
CANADA / JUDGMENT

Virk v. Singh

2020 BCSC 225

COURT

Supreme Court of British Columbia

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2020 BCSC 225 Virk v. Singh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Virk v. Singh,

2020 BCSC 225

Date: 20200220

Docket: S167429

Registry: Vancouver

Between:

Avtar Kaur Virk

Plaintiff

And

Ajit Singh

Defendant

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:

J. Scouten

Counsel for the Defendant:

R. Davidson

Place and Date of Trial:

Vancouver, B.C.

July 26, 29-31, 2019

August 1-2, 6-9, 15, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2020

Table of Contents

OVERVIEW.. 4

The Claim and Counterclaim.. 6

ISSUES. 7

HISTORY. 7

Donation Money. 7

Society Dispute. 10

Property Purchase and Debt Action. 11

Matrimonial Action. 13

CREDIBILITY. 15

The Law.. 15

Ms. Virk. 16

Prior Inconsistent Statements. 16

A. Indian Action. 17

B. Debt Action. 17

C. Matrimonial Action. 18

Evidence of Dr. Nader 19

Conclusion on Credibility Assessment 20

Mr. Singh. 22

VALIDITY OF DOCUMENTS. 23

A. Tenancy Agreement 24

B. Monetary Agreement	24
EXPRESS TRUST CLAIM..	26
The Law..	26
Certainty of Subject and Certainty of Beneficiary.	27
Certainty of Intention.	28
Conclusion on Express Trust Claim..	30
UNJUST ENRICHMENT CLAIM..	30
The Parties' Relationship.	31
Enrichment	32
Corresponding Deprivation.	33
Absence of Juristic Reason.	34
Appropriate Remedy.	35
Quantification of the Remedy.	36
DEBT CLAIM..	38
BREACH OF TRUST / BREACH OF FIDUCIARY DUTY CLAIM..	39
COSTS.	43

OVERVIEW

- [1] This case concerns events in a long-standing personal relationship between the plaintiff, Ms. Avtar Virk, and the defendant, Mr. Ajit Singh. Ms. Virk is a 60-year-old woman who receives a disability pension. Mr. Singh is a 60-year-old head priest of a Sikh temple, or Gurdwara, located in Barnala, India (the "Barnala Temple"). As will become apparent, the parties' relationship was complicated by a variety of religious, cultural, economic and personal factors.
- [2] The history of this claim begins in Barnala, India. In 1977, Ms. Virk married Mr. Gurpartap Virk. I will refer to Avtar and Gurpartap in their capacity as a married couple as "the Virks". At the time of their marriage, Mr. Virk lived in Barnala.
- [3] For many years, Mr. Virk and his parents attended religious services at the Barnala Temple. They are what witnesses referred to as "devotees" or "parishioners" of the Barnala Temple. Mr. Virk and Mr. Singh have known each other since they were children. Ms. Virk first met Mr. Singh while attending the Barnala Temple at the time of her marriage.

- [4] Ms. Virk and her immediate family immigrated to Canada in the early 1970s. They were also originally from the Barnala area. Ms. Virk returned to India and married Mr. Virk. After their marriage in India, the Virks moved to British Columbia. They had two sons and one daughter together. Mr. Virk initially worked in a mill, but he eventually started a business developing residential properties.
- [5] Ms. Virk did some farm and factory work in the early years of the marriage, but she has not worked for many years. She has suffered from mental illness, specifically depression, since at least 1993. She attempted suicide and was hospitalized due to mental illness on numerous occasions. Ms. Virk receives a disability pension as result of her mental illness.
- [6] During their marriage, Mr. Virk struggled to deal with his wife's mental illness. He sought help in dealing with her illness from his family priest and trusted friend, Mr. Singh. According to the Virks, starting in the 1990s, Mr. Singh began providing Ms. Virk with counselling and spiritual guidance.
- [7] Mr. Singh has resided at the Barnala Temple since he was 12 years old. He studied and worked at the Barnala Temple as an assistant to the former head priest, Baba Jaswant Singh. In 1995, Baba Jaswant Singh passed away and Mr. Singh became the new head priest of the Barnala Temple.
- [8] In 1993, Baba Jaswant Singh and Mr. Singh, plus two additional assistant priests, came to British Columbia to visit local parishioners, such as the Virks. During this visit, Ms. Virk was often upset and crying. In reaction to this, Baba Jaswant Singh made a direction that was significant to the parties' relationship going forward.
- [9] Baba Jaswant Singh directed that Ms. Virk would become the "religious sister" to Mr. Singh and the two other assistant priests. From this point onwards, the relationship between Ms. Virk and Mr. Singh was understood to be special in the sense that it had been declared so by Baba Jaswant Singh. Mr. Singh admitted that apart from Ms. Virk, he has no other religious sisters.
- [10] The Virks and Mr. Singh maintained a close and trusting relationship for many years. Mr. Singh often stayed with the Virks while he was in British Columbia. When in India, Ms. Virk often visited Mr. Singh at the Barnala Temple. The Virks also communicated regularly with Mr. Singh by telephone.
- [11] In 1998, the Virks purchased a home in Surrey (the "Virk Family Home"). In 2001, Mr. Singh also purchased a home in Surrey located next door to the Virk Family Home (the "Property").
- [12] By 2004, the Virks' marriage had failed and they separated. Initially, Ms. Virk went to live in India following the separation where she saw Mr. Singh often. Around the time of the Virks' separation, the relationship between Mr. Virk and Mr. Singh also began to fall apart. Mr. Virk sued Mr. Singh. Mr. Virk and Ms. Virk were involved in family litigation. Both lawsuits are discussed in more detail below.

- [13] Following the separation, Ms. Virk and Mr. Singh maintained their close relationship. However, in 2015, disputes arose between them over a variety of issues, including whether Ms. Virk owed Mr. Singh money and whether she owned the Property. By that time, Ms. Virk had lived in the Property for seven years and Mr. Singh had decided to sell it. The true ownership of the Property is at the heart of the present claim.
- [14] One issue of dispute between the parties involves Ms. Virk's allegation that Mr. Singh sexually assaulted her in 2015. Ms. Virk testified in a sincere manner about the alleged sexual assaults. Ms. Virk eventually contacted the police, but no criminal charges have been laid against Mr. Singh. Mr. Singh denies that he sexually assaulted Ms. Virk.
- [15] Ms. Virk conveyed considerable emotional pain while she testified about the alleged sexual assaults. However, I make no findings as to the truth of Ms. Virk's allegation since neither party submitted that I must decide whether the assaults occurred as part of deciding the claim and counterclaim before me.

The Claim and Counterclaim

- [16] Ms. Virk claims against Mr. Singh in respect of ownership of the Property. She alleges that in the spring of 2006, Mr. Singh offered to give her the Property if she helped him defend against a lawsuit filed by Mr. Virk in 2004. She also alleges that Mr. Singh asked her to pay him for the Property. Ms. Virk says she agreed to Mr. Singh's proposal and she ultimately fulfilled his requests.
- [17] Ms. Virk alleges that since 2007 she has paid all costs for the Property, including paying off Mr. Singh's mortgage. She says Mr. Singh holds the Property in an express trust for her. Alternatively, Ms. Virk alleges that Mr. Singh has been unjustly enriched by the contributions she made to the Property. She asks me to find that the Property is held for her pursuant to a constructive trust.
- [18] Mr. Singh denies that he ever offered to give Ms. Virk the Property and he counterclaims against her. Mr. Singh alleges that over many years, he entrusted the Virks with large sums of money donated to him by parishioners for the purpose of building a temple in British Columbia.
- [19] Mr. Singh says the Virks used the donated money for personal purposes. He also alleges that he loaned the donated money to the Virks. Mr. Singh says Ms. Virk promised to repay the loans to him and she repaid him in 2010, except for \$12,076.30, which remains outstanding.
- [20] Mr. Singh also claims that he granted Ms. Virk his power of attorney, but she misused that power when she took one of his vehicles and withdrew cash from his bank accounts without his permission. Mr. Singh alleges that he has suffered loss and damage and he seeks a judgment against Ms. Virk for debt and punitive damages.

ISSUES

[21] To decide the matters in issue, I must determine the following:

- a) Does Mr. Singh hold the Property in trust for Ms. Virk pursuant to an express or constructive trust?
- b) Does Ms. Virk owe money to Mr. Singh?
- c) Did Ms. Virk misuse the power of attorney?

HISTORY

[22] As stated above, Ms. Virk and Mr. Singh's relationship was complicated by a variety of religious, cultural, economic and personal factors. It is necessary to summarize the key events in the parties' relationship in order to understand Ms. Virk's claim, Mr. Singh's counterclaim, and the credibility of the parties.

