IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhaliwal v. Legendary Developments (Fraser Heights) Ltd.,* 2024 BCSC 1698

Date: 20240912
Docket: S225206
Registry: New Westminster

Between:

Parminder Dhaliwal, Avtar Uppal, Manveer Mattu and Jagroop Mattu
Plaintiffs

And

Legendary Developments (Fraser Heights) Ltd., Gurdeep Gordie Dhaliwal, Richelle Natt, Punjab Law Group LLP also known as PLG LLP, Aggarwal Law Office Ltd., Naresh Aggarwal, Sumandeep Singh Law Corporation doing business as Singh Law Group and Sumandeep Singh
Defendants

And

Legendary Developments (Fraser Heights) Ltd. and Gurdeep Gordie Dhaliwal
Third Parties

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Plaintiffs:	P.G. Kuchar K. Garcha
Counsel for the Defendants, Punjab Law Group LLP, Aggarwal Law Office Ltd. and Naresh Aggarwal:	K.A. Murray L. Gnanasihamany
No other appearances	
Place and Date of Trial:	New Westminster, B.C. October 16-20, 23-25, 30-31, 2023
Place and Date of Judgment:	New Westminster, B.C. September 12, 2024

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Introduction

[1] This trial dealt with the potential liability of a lawyer for releasing the buyers' deposits in three real estate transactions from his trust account to the seller before the transactions had completed, to allow the seller to discharge previous options that were registered against the properties.

[2] The plaintiffs, who intended to purchase the properties in question, allege that the defendant, who was the seller's lawyer [1], breached the trust obligations and the fiduciary duty that they say arose when the deposits were placed in his trust account.

[3] They also argue that he had a duty of care towards them in relation to the deposits, and that his conduct in receiving and releasing them fell below the standard of a reasonably competent real estate lawyer in those circumstances.

[4] They suffered financial loss, because the seller was unable to return the deposits to the defendant's trust account, and the purchase failed to complete.

[5] The defendant denies that the circumstances under which he received the deposits made them trust property, made him a trustee with respect to them, or gave rise to any fiduciary duties. He also denies that in those circumstances he owed any duty of care to the opposing party in the transaction, or that his actions in dealing with the deposits fell below the appropriate standard.

[6] His position is that the plaintiffs had agreed that the deposits could be used by the seller to remove previous encumbrances on the properties, and that they have revised their narrative since the deal failed, in an attempt to impose liability on him.

[1] His law firm is also a defendant, but since its potential liability arises from his actions, I will refer to him as the sole defendant for the sake of clarity.

Evidence

Participants

[7] The motivating force behind the intended purchases of these properties was Sukhwinder Mattu, who is an experienced residential builder. In early October 2019 he identified three building lots in a new subdivision in the Fraser Heights area of Surrey that he was interested in buying. He made inquiries about them through his realtor Harjot Dhatt. Mr. Dhatt had considerable experience as a realtor, including handling 10 to 12 previous purchases by Mr. Mattu.

[8] The plaintiffs Manveer and Jagroop Mattu are Mr. Mattu's adult sons. The plan was for them to carry out the purchase of the three lots on his behalf, because his company already had a mortgage on another property and he could not obtain any additional mortgages in his own name. Mr. Mattu made all of the decisions in relation to the purchases however.

[9] In addition, Mr. Mattu had come to an agreement with the other plaintiffs, Parminder Dhaliwal and Avtar Uppal, that they would jointly purchase the lots with Mr. Mattu's sons and contribute 50% of the purchase price. In return, they would receive an equal share of the profit after the houses that were to be built on the lots by Mr. Mattu had been sold, less the costs of construction. Ms. Dhaliwal and Mr. Uppal are experienced property purchasers, and own eight properties that they rent out as investments. They knew Mr. Mattu because he had previously built a house for them.

[10] The seller of the lots was Legendary Developments (Fraser Heights) Ltd. One of its principals was Gurdeep "Gordie" Dhaliwal. Both the company and Mr. Dhaliwal are also defendants in this action, but neither filed a response to civil claim. The company has since been dissolved and Mr. Dhaliwal has declared bankruptcy, hence the focus of the trial on the current defendant.

[11] The listing agent for the sale of the lots was Jason Sandhu. He had only been licensed for about four months when these matters arose. In addition to these lots,

Mr. Sandhu was the listing agent for three other lots in the same development that Mr. Dhaliwal's company was also offering for sale.

[12] The defendant became a lawyer in India in 1991 and was called to the bar in this province in 2010. At the time of these events he was practising with another lawyer under the name of the Punjab Law Group. Handling real estate transactions was a regular part of his practice.

[13] A dispute with his partner led to him being excluded from their office, and the Law Society then appointed a custodian over his records to ensure their continued availability. There was no evidence that this related to any ethical violations on his part, or to the transactions in issue in this case. He stopped practising law in 2021 and began working as a consultant for a company.

The Initial Offer

[14] The lots in question were listed for $549,900 each. They were posted on the Multiple Listing Service on September 23.

[15] Mr. Sandhu testified that he told Mr. Dhaliwal that the lots were worth more than that, but Mr. Dhaliwal was willing to take less for them if the deposits could be paid directly to the company, either by an agreement that was not subject to any conditions, or after the conditions had been removed. Mr. Sandhu said that in his experience deposits being paid directly to the seller is "pretty normal".

[16] Before the lots were posted on MLS, he briefly had exclusive listings for them, which did not generate any offers. Payment of the deposits directly to the seller was Mr. Dhaliwal's condition for the exclusive listings as well.

[17] Mr. Dhatt's inquiries on behalf of Mr. Mattu revealed that the lots were ready to build on, which added to their attractiveness. At his suggestion, on October 2 the

plaintiffs made an offer of $520,000 for each lot [2]. He prepared the contracts of purchase and sale that constituted the offers.

[18] The contracts provided that the deposits, of $200,000 per lot, were to be paid directly to the seller, within 24 hours of acceptance of the offer. Mr. Dhatt said that the requirement for this term was communicated to him by Mr. Sandhu.

[19] In keeping with the manner in which these deposits were to be dealt with, the standard language in the contracts providing that the deposit was to be held in trust by a real estate brokerage or a lawyer was crossed out and initialled by the plaintiffs. Mr. Dhatt said that his managing broker advised him to cross it out. He agreed with the suggestion that by doing so he was "taking out the provision about [the deposits] being held in trust". He understood that this deletion meant that the deposits were not going into "their trust", by which I took him to mean the brokerage's account.

[20] He is familiar with situations in which deposits are paid directly to the developer, and he agreed that in those situations there is always an option to purchase in favour of the buyer registered on the property. This is to protect the buyer if the deal does not complete. Despite this usual practice, no options in favour of the plaintiffs were requested by them in this offer. Mr. Mattu could not remember whether Mr. Dhatt had discussed the absence of options in these offers with him.

[21] More generally, he could not remember whether Mr. Dhatt had discussed the risks of paying the deposits directly to the seller. He was clear that Mr. Dhatt had not told him that he "might not get [the money] back". Instead, Mr. Dhatt had said that the "completion [is] going to happen."

[22] Another relevant aspect of these initial offers was that they each contained a warranty that the plaintiffs "will receive a clean title to the property against the presence of any charge or other feature whether registered or pending…"[3]. In

[2] Throughout these transactions, the terms of the offers and counteroffers on the properties were identical for each lot.
[3] The spelling and punctuation in the quotes from all of the agreements and correspondence in this case are from the originals.

addition to this general language about “clean title”, the offer for each property described an option to purchase that was currently registered against it. These options arose from previous unsuccessful attempts by their holders to buy these properties.

[23] The contracts also provided that the parties agreed to extend the completion date by two weeks if the process of clearing title had not been carried out by the indicated date.

[24] Mr. Dhatt said that he informed the plaintiffs about the option to purchase that was registered against each property. Mr. Mattu initially did not remember any discussions on this point, but later clarified, when reviewing one of the contracts, that Mr. Dhatt “briefly went through all these things.” However, he did not remember whether he was aware of the options to purchase being registered on the properties at the time the plaintiffs made this offer, although he was aware of mortgages that were registered against it. He did remember looking at the titles for the properties at some point.

[25] The two mortgages on the property were each in favour of a private lender. Mr. Dhatt said he was not concerned about them because they would be removed when the transaction completed.

[26] There was a further term indicating that the plaintiffs had been advised to seek independent legal advice with respect to the agreement. Mr. Dhatt said that he suggested that this term be included. Mr. Mattu initially did not remember having had such a discussion with Mr. Dhatt, and in cross-examination responded more definitely that Mr. Dhatt had not suggested that he obtain legal advice. He agreed that he was relying on Mr. Dhatt, but added that he was familiar with this term from previous transactions, and had never sought such advice before.

[27] Mr. Dhatt’s evidence was that the terms dealing with delivering a clean title on the properties, and indeed all of the other terms and conditions in this offer, were required by Mr. Sandhu. To the extent that his credibility might be challenged on this

point, he referred to what he said were contemporaneous notes of their initial phone conversation, which contain the language of those terms as they were later expressed in the offers.

[28] In contrast, Mr. Sandhu initially said that only the required amounts of the deposits would have come from him, but he later acknowledged that the term relating to clean title could have come from him, or that it and the reference to extending the completion date if title had not been cleared could have come from his discussions with Mr. Dhatt.

[29] Both realtors agreed that this was in effect a “subject-free offer”. Mr. Sandhu also agreed that this was as a result of Mr. Dhaliwal’s instructions.

[30] The closing dates were to be October 18, a relatively short time away. Once again, Mr. Dhatt said that this was at the insistence of the seller.

[31] The plaintiffs also signed and attached to each offer a form in which they acknowledged that the deposit was not being held by a real estate brokerage, as normally occurs. Mr. Mattu said that Mr. Dhatt had explained to him that the form was required when the deposits were not going “in the real estate trust”, and that the brokerage was not responsible for them. In other words, the buyers did not have the same protections in that situation.

[32] Mr. Dhatt said that he explained to the plaintiffs all of the risks of the deposits being paid directly to the seller and not being held until the closing, and that he was comfortable that they understood those risks.

[33] After all of the plaintiffs had signed the offers, Mr. Dhatt emailed them to Mr. Sandhu.

[34] Mr. Sandhu rejected the suggestion that he was aware that Mr. Dhaliwal wanted the deposits in order to “clear off the title[s]” to the properties. He said that he tried to get the specifics of Mr. Dhaliwal’s intended use of the deposits before the initial offer, but that Mr. Dhaliwal “didn’t really talk to [him]” about it.

The Counteroffer

Payment to the Defendant's Firm in Trust

[35] On October 4, the seller made a counteroffer. The purchase prices remained the same, except that they were now specified to be "+ GST". More significantly, the term that the deposits were to be paid directly to the seller was crossed out and replaced with "Direct to sellers lawyer PLG LLP In Trust within 24 hours of subject removal."

[36] Mr. Sandhu testified that after he had received the original offers from Mr. Dhatt and shared them with his office manager, Greg Newberry, and with Mr. Dhaliwal, the three of them had a meeting at a restaurant in Chilliwack (their brokerage is based there). At this meeting they discussed "making sure that we as sellers can also clear title of all financial charges", in particular the existing options to purchase, and they suggested to Mr. Dhaliwal "about maybe the deposit being moved to a trust account, so we can ensure that funds are there on completion day." Mr. Sandhu later elaborated that this would alleviate any concerns about a shortfall of funds to complete the purchase, if the deposits were used directly to discharge the mortgages. Mr. Newberry advised them that the deposits could also be paid to the seller's brokerage.

[37] He said that Mr. Dhaliwal agreed with the funds going to the lawyer in trust.

[38] He emphasized that he proceeded in this manner "in the interests of both the buyers and the sellers", to ensure that the deal completed. He did not accept that he was acting beyond the seller's interests by doing so.

[39] He was cross-examined on communications to him from Mr. Dhaliwal that appeared to contradict this version of events.

[40] On September 24 Mr. Dhaliwal had sent him a text message that said "PLG LLP in trust[.] For all drafts". Mr. Sandhu initially responded that this comment was in relation to one of the other lots that he had listed for the company. He then suggested that this may have been Mr. Dhaliwal's position on the deposits at that

time, but that when he and Mr. Newberry spoke to him he wanted “direct to seller” drafts.

