

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhillon v. Jaffer*,
2011 BCSC 942

Date: 20110713
Docket: S042375
Registry: Vancouver

Between:

Gurmej Singh Dhillon

Plaintiff

And

Jalal A. Jaffer and Nasib Kaur Dhillon

Defendants

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff:

Paul E. Jaffe

Counsel for the Defendant, Jalal A. Jaffer:

Allan A. Macdonald

Place and Date of Trial:

Vancouver, B.C.
May 2-6, 18-20, 2011

Place and Date of Judgment:

Vancouver, B.C.
July 13, 2011

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I. INTRODUCTION

[1] This is a claim alleging solicitor's negligence, where the solicitor unwittingly took steps on the instructions of a person who was acting fraudulently. The victim of the fraud is the plaintiff, Mr. Gurmej Dhillon. The perpetrator of the fraud was his wife, the defendant Mrs. Nasib Dhillon, who was assisted by the couple's son, Manohar Dhillon. When I refer to Mr. Dhillon, I am referring to the plaintiff.

[2] The defendant solicitor, Mr. Jalal Jaffer, did not know anything about the fraud of Mrs. Dhillon and Manohar Dhillon. The evidence is clear that his own intentions were entirely honest.

[3] Mrs. Dhillon and her son used a fraudulent power of attorney, with a forged signature of Mr. Dhillon, to enter into contract for sale of the home where Mrs. Dhillon lived with Manohar and his own family. The property was registered in Mr. Dhillon's name, but he had years earlier returned to India. Later, Mrs. Dhillon changed her mind about the sale and tried to get out of it. The purchasers brought a lawsuit against Mr. Dhillon and sought and obtained an order for specific performance in default of appearance by Mr. Dhillon.

[4] This is where the defendant, Mr. Jaffer came in. He was hired by Mrs. Dhillon to resist the sale of the home. Mr. Jaffer was ultimately unsuccessful in setting aside the specific performance order and in resisting the purchaser's application for a vesting order. The home was sold, and Mr. Jaffer received the sales proceeds and paid them out to Mrs. Dhillon without any notice to Mr. Dhillon. He understood he was doing so in accordance with the oral reasons for judgment of the Court when it granted the purchaser's vesting order. The plaintiff has a different interpretation of those reasons for judgment, which were pronounced by Macdonald, J. in Chambers on November 27, 1992 (the "Vesting Order Reasons").

[5] Years later Mr. Dhillon returned to Canada, found out about the fraud, and brought a civil action against Mrs. Dhillon and their son, Manohar Dhillon. He was

successful at trial and in sustaining the judgment on appeal. He says he was unable to recover his full damages from Mrs. Dhillon.

[6] Mr. Dhillon alleges that Mr. Jaffer owed him a duty of care and was negligent in acting on the sale of the home and paying out the proceeds of sale to Mrs. Dhillon. He also advances a concurrent claim in contract. He seeks to recover damages against Mr. Jaffer, including his legal costs involved in his lawsuit against Mrs. Dhillon and the shortfall he has suffered in collecting his damages from her. The parties agree that if this Court does conclude that Mr. Jaffer is liable to Mr. Dhillon in negligence, that the assessment of damages will be tried separately.

[7] Mr. Jaffer denies that he owed Mr. Dhillon any duties, in tort or in contract. Alternatively, he says that if he did owe Mr. Dhillon a duty of care, he did not breach that duty of care. Mr. Jaffer says he cannot be faulted for the fraudulent actions of Mrs. Dhillon, of which he was unaware. He says he put all evidence of which he was aware before the Court, and then simply complied with the Court's direction as set out in the Vesting Order Reasons, when he paid out the proceeds of sale to Mrs. Dhillon.

II. ISSUES

[8] I will approach the issues in the following way:

1. Ought Mr. Jaffer to have seen Mr. Dhillon as his client, given that Mrs. Dhillon had a Power of Attorney purportedly granted by Mr. Dhillon? If the answer to this is yes, then did Mr. Jaffer owe Mr. Dhillon a duty of care on this basis?
2. What was the effect of the Vesting Order Reasons and Vesting Order? In this regard, was Mr. Jaffer simply complying with the Court's direction when he paid out the sale proceeds to Mrs. Dhillon?
3. Did Mr. Jaffer negligently allow himself to be used as a fraudster's dupe?

[9] I will first set out the background facts in more detail. By and large the facts are not controversial.

[10] Mr. Dhillon and Mr. Jaffer never had direct dealings with each other, and their own testimony was for the most part uncontradicted. Mrs. Dhillon and Manohar Dhillon did not testify. In setting out the background facts, I have at times borrowed from the helpful written submissions of both counsel, without attribution, but only where I have reviewed and accepted their accuracy.

III. BACKGROUND FACTS

[11] In 1952, Gurmej Dhillon (“Mr. Dhillon”) married Nasib Dhillon (“Mrs. Dhillon”). Together, they had four children, one of whom is their son Manohar Dhillon.

[12] In 1968, Mr. Dhillon purchased the property with the civic address 520 East 57th Avenue, Vancouver, B.C. (the “Property”). He used his own money to purchase the Property and was the registered owner of the Property. It was a large house on a large lot, and had two rental suites.

[13] Mr. and Mrs. Dhillon, along with their children, resided in the Property as their matrimonial home for a number of years.

[14] In the mid-1980s, Mr. and Mrs. Dhillon experienced marital difficulties.

[15] Both Mr. and Mrs. Dhillon are originally from India. Mr. Dhillon is now 77 years old. He has no formal education.

[16] Mr. Dhillon used an interpreter at trial. Mr. Dhillon testified that he had never seen Mrs. Dhillon read or write English, and her spoken English was minimal.

[17] Mrs. Dhillon went to India in 1983, leaving Mr. Dhillon in Canada looking after three of their children. Manohar Dhillon also went to India.

[18] Mr. Dhillon moved back to India in 1985. He said that there Mrs. Dhillon made it clear to him that their marriage was at an end. She returned to Canada to live at the Property with the four children.

[19] Mr. Dhillon testified that he and Mrs. Dhillon did not even speak after that.

[20] Mr. Dhillon continued to live in India until sometime in March 2000.

[21] On January 23, 1992, Mrs. Dhillon signed a contract of purchase and Sale (the "Contract of Purchase and Sale") as the vendor of the Property. The Contract of Purchase and Sale provided that the completion date was January 31, 1992.

[22] Mrs. Dhillon was not a registered owner of the Property.

[23] However, sometime prior to entering into the Contract of Purchase and Sale, a document entitled "Special Power of Attorney" was created, purporting to be an instrument by which Mr. Dhillon gave Mrs. Dhillon his power of attorney (the "Power of Attorney") to sell the Property and receive the proceeds on his behalf.

[24] The Power of Attorney was dated October 20, 1991, and provided under what looks like a copy of a three rupee note as follows:

SPECIAL POWER OF ATTORNEY

Know all men by these presents that I, Gurmej Singh Dhillon, son of S. Banta Singh, resident of Vill. Nainowal Vaid, PO. Sikri, Distt. Hoshiarpur, do hereby appoint my wife Smt. Nasib Kaur, presently residing at 57 Ave. 520 East Vancouver B.C. Canada as my special Power of Attorney on my behalf and in my name.

Whereas I own immovable property situated in Canada at the above given address and at present I am residing in India, I cannot look after the property in Canada. So I have appointed my wife Smt. Nasib Kaur who is presently living in Canada as my special power of attorney.

By virtue of the powers hereby given my said special attorney is authorise [sic] to dispose off [sic] my property in Canada in any way she like [sic]. She is also authorised by this power of attorney to do the following acts/things on my behalf that is to say; -

1. To dispose of my property situated in Canada in any way way [sic] she like [sic].
2. To receive the sale proceeds of the property on my behalf.
3. To give receipt regarding the sale proceeds of the said property.
4. Generally to do all lawful acts necessary for disposing of my property in Canada on my behalf.

AND I hereby agree that all acts, deeds and things lawfully done by my said attorney shall be deemed as acts [*sic*] deeds and things done by me personally and I undertake to ratify and confirm all and whatsoever that my said attorney shall lawfully do or cause to be done for me by virtue of powers hereby given.