Donation Money

[23] Both parties led considerable evidence about the handling of money donated to the Barnala Temple in British Columbia. Mr. Singh alleges that local parishioners donated money for building a new temple and the Virks collected and held donations on his behalf.

[24] Ms. Virk denied that she collected or held donation monies for Mr. Singh related to building a temple. Mr. Virk likewise denied that he was involved in collecting or holding donation monies related to building a new temple in British Columbia. Mr. Virk said that any donations he collected for Mr. Singh related to building a medical clinic for the Barnala Temple in India.

[25] Mr. Singh alleged that parishioners made donations for the new temple starting in 1993. At the time, Mr. Singh was visiting British Columbia as part of a religious delegation. Mr. Singh testified that \$60,000 had been raised by the end of their trip on December 31, 1993. Mr. Singh testified that he left the funds in the care of the Virks when the delegation returned to India because Mr. Virk had been tasked with finding a location for the new temple.

[26] From 1993 to 1999, Mr. Singh said another \$170,000 was collected from devotees for the temple project and held by the Virks. He testified that both he and Mr. Virk kept diaries to record the donations. Mr. Singh said he left his diary in the care of the Virks when he returned to India. However, neither party produced such a diary.

[27] In support of Mr. Singh's allegation that large sums of money were donated for the temple project over the years, he called Ms. Virk's 90-year-old father, Mr. Nachhtter Sidhu, and brother, Mr. Prem Sidhu, to testify. Neither witness was very helpful, as they both professed to remember very little, especially about making donations.

- [28] Mr. Singh also produced some documents about the donations that he had used in legal proceedings in 2004. These documents are consistent with my conclusion that donations were indeed made by local parishioners, but they are not sufficient to assist me with determining the overall amounts or other particulars of the donations alleged by Mr. Singh, such as the precise amounts collected, deposited or where the money went.
- [29] I have concluded that parishioners in British Columbia gave money to Mr. Singh and his predecessor Baba Jaswant Singh to pay their expenses, to support the Barnala Temple and to support the goal of establishing a local temple. However, it is not possible on the evidence to determine the amount of those donations.
- [30] According to Mr. Singh, the Virks held the donations in several joint bank accounts with him on the understanding that the money was to be used for the new temple project. Mr. Singh said he opened these joint accounts because the Virks advised him that as a non-resident, he could not hold a bank account in his name only.
- [31] It appears on the evidence that the joint accounts were used for various purposes. Mr. Singh drew from the donated funds to pay for other needs of the Barnala Temple and even his personal expenses from time to time, including purchasing vehicles and paying the mortgage on the Property. In essence, Mr. Singh saw himself and the Barnala Temple as one and the same.
- [32] Additionally, Mr. Singh says he permitted the Virks to use some of the donated funds for their personal expenses. Mr. Singh testified that in 1999, the Virks used \$60,000 in donations to build the Virk Family Home. Mr. Singh said he trusted the Virks since they were long-time parishioners. Indeed, Mr. Singh testified that he gave the Virks blank, signed cheques to use when they needed.
- [33] Mr. Singh said at the time he had no issue with the Virks using the donations for their personal needs because they promised to pay the money back with interest. However, Mr. Singh alleges that the Virks failed to pay the money back.
- [34] Overall, Mr. Singh's evidence about the recording, safekeeping and use of the donated funds demonstrated an attitude of great informality. Mr. Singh said the donations were deposited into joint accounts with the Virks. However, official record keeping as to the receipt of donations appears to me to have been non-existent.
- [35] Mr. Singh could not recall how much donated money was deposited, when it was deposited or where it was deposited. It appears he kept a running tally in his head of the money that he says he collected. He says he counted and handed this money to the Virks each time he returned to India.

- [36] I have concluded that it is more likely than not that the Virks did hold funds that had been donated to Mr. Singh. I have reached this conclusion because of the flow of money between the parties facilitated by their banking arrangements, including joint bank accounts and the signing authority that Mr. Singh granted to Ms. Virk.
- [37] However, I am unable to reach any additional conclusions about the donated funds because there is insufficient evidence and no reliable records to demonstrate when donations were received, in what amounts donations were received, where the donations were held or deposited, who used the funds, and how the donated funds were used. Specifically, I cannot conclude on the evidence before me that Mr. Singh loaned donation money to the Virks for their personal expenses and that the Virks failed to pay him back.

Society Dispute

- [38] Mr. Singh's and Mr. Virk's friendship was becoming strained due to issues about money and Mr. Singh's influence on Ms. Virk. Their friendship deteriorated further when Mr. Singh returned to Canada in 2003 following the formation of the Nanaksar Anand Ishwar Darbar Gursikh Society (the "Society").
- [39] During Mr. Singh's 1993 visit to British Columbia, local parishioners, including Mr. Virk, discussed the creation of a society to assist with the goal of building a new temple in British Columbia. Mr. Singh believed it was important to establish such a society. However, the Society as it was envisioned in 1993 was never formally registered in British Columbia.
- [40] The Society was eventually incorporated on September 12, 2002. The Society's stated purposes included, among other things, the promotion of religious worship as practiced at the Barnala Temple and the construction of a school for Sikh religious studies.
- [41] When Mr. Singh visited British Columbia in 2003, he saw the papers for the incorporation of the Society. Mr. Singh was upset because Mr. Virk named himself, and not Mr. Singh, as the head of the Society. Mr. Singh believed that Mr. Virk had fraudulently excluded him from the Society.
- [42] Mr. Singh's concern that he had been left out of a leadership role in the Society appears to me to be based on a misunderstanding. The Society bylaws in fact named Mr. Singh as the head of the temple and as the "Spiritual Guide" of the Society. The bylaws granted Mr. Singh broad powers, including the authority to terminate or appoint any director or member.
- [43] Mr. Singh testified that even though he believed that Mr. Virk had committed fraud against him in relation to the Society, he was careful not to ruin his relationship with Mr. Virk. He denied being angry with Mr. Virk. I find this is not the case. Mr. Singh was angry with Mr. Virk. He believed Mr. Virk had excluded him from leadership in the Society. He also believed that Mr. Virk owed him money for the donations allegedly used by the Virks. Mr. Singh said he requested money for a project in India in 2003, but Mr. Virk said no money would be forthcoming.

- [44] From this point forward and prior to the separation of the Virks, Mr. Singh was determined to recover the money that he believed Mr. Virk had taken. It was at this point that Ms. Virk became instrumental in Mr. Singh's efforts to get the money back from Mr. Virk.

Property Purchase and Debt Action

- [45] The purchase of the Property and ensuing litigation further affected the relationship between the parties. Mr. Singh purchased the Property on September 28, 2001. The details surrounding the purchase of the Property are in dispute.
- [46] Mr. Virk testified that he originally wanted to buy the Property so that his sons could live next door. Mr. Virk said that Ms. Virk suggested they put the Property into Mr. Singh's name because Mr. Singh wanted to immigrate to Canada. Mr. Virk agreed because he had a good relationship with Mr. Singh at the time and he wanted to help him immigrate.
- [47] Mr. Singh offered a different explanation for the purchase the Property. He testified that Mr. Virk was supposed to find a location for the new temple and Mr. Virk told him to acquire the Property for the temple. Mr. Singh denies that he ever intended to immigrate to Canada.
- [48] On September 28, 2001, the Property was purchased and registered in Mr. Singh's name. To complete the purchase, Mr. Singh obtained a mortgage and the Virks signed that mortgage as guarantors. Mr. Virk testified that he and Ms. Virk guaranteed and co-signed the mortgage because Mr. Singh could not qualify without them.
- [49] The Property purchase was completed with a \$10,000 cash deposit, mortgage proceeds of \$59,500 and funds of \$106,988.26. The parties disagree over the origin of the \$106,988.26. Mr. Virk says he loaned Mr. Singh the funds to complete the purchase of the Property.
- [50] Mr. Singh says that the Property was purchased and paid for using funds donated to him by parishioners. Mr. Singh says the Virks held the donated funds on his behalf, and he denies the Virks contributed any of their own funds to the purchase.
- [51] On June 7, 2004, following his separation from Ms. Virk, Mr. Virk filed a claim against Mr. Singh, alleging that he had loaned money to Mr. Singh for the purchase of the Property and seeking an equitable mortgage over the Property (the "Debt Action").
- [52] In December 2005, Mr. Singh filed a statement of defence and counterclaim in the Debt Action. He denied that Mr. Virk loaned him money to purchase the Property and he denied owing money to Mr. Virk. The counterclaim sought damages for registering the certificate of pending litigation against the Property, but not an award for debt.