[41] On October 3, the morning after Mr. Sandhu emailed him the offers from the plaintiffs, he once again replied “PLG LLP in Trust for all drafts”. Mr. Sandhu reiterated that despite having given this direction, “at the meeting” Mr. Dhaliwal wanted the deposits to be provided to him directly.

[42] It then emerged, based on his text messages with Mr. Dhaliwal, that the restaurant meeting with Mr. Dhaliwal and Mr. Newberry that he had been referring to had actually occurred on September 25, after Mr. Dhaliwal had written about the drafts for a different purchase being made payable to the law firm in trust. Mr. Sandhu explained that at the time he received the offer from Mr. Dhatt, Mr. Dhaliwal was back to wanting the deposits directly, but that Mr. Newberry would not approve it.

[43] It was then pointed out to him that a few days after Mr. Newberry had essentially told Mr. Dhaliwal that in order to work with their brokerage the deposits would have to go to a lawyer’s trust account or a brokerage account, he was telling Mr. Dhatt that there was no point writing an offer unless the deposits were provided directly to the seller. He responded that he could not remember “exactly”, but “that [it] was what [Mr. Dhaliwal] wanted at the time”.

[44] He maintained that although the section providing that the deposits would be held in trust remained crossed out as they had been in the plaintiffs’ offer, in his experience the requirement that deposits be paid in trust to a lawyer would frequently be indicated by writing it in the line where “Direct to sellers lawyer PLG LLP In Trust” was placed in these contracts. I took him to be resisting the proposition that crossing out the trust provisions changed the status of the deposits from when that section remained in place. As he later put it, despite the provisions being crossed out, “direct to the seller lawyers in trust…still stands”. He agreed that if that was the parties’ intention, he could have asked Mr. Dhatt for a new version of the offer that had those sections intact.

[45] Mr. Dhatt also explained that despite the section being crossed out in this counteroffer, he believed these deposits would be "governed by the same rules and regulations" whether they went into the seller's lawyer's trust account, the plaintiffs' lawyer's trust account, or the brokerage account. As a result, he maintained that the defendant was somehow bound by the same conditions that were contained in the crossed-out section.

[46] His understanding of the effect of the funds going into the lawyer's trust account was that it would be the lawyer's duty to ensure that the completion took place, and that if it did not, "the funds will not be going anywhere". He agreed however, that the declaration of deposit form that the plaintiffs had signed specifically advised them that they did not have the same protections as if the deposits had gone into the brokerage account.

[47] Mr. Mattu said that Mr. Dhatt did not explain the effect of the deletion of that section to him. What Mr. Dhatt did tell him was that "the seller or his broker" did not want the deposits to be paid directly to the seller, and that "they want some kind of security on it…[t]hey don't want a screw-up". He understood that the money would only be used for the completion, and that the contract provided for this. He also believed that the fact that the deposits would ultimately be applied to the purchase price meant that they could only be used for that purpose. He denied understanding that under this counteroffer the use of the deposits would now be decided between the defendant and the seller. Mr. Dhatt did not "make [a] major issue" of this provision, and simply explained "everything go, go, go, same thing". He later described Mr. Dhatt telling him that the money was "in the trust, it's safe now".

[48] He did not remember having any discussion with Mr. Dhatt about the significance of signing the form acknowledging that the deposits were somewhere other than in trust with a brokerage, which differed from his memory of what had occurred with that form when the original offer was being made.

Previous Options and Use of the Deposits

[49] The other terms and conditions in the counteroffer were substantially altered from those in the original offer.

[50] The warranty with respect to the buyers receiving a clean title and the provision for extending the completion date to facilitate it were crossed out. The counteroffer instead made the purchase and sale subject to:

- Both the buyer and the seller "receiving and approving" legal advice on or before October 7 "regarding deposit structure" and "regarding the title" of the specific lot that was being dealt with in each agreement [Mr. Dhatt answered "fair enough" to the suggestion that this was put in because there was still "risk around the deposit". Mr. Sandhu suggested that legal advice was required because the deposits would be going to the seller's lawyer. Mr. Mattu never considered whether this meant that there was something about the deposit structure that required such advice];

- The seller, also by October 7, "ceasing to being obligated to the previous contract" that was reflected in the option to purchase that had been registered on each specific lot.

[51] This section also provided that it was "a fundamental term" of the contract that the sellers would deliver "a copy of the title clear and free of any previous or further obligations" (including, but not limited to the option to purchase that was registered on that particular lot) to the buyer no less than one business day before the subject removals on October 7.

[52] In addition, there was the following term:

> Upon subject removal the buyers lawyer at the sellers expense will draft and register a right to purchase on title property located at [the specific lot being dealt with in each agreement]. The seller agrees too return deposit back to their lawyer if the contract does not complete on set completion date October 18, 2019. The sellers /directors personally guarantee this deposit returned

> therefor relinquishing any claim of liability towards the listing agent and listing agents brokerage.
>
> [Emphasis added.]

[53] Mr. Dhatt testified that the changes to require the deposits to be placed in the seller's lawyer's trust account and that the previous options to purchase be removed by October 7, instead of the completion date, had been made at the direction of Mr. Sandhu's managing broker.

[54] He did not know why the term about the seller returning the deposit to their lawyer had been added if, as he maintained, the seller was not going to be able to use them before the completion. He did not discuss this issue with Mr. Sandhu. The plaintiffs asked him what the term meant when they were signing the counteroffer, but he explained that "my concern wasn't there because since the deposit is not going to [the seller] anymore." He agreed with the suggestion that "in [his] mind it should just be ignored" and that he informed the plaintiffs that "this means basically nothing."

[55] He maintained that he never had any discussion, either with the plaintiffs or Mr. Sandhu, about the deposits being used to pay off the previous options to purchase. Mr. Sandhu also maintained that there were never any such discussions.

[56] Mr. Sandhu confirmed that he was the one who added these new terms in the counteroffer. He did so because he and his manager believed that both the buyers and the seller should get legal advice "on the title and the contract", and to make sure that the options to purchase could be removed. He later described the purpose of the terms as being "for this deal to complete, the deposit be safe…the obligations on title to be cleared, and for the completion to happen smoothly." He also described himself as "trying to protect the contract" to ensure that it completed. He said that he went over the terms with his manager and then obtained Mr. Dhaliwal's agreement to them.

[57] He also disagreed that the term requiring the return of the deposits if the transaction did not complete meant that the seller would have the use of the

deposits before returning them. He did not know why this language had been used, and stressed that the agreement did not actually say that they could be used in that manner. He also did not know why options to purchase were being granted to the buyers, if the deposits could not be used by the seller.

[58] He agreed that this term was inconsistent with the purpose of the change to the destination of the deposits that he had described. He also agreed that therefore the "professional and reasonable thing to do" would have been to cross it out.

[59] When it was suggested that he considered it acceptable to "create encumbrances on title without consideration to the seller in order to ensure that the deal completed" (by providing new options to the buyers), he responded that Mr. Dhaliwal was aware of, and had agreed to the term.

[60] In response to the further suggestion that it was always intended that Mr. Dhaliwal be able to use the deposits, he said that in that case the direct to seller provisions could just have been left as they were.

[61] On October 1 Mr. Dhaliwal sent him a message that "Doesn't look like they giving me extension [.] so I need money by Friday 4pm at the latest [.] Try your best to make it happen". Although he claimed not to remember what they were discussing at that point, he agreed that the only "money" that Mr. Dhaliwal would be obtaining through him would have been from a deposit or a completion of a sale.

[62] Mr. Mattu described Mr. Dhatt informing him that the seller's agent or broker had made "a couple of changes" in the counteroffer that were good for the buyers. In addition to the deposits going into trust, the options to purchase were to be removed before the deposits were paid. He also did not know why the term about the seller returning the deposits was in the counteroffer, given his understanding that they would be held until completion.

[63] As to the right given to the buyers to register an option to purchase, Mr. Dhatt told him to take it up with his lawyer, Amarjit Dhindsa. Mr. Mattu said that when he did so, Mr. Dhindsa advised him that because the completion was going to happen

so quickly, he did not want to take money from Mr. Mattu (unnecessarily, I took Mr. Mattu to mean) to register the options. When it was pointed out to him that the counteroffer provided for the registration at the seller's expense, he added that Mr. Dhindsa said that the defendant had not asked him "to do that [that is, carry out the registration] yet".

[64] He did not seek any advice from Mr. Dhindsa before signing the counteroffer. Instead, he relied on Mr. Dhatt.

Assumption of Liability

[65] A further new term in the counteroffer was that:

> The buyer and seller are aware of the indicated charges on title including but not limited to mortgages liens and interest present and understands the obligations they have entered into to complete this transaction and have agreed to relinquish any claim of liability to buyers agent and listing agent and listing agents brokerage.

[66] At some point after the initial copy of the counteroffer was sent to Mr. Dhatt, he received a new version of the terms and conditions page from Mr. Sandhu, with the additional term, seemingly addressing the preceding one about absolving the realtors of liability, that:

> This clause was signed under seal and is binding to both parties guaranteed personally outside of their companies.

[67] According to Mr. Dhatt, Mr. Sandhu also put this clause in. Once again, he did not tell Mr. Dhatt why. He agreed that these provisions involved the parties to the transaction relinquishing any claims against the realtors, and in that manner put the realtors' interests above the parties' interests. With respect to the term being under seal and guaranteed outside of the parties' companies, he advised the plaintiffs that it meant that the parties "agree to all this".

[68] When it was suggested to Mr. Sandhu that it would not have been in Mr. Dhaliwal's interest to be guaranteeing the deal personally when it was being carried out by his company, he said that the clause was outside of his "area of expertise", and was unable to remember why it was there.

[69] He could not remember ever having seen this new version with the additional clause. In his direct evidence he claimed that the DocuSign (software that allows for the exchange of electronic signatures on documents) identification number on the page that included it was not his. However, he explained that DocuSign generates a new identification number for each session (that is, each time a group of documents is sent), and in cross-examination he agreed that this number was actually the same one that was attached to a subject removal form that he had sent after the counteroffer had been accepted. He was the only one dealing with DocuSign on the seller's side. In other words, although he claimed not to be able to remember it, the second version contained "his" DocuSign number as well.

[70] Mr. Mattu said that he never thought about the fact that he was giving up the right to sue the realtors if something went wrong because "everybody" was saying not to worry and "completion is going to happen".

Execution and Payment

[71] The deadline for the plaintiffs to accept the counteroffer was October 5.

[72] Mr. Dhatt said that he reviewed the terms and conditions of the counteroffer with the plaintiffs, who were "happy" with them, particularly the change to have the deposits go into the lawyer's trust account. He told them that they would be "protected" by it going there. He said that in general the plaintiffs were aware of their right to make changes to the counteroffer before accepting it, but that once they knew about the destination of the deposits and the timing of the payment relative to the removal of the previous options, they did not wish to make any. He testified that he drew the provision about the plaintiffs being given options to purchase over the properties to their attention, and told them that they should register them, going as far as to call their lawyer himself to recommend this. However, their lawyer advised them that the completion date was so close that it was not necessary.

[73] Mr. Mattu did not remember whether Mr. Dhatt had explained to him why these various terms had been added. His understanding of the declaration of deposit

form was that it reflected the fact that the deposits were now “going in trust”, instead of directly to the seller.

[74] The plaintiffs all signed the counteroffers and initialled the changes, and Mr. Dhatt returned them to Mr. Sandhu.

[75] The land title documents in evidence show that the options to purchase were cancelled on October 7. At the suggestion of Mr. Sandhu’s managing broker, the subject removal date was extended to October 14, to allow for the possibility that any recently-submitted charges on the properties had not yet appeared in the title search. However, the subject terms were removed by the plaintiffs on October 9.

[76] On that date Mr. Dhatt obtained the bank drafts for the deposits, which totalled $600,000, from the plaintiffs. He gave them to Mr. Sandhu the next day, as required under the accepted counteroffer. After receiving the drafts, Mr. Sandhu gave them to Mr. Dhaliwal, who had told him that he was going to be meeting with the defendant later that day.

[77] Mr. Mattu testified that his understanding was that the deposits were going to be used to “complete the deal” and would go towards the purchase price. He did not consent to them being used for any other purpose, including paying back the holders of previous options to purchase, or being released from the defendant’s trust account before the completion. He maintained this position despite agreeing that he had originally been willing to have the deposits go directly to the seller. His position had changed after the seller’s broker had identified such an approach as “risky”, and had not allowed it to “go through”.

