

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Malik v. Malik*,  
2025 BCSC 30

Date: 20250109  
Docket: S246311  
Registry: New Westminster

Between:

**Anka Sheraz Malik**

Plaintiff

And

**Nargis Yunis Malik also known as Nargis Younis Malik and James Edward  
Opper**

Defendants

Before: The Honourable Justice Tammen

## Reasons for Judgment

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(August 28, 2024 only)

Place and Date of Trial:

New Westminster, B.C.  
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August 1-2, 6-8, & 27-28, 2024

Place and Date of Judgment:

New Westminster, B.C.  
January 9, 2025

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**Introduction and Overview**

[1] At its core, this case concerns the claim of the plaintiff, Anka Sheraz Malik, to a 20% interest in a property located at 18894 53A Avenue, Surrey, B.C (the “Property”). The Property is currently owned in joint tenancy by the defendants, Nargis Yunis Malik and James Edward Opper. Nargis Malik is Anka Malik’s mother. James Opper is the common law spouse of Nargis Malik. The Property was purchased in June 2021. Since that time, the three parties to this litigation have lived in the Property with the ex-spouse of Nargis Malik, Sheraz Sabri, and Adil Malik, who is the son of Nargis Malik and Sheraz Sabri and brother of Anka Malik.

[2] In the balance of this judgment, I will refer to those with the surname Malik by their first names and intend no disrespect in so doing.

[3] The linchpin to the plaintiff’s claim is an alleged agreement made among the four Malik/Sabri family members at the conclusion of matrimonial litigation between Nargis and Mr. Sabri in 2017/2018. The net proceeds of the former family home were approximately \$546,000. Mr. Sabri agreed to a settlement in which he received \$130,000, and Nargis retained the balance, approximately \$416,000. Anka claims there was an agreement that Nargis would hold \$250,000 in trust for Anka and Adil, which could be used for education, marriage or a down payment on a house.

[4] Thus, when Nargis contributed \$225,000 as a down payment on the Property, Anka claimed it as her own contribution to the purchase. She said the amount was reduced from \$250,000 to account for some funds she had earlier borrowed from her mother, and had not yet repaid. Anka’s position has consistently been that the \$225,000 is money held in trust for the benefit of her and her brother, and that she is consequently entitled to 20% beneficial ownership in the Property. The main relief Anka seeks is a declaration to that effect, as well as an order that she is entitled to 20% of the net proceeds on sale of the Property.

[5] Anka also seeks ancillary relief, including damages for breach of fiduciary duty and breach of contract, and for the tort of detinue based on the defendants’ refusal to either permit her to remove personal belongings from the Property, or

wrongful conversion of her personal property. In her notice of civil claim, Anka sought damages for malicious prosecution, but she abandoned that claim at the conclusion of the trial.

[6] The defendants oppose all the relief sought by Anka, and also seek declaratory relief that Anka is not entitled to any beneficial ownership of the Property. Finally, the defendants counterclaim for damages against Anka, related to her failure to pay rent or otherwise contribute to expenses associated with the Property.

### **Factual Background**

#### **Undisputed Facts**

[7] Although the parties disagree on various facts critical to the legal determination of this dispute, there are many undisputed facts which permit a rough chronology to serve as the backdrop to that determination.

[8] Nargis and Mr. Sabri were married for approximately 25 years, and at the time of the marital breakdown in 2016 had two adult children, Anka and Adil.

[9] In 2016, Nargis left the family home, and commenced living with Mr. Opper, initially as a tenant, and later as a common law partner. The family home was sold in September, 2017. From that time until June, 2021, Anka, Adil and Mr. Sabri lived in various rental accommodations.

[10] Sometime in early 2021, Mr. Opper decided to sell his house, and did so without the assistance of a listing realtor. He ultimately contributed the net sale proceeds, approximately \$775,000, to the purchase of the Property.

[11] Anka worked at a law office, and she assisted Mr. Opper with the sale of his house, including putting him in touch with a notary public, Jay Khera, who prepared the sales contract.

[12] There was conflicting evidence about the formation of a plan to purchase a home in which all family members could reside, but such a plan was certainly

formulated in the spring of 2021. Nargis said it was Anka's idea. Anka said it was Nargis's idea, and that initially it did not even include Mr. Opper. Mr. Opper said he and Nargis were going to purchase a smaller home in the Fraser Valley, closer to his workplace, but ultimately agreed to Anka's plan to purchase a larger home in Surrey, in which both family units could live.

[13] The Property contains a very large three-level home, and includes a separate one-bedroom suite in the basement, which at all material times has been tenanted. There is also a two-bedroom suite in the basement, which is where Anka, Adil and Mr. Sabri were living at the time of trial.

[14] There was widely divergent evidence as to discussions concerning ownership of the Property, which I will address in due course. The evidence is clear that Anka played a very active role in the entire process of searching for a suitable property and enlisting the services of appropriate professionals to assist with purchase and financing.

[15] The original contract of purchase and sale listed Anka, Nargis, and Mr. Opper as purchasers. Anka's name was later removed by way of addendum at the insistence of the lender because Anka had a poor credit rating.

[16] The contract called for a deposit of \$225,000, which Nargis paid by bank draft. That is the money which Anka claims was held by Nargis in trust for her. It is not disputed that Anka contributed no funds directly toward the purchase price of the Property.

[17] The sale closed on June 7, 2021, and the buyers took possession on June 8, 2021. Mr. Opper paid the net sale proceeds of his former home toward the purchase price, and the balance was financed via conventional mortgage. Initially, the monthly mortgage payments were \$3,277.68. Because the interest rate was variable, the monthly payment increased over time, and as of August 2023, it was over \$5,000.00. The original mortgage amount was \$810,000.00.