- [53] The Debt Action was ultimately settled on March 12, 2012, on the first day of the trial on terms where Mr. Singh paid \$52,000 to Mr. Virk. Mr. Herr, counsel for Mr. Singh in the Debt Action, testified that the settlement was prompted by the cost of the trial coupled with a desire to avoid tearing the congregation further apart. Mr. Singh denied that the payment to settle the Debt Action related to repaying money he had borrowed from Mr. Virk to purchase the Property.
- [54] Ms. Virk, having separated from Mr. Virk, assisted Mr. Singh in defending the Debt Action. Mr. Herr testified that he spoke with Ms. Virk about the Debt Action, including when she attended meetings with Mr. Singh to discuss legal strategy. Mr. Herr stated that Ms. Virk told him that she intended to make Mr. Singh "whole" in respect of the money that he claimed to be owed. This confirms the extent to which Mr. Singh's defence of the Debt Action relied upon Ms. Virk's ongoing involvement and assistance.
- [55] Throughout the course of the Debt Action, Ms. Virk played a significant role in assisting Mr. Singh with his defence. This is directly relevant to Ms. Virk's credibility in this case. I will discuss Ms. Virk's role in defending the Debt Action in further detail when assessing her credibility.

Matrimonial Action

- [56] The Virks separated in 2004. Ms. Virk admitted that prior to the separation, her relationship with Mr. Virk was strained because she was spending a lot of time in India, suffering from depression, and receiving a great deal of guidance from Mr. Singh. Around the time of her separation and divorce, Ms. Virk's mental health deteriorated to the point that she was hospitalized more than once due to suicide attempts.
- [57] On April 8, 2004, the Virks signed a separation agreement. The separation agreement was not advantageous to Ms. Virk. It provided Ms. Virk with no spousal support. In exchange for transferring her interest in the Virk Family Home to Mr. Virk and her sons, she received some shares with a value of less than \$10,000 and an RRSP worth approximately \$37,000, plus her jewellery.
- [58] Following the separation, Ms. Virk went to India where she regularly visited Mr. Singh at the Barnala Temple. In 2005, Mr. Virk sent her the divorce papers. She described feeling depressed and suicidal at this time and totally reliant on Mr. Singh for guidance and support. Ms. Virk says Mr. Singh advised her to "go after" Mr. Virk to get a settlement of half his property. Ms. Virk eventually agreed to start a family law claim challenging the separation agreement (the "Matrimonial Action").

- [59] Mr. Singh convinced Ms. Virk to start the Matrimonial Action at least in part because he wanted Ms. Virk to repay the alleged loan of the donation funds using the money she would receive from Mr. Virk in the action. Mr. Singh arranged a meeting at Ms. Virk's parents' home, where her family encouraged her to sue Mr. Virk and use the money she would receive from Mr. Virk to repay Mr. Singh.
- [60] Mr. Singh claimed he merely observed the discussions at this family meeting. However, he admitted that it was his idea to have Ms. Virk give him the money she would receive in the Matrimonial Action.
- [61] Following the decision that Ms. Virk would try to repay the alleged loan by suing Mr. Virk, she and Mr. Singh met with Karmjit Kaur Jauhal, an acquaintance of both of them, in early 2006. Ms. Virk testified that during her meeting with Ms. Jauhal and Mr. Singh, they discussed that if she started the Matrimonial Action, Ms. Jauhal could act as litigation guardian and Ms. Virk could get money from Mr. Virk. She said that she had not been planning to sue Mr. Virk otherwise, because she did not want to fight and she had enough problems with her own situation. Ms. Jauhal agreed to act as Ms. Virk's litigation guardian in the Matrimonial Action.
- [62] On March 23, 2006, Ms. Virk's litigation guardian filed the Matrimonial Action against Mr. Virk. The Matrimonial Action sought to set aside the separation agreement and it sought spousal support and division of family assets. The Matrimonial Action alleged that Ms. Virk lacked capacity to enter into the separation agreement and that the agreement was unfair.
- [63] The Matrimonial Action eventually settled in exchange for a \$300,000 payment from Mr. Virk. On November 14, 2010, Ms. Virk received a solicitor's trust cheque in the amount of \$230,297.73, for the balance of the settlement net of legal fees. Ms. Virk then paid her settlement in the Matrimonial Action to Mr. Singh. Ms. Virk and Mr. Singh dispute what the payment was for. Ms. Virk says that the money was given to Mr. Virk in exchange for the Property. Mr. Virk says the money was a repayment for the donation funds allegedly borrowed by the Virks. I will address this dispute in more detail below.

CREDIBILITY

- [64] The credibility of witnesses is very much at issue in this case. The evidence provided by the main witnesses, especially Ms. Virk, Mr. Virk and Mr. Singh, differs significantly on key issues.

The Law

- [65] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:

- [66] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [67] Some of the witnesses who testified made prior inconsistent statements under oath. The credibility of a witness who has made prior inconsistent statements under oath must be assessed cautiously. However, the fact that a witness has previously lied, even under oath, does not mean that she lacks credibility in all respects, or that her evidence is necessarily unreliable: *R. v. Hurst*, 2019 BCSC 307 at para. 16 and *Dong v. Hofer*, 2018 BCSC 77 at para. 28.
- [68] In some circumstances, the court may require the existence of credible confirmatory evidence before relying on the account of a witness who has made prior inconsistent statements: *Judge v. Judge*, 2015 BCSC 1764 at para. 298.

Ms. Virk

- [69] Mr. Singh alleges that Ms. Virk is not a credible witness because much of Ms. Virk's evidence at trial contradicts prior statements she made, including several sworn affidavits in various court proceedings.

Prior Inconsistent Statements

- [70] Ms. Virk maintained that Mr. Singh directed her to take steps after her separation to help Mr. Singh obtain money from Mr. Virk. She says she followed his directions because she trusted him and because her poor mental state made her vulnerable.

A. Indian Action

- [71] One of the steps that Ms. Virk says she took at Mr. Singh's direction was to commence an action in India. In 2004, Ms. Virk commenced a claim in India to sell Mr. Virk's Indian properties (the "Indian Action"), alleging that the Virks had signed an agreement to sell these properties. The alleged agreement underlying the Indian Action also stated that Ms. Virk was to repay Mr. Singh with the sale proceeds.

- [72] In July of 2005, Mr. Virk filed a criminal complaint in India, alleging that Mr. Singh and Ms. Virk forged the agreement in order to sell his Indian properties and pay the proceeds to Mr. Singh. Mr. Singh denied being involved in the forgery of the agreement and charges against him were eventually dropped. None of Mr. Virk's Indian properties were sold as a result of the Indian Action.

B. Debt Action

- [73] Ms. Virk allegedly signed documents for Mr. Singh's benefit in the Debt Action that are contrary to her testimony at trial. The first is a signed statement prepared in India, and the second is a sworn affidavit prepared in Canada.
- [74] Mr. Singh produced a statement allegedly signed by Ms. Virk in India on March 3, 2005, detailing donations given to Mr. Singh and held by the Virks (the "2005 Statement"). The 2005 Statement also said that Mr. Virk borrowed money which he never repaid to Mr. Singh and that Mr. Virk had appropriated rental income from the Property. Mr. Singh signed a similar statement.
- [75] Mr. Singh said that he and Ms. Virk had the statements prepared in India. Mr. Singh said that Ms. Virk prepared the 2005 Statement separately from him and read it in English to a typist. Even though the statements were allegedly prepared separately, there were many similarities between them.
- [76] The 2005 Statement signed by Ms. Virk does not align with the way that Ms. Virk speaks. The statement contains many specific turns of phrase and garbled sentences that Ms. Virk did not use while testifying. For example, the 2005 Statement says:

Baba Ajit Singh paid 1,16,988 dollars 26 cents from his own pocket and the remaining dollars which were with us of Baba Ajit Singh Ji of the year 1993 to the tune of 60,000 dollars which we had used those 60,000 dollars at our house.

- [77] Ms. Virk could not recall drafting, dictating or signing the 2005 Statement. She said she would have followed Mr. Singh's request for the statement to defend the Debt Action. The statement is not consistent with my observations of Ms. Virk's communication style or abilities.
- [78] Ms. Virk also provided an affidavit for the Debt Action on September 22, 2005 (the "2005 Affidavit"). In the 2005 Affidavit, Ms. Virk states that she and Mr. Virk did not loan Mr. Singh \$106,988.26 to allow him to purchase the Property.
- [79] She states that the payment to Mr. Singh came "100% from money collected by either me or Mr. Singh as donations from a lot of people and Temples over a period of years", and that the donations were collected to build a new temple in Surrey.