[25] The Special Power of Attorney had what looked like a seal, although it was impossible to read, next to a signature, suggestive of a witness, and then what purported to be the signature of Mr. Dhillon.

[26] On January 29, 1992, Mrs. Dhillon's son Manohar Dhillon swore a statutory declaration, which was filed on January 30, 1992 in the Land Title Office under instrument number BF033258 attaching the Power of Attorney (the "Statutory Declaration"). In it he swore as follows:

1. I am the son of GURMEJ SINGH DHILLON and am of 16 years of age of older.
2. Attached hereto is a Power of Attorney executed by my father Gurmej Singh Dhillon in India on 30th. [*sic*] October, 1991 appointing my mother Nasib Kaur as his attorney.
3. I am fully acquainted with the signature of Transferor GURMEJ SINGH DHILLON and believe that the signature subscribed to the Power of Attorney is the signature of Gurmej Singh Dhillon.
4. The Signature of Gurmej Singh Dhillon were not [*sic*] certified by an officer under part 5 of the Land Title Act, R.S.B.C. 1979, c219 because the instrument was executed by the Transferor Gurmej Singh Dhillon outside British Columbia namely in India.

[27] The Statutory Declaration was sworn in front of Jagdish Singh, a Notary Public acting on behalf of the purchasers.

[28] In fact, Mr. Dhillon's signature on the Power of Attorney was forged. Mr. Dhillon testified that he had never seen the document and did not sign it nor authorize his wife to sell the Property.

[29] Mrs. Dhillon refused to complete the Property sale.

[30] On February 18, 1992, the proposed purchasers of the Property (the "Purchasers") commenced an action in the Vancouver Registry of the Supreme Court of British Columbia, *Hothi et al. v. Gurmej Dhillon*, Action No. C921030,

seeking specific performance of the Contract of Purchase and Sale and naming only Mr. Dhillon as the defendant in the action (the “Specific Performance Action”). At the same time the plaintiffs in that action filed a certificate of *lis pendens* on the Property.

[31] On November 4, 1992, the Purchasers brought an *ex parte* application for default judgment and specific performance (the “*Ex Parte* Application”). An affidavit in support sworn by one of the Purchasers attached the Power of Attorney as part of the evidence relied upon to enforce the Contract of Purchase and Sale.

[32] The Purchasers’ application materials for the *Ex Parte* Application included the Affidavit of their solicitor’s legal secretary, Frances Leslie Tugwood sworn October 2, 1992. In respect to the issue of service upon Mr. Dhillon, Ms. Tugwood deposed as follows at paragraphs 2-5 of her Affidavit:

2. On or about the 18th day of February, 1992, I requested our process servers West Coast Title Search Ltd., to serve the Defendant at 520 E. 57th Avenue, in the City of Vancouver, in the Province of British Columbia, with the Writ of Summons and Certificate of Lis Pendens in the within proceedings. The Agent for West Coast Title Search Ltd. attempted to serve the Defendant at that address; however, he was informed that the Defendant had just left for India to stay there for a couple of months. Attached hereto and marked Exhibit “A” is a copy of the Affidavit of Attempted Service of Carey Alden, Process Server.

3. On or about the 26th day of February, 1992, a request was made to Mr. H.S. Sandu, Barrister-at-Law, to serve the Defendant at Village Nainowal Vaid, P.O. Sikri, Hoshiarpur, where he resides. Service was effected on March 8, 1992. Attached hereto and marked Exhibit “B” is a copy of the Affidavit of Service of Sohan Lal, of New Courts, Jalandar, Punjab, India.

4. On or about the 14th day of June, 1992, an Amended Writ of Summons was filed to include the service *ex juris* endorsement.

5. On or about the 25th day of July, 1992, the Amended Writ of Summons was served upon the Defendant in the Village of Nainowal, Distt. Hoshiarpur, Punjab, India. Attached hereto and marked Exhibit “C” is a copy of the Affidavit of Service of Sohan Lal of New Courts, sworn the 31st day of July, 1992.

[33] The attached affidavits of service in India did not identify how the process server located Mr. Dhillon or identified him, other than to say that Mr. Dhillon admitted that he was the defendant in the action and the proper party to be served,

and that Mr. Dhillon's employer also identified him (the contact information of this employer was not included).

[34] The Purchasers also filed evidence that no appearance or statement of defence had been filed by Mr. Dhillon.

[35] Mr. Dhillon denies that he was served in India or that he had any knowledge about the Specific Performance Action at the time.

[36] On November 4, 1992, the *Ex Parte* Application was heard by Macdonald J., who granted default judgment and ordered specific performance of the Contract of Purchase and Sale (the "Specific Performance Order"). Macdonald J. understood that there were other occupants of the property, and that the actual mechanics of sale would still have to be worked out. His oral Reasons for Judgment were later transcribed, and provide as follows:

On this motion in action number C921030, I am satisfied that in default of appearance in defence, the Plaintiffs are entitled to judgment and that that judgment should consist of an order for specific performance of the contract of purchase and sale in issue in the action and of course for costs. There are matters that remain to be resolved, including the present state of title and the proper method of transferring title to the Plaintiffs. Secondly, the issue of who is in possession of the property. I will declare myself seized of this motion or application and there will be liberty to apply with respect to those two issues once they have been investigated. I will be here in Vancouver for the next number of weeks, until December 4th. The motion can be brought before me, either before or after court hours and I will deal with it accordingly. You will have to arrange that time through trial division of course, but the state of title must be investigated and the question of possession as well and I will have to deal with those two matters later.

[Emphasis added.]

[37] Since Mrs. Dhillon was still living in the Property, the Purchasers subsequently served her with application materials for a vesting order to obtain the transfer of title in the Property (the "Vesting Order Application"). Their Notice of Motion, filed in the Court Registry on November 16, 1992, sought a vesting order under s. 224 of the *Land Title Act*, R.S.B.C 1979, c. 219 and "such further and other relief as this Honourable Court may order". They did not seek any specific relief regarding what would happen to the proceeds of sale.

[38] On November 19, 1992, Mrs. Dhillon first attended at Mr. Jaffer's offices along with her son Manohar Dhillon to seek legal advice about opposing the sale of the Property.

[39] The Vesting Order Application was returnable November 24, 1992, and so Mr. Jaffer felt he had to act quickly. He immediately asked his assistant to open a file, and to obtain documents from the Court Registry regarding the Specific Performance Action.

[40] Mr. Jaffer testified that when his assistant opened the file, unbeknownst to him she entered into their accounting system that the client was Mr. Dhillon. He testified that he did not notice this and that it was simply an error, and likely based on the fact that it was a litigation file and Mr. Dhillon was the named defendant in the pleadings. He says that he did not consider that Mr. Dhillon was his client, rather he considered Mrs. Dhillon to be his client.

[41] Mr. Jaffer addressed all of his accounts and client correspondence to Mrs. Dhillon. Manohar Dhillon paid the first \$1,000.00 retainer to Mr. Jaffer.

[42] Mr. Jaffer could not remember whether or not Mrs. Dhillon spoke English well. He does not speak Punjabi, which was her first language, although he does speak Hindi and there is some commonality. He did not recall having any issue with communicating with her, but he acknowledged that Manohar Dhillon was always present when they met, and he may have helped them communicate.

[43] Mr. Jaffer soon determined that he would bring an application to join Mrs. Dhillon as a Defendant to the Specific Performance Action, and an application to set aside the Specific Performance Order of Macdonald J. made November 4, 1992. He prepared the Notice of Motion and filed it on November 23, 1992.

[44] The Notice of Motion prepared by Mr. Jaffer stated that an application would be made "on behalf of the defendants, Gurmej Singh Dhillon and Nasib Kaur Dhillon". He testified that this was a mistake as he was only acting for Mrs. Dhillon, and that he made this clear when he appeared in Court.

