COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Brar v. Kootenay Savings Credit Union,* 2023 BCCA 68

Date: 20230213
Docket: CA47891

Between:

Gurmeet Brar, Navdeep Brar, Jasrevan Brar, and Mauveen Brar

Appellants
(Defendants)

And

Kootenay Savings Credit Union

Respondent
(Claimant)

Corrected Judgment: The text of the judgment was corrected at paragraph 33 on May 31, 2023.

Before: The Honourable Madam Justice Bennett
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated October 18, 2021 (*Kootenay Savings Credit Union v. Brar*, 2021 BCSC 2027, Nelson Docket NEL-S-S-20319).

Counsel for the Appellants, Navdeep Brar, Jasrevan Brar and Mauveen Brar:	M.E. Guy D. Exel
Counsel for the Respondent:	R. R. W. Sookorukoff
Place and Date of Hearing:	Vancouver, British Columbia September 15, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 13, 2023

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Justice Griffin

Summary:

The appellants challenge an order declaring a transfer of property void and of no effect under the Fraudulent Conveyance Act. The property was also the subject of a separation agreement and a subsequent desk order divorce. At the time, one spouse was facing financial pressure, and the respondent credit union was awarded a judgment of over $1.5 million dollars against him. He transferred his interest to his former spouse and two children for "$1.00 and natural love and affection" though the market value of the property was $2 million dollars. The trial judge held that the family was attempting to fraudulently shield the property from creditors.

Held: Appeal dismissed. The judge's findings of credibility and a lack of good consideration were amply supported by the evidence, and no palpable and overriding error or extricable error of law has been demonstrated. He also properly exercised his inherent jurisdiction and his jurisdiction under the Fraudulent Conveyance Act when he varied the desk order after finding that it was another step in the family's fraudulent conveyance scheme. His order and declaration varying the desk order must be reflected in the entered order.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] On November 15, 2017, Mr. Gurmeet Brar and Ms. Navdeep Brar, husband and wife, transferred their jointly owned family farm property (the "Property") to the appellants, Ms. Brar and their two daughters. Effectively, this transferred Mr. Brar's half interest to the appellants, who became joint owners. The transfer was carried out in consideration of "$1.00 and natural love and affection" (the "2017 transfer"). The declared market value of the Property was $2 million.

[2] Mr. Brar claimed that he transferred his interest to implement an oral agreement he and his wife made in 2009 after their separation. The respondent Kootenay Savings Credit Union ("Kootenay") maintained that it was a fraudulent conveyance. Kootenay had obtained a judgment against Mr. Brar personally on July 22, 2015, for $1,496,637 plus interest and costs, arising from his personal indemnity on a commercial mortgage. It commenced this action on March 14, 2018, claiming under the *Fraudulent Conveyance Act*, RSBC 1996, c 163 [*FCA*], and seeking an order declaring the 2017 transfer null and void.

[3] In reasons for judgment indexed at 2021 BCSC 2027, Mr. Justice Crerar granted Kootenay the relief it sought, declaring the 2017 transfer void and of no effect against Kootenay. The judge reviewed the background of this matter in detail, and carefully considered the question of credibility. Finding the evidence of the Brars to be riddled with internal implausibilities, he found that he was unable to believe their testimony. He concluded:

> [116] … All five Brars knew or were wilfully blind to Mr. Brar's financial difficulties and the risk those difficulties posed to the family farm Property. They have failed to rebut the fraudulent conveyance inference imposed upon them by the existence of multiple badges of fraud.

[4] In making his order, the judge exercised what he considered to be his inherent jurisdiction to vary a desk order of divorce (the "Desk Order") obtained by

Ms. Brar, which was signed by a Justice of the Supreme Court of British Columbia on February 14, 2017. A term of the Desk Order provided that "[a]s per the written agreement dated January 15, 2010, [Ms. Brar] shall be the sole owner of the [Property]…". The Brars had argued that this term blocked the reversal of the transaction sought by Kootenay. The judge disagreed. He varied the Desk Order by striking out that term and declaring it of no effect. He considered that it was yet another step in the fraudulent conveyance scheme, and relied as well on section 1(d) of the *FCA*:

> 1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> (a) a disposition of property, by writing or otherwise,
>
> (b) a bond,
>
> (c) a proceeding, or
>
> (d) an order
>
> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.
>
> [Emphasis added.]