- [80] Ms. Virk says the 2005 Affidavit contains falsehoods. She cannot recall preparing or swearing the affidavit. She said that in 2005 and in the years following, she suffered from severe depression and she was taking direction from Mr. Singh. She says Mr. Singh directed her to provide all of this evidence.

C. Matrimonial Action

- [81] Ms. Virk also provided affidavits in her family law claim against Mr. Virk that she says contain falsehoods that assisted Mr. Singh. For example, in her affidavit made May 31, 2007, Ms. Virk states that the payment for the Property came from donated monies, effectively adopting the evidence in the 2005 Affidavit. In another affidavit made on January 19, 2009, she seeks to oppose Mr. Virk's attempt to have the Debt Action tried at the same as her family law claim (the "2009 Affidavit").
- [82] In the 2009 Affidavit, Ms. Virk made a number of statements that directly undermine her present claim. For example, she stated that the Property is "not a family asset for the purposes of the matrimonial action", she lives in the Property as a tenant only, the money spent on maintaining and renovating the Property comes from Ms. Virk's brothers, and she has no beneficial interest in the Property which Mr. Singh owns.
- [83] It is clear that the 2009 Affidavit was meant to assist both Ms. Virk and Mr. Singh. It thwarted Mr. Virk's efforts to tie the Debt Action to Ms. Virk's family law action and it undermined the notion that the Property was potentially a family asset.

Evidence of Dr. Nader

- [84] Ms. Virk says that her prior inconsistent statements can be explained in part by her poor mental health and vulnerability to Mr. Singh. Ms. Virk tendered an expert report by Dr. Rami Nader, a registered psychologist specializing in the diagnosis and treatment of post-traumatic stress disorder, depression and anxiety disorders. Dr. Nader reviewed Ms. Virk's extensive clinical records and interviewed her prior to preparing his report.
- [85] Ms. Virk testified that her mental health was poor after her divorce. That is confirmed by Dr. Nader's opinion. Dr. Nader reviewed clinical records for Ms. Virk and noted that between 2004 and 2006, her psychological and emotional state was highly unstable and her depression symptoms had deteriorated following her separation.
- [86] According to Dr. Nader, Ms. Virk's mental health problems likely resulted in an impairment of her cognitive abilities. Dr. Nader was also of the opinion that Ms. Virk's vulnerable cognitive state and psychosocial situation between 2004 and 2006 would have made her more likely to accept requests from people that she trusted at the time.

- [87] I accept the evidence of Dr. Nader that Ms. Virk's mental health and vulnerability played a role in her acceptance of requests by Mr. Singh, including to provide false testimony on his behalf. Counsel for Mr. Singh pointed out, rightly, that Dr. Nader's opinion only dealt with Ms. Virk's condition in 2004 to 2006 and he suggested that any mental problems Ms. Virk faced had resolved after that period.
- [88] Given all of the evidence about the extent of her mental health issues, I do not agree that with the passage of time, Ms. Virk's mental health and comprehension issues had resolved or that she became less susceptible to Mr. Singh's direction after 2006. Therefore, I accept Ms. Virk's explanation for the untruthfulness of the affidavits she prepared after 2006.

Conclusion on Credibility Assessment

- [89] I am required to exercise great caution in assessing the credibility and reliability of Ms. Virk's evidence at trial given her history of providing false evidence. This requires me to consider her explanation for the dishonesty and whether she has provided credible confirmatory evidence.
- [90] First, I find that Ms. Virk's prior false evidence was provided at the direction of Mr. Singh. I find that the purpose of this evidence was to assist Mr. Singh just as much as it was to assist Ms. Virk. Mr. Singh convinced Ms. Virk to commence the Indian Action. Ms. Virk did not prepare the 2005 Statement for herself but rather signed it at the direction of Mr. Singh, and she did not understand the content of the 2005 Statement when she signed it. Ms. Virk also signed the affidavits, such as the 2005 Affidavit and the 2009 Affidavit, at Mr. Singh's request.
- [91] I have concluded that Mr. Singh decided in 2003 that he was going to do whatever he could to ensure that Mr. Virk pay him the money that Mr. Singh believed was owing. Ms. Virk was extremely useful to Mr. Singh in this endeavor. At all relevant times, Ms. Virk was a vulnerable person. She was emotionally unstable and she suffered from significant mental illness. She regarded Mr. Singh as the most important person in her life. She believed Mr. Singh was her only friend. She looked to him for emotional support and guidance and she shared her most personal thoughts with him.
- [92] Mr. Singh agreed that Ms. Virk was his only religious sister, but at trial he minimized the extent of their relationship at every turn. He was evasive as he repeatedly denied knowledge of Ms. Virk's mental health.
- [93] I will now consider Ms. Virk's testimony at trial. To assess Ms. Virk's credibility, I observed her carefully as she testified. She was often confused by questions, even those posed by her own counsel. It was clear to me that she struggled with comprehension. Ms. Virk had difficulty recalling events and details. She also had difficulty expressing herself clearly and articulately. Dr. Nader described Ms. Virk as a poor historian. That is consistent with my own observations of her memory and her difficulties expressing herself.

- [94] Over the course of her direct and cross-examination, her inarticulate and timid demeanor was largely consistent. She came across as an unsophisticated witness. She gave no elaborate, grandiose or dramatic accounts of any events. She answered questions very plainly and to the best of her limited abilities.
- [95] I do not find that she was merely pretending to have difficulties. She was attentive and she tried to answer questions as best she could. When her evidence was challenged on cross-examination, she did not become defensive nor attempt to embroider or otherwise improve her original answers, for example, by suddenly remembering things she had previously forgotten.
- [96] Mr. Singh submits that on top of being an admitted liar, Ms. Virk is manipulative. However, her demeanor while testifying did not suggest to me that she was attempting to manipulate. Her limited abilities and cognitive challenges were demonstrated during her testimony. I do not agree that she is capable of the kind of manipulation and scheming attributed to her by Mr. Singh.
- [97] However, just because someone is inarticulate and unsophisticated does not mean her evidence must be disbelieved. I must guard against arbitrary findings as to any witnesses' credibility that is wholly dependent upon whether a witness presented as the "best actor" on the witness box: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356.
- [98] I find Ms. Virk's evidence credible in most respects because I have accepted her explanation that her actions, including past falsehoods, resulted from her poor mental state which made her vulnerable to accepting Mr. Singh's directions without question. I generally prefer the evidence of Ms. Virk over Mr. Singh except where I have noted otherwise.

Mr. Singh

- [99] In assessing the validity of Mr. Singh's evidence, I considered his credibility. It was clear to me that Mr. Singh was not a credible witness, for example, in respect of his relationship with Ms. Virk and in respect of his knowledge about her poor mental health. He was impeached in cross examination repeatedly in respect of answers he gave at trial that contradicted his discovery evidence. Rather than admit that his evidence was inconsistent, he attempted to explain away the inconsistencies by saying that he must not have understood the question at discovery, despite the assistance of an interpreter.
- [100] Mr. Singh attempted to minimize his relationship with Ms. Virk. When he was asked whether her relationship to him as a "religious sister" made their relationship closer than it was with other parishioners, he was reluctant and evasive. He appeared to minimize the personal nature of their relationship despite acknowledging that she shared highly personal information with him in person and during phone conversations.

- [101] Mr. Singh also persistently attempted to minimize his knowledge of Ms. Virk's poor mental health. Mr. Singh said that he knew Ms. Virk suffered from depression only because Mr. Virk told him so. He said that she "stayed quiet", but that is all he knew. Mr. Singh denied personally seeing any indication of Ms. Virk's mental illness and he insisted that she seemed fine to him. In some astonishing testimony about Ms. Virk's visit to India following her separation in 2004, and in the lead up to multiple suicide attempts, he testified that he never saw Ms. Virk upset.
- [102] Mr. Singh also denied that his 1997 visit to Canada had anything to do with Ms. Virk's depression. When asked about it, he stated that he would not have left thousands of devotees in India to come to Canada to help just one person. However, when asked to explain why he came to Canada in 1997, his first response was that it was due to receiving a letter from Mr. Virk informing him that Ms. Virk was "a bit unwell". He was repeatedly inconsistent or evasive about the nature and extent of his personal relationship with Ms. Virk.
- [103] I have concluded that Mr. Singh knew much more about Ms. Virk's depression and poor mental health than he stated. His evidence about his attempts to help Ms. Virk over the years contradicts his statements that she seemed perfectly well. I find that he made considerable efforts to counsel and assist Ms. Virk over the years.
- [104] Mr. Singh is an intelligent, articulate and resourceful person. That was evident throughout his testimony. Ms. Virk was no match for Mr. Singh in terms of resourcefulness. I find that Mr. Singh exploited Ms. Virk's vulnerabilities with his plans to get back at Mr. Virk and to recover, one way or another, the money that he believed he was owed. To this end, I find that Mr. Singh directed and guided Ms. Virk through a lengthy series of plans and legal maneuvers that involved Ms. Virk giving false evidence both in British Columbia and India. As stated above, I generally prefer the evidence of Ms. Virk over Mr. Singh except where I have noted otherwise.

