into the written Loan Agreements, Mr. Randhawa and Joginder spent two days reviewing "every cheque" to calculate what had been paid and how much remained owing on the various sub-loans. Conversely, Joginder stated that these meetings did not occur.
- [242] As stated above, the 2011 Agreement states that Loan #1, Loan #2, and Loan #3 are valued at \$100,000, \$200,000, and \$800,000, respectively. The instalments payable with respect to Loan #1 and Loan #2 suggest that interest is payable, although no interest rate is stated.
- [243] As briefly discussed above, the 2012 Amendment indicates that the "combined balance of loan #1 and loan #2 is \$214,000.00", reduced from \$300,000 listed in the 2011 Agreement. The 2012 Amendment also clarifies the payment terms and included the following term:
2. The Borrower agrees that he will pay the amount of \$5,833.33 per month (interest only) for the amount of \$1,000,000.00 (\$800,000.00 for loan #3 plus \$200,000.00 from loan #1 and loan #2) with the interest rate of 7% since December 20th, 2011 and start the first payment on July 20th, 2011.
 3. The Borrower agrees the amount of \$35,000.00 (Total of 6 payments \$5,833.33 from January 20th, 2012 to June 20th, 2012) plus the \$14,000.00 with the interest at 7% will be paid before December 31st, 2012.
- [244] The facts surrounding Loan #1 and Loan #2 are fairly clear. These loans are the outcome of the amalgamation of a number of sub-loans which were loaned to Joginder and GN Motors beginning in 2002.

- [245] Conversely, the facts related to Loan #3 are not as straightforward. Mrs. Randhawa's evidence indicates that the \$800,000 loan flowed from the proceeds of what she refers to as the "Taxicab Case."
- [246] The facts of the Taxicab Case are as follows. In 1993, Mr. Randhawa and Mrs. Randhawa invested, solely under Mrs. Randhawa's name, in 420413 B.C. Ltd. (the "Parent Company"), which owned Central Valley Taxi Ltd. Central Valley Taxi Ltd. operated a taxi company.
- [247] In 2003, Mrs. Randhawa commenced an oppression proceeding in respect to her shareholdings in that investment. Mrs. Randhawa asserted that other shareholders misappropriated an estimated \$3,000,000 from the Parent Company and that, in order to avoid paying taxes, the funds were not declared to the Canada Revenue Agency (the "CRA").
- [248] Counsel agreed that the following paragraph accurately summarizes the allegations in the Taxicab Case, as set out in *Randhawa v. 420413 B.C. Ltd.*, 2007 BCSC 1507, aff'd 2009 BCCA 602, leave to appeal to SCC ref'd, 33590 (May 13 2010):
- [3] This litigation began on October 31, 2003 when Mrs. Randhawa, a director of each of the corporate defendants and a 20% shareholder of the Parent Company, filed a petition alleging that the personal respondents (now defendants) breached their duties to her by improperly and secretly diverting income from the defendant taxi businesses and failing to account for it between 1994 and 2004. The defendants, other than Simerdeep Sumra, (collectively the "Kang Group") admit that they took cash from the taxi businesses between 1994 and 2002 but say that the Randhawas acted in concert with them and shared equally in those monies. Indeed, they assert that the unlawful diversion was done at the direction and on the advice of Mr. Randhawa, who was the architect of that scheme.
- [249] In 2006, a portion of the litigation surrounding the Taxicab Case was settled for approximately \$972,166 (the "Settlement Funds"). A portion of this Settlement Funds bought out Mrs. Randhawa's interest in the Parent Company. The Settlement Funds were paid in trust to the law firm Harper Grey LLP.
- [250] Mrs. Randhawa testified that in April 2006, she and Mr. Randhawa instructed Harper Grey to transfer the Settlement Funds directly to GN Motors.
- [251] In April 2006, this payment was made through two cheques: one for \$481,927 and the other for \$490,239. The cheques were annotated as "shareholder loan repayment" and "share purchase". Copies of these cheques were entered in evidence. Mrs. Randhawa could not explain these annotations but confirmed that Mr. Randhawa directed the lawyers regarding the funds.
- [252] Joginder testified that he and Mr. Randhawa entered into an arrangement whereby Mrs. and Mr. Randhawa would transfer the Settlement Funds to GN Motors and, in turn, GN Motors would use part of those funds to pay Mrs. and Mr. Randhawa's legal and accounting bills, as directed by Mr. Randhawa.

- [253] The evidence supports the assertion that on multiple occasions GN Motors repaid debts owed by Mr. Randhawa. For example, throughout 2006 and 2007, GN Motors paid \$497,093 to Harper Grey, on behalf of the Randhawa family, and paid \$83,892 to the Randhawa's accountants.
- [254] During cross-examination, Mr. Sangha also indicated that GN Motors repaid him on behalf of Mr. Randhawa for a separate, unrelated, personal loan that he had extended to Mr. Randhawa.
- [255] In the 2011 Agreement, Joginder agreed to pay monthly interest of \$4,000 on an \$800,000 loan. Notably, evidence indicates that he had already been making identical \$4,000 monthly payments to the Randhawa family as early as April 2006, shortly after Harper Grey issued cheques to GN Motors. These payments, totaling \$240,000 by December 2011, were not formally documented at the time but align precisely with the terms later set out in the 2011 Agreement--suggesting they were made in relation to the same \$800,000 loan.
- [256] Additionally, GN Motors made lump sum payments totaling \$212,000 to the Randhawa family, which included paying \$102,000 to Ms. Sall and \$110,000 to Mr. Sangha (in instalments of \$50,000 and \$60,000, respectively).

Position of the Defendants

- [257] Broadly, the Defendants dispute that the Loan Agreements accurately reflect the amount owed to Mrs. Randhawa.
- [258] It is Mohinder's position that based on the evidence, the total loan amount is unknown and is therefore subject to judicial determination. He argues that while Mrs. Randhawa takes the position that the 2012 Amendment reflects the underlying 2011 Agreement, he submits this is far from clear given that the interest rate is not specified in the 2011 Agreement. He argues that to have accurately calculated the amount owing in 2012, one would have to know the interest rate that had been applied to the 2011 loans, but that the interest rate was not specified in this case.
- [259] Mohinder also argues that the record of loans and payments, while incomplete, supports the notion that the amount owed is less than the amount listed in the Loan Agreements.
- [260] To support this proposition, Joginder testified that between 2002 and 2011 he paid a total of \$1,900,000 to the Randhawa family, either directly or via payments to their lawyers and accountants. While he acknowledged that, at the time of trial, he owed some money to the Randhawa family, he disputed the claim that the amount is anywhere near \$1,000,000. He estimated his remaining debt to be between \$100,000 and \$200,000.
- [261] Joginder also disputes the assertion that, prior to entering into the Loan Agreements, he sat down with Mr. Randhawa to calculate the amount owing.

[262] Joginder also takes particular issue with Loan #3. He asserts that, with respect to Loan #3, the oral agreement between himself and Mr. Randhawa was as follows:

- a) Mrs. Randhawa and Mr. Randhawa would direct Harper Grey to provide the Settlement Funds to GN Motors.
- b) GN Motors would pay Mrs. Randhawa and Mr. Randhawa's legal and accounting bills related to the Taxicab Case.
- c) At the direction of Mr. Randhawa, GN Motors would make payments to Mr. Randhawa, Mrs. Randhawa, and their children.

[263] Joginder argues the purpose of this arrangement was to hide the Settlement Funds from the CRA and from potential creditors. Specifically, part of the Settlement Funds flowed from the sale of Mrs. Randhawa shares in the Parent Company. Joginder alleges that Mr. Randhawa wanted to avoid paying capital gains on the sale of these shares.

[264] Joginder therefore asserts that since Mr. Randhawa's intent was to conceal the funds within GN Motors that the loan is invalid via the doctrine of *ex turpi causa*, which prohibits an individual from profiting from their own wrongdoing.

[265] Joginder confirmed that GN Motors did pay Mr. and Mrs. Randhawa's legal and accounting bills, though he acknowledged that it was possible that one of these payments was made using additional, unrelated, funds provided to him by Mr. Randhawa. The court received no further details on this additional financial arrangement.

[266] Joginder also testified that GN Motors used some of the Settlement Funds for its business operations, including to purchase pre-owned motor vehicles.

Position of the Plaintiff

[267] Mrs. Randhawa seeks enforcement of the three distinct loans, as set out in the Loan Agreements signed by Joginder. Based on the Loan Agreements, she argues that she is owed \$1,014,000, plus interest.

[268] In relation to Loan #3, Mrs. Randhawa testified that prior to providing the Settlement Funds to GN Motors, Mrs. and Mr. Randhawa met with Joginder and Ms. Khaira at GN Motors to discuss the loan.

[269] Mrs. Randhawa told the court that during a car ride to Harper Grey's office, Joginder specifically promised her that he would return the funds shortly. Mrs. Randhawa told the court that she had wanted to use the funds to purchase a new home, but that Mr. Randhawa told her that Joginder needed the funds to assist Ms. Khaira in opening her new boutique, an assertion that Ms. Khaira denied in her testimony. She told the court that she had secured her own financing independently and didn't require any further assistance.

Legal Principles

[270] The court must determine how much is owed to Mrs. Randhawa, if anything.

[271] Counsel referred the court to an excerpt from the Canadian Encyclopedic Digest which helpfully summarized how a court can determine the quantum owed between a creditor and a debtor. The excerpt read as follows:

§67 The court may be called upon to exercise judicial discretion, on the basis of commercial custom or similar evidentiary bases, to determine the value of the account to be settled between a creditor and a debtor. For an account to constitute an account stated, it is not necessary that a definite balance be struck on mutual accounts between the parties. It is sufficient if there is an admission of an existing indebtedness. The admission may be expressed or implied, and need not specify any definite amount, provided the amount can be ascertained by extrinsic evidence.

§68 To support an account stated, it is necessary to show a mutual understanding between plaintiff and defendant as to a balance struck or sum admitted, but it is not necessary that it be stated in writing. An account stated is an admission of a sum due by the defendant to the plaintiff -- an absolute acknowledgement of a debt due between the parties at the time of the action made by one party to the other or his or her agent.

§69 A settled account is only prima facie evidence of its correctness. It may be impeached by proof of unfairness or mistake in law or in fact. If a person, by stating an account with another, admits a sum due by him or her, it is immaterial on what account the debt arose, so long as there was nothing illegal in the transaction.

Canadian Encyclopedic Digest on Debtors and Creditors

[272] In practical terms, I must determine whether there is enough evidence to recognize an account stated between Mrs. Randhawa and Joginder. I may rely on commercial practices or similar evidence to assess the account's value. It is not necessary for both parties to have explicitly agreed on a specific balance; an acknowledgment of debt, either expressed or implied, is enough if the exact amount can be determined through external evidence.

[273] As highlighted above, Mrs. Randhawa seeks enforcement of the Loan Agreements signed by Joginder, which encompass three distinct loans. It is necessary to address Loan #3 separately from the other loans.

Loan #1 and Loan #2

[274] The 2011 Agreement states that Loan #1 was valued at \$100,000 and Loan #2 at \$200,000, for a total principal of \$300,000. However, the 2012 Amendment subsequently reduced the combined balance owing on these two loans to \$214,000. Neither party challenged or questioned this adjusted figure at the time the 2012 Amendment was signed.

- [275] As explained above, Loan #1 and Loan #2 are amalgamations of many sub-loans. Substantial evidence has been put before the court about the nature of these sub-loans. These transactions were not challenged in court, and no credible evidence has been presented to dispute the accuracy of the financial record.
- [276] Based on the parties' freedom of contract, and in the absence of evidence to the contrary, I accept that the amounts set out in the final contractual agreement, that being the 2012 Amendment with respect to Loan #1 and #2, is an accurate reflection of the amount owing.
- [277] Given my finding that the Loan Agreements constitute valid and enforceable legal contracts, I find that the \$214,000 agreed upon by the parties in the 2012 Amendment is a valid and enforceable debt.
- [278] The evidence suggests that no further payments were made after the 2012 Amendment was signed. Therefore, I find that Joginder owes Mrs. Randhawa \$214,000 which flows from Loan #1 and Loan #2.