[5] On this appeal, the appellants say that the judge erred in two ways:

1) In law, by varying the Desk Order, which they say was granted based on the matrimonial settlement and a 2010 separation agreement between Mr. and Ms. Brar.

2) In fact, by determining that the appellants did not meet their burden of showing that the 2017 transfer was made in good faith in accordance with section 2 of the *FCA*:

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

[6] These issues intertwine because the judge's basis for varying the Desk Order depended, to a large part, on his conclusions concerning the lack of good faith in,

and fraudulent nature of, the 2017 transfer when viewed in the context of the family's background and Mr. Brar's finances. I therefore propose to consider the second issue first. If the appellants are correct in their position on that issue, then it would seem to follow that the justification for varying the Desk Order would disappear.

2. BACKGROUND

[7] After describing the 2017 transfer from Mr. Brar to his wife, Navdeep, and their daughters, Jasrevan and Mauveen, the judge described the background:

> [2] Gurmeet and Navdeep have one other child: a son, Mavin, then aged 31. He lives on the Property, where he runs the agricultural and financial aspects of the family business, Brar Berry Farms Ltd.
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> [3] At the time of the transfer Gurmeet was under severe financial and legal pressure. On July 22, 2015 the plaintiff credit union obtained judgment against him personally for $1,496,637, plus interest and costs. The judgment flowed from Gurmeet's personal indemnity on a commercial mortgage given to the plaintiff on December 30, 2013. The commercial mortgage was registered against an Osoyoos motel owned by Gurmeet and his sister-in-law (Navdeep's brother's wife), Harjinder Saran, through their company, MP Hospitality Limited ("MP Ltd.").
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> [4] On May 19, 2016 the plaintiff applied for the appointment of a receiver-manager over the Osoyoos motel, which order was granted on June 6, 2016; Gurmeet attended the hearing. On March 20, 2017, the plaintiff started pressing Gurmeet to attend an examination in aid of execution. These communications continued through and beyond November 2017, prolonged primarily by delays on the part of Gurmeet and his then-counsel.
>
> [5] On June 12, 2015, Lloyd Investments Ltd., a creditor of Gurmeet and Navdeep, had filed a certificate of pending litigation against the Property. On December 1, 2016, another creditor, Farm Credit Canada, had demanded payment in full of the $375,872 owing. It delivered its notice of intent to realise on security. The letter was sent via registered mail to both Navdeep and Gurmeet at the Property.
>
> [6] After the July 2015 judgment and the May 2016 receivership order, the Brars made other significant changes in their financial and personal lives.
>
> [7] Some time after the May 2016 receivership order Gurmeet moved back from the Osoyoos motel, where he had apparently lived for several years, to live in his brother's basement, about five minutes away from the Property, on the same road. Navdeep and the children knew of the father's return and new living quarters, but they claim not to have known or inquired why he had moved back, or to have considered it indicative of a potential business problem with the Osoyoos motel or his finances in general.
>
> [8] On May 26, 2016, Navdeep filed a notice of family claim, alleging that the parties had separated on September 15, 2008, and had signed a