VALIDITY OF DOCUMENTS

- [105] I must also address the validity of two documents produced by Mr. Singh allegedly bearing Ms. Virk's signature.
- [106] In 2005, Ms. Virk says she gave Mr. Singh a number of blank pieces of paper with her signature on them at Mr. Singh's request. At this time, Mr. Virk had filed a criminal complaint in India against Ms. Virk and Mr. Singh relating to the Indian Action. As a result, Ms. Virk returned to Canada. It was unlikely she would be returning to India while the criminal complaint was pending.

[107] Mr. Singh also experienced temporary difficulty travelling to Canada to defend the Debt Action after Mr. Virk filed the criminal complaint. Given the travel restrictions they faced following the criminal complaint, I have concluded Ms. Virk supplied these signature pages to Mr. Singh, in the event Mr. Singh could not obtain her signature in person, to facilitate the steps that Mr. Singh intended to take to recover monies from Mr. Virk and to safeguard the Property.

A. Tenancy Agreement

[108] Ms. Virk alleges that Mr. Singh has used the blank, signed pages she gave him to create a tenancy agreement. Mr. Singh produced a Residential Tenancy Agreement allegedly signed by Ms. Virk on October 15, 2006 (the "Tenancy Agreement"). The Tenancy Agreement stated that Ms. Virk will rent the Property from Mr. Singh for \$1,200 per month.

[109] Ms. Virk denies that she ever saw the Tenancy Agreement prior to Mr. Singh producing it in this claim. Mr. Singh said the Tenancy Agreement was Ms. Virk's idea and she signed it in front of him.

[110] Mr. Singh produced the original Tenancy Agreement at his examination for discovery. The original Tenancy Agreement had been laminated. When Ms. Virk's counsel requested to view the original Tenancy Agreement following the discovery, it was not produced. Mr. Singh said the original Tenancy Agreement had been stolen out of his vehicle when it was parked outside of his lawyer's office.

[111] I do not believe that the original copy of the Tenancy Agreement was stolen. I also find that the Tenancy Agreement was not signed by Ms. Virk. Rather, it was prepared by someone other than Ms. Virk using the pre-signed, blank pieces of paper she supplied to Mr. Singh.

B. Monetary Agreement

[112] Similarly, Ms. Virk alleges that Mr. Singh has used blank, signed pages she gave him to create a loan document. Mr. Singh produced an agreement titled "Monetary Agreement between Avtar Kaur Virk and Baba Ajit Singh" dated November 24, 2010 (the "Monetary Agreement").

[113] Mr. Singh says Ms. Virk had this document prepared and she signed it in front of him. Ms. Virk denies this. She said she never saw the Monetary Agreement before Mr. Singh produced it in this litigation.

[114] The Monetary Agreement sets out the history, with approximate dates, amounts and surrounding details of how the donation money flowed between Mr. Singh and the Virks. It includes statements such as: "In the year of 1993, you, Baba Ajit Singh handed over \$60,000 to me . but we used this money for the construction of our house at 9105 149 Street, Surrey " and, "In 2008, when you visited Canada, you had collected donations from the Sangat. On the day or your departure, you handed over the donations to me in the amount of \$16,200

cash."

- [115] The Monetary Agreement concludes with Ms. Virk allegedly stating that she has paid back almost all of the money owed to Mr. Singh and that she will repay the remaining \$12,076.30 when she is able. The Monetary Agreement says: "Today my mind feels much lighter and relaxed, knowing that I have put off a lot of burden from myself by repaying back most of the Sangat donations' [sic] amount. Together, we have settled most of the debt that I had owed you "
- [116] I have concluded the Monetary Agreement was not prepared by Ms. Virk, nor by another person at her direction. I have reached this conclusion because the language in the Monetary Agreement bears absolutely no resemblance to the way that Ms. Virk speaks or communicates.
- [117] The precise nature of the financial and other details recorded in the Monetary Agreement do not align with Ms. Virk's ability to describe past events of this sort. The authenticity of the Monetary Agreement also concerns me in light of the 2009 Affidavit. In the 2009 Affidavit, Ms. Virk denied that Mr. Singh owed any debts to the Virks. However, the 2009 Affidavit fails to mention the numerous unpaid debts apparently owed to Mr. Singh that were recorded in the Monetary Agreement.
- [118] The Monetary Agreement was produced at Mr. Singh's examination for discovery and it had also been laminated. The Monetary Agreement was apparently unavailable when Ms. Virk's counsel requested to inspect it again. Mr. Singh said that the Monetary Agreement was also stolen from his vehicle outside his lawyer's office.
- [119] I do not believe that the original copy of the Monetary Agreement was stolen. I do not agree that Ms. Virk signed the Monetary Agreement. I have concluded that the Monetary Agreement was prepared by someone other than Ms. Virk using the pre-signed, blank pieces of paper that Ms. Virk supplied to Mr. Singh.

EXPRESS TRUST CLAIM

The Law

- [120] Ms. Virk's primary position is that Mr. Singh holds the Property for her absolute benefit pursuant to an express trust. There is no dispute between the parties as to the applicable law. For a trust to arise, three essential characteristics must be identified. In Bradshaw at para. 199, Justice Dillon described these essential characteristics as follows:

A trust is created intentionally by a person where she transfers legal title to a property and uses words that indicate that the transferee is to hold title for the benefit of the beneficiary. It is well established that for a trust to be created, there must be certainty of intention, certainty of subject matter, and certainty of beneficiaries/objects

- [121] In the absence of formal trust documentation, the court may determine certainty of intention by looking to the surrounding circumstances, the evidence of what was agreed upon, and how the parties conducted themselves: D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada*, (4th ed. 2012) (Waters) at 142, fn. 10, citing *Langley v. Brownjohn*, 2007 BCSC 156. Communicating a future intention to set up a trust will be insufficient unless the statement of future intention is "bought" for valuable consideration: Waters at 143.
- [122] The asserting party carries the burden of establishing the existence of a verbal agreement to create a trust. To discharge the burden, the asserting party must prove on the balance of probabilities with clear and satisfactory evidence that the parties intended to enter into a binding agreement. A verbal agreement may be enforced, including by the imposition of an express trust over an asset: *Usher v. Larabee*, 2010 BCSC 1608 at paras. 81 and 83; *Chinn v. Hanrieder*, 2009 BCSC 635 at paras. 111-112.

Certainty of Subject and Certainty of Beneficiary

- [123] There is no dispute that the subject matter of the alleged trust is the Property. Ms. Virk alleges that it was the Property - and not some other asset - that Mr. Singh promised to give to her.
- [124] Regarding the requirement for certainty of beneficiary, Ms. Virk alleges that certainty of beneficiary is clear because Mr. Singh promised to give her - and only her - the Property.
- [125] Mr. Singh argues that there is no certainty of beneficiary because the Property belonged to the temple. During Mr. Singh's testimony, he stated many times that the Property belonged to the temple. I disagree with Mr. Singh's assertion that the temple owned the Property. It was clear that Mr. Singh owned the Property. The Property was purchased and registered in Mr. Singh's name. Mr. Singh's statement of defence in the Debt Action did not assert that someone other than Mr. Singh owned the Property. Mr. Singh also left the Property to Ms. Virk in his will.
- [126] In cross-examination, Mr. Singh was asked why he never transferred the Property out of his name if the Property belonged to the temple. Mr. Singh said he and other parishioners decided that they must wait until the Society was formally incorporated before the Property could be registered in the name of the Society. However, this assertion is inconsistent with other evidence. After the Society was incorporated in 2002, Mr. Singh continued to retain title to the Property.
- [127] I am not convinced that there is any uncertainty of beneficiary due to Mr. Singh's statements that the Property belonged to the temple.