The Plaintiffs’ Understanding

[78] Of the plaintiffs, Parminder Dhaliwal appears to have had the greatest degree of awareness and concern about the details of these transactions. Like Mr. Mattu, her position was that the deposits were never to be used for anything other than completing the purchases.

[79] She testified that she was uncomfortable with the approach in the initial offer of paying the deposits directly to the seller, and wanted the money paid into trust instead, but she did not remember what had happened after she raised this concern. In any event, she still signed the offer.

[80] In general, she said that Mr. Dhatt "kind of briefly explained a few things". In cross-examination she said that Mr. Dhatt had not gone through the offer in detail, but that she had read it herself. She acknowledged the importance of understanding legal documents such as these, and of the need to raise any concerns with her advisor, who in this case was Mr. Dhatt. She agreed that she had relied on him to ensure that all of the terms necessary to reflect her understanding of the purchase were included, and that the key terms were explained, although she did not remember what he may have said about them. Because of that reliance, none of the terms in the offer were changed.

[81] She said that once the counteroffer was received, she "like[d] the fact" that the deposits were now going to be paid into trust. She did not remember what Mr. Dhatt may have said about the other terms. He did not discuss the term in the offer about seeking independent legal advice with her, and she did "not quite" understand his explanation of the need for this document confirming that the deposits were not going to be held at the brokerage.

[82] The other plaintiffs had a much more limited knowledge and understanding of the terms of the contracts. None of them read these documents before signing them.

[83] Manveer and Jagroop Mattu confirmed that all of the decisions in this transaction were left up to their father, and that they did not remember any explanation of the terms that Mr. Dhatt may have provided to them. In fact, it was their father who arranged for the bank drafts that were provided for the deposits on their behalf.

[84] Manveer Mattu said that Mr. Dhatt reviewed the various terms of the offer and counteroffer with his father, and not with him, although he added, in relation to the

counteroffer, that Mr. Dhatt had told him that “your deposit is safe, it’s in a trust account”. In cross-examination he elaborated that Mr. Dhatt had told him that the terms of the counteroffer were “favourable” to him in that respect, although he agreed that during his examination for discovery he had not remembered the terms of either of the agreements being discussed with him.

[85] Jagroop Mattu did not remember any discussions with Mr. Dhatt about the deposit structure, or why the change was made from the original offer, although he thought that Mr. Dhatt would have reviewed it briefly with them.

[86] Manveer Mattu also emailed their lawyer Mr. Dhindsa on October 17, just before the first scheduled completion date, to pass on concerns that he had heard from a friend about the seller’s negative financial situation, and to emphasize the importance of the title to the lots being clear before any “funds” were released. However he clarified in his testimony that he was referring to the funds needed to complete the transaction, not the deposits. He agreed that at that time he did not have any concerns about the deposits, but clarified in re-examination that he had not yet learned by then that they were no longer being held by the defendant.

[87] Mr. Uppal, who said his wife took the lead on their behalf in these transactions, did not remember any discussions with Mr. Dhatt about the terms of the two agreements, and initially did not even remember that a counteroffer had been received. He later explained that Mr. Dhatt had been “very thorough” in explaining the counteroffer, but that he did not remember the details. Like his wife, he confirmed that he relied on Mr. Dhatt to ensure that the terms of both agreements reflected his understanding of the circumstances and protected his interests.

[88] He remembered having had a conversation with his wife about wanting the deposits to be paid in trust. In cross-examination he initially accepted that this was around the time that the bank drafts had to be provided (which he said was the subject removal) but could not remember whether there had been any discussions with Mr. Dhatt about that issue between the offer and the counteroffer. He also asserted his understanding that the deposits would have gone into trust under the

initial offer, but then similarly could not remember any discussions with Mr. Dhatt to that effect, or having specifically discussed the term “direct to seller” with his wife. All he could say was that he would not have paid money in these circumstances into anything other than a trust account. In accordance with that position, he believed that the term of the counteroffer requiring the seller to return the deposits had no effect, because in fact they had been paid into trust.

[89] Manveer Mattu and Mr. Uppal explicitly indicated that they did not consent to the deposits to be used for any other purpose than completing the transactions, and one can infer from the overall tenor of Jagroop Mattu’s evidence that that was his position as well.

Difficulties with Completion and the Deposits

The Plaintiffs’ Efforts

[90] On October 10 the accepted counteroffers, copies of the bank drafts, the title searches initialled by the plaintiffs showing the discharge of the options to purchase, and a document called a “Conveyancer’s Instruction Report” (which listed, among other information, the defendant as the seller’s lawyer) were emailed to Mr. Dhindsa, the plaintiffs’ lawyer, by the conveyancing department of Mr. Dhatt’s brokerage. Mr. Dhatt and a legal assistant at the defendant’s firm were copied on this email.

[91] On October 14, Mr. Dhindsa wrote to the defendant on behalf of the plaintiffs, setting out his undertakings on behalf of the plaintiffs with respect to the forthcoming completion (which was then still set for October 18), and enclosing the transfer document, vendor’s statement of adjustments, and the required tax declarations.

[92] The closing date was extended by agreement to October 25, and then to November 1.

[93] Mr. Dhatt testified that after the second extension was granted, which was at the end of October, he became aware that the deposits were not in the defendant’s trust account.

[94] On October 28 he phoned the defendant, who requested that he communicate with him by email. Mr. Dhatt then sent him an email asking him to confirm that the deposits were still in his account. The defendant responded by asking who the drafts were given to, and after Mr. Dhatt informed him it was Mr. Sandhu, the defendant told him to ask Mr. Sandhu who he gave them to. Mr. Dhatt advised that Mr. Sandhu gave them to Mr. Dhaliwal. The defendant said that he had not received any drafts and directed Mr. Dhatt to speak to them. When Mr. Dhatt reported back that according to Mr. Dhaliwal the money went into the defendant's trust account "so he could pay the previous right to purchase people off", the defendant then asked Mr. Dhatt to send him the contracts. Mr. Dhatt informed him that the contracts had already been sent to him by Mr. Dhatt's real estate brokerage and told him who the buyers' lawyer was.

[95] Mr. Dhatt then forwarded the entire email chain to Mr. Dhindsa, with the request that Mr. Dhindsa "confirm" the situation (with the defendant, I took him to mean).

[96] He said that during one of the extension periods in November the defendant told him that he had the funds in his account (presumably the deposits) to complete the purchase, and that he was waiting for instructions from the seller. The defendant also told him that "there are conversations happening with the lender" who had the mortgages on the property. He passed this information on to the plaintiffs' lawyer.

[97] Mr. Sandhu said that he also did not find out that the deposits had not been kept in the defendant's trust account until the end of October, when Mr. Dhatt informed him. He said that he had a conversation with Mr. Dhaliwal once he found that it had occurred, but could not remember what Mr. Dhaliwal had said. He was "99 per cent sure" that his manager Mr. Newberry was aware of the situation as well.

[98] Mr. Mattu said that he had not asked Mr. Dhindsa to find out why the defendant had released the deposits, and could not remember why he had not done so. He said he was unaware of Mr. Dhindsa's email to the defendant asking whether the deposits had been returned or the seller was in breach of the contract. While the

successive closing dates were being negotiated, Mr. Dhindsa also did not advise him that the term requiring the seller to "return" the deposits, which implicitly permitted him to use them before then, could be a problem.

[99] On October 28 and 29 Mr. Dhindsa had an email exchange with the defendant. It began with his inquiry on October 28 about whether the defendant had "the deposit funds in trust". When he did not receive an immediate response, he followed up the next day by advising that the plaintiffs were "quite anxious" and that in the absence of further information he would have to proceed with registration of their options to purchase. The defendant replied suggesting that he do so. Mr. Dhindsa then reiterated:

> Ok but that does not answer our client's query, namely that did your client return funds to you on October 18/19 as per the contract or is he in breach?
>
> [Emphasis added]

[100] The defendant replied that Mr. Dhaliwal had not returned the deposits, and had told him that "he was working with the lenders". Mr. Dhindsa asked whether the defendant would be in a position to pay for the registration of the options, as the contracts provided, and whether the closing would occur that coming Friday. The defendant replied that he had received a call that "the realtors are working on something about the new addendum" but that he was "not aware of the terms and conditions yet".

[101] In cross-examination Mr. Dhindsa confirmed that he was prompted to make these inquiries when Mr. Dhatt forwarded an email that he had sent to the defendant earlier on October 28, advising the defendant that he had all three contracts from Mr. Dhatt's office and that they were ready for completion. Mr. Dhindsa had made notes in his file describing a telephone call with Mr. Dhatt on October 28 in which he stated:

> Apparently some confusion as to where the deposits are. He wants me to call the V[endor] lawyer to confirm whether he has in trust or not as original closing date of October 18th passed and the seller was to pay back the deposit funds to V[endor] lawyer trust account.
>
> [Emphasis added.]

[102] He said it would have been his practice to review the contracts in question when making these inquiries with the defendant. He had no specific memory of his conversations with the plaintiffs, but based on his emails to the defendant he agreed that they had asked him to inquire about "whether the funds had been returned", and that this inquiry was consistent of his review of the term of the contract requiring the seller "to return the deposit back to their seller if that contract does not complete on set completion date of October 18th…".

[103] He also agreed that on November 21, "at a point presumably there were some discussions about the deposit", in light of his inquiries with the defendant in October, he had emailed the first two pages of the contract, which contain the terms in issue, to Mr. Dhatt.

[104] Although he described having "a general concern as to what the understanding was and where the funds were", there was no record of his having written to the defendant taking the position that the funds had been wrongfully released, and he had no memory of having done so.

[105] Further extensions of the completion were agreed to - from November 1 to 15 and then from November 15 to 22. At that stage, litigation counsel became involved, and two further extensions - to January 21 and February 4, 2020 - were agreed to by them.

[106] After the November 15 date passed, the plaintiffs prepared and registered the options to purchase on the properties that had been provided for in the counteroffer. They were registered on November 22. Parminder Dhaliwal said that the meeting with Mr. Dhindsa to prepare these options was the first time that she and her husband learned that the deposits were not in the defendant's trust account.

[107] On February 4 the seller's new lawyer advised Mr. Dhindsa that he had been instructed not to proceed any further with the sales. Mr. Dhindsa's legal assistant had sent the "vendor documents" to the new lawyer on January 27. He responded to

the indication that the seller would not be completing the sales with his standard letter advising that the plaintiffs remained ready, willing and able to do so.

[108] On February 11, the plaintiffs' litigation counsel wrote to the seller, advising that the plaintiffs were electing to treat the contracts as being at an end and demanding the return of the deposits, which did not occur.

[109] The seller later applied successfully to have the plaintiffs' options removed.

The Defendant's Version of Events

[110] He had been doing some work for Mr. Dhaliwal and his various companies since 2015. This was mainly dealing with the purchase or sale of individual properties.

[111] In 2019 Mr. Dhaliwal and his business partner told him that they would be selling the 19 lots that they owned in the Fraser Heights development through the defendant company. He acted as the lawyer for the conveyances.

[112] In early 2019, he became aware of the previous attempted sale of the three lots in question. He had not been involved with the original contracts for those transactions. His involvement began when the lawyer for the previous buyers, Stephen Mangat, sent him the options to purchase in favour of those purchasers, which were to be registered on the properties. The defendant did not know why the options were to be registered, and simply asked Mr. Dhaliwal if he wished to sign them. He was aware from the attached contracts that the deposits had been paid directly to the seller, but did not remember when the completion date was and did not know why the sales had not completed. He was also aware that the deposits were in the $400,000 range for each lot, but did not know what portion of them might already have been repaid.

[113] His next involvement with the lots arose on October 2, 2019, when an employee of the defendant company asked him to prepare releases in relation to the claims against them, as well as for another lot that was not part of the transactions in

this case. He asked whether all of the deposits from these option holders had been paid back, and Mr. Dhaliwal's business partner responded that they had.

[114] He became aware that in fact the option holders were going to receive their deposits back in return for the releases when Mr. Mangat informed him that they would not be signing the releases otherwise. He acknowledged that this situation was inconsistent with the information he had previously received from Mr. Dhaliwal's partner that all of the deposits had been repaid.

[115] He then prepared the mutual releases and sent them to Mr. Mangat's assistant on October 3.