> separation agreement in 2010. That claim sought an order that "[a]s per the written agreement dated January 15, 2010 the Claimant shall be the sole owner of the family home located at 32118 Huntindon [*sic*] Road Abbotsford BC V2T 5Y7." The divorce was not contested, leading to its submission as a desk order divorce, and a final February 14, 2017 order granting the Property to Navdeep.
>
> [9] On July 12, 2016, the family had earlier tried to effect a purchase of the Property by all three children. A contract of purchase and sale for the Property was prepared, under which Gurmeet and Navdeep would sell the Property to all three children for $2.2 million. The document was signed by all members of the family. That transaction did not proceed, as the children could not obtain financing, despite efforts.
>
> [10] On October 15, 2016, Gurmeet removed himself as a director of Brar Berry Farms Ltd. This change left Navdeep as the sole director. That same day, Gurmeet transferred his 50 percent interest in the company to Mavin.
>
> [11] On March 6, 2017 Gurmeet and Navdeep encumbered the Property with two separate mortgages, for $300,000 and $700,000, each issued by a consortium of individuals rather than a formal lender.
>
> [12] The plaintiff argues that the Brars transferred the Property in order to insulate it from the ongoing collection efforts against Gurmeet. It seeks an order and declaration that the transfer is void and of no effect as against the plaintiff.
>
> [13] The Brar defendants argue that the transfer was made in good faith, as part of an admittedly slow-moving arrangement of family property following the 2008 marriage breakdown. They say that the marriage failed when Gurmeet began a romantic relationship with Harjinder Saran: his business partner, and Navdeep's brother's wife.
>
> [14] Specifically, the Brars allege a verbal trust agreement around 2009 that Navdeep would be the sole beneficial owner of the Property, while Gurmeet would be the sole beneficial owner of an adjacent property, located at 32172 Huntingdon Road (the "Adjacent Property"). The Adjacent Property was sold for $1.125 million in November 2009. The Brars argue that the transfer of the Property to Navdeep and their two daughters realised the 2009 agreement that Navdeep was the sole owner of the Property.

3. DID THE JUDGE ERR IN FAILING TO APPLY SECTION 2 OF THE *FCA*?

3.1 Overview

[8] The appellants accept that the judge correctly set out the legislative test for fraudulent conveyance, but submit that he erred in weighing three factors that, they say, must be considered in applying the test. They describe these factors in their factum as follows:

a) the credibility of the parties;

b) knowledge the parties had of Mr. Brar's debt to Kootenay; and

c) whether sufficient consideration was given for the transfer.

As I discuss below, whether there was "good consideration" within the meaning of section 2 of the *FCA* determines whether it is necessary to consider the transferees' knowledge of the transferor's "collusion or fraud": *Canlas v Global Pacific Financial Services Ltd*, 2022 BCCA 438 at para 32. Consequently, the second factor upon which the appellants rely becomes important only if they are able to establish that "good consideration" was given for the transfer.

[9] It is not, of course, for this Court to re-weigh the evidence. In order to succeed, the appellants must establish that the judge committed palpable and overriding error in his fact-finding, or misapprehended the evidence. Otherwise, this Court will not interfere. This is particularly germane to the appellants' complaints about the judge's findings of credibility: see, for example, *Franklin v Cooper*, 2016 BCCA 447 at para 12.

[10] Here, the appellants admit that Mr. Brar was "a liar, cheat and scoundrel", but say that the trial judge unjustifiably painted Ms. Brar with the same brush. They also raise the following arguments:

- the legitimacy of the 2010 separation agreement between the parties was not properly before the judge to be decided, yet he found the circumstances of its creation to be conflicting and murky, and that it undermined the claim that Ms. Brar was to be the sole beneficial owner of the Property. They rely on the Brars' lack of legal training and submit that the judge erred in holding uneducated persons like the appellants to an unreasonably high standard of understanding the legal nuances of a document not in their first language;

- the judge failed to consider the effect of cultural shame on the timing of Ms. Brar's application for a divorce;

- the judge erred in his interpretation of the 2010 separation agreement that provided Ms. Brar with "a license to exclusive occupation in possession" when he found that this did not make Ms. Brar the "sole owner" without considering what the common layperson would understand when looking at the options available in the Self Counsel Press document, and without taking into account Ms. Brar's lack of sophistication and education;

- the judge erred in failing to accept the parties' explanation for the delay in executing the matrimonial settlement document, considering it to be evidence of the appellants' bad faith in relation to the 2017 transfer;

- the judge erred in attributing knowledge to Ms. Brar of her husband's financial problems when, due to the sale of another asset, the Osoyoos Motel, she had no reason to believe that there would remain a debt owing to Kootenay, and further erred in failing to infer good faith from the timing of the transfer of the Osoyoos Motel;

- the judge erred in holding that the 2017 transfer was intended to place the assets out of the reach of Kootenay, instead of finding that it was the result of the separation agreement that was made almost a decade before;

- the judge's finding of intention on the part of the appellants was "speculative"; and

- the judge failed to appreciate that there is no rule of law that, in every case, an intention to defeat creditors must be inferred from the effect of the impugned transactions.