[45] The information that Mr. Jaffer obtained from Mrs. Dhillon which he considered material was put into an affidavit that he prepared for her to swear, which she did swear on November 23, 1992. In her affidavit, which Mr. Jaffer put before the Court on the Vesting Order Application and his application to set aside the specific performance order, she deposed:

1. THAT I am the wife of the Defendant, GURMEJ SINGH DHILLON, and as such have personal knowledge of the facts and matters deposed to herein except where stated to be on information and belief and those so stated I verily believe to be true;
2. THAT my husband, GURMEJ SINGH DHILLON, and I have been separated for about nine (9) years. He has gone back to India and has not once returned to Canada since that time;
3. THAT I believe that there are no reasonable prospects of reconciliation between my husband and myself. I have now instructed my solicitor to commence a Family Relations Act action, to seek a Declaration pursuant to Section 44 of the Family Relations Act [underlined in original] and also seek various other rights and remedies available to me, including the right to use and occupy the former matrimonial division [sic] of assets;
4. THAT sometime after October of 1991 the Defendant, GURMEJ SINGH DHILLON, sent me a Power of Attorney, a true copy of which is attached hereto and marked as Exhibit "A" to this my Affidavit. I have been advised by my Counsel and verily believe that the said Power of Attorney is deficient in a few technical respects;
5. THAT the Defendant forwarded the Power of Attorney to me for the purpose of selling the house so that he could get "some money" from it. However, a few days prior to the proposed completion date, he advised me that he wanted "all of the money" from the sale;
6. THAT my son and I contacted the listing salesman and advised him of the misunderstandings and disagreements within the family and that the sale could not be completed. He advised us not to worry and that he would work it out. We relied on that assurance and took no further steps;
7. THAT we had assumed that the matter had been resolved because we did not hear anything further until the evening of the 18th of November, 1992 when my son and I received a copy of the Praecipe, Notice of Motion and two Affidavits;
8. THAT the next day we contacted Mr. Jaffer and it was not until the following day that he was able to obtain copies of all pleadings from the Court Registry to understand what was happening;
9. THAT I believe that I have a right to be joined as a Defendant in this action on the grounds that I have a beneficial interest in the property; and to defend the Plaintiffs' claim on the grounds: -
 - a) The Contract of Purchase and Sale is improperly signed by myself as the Vendor;

- b) The Power of Attorney was improperly prepared and executed;
- c) There are special grounds for the Court not [underlined in original] to exercise its discretion in granting a decree of specific performance.

10. THAT the house in question was purchased in or about 1975 from our joint savings and borrowing the balance by way of a mortgage. I have always worked as a fruit picker and have contributed all of my income for the use of the family. I have, in addition, cooked, cleaned, raised four children, looked after the house, and generally have made significant direct and indirect contribution in the acquisition and maintenance of the house;

11. THAT since my husband's departure to India about nine (9) years ago, he has made no financial contribution whatsoever to myself. I have looked after the house, made mortgage payments and taken care of the family on my own.

[Emphasis added.]

[46] The facts which I have emphasized above made it clear to Mr. Jaffer, and would have made it clear to the Court, that Mr. and Mrs. Dhillon did not have a common interest in the proceeding, and indeed were potentially adverse.

[47] It is fair to say that by the time of the trial of the present action, Mr. Jaffer could not recall learning much more about the facts from Mrs. Dhillon than what he set out in her affidavit, nor could he recall questioning her about the facts. He accepted what she told him, and did not inquire further into the circumstances of the Power of Attorney.

[48] Mr. Jaffer also did not inquire into whether or not Mrs. Dhillon or Manohar Dhillon knew what Mr. Dhillon's position on the litigation was. He read the Purchasers' affidavits filed in support of the Vesting Order Application. He assumed that, based on the Purchaser's affidavit evidence, because Mr. Dhillon was apparently served and had not appeared, that he was taking no position.

[49] On November 26, 1992, Mr. Jaffer's application to have Mrs. Dhillon joined as a Defendant in the Specific Performance Action was granted by Macdonald J., and the remaining aspect of the application as well as the Vesting Order Application was put over to the next day.

[50] It was clear in the form of entered Order made November 26, 1992 that Mr. Jaffer was counsel for Mrs. Dhillon, and that Order did not suggest that he was counsel for Mr. Dhillon. It was also clear in the form of entered Order that it was Mrs. Dhillon's application that was being heard the next day, not an application for Mr. Dhillon.

[51] In support of the Vesting Order Application, the plaintiffs filed evidence of Mr. Shahgir S. Gill, a realtor. He deposed that he knew Manohar Gill and was the listing agent of the Property (although in fact on the contract of purchase and sale there is no MLS listing number). He said he believed there were six people living in the Property, and named Mrs. Dhillon, Manohar Dhillon, Manohar Dhillon's wife Harpreet and their three children.

[52] At the hearing of the Vesting Order Application and the application to set aside specific performance, on November 27, 1992 before Macdonald J., Mr. Jaffer advanced three arguments: first, that there were flaws in the Contract of Purchase and Sale because it did not refer to the vendor or the Power of Attorney; second, that there were flaws in the Power of Attorney; and third, that the equities should favour Mrs. Dhillon, since she would lose her shelter.

[53] The flaws that Mr. Jaffer identified in the Power of Attorney in his submissions were that changes in the document were not initialled; there was no connection between the signatory and the vendor; there was no occupation or address mentioned for either the donor or the witness; the witness was not named; and the person referred to it could be any Gurmeij Singh Dhillon because it is a common name in the Punjab area of India.

[54] On November 27, 1992, both the purchasers' Vesting Order Application and the application brought by Mr. Jaffer to set aside the Specific Performance Order were heard by Macdonald J. who granted the former and dismissed the latter. Oral reasons for judgment were given, and soon after transcribed (the "Vesting Order Reasons"). Macdonald J. accepted the evidence that Mr. Dhillon had been served.

[55] It was clear in his Vesting Order Reasons that Macdonald J. understood that it was Mrs. Dhillon who was applying to set aside the *Ex Parte* Order. He held:

... Mrs. Dhillon, having found out about this action only weeks ago by virtue of the service of proceedings relating to the application for the vesting order which is now before me as well, applies under Rules 18.5 and 52.5 to set aside that *ex parte* order. I declined to rule on the threshold issue of whether or not I had the authority to revisit my *ex parte* order until I had heard the argument on the merits. I now do so and I am satisfied, under Rule 18.5 and 52.5, that I have the authority in the present circumstances to rescind that order in appropriate circumstances. However, I have decided, after hearing Mrs. Dhillon's arguments, that I am not prepared to vary the *ex parte* order. There are several arguments raised as to why Mrs. Dhillon should be allowed to defend this action. The first is based on several alleged defects in the Power of Attorney itself, such as an inadequate identification of the grantor; the manner in which he is described in that document; the proper identification of the attorney and the absence of a declaration of attorney. After perusing the document and the supporting material, which was filed with it in the Land Title Office under the number which I recited, I am satisfied in respect of all those alleged deficiencies and I am not prepared to accept them as an excuse by Mrs. Dhillon for non-performance of the agreement which she signed. Secondly, Mrs. Dhillon signed the interim agreement in her own name and not as attorney for her husband. While that form of execution is a requirement for any instrument to be recorded in the Land Title Office, I am not convinced that it is a defect in a situation where everyone was aware of the capacity in which Mrs. Dhillon was signing the interim agreement and indeed the power of Attorney itself was produced at the time of execution to establish her authority to do so on behalf of her husband. The third issue raised arises out of the fact that specific performance is an equitable remedy. The arguments advanced in that regard deal with Mrs. Dhillon's abandonment, if I can put it that way, in this jurisdiction by her husband some nine years ago. The fact that she was left behind to raise four children and to pay the mortgage, working as a farm worker or fruit picker; the fact that when difficulties were encountered about division of the sales proceeds and she decided not to go ahead with the transaction, the real estate agents told her that she had nothing to worry about and that they would look after the matter, and the fact that she knew nothing about the ensuing legal proceedings until weeks ago. I have a great deal of sympathy for Mrs. Dhillon arising out of those facts, but I must consider the position of the Plaintiffs as well and I intend to do what I can to protect Mrs. Dhillon by ensuring that the sales proceeds will be available to her in this jurisdiction for her use until such time as her husband has established a right thereto. I commented in the course of argument and I state again, that the past history of the Dhillon marriage and her contributions to child support and the maintenance of this asset while it has increased in value would in all likelihood dictate a very substantial reapportionment under s. 51 of the *Family Relations Act*, should the issue ever come to court. It would, therefore, be my intention to ensure that the net sale proceeds are directed in such a manner as to ensure Mrs. Dhillon's ability to utilize the same to acquire alternate accommodation.

