

CANADA / JUDGMENT

Bailie v. Bailie

2010 BCSC 946

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 946 Bailie v. Bailie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bailie v. Bailie,

2010 BCSC 946

Date: 20100705

Docket: E25960

Registry: New Westminster

Between:

Patricia Josephine Bailie

Plaintiff

And

David Vince Bailie

Thomas Stock and Su-Ying Stock

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff:

Garry K. Thomas

The Defendant, David Vince Bailie:

No Appearance

Counsel for the Defendants, Stock:

Gerald Martin

Place and Date of Trial:

New Westminster, B.C.

September 28-30

& October 1-2, 2009

Place and Date of Judgment:

New Westminster, B.C.

July 05, 2010

INTRODUCTION

- [1] The plaintiff, Patricia Josephine Bailie ("Ms. Bailie"), and the defendant, David Vince Bailie ("Mr. Bailie"), married at Pitt Meadows, British Columbia on December 30, 1995, separated on October 1, 2005 and were divorced by order pronounced by the Honourable Mr. Justice Truscott in this proceeding on May 13, 2008.
- [2] There are two children of the marriage, Lucas Mark Bailie, born November 6, 1996, and John James Bailey, born August 2, 1998.
- [3] On July 11, 2006, the plaintiff applied for and was granted an order of the Provincial Court granting her sole custody and guardianship of the children of the marriage. During the marriage, and since the divorce, the plaintiff has been the primary care giver to the children.
- [4] The defendant, Mr. Bailie, although served substitutionally pursuant to the order of Master Caldwell pronounced February 27, 2007, has not entered an appearance or filed a statement of defence to either the plaintiff's claim or the counterclaim against him or the defendant Su-Ying Stock ("Ms. Stock"). Ms. Stock and her son, Thomas Stock, are also defendants named in this action.
- [5] The principal claim of the plaintiff in this proceeding is that on October 17, 2005, shortly after the parties separated, Mr. Bailie transferred title to the former matrimonial home, located at 1927 Salisbury Avenue in Port Coquitlam, British Columbia (the "Salisbury Avenue property") to the defendants, Thomas Stock and Ms. Stock in an attempt to defeat the plaintiff's claim to her share of the value or an interest in the former matrimonial home. The plaintiff contends that the transfer was a fraudulent conveyance and pleads and relies upon the provisions of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 142 and the Fraudulent Preference Act, R.S.B.C. 1996, c. 143. The plaintiff applies for orders pursuant to s. 66(3) of

the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), and the Fraudulent Conveyance Act requiring the defendants to transfer and convey the former matrimonial home to her.

POSITIONS OF THE PARTIES

The Plaintiff's claim

- [6] The plaintiff seeks a determination that the former matrimonial home is a family asset and submits that there should be a reapportionment of a 100 percent interest in the Salisbury Avenue property to her pursuant to s. 65 of the FRA. Alternatively, if the court determines that the defendants Thomas Stock and Ms. Stock are entitled to any interest in the Salisbury Avenue property, the plaintiff seeks an order for sale of that property, with the plaintiff to have sole conduct of the sale on terms that she pay from the proceeds of sale to the defendants Thomas and Su-Ying Stock, an amount equal to the value of their interest in the property.
- [7] The Salisbury Avenue property was the only asset for which the plaintiff sought a determination, division or reapportionment at the trial of this action.
- [8] Thomas Stock and Ms. Stock were added as defendants in this proceeding by order of Master Taylor, pronounced December 14, 2006.
- [9] Thomas Stock is one of two adult sons of Ms. Stock, and is named as a defendant because he and his mother have been the registered owners of the Salisbury Avenue property since its transfer to them by Mr. Bailie in October 2005. There is no evidence that Thomas Stock participated in the events leading to the transfer of title from Mr. Bailie to the Stocks.
- [10] Ms. Stock is a 62-year-old retired civil servant and accounting clerk who, since her retirement in 2002, has supplemented her pension income by buying and selling real estate.
- [11] Ms. Stock and her husband Siegfried Stock became acquainted with the plaintiff and Mr. Bailie in the fall of 1999. Ms. Stock says that between October 1999, and the separation of Mr. and Ms. Bailie in early October 2005, she advanced funds to Mr. Bailie to pay out the mortgage registered by Canada Trustco Mortgage Company ("Canada Trustco") against title to the Salisbury Avenue property under No. BN192907, to pay property taxes, and to pay for various improvements to the Salisbury Avenue property.
- [12] In addition, Ms. Stock claims that at the request of both Mr. Bailie and the plaintiff, she advanced funds to Abatis Tree Services Ltd., ("Abatis"), a company owned by the plaintiff and Mr. Bailie and incorporated in 1996 for the purpose of carrying on Mr. Bailie's commercial and residential tree trimming and removal business.
- [13] Thomas Stock and Ms. Stock say they were purchasers for value of the Salisbury Avenue property and at all times material acted in good faith.

The Counterclaim of Su-Ying Stock

- [14] On August 20, 2008, Ms. Stock filed a counterclaim against Abatis and Mr. Bailie. Although she has not named the plaintiff as a defendant by counterclaim, the relief sought by Ms. Stock includes a claim against the plaintiff and Mr. Bailie for a declaration that the transfer of the Salisbury Avenue property was made in good faith and for value, and for an order for cancellation of the "certificate of pending litigation" filed by the plaintiff against the Salisbury Avenue property. By her counterclaim, Ms. Stock also claims that the funds she advanced for Abatis were funds advanced to the plaintiff and Mr. Bailie for a family business and that those funds were used for family purposes. Ms. Stock claims priority for those advances over any claim of the plaintiff or Mr. Bailie to their family assets.
- [15] Ms. Stock claims that the balance due and owing on her loan to Abatis as of February 15, 2007, was \$14,497.73, together with interest accruing at the rate of five percent per annum.
- [16] Before Ms. Stock brought her counterclaim in this proceeding, she and her husband, Siegfried Stock, had filed a notice of claim in the Port Coquitlam Registry of the Provincial Court of British Columbia on June 21, 2007, by which they claimed against Mr. and Ms. Bailie, but not Abatis, for \$14,497.73 and interest pursuant to a promissory note dated February 2, 2001 (the "Provincial Court action"). The plaintiff filed a reply denying liability for that claim and asserting that it should be heard in this proceeding. The Provincial Court action has remained in abeyance pending the outcome of this proceeding.
- [17] The plaintiff has filed a statement of defence to counterclaim in which she alleges that Abatis is liable for the repayment of any loans made to it by Ms. Stock. The plaintiff denies that Ms. Stock advanced the amounts claimed. Further, the plaintiff submits that Ms. Stock's claims for any amounts that were advanced to Abatis, or alternatively to Mr. Bailie, and/or Mr. Bailie and the plaintiff, are statute barred under the Limitation Act, R.S.B.C. 1996, c. 266.