[116] When he received Mr. Mangat's reply that the options would not be released until the deposits had been repaid, he passed it on to Mr. Dhaliwal and his partner. He was not involved in any negotiations with the option holders. He also did not prepare the releases of the actual options that were filed in the land registry on October 7. Those were handled by Mr. Mangat's office.

[117] He explained that releasing the options themselves did not invalidate the previous buyers' contracts to purchase the properties, and so there needed to be a release by them of their rights under those contracts.

[118] His next involvement with these lots came on October 10, when Mr. Dhaliwal and his partner came to his office with the drafts from the plaintiffs and contracts purporting to relate to the plaintiffs' purchase of the lots.

[119] These contracts differed from the signed counteroffers that were provided by the plaintiffs and submitted by Mr. Dhatt.

[120] In them, the purchase price for each lot was $580,000 plus GST and the deposit was to be paid directly to the seller within 24 hours of subject removal (rather than within 24 hours of acceptance, as in the original offer).

[121] The additional terms were almost identical to those in the counteroffer, including the reference to the clause being signed under seal and being binding on

both parties outside of their companies. However, the terms that the seller would return the deposit to their lawyer if the sale did not complete, that the sellers would personally guarantee its return, and that any claim against the realtors would be relinquished, were missing.

[122] The other difference was that these contracts provided for a closing date of October 25, whereas in the accepted counteroffers it was October 18.

[123] The defendant was able to retrieve copies of these contracts in relation to two of the lots from his electronic records, but the third one could not be retrieved, as I understood it because of the custodian's control over his records. He clarified in cross-examination that the custodian was in possession of his physical files, but he had been able to access these two contracts because they had been scanned into his computer system, and were therefore available from cloud storage.

[124] He said that other than relating to a different lot, the missing contract was identical to the contracts that were available to him. (He was able to retrieve another contract relating to that lot, which appears to be identical to the accepted counteroffer, but he believed that he had received it at the end of October.)

[125] He acknowledged that there were no initials on behalf of the buyers next to the indication of the purchase price, or in the crossed-out terms on the second page. Similarly, neither party's initials accompanied the terms and conditions on that second page. Only Mr. Dhaliwal's initials were present at these points. He did not discuss the absence of these initials with Mr. Dhaliwal. (Mr. Dhatt testified that he had not prepared these offers. Mr. Sandhu, Mr. Mattu, and Ms. Dhaliwal also said that they had never seen these documents before.)

[126] The defendant testified that he asked Mr. Dhaliwal or his partner why the drafts were made out to his law firm. Whichever one of them he asked explained that "everybody's comfortable" if the deposits went through his trust account, and were paid "only" to the option holders. "They" wanted to ensure that only the option holders were paid with the deposit money.

[127] The defendant then deposited the drafts in his trust account, and one of his assistants prepared cheques from it to the option holders. Mr. Dhaliwal signed an authority for $200,000 to be paid to each of the option holders.

[128] In order to receive their cheque, each option holder had to sign the release of their claim. The defendant said that Mr. Mangat was on vacation by that point, but that "this thing had to move ahead". The option holders told him that they had already received legal advice and wanted their money, so they signed their releases and he provided them with their cheques. This all occurred in his office on October 10.

[129] His evidence of these transactions was supported by copies of the cheques to the option holders, with their signed acknowledgments of having received them, and by entries from his trust ledgers, showing the deposit of the drafts and the payments out of the cheques.

[130] He could not remember whether, when it became apparent that the deposits still had to be repaid to the option holders, he had questioned Mr. Dhaliwal's business partner about his previous claim that the deposits had all been paid back. He said that he "would have" done so. However, he did not believe that based on that revelation, he had any obligation to be "mindful of the plaintiffs' interest" in their deposits if their transaction did not complete.

[131] On October 14, his legal assistant received the letter from Mr. Dhindsa relating to the then-upcoming completion date of October 18.

[132] Of the reciprocal obligations that arose on his part after receiving this correspondence, the one that matters for current purposes was to inquire of the current mortgage holders on the properties the amount required to discharge those obligations. The defendant said that he was aware at that point that there was a dispute between the sellers and those mortgage holders "about how to release the lots". Mr. Dhaliwal told him that he was working with the lenders to accomplish this, but the defendant explained that "without a payout we can't close…".

[133] He acknowledged the discrepancy between the purchase price in the closing documents that Mr. Dhindsa sent him and the one in the contracts that Mr. Dhaliwal had brought him on October 10, but he did not raise it with Mr. Dhaliwal or his partner. He also did not raise the difference in the closing dates between the two sets of documents with Mr. Dhindsa.

[134] He took the position that he had never received the copies of the documents, including the accepted counteroffers, for these three lots, that were sent by the "conveyance" person at Mr. Dhatt's brokerage to Mr. Dhindsa on the morning of October 10, with a copy to one of the defendant's legal assistants. He rejected the further suggestion that the assistant had then brought the documents to him. He did acknowledge that the assistant who had been copied on this email was the one who was working on the transactions for these lots.

[135] He said that the first time he saw copies of the actual email and the documents that had been attached to it was when he met with his counsel, two or three months before trial. He agreed that he had seen the accepted counteroffers at the time of his communication with Mr. Dhatt at the end of October, although the email from Mr. Dhatt that followed their phone call does not appear to have had any attachments, and Mr. Dhatt did not refer to any in it.

[136] Somewhat confusingly, he then said that he did not see the email "at any time", before conceding once again that he had seen it more recently at his lawyer's office.

[137] He also provided an explanation for his email exchange with Mr. Dhatt on October 28-29 about the location of the plaintiffs' deposits. He described this as being a busy time in his office. Although he could not remember it, he accepted based on Mr. Dhatt's first email that they had had a phone conversation just before it. When Mr. Dhatt provided him with copies of the signed counteroffers, it was the first time he had seen them.

[138] He asked, “Whom did you give the drafts”, because he was concerned about the request to confirm that the money he had received was sitting in his trust account. Explaining his response that he “did not get any such drafts” from Mr. Sandhu, he said that because Mr. Dhatt had referred to the drafts being “held in trust”, and Mr. Sandhu was handling six or seven lots from this development, he was not sure which drafts were to have been held in that manner. He agreed however, that the subject line of Mr. Dhatt’s emails described the lots in question. He asked Mr. Dhatt to send him the contracts in question because the ones he had at that point made the deposits payable directly to the seller.

[139] Further, although he initially claimed to have checked his records with respect to these lots in response to Mr. Dhatt’s inquiry, it was pointed out to him that during his examination for discovery he had said that he would not have known which records to check, given that he was dealing with 19 lots on behalf of the seller.

[140] He said that Mr. Sandhu called him sometime during his exchange with Mr. Dhatt to confirm that he had received the “cheques”. He did not agree that Mr. Sandhu had called him on October 10 to follow up on that issue, as Mr. Sandhu testified.

[141] Once Mr. Dhindsa took over this exchange on the plaintiffs’ behalf, the defendant told him to go ahead with the options because Mr. Dhindsa had said that the plaintiffs were “quite anxious”. He informed Mr. Dhindsa that his client had not returned the deposits to his trust account, an obligation that was described in the contracts that he had just received from Mr. Dhatt, and passed on the information that he had received from Mr. Dhaliwal about working with the lenders. He did not remember which realtor called him to advise that they were working on a new addendum to the contracts, which he then informed Mr. Dhindsa of.

[142] When he reviewed the contracts that had been provided by Mr. Dhatt, he was “a little surprised”, but he then concluded that he was “in consistency” (by which I took him to mean that he had acted consistently) with their terms and the ones in the earlier contracts that Mr. Dhaliwal had given him. The standard language that the

deposits were to be held in trust had been crossed out, and "the addition" (relevant to his duties, I took him to mean) in the new contracts was the requirement that the deposit had to be returned to the sellers if the sale did not complete.

[143] When he was cross-examined on the difference between the manner in which the deposit was to be paid between the two sets of contracts, he was not prepared to concede that there was an inconsistency, because he had spoken to his clients about it and had been told about the purpose of making the drafts payable to his firm in trust. He was also adamant that the fact that the contracts he had received from Mr. Dhaliwal made the deposits payable directly to the seller was a complete answer to any concerns that he had no authorization from the buyers to use the deposits to pay out the previous options. As he put it, the deposits were being paid to the seller and the "seller can do anything with it" and that "[i]t says that I have to leave this money to the seller. And I asked the seller."

[144] On November 18, the "Office Admin/Conveyancing" section of Mr. Sandhu's brokerage sent him the counteroffers and related documents, presumably in relation to the latest modified completion date. The defendant said that this was the first time that he had received any contracts in relation to the lots in question from Mr. Sandhu. Around the same time, Mr. Dhindsa sent him the options to purchase in favour of the plaintiffs that the buyer was to execute.

[145] The first time that it was suggested to him that he had improperly released the deposits was in a letter from the plaintiffs' current counsel in February 2020.

[146] As of the time he ceased to be the seller's lawyer, the contracts with the plaintiffs were unable to complete because the sellers could not get a payout from the lenders, by which I took him to mean they could not reach an agreement on how much they needed to be paid in order to release their charges on the lots.

[147] In cross-examination, the defendant emphasized the overall theme that the duties of a lawyer in a conveyance are largely determined by the terms of the contract. He had dealt with "a few" other situations in which deposits had been

placed in his account, and his dealings with the deposits had been governed by the conditions under which the money had been sent.

[148] He maintained that even the process of the brokerage sending the accepted contracts to the conveyancing lawyer depended on the specific contract, and he would not accept that that was the normal way that conveyances occurred.

[149] He also emphasized that there is an essential distinction between money that is simply placed in a trust account and money that is to be held “in trust”.

Release of the Previous Options to Purchase

[150] The plaintiffs called Mr. Mangat, who acted for the holders of the previous options to purchase the lots. However, his evidence makes more sense when it is considered in the context of the defendant’s testimony

[151] By the time he testified, Mr. Mangat was at a different firm, and had not had access to his file with respect to those options. Further factors impacting his memory of the transactions were the passage of time since they were carried out and the facts that the option holders were not repeat clients. As a result, he agreed with the suggestion that he had no recollection of “any of the retainer” that he had with these clients. Despite this, he was able to recognize most of the documents that were put to him.

[152] He was the person who registered the original options. Attached to the options were contracts for the purchase of the lots that required deposits of $400,000 in each case, all to be paid directly to the seller. Two of the contracts had addendums indicating that the deposit had been paid, although in one case there was a provision for a portion of it to be refunded.

[153] He also recognized an email from an assistant at his firm to the defendant on October 3, 2019, bearing the subject line “Mutual Releases for Fraser Heights Properties” and referring to the releases being attached “as instructed”. As described by the defendant, later that day he wrote to the defendant asking him to confirm that

the deposits had been refunded to his clients in full before they signed the releases, and advising that they would not be in a position to release the options or sign the releases until this confirmation had been received.

[154] Finally, he recognized releases corresponding to the options, which were all filed by him on October 7.

[155] He said that it would be “dependent upon the circumstances” whether his practice would have been to release the options before the clients had received the deposits to which the options related.

Mr. Dhaliwal

[156] He was called by the plaintiffs as an adverse party pursuant to Rule 12-5(26) of the *Supreme Court Civil Rules* and accordingly was cross-examined by both the plaintiffs’ and the defendant’s counsel. Despite the perceived benefits to the plaintiffs in calling him, his evidence supported the defence in most respects and, like Mr. Mangat’s, best understood in the context of the defendant’s evidence.

[157] He explained that the corporate defendant was one of several companies that he and his business partner had formed for the purpose of carrying out construction projects in the lower mainland. Their original plan was to build houses on the 19 lots that they had purchased in the Fraser Heights development and sell them themselves, but in 2018 their businesses encountered cash flow problems and it became necessary to sell the lots to builders. They began selling the lots in the summer of 2018.

[158] With respect to the lots in question, he said that the deposits that were received from the original buyers were used to complete the overall purchase of all 19 lots from the developer, which occurred in October 2018.

[159] The original sales of those three lots were not able to complete as scheduled, which was also in October of that year. The second of the two mortgage holders backed away from his original willingness to take a lower amount than what he was

owed by Mr. Dhaliwal and his partner in order to have the sales complete, and would not remove his mortgage from the lots.

[160] Mr. Dhaliwal denied the accusation that his purpose in subsequently dealing with the plaintiffs with respect to those lots was to sell them twice. He pointed out that the options to purchase that he had granted the original buyers were registered on the titles of the properties, so any subsequent prospective buyers would have been aware of the previous sales.