[Emphasis added.]

[56] Mr. Jaffer interpreted the above emphasized comments as a direction by the Court that the net proceeds of sale would go to Mrs. Dhillon. He immediately advised her of this fact, in his reporting letter explaining the outcome of the hearing. In the present trial, Mr. Jaffer confirmed that the transcribed Vesting Order Reasons of Macdonald J. recorded everything the Court said about this point. In other words, his interpretation that the Court directed that the sale proceeds would go to Mrs. Dhillon was based on the above Reasons, and was not based on something else said during the hearing or before or after the ruling, which was not transcribed.

[57] Although Mrs. Dhillon's affidavit said that she had instructed her solicitor to commence a *Family Relations Act* action, she had not actually done more than express an interest in commencing such an action. No such action was commenced during the time of Mr. Jaffer's involvement in the events at issue in the present case.

[58] There was a part of the ruling made by Macdonald J. that did not make it into the transcribed Vesting Order Reasons, and that had to do with the closing date of the sale. Mr. Jaffer understood that after discussions with counsel following the above oral ruling, the Court had ordered that the closing of the Property sale was to occur on or before January 1, 1993.

[59] The sale of the Property did not complete on or before January 1, 1993. Mr. Jaffer obtained instructions from Mrs. Dhillon to apply to set aside the November 27, 1992 Order of Macdonald J. (the "Vesting Order") on the basis that the Plaintiffs had failed to complete the sale by January 1, 1993.

[60] In support of this proposed application, on January 7, 1993, Mrs. Dhillon swore a second Affidavit. At that time there was apparently as yet no draft form of Vesting Order nor had Mr. Justice Macdonald's Vesting Order Reasons been yet transcribed and published to the parties. Because of this, Mrs. Dhillon set out in her Affidavit what she understood to have transpired in the November 27, 1992 hearing. In this regard, she relied entirely on what Mr. Jaffer told her, and deposed that the Court had ordered, amongst other things, that she was to receive the net proceeds of sale, with the right to use it for the purpose of purchasing another house.

[61] At an unknown date, while acting for the Purchasers, Ms. Indra Thind prepared a draft form of the Vesting Order whose terms provided, amongst other things, as follows:

THIS COURT FURTHER ORDERS that the net sale proceeds are to be paid directly to Nasib Kaur Dhillon.

[62] Sometime after the November 27, 1992 hearing date, Ms. Thind left the employ of the law firm Dosanjh & Company. Thomas Woolley became the purchasers' solicitor.

[63] After receiving the transcribed Vesting Order Reasons, in early January 1993, Mr. Woolley prepared his own draft of the November 27, 1992 Vesting Order which added Mrs. Dhillon as a Defendant in the style of cause and provided as follows:

THE APPLICATION of the Plaintiffs coming on for hearing before me this day at Vancouver British Columbia; AND UPON HEARING Indra Thind, Counsel for the Plaintiffs; AND UPON HEARING Jalal A. Jaffer, Counsel for the Defendant, NASIB KAUR DHILLON; AND no one appearing for the Defendant, GURMEJ SINGH DHILLON as he was not served due to Default Judgment being entered against him; AND UPON READING the Affidavits of Carey Alden, Shahgir S. Gill, Frances Leslie Tugwood and Nasib Kaur Dhillon sworn and filed herein;

THIS COURT ORDERS that the Ex Parte Order of Mr. Justice Macdonald pronounced the 4th day of November, 1992, will not be varied.

THIS COURT FURTHER ORDERS that the title of the Defendant, GURMEJ SINGH DHILLON, in and to those certain lands located at 520 E. 57th Avenue in the City of Vancouver, legally described as PID No. 014-292-092, The West of 1/2 of Lot 14, Blocks 3 to 7, District Lot 657 Plan 1790 (the "Subject Property") be vested in the Plaintiffs, Paramjit Singh Hothi and Lakhvinder Singh Hajran, and that upon the application to register a Certified Copy of this Order being received by the Registrar of Titles at the said Vancouver Land Titles Office, the said Certified Copy of this Order be registered as a transfer of all the interest of the Defendant, GURMEJ SINGH DHILLON, in and to the Subject Property, free and clear of all charges and encumbrances on the interest of the Defendant in and to the said lands and premises.

THIS COURT FURTHER ORDERS that the Plaintiffs recover the costs of this Action against the Defendant, GURMEJ SINGH DHILLON, which said costs shall be deducted from the purchase price.

THIS COURT FURTHER ORDERS that the Statement of Adjustments to confirm the purchase price shall be subject to the approval of Jalal A. Jaffer, Esq., the Solicitor for the Defendant, NASIB KAUR DHILLON.

THIS COURT FURTHER ORDERS that the net sale proceeds payable to the Defendant, GURMEJ SINGH DHILLON, pursuant to the transfer of the Subject Property in accordance with the terms of the Vesting Order be paid to the Solicitor for the Defendant, NASIB KAUR DHILLON.

THIS COURT FURTHER ORDERS that the costs of the Defendant, NASIB KAUR DHILLON, on a Solicitor/Client basis, shall be awarded to the Defendant, NASIB KAUR DHILLON, and shall be payable to her from the proceeds of the sale of the Subject Property which are paid in trust to the Solicitors for the Defendant, NASIB KAUR DHILLON.

(The "Woolley Draft Order".)

[64] On or about January, 12, 1993, Mr. Woolley sent Mr. Jaffer a copy of the Woolley Draft Order.

[65] On January 18, 1993, Mrs. Dhillon's application to set aside the November 27, 1992 Vesting Order was heard by Blair J., who dismissed the application and set the completion date for the Property sale as February 1, 1993 (the "January 18, 1993 Order").

[66] On January 19, 1993, Mr. Jaffer wrote a letter to Macdonald J. requesting clarification as to whether, in the November 27, 1992 Vesting Order, the Court intended to fix January 1, 1993 as the closing date for the Property sale.

[67] On January 22, 1993, Mr. Woolley delivered Appointments to assess the Plaintiffs' costs and to settle the terms of the November 27, 1992 Vesting Order and January 18, 1993 Order of Blair J.

[68] On January 26, 1993, Macdonald J. wrote a Memorandum to Counsel addressed to Indra Thind and Mr. Jaffer advising as follows:

I have Mr. Jaffer's letter of January 19, 1993 regarding the specified completion and possession date.

While my notes do not contain a reference to that aspect of the order, it is my clear recollection that January 1, 1993 was the date fixed, following some discussion with counsel. I was ot [*sic*] prepared to require the delivery of possession before the Christmas holiday, but, as Mr. Jaffer recalls, "did not want to see this matter prolonged".

[signature]

P.S. Since dictating the above, I have received Mr. Woolley's letter of January 21, 1993.

[69] Upon receipt of the January 26, 1993 Memorandum of Macdonald J., Mr. Jaffer asked the Court Registry if Mrs. Dhillon could bring an application before Blair J. to review his January 18, 1993 Order. He was advised that he should write Blair J. a letter requesting an appearance before him for that purpose. On February 5, 1993, Blair J. issued a Memorandum re-affirming his January 18, 1993 Order.

[70] Mr. Jaffer must have considered there was still merit in an argument that the sale should be set aside based on the purchasers' failure to complete on January 1, 1993 which he understood to be the date ordered by Macdonald J. He obtained instructions in early February 1993, from Mrs. Dhillon, to commence an appeal to set aside the November 27, 1992 Vesting Order and the January 18, 1993 Order. Mr. Jaffer filed a Notice of Appeal on behalf of Mrs. Dhillon on February 9, 1993 in *Hothi et al. v. Gurmej Singh Dhillon and Nasib Kaur Dhillon* B.C.C.A. No. CA0116751 (the "Appeal").