[18] On June 5, 2021, Anka accompanied Nargis and Mr. Opper to the office of a notary public, Trudy Cheng, and both Nargis and Mr. Opper signed the documents necessary to complete the purchase. Both also signed a document called a “transparency declaration”, to be filed with the Land Owner Transparency Registry (LOTR). That document did not indicate an interest in the Property being held for the benefit of Anka.

[19] Ms. Cheng testified that Anka showed her a document which set out a 40/40/20 equity split among the parties, with Anka owning 20%. Ms. Cheng said all three parties were present at the time and that she did not notarize the document.

[20] On June 6, 2021, a different notary public, Mr. Khera, attended at Mr. Opper’s home and presented Mr. Opper and Nargis with new transparency declarations, and a second document called a “transparency report.” The transparency reports state that each of Nargis and Mr. Opper “is holding 10% in trust” for Anka, and that Anka “has a 10% beneficial interest in this property.”

[21] Both Nargis and Mr. Opper signed those transparency documents, and they became exhibits at trial. There was divergent evidence on the circumstances in which they were signed, and the conversation with Mr. Khera at the time, which I will address in due course. It is not in dispute that Anka was present at Mr. Opper’s house when Mr. Khera met with Nargis and Mr. Opper, but remained in a different room in the house and played no part in the interaction between Mr. Khera and the defendants.

[22] On June 5, 2021, all of Mr. Opper, Nargis, Anka, Adil and Mr. Sabri signed a contract, entitled “Residential Agreement” (the “Agreement”), which was prepared by Anka.

[23] The Agreement identifies Nargis Malik and James Opper as the “Owners” and Anka Malik, Sheraz Sabri and Adil Malik as the “Residents”.

[24] The Agreement is brief (only six paragraphs) and comparatively straightforward. The important terms are these:

- The Residents would move into the house on June 30, 2021.
- Mr. Sabri and Adil would live in the basement suites, and Anka would live in the upper portion of the house, with Nargis and Mr. Opper.
- The mortgage and utility bills would be split “equally amongst the Owners and Residents on the last day of each month.”
- All parties would be jointly responsible for all maintenance of the house.

[25] For approximately three months, the parties lived in the Property relatively uneventfully. The mortgage payment consisted of \$900 rent from the tenant in the one-bedroom suite, \$1,200 from Mr. Opper and Nargis, and \$1,200 from Anka, Adil and Mr. Sabri.

[26] An incident occurred on October 11, 2021, which led to Anka being removed from the Property and charged with assaulting Nargis. Anka was precluded from returning to the Property until November 1, 2021, when her bail terms were amended to permit her to live in the basement suite with her father and brother. That has remained the situation. In February 2022, Crown counsel directed a stay of proceedings of the assault charge. It was Nargis’s initial complaint and statement to police which formed the factual basis for the pleading of malicious prosecution, which, as noted, was not pursued in final submissions by plaintiff’s counsel.

[27] Nonetheless, the net result of the events of October 11, 2021 is that the living arrangements and overall family dynamic changed irrevocably. There can be no doubt that since that date, all the parties to the Agreement have been in fundamental breach of that contract. Anka has not been permitted to reside in the upper level of the household. The “resident” parties have not been contributing to the mortgage or other maintenance expenses, certainly not since January 2022.

[28] Anka has sought the assistance of the courts to retrieve her personal belongings from the upper level of the Property, and according to her, some of them have been misappropriated by either Nargis or Mr. Opper, or both.

[29] In March 2022, the defendants served Anka, Adil and Mr. Sabri with a 10-day notice to end tenancy pursuant to the provisions of the *Residential Tenancy Act*,

S.B.C. 2002, c. 78. All three “resident” parties applied to set aside the notice to end tenancy and a hearing was scheduled for June 27, 2022. At the hearing, based on the positions taken by both sides to the dispute, the arbitrator declined to exercise jurisdiction, primarily because the Agreement was not a tenancy agreement and there was a dispute over beneficial ownership of the Property.

### **Disputed Facts**

[30] There are many issues about which there is conflicting evidence, but which are not relevant to the issues I must decide. For example, I need not decide what precipitated Nargis calling the police on October 11, 2021 and specifically, whether or not Anka assaulted Nargis. Similarly, I need not comment on the other allegations of assault contained within the evidence of Anka and Mr. Opper. Those matters are irrelevant to the legal questions at issue in this trial.

[31] The key evidentiary conflicts which I must resolve relate to discussions among the parties concerning the alleged creation of a trust, ownership of the Property, and the circumstances surrounding any signed documents which shed light on the parties’ intentions.

### **Family Discussions in 2017/2018**

[32] It is not disputed that at the time of the marital breakdown of Nargis and Mr. Sabri the family home was sold and the net sale proceeds, approximately \$540,000, were paid to Nargis. Apparently, the state of title showed that Nargis owned 99% and Mr. Sabri owned 1% of the home. Mr. Sabri commenced a family action and sought division of assets. On March 28, 2018, a consent order was made, which constituted full and final settlement of Mr. Sabri’s claim upon payment to him by Nargis of \$130,000.

[33] The content of the discussions among the four family members which preceded the settlement of Mr. Sabri’s claim is very much in dispute.

[34] Anka testified that the reason Nargis received more money from the sale of the family home than Mr. Sabri was because Nargis said she was holding \$250,000

in trust for Anka and Adil. The money was to be used for education, marriage or a down payment on a house. Anka said there was a conversation in the family home after her father commenced his action, in which Mr. Sabri and Nargis reached agreement on that arrangement. Anka and Adil were also present during the discussion. Thereafter, according to Anka, the matter was discussed multiple times. Her understanding was that \$250,000 of the net proceeds of the family home belonged to herself and Adil; she referred to it as “our money”.