[11] With respect, I am unable to accept these submissions. While it would have been open to the judge to take a different view of the evidence, that is not the issue. The appellants have not pointed to any palpable and overriding error, nor have they established a material misapprehension of the evidence. It follows that they have not established any proper basis upon which this Court could interfere with the judge's findings.

3.2 Credibility

[12] The judge's credibility findings were amply supported. He noted that the evidence of the Brars was "a coordinated collective effort to downplay [their knowledge that the Property was in peril of being seized by creditors]", and that their evidence was wholly uncorroborated, "with key witnesses missing from the trial" (at paras 20–22). In addition, the judge observed, significant potential corroborating documents that they were in a position to produce were absent (at para 25), and the family appeared to suffer from "an acute collective memory fog" (at para 26).

[13] At trial, the appellants relied to a significant degree on the evidence of Mr. and Ms. Brar's son, who, the judge noted:

> [28] … at first tried to be similarly aloof in memory and proximity to his father. When pressed on certain aspects of the evidence, he had to admit greater knowledge and involvement than he had first professed, in an attempt to protect his mother's repeated defence of general ignorance. For example, he admitted to coordinating his mother's visit to a lawyer for the purpose of the notice of family claim; he then claimed that he took his mother to the meeting but elected not to be present during the meeting, so did not know the details (Navdeep herself remembered nothing of the meeting, despite its relative recency, and despite its importance to her life). [The son's] testimony was at times evasive, glib, and argumentative. …

[14] From this and other passages, it is also clear that the judge was very much alive to Ms. Brar's position of "general ignorance", and to other concerns raised by the appellants about her situation:

> [29] Navdeep was repeatedly brought back to her 2019 and 2021 examination for discovery transcripts to highlight inconsistencies between her trial evidence and her earlier solemnly affirmed evidence. In general, her

discovery evidence revealed her to be considerably more knowledgeable, with greater memory, than she presented at trial. At trial she maintained that she did not learn of Gurmeet's Osoyoos motel business, its failure, or the foreclosure proceedings until the safe date of 2018, after the transfer. But on discovery, she admitted that she knew of the motel purchase back in 2011. More importantly, she admitted that she learned of the motel foreclosure proceedings when the family applied for a TD mortgage, in 2017, in preparation for the transfer. She also admitted that Mavin had shown her documents from the foreclosure proceeding at least before the start of this proceeding in 2018 (although not necessarily before the transfer):

> Q Okay. How was it brought to your attention?
>
> A My son showed it to me.
>
> Q Mavin?
>
> A Yes.
>
> Q And what did your son tell you about the document?
>
> A He did not say anything to me. He did not tell me anything. He just read it and went quiet.

[30] Navdeep's claims that she did not know of Gurmeet's financial difficulties are also undermined by her testimony at trial and discovery that he repeatedly pressured her into jointly applying for the multiple mortgages, on the repeated basis that "he needed money." As expanded below, I am satisfied that despite her trial position that she remembered and understood almost nothing, she was also well aware that the Property was at risk, and that the purpose of the transfer was to protect the Property from creditors.

[31] Navdeep was also repeatedly impeached with documents that she had signed. For example, she at first claimed that they had not told her accountant that they had separated (in an effort to explain the CRA filings indicating that they were still married and not separated), only to be confronted with the accountant's signature as a witness on their separation agreement.

[32] It was argued that these discrepancies flowed from depression or health issues. But her persistently asserted lack of memory and understanding of events and documents at trial, in contrast to her more crisp and frank evidence on discovery, is damning. Whether attributed to problems in credibility or reliability, or both, the Court could place little weight on her evidence.