Loan #3

- [279] The circumstances surrounding the third and largest loan are highly complex, and the court does not have a detailed financial record on which to rely. Mrs. Randhawa retains the burden of proving the quantum of outstanding debt owed.
- [280] The evidence before the court confirms that Mr. and Mrs. Randhawa directed the Settlement Funds, totaling \$972,166, to be paid directly to GN Motors. The annotations on the cheques suggest the money was provided to repay a non-existent shareholder loan.
- [281] Based on the testimony of Joginder, this financial transfer was intended to protect the Randhawa family's assets from creditors in the event of a bankruptcy or, "in case things go wrong." This casts doubt on the legitimacy of Loan #3.
- [282] Joginder testified that Mr. Randhawa instructed him to transfer the money back to him in a manner that would avoid scrutiny from the CRA. Specifically, Mr. Randhawa instructed Joginder to pay Mrs. Randhawa's legal and accounting fees directly, to repay his personal loan to Mr. Sangha, and to make payments directly to Ms. Sall rather than to Mrs. Randhawa.
- [283] While I have found that Joginder is not be a credible witness, in this case, his testimony is supported by corroborating evidence. The pattern of transactions, coupled with the absence of financial records, strongly suggests an effort to obscure the origin and purpose of the funds rather than to establish a legitimate loan with clear terms and repayment obligations.
- [284] Accordingly, while both Loan Agreements list the quantum of Loan #3 as being \$800,000, I will consider whether Loan #3 is valid and enforceable.

Is Loan #3 Void per the Doctrine of Ex Turpi Causa?

- [285] It is well established that the doctrine of ex turpi causa, sometimes referred to as the defence of illegality, prohibits a plaintiff from pursuing legal relief for damages which arose as a result of their own illegal conduct.
- [286] In this case, Mrs. Randhawa, the plaintiff, seeks to enforce a loan for \$800,000 which the defendants allege was provided to GN Motors to avoid taxes, and is thus rooted in illegality. In light of suspicious circumstances related to Loan #3, I have closely examined the circumstances and the evidence to determine whether this loan should be invalidated under the principles of ex turpi causa.
- [287] The leading Canadian case on ex turpi causa is *Hall v. Hebert*, [1993] 2 S.C.R. 159, 1993 CanLII 141 (S.C.C.). As explained in this case, ex turpi causa functions as a shield rather than a sword. It cannot be the foundation of a cause of action, but rather serves to negate a cause of action that would otherwise be complete in the absence of the doctrine's application. Its primary purpose is therefore to prevent the court from enforcing claims arising from the plaintiff's own illegal or immoral conduct.
- [288] *Hall* highlights that when a transaction is tied to illegality involving the plaintiff, and the plaintiff cannot succeed without relying on that illegality, the claim must fail. This is to ensure that the legal system does not condone or enforce claims based on illegal or immoral acts.
- [289] In *Zimmerman v. Letkeman*, [1978] 1 S.C.R. 1097, 1977 CanLII 196 (S.C.C.) the SCC also cited and reiterated the principle at p. 182:
- [W]here the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff.
- [290] This principle has also been endorsed by the BCCA, including in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2020 BCCA 130.
- [291] Joginder gave evidence that in 2006 Mr. Randhawa said he wanted to give money to GN Motors to protect his family's assets from creditors. Subsequently, Mr. and Mrs. Randhawa instructed the Settlement Funds to be transferred to GN Motors. The money was transferred under the guise of being a "shareholder loan repayment" and a "share purchase," neither which ever occurred.
- [292] It appears that the parties then tried to legitimize this suspicious monetary transfer after the fact by calling it Loan #3 in the 2011 Agreement.

- [293] I find that the movement of funds after they were received by GN Motors also raises serious concerns. The money consistently passed through several individuals, for the benefit of Mr. and Mrs. Randhawa, without ever being handled or received directly by Mr. Randhawa or Mrs. Randhawa.
- [294] I find that this behaviour casts serious doubt on the legitimacy of Loan #3 as set out in the Loan Agreements. Mrs. Randhawa was also unable to provide any explanation to rebut the concerns that were raised regarding these money transfers.
- [295] After a review of the evidence, I find that the only plausible explanation for these transfers is that Mr. Randhawa orchestrated the transfers in an attempt to shield the money from the CRA and other potential creditors.
- [296] An attempt to evade the payment of taxes is an offence under s. 239 of the Income Tax Act, R.S.C. 1985, c.1 (5th Supp.): *Georgas v. Ball*, 2024 BCSC 958 at para. 64. Transferring money in an attempt to delay, hinder, or defraud creditors is a violation of s. 1 of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA].
- [297] In *Youyi Group Holdings* at para. 47, the BCCA states that a contract "may be illegal per se if performance of the contract violates a statutory or common law prohibition. Such a contract will be unenforceable."
- [298] However, the modern approach to *ex turpi causa* is also somewhat flexible. As noted in *Lindsay v. Ambrosi*, 2019 BCCA 442 at paras. 25–28, the modern approach to the defence of illegality grants trial judges some discretion in determining whether to apply the defence. For instance, if the illegality is relatively minor or unintentional, and refusing to enforce the contract would be a disproportionate response, a judge may decide that enforcement is appropriate.
- [299] The impact on public policy is another key consideration. Courts must determine whether enforcing an otherwise illegal agreement would undermine the integrity of the legal system: *Youyi Group Holdings* at para. 69; *Wang v. Jiang*, 2021 BCCA 132 at para. 50.
- [300] Refusing to enforce a debt may appear unfair given that the parties arguing that the contract is immoral or illegal, namely the defendants, also seem to have benefitted from Mr. Randhawa's financial deviance. However, this doctrine is not meant to shield the benefiting party but is instead grounded in the broader concept of public policy. Public policy ensures that the legal system does not endorse or enforce wrongful actions. Consequently, in the context of the individuals involved, the court's paramount concern is safeguarding the integrity of the law.
- [301] While in some cases, denying recovery entirely could create a greater injustice—for example, allowing one party to retain a benefit without compensation. However, if granting relief would legitimize illegal conduct, courts will refuse enforcement as judicial discretion should align with public policy objectives, rather than applying an inflexible rule.

- [302] The evidence establishes that the transfer of the Settlement Funds, which later became Loan #3, was deliberately structured to conceal assets from tax authorities and creditors. Tax evasion and the evasion of creditors violates both the relevant statutory provisions and public policy.
- [303] Enforcing relief stemming from this otherwise illegal agreement would undermine the integrity of the legal system and, consequently, I decline to do so. Courts should not assist Mrs. Randhawa in enforcing a debt that was designed to subvert legal obligations and that contravene public policy.
- [304] In accordance with *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 [Transport North], Joginder's signing of the Loan Agreements, which included Loan #3, did not validate the otherwise illegal loan.
- [305] In *Transport North* the SCC determined that a subsequent acknowledgement of a loan does not validate an otherwise illegal loan. The court emphasized that public policy concerns take precedence over party consent when illegal terms in a contract are at issue. Even if Joginder willingly agreed to the terms of the Loan Agreements, any provision that contravenes the law or violates public policy cannot be legitimized by mere agreement.
- [306] Therefore, I find that Mr. and Mrs. Randhawa's later attempt to retroactively legitimize Loan #3 through the formal Loan Agreements does not remedy its initial illegality. Joginder's acknowledgment of Loan #3 by signing the Loan Agreements does not override the loan's underlying illegal intent.
- [307] In accordance with the doctrine of *ex turpi causa*, Loan #3 is void and unenforceable.

The Repayment of Loan #3

- [308] It is the defendant's position that in addition to being barred by the doctrine of *ex turpi causa*, that Joginder has already repaid the entirety of Loan #3. The evidence supports this argument.
- [309] Out of the money that was advanced to GN Motors via the Settlement funds, the evidence suggests that GN Motors issued payments of \$110,000 to Mr. Sangha and \$102,000 to Ms. Sall, on behalf of Mr. and Mrs. Randhawa.
- [310] Further, the evidence at trial was that, beginning in 2006, Joginder made regular \$4,000 payments towards Loan #3. Not all the records of these transactions are available, but from those presented in court and acknowledged by counsel, the total of these payments amount to \$240,000.
- [311] The monthly payments of \$4,000 were formally documented in the 2011 Agreement as follows:

3. The Borrower agrees that Loan #3 will be repaid (with interest only \$4000 per month starting on October 20th, 2011) from the Borrower's proportionate share, as a shareholder of the Company, of the sale proceeds from each lot sold at the Development (the "Borrower's Sale Proceeds") as such sale proceeds are received, and the Borrower hereby assigns and transfers the Borrower's Sale Proceeds to the Lender and hereby consents to and authorizes the Company and its directors to pay the Borrower's Sale Proceeds to the Lender until such time as an aggregate amount equal to Loan #3 has been paid to the Lender.
- [312] Except for a few cheques that were addressed to Mrs. Randhawa, all the other cheques presented in evidence were paid directly to Ms. Sall. Joginder also testified that he often made the \$4,000 payments in cash. Ms. Sall disagreed with this assertion, but the parties agree that the receipts that were provided to the court do not account for all the transactions.
- [313] Ms. Sall testified that when she received cheques, she simply signed them and handed them over to her father, Mr. Randhawa, as the funds were ultimately directed to him. Accordingly, these payments should be regarded as having been made to Mr. and Mrs. Randhawa in repayment of the Settlement Funds, which later became Loan #3.
- [314] In reviewing the financial records, I focused solely on the \$4,000 payments which began after Harper Grey directed the Settlement Funds to GN Motors. The first \$4,000 payment was made to Ms. Sall on May 15, 2006. Payments were then consistently made on the 15th of most months until Joginder began missing payments in 2011. From the evidence, I accept that Joginder made the following payments:
1. In 2006, he made 8 payments of \$4,000 each.
 2. In 2007, he made 12 payments of \$4,000 each.
 3. In 2008, he made 12 payments of \$4,000 each.
 4. In 2009, he made 12 payments of \$4,000 each.
 5. In 2010, he made 12 payments of \$4,000 each.
 6. In 2011, he made 4 payments of \$4,000 each.
- [315] I find, on the basis of the evidence, that following the transfer of the Settlement Funds, GN Motors--through Joginder--made \$240,000 in \$4,000 monthly payments to the Randhawa family, ostensibly toward Loan #3. The 2011 and 2012 Loan Agreements characterize these payments as interest on an \$800,000 loan. However, similar \$4,000 payments had been made regularly for several years prior to the execution of those agreements, and there is no contemporaneous documentation confirming the original terms under which those earlier payments were made. It is therefore unclear whether the payments were intended solely as interest or whether they were also meant to reduce the principal or serve some other purpose. In light of the parties' efforts to obscure the nature of the transaction, and the inconsistency between the written agreements and their earlier conduct, the specific terms

of any original oral agreement relating to Loan #3 remain unknown.

- [316] On behalf of Mrs. Randhawa, GN Motors also paid Harper Grey \$497,093 for legal fees accrued by the Randhawa family. GN Motors also paid Mr. and Mrs. Randhawa's accountants \$83,892.
- [317] In summary, following the transfer of the Settlement Funds the financial records confirm that GN Motors and Joginder collectively paid a total of \$1,032,985 either directly to the Randhawa family or on their behalf to third parties. This amount exceeds both the \$972,166 originally advanced from the Settlement Funds, and the alleged \$800,000 Loan #3 amount.
- [318] Given this, there is no legal or factual basis to assert that Joginder remains indebted under Loan #3 as the evidence unequivocally establishes that the Randhawa family has been repaid in excess of the amount they originally advanced.
- [319] Therefore, I find that Loan #3 is unenforceable due to its illegality. Further, there was no unjust enrichment resulting from the loan. Even if the loan were enforceable, I find that it has already been fully repaid. As such, refusing to enforce Loan #3 would not result in Joginder being unjustly enriched, as he has already repaid the full amount advanced to him.

Severance of Loan #1 and Loan #2 from Loan #3

- [320] While Loan #3 is invalid and unenforceable, I do not find that Loan #1 and Loan #2 are tainted by the same illegality. The financial record clearly indicates that these loans are the amalgamation of authentic sub-loans which were advanced by the Randhawa family. I will therefore address whether the illegal elements of the Loan Agreements are severable from Loan #1 and Loan #2.
- [321] In *Transport North*, the SCC addressed the principle of severance, and specifically, "notional severance," in the context of contracts whose interest rates violated s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. The SCC affirmed that the court may be able to sever the illegal portion of a contract from the remainder of the document, if the illegal portion is isolated and separable from other legal elements. This allows the remainder of the contract to operate lawfully.
- [322] In cases where the remainder of a contract is lawful and enforceable, and the illegal provisions can be removed without altering the fundamental nature of the contract or violating public policy, the lawful portions may be upheld.
- [323] Additionally, paragraph 10 of the 2012 Amendment states: "The Shareholders agree that where any part of this Agreement is declared invalid, the validity of the remainder shall continue in full force and effect and be construed as if the agreement had been executed without the invalid portion."

- [324] This provision demonstrates that the parties considered the issue of invalidity and severability. The Loan Agreements are also structured such that Loan #1 and Loan #2 are separate financial transactions with distinct repayment terms.
- [325] Applying the principles, and based on the evidence before me, I find no evidence to suggest that Loan #1 and Loan #2 were created for any illegal purpose. They appear to be legitimate financial transactions, supported by performance both before and after the parties entered into the formal Loan Agreements. I also find that, given the parties drafting, the illegal portion of the contract contained in Loan #3 is isolated and separable for Loan #1 and Loan #2.