[161] He retained Mr. Sandhu as his realtor because Mr. Sandhu told him that he already had buyers for the lots. They were only listed on MLS because Mr. Sandhu wanted to get credit for selling them with his brokerage. He said that Mr. Sandhu was aware of the previous sales of the three lots and the registered options to purchase, and they had multiple discussions about the need to remove the options.

[162] He emphasized that the lots had only been listed at their original price (which he mistakenly believed was $520,000) in order to obtain direct deposits. That was well below their market value, he said.

[163] With respect to his meeting with Mr. Sandhu and Mr. Sandhu's office manager Mr. Newberry, he originally described their concern as being that if they were going to be "giving direct deposits" or "releas[ing]" the deposits, they wanted options to be placed on title (in favour of the plaintiffs, that is). He added that they were concerned because of rumours about the company that were circulating (about its financial vulnerability, I took him to mean), and as a result about the deal completing.

[164] He rejected the proposition that making the plaintiffs' deposits payable to the defendant's trust was intended as a restriction on his use of them before completion. He said in that case the deposits would never have been paid to the seller's lawyer, a practice that was unheard of in the many real estate transactions that he has participated in during his career. Instead, if that had been the plaintiffs' intention, the

deposits would have been paid into the brokerage account of one of the party's realtors, or into the trust account of the buyer's lawyer.

[165] The reason the payment of the deposits changed from being paid directly to him in the offer to being paid to the defendant in the counteroffer, he explained, was that it was necessary to have the defendant obtain a release from the original purchasers, who were not prepared to wait any longer for the return of their deposits. He pointed out that simply removing the options would not have voided the contract with the original purchasers. Instead, there had to be a release of their claims.

[166] He elaborated that the defendant had to give an undertaking to pay out the existing option holders and have the plaintiffs' options registered. When it was put to him that the previous options were removed on October 7, he said that this was pursuant to the undertaking to pay the deposits back once that had been done. A gap was necessary between the removal of the previous options and the repayment of the deposits so that the plaintiffs' options could be put on. Those previous buyers were getting "a little nervous" he said, and were threatening to put their options back on the next day if they did not receive their deposits on October 10. He agreed that he had received the plaintiffs' deposits "a couple days after" the removal of the previous options.

[167] He could not say how many of the 19 lots had the deposits that were paid directly to the seller. He thought that there were probably some in which they were paid to the buyer's lawyer so that the discharge of any options on those lots could be arranged with the defendant on the seller's behalf.

[168] None of the plaintiffs' deposits were retained by him, he maintained. All of them went directly to the previous buyers, to secure the lease of their options.

[169] He did not remember having picked up the deposits from Mr. Sandhu and then dropping them and the contracts off with the defendant. He later said that he was "fairly certain" that he had not, although he conceded that he could not be completely sure about that in light of the passage of time. His assumption was that

Mr. Sandhu dropped of the deposits. He also believed that the deposits and contracts would have been sent directly to the defendant from the brokerage, as it was the brokerage's responsibility to do so.

[170] He questioned the legitimacy of the contracts that the defendant claimed to have received from him, on the basis that one of the sets of initials that were attached to them on his behalf – on the page dealing with the new terms and conditions – did not resemble the way in which he writes them. In his view, this discrepancy cast doubt on the entire document. He had no explanation for how that set of his initials might have been placed there.

[171] He agreed that the authorities to pay the previous buyers their deposits back were signed by him on October 10, and that he went to the defendant's office to do it. All of the option holders were waiting at the defendant's office on that day. He denied having gone there with his business partner and, once again, having brought the deposits and contracts with him.

[172] He first asserted that the $200,000 that each of the previous buyers received was the remainder of what they were owed, and that they had previously had some portion of their deposits returned to them. He then said that they "obviously" did not get paid in full from the plaintiffs' deposits, and that they were still owed some money.

[173] He "assumed" that when the defendant became his counsel in the spring of 2019, the defendant would have become aware that there were contracts for the sale of lots that had not completed as scheduled, and that the deposits that had been received in relation to them had not been returned. The defendant was also aware, according to him, that the deposits received from the plaintiffs were going to be used to repay the previous purchasers their deposits and remove their options. He said that one of the previous buyers waited in the defendant's office all day until he received his repayment. He added that Mr. Sandhu told the defendant that the plaintiffs' options had to be put on at the same time that their deposits were released.

[174] He agreed with the suggestion that the contracts with the plaintiffs, like the ones with the previous buyers, could not complete because he and his partner did not have sufficient funds to remove the existing mortgages on the lots that were held by their lenders.

[175] In cross-examination by the defendant's counsel, Mr. Dhaliwal readily accepted the propositions that were put to him, which clarified his evidence further. Of the greatest potential relevance, he accepted that:

- In the summer and in September of 2019, he was trying to reach an arrangement to satisfy his lenders and close all of his outstanding deals for the lots. He reached a tentative arrangement that would have allowed him to close on the overall purchase of the lots from the developer, as long as he could get them all sold.

- The buyers of these three lots were unhappy with waiting further, so he put the lots on the market and explained the situation to Mr. Sandhu. In particular he needed to satisfy those previous buyers by using the deposits that would be received from new buyers. Mr. Sandhu knew that they were listing the lots for $100,000 less than market value, in order to obtain the direct to seller deposits that would preserve the overall deal.

- Hence, the plaintiffs' deposits were to go to the defendant in trust in order to pay out the previous buyers on their options, another fact that Mr. Sandhu was "well aware" of. At one point he was asked (by Mr. Sandhu and his manager, I took it) if the deposits could be placed with the brokerage, to which he responded that the whole point of selling the lots was to obtain the necessary deposits to remove the previous option holders. Mr. Sandhu and his manager came back to him with the decision that they were prepared to have the plaintiffs' deposits released to the defendant.

- This led to a discussion with them about adding terms to the agreement that would allow the plaintiffs to obtain options on the lots in exchange for the

deposits being used for discharging the previous options. Mr. Dhaliwal said that was the entire purpose of their meeting.

- The subject removal date was extended from October 7 to October 9 because despite the release of the previous options having been filed on the 7th, they were not showing up on the title as having been released. He spoke to a manager at the Land Title Office, who arranged to have it done immediately.

- The arrangements that he had reached with the previous buyers was that they would remove their options before they received their deposits back, but that they did not have to release their contractual claims until the money had actually been repaid. Their contracts were still enforceable until they provided the releases. They were paid on the 10th and signed the releases then.

- To facilitate this, he instructed the defendant to deposit the plaintiffs' drafts and then draw cheques in the same amounts to repay the option holders.

- At no point did he believe that the defendant was acting for the plaintiffs.

Expert Opinions

[176] The parties each provided an expert report from an experienced real estate lawyer – Tomislaw Dusevic for the plaintiffs and Edward Wilson for the defendant. Both of them have extensive experience with residential conveyances over many years, including with respect to the terms of contracts and purchase and sale and the disposition of deposits. Mr. Dusevic's expertise arises mainly from his practice, while Mr. Wilson has also presented extensively on real estate issues to other lawyers, provided advice to government on various pieces of real estate-related legislation, and taken a lead role in initiatives such as electronic filing and amendments to the standard form contract.

Mr. Dusevic

[177] He expressed the view that the defendant owed a duty of care to the plaintiffs. When the defendant received drafts payable to the law firm in trust, he would have

understood that the money was “impressed with conditions”, the nature of which he was obligated to confirm if he chose to deposit it. In his opinion, a reasonably competent lawyer would make inquiries of their client about the conditions, to ensure that they did not breach them. Then, “[a]ssuming that payment to third parties was not contemplated” by those conditions, before making the payment such a lawyer would inquire of the seller whether they consented to it.

[178] In his opinion, these duties apply equally to the situation described by the defendant, in which the contract of purchase and sale had the section about holding the deposit in trust deleted and made it payable directly to the seller, but the drafts were payable to the law firm in trust.

[179] His cross-examination focused on whether these funds were necessarily impressed with trust conditions.

[180] He proceeded from the premise that this “was not [the defendant]’s money”, and that he must have received it from the seller for a reason, hence his duty to inquire what the specific conditions were. Accentuating these concerns is the fact that deposits are part of the purchase price, which under the standard form contract the defendant would have received as a stakeholder.

[181] He agreed however, that conditions that would govern the use of money paid into trust (different from the standard ones, I took him to mean) can certainly be set out in an agreement.

[182] He conceded that if the agreement provided for the deposits to be paid directly to the seller then, provided that the amount of the deposits is applied to the purchase price at the completion, “a seller can do what he wants” with them in the meantime. In contrast, his opinion is that when the deposits are paid to someone else under the agreement, that person, as a stakeholder, has to hold them until the end.

[183] The facts that he had been asked to assume were that the defendant had only received the two agreements that provided for the deposits to be paid to the

seller. He was “not clear” about whether the defendant also had a third one that said that the deposits should be paid to the law firm in trust. In the latter scenario “even more alarm bells should have gone off” in his view, because then the agreements themselves would be contradicting each other.

[184] He initially agreed that crossing out the section of the standard agreement that dealt with the basis on which the deposit was being held removes “a whole bunch of the conditions that you would talk about” when asserting that the deposits received by the lawyer are impressed with conditions. He then said he was “not sure” about that, and that it was necessary to consider the provisions of the *Real Estate Act* that are referenced in the section, to see if it actually made any difference to the applicability of those conditions. He agreed that he had not addressed the significance of crossing out this section in his report.

[185] He accepted that “in general terms” his opinion is that if the money is paid into a lawyer’s trust account, the lawyer is then “acting as trustee” over it. He later agreed with the less qualified proposition that “a trust is automatically created” when money is paid into a lawyer’s trust account, although he also acknowledged that a trust account is the only means by which a lawyer can receive money that is not intended for themselves.

[186] He clarified that the trust is still between the lawyer and their own client, and that specific duties towards the buyers only arose in this case because the agreements that the defendant had said something different was to be done with the deposits than was indicated on the drafts, which raised the essential question of the basis on which the defendant held them. Crucially in his view, if the agreements and drafts had accorded with each other, no conflict would have arisen, and the defendant could just have done with the deposits whatever the agreements dictated.

[187] He explained that the defendant’s duty of care to the buyers, despite them not being his clients, arose when the defendant saw the contradictions between the payees under agreements and in the drafts. He clarified that, strictly speaking, the duty arises when there is a request by the seller for the money to come out of trust,

which then requires the permission of the buyers, even though that could have placed the defendant in a potential conflict of interest.

[188] With respect to the manner in which these agreements should be interpreted, he agreed that options to purchase are usually used to provide the buyer with security when the deposit is going to be released in some manner. While he considered the proposition to be speculative, he did not necessarily disagree that a reference to returning the funds meant that the seller must have had the deposit. Similarly, while it was "an interpretation" that the seller's assumption of personal liability meant that the money must have been out of trust, he was not convinced that it was the only one.

[189] He could not remember having seen a provision for the parties to obtain legal advice about the "deposit structure" before, but once again he felt it was inviting him to speculate to conclude that it pointed to something unusual happening with the deposit.

Mr. Wilson

[190] His opinion was that no duty of care was owed by the defendant to the plaintiffs. The defendant was not their lawyer and there was no evidence that they believed that he was, there were no communications between him and the plaintiffs before the deposits were placed into his trust account or paid out from it, and they were independently represented by their own realtor in negotiating and drafting the agreements. In addition, they did not deliver the drafts to the defendant on any terms, but rather gave them to the seller [4], and they did not advise the defendant of any such terms as part of that process.

[191] In his view, if a reasonably competent lawyer received the drafts in these circumstances, they would have sought instructions from their client, the seller. Where those instructions were that the deposits were to be used to pay out the

[4] It is not disputed that the drafts were provided to Mr. Dhaliwal by Mr. Sandhu, but I took Mr. Wilson to be drawing a distinction between this indirect means of providing them to the defendant, and the plaintiffs delivering them directly to him, accompanied by explicit conditions.

options to purchase, were equal to the amount required to so, and were needed to complete the contract, then having the drafts made payable to the lawyer facilitated that process, and the instructions would be consistent with the terms of the agreements. In that case, the lawyer would proceed based on them. The lawyer would not have to seek instructions from the buyers.