Certainty of Intention

- [128] To find a trust, there must be convincing evidence establishing certainty of intention on Mr. Singh's part to create a trust in favour of Ms. Virk.
- [129] A declaration of trust will only be valid where the settlor intends to part with their property: *Carson v. Wilson*, [1961] O.R. 113 (C.A.). In order to determine whether a party had the necessary intention to create a trust, the court may look to surrounding circumstances: *Waters* at 143.
- [130] Justice Weatherill noted that the court can consider the conduct of the parties to determine certainty of intention in *McInerney v. Laass*, 2015 BCSC 1708:
- [40] Certainty of intention is a question of fact. In the absence of formal documentation creating a trust, the court may infer an intention to create a trust from the surrounding circumstances. Evidence of what the parties intended, what they actually agreed upon and how they conducted themselves will be considered (*Elliott* at paras. 26 and 28).
- [131] Where an express trust is alleged, it is the conduct of the settlor that is determinative, not the beneficiary: *Warde v. Slatter*, 2017 BCSC 274 at para 66. Therefore, it is Mr. Singh's conduct that must be examined in the case before me to determine whether an express trust arises.
- [132] According to Ms. Virk, after her separation and divorce, she returned to Surrey from India in early 2006. She was severely depressed, estranged from her family and living alone in a rental suite. She also alleges she was totally reliant on Mr. Singh for emotional support and guidance.
- [133] Mr. Singh agrees that he visited Ms. Virk in her rental suite in Surrey in early 2006. However, Mr. Singh and Ms. Virk offered very different accounts of Mr. Singh's first visit to her rental suite. Mr. Singh says that he was concerned about Ms. Virk's living conditions and he arranged a meeting with Ms. Virk and her estranged family to help them reconcile.
- [134] Ms. Virk alleges that during Mr. Singh's visit to her rental suite, he offered to give her the Property if she paid him some money and committed to help him defend the Debt Action. In the Debt Action, Mr. Virk had obtained an agreement, subject to court approval, to sell the Property for \$263,000.
- [135] Ms. Virk says after Mr. Singh showed her the pending sale agreement from the Debt Action, she agreed to pay Mr. Singh \$236,000 for the Property with any monies she recovered from Mr. Virk in the Matrimonial Action. In 2010, Ms. Virk paid Mr. Singh \$230,297.73 from her settlement in the Matrimonial Action.

- [136] Ms. Virk says Mr. Singh secured his promise to give her the Property when he left the Property to her in his will. On March 23, 2006, Ms. Virk and Mr. Singh met with Mr. Singh's lawyer to sign wills that he prepared for each of them. In his will, Mr. Singh left all of his Property to Ms. Virk and Ms. Virk's will mirrored his.
- [137] Mr. Singh does not dispute that he left Ms. Virk the Property in his will. However, he says that Ms. Virk promised him that if she inherited the Property, she would give it to the temple.
- [138] Mr. Singh also denied that he needed Ms. Virk's assistance defending the Property from Mr. Virk's Debt Action. Mr. Singh said that local parishioners made arrangements to cover his legal expenses. Mr. Singh's insistence that he did not need Ms. Virk's assistance is undermined by a letter from his counsel in 2005 advising him that while Ms. Virk would not make a good witness, presumably due to comprehension issues, her affidavit would assist in preventing the sale of the Property by Mr. Virk.
- [139] Mr. Singh denies that he offered to give Ms. Virk the Property in exchange for a cash payment and her assistance in defending the Debt Action. He says that Ms. Virk is a liar who ought to be disbelieved. Mr. Singh says that the money Ms. Virk paid to him in 2010 was not a payment for the Property, but a repayment of the money the Virks had borrowed from him, and Ms. Virk was nothing more than a tenant at the Property.
- [140] To make out certainty of intention, it must be shown that Mr. Singh intended to give up his interest in the Property. Considering the surrounding circumstances and Mr. Singh's conduct in the years following the conversation he had with Ms. Virk about giving her the Property, it is apparent that he had no such intention.
- [141] As part of his plans to protect the Property from Mr. Virk, Mr. Singh encouraged Ms. Virk to attest to the fact that he owned the Property and that he paid for the Property exclusively. He also encouraged her to attest to the fact that she held no beneficial interest in the Property and to say that she was merely a tenant.
- [142] When Ms. Virk asked Mr. Singh to transfer her title to the Property, he told her that he needed to retain title of the Property in case he wanted to immigrate to Canada. Mr. Singh never transferred title to the Property to Ms. Virk nor to the Society for use as a temple.
- [143] Mr. Singh also continued making monetary contributions to the Property by allowing Ms. Virk to withdraw money from his bank accounts and to use that money for the Property. These are not the actions of someone who intends to divest himself absolutely of the Property. Rather, these are the actions of someone who intends to retain ownership of the Property. Mr. Singh's statement that he would give Ms. Virk the Property was untrue. He never intended to create a trust for her.

Conclusion on Express Trust Claim

[144] While I disbelieve parts of Mr. Singh's evidence, I am not convinced that he intended to settle a trust in favour of Ms. Virk and to hold the Property in an express trust for her. After considering the evidence as a whole, I have concluded there is insufficient evidence to show on a balance of probabilities that Mr. Singh intended to part absolutely with his beneficial interest in the Property. While I find that Mr. Singh did promise Ms. Virk that she would have the Property if she helped him recover the money from Mr. Virk, this is not sufficient to find an express trust.

UNJUST ENRICHMENT CLAIM

[145] Since I decline to find an express trust over the Property in favour of Ms. Virk, I will now consider the alternative relief sought. Ms. Virk's alternative position is that Mr. Singh has been unjustly enriched by her contributions to the Property. She says the appropriate remedy is a constructive trust over the Property because of the nature of her contributions to the Property.

[146] In cases where unjust enrichment is alleged, the "fundamental concern is the legitimate expectation of the parties": *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 990. The basic notions underpinning an action for unjust enrichment are: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. If these are proven, the action will be established and the right to claim relief will be made out: *Peter* at 987.

The Parties' Relationship

[147] Ms. Virk and Mr. Singh did not live together in a marriage-like relationship. Mr. Singh was Ms. Virk's priest, close friend and religious leader. Ms. Virk was his religious sister since 1993 and a loyal follower. She was also a vulnerable person who was dependent on him for guidance and support from at least the date of her separation in 2004, if not earlier. Mr. Singh would often stay at the Property with Ms. Virk when he visited Canada. This raises the question of whether theirs is the kind of relationship that is capable of attracting the remedy of constructive trust.

[148] In *Pettikus v. Becker*, [1980] 2 S.C.R. 834, the Supreme Court of Canada used broad language when it held that the doctrine of constructive trust applied in the context of a relationship where the parties were unmarried (at 850-851):

I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

[Emphasis added.]

- [149] The remedy of constructive trust has been applied in a variety of relationships, including parent and child, brother and sister and close friends. In *Thomas v. Florkow*, 2011 BCSC 802, aff'd 2012 BCCA 486, Justice Kelleher recognized that the use of constructive trusts has been broadened beyond conjugal relationships. He imposed a constructive trust where the parties had a "non-conjugal but domestic arrangement that was a partnership": para. 81.
- [150] The relationship that existed between Mr. Singh and Ms. Virk was unique. In some respects, it was akin to a sibling relationship. It also bore some characteristics of a non-conjugal but domestic arrangement that was a partnership similar to the one at issue in the *Thomas* case. Therefore, I conclude the relationship between Mr. Singh and Ms. Virk is capable of attracting the remedy of constructive trust even though they were not married nor living together in a marriage-like relationship.

Enrichment

- [151] According to Ms. Virk's evidence, Mr. Singh has been enriched by Ms. Virk's contributions to the Property. Ms. Virk has lived in the Property since 2007. Prior to that, she assisted Mr. Singh with collecting rent on the Property and dealing with problem tenants.
- [152] Ms. Virk deposited the monies she received in the settlement of the Matrimonial Action into Mr. Singh's account. That account was used to maintain and improve the Property. Ms. Virk paid the money believing that she was acquiring the Property and not to repay a loan owed to Mr. Singh by herself or Mr. Virk.
- [153] Over the course of nearly 13 years, Ms. Virk maintained the Property to a high standard. The evidence shows that she personally cleaned up the Property and she carried out renovations and improvements on the Property.
- [154] Ms. Virk says she deposited the support and pension monies she received, plus any earnings from reselling items on Craigslist, into accounts she held jointly with Mr. Singh and accounts in Mr. Singh's name. She says she paid all expenses for the Property using her money. She also says she used the money she received from Mr. Virk after their separation to pay for renovations on the Property.
- [155] Ms. Virk says she has made various improvements to the Property including replacing the roof and deck, repaving the driveway, renovating the kitchen, and enhancing the yard and garden. Ms. Virk has also been responsible for the day-to-day care and maintenance of the Property. She ensured the property taxes, mortgage payments and other expenses related to the Property were paid.
- [156] When Mr. Singh visited from India he and Ms. Virk would review her expenses and the work done on the Property. In effect, Mr. Singh regarded Ms. Virk as the caretaker of the Property.
- [157] I find that Mr. Singh has been enriched through Ms. Virk's contributions to the Property.