LITIGATION HISTORY

- [18] On September 7, 2007, the Honourable Madam Justice Fisher granted a declaration pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 that there was no reasonable prospect of reconciliation between the plaintiff and the defendant. Fisher J. also ordered Mr. Bailie to provide a Form 89 Financial Statement, which the defendant has never produced.
- [19] This action originally came on for trial before Mr. Justice Truscott on May 13, 2008. Mr. Bailie did not attend. The trial was adjourned on the application of the defendants Ms. Stock and Thomas Stock, to permit them more time for preparation, on condition that those defendants were prohibited from transferring the Salisbury Avenue property or otherwise encumbering it until further order of the court.

- [20] Mr. Justice Truscott also found Mr. Bailie to have a Guidelines income of \$50,000 and ordered him to pay to the plaintiff the sum of \$759 per month for the support of the children of the marriage, payable on the first day of each and every month, commencing on October 1, 2005. The remaining claim against Mr. Bailie relating to the alleged fraudulent conveyance of the Salisbury Avenue property was adjourned, and was ultimately heard commencing September 28, 2009.
- [21] Mr. Bailie has paid no child support to the plaintiff. At the time of trial, he had not had any contact with the children of the marriage since the spring of 2009. Mr. Bailie did not participate in the trial of this action.
- [22] The arrears of child support owed by Mr. Bailie to the plaintiff pursuant to the order of Mr. Justice Truscott total \$44,022 (58 months x \$759). In addition, Mr. Bailie has failed to pay the costs previously ordered by Mr. Justice Truscott in the amount of \$2,970.

ISSUES

[23] The following issues arise in this proceeding:

- A. Is evidence of statements allegedly made to Ms. Stock by Mr. Bailie or by his mother Shirley Bacon, (now deceased), concerning the loan transactions or the transfer of the Salisbury Avenue property admissible under either a traditional exception, or on the principled approach to the hearsay rule?
- B. At the time of the transfer from Mr. Bailie to Thomas and Su-Ying Stock, did the plaintiff have a claim to an interest in the Salisbury Avenue property and did Mr. Bailie transfer the property for the purpose of defeating the plaintiff's claim?
- C. Was the defendant Ms. Stock a purchaser in good faith and for value?
- D. If Ms. Stock was not a purchaser in good faith and for value, what is the plaintiff's interest in the Salisbury Avenue property and is the plaintiff entitled to reapportionment of a 100 percent interest in that property?
- E. Is the plaintiff liable in debt to Ms. Stock in the amount of \$14,497.73 together with interest from and after February 15, 2007, at the rate of five percent per annum pursuant to the promissory notes?
- F. In the event that Ms. Stock proves the amount of her debt claim, is her counterclaim statute barred by the Limitation Act?
- [24] In order to determine whether the transfer of the Salisbury Avenue property from Mr. Bailie to the Stocks was made for the purpose of defeating the plaintiff's claim, it will be necessary to make findings of credibility respecting the testimony of both the plaintiff and Ms. Stock.

BACKGROUND

[25] On May 31, 1985, Mr. Bailie purchased the Salisbury Avenue property for \$85,000. He granted a mortgage to Canada Permanent Mortgage Corporation in the amount of \$45,000, which was registered against title to the Salisbury Avenue property under No. Y86205, and was discharged from title on June 28, 1989.

[26] After he purchased the Salisbury Avenue property, Mr. Bailie granted the following mortgages to Canada Trustco, all of which were discharged from title before Ms. Stock advanced any funds to Mr. Bailie.

Mortgage

Registration Date

Amount

Cancellation Date

BE105128

June 18, 1991

\$100,000

August 20, 1999

BH346663

September 23, 1994

\$ 30,000

February 26, 1997

BK394079

December 6, 1996

\$ 50,000

August 20, 1999

[27] On December 30, 1995, the plaintiff, who was then 23 years old, married the defendant, who was then 37 years old. At the time of the marriage, Mr. Bailie was divorced, and had one child by his previous marriage.

[28] Title to the Salisbury Avenue property remained in Mr. Bailie's name until the registration of the transfer to Ms. Stock and Thomas Stock, as joint tenants, on October 17, 2005.

- [29] The plaintiff has a diploma in accounting and business administration from Douglas College. When the parties married, Ms. Bailie was employed as an accounting clerk and cashier at a large hotel. The plaintiff left that position at the time of her first pregnancy in 1996. She remained at home to care for her children until 2000 when she returned to work on a part time basis. Since 2002, the plaintiff has been employed in a full-time position with the City of New of Westminster. In 2009, Ms. Bailie earned a gross annual income of \$44,000.
- [30] Mr. and Ms. Bailie agreed that when Ms. Bailie started working full-time she would pay for the utilities and household accounts, while Mr. Bailie would pay home insurance, property taxes and the mortgage.
- [31] On May 13, 1996, Abatis was incorporated. The plaintiff and Mr. Bailie each subscribed for 50 shares in Abatis. For the duration of the marriage, Mr. Bailie operated his tree trimming and removal business through Abatis. The plaintiff answered the phones, made bank deposits and performed some bookkeeping for Abatis, but beyond this had little involvement in the day to day operation of the company. After Ms. Stock began lending monies to Abatis in the fall of 1999, she took over the financial records of the company.
- [32] The principal assets of Abatis at the times material to this proceeding were a 1988 Ford F450 truck, a 1999 F350 truck, and a Case Bobcat skid steer (the "Bobcat"), used to lift logs and trees, which the company purchased in 2000.
- [33] On July 17, 1999, Mr. Bailie granted a mortgage to Canada Trustco, to secure a loan of \$120,000, payable on demand. Monthly payments were for interest only, at the bank's prime rate. This mortgage was registered against title to the Salisbury Avenue property under No. BN192907 on July 21, 1999 (the "Canada Trustco mortgage").
- [34] In the fall of 1999, Ms. Stock met Mr. Bailie, when she and her husband hired Abatis to cut down a tree on their property. Ms. Stock and her husband were pleased with Mr. Bailie's work and struck up an acquaintance with Mr. and Ms. Bailie. The two couples shared Thanksgiving dinner at the Bailies' home (the Salisbury Avenue property) on October 11, 1999.
- [35] Around this time, the plaintiff prepared income statements for Abatis for the months of July, August and September of 1999, which showed that Abatis was in some financial difficulty. Abatis' operating expenses exceeded its income in July and August of that year. The company earned a net income of only \$4,500 in September, 1999.
- [36] At or about the time of the Thanksgiving dinner, Ms. Stock agreed to advance \$6,500 to assist Mr. Bailie in paying expenses of Abatis. On October 18, 1999, Mr. Bailie signed a promissory note, as president of Abatis, by which he acknowledged that he had borrowed \$6,500 "for a company loan".
- [37] In her direct and cross-examination, the plaintiff testified that she did not recall any discussions with Ms. Stock at the Thanksgiving dinner respecting a loan to Mr. Bailie or Abatis. In cross-examination, Ms. Bailie was not prepared to agree that she had drawn up

the three monthly income statements to assist Mr. Bailie in obtaining a loan from Ms. Stock. The plaintiff, who was at home with the children in the fall of 1999, did agree that at that time Abatis was the main source of income for the family. She acknowledged that it was important that Abatis have sufficient funds to pay its expenses and to carry on its business. The plaintiff drew up the October 18, 1999, promissory note at the request of Ms. Stock, and signed it as a witness. I find that it is consistent with the circumstances as they existed in the fall of 1999 that the plaintiff likely prepared the three monthly income statements to assist Mr. Bailie in demonstrating to Ms. Stock that Abatis was in need of financial assistance.