Conclusion on the Amount of Debt Owing

- [326] In summary, based on my legal and factual findings, I find that Loan #3, derived from the Settlement Funds, was deliberately structured to evade taxes and conceal assets from creditors. Enforcing this loan would violate public policy. In accordance with the doctrine of *ex turpi causa*, Loan #3 is therefore unenforceable.
- [327] If I am wrong, and Loan #3 is lawful and enforceable, I nevertheless find that Loan #3 has been fully repaid. Given the lack of any remaining outstanding obligation, there is no legal or equitable basis for enforcing further payments.
- [328] Accordingly, the claim for the repayment of Loan #3 is dismissed entirely, and any claim for an outstanding balance is rejected.
- [329] In contrast, I find that Loan #1 and Loan #2 stem from legitimate financial transactions. There is no indication that these loans were connected to any illegitimate purpose or attempts to evade legal obligations. Accordingly, the illegality of Loan #3 does not taint the enforceability of the remaining valid obligations.
- [330] Applying the principle of severance from *Transport North*, I therefore order that Loan #3 be severed from Loan #1 and Loan #2. Loan #1 and Loan #2, which have most recently been delineated in the 2012 Amendment, remain enforceable contractual obligations.
- [331] Based on the financial records and the 2012 Amendment, I find that the total outstanding balance for Loan #1 and Loan #2 is \$214,000. This amount is valid, enforceable, and payable by Joginder.
5. Did the 2012 Amendment Establish an Express Trust?

Relevant Facts

- [332] As stated above, the 2012 Amendment, while labelled "Addendum to Loan Agreement Made October 10, 2011" reads more like a new, stand-alone contract as it provides new terms without explaining how they amend the 2011 Agreement. The most notable of these changes is paragraph 4, which provides that "The Borrower agrees that all his shares in 653294 BC Ltd. will be held in trust." It is Mrs. Randhawa's position that this provision requires Joginder to hold his shares in 653 in trust for her.
- [333] The 2012 Agreement between Joginder and Mrs. Randhawa also includes the following pertinent provisions:
- 5) The Borrower agrees when the development is complete and sold (For the properties at 6156 and 6138 - 138th Street, Surrey, BC) up to \$1,000,000.00 (One Million dollars) goes first directly to the Lender from the value of all his shares in the company.
 - 6) The Borrower agrees in the case of his shares are not worth \$1,000,000.00 whatever the shortfall is he will make an arrangement for that so that the Lender will get her loan of \$1,000,000.00 as a whole.
 - 7) The Borrower agrees if he cannot make an arrangement for the shortfall, he will secure the shortfall by way of mortgage on his residential property or 5730 Marine Drive, Burnaby, BC; and 3901 - 2nd Avenue, Burnaby, BC or any other property owned by him at that time. He will pay 12% interest on the shortfall for five years and the payment of interest will be paid monthly.
- [334] A resolution by the Directors of 653, passed on May 18, 2015, and signed by both Mohinder and Joginder, is also relevant to the analysis of whether Joginder had an obligation to hold his shares in trust for Mrs. Randhawa. The resolution includes the following provisions:
7. Joginder Khaira acknowledges that he owes [Mrs.] Jasvir Kaur Randhawa one million fourteen thousand (\$1,014,000.00) Canadian dollars. His last payment of interest was made on December 20th, 2011. The total amount of principal and interest (at the interest rate of 7%) owed since December 20th, 2011 to Jasvir Randhawa;
 8. Joginder Khaira owns a total of 223 shares (some of these shares are held in trust under Nirmal Thakur's name) in 653294 BC Ltd. 22.3% of the profit will be remitted by the company (653294 Ltd) directly to Mrs. Jasvir Randhawa;
 9. In the event that Mrs. Jasvir Randhawa does not receive the full amount she is owed by Mr. Joginder Khaira, it is agreed upon by Mr. Khaira that he will pay back the remaining principal and interest owed to Mrs. Randhawa from his personal wealth.

Legal Principles

[335] An express trust is a form of trust whereby the parties agree, usually in writing, an intention for the trustee to hold the settlor's property in trust for the benefit of the trustee or others. To establish an express trust there must be:

- a) certainty of the intention to create a trust;
- b) certainty of the subject matter of the trust; and
- c) certainty of objects of the trust.

(Brown v. Manuck, 2015 BCSC 1966 at para. 147, citing Suen v. Suen, 2013 BCCA 313 at para. 47.)

[336] Certainty of intention is a factual matter, while certainty of subject and object involve both legal and factual considerations: Grewal v. Khakh, 2018 BCCA 357 at para. 24.

[337] The settlor's intention is crucial in determining whether an express trust has been created. Intention may be express or implied and can be inferred from words or actions without technical language.

[338] Certainty of intention requires proof that the settlor had clear intention that the person who received the property is holding the property subject to trust obligations. Intention can be found to exist even where the parties do not expressly say they are creating an express trust, so long as the "settlor's language makes it clear that a trust is being created": Brown at para. 148.

[339] In determining if the statements of the settlor create certainty of intention, the court is bound to interpret the statements in accordance with their true and proper meaning: Xu v. Hu, 2021 BCCA 2 at para. 17.

[340] Certainty of subject matter has two main elements. First, the property that is subject to the trust must be clear. Second, the nature of each beneficiary's interest in the trust property must be clear: Brown at para. 149.

[341] Certainty of objects requires it to be clear whether any given person is a member of the class of possible beneficiaries: Brown at para. 150.

[342] Express trusts are distinct from other trusts which arise by operations of law, as express trusts are created through the actions and intentions of the settlor: Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at para. 83.

[343] The onus of establishing each of the three certainties lies with the party asserting the trust's existence: Xu at para. 13. In this case, the onus lies with Mrs. Randhawa.

Position of the Plaintiff

[344] Mrs. Randhawa asserts that the Loan Agreements created an express trust between her and Joginder, in her favour. In particular, she relies upon the explicit provision in the 2012 Amendment which states that Joginder's shares in 653 would be held in trust.

[345] Further, Mrs. Randhawa argues that the essential elements of an express trust are present in this case, as follows:

1. **Certainty of Intention:** Mrs. Randhawa asserts that the Loan Agreements clearly state that Joginder's shares in 653 will be held in trust for her until his debt is repaid.
2. **Certainty of Subject Matter:** The subject matter of the trust is the shares in 653, which Joginder agreed to hold in trust.
3. **Certainty of Object:** Mrs. Randhawa argues that she is the clear beneficiary of the trust as Joginder owed her the loan repayment and secured this loan via the shares in 653.

Position of the Defendants

[346] Joginder testified that he did not agree to hold his shares in 653 in trust for Mrs. Randhawa and that he did not tell Mohinder that he owed Mrs. Randhawa any money prior to transferring his shares to Mohinder.

[347] Mohinder also disputes the existence of an express trust, and argues that the essential elements of an express trust are not present, namely:

1. **Certainty of Intention:** Mohinder denies that Joginder ever intended to hold his shares in trust for Mrs. Randhawa. Mohinder points out that the provision in the 2012 Amendment is ambiguous and does not unequivocally establish an intention to create an express trust.
2. **Certainty of Subject Matter:** Mohinder contends that the subject matter, namely the quantity of shares, is unclear. At the time when the 2012 Amendment was signed, Joginder did not have full legal title to all his shares in 653, as some shares were held by Mr. Thakar. It is not clear whether those shares were part of the trust.
3. **Certainty of Object:** Mohinder argues that it is not clear who the beneficiary of the alleged trust was meant to be, given the involvement of various Randhawa family members in both the lending and repayment of the sub-loans. The trust object is therefore not sufficiently certain.

Applying Legal Principles to Express Trust Argument

[348] To establish an express trust, Mrs. Randhawa must prove three things: certainty of intention, certainty of the subject matter of the trust, and certainty of objects of the trust. I will consider these issues now.

Certainty of Intention

- [349] Mrs. Randhawa asserts that the 2012 Amendment, particularly paragraph 4, explicitly states that Joginder's shares in 653 were to be "held in trust" for her. She argues that this written agreement demonstrates Joginder's clear intent to hold the shares in trust as security for his debt, which she understood to be the arrangement.
- [350] The court must also assess whether Joginder intended to create a trust. The applicable legal test requires examining whether his words and actions clearly demonstrate such intent. Courts typically focus on statements made when property is transferred to a trustee; however, no actual transfer occurred here, as Joginder already held most of the shares when the 2012 Amendment was signed.
- [351] The 2012 Amendment states: "The Borrower agrees that all his shares in 653294 BC Ltd will be held in trust." While this wording suggests an intention to create a trust, as noted in Xu, the mere use of terms like "trust" does not, in itself, establish intent. The overall context must support such a conclusion through actions or expressions that unequivocally convey the settlor's intention to create a trust.
- [352] The absence of an actual transfer complicates the analysis, limiting the court's ability to apply the standard approach to determining certainty of intention. Additionally, the agreement lacks a clear timeline or mechanism for establishing the alleged trust. Instead, it appears primarily concerned with Joginder's debt repayment rather than the creation of a fiduciary obligation over the shares. This raises substantial doubt as to whether a trust was genuinely intended.
- [353] Although the agreement uses the phrase "held in trust," the broader evidence--such as Joginder's consistent denial and the complexity of family financial transactions--suggests that the requisite certainty of intention for an express trust may be lacking. The term "held in trust" is not further defined, and the 2012 Amendment does not outline any trustee duties or obligations.
- [354] The May 2015 Resolution further complicates matters. While it acknowledges Joginder's debt to Mrs. Randhawa and references shares held in Nirmal Thakar's name, it does not reaffirm or clarify any trust arrangement--nor does it mention a trust at all. This omission suggests that the parties may not have considered the trust provision binding or definitive. Moreover, the subsequent transfer of shares from Joginder to Mohinder lies at the core of this litigation. Determining the true intention of the parties is crucial not only to understanding the nature of this transfer but also to assessing what each party believed regarding ownership and control of the shares. If a trust had been intended, such a transfer would typically be inconsistent with the fiduciary obligations associated with holding property in trust.

[355] In summary, while the 2012 Amendment includes the phrase "held in trust," it does not clearly establish that Joginder intended to hold the shares in a fiduciary capacity for Mrs. Randhawa's benefit.

Certainty of Subject Matter

[356] In interpreting the provisions of a contract, courts aim to ascertain the parties' intentions by examining the plain language of the agreement, considering its context, and ensuring coherence throughout. Words are generally given their ordinary and natural meaning unless a specialized meaning is clearly intended.

[357] Upon review of the 2012 Amendment, considering both the language of the amendment and the broader context, I find that neither the property subject to the alleged trust, nor the nature of Mrs. Randhawa's beneficial interest in the alleged trust property, is sufficiently certain.

[358] From a review of the 2012 Amendment, it is not clear whether or not paragraph 4 intended to encapsulate the 101 shares held by Mr. Thakar as the language of the 2012 Amendment simply does not address this issue.

[359] While Joginder had a beneficial interest in the shares held by Mr. Thakar he did not have legal title to those shares at the time of the alleged trust creation. In *Suen v. Suen*, 2013 BCCA 313 at para. 45, the BCCA stated that an express trust cannot be created until the trust property has vested in the trustee. Given Joginder's lack of clear legal title to all his shares, these shares could not be vested in him as the trustee and could not have been held in trust for Mrs. Randhawa.

[360] In *Suen*, the BCAA emphasized that, for a trust to be valid, its subject matter must be clearly defined. Mrs. Randhawa claims that all of Joginder's shares were held in trust for her. However, this assertion is inconsistent with the fact that Mr. Thakar held some of Joginder's shares. This discrepancy, combined with the absence of any clear identification of the trust property in the 2012 Amendment, makes it impossible to determine with certainty which specific shares, if any, were subject to the alleged trust. As a result, I find that the subject matter of the trust is not defined with the requisite degree of certainty.

[361] Further, even if this court were able to determine which shares were captured by the alleged trust, I also find the nature of the beneficiary's interest in the shares is not clear.

[362] I find that the provisions of the 2012 Amendment, when considered together, and viewed in the context of the Resolution passed by the Directors of 653, does not explicitly grant Mrs. Randhawa a direct right to ownership or control over the shares themselves. Instead, they establish alternative mechanisms to ensure repayment of Mrs. Randhawa's debt, including via the proceeds derived from the Townhouse Project.