[35] Adil’s evidence was somewhat different. He said there was some discussion that if he and Anka ever bought a house, Nargis would put \$250,000 aside for them for that purpose. He said there were “a few brief discussions” about that topic, which occurred approximately one year after the sale of the family home. Those discussions took place in the rental accommodation in which he, Anka and Mr. Sabri were then living.

[36] Adil said most of the discussions were between Nargis and Anka. The funding was contingent on them moving in together, which he said was not being contemplated at the time, so he viewed it as “just talk.” Anka told Adil the content of her conversations with Nargis multiple times, and Nargis talked about it with Adil “a little bit.”

[37] When asked if the money could be used for any purpose other than the purchase of a house, Adil responded “not to my knowledge.”

[38] Adil said \$250,000 was an amount that he, Anka and Nargis came up with for a potential down payment on a house. Adil did not say that Mr. Sabri was involved in arriving at that amount.

[39] Adil said the \$250,000 could have all been intended just for Anka. Nargis simply said “it’s for the two of you”, meaning Adil and Anka, but gave no specific amounts or percentages for each of them.

[40] Mr. Sabri was the final witness called by the plaintiff who gave evidence on this topic. Unfortunately, Mr. Sabri suffered a serious stroke in early 2024, which left

him in a compromised cognitive condition. He was able to testify, and parts of his evidence were lucid, but other portions were not. He had considerable difficulty communicating his evidence but I am confident that I understood the salient things he wished to convey to the court.

[41] Although he stated different amounts, it is clear that Mr. Sabri recalls some discussion in which Nargis told him that she would set aside either \$225,000 or \$250,000 from the house sale proceeds for the benefit of Anka and Adil. As to the purpose for which the money was to be used, Mr. Sabri said it was for the children's future. Specifically, he said it was to be used for the education of the children and the marriage of Anka. Nargis told him the money was for the children's "education and marriage."

[42] Nargis denied that there was any conversation about an amount of money being held in trust or otherwise set aside for the benefit of Anka and Adil.

[43] Nargis said the proceeds from the sale of the family home went into her bank account. Later, Mr. Sabri commenced family law proceedings, and through his lawyer, asked for \$130,000, and she gave him that amount. She said she was left with only \$225,000. She said she gave Anka and Mr. Sabri other sums of money. One such sum, which Anka agrees she received, was \$22,000 to pay off credit card debt. Nargis could not say what happened to the remaining amount, \$163,000.

[44] Nargis was adamant that the \$225,000 she used for the down payment for the Property was all that she had left over from the sale of the former family home. She was equally adamant that she had no discussion with any of Mr. Sabri, Anka or Adil about holding \$250,000 in trust for the benefit of her children.

#### **Discussions at time of purchase of the Property**

[45] As noted, there was differing evidence concerning the genesis of the idea to purchase a single house for all family members. Anka said Nargis suggested living together to share costs, and also said that she would apply the money she was holding for Anka toward the home purchase.

[46] Both Nargis and Mr. Opper said the idea of buying a large house in which they could all live originated with Anka. Anka persuaded them to pivot from their initial plan to purchase a small one-storey house.

[47] I accept the evidence of the defendants on this issue. Their evidence, particularly Mr. Opper's evidence that his initial plan on selling his house was to downsize and move closer to his place of work, accords with common sense and human experience. Anka also testified that when she initially started assisting Mr. Opper and Nargis in their home search, their plan was to purchase a rancher for approximately \$1.1 million.

[48] I find it is more probable than not that it was Anka's idea to purchase a larger home in Surrey in which the two family units could live together.

[49] The thornier question is what discussions then ensued about contributions to, and ownership of, the Property. On this issue, there were inconsistencies between the evidence of Mr. Opper and Nargis, and within the testimony of each.

[50] Anka's evidence was comparatively straightforward. The initial down-payment, \$225,000, was her money, held by Nargis in trust. Based on that contribution, the parties agreed that she would be a 20% owner, with Mr. Opper and Nargis each owning 40%. For that reason, all three were named as purchasers in the initial contract of purchase and sale. When the bank insisted on Anka's name being removed, she then sought to have her 20% interest memorialized through other means. At the suggestion of her notary public contact, Mr. Khera, she chose the LOTR declarations as the vehicle for documenting her interest in the Property.

[51] Both Nargis and Mr. Opper testified that, at one point, Anka said she would contribute \$50,000 to the purchase of the Property, but she never came up with any money. However, neither of them linked that promised contribution to the fact that Anka was originally named as a purchaser on the contract of purchase and sale.

[52] Both Nargis and Mr. Opper testified that their plan was to sell the Property after approximately three years, when Mr. Opper would be 65 and likely retire. They

both said they discussed that plan with Anka at the time the Property was purchased.

[53] At an examination for discovery on October 6, 2023, when asked if she discussed that timeline for selling the Property with Anka, Nargis responded that Anka “had nothing to do with it.” She then agreed that when Anka moved into the Property, she would not have known that she would need to move out in three years.

[54] When that discovery evidence was put to Nargis at trial, she said her trial evidence was true. She also said that she had difficulty with giving her discovery evidence in Punjabi as opposed to Urdu, her first language.

[55] Nargis testified that the plan was always for her and Mr. Opper to each own 50% of the Property. When asked in examination-in-chief if there were any discussions about who would receive the proceeds when the Property was sold, Nargis said there was a discussion but she did not recall it.

[56] At her continued examination for discovery on November 23, 2023, Nargis testified, in part, as follows:

269 Q Do you remember ever having a conversation with Anka and James where you confirmed that Anka would get 20 percent in total, 10 percent from you and 10 percent from James and not 20 percent each?

A Yes. I remember that, but it also included that she would pay all the bills and all the expenses and will share with us.