- [38] Ms. Stock maintains that between October 18, 1999, and February 2, 2001, she advanced the total sum of \$62,750 to pay expenses of Abatis.
- [39] Ms. Stock and her husband had Christmas dinner with the Bailies in 1999. Ms. Stock testified that around this time Mr. Bailie and his mother, Shirley Bacon ("Ms. Bacon"), who then lived with Mr. and Ms. Bailie at the Salisbury Avenue property, began to press her to make a substantial loan to assist Mr. Bailie with his business and other expenses. According to Ms. Stock, over the winter of 1999 - 2000, both Ms. Bacon and Mr. Bailie continued to make overtures to her for a loan to Mr. Bailie in the amount of \$190,000 to \$200,000, to be secured by a mortgage on the Salisbury Avenue property.
- [40] Unfortunately, Ms. Bacon died on February 28, 2001.
- [41] To the extent that Ms. Stock tenders evidence of statements made to her by Ms. Bacon and Mr. Bailie relevant to the transactions in issue in this proceeding for the truth of the contents of those statements, that evidence is hearsay and is presumptively inadmissible. Later in these reasons, I will determine whether certain statements allegedly made by Ms. Bacon before her death, and statements made by Mr. Bailie respecting the loan transactions and the transfer of the Salisbury Avenue property are admissible under the principled exception to the hearsay rule. I will also consider whether statements made by Mr. Bailie to Ms. Stock are admissible under a traditional exception to the hearsay rule as admissions made by a party adverse in interest.
- [42] Ms. Stock also claims that in late 1999 or early 2000, Mr. Bailie showed her a statement from Canada Trustco indicating that Mr. Bailie's mortgage debt was approximately \$152,000. She says that she had discussions with Mr. Bailie about a loan of \$190,000 which would enable him to pay out Canada Trustco and at the same time have some additional funds to pay other debts.
- [43] Ms. Stock gave evidence that between February 2, 2000, and May 31, 2000, she advanced \$189,542.65 to pay the full amount of Mr. Bailie's indebtedness to Canada Trustco, and some additional debt of Mr. Bailie. Ms. Stock was unable to obtain copies of the cheques from the bank, because, by the commencement of this litigation, the bank's records were more than six years old and Canada Trustco, or its successor TD Bank, had purged those records. Ms. Stock produced certified copies of computer entries from TD Bank which she claims correlate to the advances she made. While these records show that cheques were written on

Ms. Stock's account in amounts corresponding to the advances she claims to have made to Mr. Bailie, these records do not identify the payee of each cheque. Ms. Stock has kept no contemporaneous records of the amounts she claims to have advanced to Mr. Bailie, or of any repayments received from him.

- [44] On May 30, 2000, Mr. Bailie granted a mortgage to Ms. Stock for \$190,000, payable on demand, with interest at six percent per annum. The mortgage provided for monthly payments of \$1,000. Ms. Stock registered that mortgage against title to the Salisbury Avenue property on June 2, 2000.
- [45] Ms. Stock registered the discharge of the Canada Trustco mortgage on title to the Salisbury Avenue property on September 15, 2000, under No. BP219887.
- [46] Ms. Stock claims that in addition to the \$190,000 that she says she advanced to Mr. Bailie between February 2, and May 31, 2000, she made the following "equity loans" to Mr. Bailie and that he agreed with her that the amounts of each of these loans should be added to the balance owing on the mortgage.

Date

Amount

Purpose

August 15, 2000

\$5,500

Front yard pavement

May 15, 2001

\$18,000

"Equity loan to Bacon's"

November 15, 2001

\$7,800

Renovation of basement suite

July 15, 2002

\$1,706.91

2002 property tax on Salisbury Avenue property

November 15, 2002

\$3,500

Repairs to main bathroom

July 15, 2003

\$13,000

For property tax and rebuilt truck engine (includes 2003 property tax of \$1,834.64)

July 15, 2005

\$1,981

2005 property tax for Salisbury Avenue property

- [47] Ms. Stock made no written agreement with Mr. Bailie about adding these amounts to the mortgage balance. She says that she discussed these advances with Mr. Bailie, and he agreed to them.
- [48] There are other difficulties respecting the "equity loans". The only receipt that Ms. Stock has produced relating to the August 15, 2000, equity loan for "front yard pavement" is in the amount of \$1,500. She has produced no documents to substantiate the remaining \$4000 she claims she advanced for this equity loan.
- [49] In cross-examination, Ms. Stock explained the \$18,000 "equity loan to Bacon's" by testifying that Mr. Bailie needed money to finish up his mother's affairs following her death. She said that she initially paid Mr. Bailie \$15,000 and then later helped him with his mother's funeral expenses, and that the total amount advanced was \$18,000.
- [50] On March 2, 2001, Ms. Stock did pay \$15,000 to Mr. Bailie's account at the Toronto Dominion Bank/Canada Trust. This is the only payment made by Ms. Stock to Mr. Bailie that is supported by a cheque. I understood Ms. Stock to maintain in cross-examination that this cheque formed part of the \$18,000 "equity loan to Bacon's". She acknowledged that when she prepared her statement of the equity loan, she recorded the date of the advance as May 15, 2001, even though the greater part of this amount was advanced more than two months earlier.
- [51] Ms. Stock has no documentation to support the alleged November 15, 2002, equity loan of \$3,500 for repairs to the main bathroom of the Salisbury Avenue property. She testified that her husband performed the work, that he was never paid for it, and that Mr. Bailie agreed to add this amount to the balance owing under the mortgage.
- [52] After Ms. Bacon died on February 28, 2001, Ms. Stock suggested to the Bailies that they improve the basement suite where Ms. Bacon had lived, and then rent it out to tenants. Ms. Stock claims to have paid for various improvements to the Salisbury Avenue property, but has not produced invoices or receipts that would support her claim for the \$7,800 equity loan for renovations to the basement suite. Although the basement suite was renovated, Ms. Stock has not established the cost of those renovations, or that she advanced \$7,800 to pay for the work. After the basement suite was renovated, it was rented to tenants. Ms. Stock

received the rent cheques, and initially applied them to her mortgage.