- [363] Paragraph 4 requires Joginder to hold the shares "in trust," which suggests an obligation to manage and preserve the value of the shares. However, the amendment does not require Joginder to transfer either ownership of the shares or provide Mrs. Randhawa with immediate control over the shares.
- [364] Paragraph 5 provides that Joginder will pay up to \$1,000,000 to Mrs. Randhawa from the value of the shares once the Townhouse Project is completed and sold. While this ties repayment to the financial outcome of the shares, it does not suggest that Mrs. Randhawa is entitled to ownership of the shares themselves.
- [365] Paragraphs 6 and 7 further emphasize repayment by requiring Joginder to arrange alternative means of payment in the event of a shortfall and to secure the debt through mortgages on other properties. These provisions reinforce that Mrs. Randhawa's entitlement lies in the repayment of a loan, not in acquiring an ownership interest in the shares.
- [366] In summary, the 2012 Amendment focuses on ensuring that Mrs. Randhawa is repaid through the value generated by Joginder's shares and through other security measures. However, it does not grant her any direct or immediate ownership interest in the shares themselves.
- [367] This interpretation is consistent with the Further Amended Notice of Civil Claim, in which Mrs. Randhawa seeks a "declaration that the Defendant Khaira [Joginder], and Mohinder, hold their interest in 653294 BC Ltd., in trust for the plaintiff until the plaintiff has been paid in full for all the debts, and interest, owed by the defendant Khaira [Joginder] to the plaintiff."
- [368] I find that the relief sought in the pleading supports the conclusion that Mrs. Randhawa's claimed interest in the shares is limited to securing repayment of the debts owed to her, rather than constituting a beneficial interest in the shares themselves or in the full economic value and obligations associated with them.
- [369] The May 2015 resolution of 653's Board of Directors, which acknowledges Joginder's debt, but omits any reference to the shares being held in trust or forming part of Mrs. Randhawa's direct remedy further supports the conclusion that the amendment does not contemplate Mrs. Randhawa acquiring rights to the shares.
- [370] In conclusion, while the 2012 Amendment sets out a framework to secure repayment of the debt, it does not confer upon Mrs. Randhawa any direct interest in Joginder's shares, nor does it impose a fiduciary obligation on Joginder to hold the shares in trust for her. The agreement focuses solely on mechanisms for loan repayment and contains no provisions granting her ownership or control over the shares. Accordingly, there is insufficient evidence to establish that Mrs. Randhawa holds a beneficial interest in the shares.

[371] I therefore find that Mrs. Randhawa has not established either the specific property that is subject to the alleged trust, or the nature of any beneficial interest she claims to hold. As such, the requirement of certainty of subject matter has not been met.

Certainty of Objects

[372] Certainty of objects requires that the beneficiaries of a trust be clearly identifiable. In Xu, the court emphasized that a trust cannot be valid if the identity of the beneficiaries is unclear.

[373] The 2012 Amendment itself does not clarify who is the beneficiary of the trust, it merely states that the shares will be "held in trust." Excluding Joginder, Mrs. Randhawa is the only other party to the amendment. While this suggests that she may be the intended beneficiary, the broader context raises doubts.

[374] The evidence confirms that the sub-loans were provided by various members of the Randhawa family, all at the direction of Mr. Randhawa. Similarly, Joginder's re-payments were made to multiple family members, including Mr. and Mrs. Randhawa's four children, again, at the direction of Mr. Randhawa.

[375] In addition, the evidence suggests that the parties did not draw clear lines between individuals, their families, and their companies. For example, Mr. Randhawa did not appear to differentiate between himself, his wife, his children, and 088. Joginder also gave evidence that he only discussed financial matters with Mr. Randhawa, and Mr. Randhawa never indicated to him that Mrs. Randhawa was the source of the loaned funds.

[376] While Mrs. Randhawa asserts that it is obvious that she is the beneficiary of the trust, such a conclusion is not at all clear from the language of the 2012 Amendment, or the broader context of the parties' financial dealings. I therefore find that certainty of objects is not proven in this case.

Conclusion on Express Trust

[377] In accordance with Brown and Suen, the existence of an express trust requires that all three certainties--certainty of intention, certainty of subject matter, and certainty of objects--be established. Having found that none of these prerequisites are met, I conclude that there is insufficient certainty to support a finding that the 2012 Amendment created an express trust granting Mrs. Randhawa a beneficial interest in Joginder's shares in 653294 BC Ltd.

6. Was Joginder's Transfer of his Shares in 653 a Fraudulent Conveyance?

[378] Mrs. Randhawa argues that the Share Transfer, which transferred Joginder's shares in 653 to Mohinder, was a fraudulent conveyance, a fraudulent preference, and/or was the result of a civil conspiracy.

[379] I will first address the allegation of fraudulent conveyance. To determine whether the Share Transfer was a fraudulent conveyance, the court must consider:

1. Does the Share Transfer violate s. 1 of the FCA?
2. If so, should this court nevertheless uphold the validity of the Share Transfer, in accordance with s. 2 of the FCA? An otherwise fraudulent transaction will only be upheld under s. 2 if the transaction (1) had good consideration, (2) was done in good faith, and (3) the person receiving the transferred property had no knowledge of the fraud.

Relevant Facts

[380] Between October 2006 and June 2016, Mohinder lent Joginder and GN Motors a large sum of money.

[381] Mohinder testified that beginning in 2010, he and his wife became concerned that Joginder was not contributing equally towards the expenses of the Townhouse Project. As a result of these concerns, Mohinder asked Joginder to formalize the Mohinder Loans in writing.

[382] Joginder gave evidence that, in response, he asked his bookkeeper, Brenda, to prepare a promissory note for the current amount owing, which was \$343,777. Joginder also instructed Brenda to list his shares in 653 as security for the amount owing.

[383] Joginder testified that he and Mohinder signed the 2010 Note on August 21, 2010, at the Burnaby GN Motors dealership. He testified that Mr. Sangha and Mr. Satnam Sanghera, Mohinder and Joginder's cousin, were both present for the signing of the 2010 Note.

[384] Joginder testified that he understood that the 2010 Note gave a security interest in his shares in 653 to Mohinder and that if he did not repay the Mohinder Loans, he would have to transfer the shares to Mohinder. Mohinder also testified that he read and understood the 2010 Note before signing it.

[385] Mr. Sanghera testified that, in 2010, he worked at the GN Motors dealership, and that he witnessed the signing of the 2010 Note and signed the 2010 Note as a witness.

[386] Mr. Sangha testified that he attended the Burnaby GN Motors, witnessed the signatures on the 2010 Note, and signed the 2010 Note as a witness.

[387] Both Joginder and Mohinder testified that in 2015, Mohinder sought to have the 2010 Note updated to list all additional amounts lent to Joginder in the interim. The 2015 Note had an updated principal of \$727,802. While the 2015 Note is dated September 18, 2025, all parties did not sign on this day.

[388] Joginder indicated that he signed the 2015 Note on or about September 18, 2015, at the Surrey GN Motors dealership, and that Mr. Sangha and Mr. Sanghera witnessed his signature.

- [389] Mr. Sangha testified that while he attended the Surrey GN Motors dealership on or about September 18, 2015, and signed the 2015 Note, he did not witness Joginder's signature.
- [390] Mr. Sanghera testified that he was working at the GN Motors dealership located in Surrey and that he signed the 2015 Note on or about September 18, 2015. Under cross examination, Mr. Sanghera confirmed that he signed the notes in 2010 and 2015, respectively, and that he did not sign the Promissory Notes on the same date.
- [391] Mohinder testified that he signed the 2015 Note after Joginder did, but within a day or so of September 18, 2015, and that he signed at Joginder's house.
- [392] Both Joginder and Mohinder testified that they read the contents of the 2015 Note before it was signed and understood its terms. Joginder confirmed that he understood that if he did not repay the Mohinder Loans, he would have to transfer his shares 653 to Mohinder.
- [393] Mohinder indicated in his testimony that as of February 2017, Mohinder had loaned Joginder and GN Motors \$927,177, and that no re-payments of the loans had occurred.
- [394] Mohinder testified that in the fall of 2016, he grew concerned about his financial situation and demanded that Joginder either repay the Mohinder Loans or transfer him the 653 shares as outlined in the Promissory Notes.
- [395] Around this time, Joginder's only significant assets consisted of his primary residence and his shares in 653. Both Mohinder and Joginder testified that in November 2016, Joginder agreed to transfer 121 of his shares to Mohinder, along with the rights to 101 additional shares held by Mr. Thakar. It is notable that the Share Transfer took place shortly after Mrs. Randhawa commenced this litigation and made an application for summary trial.
- [396] These are the same shares that Mrs. Randhawa claims were used to secure the debt referenced in the Loan Agreements. The defendants assert that the transfer of these shares was made to repay the Mohinder Loans, while Mrs. Randhawa contends that the Share Transfer was intended to frustrate her ability to recover the debt owed to her.
- [397] The transaction was formalized in a Share Transfer Agreement dated November 10, 2016, which was drafted and witnessed by Joginder's lawyers and admitted into evidence. The Agreement reflects that Joginder transferred his 121 common shares, along with the rights to an additional 101 shares, to Mohinder for nominal consideration of \$1.00.
- [398] In 2017, following the resolution of the Townhouse Project's litigation with Mr. Thakar, the 101 shares were transferred to Mohinder.
- [399] Mrs. Randhawa told the court that she only learned about the Share Transfer in 2017, or early 2018, when she was informed by her lawyer.

- [400] The evidence also shows that, in 2016--around the same time as the Share Transfer--Mohinder registered a \$600,000 mortgage against Joginder's primary residence. As a result, Mohinder became entitled to that amount from the property's equity. Joginder testified that he received only a small portion of the sale proceeds when the property was eventually sold. From this, I infer that the sale proceeds exceeded \$600,000 and that Mohinder received the full amount secured by the mortgage.
- [401] This mortgage is significant because, under para. 7 of the 2012 Amendment, Joginder was obligated to secure any repayment shortfall by mortgaging certain properties, including his primary residence. By allowing Mohinder to register a \$600,000 mortgage against this property, Joginder effectively diminished the equity available to secure Mrs. Randhawa's debt, thereby impairing her ability to recover the amounts owed to her.
- [402] By 2016, Joginder's financial situation was rapidly deteriorating. He ultimately filed an Assignment in Bankruptcy on July 20, 2022.
- [403] While Joginder told the court that he understood he owed some funds to the Randhawa family, the Assignment of Bankruptcy does not list any outstanding debt to either 088 or to any member of the Randhawa family. However, it does list that he owed a total of \$763,900 to Mohinder, \$600,000 of which was secured by a mortgage, \$163,900 of which was unsecured.
- [404] The exclusion of the Randhawa family is conspicuous given that Mrs. Randhawa had already commenced this action to seek the repayment of debt.

Legal Principles

[405] The Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA] is a short piece of legislation, which reads as follows:

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,
 - (b) a bond,
 - (c) a proceeding, or
 - (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[406] The term "creditor" used in s. 1 of the FCA was defined by Newbury J.A, in *Mawdsley v. Meshen*, 2012 BCCA 91, as follows:

The word "creditor" normally refers to a person to whom a debt or obligation is owed, or to someone entitled to the fulfilment of an obligation [citation omitted.]

[407] Given that Mrs. Randhawa has a claim in debt, she qualifies as a "creditor" under s. 1 of the FCA. Creditors may provide secured or unsecured loans. As a result, she has standing to commence and pursue an action under the FCA: *Canadian Imperial Bank of Commerce v. Boukalis*, 34 D.L.R. (4th) 481, 1987 CanLII 2694 (B.C.C.A.).

[408] In the case of 0848052 B.C. Ltd. v. 0782484 B.C. Ltd., 2023 BCCA 95 at para. 57, the BCCA lists the three elements required to prove a fraudulent conveyance under the FCA:

1. there must be a disposition of property;
2. made with the "intent to delay, hinder or defraud creditors and others"; and
3. the transaction has the effect of delaying, hindering, or defrauding creditors or others.

[409] Firstly, the party must prove a "disposition of property." A transfer of shares constitutes a "disposition of property" under the FCA: *MacKenzie v. MacKenzie*, 2006 BCSC 367 at para. 124.

[410] With respect to "intention", in the case of *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521 at para. 73, the BCCA held that the only intention needed to void a transaction is the intention to put assets out of the reach of creditors. There is no need for the transferrer to have any additional intent of dishonesty or moral wrongdoing.

[411] As stated recently by the BCCA in the case *IE CA 3 Holdings Ltd. v. NYDIG ABL LLC*, 2024 BCCA 244:

[56] The necessary intent has long been held to not require a subjectively dishonest state of mind, but it does require something more than simply proving that the effect of the transfer is to hinder or delay creditors. The claimant must still prove as a matter of fact that there was an intention to "delay, hinder or defraud creditors of their just and lawful remedies": *Mawdsley v. Meshen*, 2012 BCCA 91 at para. 7, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 182.

[Emphasis in original.]

[412] The question of whether the disposition was made with an intention to defeat, hinder, delay, or prejudice a claim of Mrs. Randhawa is a question of fact that must be determined in the specific circumstances of the facts of this case.