[71] On February 16, 1993, Mr. Jaffer faxed Mr. Woolley a letter advising that the Woolley Draft Order should be revised as follows:

1. Justice MacDonald's Order should provide that Completion and Possession Date shall be on or before the 1st of January, 1993....

[72] Mr. Woolley did not accept this suggested change and applied to settle the terms of the Vesting Order. On February 18, 1993, the Purchasers' application to settle the terms of the November 27, 1992 Vesting Order and January 18, 1993 Order was heard by Master Doolan. Mr. Jaffer did not appear on that occasion, as another lawyer from his firm attended.

[73] Among other things, Master Doolan settled both Orders in the terms presented by the Purchasers' counsel such that the November 27, 1992 Vesting Order was settled according to the Woolley Draft Order, as set out in its entirety above.

[74] On February 19, 1993, the Purchasers' solicitor delivered the proceeds of sale in the amount of \$186,698.40 to Mr. Jaffer.

[75] On February 25, 1993, Mr. Jaffer's colleague, Mr. G. Creighton Scott returned the sales proceeds to the Purchasers' solicitor.

[76] On or about February 25, 1993, Mr. Jaffer brought a further application on Mrs. Dhillon's behalf "to review and vary the Order of the Honourable Mr. Justice Macdonald made November 27, 1992, as settled by Master Doolan on February 18, 1993". This application was dismissed by Macdonald J.

[77] On July 26, 1993, in the Appeal proceedings, Mr. Jaffer's colleague, G. Creighton Scott, brought an application on Mrs. Dhillon's behalf to stay the sale of the Property. This application was dismissed by Rowles J.A. Mr. Scott then wrote to Mrs. Dhillon strongly recommending she abandon the appeal, given that the Property was going to be transferred in any event. Mrs. Dhillon apparently accepted that advice and the Appeal was abandoned.

[78] The sale of the Property proceeded pursuant to the Vesting Order. Mr. Jaffer continued to act, and obtained instructions from Mrs. Dhillon to agree to the closing date of September 30, 1993.

[79] Mr. Jaffer reviewed the Statement of Adjustments prepared by the purchasers' with Mrs. Dhillon. He obtained her approval of it and communicated this back to counsel for the Purchasers.

[80] On September 30, 1993, the Purchasers' solicitor filed the Vesting Order at the New Westminster Land Title Office and delivered the proceeds of sale to Mr. Jaffer's firm by way of a trust cheque in the amount of \$187,201.18.

[81] That same day, Mr. Jaffer paid out the sales proceeds to Mrs. Dhillon less his firm's fees and disbursements for legal services in the amount of \$5,034.68. His firm's account, addressed to Mrs. Dhillon, reduced legal fees from \$7,250 to \$3,500 as a courtesy due to the unsuccessful result in the litigation. The account included all the work in relation to the Appeal, settling the Vesting Order, and completion of the sale.

[82] The net proceeds of sale paid to Mrs. Dhillon totalled \$182,166.50.

[83] Throughout all the work he did in relation to this matter, Mr. Jaffer never had any communication with Mr. Dhillon.

[84] Mrs. Dhillon did not retain Mr. Jaffer or his firm to act further on her behalf. Notwithstanding her statement in her November 23, 1992 Affidavit that she had instructed her solicitor to commence proceedings pursuant to the *Family Relations Act*, she did not retain Mr. Jaffer to do so and it was not until August 19, 2005 that she commenced such proceedings using other counsel.

[85] In March 2000, Mr. Dhillon returned to Vancouver after living in India for approximately fifteen years. He says that is when he discovered the fraud on him and the sale of the Property.

[86] On August 18, 2000, Mr. Dhillon commenced an action for fraud against both Mrs. Dhillon and her son Manohar Dhillon in respect to the sale of the Property and other matters in the action *Gurmej Dhillon v. Nasib Dhillon and Manohar Dhillon* B.C.S.C. No. S004493 (the "Fraud Action"). Mr. Dhillon was successful both at trial and the subsequent appeal.

[87] In his Reasons for Judgment in the Fraud Action dated July 15, 2005, indexed at 2005 BCSC 1903, among other things Pitfield J. found that Mrs. Dhillon and Manohar Dhillon had committed civil fraud by forging Mr. Dhillon's signature on the Special Power of Attorney, selling the Property without his consent or knowledge, and failing to provide him with any of the proceeds of sale.

[88] At para. 13 of his Reasons for Judgment in the Fraud Action, Pitfield J. found that Mrs. Dhillon had used a portion of the proceeds of the sale of the Property to purchase another property, which was later sold, and a third property purchased. Along the way, she also used a portion of the proceeds for her personal use.

[89] At para. 48 of his Reasons for Judgment, Pitfield J. granted relief to Mr. Dhillon in the following terms:

As I have previously mentioned and I repeat, Nasib currently resides in 785 East 52nd Avenue. That property, as I have said, was purchased with funds derived from the sale of East 57th Avenue. It follows that I will grant the order sought by the plaintiff as recited in paragraph 146 of the plaintiff's submission to me as follows:

A declaration that the defendant, Nasib Kaur Dhillon, holds the title to the real property located at 785 East 52nd Avenue, Vancouver, British Columbia, legal description PID 003959899 Lot 24 except the south seven feet now road district lot 660 plan 4645 in trust on behalf of the plaintiff.

And an order that the title to this property be transferred to the plaintiff by vesting order as well as an order that the defendants and any members of their family, and indeed any person other than a tenant who is not related to either of Nasib or Manohar by blood or marriage, shall vacate the property forthwith.

[90] On August 19, 2005, Mrs. Dhillon commenced *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*] proceedings against Mr. Dhillon in *Nasib Kaur Dhillon v. Gurmej Singh Dhillon* B.C.S.C. No. E052656 ("Mrs. Dhillon's Matrimonial Action").

[91] On October 18, 2005, in Mrs. Dhillon's Matrimonial Action, Satanove J. pronounced a declaration that there was no reasonable prospect of reconciliation between the Dhillons.

[92] In dismissing the appeal of the Fraud Action on November 23, 2006, at para. 112 of the Appeal Reasons (2006 BCCA 524), Thackray J.A. granted a one year stay of execution of the restitution and disgorgement portions of the relief granted by Pitfield J. This was to allow for the resolution of the matrimonial litigation.

[93] The Dhillons' matrimonial property issues were not disposed of within the one year stay of execution period granted by Thackray J.A.

[94] On March 6, 2008, upon the filing of the vesting order granted by Pitfield J. in the Fraud Action, Mrs. Dhillon's property located at 782 East 52nd Avenue, Vancouver, B.C. was transferred to Mr. Dhillon.

[95] On September 8, 2009, Mr. Dhillon commenced *FRA* proceedings against Mrs. Dhillon in *Gurmej Singh Dhillon v. Nasib Kaur Dhillon* B.C.S.C. No. E092772 ("Mr. Dhillon's Matrimonial Action").

[96] There has been no final disposition of either Mrs. Dhillon's Matrimonial Action or Mr. Dhillon's Matrimonial Action.

IV. OUGHT MR. JAFFER TO HAVE SEEN MR. DHILLON AS HIS CLIENT?

[97] The plaintiff argues that since Mrs. Dhillon was acting under the Power of Attorney, Mr. Jaffer ought to have considered Mr. Dhillon as his client.

[98] The factual question is in what capacity was Mr. Jaffer representing Mrs. Dhillon: in her capacity as the attorney under the Power of Attorney, or in her own personal capacity? If he was representing her in her capacity as attorney pursuant to the Power of Attorney, then arguments may be made that the donor of that Power of Attorney was truly the client.

[99] This was the point of expert opinion evidence of a solicitor called by the plaintiff as a witness, which suggested that when a lawyer takes instructions from a person acting under a power of attorney, the true client is actually the grantor of that power of attorney. But the premise of that opinion evidence was that the person dealing with the solicitor was acting under the power of attorney and not in his or her personal capacity. For the reasons that follow, I have found this premise to not apply to the facts of this case, and the expert opinion evidence to thus be of little value.