…

[34] Finally, I have kept in mind the sensible cautions in [*Wu v. Gu,* 2020 BCSC 396] at paras 102–105 with respect to adverse credibility findings based on translated testimony. I have also exercised caution with respect to potential cultural norms in the delivery and content of testimony. I am satisfied that the inconsistent evidence of Navdeep and Gurmeet transcends any linguistic or cultural roots.

[Emphasis added.]

[15] While they argue that the judge should have taken a different view of these matters, the appellants have demonstrated no reversible error in the approach he took.

3.3 Good consideration

[16] At trial, the defendants argued that there was good consideration for the 2017 transfer on two related bases. The first was because there was an oral trust agreement made in 2009 that Ms. Brar would own full beneficial rights to the Property while Mr. Brar would receive the full proceeds of the sale of an adjacent property as its sole beneficial owner (see paras 14 and 46 of the judge's reasons). The second was that the 2010 separation agreement confirmed this oral agreement and was ultimately reflected in the Desk Order.

[17] The judge rejected the Brars' evidence about the alleged 2009 oral trust agreement, and the appellants have demonstrated no palpable error in that regard. It therefore became incumbent upon the judge to consider the 2010 separation agreement, contrary to the appellants' submission that the agreement was not before the judge. It provided that "the Wife shall have a licence to exclusive occupation and possession of the matrimonial home situate and being at …"

[18] The appellants have pointed to no extricable legal error in the judge's conclusion that this wording did not purport to bestow a 100% beneficial interest in the Property on Ms. Brar as the appellants argued. The judge's interpretation was consistent with and supported by the circumstances before him. On this and other matters, the appellants complain that the judge failed to accept evidence given by Ms. Brar and her daughters, but as noted above, the judge expressed ample reasons for being unable to do so.

[19] Given the judge's findings, it was open to him to conclude, as he did (at paras 93–103), that the 2017 transfer was not made for "good consideration" within the meaning of section 2 of the *FCA*, and that it was not made in good faith. While

consideration of "$1.00 and natural love and affection" may indeed constitute sufficient consideration to satisfy the legal requirements for the formation of a contract, it does not follow that it also constitutes "good consideration" within the meaning of section 2 of the *FCA*: see *Canlas* at paras 27–31, and *Chan v Stanwood*, 2002 BCCA 474.

[20] On the judge's interpretation of that separation agreement, and on his findings of fact, the appellants' argument that the 2017 transfer was for good consideration and in furtherance of a proper purpose—fulfilling Mr. Brar's obligations under the separation agreement—cannot succeed. As this Court observed in *Canlas* at para 32, in these circumstances, the question of whether the appellants had any notice or knowledge of Mr. Brar's "collusion or fraud" within the meaning of that section does not arise.

[21] I conclude that the appellants have established no error in the judge's finding that section 2 of the *FCA* was of no assistance to the appellants. He carefully assessed the parties' credibility, considered whether there was good consideration in accordance with the applicable authorities, and weighed the relevant factors.

4. DID THE JUDGE ERR IN VARYING THE DESK DIVORCE ORDER OF FEBRUARY 14, 2017?

4.1 The judgment below

[22] As noted above, it was a term of the 2017 Desk Order that "[a]s per the written agreement dated January 15, 2010, [Ms. Brar] shall be the sole owner of the [Property]…" [the "Property term"]. On the question of its effect, the judge said this:

> [104] The defendants argue that any reversal of the transaction is blocked by the desk order divorce order signed by a justice of this Court on February 14, 2017. In the process leading to the desk order, Gurmeet was served with the notice of family claim but did not file a response. Navdeep accordingly filed a desk application for a non-contested divorce. With it, as required, she drafted and submitted a draft order. With such applications, the Court reviews, *inter alia*, the averments required under s. 11 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), including the solemnly affirmed confirmation that there has been no collusion, condonation, or connivance in relation to the