[413] Often, such intent is inferred from factual indicia of fraud, which are also referred to as "badges of fraud". In the case *Balfour v. Tarasenko*, 2019 BCSC 2212 at para. 60, the BCSC summarizes some of the "badges of fraud" which may lead to a finding that the transfer of property was intended to defraud creditors, as follows:

- a) where a transfer of property has the effect of delaying, hindering, or defeating creditors, the necessary intent is presumed;
- b) inadequate consideration paid for the transferred property may be indicative of fraudulent intent;
- c) a transfer that renders the transferor unable to meet his then existing liabilities or which divests the transferor of all or a substantial portion of his or her assets may be indicative of an intent to defraud creditors;
- d) a transfer between related parties in suspicious circumstances may be an indication of an intent to defeat creditors unless the parties present an adequate explanation;
- e) the state of the debtor's financial affairs at the time of the transaction, including his income, assets, and debts, may indicate a specific intention;
- f) a transfer of property made in haste may be indicative of a fraudulent intent; and
- g) a transfer of property made at a time when a debt or claim against the transferor is in existence or is imminent may be indicative of an intent to defraud creditors.

[414] While these "badges of fraud" can create the presumption of fraudulent intent, the presumption is rebuttable: *IE CA 3 Holdings* at para. 57, citing *Mawdlsey* at para. 70.

[415] In legal transactions involving closely related parties, the trier of fact must vigilantly scrutinize the testimony of the parties who were involved in the allegedly fraudulent transaction. As stated in *Jennings v. Chow*, 2008 BCSC 110:

[18] The circumstances in this case raise a question as to whether the transfer was made in good faith. In relation to who bears the onus of proof that the transfer was done in good faith, I refer to *CIBC Mortgage Corp. v. Pender*, 1999 CanLII 2616, (B.C.S.C.) in which *Sinclair-Prowse J.* adopts the following passage from *Frimer v. Lercher*, [Q.L. 1984 B.C.J. No 728] (B.C.S.C.):

[13] It is established that where suspicion touches a transaction made between near relatives, the burden of establishing the bona fides of the transaction shifts from the plaintiff to the parties to the transaction. Furthermore, in these circumstances the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can safely be acted upon without corroboration. These rules, which are rules of practice rather than of absolute law, are well established [Citations omitted.]

- [416] The inherent risk of bias and potential for fraud in cases where the parties are closely related demands that evidence be approached with skepticism. Overall, the judicial stance is clear: corroborative evidence is crucial to establish the authenticity of transactions involving parties with close connections.
- [417] Even if a transferor believes they are acting prudently to protect their family, the court may still presume fraudulent intent if the transfer hinders, delays, or defeats creditors' claims.
- [418] Lastly, the "effect of the transfer" must be considered. If the transaction places assets beyond the reach of creditors, this effect can be persuasive evidence that the transaction was intended to defraud.
- [419] That being said, in accordance with s. 2 of the FCA, transactions made for good consideration and in good faith are protected from being voided by the FCA. In order for a transaction to be saved by s. 2 of the FCA, the disposition must be made: (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud: *Abakhan* at para. 89.
- [420] In *Chan v. Stanwood*, 2002 BCCA 474 at para. 24, which is a leading case in relation to s. 2 of the FCA, the BCCA said:
- [20] Where the consideration is inadequate or nominal, a creditor need only show that the transferor intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the transferee actively participated in the fraud. As stated by this court [citation omitted]:
- it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice or knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless it be proved that the purchaser was actually privy to the fraud, i.e., a party to carrying out the fraudulent intention and purpose.
- [Emphasis in original.]
- [421] In *Mawdsley*, the BCCA also held that where a transfer is made for valuable consideration, the intent of both the transferor and the transferee must be shown to be fraudulent in order for the transaction to be set aside under the FCA.
- [422] In summary, if I find that the Share Transfer is a fraudulent transaction under s. 1 of the FCA, I must consider if the transaction should nevertheless be saved under s. 2 of the FCA. In doing so, I must consider whether the transfer was supported by good consideration. If the transfer was made for valuable consideration, I must go on to consider whether the transfer was made in good faith and whether Mohinder, as the recipient of the shares, had knowledge of Joginder's intention to delay, hinder, or defraud Mrs. Randhawa's ability to collect on her outstanding debts. If he did not have fraudulent intent, I must uphold the Share Transfer under s. 2.

- [423] The original Promissory Notes were not provided to the court, however, the validity of the Promissory Notes plays a significant role in the analysis of whether the Share Transfer is a fraudulent conveyance.
- [424] If the Promissory Notes do not reflect a real debt, or if they were forged after the Share Transfer, it would strongly suggest that the transfer was made with the intent to delay, hinder, or defraud Mrs. Randhawa's ability to collect on her outstanding debts, in violation of s. 1 of the FCA.
- [425] Importantly, if the Promissory Notes were manufactured after the fact, it would impute knowledge to both Joginder and Mohinder that they intended to place the shares beyond the reach of Mrs. Randhawa.

Does the Share Transfer Violate s. 1 of the FCA?

- [426] Having already determined that the Share Transfer was a disposition of property, I must now evaluate whether the Share Transfer was intended to delay, hinder, or defraud Mrs. Randhawa ability to collect on her outstanding debts.

Position of Defendant

- [427] Mohinder contends that the share transfer was made for good consideration and in good faith, based on pre-existing debt evidenced by the Promissory Notes. He also argues that he lacked knowledge of Joginder's debt to Mrs. Randhawa.
- [428] Mohinder argues that Mrs. Randhawa cannot successfully establish that the Share Transfer was a fraudulent conveyance, as the shares transferred by Joginder to Mohinder were never available to Mrs. Randhawa to satisfy her debt claims. It is his position that the shares were transferred subject to the Promissory Notes, which was entered into over a year before the 2011 Agreement.
- [429] He also argues that the Share Transfer is not fraudulent, as the purpose of the transfer was to satisfy an outstanding debt, as laid out in the Promissory Notes and was therefore supported by good consideration and completed in good faith.
- [430] Lastly, the defendants argue that the evidence does not support a claim that the Share Transfer was intended by either Joginder or Mohinder to hinder or delay Mrs. Randhawa's claim. This is especially true for Mohinder, who alleges that, at the time of the Share Transfer, he did not know that Joginder was indebted to Mrs. Randhawa or that she alleged to have a claim to Joginder's shares.
- [431] Therefore, even if the Share Transfer violates s. 1 of the FCA, Mohinder argues that the transaction should be saved under s. 2 because, as the recipient of the shares, he did not have the requisite fraudulent intent.

- [432] Mohinder relies upon the case *Kelly v. Gonzalez*, 2014 BCSC 1269 to support the proposition that a loan, documented through a promissory note or written agreement, can legitimize a transfer of assets challenged under the FCA. In *Kelly*, the Court held that a conveyance from a father to his daughter was not fraudulent because it was made in repayment of a legitimate loan. The loan had been advanced to finance and build the disputed property and was evidenced by both a promissory note and a written contract.
- [433] Mohinder also relies upon *Taylor Ventures Ltd. (Trustee of) v. High Meadow Holdings Ltd.*, 2008 BCCA 80, where the BCCA upheld a transfer, despite the transferee's deemed knowledge of a fraudulent conveyance, due to the presence of valuable consideration and the absence of demonstrable harm to the creditor.

Position of the Plaintiff

- [434] Mrs. Randhawa contends that the Share Transfer violated the FCA as the effect of the transfer placed the shares out of Mrs. Randhawa's reach, thus preventing her from recovering the debt owed to her. She argues this demonstrates an intent to delay, hinder, or defraud her.
- [435] She also argues that most, if not all, of the badges of fraud were present in the Share Transaction, namely:
1. The transfer put Joginder's only remaining valuable asset out of reach of Mrs. Randhawa. This frustrated her ability to recover the debt owed to her.
 2. The transfer was between two close brothers.
 3. At the time of the transfer, Joginder had no income, all his assets had been dissipated, and he had significant debts.
 4. The transfer was made in secret without notice to other known debtors who had known entitlement to the shares.
 5. The transfer took place shortly after Mrs. Randhawa commenced this litigation and made an application for summary trial.
- [436] Mrs. Randhawa argues that the Share Transfer cannot be justified under s. 2 of the FCA because the transfer was not made between arm's length parties, lacked fair consideration, and was made with fraudulent intent.
- [437] Mrs. Randhawa argues that Mohinder was aware of Joginder's outstanding debt to her and, as such, his actions can be imputed with the intent to hinder her ability to recover that debt. She relies on a pattern of conduct by both Mohinder and Joginder as evidence of their dishonest intent.

- [438] She emphasizes that the Share Transfer is particularly concerning given that, at the time, Mohinder was the sole director of 653. This position allowed him to complete the transfer unilaterally, without informing or involving the other families invested in the Townhouse Project. As a result, the transfer was carried out in secret, excluding the Randhawa family from any participation or oversight.
- [439] In addition to acquiring Joginder's shares, Mohinder also registered a \$600,000 mortgage against Joginder's residential property. This mortgage was never disclosed at any point during these proceedings by either Joginder or Mohinder, and it further impaired Mrs. Randhawa's ability to recover her debt from the equity in that property.
- [440] It is her position that the transfer of shares from Joginder to Mohinder runs foul to s. 1 of the FCA and cannot be saved by s. 2.

Applying Principles to Facts of Case

- [441] As stated above, dishonest or fraudulent intent is not necessary to void a transaction under s. 1 of the FCA. It must only be proven that the transaction was intended to hinder, delay, or defeat a creditor. Where the transaction had the effect of delaying or hindering a creditor, as was the case here, intent is presumed.
- [442] That being said, in assessing a transaction under the FCA, it can be useful to assess whether the "badges of fraud" are present. The evidence in this case establishes that several "badges of fraud" were present in the Share Transfer:
1. **Familial Relationship:** The transfer occurred between brothers, necessitating heightened scrutiny.
 2. **Consideration:** The Share Transfer Agreement indicates a consideration of \$1.00, which does not reflect either the true value of the shares, or the debt allegedly secured. The Share Transfer Agreement also does not reference that the shares were transferred in satisfaction of the debt owing under the Promissory Note. I find that these factors create a presumption of inadequate consideration.
 3. **Timing:** The transfer was executed while Joginder was effectively insolvent and shortly after this litigation was commenced by Mrs. Randhawa. The transfer also occurred around the same time as the registration of the mortgage on Joginder's property thus disposing of all of Joginder's remaining assets. Collectively, these actions indicate that the share transfer was designed to shield assets from creditors.
 4. **Financial Distress:** At the time of the transfer Joginder had sold his remaining assets and was unable to meet his financial obligations.
 5. **Lack of Disclosure:** Neither the Share Transfer, the registered mortgage, or the Promissory Notes were properly disclosed. The Share Transfer was conducted in secret. This secrecy was facilitated by Mohinder being the sole director of 653 at the time. As the sole director,

Mohinder did not require third-party notification or approval for the transfer. This allowed the transaction to proceed without external scrutiny and undermines the legitimacy of the Share Transfer. Similarly, the mortgage registered on Joginder's property was not disclosed by the defendants during this proceeding.

6. Effect: The transfer of shares and the contemporaneous registration of the mortgage left Joginder with no significant assets, thus hindering and delaying Mrs. Randhawa's ability to recover her debt.

[443] To this end, I find that the lack of disclosure, the timing of the transfer amidst litigation, and the concurrent registration of the \$600,000 mortgage against Joginder's home raise serious concerns about the honesty of the transaction.

[444] I find that the circumstances of the transfer are indicative of an intent to hinder, delay, or defeat Mrs. Randhawa's legal claims, and that this transaction therefore constitutes a fraudulent conveyance that violates s. 1 of the FCA.

Should the Court Uphold the Validity of the Share Transfer Under s. 2 of the FCA?

[445] In order for a transaction to be saved by s. 2 of the FCA, the disposition must be made: (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud.

Good Consideration

[446] It is necessary to consider whether the Share Transfer was based on good consideration. To do so, I will begin by considering whether the amounts stated in the Promissory Notes are substantiated by corroborating evidence.

[447] Mohinder testified and submitted documentation detailing the loans he provided to GN Motors and Joginder. These documents outline the amounts, terms, and sources of the funds. I thoroughly reviewed this evidence.