270 Q So if Anka had been paying all of the bills and the mortgage and everything as agreed, would you say that she has a 20 percent interest in the property?

A Yes. And James also considered her as his daughter, and he also said that we will give her.

[57] Those two questions and answers were read in by the plaintiff, and thus formed part of her case. Counsel also put those questions and answers to Nargis in cross examination. In her response, Nargis again spoke of the difficulty between Punjabi and Urdu. She also said that they talked about Anka receiving \$20,000, not 20 percent. She said she did not know how \$20,000 turned into 20 percent at the examination for discovery.

[58] Nargis said nothing in examination-in-chief about an agreement to give Anka \$20,000 when the Property was sold. To the contrary, she testified in examination-in-chief that she did not recall the discussion about who would receive the proceeds when the Property was sold.

[59] Mr. Opper, who testified after Nargis, and was present in court throughout her testimony, said there was an agreement to give Anka \$20,000 when the Property was sold. He said there was a discussion about that just before the possession date (June 8, 2021). Mr. Opper testified that \$20,000 was “just a figure” that he and Nargis proposed, and Anka accepted it. The money would be a “future down payment” for Anka to use to purchase a house. Mr. Opper described the money as a gift.

[60] Later in examination-in-chief, Mr. Opper said the reason Anka was listed as a purchaser on the original contract for purchase and sale was because she wanted security for the \$20,000 gift. That contract was signed in late April 2021, more than six weeks prior to the closing date.

### **The LOTR Documents**

[61] The evidence surrounding the creation and signing of the LOTR documents is unsatisfactory in all respects. The testimony of all three parties is sparse and incomplete. The testimony of the notary public, Mr. Khera, who prepared the June 6, 2021 documents is likewise sparse, and likely inaccurate.

[62] Anka testified that, prior to the addendum removing her as a purchaser, the parties' intention was that there would be a 40/40/20 percent ownership among them, with her owning 20 percent of the Property. She said that was based on the \$225,000 deposit she had given, plus the fact that she would be contributing to the mortgage.

[63] Once the addendum was signed, removing her as a purchaser, Anka consulted with Mr. Khera who suggested documenting her 20% ownership through the LOTR documents.

[64] It is unclear why two different sets of LOTR documents were prepared and signed by Nargis and Mr. Opper. After the first set was signed at the meeting with Ms. Cheng on June 5, 2021, another notary public, who did not testify, prepared the second set and provided them to Mr. Khera to bring to the parties.

[65] Anka said that Mr. Khera brought those documents to Mr. Opper's house, where she was present, on June 6, 2021. The defendants signed the LOTR documents after Mr. Khera explained the contents of those documents to them.

[66] Anka did not testify about any conversation among the three parties where agreement was reached concerning her 20% ownership interest. She simply glossed over that important evidence in examination-in-chief.

[67] In cross-examination, it was not put to Anka that the reason she was listed as a purchaser in the original contract of purchase and sale was to protect the \$20,000 she would receive as a gift from Mr. Opper and Nargis upon sale of the Property. That was the reason given by Mr. Opper in his testimony, both in chief and later in cross examination.

[68] Mr. Khera was called by the plaintiff. He said he met with Nargis and Mr. Opper at Mr. Opper's house on June 6, 2021 and explained the LOTR documents to them, but that they did not sign them in his presence. Rather, he left the documents with them.

[69] Mr. Khera was asked about Exhibits 30 and 31, which are documents entitled "Transparency Report", signed by Nargis and Mr. Opper, respectively. These are the documents which declare that the signatory holds a 10% interest in trust for Anka. Mr. Khera said he summarized Ex. 30 for Nargis, in English, and she asked no questions. He then summarized Ex. 31 for Mr. Opper. Mr. Khera said he explained that the documents meant that they were each holding a 10% interest for Anka. He left the unsigned documents with the defendants.

[70] In closing submissions, plaintiff's counsel conceded that Mr. Khera is likely mistaken about leaving unsigned documents with the defendants, and that they

probably signed and returned the documents to him on June 6, 2021. Nonetheless, Anka relies on the balance of Mr. Khera's evidence, in particular his testimony about explaining the documents to the defendants.

[71] Further complicating my assessment of Mr. Khera's evidence is this: he was not cross-examined at all about the testimony which was to come from both defendants that he failed to explain the documents to them, and indeed, said they were unimportant.

[72] Nargis testified that she cannot read English, and thus did not know what she was signing on June 6, 2021. I accept her evidence on this point. I do not accept Nargis's evidence that she was unable to communicate her discovery testimony in Punjabi. Rather, I find that she possesses an adequate ability to communicate orally in that language, although Urdu is her first language. I am also satisfied that Nargis can communicate adequately in spoken English. She and Mr. Opper communicate solely in English. However, there is no evidence that Nargis can read English, and I accept her testimony that she cannot. That finding certainly applies to complex legal documents, such as the LOTR documents.

[73] Although I have accepted that Nargis could not read the documents she signed on June 6, 2021, I do not accept her evidence about the interaction with Mr. Khera at the time. In examination-in-chief, Nargis said Mr. Khera came to the house, said that he was in a rush, and asked them to sign the documents. When they asked what was in the documents, he said "nothing important" and repeated that he was in a hurry.

[74] In cross-examination, Nargis said that Mr. Khera did not leave a copy of the documents with them, nor did they ask for a copy. She then said that she had no questions for Mr. Khera, and she signed without knowing the contents of the documents. A passage from her discovery evidence of November 23, 2023 was then put to her, wherein she stated that "we kept asking" Mr. Khera what was in the papers, and he said "nothing."

[75] When asked which of her answers was true, Nargis said she did not recall anything except that Mr. Khera came to the house, got them to sign the documents, and left.