> application for a divorce (the other primary *foci* of such reviews -- jurisdiction and adequate support of children -- were inapplicable to the filing). Navdeep's submitted order, duly endorsed by the reviewing judge, included the term that "[a]s per the written agreement dated January 15, 2010, [Navdeep] shall be the sole owner of the [Property]…" That aspect of the order, insofar as it is expressly sought in the notice of family claim, would not have been second-guessed in the unopposed desk order divorce process, and should not be considered as a judicial determination based on tested or contested evidence.
>
> [105] In any case, as set out above, this portion of the notice of family claim is false: the 2010 separation agreement only purports to give Navdeep "a license to exclusive occupation in possession" of the Property, and does not make her the "sole owner". The affidavit provided by Navdeep in support of the desk order divorce does not attach the 2010 separation agreement as an exhibit.[9]

[In footnote 9, the judge observed: "Again, Navdeep disavowed any memory of signing the affidavit, and did not initially recognize any of the desk order divorce filings."]

> [106] Although putative fraudulent conveyances usually occur between family members, counsel could find no case law directly on point: where the defendant argues that an alleged fraudulent conveyance has been on some level endorsed – some would say inadvertently laundered – and thus insulated by an intervening court order -- whether divorce or otherwise -- confirming or effecting the transfer. The scenario arose in [*Liu v. Wang,* 2009 BCSC 1792], but, as the fraudulent conveyance claim was dismissed, the Court did not need to consider the issue. In its 2016 report, "Reviewable Transactions," the Alberta Law Reform Institute noted that this issue remained unsettled:
>
> > Current law offers one set of rules for attacking all transfers of property that have the effect of hindering or defeating creditors. This produces uncertain and unfair results in some cases, the most significant of which are those involving payments of money and transfers of property in satisfaction of legally recognized spousal claims to support and division of property. Questions abound. Is a transfer of property pursuant to a spousal property settlement void or valid according to whether a debtor-transferor was not conscious of its effect on his or her creditors rights of recovery? Can transfer of property under a bona fide settlement agreement or court order be undone if it is subsequently challenged by creditors of the transferring spouse?
> >
> > [Emphasis added by the judge.]
>
> [107] Returning to first principles, our Court of Appeal has confirmed that the court has inherent jurisdiction to set aside a judgment or order (including a consent order) obtained by fraud, collusion, or perjury: *Pond v. Pond*, 2017 BCCA 243 at para. 2. The desk order divorce was yet another step in the

fraudulent conveyance scheme. Indeed, each of the three *Pond* preconditions were present in the desk order divorce application, as set out above.

[108] Which brings us back to the plain wording of the *FCA*. While this case, as most *FCA* cases, seeks to void the "disposition of property" (s. 1(a)), that is not the sole action that can be reversed by the court under the statute. Indeed, by s.1(d), "an order" may expressly be declared void and of no effect where it is part of a process designed to "delay, hinder or defraud creditors." The Law Reform Commission of British Columbia discusses this provision in its *Report on Fraudulent Conveyances and Preferences*, (1988) BCLRC 94 at 12:

> The *Fraudulent Conveyance Act* refers to transactions in the form of a "bond, proceeding or [and] order." The reason for their inclusion would appear to be that the legal process may not be used to authorize a transaction intended to prejudice creditors.
>
> Examples of using legal process to transfer an interest in property are easy to imagine. A person may consent to a judgment for a fictitious debt and allow execution against his property to effect a transfer. Such a transaction should be no more immune from attack than a straightforward conveyance.
>
> Under the *Family Relations Act* property vested in the name of one person may, by operation of law, become unavailable to satisfy that person's debts. Section 43 of the *Family Relations Act* provides that a *prima facie* undivided half interest in family assets vests in each spouse when one of a number of "triggering events" occurs. These triggering events include a separation agreement, decree of divorce or nullity, or an order under section 44 of the *Family Relations Act* declaring that the spouses have no reasonable prospect of reconciliation. Obtaining a declaration that the spouses have no reasonable prospect of reconciliation would, in effect, transfer an interest in one spouse's property to the other spouse.

[109] The February 14, 2017 desk order divorce order is accordingly varied to remove and void and declare of no effect paragraph 1, the purported award of the Property to Navdeep.

[23] This term pronounced by the judge in para 109 of his reasons was inadvertently omitted from the final order pronounced October 18, 2021, as entered. That final order has since been amended to include the term by a further order pronounced January 27, 2023, and entered February 7, 2023.