[100] Mr. Jaffer's evidence was that he considered Mrs. Dhillon to be his client, not Mr. Dhillon. While there were a couple of small slip-ups in his records, his overall conduct was consistent with Mr. Jaffer considering that Mrs. Dhillon was his client in her personal capacity, and not as attorney for Mr. Dhillon, including:

- a) Mr. Jaffer made no attempt to contact Mr. Dhillon, directing all correspondence and accounts to Mrs. Dhillon;
- b) he learned from Mrs. Dhillon that she had interests adverse to Mr. Dhillon, including over the use of the Power of Attorney and the division of any proceeds of sale and pending matrimonial litigation in which she might

claim a beneficial interest in the Property, all of which he put before the Court in an Affidavit sworn by her; and,

- c) he represented her personally in the Purchaser's Specific Performance Action, including in bringing an application to add her as a party to set aside the Specific Performance Order, and in opposing the Vesting Order Application, and in numerous litigation steps after that.

[101] The facts are that when Mrs. Dhillon came to see Mr. Jaffer, she had already exercised her purported authority under the Power of Attorney, by signing the Contract of Purchase and Sale. She told him how Mr. Dhillon had changed his mind about what was to happen with the proceeds of sale: that at first, he had wanted "some money" but then wanted "all of the money". These facts made her potentially adverse to Mr. Dhillon. She also told him facts about their marriage breakdown, and facts that would support her claiming a beneficial interest in the Property. These facts also made her potentially adverse to Mr. Dhillon.

[102] I find that when Mrs. Dhillon came to see Mr. Jaffer, she was not seeking to act under the Power of Attorney. Rather, she was trying to resist the sale, as occupant of the Property and someone with a separate interest from, and potentially adverse in interest to, the donor Mr. Dhillon. I find that in their initial meeting or meetings it was clear to Mr. Jaffer that Mrs. Dhillon was no longer acting under the Power of Attorney, trying to take steps on behalf of the donor, but instead was trying to set aside the whole transaction in her own right because it was prejudicing her personally by causing her to lose the home she lived in and had contributed to maintaining over the years.

[103] I conclude that when Mr. Jaffer first began to act for Mrs. Dhillon, he was acting for her in her own personal capacity, as occupant of the Property with a beneficial interest in it, and he was not acting for her in her capacity as attorney for Mr. Dhillon pursuant to the Power of Attorney. She had received the Vesting Order Application, and wanted to oppose the sale of the home she was living in. The materials Mr. Jaffer put together for the Vesting Order Application described her

personal circumstances, including her interests potentially adverse to Mr. Dhillon, such as her assertion of a beneficial interest in the home. He was expressly seeking to represent her personally in litigation with a view to undermining the validity of the Power of Attorney and the Contract of Purchase and Sale. All of the steps Mr. Jaffer took in the litigation were with a view to assisting Mrs. Dhillon in her personal capacity only.

[104] I therefore have little difficulty in concluding that when Mr. Jaffer first began to act for Mrs. Dhillon and throughout the time he acted for her in the Specific Performance Action, he had no reason to consider that Mr. Dhillon was his client. That concept might have arisen had Mrs. Dhillon come to him to exercise her authority under the Power of Attorney. However, it did not because she did not.

[105] But another question arises, and that is whether or not Mr. Jaffer's role in acting for Mrs. Dhillon in her personal capacity changed when he became involved in the sale of the Property, after the litigation efforts to resist the sale on her behalf ended.

[106] The plaintiff argues that Mr. Jaffer's only capacity in acting in respect of the sale of the Property, once the litigation ended, was to assist Mrs. Dhillon in her role as attorney under the Power of Attorney. No one else was representing the vendor of the Property who was the registered owner, Mr. Dhillon, and so the plaintiff argues, the only authority Mrs. Dhillon had was pursuant to the Power of Attorney, and Mr. Jaffer was thus representing her in her capacity as attorney. In such a situation, the plaintiff argues that Mr. Jaffer ought to have recognized that the true client was the donor, Mr. Dhillon.

[107] Mr. Jaffer disagrees, and argues that the authority he had to take steps on the sale came as lawyer for Mrs. Dhillon in the Specific Performance Action, as the sale of the Property was based on the Vesting Order Reasons and Vesting Order in that litigation, and was not based on the Power of Attorney.

[108] Thus, before I can answer the question of whether Mr. Jaffer ought to have considered Mr. Dhillon as his client on the sale of the Property, I must consider the effect of the Vesting Order Reasons and Vesting Order.

V. THE EFFECT OF THE VESTING ORDER REASONS AND VESTING ORDER

[109] It is clear that Macdonald J. made some comments about the proceeds of sale in his Vesting Order Reasons. The issue is: what was the effect of these comments and the resultant Vesting Order?

[110] In the Vesting Order Reasons, Macdonald J. did not expressly state that he was directing that the proceeds of sale of the Property should be paid out to Mrs. Dhillon. However, this is what Mr. Jaffer understood was the effect of the Vesting Order Reasons and this is why he says he did pay out the proceeds to Mrs. Dhillon.

[111] The Supreme Court of Canada has expressed the standard of care of a solicitor, in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, per LeDain J. at 208, as follows:

“A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken: See *Hett v. Pun Pong* (1890), 18 S.C.R. 290, at p. 292. The requisite standard has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.

[112] There were at least two options open to Mr. Jaffer upon hearing and later obtaining a transcribed copy of the Court’s Vesting Order Reasons.

[113] The first option was to seek clarification of the Court’s intention. Realizing that no submissions had been made as to what was to happen to the sale proceeds, no specific relief had been sought in the Notices of Motion in this regard, and Mr. Dhillon had no notice of any application by Mrs. Dhillon to take all of the proceeds, Mr. Jaffer could have decided to seek further direction from the court as to the meaning of the Court’s comments.

[114] Counsel for the plaintiff argues that Mr. Jaffer should have considered the fact that normally courts do not make orders disposing of rights in property, when there has not been notice to affected parties. He should have considered the probability that the Court's comments were simply *obiter* comments inviting future applications by his client, on proper notice to Mr. Dhillon, to seek an order preserving the funds in the presumed pending *FRA* action. Given that Mr. Jaffer knew that Mr. Dhillon had told Mrs. Dhillon he wanted all of the sale proceeds, arguably Mr. Jaffer should have tried to obtain more certainty from the Court as to what was to happen with the proceeds of sale.

[115] Counsel for the plaintiff also argues that Mr. Jaffer ought to have thought about the fact that the Court made a costs order that could be seen as inconsistent with the notion that all of the net sale proceeds would go to Mrs. Dhillon. The transcribed Vesting Order Reasons did not address costs. However, it appears as though costs were addressed after the main part of the ruling, in the Court's discussion with counsel, as is indicated in the Court Clerk's notes. Consistent with the Clerk's notes, the form of Vesting Order that was drafted by Purchasers' counsel had the Court awarding the Purchasers their costs out of the sale proceeds, on a party and party basis; and awarding Mrs. Dhillon her costs out of the sale proceeds on a solicitor and client basis.

[116] Logically, if the Court had truly intended to order that Mrs. Dhillon was to recover the net sale proceeds in any event, there would seem to be no need to order that she also recover her solicitor and client costs out of the same proceeds. This raises some doubt that the Court's intention was to direct the net sale proceeds to Mrs. Dhillon. Mr. Jaffer had no real explanation for this inconsistency and did not seek clarification from Macdonald J.

[117] Mr. Jaffer chose a second option: not to seek clarification from the Court and simply rely on his own interpretation of the Vesting Order Reasons as directing the sale proceeds to go to his client.

[118] The temptation for a judge, having practiced as a lawyer, is to ask: “what would I have done as a solicitor, if in the situation in which Mr. Jaffer found himself?” That of course is not the correct test and courts must be mindful to resist this temptation in a case claiming solicitor’s negligence. I must determine if Mr. Jaffer’s conduct, in interpreting the Vesting Order Reasons, and subsequent steps in reliance on his interpretation, fell below the standard of care of a reasonably competent solicitor.