- [53] Ms. Bailie knew that the rent cheques went to Ms. Stock to pay loans that her husband owed to Ms. Stock. However, Ms. Bailie had no clear understanding of the total amounts advanced by Ms. Stock to Mr. Bailie, or of the particular debts to which Ms. Stock applied the rent cheques from time to time.
- [54] In July 2002, Ms. Stock loaned \$12,928.77 to the plaintiff to pay out her car loan. The plaintiff repaid Ms. Stock for the car loan. Later, the plaintiff also repaid Ms. Stock an additional \$1,000 which Ms. Stock had advanced to her in February 2003, so that she could keep a minimum balance in her bank account and thus avoid service charges.
- [55] On November 20, 2003, Ms. Stock paid \$2,000 to the former spouse of Mr. Bailie to avoid the registration of a child support order against the Salisbury Avenue property.
- [56] Ms. Stock also paid the 2002, 2003 and 2005 property taxes for the Salisbury Avenue property, which, as we have seen, she added to the mortgage debt as "equity loans".
- [57] Although Ms. Stock has not proved that she advanced \$7,800 for the basement suite renovations, she has produced documents that show that she paid \$1,500.24 for the front yard paving, \$1,045.34 for appliances and \$208.36 for tiles supplied to the Salisbury Avenue property.
- [58] On October 24, 2003, Abatis was struck from the Companies Registry. Ms. Stock paid to have the company restored, and then paid the insurance on the F350 truck owned by Abatis.
- [59] By the time this proceeding came on for trial, Abatis had once again been struck from the Companies Registry, and dissolved.
- [60] On April 6, 2004, Ms. Stock paid \$3,947.52 for repairs to the F450 Truck, formerly owned by Abatis, but by that time registered in Mr. Bailie's name. This debt of Mr. Bailie is not included in Ms. Stock's counterclaim.
- [61] During the summer and fall of 2004, Ms. Stock says that she and Mr. Bailie began to discuss the transfer of the Salisbury Avenue property to Ms. Stock because the amount owing on her mortgage continued to accumulate. From the time the mortgage was registered, Mr. Bailie had made monthly payments of only \$750, rather than \$1000 as required by the terms of the mortgage. Beginning in February, 2004, Ms. Stock applied the monthly rent of \$550 from the basement suite not to the mortgage, as she had formerly done, but to the Abatis loans. By this time she had also added the "equity loans" to the amount owing under her mortgage.
- [62] On March 15, 2005, Mr. Bailie and Ms. Stock signed a written agreement for the purchase and sale of the Salisbury Avenue property for \$275,000. At the time they made the agreement, the completion date was August 31, 2005. According to Ms. Stock, because Mr. Bailie was going to be out of town on August 31, they changed the completion date to December 31, 2005.

- [63] On September 30, 2005, the plaintiff and Mr. Bailie had a bitter quarrel which resulted in the plaintiff leaving the house. When she returned on the morning of October 1, 2005, the plaintiff found that Mr. Bailie had locked her out of the house.
- [64] Ms. Bailie and the children moved in with her mother, and later found rental accommodation.
- [65] On October 1, 2005, the plaintiff informed Ms. Stock that Mr. Bailie had locked her out, and that she and her husband had separated. Upon receiving that information, Ms. Stock was concerned that she might become involved in "a messy lawsuit" over the Salisbury Avenue property. She contacted Mr. Bailie to advance the date for transfer of the Salisbury Avenue property from December 31, 2005 to October 15, 2005.
- [66] According to Ms. Stock, on October 15, 2005, the balance of principal and interest owing on her mortgage, inclusive of the equity loans, was \$256,222.51.
- [67] On October 14, 2005, Ms. Stock had a discharge of her mortgage prepared, together with a transfer of title to the Salisbury Avenue property from Mr. Bailie to Thomas Stock and herself. That day, Ms. Stock and Mr. Bailie attended before the same solicitor to execute the discharge of mortgage and the transfer. Ms. Stock then registered the discharge and transfer on October 17, 2005.
- [68] The fair market value of the Salisbury Avenue property at the time of transfer was \$345,000. I accept the evidence of the plaintiff's appraisal expert, Mr. Daniel Jones, that most of the value of the Salisbury Avenue property was and is in the land, rather than the house. Mr. Jones, whose evidence on this point was not seriously challenged on cross-examination, based his valuation of the Salisbury Avenue property as of October 1, 2005, on its potential for redevelopment. In June 2005, the City of Port Coquitlam designated an area that includes the Salisbury Avenue property under its Official Community Plan for small lot residential use. As Mr. Jones explained, the highest and best use of the Salisbury Avenue property was as development land that would generate some rental income until such time as it could be redeveloped as two small lots. The plaintiff also filed a second appraisal report from Mr. Jones which establishes that as of April 30, 2008, the time this action was originally scheduled for trial, the fair market value of the Salisbury Avenue property was \$480,000.
- [69] Ms. Stock and Thomas Stock have had the use of the Salisbury Avenue property since October 17, 2005. There is no evidence of what revenue, if any, they may have earned from the property since the transfer.

DISCUSSION AND ANALYSIS

Ms. Stock's testimony concerning out-of court statements of Ms. Bacon and Mr. Bailie

- [70] Ms. Stock gave evidence that Ms. Bacon pressed her over the winter of 1999 - 2000 to provide a loan of up to \$200,000 to Mr. Bailie to assist him in paying business expenses and other debts. Ms. Stock also testified that Ms. Bacon told her that the balance outstanding on the Canada Trustco mortgage registered against title to the Salisbury Avenue property was \$152,000. Counsel for the plaintiff objected to this evidence on the ground that it was inadmissible hearsay. Counsel for Ms. Stock submitted that this evidence was admissible under the principled exception to the hearsay rule.
- [71] It is necessary to consider the purpose for which Ms. Stock tendered the out-of-court statements of Ms. Bacon. Evidence of what Ms. Bacon said to Ms. Stock is only hearsay when it is tendered to prove the truth of its contents: *R. v. Khelawon*, [2006] 2 S.C.R. 787, at para. 36. Ms. Stock's evidence that Ms. Bacon encouraged or pressed her to loan money to Mr. Bailie is admissible to explain why Ms. Stock agreed to loan money to Mr. Bailie. That evidence is tendered not to prove the truth of statements made by Ms. Bacon, but rather to provide the background to the loans.
- [72] However, Ms. Stock's evidence that Shirley Bacon told her that her son owed \$152,000 on the Canada Trustco mortgage was tendered for its truth, and is presumptively inadmissible as hearsay.
- [73] The test for admissibility of hearsay evidence under the principled approach is set out in *Khelawon*, at para. 2:

When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or as circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold for liability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

- [74] The onus is on the party tendering the hearsay evidence to establish necessity and reliability on a balance of probabilities: *Khelawon* at para. 47.
- [75] The test of necessity is met in this case because Ms. Bacon passed away in 2001.
- [76] With respect to reliability, there is no evidence to negate the possibility that the declarant, Ms. Bacon, was mistaken about the amount owing on the Canada Trustco mortgage. There is no evidence that Mrs. Bacon had sufficient knowledge of her son's financial affairs to render her statement regarding the amount owed by Mr. Bailie to Canada Trustco reliable enough to meet the threshold for admissibility.