4.2 Discussion

[24] The appellants argue that once the Desk Order was entered, the court was *functus officio*. Accordingly, they say, the judge had no jurisdiction to vary it or set aside the Property term.

[25] There are well-established, though limited, circumstances in which a court has inherent jurisdiction to set aside an entered order, particularly where it has not been the subject of judicial consideration of contested positions. The circumstances were described by this Court in *Pond v Pond*, 2017 BCCA 243 at para 2 and *Racz v Mission (District)* 1988, 22 BCLR (2d) 70, 1988 CanLII 2937 (CA). They include orders obtained by fraud, collusion or perjury, and orders that constitute an abuse of process.

[26] In this case, the order came about in this way. On May 26, 2016, Ms. Brar filed a notice of family claim in which she advanced a claim for divorce and a claim for an unequal division of property. In support of her claim for an unequal division of property, she referred to the Property, and pleaded that "as per the written agreement dated January 15, 2010, the Claimant shall be the sole owner of the family home located at…". In the affidavit she filed in support of her Desk Order application, she affirmed that the facts stated in her notice of family claim were true. But they were not. As found by the judge, the 2010 separation agreement did not provide that she was to be the sole owner. Accordingly, the Property term was obtained upon a false premise. It follows, in my view, that the circumstances were sufficient to give rise to the inherent jurisdiction upon which the judge relied as discussed in *Pond*.

[27] I observe that in the excerpt quoted by the judge at para 106 from the Alberta Law Reform Institute's 2016 report, the Institute asked: "Can transfer of property under a *bona fide* settlement agreement or court order be undone if it is subsequently challenged by creditors of the transferring spouse?" That question

remains unanswered because it does not arise in this case. In the circumstances before the judge, the transfer was *not* carried out pursuant to a *bona fide* settlement agreement or court order. The purported settlement agreement did not provide for Ms. Brar to be sole owner; the Property term of the court order was based upon the false premise that it did.

[28] Neither party to that order sought to have it varied. Nevertheless, it is accepted that an application to do so will generally (though not invariably) be brought in a separate action, as was this one: see the discussion in *Long v Red Branch Investments Limited*, 2018 BCCA 115 at paras 45–51. I conclude that it was open to the judge to vary the order in this action given both his inherent jurisdiction and the jurisdiction granted by section 1(d) of the *FCA* in the circumstances found by the judge. The appellants have established no error of law.

5. CONCLUSION

[29] For the reasons set out above, I would dismiss the appeal. I consider it important, however, to add the following observations.

[30] While the judge determined that both the 2017 transfer and the Property term in the Desk Order must be set aside, what has not been determined is the extent of Mr. Brar's interest.

[31] It will be recalled that the Desk Order contained only two terms. The term that the parties be divorced survives. The Property term does not. The result is that Ms. Brar is divorced, but her claim for an unequal division of property as set out in her notice the family claim remains unresolved. It is a claim that is open to her to pursue. Although she can no longer rely on the 2010 separation agreement, there is nothing in the orders pronounced by the judge that prevents Ms. Brar from asserting, for instance, that she is entitled to an unequal division of the Property in accordance with the provisions of sections 94 and 95 of the *Family Law Act*, SBC 2011, c 25.

[32] Of course, I cannot say whether such a claim would have any merit. Nevertheless, as this Court confirmed in *Chichak v Chichak*, 2021 BCCA 286 at paras 9–10, any judgment against title under the *Court Order Enforcement Act*, RSBC 1996, c 78 (such as Kootenay might obtain in this case) would be subject to the equities, including beneficial interests, because a judgment creditor (Kootenay) cannot take more than the interest of the judgment debtor (Mr. Brar). Here, the extent of Mr. Brar's interest remains to be determined in accordance with any claim Ms. Brar may have under the *Family Law Act*.

[33] The parties should proceed accordingly in the Supreme Court of British Columbia, and I would direct Ms. Brar to file a copy of the entered orders of the Supreme Court pronounced October 18, 2021, and January 27, 2023, in her family law proceeding.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Griffin"