[119] The most prudent course for Mr. Jaffer to take would have been the first option above. The courts rely on counsel to seek clarification where there may be ambiguity in a court’s order or where counsel may have concerns that the court may have overlooked an important matter. However, the issue is whether Mr. Jaffer fell below a standard of care in taking the second option, relying on his interpretation of the Vesting Order Reasons.

[120] There are a number of facts which support Mr. Jaffer’s reading of the Vesting Order Reasons as reasonable:

- a) The Court could not logically order the registration of title in the Purchaser’s name without dealing with the sale proceeds. While neither party had asked for specific relief regarding the sale proceeds, the Purchasers had asked for “such further and other relief as this Honourable Court may order”. The issue of what to do about the sale proceeds was before the Court, as a natural consequence of the Vesting Order Application.
- b) The Court believed that Mr. Dhillon had not bothered to appear to defend the Specific Performance Action, despite being served, and that he was in India. The Court might have inferred that Mr. Dhillon had washed his hands of the whole process and was not particularly interested in what happened to the Property, and hence, was also not interested in what happened to the sale proceeds. While contrary to this was the evidence of Mrs. Dhillon that Mr. Dhillon had told her that he wanted all of the money from a sale, this was based on a conversation that had taken place before the

litigation had commenced. Given the evidence of Mrs. Dhillon as to how long Mr. Dhillon had not lived at the Property, and how Mrs. Dhillon had been essentially left by him in Canada to fend for herself and the children, the Court may have inferred that Mr. Dhillon's previously stated position to Mrs. Dhillon was abandoned by him and was not one he was prepared to advance in Court given the family history.

c) The Court clearly felt that had Mr. Dhillon tried to advance a claim to the sale proceeds, there was a good chance he would lose to some or all of Mrs. Dhillon's claims in a FRA action. However, something had to happen to the sale proceeds immediately, in order to allow the Purchasers to obtain title to the Property.

d) The Court knew that Mr. Dhillon was the registered owner of the Property, but made no directions or inquiries as to how the sale proceeds were to be preserved for Mr. Dhillon or sent to him. If the Court had wanted Mr. Dhillon to receive the sale proceeds, or wanted to have the sale proceeds preserved for Mr. Dhillon, it would have needed to address how to accomplish this in the Vesting Order Reasons, but it did not.

e) While it can be argued that the Court had no jurisdiction to make an order that Mrs. Dhillon receive the sale proceeds, Mr. Jaffer was in Court representing Mrs. Dhillon's interests and not Mr. Dhillon's interests on the applications before Macdonald J. Mrs. Dhillon had lost the argument that the specific performance order should be set aside, but the judge was sympathetic to her plight in losing her home. It was within the Court's jurisdiction to make orders regarding what would happen to the sale proceeds. Since the Court was as aware of the facts as Mr. Jaffer, it may not have reasonably crossed his mind to question the Court's Order.

[121] Mr. Jaffer's belief that the Court had ordered that the sale proceeds go to Mrs. Dhillon seemed consistent with the approach to the form of Vesting Order drafted by counsel for the Purchasers in the Specific Performance Action. The first

draft Order by the Purchasers' counsel had the proceeds being paid directly to Mrs. Dhillon. For reasons that are not entirely clear, this form of the Order was changed to have the proceeds being paid to Mrs. Dhillon's counsel in trust. But the Purchasers had no reason to believe that if the proceeds were paid to Mrs. Dhillon's counsel in trust, that they would not be paid out to Mrs. Dhillon once legal fees and disbursements were addressed.

[122] The Purchasers' counsel would be taking a risk paying the proceeds to Mrs. Dhillon's counsel, without any guarantees or restrictions on what would happen to the funds, if they thought that the proceeds were to be preserved for Mr. Dhillon. The Purchasers' counsel knew from the same evidence that was before the Court on the Vesting Order Application that Mrs. Dhillon had interests potentially adverse to Mr. Dhillon. The Purchasers knew that Mr. Dhillon was the registered owner of the Property. Yet, the Purchasers' counsel appeared to have interpreted the Court's Vesting Order Reasons the same way as Mr. Jaffer did: that the sale proceeds would be paid to the benefit of Mrs. Dhillon. They must have assumed that any dispute between Mrs. Dhillon and Mr. Dhillon over the sale proceeds could later be sorted out by them, presumably in a *FRA* action.

[123] If I were to suppose that Mr. Jaffer had resigned acting for Mrs. Dhillon immediately after the Vesting Order Reasons were rendered, I have little doubt inferring from all of the evidence that the Purchasers would have sought her approval of the Statement of Adjustments and paid the sale proceeds directly to her based on the Vesting Order Reasons.

[124] One interpretation of the costs ruling is that its inconsistency with the direction that all net sale proceeds go to Mrs. Dhillon was simply an oversight. Another explanation is that the Court wished to make clear that if Mr. Dhillon made a claim to the sale proceeds in the future, such as in *FRA* litigation, that at a minimum Mrs. Dhillon was entitled to have her costs of the Specific Performance Action paid out of the proceeds; and, in the meantime, she was to have the use of the net sale proceeds.

[125] Another term that made its way into the Vesting Order, but was not mentioned in the Vesting Order Reasons, was the term that Mr. Jaffer approve the Statement of Adjustments on the sale. This term is contained in the Clerk's notes of the hearing, and must have been something that was raised in discussion with counsel about the mechanics of the sale, after the oral ruling. The Court knew that Mr. Jaffer was not representing Mr. Dhillon. The only reason for ordering that Mr. Jaffer approve the Statement of Adjustments must have been to protect Mrs. Dhillon's interest in the sale proceeds.

[126] There was nothing in the Vesting Order Reasons, or any evidence of the Court's discussion with counsel, that would indicate that the Court was relying on Mr. Jaffer as an officer of the court to protect Mr. Dhillon's interests.

[127] On the facts put before the Court, I find that neither the counsel for the Purchasers, nor the Court, could have had any expectation that Mr. Jaffer was acting for anyone other than Mrs. Dhillon, or that he was protecting Mr. Dhillon's interests.

[128] When the form of Vesting Order was settled by a Master, it appears that no issue was raised by anyone about the fact that the order provided that the sale proceeds would be paid to Mr. Jaffer in trust. But the Master was concerned with another dispute, namely, the closing date, and so may not have considered this term of the Order.

[129] The plaintiff argues that so many months went by, between the Vesting Order and the actual sale of the Property, that Mr. Jaffer ought to have brought to the Court the fact that Mrs. Dhillon had not commenced *FRA* proceedings, and so an underlying fact relied upon by the Court in granting the Vesting Order Reasons had not actually occurred. The problem with this argument is that the Court, in granting the Vesting Order, clearly understood that the outcome of any *FRA* litigation was not certain and was in the future, commenting that the facts would "...in all likelihood dictate a very substantial reapportionment under s. 51 of the *Family Relations Act* should the issue ever come to court".

[130] The Court made no directions as to what should happen in the potential *FRA* litigation. For example, the Court did not order that the sale proceeds be paid into Court pending a Court order in the *FRA* litigation. Rather, the Court simply observed the fact that in *FRA* litigation, Mrs. Dhillon would likely have a very strong claim to reapportionment. This is what gave the Court the confidence that its Order directing the sale proceeds to Mrs. Dhillon was appropriate, leaving the onus on Mr. Dhillon to pursue those proceeds rather than leaving her without the ability to find another home.

[131] The plaintiff also argues that Mr. Jaffer's role changed at least by the time of the sale of the Property, so many months after his role on the Vesting Order Application. The plaintiff argues that Mr. Jaffer's role in the sale of the Property was based on Mrs. Dhillon's instructions pursuant to the Power of Attorney. I do not agree. Rather, as counsel for Mrs. Dhillon in the litigation, it was reasonable for Mr. Jaffer to see that he had a role in carrying out the Court's Vesting Order which was the result of that litigation, and indeed, the Court ordered that he have a role. The Court would not likely have assumed that Mr. Jaffer would be able to act in such a capacity on behalf of Mr. Dhillon, since the evidence before the Court was that Mr. and Mrs. Dhillon were potentially adverse in interest. Since Mrs. Dhillon had argued before the Court that she had a beneficial interest in the Property, and since, as Mr. Jaffer understood it, she was to receive the sale proceeds, his role was to advise her on the Statement of Adjustments, and to assist her in receiving the sale proceeds.