[448] The documentation demonstrates that Mohinder began loaning money to Joginder and GN Motors in October 2006 and continued to do so until February 28, 2017. Reliable records of these transactions were maintained and were submitted in court. The evidence demonstrates the following:

- a) Between October 2006 and June 2016, Mohinder and his wife, loaned GN Motors \$763,277, as follows:
 - i. October 15, 2006 - \$20,000
 - ii. May 21, 2007 - \$23,777
 - iii. May 25, 2007 - \$45,000
 - iv. June 5, 2007 - \$65,000

- v. September 2, 2007 - \$10,000
- vi. September 17, 2007 - \$30,000
- vii. March 17, 2010 - \$50,000
- viii. August 21, 2010 - \$100,000
- ix. April 20, 2011 - \$20,000
- x. September 18, 2015 - \$300,000
- xi. June 10, 2016- \$99,500
- a) Between December 2016 and February 2017, Mohinder loaned Joginder the amount of \$163,900, as follows:
 - i. December 4, 2016 - \$5,000
 - ii. January 19, 2017 - \$125,000
 - iii. February 9, 2017 - \$11,600
 - iv. February 17, 2017 - \$2,300
 - v. February 28, 2017 - \$20,000

[449] Notably, after December 2011--when Joginder ceased making payments to the Randhawa family--his brother Mohinder nevertheless advanced him an additional \$562,400. This sequence of events underscores Joginder's financial distress at the time, while also highlighting the preferential and opaque nature of his financial dealings with Mohinder. While Mohinder may have initially advanced funds in an effort to support his brother, it is the steps taken once Joginder's financial position became untenable that raise concerns--namely, that the related-party transactions were structured to protect Mohinder's interests at the expense of Mrs. Randhawa's ability to recover her debt.

[450] After reviewing the evidence, I am satisfied that between 2006 and 2017, Mohinder loaned Joginder a total of \$1,489,577. Given the magnitude of the loans, I find it reasonable that Mohinder would seek some assurance of repayment and security for the amounts owing. Indeed, it is notable that he waited as long as he did to take such steps. I therefore accept that the principal amount of \$727,802, as recorded in the 2015 Promissory Note, is substantiated by the evidence.

[451] While I have found that the amounts listed in the Promissory Notes reflect a genuine debt, the evidence does not support a finding that the Share Transfer was made in good faith as part of that debt repayment. Instead, I find that the transfer was intended to shield assets from Joginder's creditors, including Mrs. Randhawa.

- [452] The Share Transfer Agreement is particularly revealing. Although it was drafted by legal counsel, the agreement simply states that the shares were transferred for \$1.00, without any reference to the Promissory Notes or Joginder's outstanding debt to Mohinder. This omission raises serious questions about the true nature of the transaction and suggests that the transfer was not genuinely made in satisfaction of the debt recorded in the Promissory Notes.
- [453] The stated value of \$1.00 is also unconnected to the \$727,802 set out in the 2015 Note. This \$1.00 consideration was grossly inadequate, particularly given that Mohinder and Mr. Sangha later paid \$1.6 million for a 33% share in the same Townhouse Project. The nominal \$1.00 consideration for the shares simply does not meet the statutory threshold for good consideration.
- [454] Finally, the contemporaneous registration of a \$600,000 mortgage on Joginder's residence further casts doubt on the legitimacy of the Share Transfer. The combined value of the shares and the mortgage far exceeds both the amount recorded in the Promissory Note and the total amount actually loaned to Joginder. This disparity creates a strong inference that the mortgage was intended to satisfy the genuine portion of the debt, and that the Share Transfer was structured primarily to dispose of Joginder's remaining assets in a coordinated effort to shield them from his creditors, including Mrs. Randhawa.
- [455] In these circumstances, I find that the shares were not transferred for good consideration.

Good Faith and Lack of Fraudulent Intent

- [456] I will now consider whether the Share Transfer was completed in good faith, and whether Mohinder acted with fraudulent intent. Given the overlap in the analysis, I will address these issues together. I begin by examining Mrs. Randhawa's allegation that the Promissory Notes were forged in an attempt to retroactively justify the Share Transfer. If established, such forgery would provide compelling evidence of fraudulent intent.

Were the Signatures and/or Dates on the Promissory Notes Forged?

Position of the Defendants

- [457] It is the Defendant's position that the Promissory Notes are legitimate documents that were expressly designed to acknowledge and secure previous loans. Mohinder and Joginder assert that the Promissory Notes are valid and were created and signed in 2010 and 2015, respectively.
- [458] To support his position, Mohinder introduced into evidence an expert report from Graham Ospreay, a forensic document examiner and forgery analyst.

Position of the Plaintiff

- [459] Mrs. Randhawa argues that the Promissory Notes are forgeries which were created after the commencement of this proceeding to frustrate any claim she has with respect to the shares. She suggests that this forgery was an attempt to justify a transaction which would otherwise violate the FCA.
- [460] To support her position, Mrs. Randhawa obtained the expert opinion of Dr. Shabnam Preet Kaur MSc., Ph.D., who was qualified by this court as an expert forensic document examiner.

Analysis of the Legitimacy of the Promissory Notes

- [461] I undertook an examination of the authenticity and validity of the Promissory Notes to assess their veracity and the weight they should be given in this case.
- [462] Despite there being no originals available, I note that in their respective testimonies Mohinder and Joginder, as well as the witnesses to the Promissory Notes, all confirm the validity and the execution of the Promissory Notes. Photocopies of the alleged Promissory Notes were provided to the court and were assessed by two separate experts, namely, Dr. Kaur and Graham P. Ospreay, who expressed two conflicting opinions about when the documents were signed.
- [463] Guidance on how to handle conflicting expert reports was discussed in *R. v. Molnar*, 76 C.R. (3d) 125, 1990 CanLII 13292 (O.N.C.A.) at p. 127. *Molnar* was followed by the BCSC in *Italy v. Seifert*, 2003 BCSC 501 at para. 112.
- [464] It is not sufficient to simply decide which expert's opinion you prefer. Nor does the trier of fact have to choose one expert report over the other. Instead, they must evaluate whether one expert's opinion provides a higher degree of certainty or reliability. They may decide to reject both reports if they do not adequately assist in forming a conclusion, on a balance of probabilities.

Dr. Kaur's Report

- [465] Mrs. Randhawa relies on the Kaur Report to argue that the 2010 and the 2015 Promissory Notes were signed at the same time. She was asked to determine, if possible, whether the questioned signature on the 2010 Promissory Note was signed on or around the date on which the document is dated. If not, she was asked to determine what date it was signed?
- [466] Dr. Kaur conducted an analysis of the signature on a photocopy of the 2010 Promissory Note and compared it with 175 samples of Joginder's signature.
- [467] The signature samples ranged from 2002 to 2022. Dr. Kaur was instructed to assume that all samples, except for the 2010 Promissory Note, were signed on the date indicated on each document.

[468] To this end, I admitted a report from Dr. Kaur, dated February 8, 2024 (the "Kaur Report").
The relevant observations from the Kaur Report are as follows:

Further, the above observations are sufficient to conclude that the questioned signature marked as Q1 matches with the same model known signatures marked as K162 to K175 and was probably written in the year 2015 or after the year 2015.

[Emphasis added.]

[469] The Kaur Report later summarizes that after an examination of the signatures, she opines that:

1. It is probable that the questioned signature marked as Q1 [2010 Promissory Note] was not signed on or around the date on which the document is dated.
2. It is probable that the same set of pens was used to write handwriting and signatures on the questioned document marked as Q1 and the known document marked as K163. Therefore, it is probable that the signature marked as Q1 was written on the same day in the year 2015 or after the year 2015 was written on the same day in the year or after the year 2015.

[Emphasis added.]

[470] Dr. Kaur affirmed these opinions during her oral testimony. During her direct and cross-examination, Dr. Kaur also confirmed that:

1. All the documents she examined were emailed to her as scanned PDF files. There is a possibility that the documents may have been scanned versions of printed documents. She did not inquire about whether the documents examined were scans of originals or of photocopies.
2. She did not examine the original Promissory Notes, which are unavailable. Her findings are based on scanned copies of the Promissory Notes. This limited her analysis.
3. It appeared that, during the period of 2002 to 2022, Joginder signed three different ways. She agreed that people can have different signatures for different types of documents, but that she did not ask for different types of documents from different time periods. Instead, she relied on the documents she received which were, for the most part, cheques signed by Joginder.

[471] Dr. Kaur reached the conclusion that the signatures of the Promissory Notes were probably signed on the same day and were probably signed in, or after, 2015.

[472] Dr. Kaur clarified the degree of certainty signalled by the term "probably." She indicated that a probable level of certainty is not the strongest on the opinion scale and that it is the "third level of certainty." The two stronger levels of certainty are "highly probable" and "conclusive," with conclusive being the strongest level of certainty.

- [473] To come to this conclusion, Dr. Kaur performed a visual examination of the signatures, including an analysis of blurr striation, pen skipping, ink blobbing, and pen strokes. Dr. Kaur cited a number of technical papers as the basis of her techniques to observe the burr striations, blobbing, and pen strokes.
- [474] While Dr. Kaur stated that using photocopies did not severely affect her analysis, the court also heard that signatures are typically analyzed using original documents to confirm details such as the type of pen and ink used. Not having access to original documents limited her ability to provide a stronger conclusion.
- [475] The level of certainty is further impacted by Dr. Kaur's reliance on a limited selection of documents, namely cheques, as these signatures may not fully represent the diversity of Joginder's signature styles as his signature could differ when signing formal documents, such as Promissory Notes.
- [476] In civil cases such as this, the standard of proof is the balance of probabilities. This means that the plaintiffs bear the burden of proof to show that their version of events is more likely than not to be true -- that is, greater than 50% likelihood.
- [477] Dr. Kaur's conclusion that the signature was "probably" written in 2015 or later suggests a reasonable but not definitive likelihood. A probable finding, without evidence to the contrary, may be sufficient to ground a finding, on the standards of a balance of probabilities, that the signatures were made after 2015.

Dr. Ospreay's Report

- [478] In response to the Kaur Report, Mohinder introduced into evidence an expert report from Graham Ospreay, dated March 22, 2024. In his report, Mr. Ospreay concluded that it was 'simply not possible' for Dr. Kaur to make her findings and that "the report of Dr. Kaur is not one which can be relied upon for the purposes it was provided".
- [479] In his evidence, Mr. Ospreay took issue with the conclusions reached by Dr. Kaur. In his expert report and in his testimony, he indicated that:
1. He disagrees with Dr. Kaur's opinions because her examination and observations are not in general accordance with the methodology used by forensic document examiners for ink dating and/or pen identification, which requires an analysis of the original signed documents.
 2. It is not possible for Dr. Kaur to examine and compare the ink or the pens on the two Promissory Notes from a scanned PDF document, especially when it is unclear if the scanned document was the original document or a photocopy of the original document.

3. When observing a digital image, it is impossible to identify which particular pen was used nor the true characteristics of the actual ink applied to the paper. Such identifications can only be made by the examination of the original document and a 'wet' signature or handwriting.
 4. The characteristics of the ink and pen depicted in the Kaur Report, which include images of the signatures on the Promissory Notes, are due to the movement of the pen held by the writer and the relative pen pressure of what can be observed from a copy and not as a result of the same ink and pen being used.
 5. Dr. Kaur's assessment that the Promissory Notes were probably written on the same day in the year 2015 is undermined by her comment "or after the year 2015." Dr. Kaur makes no mention of how many years after 2015 she thinks the signature was made, nor does she remark on the likelihood of the same pen being used a year or more later.
- [480] Given the above, it is Dr. Ospreay's conclusion that the Kaur Report cannot be relied upon for the purposes it was provided, as, given her methods, Dr. Kaur would be unable to provide an accurate opinion as to when the Promissory Notes were signed.
- [481] I note that Dr. Ospreay agrees with Dr. Kaur's assessment that Joginder used three different signatures. However, he stated that there is no evidence to suggest why or when Joginder changed his signature and, without that evidence, Dr. Kaur could arrive at an erroneous conclusion when dating the Promissory Notes.
- [482] After a review of Mr. Ospreay's evidence, which highlights the methodological flaws and uncertainty in the Kaur Report, I find that Dr. Kaur's conclusions are weakened and that the reliability of her report tips away from probable certainty. Her reliance on photocopies rather than originals significantly reduces the reliability of her findings, particularly regarding ink dating and pen identification.
- [483] A review of relevant case law reveals that courts have previously declined to accept the evidence of handwriting experts who analyzed photocopies to determine the authenticity or date of signatures, photocopies are a secondary, inferior, form of evidence and that it is preferable for originals to be admitted into evidence: *Gupta v. Kumar*, 2022 BCSC 860 at paras. 57-63; *Wei v. Mei*, 2018 BCSC 157, para. 71 citing *Vilamar, S.A. v. Sparling*, [1987] Q.J. No. 2708 (Q.S.C.). at para. 165.
- [484] In *Mountainview Market Ltd. v. Sandu*, 2017 BCSC 157, the BCSC accepted that the defendant had not signed a contested settlement agreement, but noted:

[256] Mr. Purdy [the expert] admitted in cross-examination and stated in his report that he could not state with certainty that the purported signatures were fraudulent. Mr. Purdy explained that he was hampered in his analysis by the fact that he was not given the original copy of the Settlement Agreement to compare to other original signatures of the Sandus. A photocopy can conceal certain fine details in a signature, including concealing points where the pen is lifted from the paper and the pen pressure characteristics.