Corresponding Deprivation

- [158] Ms. Virk says she has suffered a deprivation through her contributions to the Property. She paid over to Mr. Singh the settlement monies she received in the Matrimonial Action. Ms. Virk says she completed the renovations to the Property by using contractors that she knew from Mr. Virk's development business. They allegedly gave her reduced rates or worked for free. She says she paid off the \$55,000 mortgage balance on the Property in 2013 using her own money.
- [159] Mr. Singh submits that it was his money that was used to pay for renovations and upkeep of the Property. He said Ms. Virk had access to his bank accounts to withdraw money to pay for expenses for the Property and to pay off the mortgage. He submits that Ms. Virk lacked the income and means necessary to make the financial contributions that she alleges.
- [160] I do not agree with Ms. Virk's assertion that she paid for all of the Property-related expenses. In light of her modest income and lack of assets, she lacked the financial means to pay for all expenses using her own money.
- [161] Ms. Virk had access to Mr. Singh's money and she was authorized to withdraw money to cover expenses that she determined were necessary. However, I am satisfied that whatever money Ms. Virk earned, she comingled with Mr. Singh's money in their various bank accounts. In other words, she used her money as well as his money for expenses related to the Property. Ms. Virk contributed financially, as well as in other ways, to the preservation, maintenance and improvement of the Property.
- [162] Ms. Virk has virtually no assets. Mr. Singh claims ownership of the Property and the Nissan vehicle registered in Ms. Virk's name. By spending all of her income and settlement monies on the Property, Ms. Virk has foregone the opportunity to invest the money or acquire assets of her own. I conclude that Ms. Virk has been correspondingly deprived.

Absence of Juristic Reason

- [163] Mr. Singh submits that there is a juristic reason for the enrichment and corresponding deprivation. He says that Ms. Virk always lived in the Property as a tenant and she paid monthly rent and other costs to maintain the Property due to the Tenancy Agreement.
- [164] Since the Tenancy Agreement is not valid, Ms. Virk is not a tenant in the Property and the alleged tenancy is not a juristic reason for Ms. Virk's enrichment.
- [165] Mr. Singh also submits that when Ms. Virk paid him the settlement money from the Matrimonial Action, she was not paying for the Property, but rather repaying a loan that she or Mr. Virk owed to him. While Mr. Singh has maintained for many years that Mr. Virk owed him money, he did not advance a claim for outstanding loans against Mr. Virk in his counterclaim in the Debt Action. Instead, Mr. Singh ended up paying money to Mr. Virk to resolve the Debt Action. This undermines Mr. Singh's claim that Ms. Virk was repaying the debt when she deposited her settlement from the Matrimonial Action into Mr. Singh's

account. I prefer Ms. Virk's evidence about the Tenancy Agreement and the Monetary Agreement over Mr. Singh's evidence for the reasons I have already explained.

[166] I have concluded that there is an absence of a juristic reason for Mr. Singh's enrichment. Mr. Singh was not Ms. Virk's landlord, nor was he her creditor.

[167] Ms. Virk believed she was paying Mr. Singh for the Property. She gave Mr. Singh the money she received from the settlement of the Matrimonial Action at a time when she had no other assets. She also spent the money she received under her separation agreement on the Property. She used her monthly pension income and support payments towards the ongoing maintenance and improvement of the Property. Mr. Singh has been enriched, Ms. Virk has been correspondingly deprived, and there is no juristic reason. Therefore, Mr. Singh has been unjustly enriched by Ms. Virk's contributions to the Property.

Appropriate Remedy

[168] Since I have concluded that Mr. Singh has been unjustly enriched, I must now consider whether monetary damages are adequate or whether Ms. Virk's contribution is linked to the Property such that monetary damages would be inadequate.

[169] Relief in the form of a constructive trust may flow where monetary damages are not adequate and the plaintiff's contribution, which grounds the action, is linked to the Property over which the constructive trust is claimed: *Peter* at 988.

[170] Ms. Virk is a vulnerable person. Her history of mental health problems and comprehension challenges amply demonstrate her vulnerability. One of the recognized purposes of constructive trusts is to protect vulnerable parties and therefore, it is open to me to apply this remedy in Ms. Virk's case: *Sangha v. Reliance Investment Group Ltd.*, 2011 BCSC 1324 at para. 515.

[171] The evidence establishes that Ms. Virk has formed a strong emotional attachment to the Property. Her testimony, coupled with photos and video of the Property, clearly show how lovingly she has cared for it. Ms. Virk carried out and contributed to the clean-up and renovations to the home and she has decorated it with care. Ms. Virk landscaped and created extensive gardens which she has maintained personally. In short, Ms. Virk has improved and maintained the Property to a high standard.

[172] While I have concluded that Mr. Singh continued to use his own money to maintain and improve the Property and to pay off the mortgage, I have also concluded that Ms. Virk contributed virtually all of her income, plus the monies she received from her separation and the settlement of the Matrimonial Action to maintain and improve the Property.

[173] Ms. Virk's contribution, which grounds this action, is closely linked to the Property and I have concluded monetary damages would not be sufficient in the circumstances of this case. Therefore, I have concluded that a constructive trust is the appropriate remedy.

- [174] Even if I had concluded that the necessary nexus had not been made out between Ms. Virk's contribution to the Property, I considered whether Mr. Singh has the means to pay a monetary judgment. Mr. Singh said he was totally dependent upon donations and that he has no money of his own. This leads me to conclude that a proprietary award would still be appropriate given Mr. Singh's inability to pay a monetary award: *Wilson v. Fotsch*, 2010 BCCA 226 at para. 48.
- [175] I have also considered whether I should decline to exercise my discretion due to Ms. Virk's past dishonest conduct, including her admission that she provided false affidavits. I have accepted Ms. Virk's submission that her past dishonest conduct is adequately explained by the particular circumstances that were present in her life, such as her poor mental health and her dependence on Mr. Singh for guidance. Therefore, Ms. Virk's past conduct does not persuade me against exercising my discretion in her favour.

Quantification of the Remedy

- [176] Peter sets out the two methods of evaluating a party's contribution to a relationship. The "value received" approach looks at "the value of the services which the claimant has rendered", while the "value surviving" method looks at "the amount by which the property has been improved" or "what portion of that property is attributable to the claimant's efforts": Peter at 998-999.
- [177] The value survived approach is generally the appropriate method in constructive trust cases: *Wilson* at para. 51. According to *Wilson*, under the value survived approach the court is not required to determine the exact value of the benefit received by the defendant. Rather, a party's proportionate contribution to the value of an asset will entitle that party to a comparable share in its value: *Wilson* at para. 60.
- [178] In order to determine the value of the asset under the value survived approach, the court must determine the value of the asset both at its acquisition or the start of the parties' relationship, and at the relationship's end. Then, the court must analyze the parties' respective contributions to determine the plaintiff's share: *Wilson* at paras. 62-63.
- [179] First, I must determine the value of the Property at the start of the parties' relationship. In 2005, Mr. Virk was seeking court approval to the sell the Property in the Debt Action. Mr. Virk had a contract prepared to sell the Property to a third party for \$263,000. According to Ms. Virk, she and Mr. Singh used that contract to come up with the figure of what she would pay for the Property. I find that \$263,000 is the value of the Property at the start of the relationship. This is appropriate because at the time of that contract, Ms. Virk and Mr. Singh were clearly involved in a partnership-like relationship which I have described at length earlier in these reasons.

- [180] As for the value of the Property at the end of the relationship, I have been presented with no evidence from either party to substantiate the current market value of the Property. The increase in the value of the Property from \$263,000 to its current value is what is available for apportionment.
- [181] Turning to Ms. Virk's contributions to the Property, it is not necessary to consider her contributions in terms of a minute tally of the value of the services provided. In *Thomas, Kelleher J.* described treating the plaintiff as a "co-venturer", rather than as "hired help": para. 82.
- [182] As I have already described in detail, Ms. Virk has made significant contributions to the Property. Her contributions included: caring for the Property full time; providing a place for Mr. Singh to stay on his visits; carrying out improvements and maintenance on the Property using her own labour, and; using her own limited income, together with Mr. Singh's money, to cover Property expenses.
- [183] I have assessed the level of Ms. Virk's relative contribution to the Property during the relevant period at 70 percent. As a result, I have determined, based on the evidence of her contributions, that it is equitable that Ms. Virk shall be entitled to 70 percent of the increase in value of the Property from \$263,000 to its current value.
- [184] The parties shall undertake a joint appraisal of the Property to ascertain its current market value. If the parties are unable to agree on the arrangements for a joint appraisal, or the necessary calculation to designate Ms. Virk's proportionate share in the Property, these matters may be spoken to.