[192] Mr. Wilson noted that if the drafts had been made payable to the seller, he could have deposited them in his own account and then given them to the lawyer to complete the payout.

[193] Dealing with any obligation on the lawyer to make further inquiries in light of the fact that the drafts were payable to the lawyer's trust account but the agreements provided for the deposits to be paid directly to the seller, his opinion was that if the seller's instructions were consistent with the terms of the agreement in the manner that he had previously described, and the seller instructed the lawyer to pay them out before the completion that was provided for under the agreements, a reasonably competent lawyer could carry out those actions.

[194] In cross-examination, the plaintiffs' sought to undermine the discharge of the previous options to purchase as the reason for the release of the deposits from the trust account, by showing that they were actually discharged on October 7, before the deposits were paid. Mr. Wilson was also shown partially-executed mutual releases dated September 30 between the previous option holders and the seller, affirming that their deposits had been repaid and that no money as owing to them. Addressing the discharges, Mr. Wilson responded that there could have been an agreement with those option holders to pay them for removing their options as soon as the deposits were received.

[195] Like Mr. Dusevic, Mr. Wilson was not clear, based on his assumed facts, whether the defendant had only the two agreements in which the deposits were payable directly to the seller, or also had a third one in which they were payable to his trust account.

[196] Where the deposits were made payable to the seller under the agreements, and those contracts contained obligations to discharge the options, he did not believe that a specific further provision was necessary to allow the deposit to be used for that purpose. He acknowledged that when receiving deposits into their trust fund a lawyer must confirm what the contract says about using the deposits and what their client's instructions are. He also acknowledged that there can be circumstances in which a lawyer who accepts money belonging to a non-client can owe the non-client a duty of care, but he emphasized that the existence of such a duty depends entirely under the circumstances under which the money came into the lawyer's possession.

Positions

Plaintiffs

Breach of Trust and Fiduciary Duty

[197] With respect to these allegations (which can be considered together, since the breach of fiduciary duty would only have arisen in the context of the defendant acting as a trustee) the plaintiffs rely on Mr. Dusevic's opinion that a trust is automatically created whenever money is paid into a lawyer's trust account[5], and that where the conditions under which the lawyer holding the money are not known, the lawyer has a duty to make inquiries to determine them.

[198] The plaintiffs' theory is that Mr. Dhaliwal duped the defendant, by presenting him with fake contracts, in order to free the deposits to discharge the previous options, which was contrary to the actual accepted counteroffers. If I accept the defendant's evidence that he received the contracts from Mr. Dhaliwal, which the plaintiffs say is the only thing that makes sense, his duty to inquire was triggered by the discrepancy between the payment of the deposits directly to the seller's lawyer under those contracts and the payee of the drafts being his trust account. Under this analysis, it is irrelevant that the defendant did not receive the actual counteroffers

[5] In reply the plaintiffs' counsel conceded that this was not an invariable rule, but maintained that a trust had arisen on the current facts.

that the plaintiffs had agreed to – he was still dealing with their money under conditions that needed to be clarified.

[199] While that "red flag" was sufficient in itself to trigger the duty to inquire further, additional factors that called for such inquiries were the absence of:

- authority in the contracts to use the deposits to pay out the previous options;
- the buyers' initials on the changes to the contracts; and
- the standard form confirming that the condition dealing with the removal of the options had been satisfied.

[200] On the last point, the plaintiffs say that the defendant also needed to address the contradiction between the previous information provided to him that the options had all been repaid, and the fact that he was now being directed to use the plaintiffs' deposits to repay them.

[201] Finally, although the argument was not completely developed, I also took the plaintiffs to be submitting that it is implausible that the defendant's assistant would not have brought him the genuine accepted counteroffers that she had been copied with on the morning of October 10. As a result, he should also have taken the contents of those contracts into account when considering Mr. Dhaliwal's payout instructions.

[202] If such inquiries had been made, they would have revealed that the deposits were not to be used to discharge the previous options, which in fact had already been removed on October 7.

[203] In presenting this argument, the plaintiffs seek to distinguish *Green Light Solutions v. Baker*, 2021 BCCA 287, a recent decision in which the deposit of a third-party's funds into a lawyer's trust account, without more, was found to be insufficient to make him a trustee over them.

[204] In that case, the lawyer's client had negotiated a loan agreement with the plaintiff, under the terms of which the plaintiff would pay a $30,000 deposit in trust to the lawyer, which was refundable if the loan was not made. The client informed the lawyer that he would be receiving funds into his trust account. In response to a question from the lawyer, the client advised that there was not any "hold" on them, which the parties agreed on appeal meant that there were "no strings attached". On the client's instructions, the lawyer later paid the deposit to the client. When the loan did not materialize, the plaintiff demanded the repayment of the deposit, and when that was not done it brought an action against both the client and the lawyer.

[205] Because there was no evidence that the lawyer had ever consented to act as a trustee over the deposit, Justice Abrioux reviewed the bases under which the lawyer could nonetheless be found to have occupied such a role. These bases are implied acceptance, when the lawyer deals with trust property for reasons that cannot be clearly linked to another purpose (para. 36); as a trustee *de son tort*(or *de facto* trustee), as a result of having possessed or administered trust property with actual or constructive knowledge of its status (para.38); and knowingly assisting "in a dishonest and fraudulent design" by the trustee (para. 43).

[206] The lawyer's conduct was found not to fall within any of these categories. He had played no role in negotiating the agreement (and was actually unaware of its existence until the plaintiff requested the return of the deposit) and had not had any contact with the plaintiff; he received the deposit without any express notice that they were subject to a trust (and in fact received a response to his inquiry suggesting that there were no limitations on the use to which they could be put); and, other than transferring it out on the client's instructions, he did not administer it in any way.

[207] The plaintiffs submit that in contrast, the current defendant not only had not the drafts payable to him in trust, but contracts showing that the drafts were in relation to their property purchases, and were to constitute their deposits in those purchases.

[208] The current facts, they say, bear more resemblance to those of another frequently-decided decision on this issue: *Royal Bank of Canada v. Fogle*r, (1991) 84 D.L.R. (4th) 724 (Ont. C.A.). In that case, the lawyer was negotiating on behalf of a client to buy out the client's other partners in a business. The lawyer suggested that the client should place $180,000 in the lawyer's trust account, to be applied to the purchase price if the purchase completed. The purpose was "to facilitate the transaction, and as a show of good faith to the potential vendors". The client agreed, and requested an advance in that amount from the loan for the buyout that he had previously arranged with the plaintiff bank. The bank provided the advance. The understanding between the client and the bank was that the advance would be put towards the purchase price if the transaction completed, and would be returned to the bank if it did not.

[209] The trial judge had found that the client had adequately communicated the basis on which he had received the money to the lawyer, and that the lawyer received them subject to the same conditions that had been imposed on the client. At the client's suggestion, he gave the lawyer a written instruction about the planned use of the money, which provided that he was to pay it to the plaintiff bank except as the client otherwise directed. The client's intention was to make the bank "more comfortable". Contrary to these instructions, the lawyer transferred $100,000 of the deposited funds out of his trust account, to cover unpaid legal fees, and paid the rest to the client.

[210] Chief Justice Dubin found that by dealing with the money in this way - contrary to the terms of the trust and knowing of those terms - the lawyer became liable as a trustee *de son tort*.

[211] In the course of his analysis, Dubin C.J.O. made comments that the plaintiffs say resonate with the current facts:

> 38 As has been noted, the moneys came into the hands of the law firm by way of a draft drawn on the bank in favour of the law firm in trust. Putting [the lawyer]'s evidence at its highest, and apart from the finding of the trial judge as to his specific knowledge, [the lawyer] was uncertain as to the exact nature of the trust. That being so, before taking title he was, in my opinion,

> obliged to make inquiries of the bank in order to ascertain the manner in which he could deal with the moneys.
>
> 39 Waters, Law of Trusts in Canada, 2d ed. (Toronto: Carswell, 1984), puts this proposition, at p. 401, as follows:
>
> > It is what he actually knows or ought as an honest, reasonable man to have known. Though he does not have actual or imputed knowledge (and such knowledge would, of course, bind him), an honest, reasonable man would make enquiries if there are suspicious circumstances surrounding property which is proffered to him, whether or not in the course of trade. Before he becomes the title holder, he wants to know that he is entitled both to take title and to deal with the property as he thinks fit. Each of these types of person is liable as a constructive trustee, whether or not he himself benefited by administering property as a trustee de son tort or on joining in a trustee's fraudulent and dishonest design…

[212] Although he ultimately distinguished it on the facts before him, Abrioux J.A. accepted the analysis in *Fogler* in *Green Light*:

> 30 …. As it makes clear, an agreement to pay funds "in trust" to a party's lawyer may, in appropriate circumstances, result in that lawyer becoming trustee to a non-client, even where the non-client is adverse in interest to the lawyer's client. I also accept that in Fogler-like circumstances, the Agreement could have resulted in [the lawyer] becoming [the plaintiff]'s trustee. But reference to a trust in an agreement does not necessarily make the recipient of property a trustee, as I will explain. And the question is whether, in these circumstances, the recipient was a trustee.

[213] The plaintiffs submit that the defendant was subject to just such a duty to inquire in this case.

Negligence

[214] The plaintiffs submit that by accepting the plaintiffs' drafts and placing them into his trust account, the defendant established a sufficient degree of proximity with the plaintiffs to support a duty of care towards them on his part (proximity being an additional required element of a negligence claim that involves pure economic loss, in addition to a duty of care and a breach of the applicable standard of care).

[215] As explained by Mr. Dusevic in his opinion, a reasonably competent lawyer, when faced with the contradiction between the recipient of the deposits in the contracts and the payees of the drafts, would have inquired further to determine the

basis on which they were receiving and holding the deposits, and would not have paid them out until those matters had been clarified. I understood the plaintiffs to be submitting that the other surrounding circumstances – the questions about the validity of the contracts that the defendant was provided with, and the uncertainty about the status of the previous options – would have further triggered a reasonably competent lawyer to make these inquiries. In relation to the latter concern, they submitted that such a lawyer, when presented with seemingly invalid contracts, would need to "get to the bottom of the situation" and establish that the contracts were binding, before proceeding further.

[216] In their canvass of the authorities, the plaintiffs placed particular emphasis on the finding of a duty of care to non-clients in circumstances where the lawyer had performed tasks on behalf of those parties.

[217] In the foundational decision of *Tracy v. Atkins,* (1979) 16 B.C.L.R. 223 (C.A.) the client was the buyer of a property from the plaintiffs. The contract provided for a down payment by the client and then a mortgage being granted to the plaintiffs for the rest of the purchase price. The plaintiffs were elderly and unsophisticated and were not represented by their own lawyer in the transaction.

[218] The client brought a forged letter to the defendant lawyer purporting to have been written by the plaintiffs, instructing the lawyer to register another mortgage from a different lender in priority to the plaintiffs' mortgage. In fact, the only letter that the plaintiffs had written to the lawyer was one giving their agreement to extend the completion date.

[219] The client told the lawyer that the plaintiffs had agreed that the proceeds of this new first mortgage could be paid directly to the client.

[220] After receiving the proceeds of that mortgage, the client left the jurisdiction.

[221] The Court of Appeal upheld the trial judge's finding of liability against the lawyer. Chief Justice Nemetz concluded (at paras.10 -16) that by undertaking to carry out all of the conveyancing, including work that would normally have been

done by a lawyer on behalf of the plaintiffs, the lawyer had “placed himself in the position of dealing with the plaintiffs' interests at a time when he knew or ought to have known that the plaintiffs were or might be relying on him to protect those interests”, which gave rise to a sufficient relationship of proximity between them. Nemetz C.J.B.C .went on to find that having placed himself in that position, the lawyer should have been alerted to the possibility of harm to the plaintiffs arising from various aspects of the transaction, such as the over-mortgaging of the property relative to its value, the disproportionate benefits to the client despite his not having actually paid anything himself, and the limited payment and “dubious security” that the plaintiffs actually received. In particular, “the abnormal instructions that the mortgage moneys [from the new first mortgage] were to be paid to the purchaser (the lawyer's client) should have suggested to the most inexperienced practitioner that something unusual was occurring”. To make matters worse, the client had already tried a similar mortgage priority scheme in a previous transaction, with the defendant lawyer also acting for him at that time, but had been thwarted by the objection of the seller’s lawyer.