- [77] None of the circumstantial guarantees of trustworthiness discussed by the Court in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 795-796 are applicable to the statement of the deceased declarant. Ms. Bacon did not make the statement under oath. There is no contemporaneous note or record of her statement, and there was no opportunity for cross-examination of the declarant.
- [78] Counsel for the plaintiff submits that Ms. Stock, the recipient of Ms. Bacon's statement, as a party with a significant interest in this litigation, had a motive to fabricate this evidence. Ms. Stock was cross-examined at some length. In any event, her motive to fabricate is a matter that would go to an assessment of the ultimate reliability of this evidence, rather than threshold reliability.
- [79] Ms. Stock's hearsay testimony about the amount owed on the Canada Trustco mortgage is also contradicted by the evidence that the Canada Trustco mortgage registered against title to the Salisbury Avenue property at the material time was a demand mortgage for \$120,000. The monthly payments under the Canada Trustco mortgage were for interest only. There is no evidence that Mr. Bailie was in arrears. The balance owing could not have been more than the full principal amount of \$120,000.
- [80] Weighing all of these factors, I find that Ms. Stock has failed to establish on a balance of probabilities that the statement purportedly made to her by Ms. Bacon respecting the Canada Trustco mortgage balance is sufficiently reliable to be admissible. I therefore disregard that evidence.
- [81] Ms. Stock also sought to adduce hearsay evidence of statements made by Mr. Bailie to her that he owed \$152,000 on the Canada Trustco mortgage at the time she advanced funds to pay out that mortgage; that Mr. Bailie agreed to add all of the equity loans to the mortgage debt; and that Mr. Bailie agreed with her calculations of both the mortgage balance and the amounts owing on the Abatis loans.
- [82] Counsel for Ms. Stock submitted that these statements of Mr. Bailie are admissible, either as admissions against interest, or under the principled approach to the hearsay rule.
- [83] I find that these out-of-court statements attributed to Mr. Bailie are not admissible as admissions by a party adverse in interest to Ms. Stock. In *Sopinka, Lederman and Bryant, The Law of Evidence in Canada*, 3rd ed. (LexisNexis Canada Inc., 2009) at p. 367, para. 6.417, the learned authors state:

An admission may consist of an oral or written statement or conduct made directly by or on behalf of a party litigant and tendered as evidence at trial by the opposing parties.

- [84] Admissions are only binding as against the party who made them: *Chote v. Rowan* [1943] O.W.N. 646 (C.A.).

- [85] At first glance, Ms. Stock and Mr. Bailie would appear to be parties adverse in interest. Ms. Stock has counterclaimed against Mr. Bailie in this proceeding. However, her conduct demonstrates that she and Mr. Bailie are not truly adverse in interest. After the plaintiff commenced these proceedings, Ms. Stock met with Mr. Bailie for the purpose of obtaining his agreement respecting both the amounts advanced under her mortgage, and amount of her counterclaim for the Abatis loans. She did so, as she put it, so that she and Mr. Bailie could present a "united front" to the plaintiff in this litigation. Ms. Stock admitted that she has remained in communication with Mr. Bailie from the time of the transfer of the Salisbury Avenue property to the time of trial, and that had she chosen to do so, she could have subpoenaed Mr. Bailie to give evidence in this proceeding. She also testified that at the time of trial Mr. Bailie's Corvette motor vehicle and the F450 truck were both parked in her driveway. She had taken no steps to seize them to recover the amounts she claims that Mr. Bailie owes to her. In short, Ms. Stock has conducted herself as if her interests and those of Mr. Bailie are aligned. In these circumstances, I find that the out-of-court statements made by Mr. Bailie to Ms. Stock are not admissible as admissions by a party adverse in interest.
- [86] These statements also do not meet the test of admissibility under the principled exception. Ms. Stock has failed to meet the threshold of necessity. Ms. Stock made a choice not to call Mr. Bailie as a witness. There is no evidence that he was unavailable to testify by reason of illness, or otherwise. Mr. Bailie had material and relevant evidence to give respecting the agreements he made with Ms. Stock, the amounts he borrowed and repaid, and the transfer of title to the Salisbury Avenue property. Although Ms. Stock's case depends to a significant extent on the truth of statements allegedly made by Mr. Bailie, she chose not to call him to testify. Because the threshold of necessity has not been met, the hearsay evidence of Mr. Bailie is not admissible under the principled approach to the hearsay rule.
- [87] I would add this comment with respect to reliability of Ms. Stock's evidence of the out-of-court statements of Mr. Bailie. Both the declarant and the recipient have a direct interest in the outcome of this case. The plaintiff had no opportunity to cross-examine Mr. Bailie at trial. Counsel for Ms. Bailie attempted to examine Mr. Bailie for discovery. However, Mr. Bailie walked out of the discovery shortly after it commenced. The absence of any opportunity for the plaintiff to test Mr. Bailie's statements by cross-examination means that this evidence also fails to meet the threshold for reliability. Ms. Stock's hearsay testimony regarding statements made to her by Mr. Bailie concerning the Canada Trustco mortgage balance, and purportedly confirming the amounts advanced by Ms. Stock to Mr. Bailie or Abatis is therefore inadmissible.

Payout and discharge of the Canada Trustco mortgage

- [88] Ms. Stock's evidence respecting the amount she advanced to pay out the Canada Trustco mortgage was contradictory, and unsupported by any contemporaneous documentation confirming the amount actually required to discharge that mortgage.