[76] Mr. Opper's evidence was more problematic still. He said the original agreement was to permit Anka to live in the upstairs of the Property, and be able to pay reasonable rent. The topic of a 40/40/20 ownership split was "never discussed."

[77] In examination-in-chief, regarding June 6, 2021, Mr. Opper said that he met with Mr. Khera "just to sign paperwork." He described a "very short" meeting by the front door of his house. He asked Mr. Khera what the documents were, and Mr. Khera said they were nothing important, something they needed for their files which Ms. Cheng forgot to get them to sign. Mr. Opper believed Mr. Khera and signed the paperwork. Mr. Opper said he did not remember the details of what he signed that day.

[78] Mr. Opper was then shown Ex. 31, which he said he remembered signing with Ms. Cheng, the notary with whom he met on June 5, 2021. Mr. Opper was then shown the signature page. He identified his signature and said he signed on June 6, 2021 with Mr. Khera, not Ms. Cheng.

[79] He then gave a series of somewhat confusing answers about his understanding of "beneficial interest" and "equitable interest" both at the time of signing and at time of trial. He said that Mr. Khera did not explain "beneficial interest" on June 6, 2021.

[80] In cross-examination, Mr. Opper confirmed that it was his signature on Exhibits 29 and 31. He then reiterated that Mr. Khera explained nothing to him and Nargis. He said he understood the concept of "beneficial interest." He then said, referring to Ex. 31, that he also signed one of "these" with Ms. Cheng but that "this has been changed" with respect to holding 10% in trust for Anka. He concluded by stating that he asked Mr. Khera to explain the document but Mr. Khera avoided the question.

[81] Clearly, Mr. Opper was confused about some of the documents he was shown while he was in the witness stand. He was not shown Ex. 57, which is the LOTR document he signed on June 5, 2021. That document is called “Transparency Declaration”, as is Ex. 29. Exhibit 31 is a different document, called “Transparency Report.”

[82] The difference between Exhibits 57 and 29 is the answer to the question: “Is this transferee a reporting body?” Because the answer typed on Ex. 57 was “no”, a Transparency Report is apparently not required, and thus was not signed on June 5, 2021. The Transparency Declaration dated June 6, 2021, Ex. 29, answers that question in the affirmative, and is signed by both Mr. Opper and Nargis, as transferees. Each then signed a Transparency Report showing the 10% beneficial interest being held for Anka.

[83] More troubling is this: Mr. Opper was not asked, in examination-in-chief or cross-examination, if he actually read the document or documents he signed on June 6, 2021. Consequently, there is no evidence as to what was in his mind at the time, or what he thought he was signifying by affixing his signature.

[84] I do not accept the defendants’ evidence that Mr. Khera failed entirely to explain the documents to them, and that he either avoided answering their questions or said the documents were not important. Rather, I accept Mr. Khera’s evidence that he provided some explanation to both defendants. However, Mr. Khera offered little detail about the content of the explanation, and he was clearly mistaken about the fact that the documents were signed in his presence. At the end of the day, all that can be taken from Mr. Khera’s evidence is that he said something about the documents stating that the defendants held 10% of the Property in trust for Anka. His evidence sheds no light on what was actually in the defendants’ minds when they signed the documents.

### **Issues and Discussion**

[85] In brief compass, the issues I must decide are these:

- 1) Is the plaintiff entitled to an undivided 20% interest in the Property?
- 2) If so, what ancillary declarations and orders should be made?
- 3) Is the plaintiff entitled to damages for breach of fiduciary duty?
- 4) Is the plaintiff entitled to damages for breach of contract in relation to the Agreement?
- 5) Is the plaintiff entitled to damages for the tort of detinue in relation to her personal property?
- 6) Are the defendants entitled to damages for unpaid rent and other costs associated with the Property, pursuant to the Agreement?

### **The Plaintiff's Claim to a Beneficial Interest in the Property**

[86] Anka advances two slightly different bases on which she says she is entitled to a declaration that she owns an undivided 20% interest in the Property. Her two arguments are based on trust principles and contract law. Anka's primary position is that an express trust was created in 2017/2018, at the time the family claim was settled. Her alternative position is that there was a verbal agreement among herself, Nargis, Adil and Mr. Sabri that Nargis would keep \$250,000 to be used for the benefit of the children for specific purposes – a binding verbal agreement to create a trust. I will address those two submissions in order.

### **Express Trust**

[87] Anka submits that there was an express trust created in early 2018, which resulted in Nargis holding \$250,000 for the benefit of Anka and Adil. According to Anka, Nargis became trustee of those funds, and agreed that they would be used for one of three purposes: marriage, education or a down payment on a house purchase.

[88] I accept without hesitation that an express trust need not be reduced to writing, and that a verbal express trust is permissible in law. Indeed, the creation of an interest in land pursuant to an express trust is exempt from the general requirement that dispositions of land be evidenced in writing: *Law and Equity Act*, R.S.B.C 1996, c. 253, s. 59(1)(a); *Xu v. Hu*, 2021 BCCA 2 at para. 18. Thus, in

this case, if I am persuaded that an express trust was created, as submitted by Anka, and the trust funds were used for the down payment of the Property, Anka is entitled to a declaration that she holds an equitable interest in the Property.

[89] The three essential characteristics of a trust, colloquially referred to as “the three certainties”, are: 1) certainty of intention; 2) certainty of subject matter; and 3) certainty of objects. An express trust is created when the three certainties have been established and the trust property has been vested in the trustee: *Aura Ventures Corp. v. Vancouver (City)*, 2023 BCCA 209 at para. 45; D. W. M. Waters, M. R. Gillen & L. D. Smith, *Waters’ Law of Trusts in Canada*, 5<sup>th</sup> ed. (Toronto: Thomson Reuters, 2021) at 142.