[Emphasis added.]

[485] Based on the competing expert opinions and the legal precedents, I find that although both reports are somewhat helpful, neither can determinatively prove when the Promissory Notes were prepared and signed.

[486] I therefore turn my attention to reviewing the evidence surrounding the creation and signing of both Promissory Notes. Mohinder, Joginder, Mr. Sanghera, and Mr. Sangha all confirmed that they signed the 2010 and 2015 Promissory Notes on or about the date listed on the respective document; however, these witnesses do not have identical recollections of the event.

[487] I accept that the small discrepancies in their evidence are understandable given that almost 14 years have passed since the document was signed. I do not find that the small discrepancies impact the credibility of this evidence. In fact, if their evidence had been identical, given the amount of time that has passed, it might have raised concerns regarding potential collusion.

[488] After reviewing the entirety of the evidence, I find that Dr. Kaur's opinion is inconsistent with the testimony of Mohinder, Joginder, Mr. Sangha, and Mr. Sanghera. On cross-examination, all four witnesses denied signing the Promissory Notes at the same time. Each provided clear and consistent recollections of signing the Notes on or around the dates stated within them. They also testified with certainty that the signatures were witnessed at two different car dealerships.

[489] As a result of this evidence, as well as the doubt cast on the Kaur Report by Dr. Ospreay, I accept that the Promissory Notes were signed on or about the date listed on the documents and were therefore not forged after the Share Transfer.

Do the Circumstances Surrounding the Share Transfer Indicate Bad Faith or Fraudulent Intent?

[490] I will now assess the broader circumstances surrounding the Share Transfer to determine whether there is evidence that Mohinder participated in the transaction in bad faith or with fraudulent intent.

[491] The evidence indicates that neither Mr. Randhawa nor Mrs. Randhawa were aware that Joginder had pledged shares in 653 as collateral to the Mohinder Loans. Mohinder testified that he was similarly unaware that Joginder had pledge his shares to Mrs. Randhawa; however, Mrs. Randhawa disputes Mohinder's claim of ignorance.

- [492] On May 18, 2015, 653 had a shareholder meeting. At this meeting, Mr. Randhawa presented the "May 2015 Resolution," which outlined Joginder's debts to Mrs. Randhawa to the project's stakeholders. The resolution was signed by the attendees, including Mohinder.
- [493] Mohinder claims that he signed the document under pressure in order to ensure the continuation of the Townhouse Project. The issue before me is not whether Mohinder signed the document under duress, it is whether this signature evidences an awareness of the loans between Joginder and Mrs. Randhawa.
- [494] During his testimony, Mohinder admitted that at this May 2015 meeting he became aware that Mrs. Randhawa claimed Joginder owed him money, but he maintained that he had no knowledge of any potential claims against Joginder's shares.
- [495] In reviewing the May 2015 Resolution, the following passages referenced earlier are relevant:
1. At para. 7, Joginder acknowledges that he owes Mrs. Randhawa \$1,014,000 Canadian dollars.
 2. At para. 8, the resolution acknowledges the shares that Joginder owns and then states "22.3% of the profit will be remitted by the Project (653294 BC Ltd.) directly to Mrs. Jasvir Randhawa."
 3. At para. 9, the resolution states, "In the event that Mrs. Jasvir Randhawa does not receive the full amount she is owed by Mr. Joginder Khaira, it is agreed upon by Mr. Khaira will pay back the remaining principal and interest owed to Mrs. Randhawa from his personal wealth."
- [496] I note that there is no reference to Joginder holding his shares in 653 in trust for Mrs. Randhawa, nor is there any reference that the loans leveraged the shares as collateral.
- [497] Accordingly, based on the May 2015 Resolution alone, I accept that Mohinder may not have been aware at that time of any trust arrangement involving Joginder's shares. However, it is clear from the broader evidentiary record that Mohinder knew Joginder owed a significant debt to Mrs. Randhawa, and it is that knowledge--not awareness of any alleged trust--that is the critical issue in this analysis.
- [498] Less than a year later, on March 2, 2016, Mohinder prepared a confidential selling proposal, which he presented to Mr. Randhawa and the Randhawa family. The proposal invited 088 to buy out the remaining shareholders of 653. The evidence suggests that the proposal arose in the context of a shareholder deadlock between Mr. Randhawa and the other investors over several key issues related to the Townhouse Project. Its purpose was to initiate discussions about separating the two groups and to outline a potential buyout framework.

[499] The proposal included estimated selling prices, construction costs, and liabilities owed to Westminster Savings Credit Union. Notably, it also explicitly acknowledged that Joginder owed shares to Mrs. Randhawa--demonstrating Mohinder's awareness of her claim and its relevance to the ownership structure of 653.

[500] On page 5 of the Proposal, it is noted that 12.2% of Joginder shares were partially valued in favour of 088, subject to an agreement between Joginder and 088. Further, on page 6, the Proposal states:

Since 0888490 B.C. Ltd. owns its own shares and is entitled to Mr. Nirmal Thakar's shares, which originated from Mr. Joginder Khaira, below is a summary of the payout amounts based on the company's worth that 0888490 B.C. Ltd. is required to pay to Mr. Palminder Sangha, Mr. Mohinder Khaira, and Mr. Joginder Khaira as necessary.

[501] Finally at page 8, para. 1, it reads:

This proposal is valid once an agreement is reached between Mr. Joginder Khaira and 0888490 B.C. Ltd. Since prior monies are owed by Mr. Joginder Khaira to 0888490 B.C. Ltd., Mr Nirmal Thakar's shares which mostly originated from Mr. Joginder Khaira are to be transferred to 0888490 B.C. Ltd. Once a settlement with Mr. Nirmal Takar is reached. How much of the remaining shares value of Mr. Joginder Khaira is owed to 0888490 B.C. Ltd. has to be negotiated between 0888490 B.C. Ltd. And Mr. Joginder Khaira.

[502] The Proposal was drafted by Mohinder himself on March 2, 2016, approximately eight months before the Share Transfer and contradicts his assertion of ignorance regarding Mrs. Randhawa's interest in Joginder's shares. I therefore find that Mohinder's assertions of ignorance are not credible.

[503] Similarly, Joginder testified that, at the time of Share Transfer, he did not believe he owed Mrs. Randhawa any money, but he acknowledged in court that he believes he still owes them some money. This evidence is inconsistent. Nothing changed with respect to his debt between the time of the transfer and the time of trial, I am therefore left to conclude that Joginder was not being truthful that he was unaware of his debt to Mrs. Randhawa at the time of the Share Transfer.

[504] Mohinder testified that, around the time of the transfer, he was increasingly anxious about recovering the money Joginder owed him, given the stalled progress of the Townhouse Project and mounting legal and financial pressures on 653.

[505] Mohinder stated that his intention was solely to protect his financial interests as he was unaware of the Loan Agreements or Mrs. Randhawa's alleged claim to Joginder's shares. While Mohinder may have acted with the intention to protect his family, it is disingenuous to suggest that he was not aware that Joginder owed the Randhawa family a significant amount of money or that Mrs. Randhawa alleged a claim to Joginder's shares.

- [506] I therefore find that Mohinder has failed to establish the bona fides of the Share Transfer. The transfer rendered Joginder unable to satisfy his debts and depleted him of his last valuable asset. The unregistered status of the Promissory Notes, the concurrent timing of the Share Transfer, the mortgage, and the commencement of this litigation, as well as the multiple badges of fraud make it impossible to characterize the Share Transfer as a good faith transaction.
- [507] The transfer was conducted in secret, facilitated by Mohinder in his capacity as the sole director of 653. This lack of transparency is a significant "badge of fraud" and indicates an intention to covertly hide Joginder's assets from his creditors, including Mrs. Randhawa.
- [508] My findings are fortified by the \$600,000 mortgage registered by Mohinder against Joginder's residence. The existence of this mortgage undermines the notion that the Share Transfer occurred to satisfy the debt owed in the Promissory Notes, given that the combined value of the shares and the mortgage well exceed the amount listed on the Promissory Notes.
- [509] In summary, after reviewing all the evidence, I find that both Joginder and Mohinder conspired to place Joginder's remaining assets out of reach of Mrs. Randhawa. They then executed the Share Transfer with the intent to hinder, delay, or defraud Mrs. Randhawa. Both Joginder and Mohinder therefore had fraudulent intent and the Share Transfer was not conducted in good faith.

Conclusion on Whether the Share Transfer is a Fraudulent Conveyance

- [510] I find that the transfer of Joginder's shares in 653 to Mohinder was a fraudulent conveyance which violated s. 1 of the FCA.
- [511] I reject Mohinder's defense under s. 2 of the FCA, as his actions and omissions suggest a deliberate effort to prioritize his own financial interests while disregarding the rights of other creditors, particularly Mrs. Randhawa.
- [512] I find that neither good consideration, nor good faith, are present. Even if I were to accept that the Share Transfer was based on the repayment of the loans owed in the Promissory Notes, I find that the presence of good consideration would not rebut the strong indicia of fraudulent intent found in this case. Good consideration, without good faith, would not render the transaction valid.
- [513] Considering the evidence, I therefore find that the transfer of shares from Joginder to Mohinder constitutes a fraudulent conveyance under s. 1 the FCA and does not meet the qualifications set out in s. 2 of the FCA. The Share Transfer is therefore void.
- [514] Given my conclusion that the transfer of shares constitutes a fraudulent conveyance under the FCA, it is unnecessary to determine whether there was a fraudulent preference. The finding of fraudulent conveyance provides sufficient remedy to the creditors, rendering any additional analysis redundant.

7. Did Joginder and Mohinder conspire to harm Mrs. Randhawa's interest through the Share Transfer?

Legal Principles

[515] Mrs. Randhawa alleges that the Defendant's have committed the civil tort of conspiracy. The elements of the tort of civil conspiracy are:

- a) an agreement between two or more persons;
- b) concerted action taken pursuant to the agreement;
- c) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
- d) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent); and
- e) actual damage suffered by the plaintiff.

(Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 at para. 341, citing Can-Dive Services Ltd. v. Pacific Coast Energy Corp., 96 B.C.L.R. (2d) 156, 1993 CanLII 6870 (B.C.C.A.) at para. 5.)

[516] The above elements were derived from the test articulated by the SCC in Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, 1983 CanLII 23 (S.C.C.) at p. 471. In this case, the SCC found that the tort of conspiracy exists in two circumstances, namely:

1. whether the means used by the defendants are lawful or unlawful the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
2. where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[517] The SCC therefore recognizes two primary forms of actionable conspiracy: predominant purpose conspiracy and unlawful means conspiracy.

[518] Predominant purpose conspiracy involves an agreement or coordinated action where the primary objective is to harm the plaintiff, regardless of whether the means employed are unlawful, provided harm results. Conversely, unlawful means conspiracy requires proof of an agreement or coordinated action between two or more parties, the use of unlawful means (such as fraudulent conveyance), the knowledge that their actions were likely to cause harm to the plaintiff, and that actual harm occurred. Unlawful means conspiracy does not require proofs that parties primary intention was to harm the plaintiff.

- [519] In *XY, LLC v. Zhu*, 2013 BCCA 352 at para. 49, the BCCA discussed the legal test for "unlawful means," sometimes called "unlawful act," in the context of civil conspiracy. The court notes that there is limited case law in Canada on this matter but reiterates that in *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, 1961 CanLII 69 (S.C.C.), the SCC states that "unlawful means" refers to actions that are prohibited and can transform a lawful agreement into a tortious conspiracy.
- [520] The BCCA also notes that in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, the Ontario Court of Appeal ("ONCA") examined the issue of what constitutes "unlawful conduct" in the context of intentional interference with economic relations. The ONCA determined that for a tortious conspiracy to exist, each conspirator must engage in unlawful conduct; however, the ONCA suggested that the definition of unlawful conduct should not be solely based on intentional interference cases, but should also consider conduct that has been deemed unlawful in the circumstances of the tort of conspiracy.
- [521] For example, at para. 47, the ONCA highlighted that "quasi-criminal conduct [or conduct that breaches the Criminal Code], when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party."
- [522] Additionally, conduct that is deemed unlawful under private law, such as inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, and defamation, can also be considered unlawful conduct for the purposes of civil conspiracy.
- [523] In summary, to be considered "unlawful conduct" for the purposes of tort of conspiracy, the defendants must have engaged in acts that were legally wrong, which is a separate legal issue to whether or not the behaviours are actionable in private law. However, competitive activities that are otherwise lawful do not qualify as "unlawful conduct" for the purpose of the conspiracy tort.
- [524] As in all civil cases, the standard of proof for civil conspiracy is proof on a balance of probabilities. Additionally, once an agreement has been proven to exist, statements of one co-conspirator are admissible against all others if they were made while the conspiracy was ongoing in furtherance of the common object: *Le Soleil Hospitality* at paras. 344–345.