- [89] Ms. Stock prepared a document entitled "Summary of payments to TD to payout mortgage" that purports to show that between February 2, 2000, and May 31, 2000, she paid eight cheques totalling \$189,542.65 in order to pay out the Canada Trustco mortgage then registered against title to the Salisbury Avenue property.
- [90] The only mortgage registered against title at that time was Canada Trustco mortgage, a demand mortgage securing the principal amount of \$120,000, with interest only payable monthly.
- [91] During her examination in chief, Ms. Stock tendered the evidence that I have ruled inadmissible that Mr. Bailie and Ms. Bacon told her, before she advanced any money to Mr. Bailie, that the amount owed on the Canada Trustco mortgage was \$152,000. In cross-examination, Ms. Stock claimed that she had seen a discharge statement confirming that the amount owing on the mortgage was \$152,000, but that she no longer had a copy of that document. Later in her cross-examination, she initially denied that in her direct examination she had testified that her understanding that \$152,000 was owing on the mortgage was based only on information she had received from Mr. Bailie and Ms. Bacon. Ms. Stock was compelled to acknowledge that she had given that evidence when the audiotape of that portion of her direct examination was replayed.
- [92] Ms. Stock, when confronted with the fact that the Canada Trustco mortgage was an interest only mortgage for the principal amount of \$120,000 and that it was not in arrears, nonetheless continued to assert that Mr. Bailie owed \$152,000 under that mortgage. She also suggested that there may have been two mortgages, with \$100,000 advanced under No. BN192907, and a further \$50,000 advanced under a second Canada Trustco mortgage. Ms. Stock was then shown that only one Canada Trustco mortgage remained registered against title to the Salisbury Avenue property after August 20, 1999. A \$50,000 mortgage (Canada Trustco mortgage BK394079) had been discharged from title on August 20, 1999, before Ms. Stock advanced any monies to Mr. Bailie. Ms. Stock responded by asserting that Mr. Bailie also had an unsecured line of credit. She suggested that that the combined mortgage debt and unsecured line of credit totalled \$152,000. Ms. Stock was unable to produce any document to support her assertion that at the time she advanced funds to Mr. Bailie he was indebted to Canada Trustco in the amount of \$152,000.
- [93] Ms. Stock has failed to establish that Mr. Bailie owed \$152,000 to Canada Trustco. The principal amount outstanding on mortgage BN192907 at the time it was discharged cannot have exceeded \$120,000.

Ms. Stock's alleged Mortgage Advances

- [94] Again, much of Ms. Stock's evidence regarding her mortgage advances suffers from inconsistency. Her testimony regarding certain of the advances is too vague to be reliable.

[95] Ms. Stock testified that she drew eight cheques in the amounts set out below to pay out the Canada Trustco mortgage and to pay other debts for which Mr. Bailie was responsible:

(a)

\$18,000

February 2, 2000

(b)

\$68,000

February 2, 2000

(c)

\$ 3,000

March 6, 2000

(d)

\$20,000

April 12, 2000

(e)

\$ 4,400

April 20, 2000

(f)

\$45,000

April 20, 2000

(g)

\$30,600

May 23, 2000

(h)

\$ 542.65

May 31, 2000

Total

\$189,542.65

- [96] Ms. Stock was unable to produce copies of any of the cheques in issue. She was unable to produce any confirmation that the cheques were paid either to Mr. Bailie or to the TD Bank or some third party.
- [97] At trial, Ms. Stock gave evidence that cheques applied to the payout of the mortgage totalled \$152,000 and that the balance, between \$37,000 and \$38,000 was applied to other debts. At trial, she said that she paid the cheque dated February 2, 2000 for \$18,000 to Ms. Bacon, to repay monies that Ms. Bacon had advanced to Mr. Bailie some 10 years earlier.
- [98] On discovery, Ms. Stock testified that she gave between \$37,000 and \$38,000 to Ms. Bacon to repay monies that Ms. Bacon had lent to Mr. Bailie for legal fees and other expenses he had incurred 10 years previously in connection with his first divorce. Ms. Stock offered no explanation for why she would agree to pay substantial sums to Ms. Bacon for debts allegedly owed by Mr. Bailie to his mother, and which had gone unpaid for many years. Had Mr. Bailie testified, he might have shed some light on whether his mother had provided funds to him at the time of his first divorce, the amount of any advance, and whether the advance was a gift or loan. I infer from Ms. Stock's failure to call Mr. Bailie that his evidence would have been unlikely to assist her in establishing either that she paid \$18,000 to Ms. Bacon, or that amount properly forms part of the alleged mortgage loan of \$190,000.
- [99] During the trial, Ms. Stock initially said that she made all of the cheques that were applied to pay out the Canada Trustco mortgage, other than the last cheque for \$542.65, payable to Mr. Bailie. Later, she said that some of the cheques which she gave to Mr. Bailie may have been made payable to Canada Trustco. On discovery, Ms. Stock testified that she paid \$152,000, as well as the final payment, directly to TD Bank.
- [100] At trial, in cross-examination, Ms. Stock denied that she paid the two cheques in the amount of \$18,000 and \$20,000 to Ms. Bacon. When confronted with the fact that at different points in her testimony she had said that she had paid the \$18,000 cheque to Ms. Bacon and to Mr. Bailie, Ms. Stock responded by saying that "these two persons are one person to me" and that in her mind Ms. Bacon's loans were the same as Mr. Bailie's loans.
- [101] Ms. Stock bears the burden of proving the amount of the mortgage loan on the balance of probabilities. Her evidence regarding the payment, or payments allegedly made to Ms. Bacon is too vague and contradictory to meet that standard.
- [102] Ms. Stock's evidence was also inconsistent with respect to the \$68,000 advance. In direct examination, she testified that \$43,000 of the \$68,000 was used to pay off a 1999 loan for the F350 truck and that these monies did not form part of the mortgage advance. Later in her examination in chief, Ms. Stock testified that part of the \$68,000 was used to pay off the F350 loan debt but she did not know how much was used for that purpose, or how much was applied to the Canada Trustco mortgage.

- [103] Ms. Stock also gave inconsistent testimony respecting the \$3,000 cheque. Initially in her examination in chief, Ms. Stock said that she did not know what the \$3,000 was used to pay for. On the following day, while she still in direct examination, she testified that the \$3,000 was part of the \$190,000 mortgage advance.
- [104] With respect to the final cheque in the amount of \$542.65, Ms. Stock testified that she made this cheque payable to the TD Bank and that it represented the final payment on the Canada Trustco mortgage, and that she delivered this cheque to the bank herself.
- [105] Counsel for the plaintiff suggested to the defendant Stock that if all of the other cheques were paid to Mr. Bailie, she had no direct knowledge of what he had done with those cheques, and therefore could not say that they had been applied to pay out the Canada Trustco mortgage. The plaintiff also argues that if Ms. Stock paid \$38,000 to Ms. Bacon and applied \$43,000 to pay off the F350 loan, and if the \$3,000 cheque was not part of the mortgage payment, then Ms. Stock could have paid no more than \$105,000 toward the Canada Trustco mortgage debt. However, the plaintiff submits that Ms. Stock's evidence is so deficient that the court ought not to conclude that Ms. Stock provided any funds to pay out the Canada Trustco mortgage.
- [106] Notwithstanding the deficiencies in Ms. Stock's evidence, I do not accept that submission. The bank did deliver a discharge of the mortgage, and would only have done so once the mortgage was paid out in full. Mr. Bailie's business was in financial difficulty. He had sought and received financial assistance for Abatis from Ms. Stock in the fall of 1999. From that time through June 2000, Ms. Stock was Mr. Bailie's source of financial aid. It is unlikely that the anaemic financial condition of Abatis would have permitted Mr. Bailie to do anything more than keep up the monthly interest payments on the Canada Trustco mortgage. On the balance of probabilities, I find that Ms. Stock did provide the funds required to discharge the Canada Trustco mortgage.
- [107] The plaintiff did not seriously challenge Ms. Stock's evidence that the four cheques that she wrote between April 12 and May 23, 2000, and which total \$100,000, were applied to pay out the Canada Trustco mortgage, whether they were issued to Mr. Bailie or to Canada Trustco.
- [108] As for the remaining \$20,000 required to pay out the \$120,000 owing on the Canada Trustco mortgage, I find that Ms. Stock also provided that amount. The likely source of those funds was the balance of her \$68,000 cheque, after deduction of the amount applied to the F350 loan. I accept that the amount required to pay the F350 loan was approximately \$43,000.
- [109] Finally, I also accept Ms. Stock's evidence that she made a final payment of \$542.65 to Canada Trustco for the discharge of the mortgage. Ms. Stock did issue a cheque for that amount on May 31, 2000, very shortly before the bank executed the discharge of mortgage BN192907 on June 2, 2000.
- [110] I conclude that Ms. Stock advanced a total of \$120,542.65 to pay out the Canada Trustco mortgage.