[132] The fact of the conveyance of the Property was the result of Mrs. Dhillon losing the arguments advanced in her favour in the Specific Performance Action, and the Purchasers succeeding in that action to obtain the Vesting Order. It was not a result of the exercise of the Power of Attorney. There was nothing in the Court's Vesting Order Reasons to suggest that Mrs. Dhillon was directed to facilitate the sale under Mr. Dhillon's Power of Attorney, or that Mr. Jaffer was to take on a broader role than he had done.

[133] Furthermore, Mrs. Dhillon did not sign any transfer documents as the attorney for Mr. Dhillon under the Power of Attorney. I find that on the sale of the Property, she was continuing to instruct Mr. Jaffer in her personal capacity only.

[134] In considering the issues before me, I am mindful that the British Columbia Court of Appeal commented on the Vesting Order Reasons in the appeal of the Fraud Action, 2006 BCCA 524. The comments of Thackray J.A. of the Court of Appeal on the one hand accepted that Macdonald J. “took it upon himself to... direct the proceeds of sale”, at para. 64. This is an interpretation of the Vesting Order Reasons which is consistent with the defendant’s interpretation. On the other hand, the Court of Appeal stated that this order was “outside of the jurisdiction of the chambers judge” (para. 64) and was “*obiter*” (para. 70). This is consistent with the plaintiff’s interpretation of the Vesting Order Reasons. I have not spent time analyzing these comments, because of course the Court of Appeal was addressing a separate issue. The Court of Appeal has not addressed the very issue now before this Court in this solicitor’s negligence proceeding, namely, whether or not Mr. Jaffer acted reasonably in interpreting the Vesting Order Reasons in the way he did.

[135] But I do observe that I would be loathe to find a solicitor liable in negligence for following a court order, regardless of whether or not it was within the judge’s jurisdiction to make it. The proper place to challenge the judge’s jurisdiction would have been on an appeal, brought by Mr. Dhillon, or perhaps on an application for reconsideration before entry of the formal order, but the learned chambers judge made no order that Mr. Dhillon be given notice of the Vesting Order and Mr. Dhillon did not therefore learn of the order in time to bring an appeal. While that is unfortunate, I do not consider it reasonable to consider the remedy to this problem to be the imposition of liability on Mr. Jaffer. The underlying cause of the Vesting Order, in failing to protect Mr. Dhillon’s interest in the sale proceeds, was the fact that the Purchasers claimed that Mr. Dhillon had been served and so had chosen not to appear. The Vesting Order may not have happened but for this assertion of fact that Mr. Dhillon says was false.

[136] Based on all of the circumstances and the context of the Vesting Order Application, I conclude that Mr. Jaffer's interpretation of the Vesting Order Reasons, as directing that the net sale proceeds would be payable to Mrs. Dhillon, was not below the standard of care of a reasonably competent solicitor. I also find that throughout Mr. Jaffer's role in this matter, he represented Mrs. Dhillon's personal interests, and did not represent her in her capacity as attorney under the Power of Attorney. He therefore had no reason to think of Mr. Dhillon as his client, and owed Mr. Dhillon no duty of care in this regard.

VI. DID MR. JAFFER NEGLIGENTLY ALLOW HIMSELF TO BE USED AS A FRAUDSTER'S DUPE?

[137] The plaintiff argues that even if Mr. Jaffer ought not to have considered Mr. Dhillon as his client, pursuant to the Power of Attorney, he nevertheless owed him a duty of care.

[138] The plaintiff argues that Mr. Jaffer allowed himself to be a dupe of Mrs. Dhillon and Manohar Dhillon, and had he taken reasonable care, he could have prevented the fraud that happened.

[139] The plaintiff claims that there were a number of red flags that ought to have alerted Mr. Jaffer to make inquiries of Mrs. Dhillon and Manohar Dhillon, and if he had, he would have revealed the fraud. Instead, Mr. Jaffer did not question Mrs. Dhillon or Manohar.

[140] Chapter 4, s. 6 of The Law Society of British Columbia, *Professional Conduct Handbook*, Vancouver: Law Society of British Columbia, 2011, states:

6. A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.³

[heading and rule amended 03/2005; heading amended 05/2005; rule amended 06/2011]

[Footnote 3: A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should make inquiries of a client who: (a) seeks the use of the lawyer's trust account without

requiring any substantial legal services from the lawyer in connection with the trust matters, or...

[renumbered 04/1996; amended 03/2005; 05/2005]]

[141] Mr. Jaffer agreed in cross-examination that a lawyer has the duty to not engage in any activity that the lawyer knows or ought to know assists a fraud, and has a duty to be on guard against becoming the tool or dupe of an unscrupulous client, which may include the duty to make inquiries.

[142] In addition, the same *Professional Conduct Handbook* states, in Chapter 1, Canons of Legal Ethics:

3(1) A lawyer should obtain sufficient knowledge of the relevant facts...

...

(5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

[143] Mr. Jaffer readily agreed that the above professional standards apply to lawyers practicing in British Columbia.

[144] Here, Mr. Jaffer did not know that the Power of Attorney was fraudulent. The plaintiff says there were a number of odd circumstances about the Power of Attorney, and how it fit with Mrs. Dhillon's story, and the timing of the conveyance, that ought to have put Mr. Jaffer on alert to investigate.

[145] The problem with this argument is that the use of the fraudulent Power of Attorney occurred before Mr. Jaffer was retained. His role was to help Mrs. Dhillon set aside or resist the very transaction that the plaintiff says was fraudulently entered into. As such, Mr. Jaffer was not accepting instructions from clients perpetrating a fraud, he was accepting instructions to help them out of the consequences of their fraud (although he did not know of the fraud). Had Mr. Jaffer been successful, it

would have been to Mr. Dhillon's benefit as it would have reversed the fraudulent sale.

[146] It has to be kept in mind that Mr. Jaffer did not ask the Court to make any order regarding the sale proceeds. He was simply concentrating on stopping the sale. What appears to have influenced the Court to make directions regarding the sale proceeds was the Court's understanding that Mr. Dhillon had been served and had not appeared, and the Court's reliance on Mrs. Dhillon's evidence regarding her contributions to and beneficial interest in the Property. Mr. Jaffer was not responsible for the Purchaser's evidence that Mr. Dhillon had been served. There is no suggestion that Mrs. Dhillon's evidence of contributions to the Property was anything but true.

[147] Mr. Jaffer then followed his understanding of the Court's directions, which I have already found was not below the standard of care of a reasonably competent solicitor.

[148] The only part of Mr. Jaffer's role that was not focussed on trying to prevent the sale of the Property, was his role in completing the sale and paying out the proceeds of sale. Here, if there was any other fraud that had led to the Vesting Order, it was the evidence that Mr. Dhillon had been served. Again, it was not Mr. Jaffer who was assisting anyone in putting forward that evidence. Rather, it was the Purchasers who put forward that evidence.

[149] I do not see that Mr. Jaffer did anything which could be said to be in furtherance of the fraud. Rather, he was just dealing with matters that occurred as a consequence of the fraud having occurred before he even came on the scene and was retained. I conclude therefore that he did not allow himself to be negligently used as a fraudster's dupe and that his actions or omissions did not facilitate a fraud.

VII. CONCLUSION

[150] I have found that Mr. Jaffer ought not to have seen Mr. Dhillon as his client. Mr. Jaffer was representing Mrs. Dhillon in her personal capacity only, and not in her

capacity as attorney under the Power of Attorney. I have also concluded that Mr. Jaffer's interpretation of the Vesting Order Reasons was not below the standard of care of a reasonably competent solicitor. Further, I have found that Mr. Jaffer took no steps which could be considered as in furtherance of the fraud, which occurred before his involvement. The plaintiff's claim is therefore dismissed.

[151] The defendant is entitled to ordinary costs, unless there are matters affecting costs of which I am unaware, in which case the parties can seek to make further submissions.

"S. Griffin, J."
The Honourable Madam Justice S. Griffin