Position of Defendant

- [525] Mohinder argues that if the court determines that the Share Transfer was not a fraudulent conveyance or a fraudulent preference, then it follows that Mrs. Randhawa will not be able to prove an "unlawful means" on which to base a civil conspiracy claim nor will she be able to prove that the predominant purpose of the Share Transfer was to harm her.
- [526] As such, Mohinder argues that if Mrs. Randhawa's fraudulent conveyance and fraudulent preference claims fail, her civil conspiracy claim must also fail.

- [527] He also asserts that the share transfer was not intended to harm Mrs. Randhawa, especially since he was not aware of her alleged claim to the shares until he was added as a party in 2019. He therefore states that he did not contemplate that the share transfer would or could injure Mrs. Randhawa.
- [528] Mohinder also asserts that the sole intention of the Share Transfer was to satisfy Joginder's debt to Mohinder pursuant to the terms of the Promissory Notes.

Position of Plaintiff

- [529] It is Mrs. Randhawa's position that, even if the Court concludes that the Promissory Notes are valid and that the transfer of shares from Joginder to Mohinder does not contravene the FCA or the FPA, Mohinder and Joginder nevertheless conspired to cause her harm.
- [530] Mrs. Randhawa alleges that Joginder and Mohinder conspired to transfer Joginder's shares in 653 to Mohinder in order to frustrate her ability to recover the amounts owed under the loans.
- [531] She argues that, as of the May 18, 2015 Shareholders' Meeting, Mohinder was aware that she had a potential entitlement to Joginder's shares, and that he acknowledged this in the May 18, 2015 Resolution.
- [532] Mrs. Randhawa further submits that Mohinder again acknowledged the Randhawa family's entitlement in the March 2016 Selling Proposal. She argues that Mohinder's failure to disclose his subsequent acquisition of Joginder's shares--through the Promissory Notes--amounts to misrepresentation by silence.

Relevant Facts

- [533] The relevant facts supporting the allegation of conspiracy have already been detailed in the preceding sections of this decision. Briefly, the Share Transfer by Joginder to Mohinder on November 10, 2016, occurred amidst ongoing litigation with Mrs. Randhawa and after Joginder's default on loans owed to her. This transfer, effected for a nominal price of \$1.00, despite testimony valuing the shares at \$1,000,000, has already been found to constitute a fraudulent conveyance, aimed at shielding assets from Mrs. Randhawa.
- [534] Both Mrs. Randhawa and Mohinder testify to competing claims over Joginder's shares. Mrs. Randhawa claims that Joginder owed her \$1,014,000, and that this amount was secured by Joginder's shares, while Mohinder claims to have loaned Joginder \$727,802, secured by Promissory Notes, leveraged against the same shares Mrs. Randhawa asserts were held in trust for her.

- [535] Circumstantial evidence suggests that Mohinder, fully aware of Mrs. Randhawa's claims, proceeded with the share transfer to protect his financial interests at her expense. The timing of the transaction, coinciding with litigation and the registration of a \$600,000 mortgage on Joginder's matrimonial property, reduced the pool of assets available to creditors. Mohinder's failure to disclose his claim over the shares during the litigation further supports an inference of a concealed and coordinated action.
- [536] Taken together, these facts, as outlined in earlier sections, are critical to assessing the allegation that Joginder and Mohinder acted in concert to frustrate Mrs. Randhawa's ability to recover her debts. The timing, intent, and impact of the defendants' actions, underpin Mrs. Randhawa's claims of conspiracy.

Applying Principles to Facts of Case

- [537] Applying the above legal principles to the facts, the evidence supports both a finding of agreement and a finding of concerted action between Joginder and Mohinder. The execution of the share transfer during ongoing litigation, combined with Joginder's financial difficulties and default on debts owed to Mrs. Randhawa, demonstrates coordination between the defendants.
- [538] For clarity, I note that the absence of direct evidence of an explicit plan or agreement to commit wrongful acts does not necessarily preclude a finding of conspiracy.
- [539] In *Canada Cement LaFarge* the SCC held that courts may infer an agreement between parties from the conduct, timing, and surrounding circumstances of the parties' actions viewed in their entirety, and considering the alleged wrongful conduct. In coming to this conclusion, the SCC emphasizes that conspiracy often involves covert actions, making direct proof of a formal agreement unlikely.
- [540] I have evaluated the Defendant's patterns of behavior, the timing of their actions, and the consistency of their conduct to determine whether it is reasonable to infer that they acted in concert to achieve a common objective.
- [541] In the present case, the timing and structure of the Share Transfer--coinciding with ongoing litigation, the registration of a \$600,000 mortgage by Mohinder on Joginder's residential property, and Joginder's financial difficulties--strongly suggest coordinated action. Mohinder received the shares for a nominal value of \$1.00, despite testimony valuing them at \$1,000,000. As discussed above, Mohinder was aware of Joginder's debt to Mrs. Randhawa. Taken together, these facts support the inference that the defendants acted in concert to protect Mohinder's financial interest while shielding assets from Joginder's creditors, including Mrs. Randhawa.
- [542] The defendants' failure to disclose the Promissory Notes to Mrs. Randhawa further undermined her ability to recover the debt and reinforces the inference of coordinated conduct.

- [543] While there is no direct evidence of an explicit agreement between Mohinder and Joginder, this is not fatal to the conspiracy claim. A court may infer an agreement from circumstantial evidence, the parties' conduct, and the natural consequences of their actions. In this case, the timing of the Share Transfer and the concealment of material information support the conclusion that the defendants acted jointly and with shared intent.
- [544] The harm to Mrs. Randhawa is also evident. The Share Transfer and concurrent mortgage registration substantially diminished the pool of assets available for recovery, directly obstructing her ability to enforce her claims. This satisfies the requirement of actual harm under the doctrine of conspiracy.
- [545] I find that the evidence substantiates the conspiracy claim under both the predominant purpose and unlawful means frameworks.
- [546] The timing and execution of the Share Transfer strongly suggest that the defendants' predominant purpose was to harm Mrs. Randhawa's financial interest. The transaction occurred while litigation was ongoing and while she was actively seeking to enforce Joginder's debt.
- [547] Despite being aware of the legal proceedings, Mohinder prioritized his own financial interests over those of Mrs. Randhawa. This deliberate prioritization, to the exclusion of other creditors, demonstrates a shared intention to frustrate her ability to recover the debt owed.
- [548] The concealment of the Promissory Notes and Mohinder's failure to disclose his security interest in Joginder's shares during litigation further supports an inference of intent to obstruct recovery.
- [549] While direct evidence of intent is not required, the court may infer intent from the natural and probable consequences of the defendants' conduct. In this case, the deliberate transfer of assets and concealment of material information support the conclusion that the defendants intended to disadvantage Mrs. Randhawa.
- [550] In any event, the Share Transfer also meets the requirements of unlawful means conspiracy. As previously found, the transfer constituted a fraudulent conveyance. The defendants undertook this unlawful act, knowing or ought to have known it would cause financial harm to Mrs. Randhawa.

Conclusion on Conspiracy Arguments

- [551] The evidence supports a finding that Joginder and Mohinder acted in concert to harm Mrs. Randhawa's ability to recover her debts. Their coordinated actions prioritized Mohinder's financial interests and obstructed her legal claims.

[552] Although there is no direct evidence of an explicit agreement, the court may infer conspiracy from circumstantial evidence, including conduct and the natural consequences of the defendants' actions. Viewed as a whole, the evidence demonstrates a deliberate effort to shield assets and cause financial harm to Mrs. Randhawa.

[553] I find that all elements of conspiracy are satisfied under both the predominant purpose and unlawful means frameworks.

IV. CONCLUSION

[554] The following is a summary of my conclusions on the issues raised in this decision:

1. Limitation Issue: I reject the defendants' argument that Loans #1 and #2 were time-barred.
2. Validity of the Loan Agreements: I conclude that the October 2011 Agreement and the May 2012 Amendment are valid and enforceable contracts.
3. Amount of Debt Owed: I find that Loan #1 and Loan #2 are legitimate and enforceable obligations, with a total enforceable amount of \$214,000. However, I find Loan #3 (\$800,000) to be unenforceable under the doctrine of *ex turpi causa*. Alternatively, even if Loan #3 were enforceable, I find that it was fully repaid.
4. Severance of Loan #3 from Loans #1 and #2: I have severed the illegal Loan #3 from the legitimate Loans #1 and #2.
5. Express Trust Claim: I reject Mrs. Randhawa's argument that the 2012 Amendment created an express trust.
6. Fraudulent Conveyance and Conspiracy: I conclude that Joginder's transfer of shares to Mohinder constitutes a fraudulent conveyance, which arose through an unlawful conspiracy between Joginder and Mohinder to hinder Mrs. Randhawa's ability to recover her enforceable debt.

V. RELIEF / REMEDY

[555] I grant judgment in favor of Mrs. Randhawa against Joginder and Mohinder, jointly and severally, in the amount of \$214,000, with contractual interest at 7% accruing from May 23, 2012.

[556] The standard remedy under the FCA is to reverse the impugned transaction, but courts are not obligated to do so in every case. (see *Guthrie v. Abakhan & Associates Inc.*, 2017 BCCA 102 at para. 24). Here, reversing the transfer of shares from Joginder to Mohinder is neither practical nor equitable. The passage of time and the continued development of the Townhouse Project have significantly altered the shares' value and nature, making retransfer unfeasible.

- [557] In *Guthrie, and Vancouver Coastal Health Authority v. Moscipan*, 2019 BCCA 17, the BCCA confirmed that, in certain circumstances, courts may decline to reverse the impugned transaction while still allowing the transferred property to remain available for creditor enforcement. I find this to be the appropriate approach in this case.
- [558] Declaring the share transfer void does not mean the shares must revert to Joginder. As explained in *Guthrie*, the purpose of such a declaration is not to restore ownership to the transferor but to ensure the transferred property remains available for creditor enforcement. Since the shares still exist, despite being registered in Mohinder's name, Mrs. Randhawa may treat them as exigible assets to satisfy Joginder's \$214,000 debt. She may also pursue additional remedies, such as registering a judgment against the shares or seeking a declaration of trust. This approach aligns with *Bank of Montreal v. Iskenderov*, 2023 ONCA 528, where the ONCA confirmed that the purpose of fraudulent conveyance relief is to nullify the transfer so creditors can enforce their claims against the transferred property, rather than to return the property to the original owner.
- [559] Although *Guthrie* primarily dealt with real property, courts have extended fraudulent conveyance principles to other assets. In *Estate of Gavin v. Gavin*, 2023 PECA 8, the PEICA held that fishing licenses qualify as exigible property subject to execution. Similarly, *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78, the Newfoundland and Labrador CA confirmed that corporate shares can also be treated as exigible assets in the hands of the transferee, without requiring a strict retransfer to the original owner.
- [560] Applying the approach set out in *Guthrie*, the court in *Shoal Investments* similarly found that Mr. Murphy's transfer of shares was intended to defeat a creditor's claim. Instead of ordering a retransfer, the court imposed joint and several liability on the transferee, ensuring the creditor's ability to recover.
- [561] These cases illustrate that the FCA applies broadly to various valuable assets that debtors may attempt to shield from creditors.
- [562] Consistent with *Guthrie* and *Vancouver Coastal Health Authority*, I find that the Share Transfer is void as a fraudulent conveyance. However, while the transfer remains valid between Joginder and Mohinder, the shares remain subject to enforcement by Mrs. Randhawa, allowing her to execute against them and ensuring her debt takes priority in any sale or disposition.
- [563] Accordingly, the transfer of shares will not be set aside, and Mohinder remains the registered owner. However, Mohinder holds the shares in trust for the benefit of Mrs. Randhawa.
- [564] To preserve the value of the shares and prevent any further dissipation of assets, I order that no party, including the parties to this action or any individual with notice of this Order, may dispose of, transfer, encumber, or otherwise deal with the shares in any manner that would diminish their value without further order of this Court.

[565] Mrs. Randhawa is granted leave to apply, on notice to Joginder's trustee in bankruptcy, for an order enforcing her debt against the Shares as an enforceable debt against Joginder.

VI. COSTS

[566] As Mrs. Randhawa has been substantially successful in this litigation, I order that she is entitled to her party-and-party costs, payable forthwith after assessment by the Registrar.

[567] However, I recognize that the parties have not yet had the opportunity to address costs in light of these reasons. If any party seeks a different costs order, they may file concise written submissions, not exceeding five double-spaced pages, electronically through Supreme Court Scheduling, within 45 days of this judgment.

"Sukstorf 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/25/05/2025BCSC0542.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/randhawa-v-khaira-2025>

Prepared on 29 October 2026 · Esheria