The Mortgage Statement Prepared By Ms. Stock

[111] Ms. Stock prepared her "Statement of the Bailie's Mortgage" in 2007, after the commencement of this proceeding. Although Ms. Stock initially asserted that she had prepared an Excel spreadsheet in 2000 containing the basic information recorded in her 2007 mortgage statement, she admitted in cross-examination that when she drafted the mortgage statement in 2007 she had no notes or documents for 2000, 2001, 2002, 2003, 2004 or 2005 showing principal balances, payments received, or interest charged on the loan. She also agreed that the entries she made on the spreadsheet were not contemporaneous with the times of payment.

[112] Ms. Stock testified that she had made some notes about payments and advances but said she had thrown out these notes. On her examination for discovery Ms. Stock gave the following evidence:

324 Q Okay. If I understand your evidence, though, you drafted this document, Exhibit 1, in the year 2007 because your lawyers asked you to, correct?

A Yes.

325 Q So this type of document wasn't drafted in the year 2000?

A Of course, since my lawyer asked for a document like this, I made it nice and neat with a computer. I have other papers. I put them all together to compile a table like this one.

326 Q Again, my question actually was, there was no document like this done by you in the year 2000?

A No.

327 Q There was no document like this one, being Exhibit 1, done in the year 2001?

A Like this one? No. I did this one in 2007.

328 Q Okay. There is no document like this one, being Exhibit 1, done in 2002?

A No.

329 Q There was no document like this one, being Exhibit 1, done in 2003?

A No.

330 Q There was no document like this one, being Exhibit 1, in 2004?

A No.

331 Q There was no document like this one done in 2005?

A No.

[113] Ms. Stock testified that after she completed the mortgage statement, she reviewed it with Mr. Bailie and had him initial the document to signify his agreement with its contents, including each of the entries for "equity loans". Ms. Stock also testified that she sought out Mr. Bailie and obtained his agreement with the contents of the mortgage statement in order to be able to present "a united front" with him in this litigation.

[114] Ms. Stock testified that Mr. Bailie made the mortgage payments to her in cash, and that she made notes in her calendar of the dates she received mortgage payments. She testified that she had thrown out the calendar in which she recorded these payments, but nonetheless had a clear recollection of the amounts and dates of the payments when she prepared her mortgage statement in 2007.

[115] I do not find that evidence to be credible. Neither the method nor the timing of Ms. Stock's preparation of her mortgage statement inspire any confidence that it is an accurate or reliable record of the amount owing on her mortgage.

[116] In her statement of the Bailies' mortgage, Ms. Stock applied both the monthly mortgage payments and the payments of rent on the basement suite to payment of the mortgage debt until February 15, 2004. After that date, she allocated the monthly rent to payment of the Abatis debt. Ms. Stock has not established that she had an agreement that the rent she received from payment of the mortgage granted by Mr. Bailie could be applied to payment of the Abatis loans. The monthly rent that Ms. Stock received from February 15, 2004 through October 15, 2005 should probably have been applied in reduction of the balance owing on her mortgage.

[117] Ms. Stock has not produced any evidence of a written agreement to add the various "equity loans" to the principal amount of her mortgage. However, she has produced the cheque showing that she did advance \$15,000 to Mr. Bailie's account in March 2001. I accept that amount forms part of the debt secured by Ms. Stock's mortgage prior to the October 17, 2005 transfer of title to the Salisbury Avenue property. Ms. Stock has also established that she paid the property taxes on the Salisbury Avenue property for 2002, 2003, and 2005, in the amounts of \$1,707, \$1,835, and \$1,981 respectively, for a total of \$5,523. Ms. Stock paid the

taxes in order to protect her interest, as mortgagee, in the Salisbury Avenue property.

[118] Ms. Stock has not established that she made mortgage advances totalling \$190,000 to Mr. Bailie in 2000, or that her subsequent equity loans, together with accrued interest had increased the balance due on her mortgage to \$256,000 by October, 2005. However, I have found that Ms. Stock has established, on the balance of probabilities that she advanced \$120,542.65 to pay out the Canada Trustco mortgage. In addition to that sum, I am persuaded that Ms. Stock advanced the sum of \$15,000 in March, 2001, and \$5,523 to pay property taxes.

[119] I have also found that Ms. Stock advanced \$1,500.24 for paving, \$1,045.34 for appliances, and \$208.36 for tiles, and that she paid \$2,000 to prevent the registration of a charge by Mr. Bailie's former spouse against title to the Salisbury Avenue property. These amounts total \$4,753.94, and were also advanced by Ms. Stock to improve or preserve the property charged by her mortgage.

[120] I find that the amount of debt secured by Ms. Stock's mortgage at the time of the transfer was \$145,819.54, (the sum of \$120,542.65 + \$15,000 + \$5,523 + \$4,753.94).

Transfer of Salisbury Avenue Property

[121] There is no question that the Salisbury Avenue property, as the former matrimonial home, was used for a family purpose, and was a family asset.

[122] Ms. Stock testified that she did not discuss the contract for the purchase and sale of the Salisbury Avenue property directly with Ms. Bailie. However, Ms. Stock maintains that the plaintiff was present when discussions took place at the kitchen table at the Salisbury Avenue property between her and Mr. Bailie. Ms. Stock asks the court to infer that the plaintiff must have been aware of these discussions, and the agreement for the transfer of the Salisbury Avenue property from Mr. Bailie to Ms. Stock.