[90] In the present case, the subject matter of the purported trust is clear - it is the sum of \$250,000, already in Nargis’ possession pursuant to the sale of the former matrimonial home. Likewise, the purported objects are clear – they are Nargis’s two adult children and intended beneficiaries, Anka and Adil.

[91] The real issue here is the certainty of intention. Technical words or expressions are not necessary to create a trust. Intention is what is important; if it can be established that the transferor intended to create a trust, a trust is set up: *Waters’ Law of Trusts in Canada* at 143.

[92] In the absence of a written agreement, the court may infer an intention to create a trust from the surrounding circumstances. As noted by the Court of Appeal 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’”: *Larochelle v. Soucie Estate*, 2019 BCSC 1329 at para. 199; see also *Tozer v. Bank of Nova Scotia*, 2012 NBCA 57 at para. 14; *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2014 BCSC 1444 at para. 94. 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: *Firepower Debt GP Inc. v. TheRedPin, Inc.*, 2019 ONCA 903 at para. 11.

[49] Intention to create a trust may arise from words or acts and need not contain technical language.

[93] Here, I must consider the evidence of the discussions among the family members in 2017/2018 and the surrounding circumstances both then and at the time the Property was purchased, from the perspective of a reasonable observer.

[94] When I consider the totality of the circumstances, I am not persuaded that an express trust was created. The plaintiff has failed to persuade me on a balance of probabilities that a specific obligation was created which required Nargis to hold \$250,000 in trust for Anka and Adil.

[95] I find the evidence of all four family members to be unreliable concerning the discussions at the time the family action brought by Mr. Sabri was settled, and he received \$130,000. All I can safely conclude is that there was some discussion in the period 2017-2019 about the reason Nargis was retaining the majority of the proceeds from the sale of the former family home. It seems likely that such discussion included the notion that Nargis might use some of the funds for the benefit of the adult children at some time in the future, but I am far from persuaded that there was an express agreement, as posited by Anka.

[96] Adil's evidence concerning the circumstances surrounding the alleged trust differed markedly from that of Anka. He said the critical conversation occurred about one year after the sale of the family home, at a rental accommodation. Anka said the conversation occurred in the family home, and therefore I infer it must have occurred, per Anka's recollection, prior to the time Adil says it happened.

[97] The evidence of the three family members called by the plaintiff differed as to the uses to which the money could be put. Adil referred only to the purchase of a house. Mr. Sabri said the money was for marriage or education. Only Anka referred to all three potential uses of the money.

[98] Adil said he and Anka arrived at the amount of \$250,000, and Nargis agreed to this amount. He said nothing about Mr. Sabri's involvement in those discussions.

[99] From the totality of the evidence of Anka and Mr. Sabri, I infer that they were describing an agreement reached expressly within the settlement discussions in respect of the matrimonial litigation between Nargis and Mr. Sabri. Anka claims that Mr. Sabri gave up his claim to equal division of family assets because Nargis agreed to hold some funds for the benefit of the children.

[100] On that score, I note that Mr. Sabri was represented by counsel at the time of the consent order, while Nargis was self-represented. If the intention was to create an obligation on the part of Nargis to hold funds in trust, this obligation could have been easily documented by Mr. Sabri and his counsel. It was not. Rather, the court order states that Mr. Sabri accepted \$130,000 as full and final settlement of his family claim.

[101] The evidence of both Anka and Adil is extremely vague as to subsequent conversations about the alleged trust funds. Importantly, Anka described only one specific conversation, in very general terms, in which, according to her, Nargis acknowledged that the money to be used for a down payment on the Property was trust money for Anka's benefit. According to Anka, that conversation took place at her rental suite when Nargis first proposed the idea of purchasing a home together.

[102] In her subsequent testimony, Anka said nothing else about any conversations concerning ownership of the down payment funds. The only other substantive evidence she gave on this score was that, at some time, Nargis said she was deducting \$25,000 from the trust amount because Anka had not repaid an earlier loan of \$22,000.

[103] Although I am extremely skeptical of much of Nargis's testimony on this critical issue, in particular her inability to account for approximately \$163,000 from the sale of the former family home, I tend to accept her evidence about the amount of the down payment, \$225,000, and the reason for that amount. In essence, Nargis said that was the amount of money she had available at the time to contribute to the house purchase. That evidence accords with common sense and human experience.

[104] The only objective evidence which potentially supports the creation of a trust obligation is the Transparency Report signed by Nargis on June 6, 2021. As noted, I accept Nargis's evidence that she was unable to read the document because she cannot read English. However, I do not accept that Mr. Khera said the document was not important and declined to answer further questions about it. Rather, I accept Mr. Khera's evidence that he explained, at least in general terms, the import of the documents he had brought with him for signature. However, Mr. Khera's evidence was understandably vague about the explanation, and he gave few details. I find that Mr. Khera said the documents stated that each of Nargis and Mr. Opper was holding 10% of the Property for Anka.

[105] That finding does not tip the scales sufficiently for me to find an intention to create an express trust in these circumstances.

[106] Finally, I must consider the admissions made by Nargis at discovery on November 23, 2023. There, Nargis conceded that she recalled a conversation in which she confirmed that Anka would get 20% of the Property, which was contingent on Anka contributing to household expenses. As noted, I do not accept that there is an interpretation issue with that answer. Nor do I accept Nargis's explanation at trial that she was speaking of a gift of \$20,000, as opposed to 20% in her discovery answer. However, my non-acceptance of Nargis's explanation is not positive evidence of the creation of an express trust.