[222] As a result of these circumstances, the lawyer had the obligation to “inquire more fully”. Specifically, he should have contacted the plaintiffs after receiving the purported mortgage priority letter from them, to “inquire into the instructions he had received.”

[223] A similar analysis was applied in *Dhillon v. Jaffer*, 2012 BCCA 156. In that case, the plaintiff husband had left the client wife and moved to India. Using a forged power of attorney, the client sold the former family home, which was registered in the plaintiff’s name. The client then decided not to go through with the sale and the buyers sued successfully for specific performance, which resulted in a default judgment against the plaintiff. The lawyer acted for the client in her unsuccessful attempt to vary this default judgment. The judge who refused to vary the judgment made remarks that suggested his intention to preserve the sale proceeds, pending the client bringing a family law action for a reapportionment of them in her favour. The resulting vesting order in favour of the buyers directed that the proceeds, which

it specified were payable to the plaintiff, be paid into the lawyer's trust account. After receiving them, the lawyer released them to the client.

[224] At trial, the judge had found that the lawyer did not owe a duty of care towards the plaintiff and if he did owe such a duty, his actions had not fallen below the applicable standard of care.

[225] The Court of Appeal found that the trial judge had erred by failing to consider whether "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs", as the issue had been expressed in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24

[226] Mr. Justice Donald concluded that such an obligation did exist:

> 34 It would be difficult to find a case with a closer proximity than this. While the [lawyer]'s mandate for [the client] was to undo the deal to sell the house, when he failed in that endeavour, he was left with the responsibility of handling the [plaintiff]'s property. The sale proceeds came into his hands. They derived from the exercise of a Special Power of Attorney which he believed to be genuine. The sale was effected by [the client] on the [plaintiff]'s behalf as sole registered owner. As far as the [lawyer] knew, the [plaintiff] wanted all the proceeds for himself and was not prepared to share them with [the client]; after all, that was her principal motive in trying to collapse the sale. The [lawyer] had to know that paying the proceeds to [the client] was contrary to the appellant's wishes.

[227] Further, while it was not determinative of the standard of care, Donald J.A. found it informative on the proximity analysis that the Law Society's accounting rules defined "client" to include a person "on whose behalf" the lawyer receives funds "in connection with [their] practice" (paras. 35,37).

[228] Donald J.A. also found that the trial judge had set the standard of care "dangerously low", by justifying the lawyer's conduct by reference to the judge's remarks about preserving the funds for the benefit of the client in family proceedings. He pointed out that the situation that faced the lawyer "called for the application of

elementary principles that all lawyers must know, including, "[i]f you are handling another's money, do not give it to your client without the owner's consent" (para.47).

Defendant

Breach of Trust and Fiduciary Duty

[229] The defendant began with a more fundamental question than whether he became a trustee with respect to the deposits - whether any trust was ever created over them in the first place. His position is that of the "three certainties" (intention to create a trust, the subject matter of it, and its objects – see *Brown v. Manuck*, 2015 BCSC 1966, at para. 147) necessary to establish a trust, those relating to the parties' intention to create it and its objects were not present in this case.

[230] This question is to be resolved entirely based on a review of the terms of the contracts because, when a contract is said to give rise to a trust, it is the trust's "fount and origin": Waters, Smith, Gillen, *Waters' Law on Trusts in Canada*, 5th ed. (Thomson Reuters 2021) C.3.1V at 69. The subjective intentions of the parties are not relevant in this analysis. Instead, as explained in *Virk v. Singh*, 2022 BCCA 153:

> 48 A court must undertake an objective inquiry to determine whether there is an intention to form an express trust. This requires examination of certainty of intention in an objective manner, to "construe the agreement against the background facts to determine 'objectively the "aim" of the transaction'"…Intention is inferred by considering what a reasonable person would discern from the words and conduct of the parties, as well as the surrounding circumstances…
>
> [Internal citations omitted.]

[231] Further, the relevant time frame for determining intention is the time of the transaction. If it is necessary to consider post-transaction conduct, its credibility and admissibility must be carefully assessed: *Virk* at para. 51.

[232] Where the trust is said to have been created by a contract, rules of contractual interpretation also apply, including that when an agreement has been entirely reduced to writing, the contract is the evidence of the parties' intention, not their subjective views. Notably, the contracts here contained a term that they represented the entire agreement between the parties. The surrounding

circumstances can be looked at where an ambiguity in the contractual language needs to be resolved, but those circumstances cannot be allowed to "overwhelm" the actual language of the agreement. In addition, unless there has been fraud or misrepresentation, a party who signs a contract is bound by its terms, whether or not they have read it: *1001790 BC Ltd. v. 0996530 BC Ltd*, 2021 BCCA 321 at paras. 36, 41.

[233] The defendant submits that when viewed in that manner, it is clear that there was no intention that the defendant hold the deposits be held in trust or take any steps on the plaintiffs' behalf. The only term that leans in that direction – paying the deposits "in trust" to the defendant's firm – is not sufficient in itself to create those obligations. Use of such terms has been found to fall short of establishing a trust when the terms of the agreement as a whole indicate otherwise: for example, *Angus v. Port Hope (Municipality),* 2017 ONCA 566, leave to appeal refused [2017] S.C.C.A. No 382.

[234] In fact, the crossing out of the term requiring the deposits to actually be held in trust, the language requiring the deposits to be returned if the transactions did not complete, and the assumption of personal responsibility for them by the seller, are completely inconsistent with such an obligation, the defendant submits. The latter two features of the contract would only have been required if the seller was to have access to the funds.

[235] Other elements of the contracts pointing away from the creation of a trust are the terms for the plaintiffs receive options to purchase over the properties, and making the contract subject to them receiving legal advice about the deposit structure itself. These are both terms for the management of risk, the defendant argues, which would not have been required for funds that were held in trust.

[236] In contrast, the plaintiffs' position would require findings that the crossing out of the term requiring the deposits to be held in trust did not limit its application, and that the term requiring the deposits to be returned has no meaning.

[237] The defendant submits that these features of the contracts also make it impossible to determine the objects of the trust, since the crossed-out term also established for whose benefit the deposits were to be held. The requirement that they were ultimately to be applied to the purchase price does not clarify the basis on which they were held in the interim.

[238] If any surrounding circumstances are to be considered, the defendant says that they favour his interpretation. The plaintiffs were not the ones who changed the destination of the deposits in the counteroffers and, to the extent that any of them actually considered the issue, they were originally content to offer to buy the properties on the basis of the deposits going directly to Mr. Dhaliwal. While they may not have been aware of the details of Mr. Dhaliwal's agreement with the previous option holders, they submitted an offer under which he could use the deposits in any manner that he wished. The defendant also questions why Mr. Dhaliwal would have to dupe the defendant with forged contracts to free the deposits, when he could simply have accepted the direct to seller term that was originally offered to him. Adding to this implausibility, the uncontradicted evidence is that the money went directly to the previous option holders, which no one has suggested was not a legitimate purpose in itself.

[239] It is also telling, in the defendant's submission that until the formal letter sent on their behalf by their present litigation counsel in February 2020, there was no suggestion on their behalf that the defendant had improperly released the deposits, despite the ongoing rescheduling of the completion dates and the plaintiffs' awareness since the end of October that the deposits had gone out and had not been returned.

[240] On the seller's side, Mr. Dhaliwal used the term "PLG in trust" to facilitate other sales in which it is clear that he required the use of the deposits.

[241] If he is unsuccessful in establishing that no trust existed, the defendant argues that none of the potential bases on which he could be found to be a trustee have been established.

[242] He only ever dealt with the deposits as the lawyer for the client who had provided them to him, in the context of real estate transactions, and there were no dealings with the deposits by him that were not directly linked to that role, so as to cast him the role of a constructive trustee. Nor can it be said that he administered the alleged trust property for the plaintiffs as its beneficiaries, so as to make him a *de facto* trustee over it. Unlike the *Fogler* decision on which the plaintiffs rely, there was no statement accompanying the payment of the drafts that they were to be held in trust for the plaintiffs as beneficiaries, whether by the seller or anyone else. Instead, the current circumstances are said to be closer to those in *Green Light*, in which the lawyer played no role in creating the agreement under which the funds were paid to him, had no communications with the plaintiff, and simply followed his client's instructions on the disposition of the funds.

Negligence

[243] The defendant submits that a finding that the contracts contemplated the release of the deposits defeats that claim, because his release of them would not have been the cause of the damage to the plaintiffs even if he owed them a duty of care and fell below the applicable standard.

[244] Regardless, he says that neither element of negligence has been proven by the evidence.

[245] At a conceptual level, there are good reasons not to impose liability of this nature on those who act for sellers in real estate transactions (a commercial one in that case), as explained in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.*, (1989) 40 B.C.L.R. (2d) 288 (C.A.):

> 38 It is, in my view, impossible that the vendor in a commercial transaction for the sale of property, such as the present, could owe a duty of care in the tort of negligence to the purchaser of the property, to protect the purchaser's economic interests in carrying their bargain into effect. The duties of each in relation to such a business dealing are to be found in the terms, express and implied, of their contract and, in the absence of a decision of the court, it is for each to decide whether and in what way to discharge those contractual duties or whether to abandon them and make compensation instead.

> 39 Nor can it be said that such parties, in carrying out their dealings, are conferring benefits on each other, for in a commercial context — as between contracting parties necessarily motivated by self-interest — that makes no sense.
>
> 40 This being so, it is, in my view, impossible that persons employed by, or acting for, a vendor in giving effect to such a transaction — they having no reason to believe they are relied on by the purchaser and the purchaser also having no reasonable basis for such reliance — could owe a duty to that party which their principal did not have. Had they such a duty they could not safely care also for the interests of their principal, which is, of course, their real function.

[246] The defendant explains that the imposition of a duty of care towards a third party on lawyers has been restricted to situations in which “something more” is present, such as reasonable reliance by the third party: *Esser v. Luoma*, 2004 BCCA 359 at para. 18. The *Tracy* and *Dhillon* decisions are best understood as falling within this kind of exception. In the former decision the lawyer had undertaken tasks for the self-represented party in the transaction that would normally have been carried out by their own lawyer, and in the latter the lawyer was placed by a court order in the position of safeguarding the opposing party’s interest in the funds he was holding.

[247] Here, the defendant had no contact with the plaintiffs or their agents until after the deposits had been released, and he did not communicate to them or provide any basis on which they could have believed that he was acting in their interests. Imposing a duty of care in such a situation would have the wide-ranging consequences of preventing a lawyer from acting on a client’s instructions that are reasonable on the face of the contract that is presented, and would mean that the mere deposit of funds into a trust account would create a trust obligation to the depositor, despite the absence of any knowledge of the conditions under which they were deposited.

[248] Examples of the rejection of such a proposition are found in *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6 (a lawyer declining to follow the directions of the opposing party, over his own client’s instructions, with respect to the details of the mortgage that the party was contributing to) and *Scott v. Valentine,*

2012 ONSC 6349 (a lawyer allowing a third party's funds to flow through his trust account pursuant to an agreement between the third party and his client, of which the lawyer had no knowledge).

[249] As to Mr. Dusevic's opinion that a duty was created because of the red flags that presented themselves to the defendant, these have been held to be related more closely to whether the standard of care was breached rather than to the existence of a duty: *Esser* at para. 30.

[250] More generally, Mr. Dusevic's evidence is said to fall short of demonstrating any breach of the standard of care. While the defendant concedes that Mr. Dusevic is certainly an experienced real estate lawyer, his experience with deposits being paid directly to sellers (and the arrangements that should flow from that occurring) was limited, despite other witnesses describing it as a familiar practice. The defendant also contends that Mr. Dusevic's views of the operation of the terms of these particular contracts – that the term applying the deposit to the purchase price gives sufficient notice of a trust over them until closing, and that the term about the deposit being held in trust may still apply under the *Real Estate Act* even if it is crossed out – are incorrect, as was his view that the act of depositing funds into a lawyer's trust account in itself creates a trust over them.

Causation

[251] Finally, the defendant submits that even if the other essential elements of negligence have been established here, there has been no proof that the harm suffered by the plaintiffs was caused by it.

[252] The plaintiffs' initial willingness to pay the deposits directly to the seller, and their continued willingness to extend the completion dates, support a finding that they would have proceeded with the purchases even if the defendant had canvassed their willingness to have the deposits released to facilitate the payment of the previous options. Under the counteroffer they were given options to purchase and had the personal liability of the seller to fall back on to safeguard their position, and the defendant submits that it is not realistic to assert that anything meaningful had

changed in their willingness to proceed as a result of the additional terms contained in it.