DEBT CLAIM

- [185] Mr. Singh claims Ms. Virk owes him \$12,076.30 as the outstanding portion of a loan that Mr. Singh advanced to the Virks. Ms. Virk denies that any loan existed and says that in 2010, she paid Mr. Singh approximately \$230,000 from the monies she received in the Matrimonial Action because Mr. Singh promised to give her the Property.
- [186] As proof that the 2010 payment was a repayment of a loan, rather than a payment for the Property, Mr. Singh points to the Monetary Agreement. I have already concluded that Ms. Virk did not sign the Monetary Agreement. Therefore, Mr. Singh cannot rely on the Monetary Agreement as the basis for the debt claim.
- [187] I have found that the money paid by Ms. Virk to Mr. Singh in 2010 was for the Property, not for the repayment of a loan. It is unclear whether there was any loan in the first place, and if so, the amount of the loan and its terms are unclear. Mr. Singh says the Virks promised to repay the loan with interest. He was vague as to when the loan was due to be repaid. He admits he asked Mr. Virk for the money in 2003 but Mr. Virk put him off. Mr. Singh's evidence concerning the interest allegedly due on the loan was not consistent regarding what rate applied. I am unable to determine that there was a loan based on the evidence.

[188] As I have stated above, the extremely casual and imprecise way that the Virks and Mr. Singh conducted their financial affairs makes it difficult to determine the flow of money between the parties. Other than Ms. Virk's payment to Mr. Singh in 2010, I am unable to distinguish what money flowing between them belonged to Mr. Singh or the Virks. I am also unable to determine whether any donated funds were withdrawn by the Virks as a loan from Mr. Singh.

[189] I am not satisfied on the whole of the evidence that Ms. Virk owes Mr. Singh \$12,076.30. The claim in debt is dismissed.

BREACH OF TRUST / BREACH OF FIDUCIARY DUTY CLAIM

[190] By 2001, Mr. Singh had given Ms. Virk his power of attorney. In his counterclaim, Mr. Singh says that Ms. Virk misused the power of attorney by taking one of Mr. Singh's vehicles, namely the Nissan, and withdrawing cash from his bank accounts without his permission.

[191] The duties of a power of attorney are set out in s. 19 of the Power of Attorney Act, RSBC 1996, c. 370, which provides as follows:

- (1) An attorney must
 - (a) act honestly and in good faith,
 - (b) exercise the care, diligence and skill of a reasonably prudent person,
 - (c) act within the authority given in the enduring power of attorney and under any enactment, and
 - (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.
- (2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.
- (3) An attorney must do all of the following:
 - (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
 - (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the Trustee Act;
 - (c) to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult;
 - (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;

- (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.
- (4) An attorney must keep the adult's property separate from his or her own property.
- (5) Unless the enduring power of attorney states otherwise, subsection (4) does not apply to property that
 - (a) is jointly owned by the adult and the attorney as joint tenants or otherwise, or
 - (b) has been substituted for, or derived from, property described in paragraph (a).

[192] Mr. Singh also relies on *British Columbia (Public Guardian and Trustee) v. Ferrier*, 2017 BCSC 2142 at para. 10 ("Ferrier"), where Justice Baird states as follows:

[10] Section 19 of the Power of Attorney Act provides that the respondents owe Mrs. Ferrier a duty to act honestly and in good faith, to exercise the care, diligence and skill of a reasonably prudent person in the management of her affairs, and to act in her best interests in a manner that is distinct and totally separate from their own interests and priorities. The law exists in these terms to assure, as far as possible, that vulnerable people are not exploited. Furthermore, the respondents are specifically obliged by s. 19(4) of the Power of Attorney Act, to keep their mother's property separate from their own, a near impossible task, according to Mr. David Ferrier, because 'they are a family and share everything'.

[193] In *Ferrier*, Justice Baird concludes (at para. 11) that the power of attorney had to be terminated in order to deal with the issue of the respondents believing that their mother's property was common property which they were entitled to "access at their discretion for their own purposes as well as hers".

[194] Ms. Virk admits that she closed two bank accounts in Mr. Singh's name. She also admits that she kept the money in those accounts and that she did not have Mr. Singh's express permission. Ms. Virk says that she often deposited and comingled her own money with the money held in Mr. Singh's accounts. When she withdrew the money, she says she was merely taking back her own money. Ms. Virk said she was able to close the accounts because she had signing authority on the accounts and not because she used Mr. Singh's power of attorney.

[195] In my view, the evidence of the long-standing arrangement between Mr. Singh and Ms. Virk regarding their financial affairs, including the use of the power of attorney, demonstrates that Ms. Virk had wide discretion. The parties had an extremely relaxed approach to their joint financial affairs. Again, Ms. Virk comingled her money in accounts held only in Mr. Singh's name.

- [196] As I have stated above, the evidence of the financial history between these parties shows that money flowed freely between them. There was no formal accounting system. Mr. Singh says Ms. Virk would tell him about money she had deposited or withdrawn and she was authorized to withdraw money as it was required. The appropriate use for the money was never formally defined by the parties.
- [197] Given the nature of the relationship between Mr. Singh and Ms. Virk, and the evidence of their long-standing arrangement to manage their joint financial affairs, I am not convinced that the concerns raised in *Ferrier* are applicable in the case before me.
- [198] Given the evidence, I am unable to conclude that Ms. Virk committed breach of trust when she withdrew the funds and closed Mr. Singh's accounts. Mr. Singh has not established that Ms. Virk was not entitled to use her discretion to remove the money as she did. Simply put, Mr. Singh agreed to a long-standing arrangement with Ms. Virk regarding their financial arrangements. That arrangement provided Ms. Virk with the authority to withdraw and use money held in their joint accounts and in accounts in Mr. Singh's name as she deemed it necessary.
- [199] Mr. Singh also alleges that Ms. Virk took title to the Nissan vehicle. Mr. Singh says the Nissan is his property because he alone paid for it. I am satisfied based on the evidence of payments presented by Mr. Singh that he paid for the Nissan himself and that he is the rightful owner of the vehicle.
- [200] Therefore, Mr. Singh is entitled to have the Nissan returned to him. Mr. Singh is also entitled to an award of compensatory damages from Ms. Virk for \$2,300 for wrongfully taking title to the Nissan. I have arrived at this amount by estimating the rental vehicle costs that Mr. Singh would have incurred had he replaced the vehicle during his visits to British Columbia following his demand that Ms. Virk return the Nissan to him.
- [201] I have considered Mr. Singh's claim for punitive damages with respect to Ms. Virk's alleged misuse of his power of attorney and appropriation of the Nissan. Punitive damages are designed to punish the wrongdoer and their object is also retribution, deterrence and denunciation: *Bronson v. Hewitt*, 2011 BCSC 102 at paras. 23 and 31.
- [202] An award of punitive damages is only rational when the objectives of retribution, deterrence and denunciation are not satisfied by compensatory damages: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 87. Punitive damages must be awarded cautiously and they require evidence of malicious and high-handed conduct that markedly departs from the ordinary standards of decent behavior.
- [203] I have already determined that Mr. Singh is entitled to an award of damages for \$2,300 in relation to the appropriation of the Nissan. In my view, the objectives of retribution, deterrence and denunciation are satisfied by the damages already awarded to Mr. Singh.

- [204] Ms. Virk is a person of very modest means. She also explained her rationale for taking the Nissan by pointing to banking records to try to establish that she had paid for the vehicle out of her own funds. I prefer Mr. Singh's evidence on this issue.
- [205] However, I have already concluded that the parties comingled their money and had very relaxed attitudes about withdrawing and using money from the respective bank accounts. Mr. Singh purchased and maintained multiple vehicles in British Columbia.
- [206] For many years Mr. Singh appeared to have no issue with Ms. Virk using the Nissan as her personal vehicle. Taking the entirety of the evidence into account, I have concluded that Ms. Virk did not act in a malicious or high-handed manner when she took the Nissan and I decline to award punitive damages.

COSTS

- [207] As Ms. Virk has achieved substantial success in proving her claim for a constructive trust and Mr. Singh's counterclaim, which occupied only a small part of the trial, has been partially dismissed, Ms. Virk is therefore entitled to costs.

"E. McDonald J."

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