[107] I find it is more probable than not that there was some discussion among Anka, Nargis, and Mr. Opper at the time of the purchase of the Property concerning a potential ownership stake falling to Anka. On the totality of the evidence, I cannot say what that conversation was, nor its potential legal effect. Anka did not testify about any specific conversations in that regard. I do not accept the testimony of Nargis and Mr. Opper that there was only an offer of a gift of \$20,000 on sale of the Property. I suspect there was some conversation about Anka possibly contributing to the down payment and thus having an ownership stake in the Property, but I can make no positive findings of fact on that score.

[108] Circling back to the central question, whether an express trust was created in 2018, my suspicions about conversations in 2021, three years later, do not appreciably affect the answer to that question. I remain unpersuaded that Nargis was required to hold \$250,000 in trust for the benefit of Anka and Adil.

### **Verbal Agreement**

[109] Anka's alternative submission is that there was a verbal agreement among her, Nargis, Adil and Mr. Sabri that Nargis would keep \$250,000 to be used for the benefit of Anka and Adil, for one of the three purposes identified by Anka in her testimony.

[110] The plaintiff refers to this as a "verbal agreement to create a trust."

[111] I accept that it is open to me to find that a binding contract was formed in 2018 among the four family members, and to give effect to the verbal contract by imposing a trust over the Property in favour of Anka. However, as with the express trust claim, this claim fails for want of proof.

[112] Critically, I cannot find that there was a meeting of the minds among the four individuals at the time Mr. Sabri's family claim was settled. I reiterate that it would have been a relatively straightforward matter for Mr. Sabri's lawyer to document the agreement in some fashion. On the plaintiff's theory, the consideration for the benefit to be received by Anka and Adil under the contract was Mr. Sabri's forbearance of his entitlement to equal division of family assets.

[113] I have already pointed out the differences in the testimony of Anka, Adil and Mr. Sabri concerning the critical discussions. I am unable to make specific findings of fact about an actual agreement whereby Nargis was bound to hold funds for the benefit of Anka and Adil.

[114] The contract analysis also breaks down when I consider the circumstances at the time of purchase of the Property. At that juncture, Mr. Opper enters into the contractual matrix. He was under no obligation to hold 10% of the Property for

Anka's benefit, as he was not a party to the earlier discussions. Any such conveyance would clearly be a gift, and thus not enforceable as a contractual obligation.

[115] As noted, I am wholly unsatisfied with the evidence surrounding the creation of the June 6, 2021 LOTR documents, in particular the evidence of Mr. Opper. I cannot conceive of a reason that he would sign a document which clearly states that he is holding 10% in trust for Anka, and that she has a 10% beneficial interest in the Property, unless he intended to convey that ownership stake to Anka. However, he was asked no questions about what was in his mind at the time he signed that document, nor whether he even read it prior to signing.

[116] I repeat, I strongly suspect that there were conversations in the spring of 2021 among Anka, Nargis, and Mr. Opper about some ownership interest falling to Anka, but I heard no reliable testimony about those discussions and therefore can make no findings of fact.

[117] For the foregoing reasons, the plaintiff's claim that she holds a 20% interest in the Property as a trust beneficiary is dismissed. The plaintiff has not persuaded me that she is entitled to the declaratory relief she seeks, nor to 20% of the net sale proceeds of the Property.

### **Breach of Fiduciary Duty**

[118] The plaintiff's claim for damages against Nargis for breach of fiduciary duty was premised on a finding that Nargis was a trustee of the \$250,000. Given my findings on that issue, the claim of breach of fiduciary duty must be dismissed.

### **Damages for Breach of the Residential Agreement**

[119] There is little doubt that since October 11, 2021, all the parties to this litigation have been in breach of the residential Agreement. The defendants have not been permitting Anka to reside in the upper level of the home. Anka has, at least since January 2022, not contributed to the mortgage and other expenses associated with

the Property. I need not decide the issue of Anka's contributions (or lack of same) for the last quarter of 2021.

[120] Anka's position, as set out in her written submissions, is that she is entitled to some amount of damages for the defendants' breach of contract. She then concedes that she should reimburse the defendants for a portion of the mortgage expenses but submits that the evidence of her proportionate share of the other expenses, mainly utilities, is too imprecise to be quantified. Anka thus seeks, in essence, some form of set-off, a reduction in the amount she is required to pay for the mortgage, based on the defendants' obligation to her for damages for their breach of the Agreement.

[121] I will return to this submission when I consider the counterclaim.

#### **Claim in Detinue**

[122] Anka claims that the defendants have either failed to return, or converted to their own use, some of her personal belongings, as well as Mr. Sabri's watch collection. Anka seeks damages for the tort of detinue. In the alternative, if I find that the defendants have converted Anka's personal property to their own use, Anka seeks damages for the tort of wrongful conversion.

[123] These tort claims fail for want of proof. I am unable to make findings of fact as sought by the plaintiff.

[124] Anka's claims relate to three categories of items:

- 1) A 22-carat set of jewelry which Anka gave to Nargis as collateral for a \$12,000 loan in May 2019. Anka said she asked Nargis to return the jewelry but Nargis refused;
- 2) Various personal belongings which were present in the house on October 11, 2021, but have since gone missing. These items include Mr. Sabri's watch collection, Anka's Burberry trench coat, a guitar, and miscellaneous office attire belonging to Anka; and

- 3) A laptop computer and binder with important documents, which Anka said went missing from the basement of the home while she was away on a trip to Los Angeles in October 2022.

[125] On October 7, 2022, Justice Gibb-Carsley made an order requiring the defendants to preserve Anka's personal property located at the Property, and to forthwith return the binder and laptop.

[126] On September 8, 2023, Justice Crossin made an order authorizing Anka to enter the Property for up to nine hours, for the purpose of retrieving all her personal belongings. On September 17, 2023, Anka, accompanied by a member of the Surrey Police Department, removed her personal belongings from the main level of the Property. According to Const. Brar, the endeavour lasted between three to five hours.