[253] What is more likely in this case, the defendant submits, is that the plaintiffs have reconstructed their positions at the time of the transaction in an attempt to impose liability on him for the subsequent loss of the deposits, because of the lack of solvent alternative defendants.

[254] There is also said to be no likelihood that matters would have unfolded differently if the defendant had had the actual counteroffers, instead of the ones that Mr. Dhaliwal provided to him. Leaving aside the facts that neither expert gave evidence of a duty on a lawyer in this situation to ensure that the contracts were binding, and that the defendant would have owed such a duty to his own client and not to the plaintiffs, having access to the counteroffer would not, according to Mr. Wilson, have imposed any different obligations on him.

Discussion

[255] First of all, I am satisfied that the objective meaning to be ascribed to the accepted counteroffer, in light of the surrounding circumstances, is that the seller would have the use of the plaintiffs' deposits before completion, and would return them if the deal did not complete. For the purposes of determining whether any trust was created over the deposits by the contracts, I am also satisfied that this is the meaning that the reasonable person would discern from the words used by the parties.

[256] In addition to the obvious point that an obligation to return the deposits would not be required unless they were available for use before that, the elimination of the standard language requiring the deposits to be held in trust, the reference to legal advice specifically relating to the deposit structure, the granting of options at the seller's expense, and the assumption of personal liability by the seller for the deposits also all point strongly towards this meaning.

[257] To the extent that the surrounding circumstances are relevant, the plaintiffs' contemporaneous conduct is also consistent with such an interpretation, including their willingness to make the initial required offer with the deposits paid directly to the seller and with no protection for them through the granting of options, and the absence of any suggestion in communications on their behalf, until litigation counsel became involved, that the defendant had improperly released the deposits pursuant to the counteroffer. Particularly telling in this regard was Mr. Dhindsa's question to the defendant, which could only have been informed by the plaintiffs' understanding, about whether the seller had "returned" the deposits, failing which he would be "in breach", and his file notes to the same effect.

[258] Reading the contracts in this way also makes sense of what would otherwise seem to be contradictory actions by the seller and his realtor presenting a counteroffer that mainly added these protective conditions for the plaintiffs. Although his manner of testifying was unsatisfactory, in that he was disrespectful to, and at times openly mocking of the plaintiffs' counsel, the actual content of Mr. Dhaliwal's evidence – that the structure of paying the deposits to the defendant was needed to facilitate the repayment of the deposits of the previous option holders and the release of the options, was supported by Mr. Mangat's correspondence with the defendant on the option holders' behalf and the documents showing that they were paid out and released their options on October 10. I do not see the option holders' willingness to remove the options on October 7 as undermining the plausibility of this interpretation. As Mr. Mangat explained, his willingness to proceed in that manner would depend on the circumstances, and it was common ground that the option holders' rights under the contracts were not extinguished until they signed the releases.

[259] Further, if Mr. Sandhu's manager actually played a role in the conditions that were added in the counteroffer, I am satisfied that ensuring that the deal completed, as Mr. Sandhu described their motivation in adding the conditions, meant ensuring that the deposits could be used by Mr. Dhaliwal, but safeguarding the plaintiffs with respect to their return. I do not believe Mr. Sandhu's protestations that these terms

were not intended to facilitate the obvious purpose that they indicate. His attempts to support a different purpose did not make sense, and Mr. Dhatt's alternative interpretations of the relevant provisions were similarly implausible.

[260] However, I would not attach any particular weight to Mr. Dhaliwal's requirement that deposits be paid to the defendant's law firm in trust in relation to the sale of other lots during the same period as part of the surrounding circumstances, because he still attempted to get the deposits paid directly to him before his realtor apparently advised a more appropriate way of obtaining the use of them.

[261] Although the plaintiffs' claimed subjective intentions when entering into the contracts could not determine the contractual meaning in any event, I would add that I do not accept the intentions that they now claim to have had. Their lack of memory about crucial aspects of the transaction and their overall vagueness in describing it, and the similar shortcomings of Mr. Mattu's evidence, despite him being the main decision-maker, may mean that they were attempting to evade the level of understanding about the release of the deposits that they actually had at the time. Or, it may mean that they put their faith entirely in Mr. Dhatt, who either did not understand the relevant terms himself and advised them poorly, or did not bother explaining the conditions about the use of the deposit that he had negotiated because he was so confident that the deal would complete. In the former case, I do not believe their evidence (or that of Mr. Dhatt and Mr. Sandhu) that it was never contemplated that the deposits would be released to the sellers before completion. In the latter case, they were unwise enough to sign contracts that permitted that to occur without reading and/or understanding what they were agreeing to, which does not relieve them from their obligations.

[262] Thus, I find that the contracts did not provide the basis of any trust over the deposits that would have required that they be held by the defendant until the completion.

[263] The remaining question under this basis of liability is whether anything in the manner in which the deposits were provided to the defendant led to the formation of

the trust. Here it is necessary to resolve the factual issue of whether the defendant received the actual counteroffers, or the contracts with a higher purchase price and most of the conditions of the counteroffers, which also did not contain the plaintiffs' initial on the changes.

[264] The parties appear to accept that the defendant had the uninitialed versions. The defendant's counsel candidly characterized the origin of these documents as a mystery that cannot be resolved. The plaintiffs' counsel submitted that the actual counteroffers, having been emailed to his assistant that morning, must have been brought to his attention as well, but maintained that Mr. Dhaliwal's presentation of the uninitialed versions to the defendant, in an attempt to dupe him into releasing the deposits, is the only finding that makes sense.

[265] I would not put much weight on Mr. Dhaliwal's denial of having personally provided the contracts to the defendant, or of having generated the uninitialed versions. He ultimately took the position only that he was unlikely to have brought them himself, as opposed to actually remembering that he had not. His concerns about the genuineness of one of the sets of his initials on them were also not resolved in any convincing way. More broadly, during this period he seems to have been engaged in a desperate struggle to keep his company afloat, and may have either mistakenly provided a version of the contracts that only he and his realtor had worked on or, under the pressure of those circumstances, perceived some advantage in giving the defendant such a version. If it was a fraud of some kind, I do not think its purpose was to free the deposits however, since I have already concluded that both the buyers and the seller envisioned them being released under the terms of the counteroffer.

[266] I also do not find it implausible that the actual counteroffers, which related to a closing date that was not immediately looming and were not accompanied by the completion letter that Mr. Dhindsa sent on October 14, were not immediately brought to the defendant's attention by his assistant. There would not have been any

particular urgency in doing so, particularly since the defendant had only been copied on the correspondence at that point.

[267] Another possibility, since the uninitialed versions were only scans of the originals, and the defendant did not have access to his physical file, is that he retrieved the wrong documents - perhaps earlier, partially-completed versions -and mistakenly characterized them as the ones that Mr. Dhaliwal had provided because they were all he could find. This might explain why he could not retrieve a contract in the same terms for the third lot. Unfortunately, because this possibility was not pursued in cross-examination of the defendant, it cannot be given any weight.

[268] Therefore, without being able to resolve the matter with absolute certainty, I accept the parties' position that it is most likely that the defendant was provided with the uninitialed drafts, and will proceed on that basis.

[269] I conclude that bringing the defendant these different versions has no effect on my conclusion that no trust over the deposits was created.

[270] I do not think that this is a comparable situation to the one in *Fogler*, where the lawyer knew of the existence of a trust to the benefit over the money he received from his client. As I have already found, the contracts that the buyers and the seller entered into did not create such a trust over the deposits, so there would be nothing of that nature for the defendant to have been informed of. On their face, these versions permitted the payment of the deposits directly to the seller, so there was nothing in the defendant carrying that into effect that imposed a trust obligation.

[271] With respect to the payees of the drafts being the law firm in trust, merely designating a payment as being in trust does not in itself impose a trust obligation where the terms of the agreement governing it indicate otherwise. I think that Mr. Dusevic's categorical assertion to the contrary on that point must be mistaken (and indeed the plaintiffs' counsel qualified it in their reply submissions), as was his position that the deposits were necessarily "impressed with conditions" that were not reflected in the governing agreements and that required further inquiries.

[272] Here these versions of the contracts made it clear what was to be done with the deposits, and there were no terms in them that suggested that the deposits could not flow through the trust account to the seller. While it is more relevant to the negligence claim, the fact that Mr. Dhaliwal's instructions were consistent with the contracts on their face, as Mr. Wilson pointed out, also weighs against the existence of any trust obligations.

[273] This conclusion that no trust was created makes it unnecessary to consider whether the defendant engaged in some action that made him a form of trustee over the property. Had it been necessary, I would have agreed with the defendant that his role in relation to the deposits was confined to the parameters of a real estate transaction and, as in *Green Light*, that he played no role in creating the contracts under which the deposits were paid, had no direct communications with the plaintiffs, and followed Mr. Dhaliwal's instructions on the disposition of the funds.

[274] Turning to the negligence issue, I am unable to identify anything in the circumstances that the defendant was presented with that provides the "something more" that is needed to establish a relationship of proximity with the plaintiffs. Unlike *Tracy* and *Dhillon*, he did not undertake tasks that would normally have been performed by their lawyer, and was not placed in a situation in which he was required to safeguard their interests. His role was solely to carry out his client's end of the contracts by making the deposits available, a process in which the plaintiffs had their own representation, and I have already found that both the actual counteroffers and the versions that were presented to him contemplated the specific actions with respect to the deposits – releasing them to the seller – that he carried out. In most respects this situation resembles the kinds of transactions in which the Court of Appeal in *Kamahap* said it was "impossible" that a duty on the part of someone acting for the seller to the buyer could arise, since there could have been no reasonable reliance by the buyer.

[275] The discrepancy between the payee of the drafts being the law firm in trust and the contracts making the deposits payable to the seller was the centrepiece of

Mr. Dusevic's opinion that a duty of care arose. Assuming that expert opinion can be received on this issue, I am not persuaded by it.

[276] His opinion that such a duty existed in those circumstances assumes the very relationship of proximity that is in dispute, since the discrepancy could only be meaningful in the context of a relationship with the buyers. As *Esser* made clear, red flags are more relevant to the question of whether the standard of care has been breached, which is only a concern once a duty of care has been established. More importantly, his position that the duty is created purely by the contradiction between the payees of the drafts and the payment of the deposits under the contract is contrary to the requirement of reasonable reliance by the buyer that has been found to be essential to support a duty to a non-client.

[277] Thus, I am not satisfied that a sufficient relationship of proximity existed with the plaintiffs to support a duty of care towards them by the defendant.

[278] Had it been necessary to consider the standard of care, I would have preferred Mr. Wilson's opinion, that the consistency of the seller's instructions with the terms of the contracts meant that a reasonably competent lawyer could have proceeded on the basis of those instructions and paid out the previous options, and that no further duty to inquire, including with the buyers, arose. His view was grounded in what the contracts actually directed about the use of the deposits, viewed in light of such a lawyer's own client's instructions, which resonated with the actual evidence. As he envisioned, the payment to the defendant facilitated the discharge of the options, by permitting the defendant to interact with the option holders' lawyer to obtain releases of their claims, and was consistent with the purposes of adding the option-related conditions to the counteroffers, the bulk of which were contained in the versions that Mr. Dhaliwal provided to the defendant.

[279] Lastly, even if a duty of care, a relationship of proximity and a breach of the standard of care had been proven, I am satisfied that the defendant's actions did not cause the loss claimed. As I have found, the plaintiffs either knowingly agreed to the deposits being paid out, or carelessly signed contracts that bound them to that

agreement. In either case, I conclude that had the inquiries that the plaintiffs argue for been carried out, the deposits would still have been made available to the seller, once again with either their active agreement or careless acquiescence.

Conclusion

[280] For these reasons, the action must be dismissed.

[281] In the absence of further submissions, the defendant would be entitled to his costs of the action at the ordinary scale of difficulty. However, the defendant has indicated an intention to pursue special costs for the period in which the plaintiffs pursued claims in fraud and conspiracy against him, which they abandoned before trial. If that still describes the situation accurately, then the parties may make written submissions on that issue, which should be filed with Supreme Court Scheduling and exchanged according to whatever schedule is agreed between them.

"Schultes J."