[127] Nargis denies ever receiving the jewelry as collateral. She said Anka merely gave her photographs of the jewelry. Nargis denied being in possession of any of Anka's belongings. She said the guitar is in the lower level of the Property. Nargis specifically denied removing the laptop and binder in October 2022.

[128] Mr. Opper likewise denied being in possession of any of Anka's belongings. In response to Anka's evidence that she had seen Mr. Opper wearing one of Mr. Sabri's watches, Mr. Opper flatly denied the suggestion. He said he had not worn a watch in many years.

[129] Adil was present at the Property in October 2022, when Anka was in Los Angeles and Nargis and Mr. Opper entered the basement suite. Adil said neither Nargis nor Mr. Opper removed the laptop and binder. He was certain of that.

[130] Anka submits that her evidence about giving the jewelry to Nargis as collateral is supported by documentary evidence, Ex. 4. That is a document created by Anka and signed only by her. It is not confirmatory of her testimony. I am not persuaded that Anka gave the jewelry to Nargis as collateral.

[131] With respect to the laptop and binder, I accept Adil's evidence that Nargis and Mr. Opper did not remove those items.

[132] As for the remaining personal property, I cannot conclude on a balance of probabilities that those items were removed by Nargis and/or Mr. Opper between October 11, 2021 and September 17, 2023.

[133] Moreover, I point out two other frailties in the plaintiff's position. Firstly, Anka cannot legally make a claim for watches which belong to Mr. Sabri. Secondly, there is no evidence of the value of the other miscellaneous items which Anka says were missing from the upper level of the house when she removed her belongings in September 2023.

[134] The plaintiff's claim for damages based on the torts of detinue and conversion is dismissed.

### **The Counterclaim**

[135] The defendants make a counterclaim. As set out in their written submissions, they seek:

- a. a declaration that the Plaintiff is not a beneficial owner of the Property;
- b. a declaration that the Defendants, or each of them, are not holding the Property, or any portion thereof, in trust for the Plaintiff;
- c. a declaration that the Defendants are the sole legal and beneficial owners of the Property;
- d. damages in the amount of the outstanding Rent Payment from October 2021 to the present;
- e. an order that the Plaintiff must vacate the Property, leaving it in the same condition it was at as of July 2021;
- f. a writ of possession for the Property;
- g. a permanent injunction restraining the plaintiff from returning to the Property after the writ of possession is enforced;
- h. interest pursuant to the *Court Order Interest Act*, and

i. costs.

[136] The declaratory relief is comparatively straightforward. In light of my earlier findings, the defendants are entitled to some declarations concerning ownership of the Property. However, in my view, it is sufficient if I make a basic declaration that the state of title reflects the true ownership of the Property, that the defendants are the sole legal and beneficial owners of the Property. The other declarations sought are superfluous.

[137] I decline to make any orders requiring Anka to immediately vacate the Property or enjoining her from returning. Armed with this judgment, and the declaration I have just made, the defendants can address their concerns about Anka's continued presence through the Residential Tenancy Branch.

[138] That leaves for consideration the issue of damages against Anka for unpaid rent and utilities. That claim is dismissed.

[139] As previously noted, the defendants have been in breach of the Agreement since October 11, 2021, by refusing to permit Anka to reside in the main level of the Property. In my view, the defendants should not be permitted to enforce only those portions of the Agreement which enure to their benefit. Their breach, effectively evicting Anka from the main level of the Property, was fundamental, and disentitles them to the benefits of the remainder of the Agreement.

[140] Moreover, the defendants' interpretation of the Agreement is flawed. Mr. Opper said he viewed Anka's financial contributions as rent, but that is not the characterization set out in the Agreement. There is no fixed amount for rent. In addition, the obligation to contribute half of the mortgage and other maintenance expenses is shared among all those listed as "Residents." That includes Adil and Mr. Sabri. Anka is not solely responsible for 50% of those expenses.

[141] There is no evidence of efforts made by the defendants to collect the expense items from Adil and Mr. Sabri, who remained in the house, presumably pursuant to the terms of the Agreement.

[142] Once the defendants made the choice to evict Anka, it was their burden to negotiate a fresh agreement with Adil and Mr. Sabri regarding continued occupancy of the basement suite. One view of the state of affairs post-November 2021 is that Anka is living in that suite as a houseguest or sub-tenant of Adil and Mr. Sabri. The evidence is that Anka sleeps on the sofa in the games room as opposed to one of the bedrooms. Those bedrooms are occupied by Adil and Mr. Sabri.

[143] It seems to me that if Anka was intent on continuing to live at the Property, she should have been paying some rent, or otherwise contributing to the maintenance and other costs associated with the home. However, I am unable to calculate an amount which would be fair to all parties on the evidence before me.

[144] I reiterate, the defendants now have options pursuant to the *Residential Tenancy Act*, and it is for them to decide how to pursue those options. Their counterclaim, seeking damages pursuant to the Agreement, is dismissed.

### **Conclusion**

[145] In conclusion, I make the following orders:

- 1) The plaintiff's claims for declaratory relief are dismissed;
- 2) The plaintiff's claims for damages against the defendants are dismissed;
- 3) I make a declaration that the state of title certificate accurately reflects the true ownership of the property. The defendants are the sole legal and beneficial owners of the Property, as legally described in the pleadings;
- 4) The defendants' claims for damages against the plaintiff are dismissed.

[146] Given the result, in essence the dismissal of all claims brought by all parties, in my view the parties should bear their own costs. However, if there are circumstances of which I am unaware which might impact the assessment of costs, or if any party otherwise wishes to make submissions on costs, they should advise the Court through Supreme Court Scheduling within 30 days of the date of this judgment, and arrangements can be made to convene a hearing for that purpose.

“Tammen J.”