[123] The plaintiff testified that she had no discussions with either Mr. Bailie or Ms. Stock about the transfer of the Salisbury Avenue property. Ms. Bailie said that neither Mr. Bailie nor Ms. Stock showed her the contract of purchase and sale of March 15, 2005 and that Ms. Stock never told her that her mortgage was in arrears. Ms. Bailie was aware at the time she married Mr. Bailie that he had a mortgage with Canada Trustco. Mr. Bailie made the mortgage payments. The plaintiff testified that she had no knowledge of the details of the various Canada Trustco mortgages registered against title to the property during the marriage, or of the amounts paid by Mr. Bailie.

[124] The Salisbury Avenue property was both the family home and the principal family asset. Ms. Bailie testified that until the separation, it was her intention that the family continue to reside in the Salisbury Avenue property until John, the younger son, graduated from the neighbourhood middle school, which was located near the Bailies' home. John did not commence his three years of middle school until 2009.

[125] After the plaintiff gave that evidence, Ms. Stock testified that she had discussions with Mr. and Ms. Bailie about taking title to the Salisbury Avenue property and then renting it back to the Bailies for \$750 per month until the children completed middle school. Ms. Stock also testified that when she and Mr. Bailie discussed the transfer of the Salisbury Avenue property at the kitchen table, Ms. Bailie would come and go as she worked in the kitchen or looked after the children, but suggested that she was generally within hearing range of these discussions. I do not find this evidence to be credible. Because the Salisbury Avenue property was the family home, and the only asset of any substantial value, it is unlikely that the plaintiff would have taken such a passive interest in any discussions between Mr. Bailie and Ms. Stock regarding the transfer of the family home.

[126] Ms. Stock claims that she first discussed purchasing the Salisbury Avenue property with Mr. and Ms. Bailie in the fall of 2004. The plaintiff denied that she was a party to any such discussions. Ms. Stock maintains that in September 2004 she arranged for Sears to inspect the furnace ducts before she decided whether she would acquire the Salisbury Avenue property. In cross-examination, she said that she used the inspection of the furnace as a home inspection preliminary to her purchase of the property. This evidence is improbable. Had Ms. Stock sought a home inspection before purchasing the property, I am satisfied that she is sufficiently astute to have engaged a professional home inspector. The plaintiff testified that she hired Sears to have the ducts cleaned because the work needed to be performed. The plaintiff, not Ms. Stock, signed the Sears estimate for the work. I accept the plaintiff's testimony on this point.

[127] Ms. Stock maintained that the plaintiff was either involved in or at least present during discussions in 2004 and 2005 concerning the sale by Mr. Bailie of the Salisbury Avenue property. When cross-examined, Ms. Stock was unable to recall any comments or contributions made by Ms. Bailie to these discussions. She also testified that the plaintiff was aware of the contract of purchase and sale made between Ms. Stock and Mr. Bailie in 2005. At trial, Ms. Stock testified that she drew up the agreement for purchase and sale on March 15, 2005, and took it with her that evening to the Salisbury Avenue property where she discussed the agreement with Mr. Bailie. Ms. Stock said that Ms. Bailie was also present on that occasion.

[128] In cross-examination, Ms. Stock was confronted with her evidence on examination for discovery:

604 Q You'll agree with me that Patricia did not know about this Contract of Purchase and Sale, correct?

A She knows. I think her husband told her.

605 Q You didn't tell her?

A I was -- everybody knows in 2004 already. We are already talking about it in 2004 that it's gonna be sold in 2005. There's no point talking about it.

...

608 Q So your position is that you told Patricia in June 2005 that you were buying the property?

A It was the end of 2004 we already had this all talked about.

609 Q Okay. Well, this Contract of Purchase and Sale is actually dated March 2005, so this document would not have existed before March 15th, 2005. You agree with that?

A Yeah, I agree.

610 Q Did you have any conversation with Patricia Bailie on March 15th, 2005 or after about this contract?

A Patricia was working. When we were signing this contract, she was working. She wasn't there. I had an argument with Dave.

[129] Ms. Stock was then compelled to concede at trial that Ms. Bailie was not present when both defendants signed the agreement for purchase and sale of the Salisbury Avenue property.

[130] Ms. Stock also testified that in or about June 2005, Ms. Bailie asked her if the sale of the Salisbury Avenue property had completed and Ms. Stock told her that it was not going to close until August 31, 2005. According to Ms. Stock, the plaintiff then asked who would pay the 2005 property taxes and Ms. Stock replied that she would pay them and they would be included as an adjustment to the sale price.

[131] Ms. Bailie denied these conversations and testified that she had no knowledge of the contract of purchase and sale in March or June, 2005. The plaintiff said that she only found out about the transfer of the Salisbury Avenue property about a year after it had been registered when at or about the time she was initiating these proceedings, she conducted a search of title. After her discovery of the transfer, she retained counsel who amended her pleadings to pursue the fraudulent conveyance claim.

[132] It is not probable that the plaintiff would engage counsel to prosecute that claim if, as Ms. Stock maintains, she had prior knowledge of, and had acquiesced to the transfer of the Salisbury Avenue property from Mr. Bailie to Ms. Stock. In preferring Ms. Bailie's evidence to that of Ms. Stock, I also take into account that the plaintiff was consistent and forthright in her testimony on this point. For her part, Ms. Stock gave contradictory evidence on whether Ms. Bailie was present when the agreement of purchase and sale was signed; Ms. Stock was unable to recall anything allegedly said by Ms. Bailie during discussions concerning the disposition of the family home; and Ms. Stock was often evasive in cross-examination.

[133] I find that the plaintiff was not present when Mr. Bailie and Ms. Stock discussed the transfer of the Salisbury Avenue property, or when Ms. Stock and Mr. Bailie signed the agreement of purchase and sale on March 15, 2005. I also find that Ms. Bailie had no knowledge, prior to the transfer, of Mr. Bailie's intention to sell the Salisbury Avenue property to Ms. Stock. Ms.

Stock's evidence on this point is not reliable. The retention of counsel and amendment of pleadings by Ms. Bailie is more likely an accurate reflection of when the plaintiff became aware of the transfer of the Salisbury Avenue property.

- [134] The contract of purchase and sale originally provided for a closing date of August 31, 2005. According to Ms. Stock, because Mr. Bailie was out of town in August 2005, the closing date was changed to December 31, 2005.
- [135] When Ms. Stock became aware that Mr. and Ms. Bailie had separated, and that there was the potential for "messy" litigation as she put it, she insisted, and Mr. Bailie agreed, to advance the closing date to October 2005.
- [136] In cross-examination, Ms. Stock acknowledged that she only filed the transfer on October 17, 2005 because of the separation.
- [137] Both the discharge of Ms. Stock's mortgage and the transfer were dated October 14, 2005, the day prior to the amendment of the contract of purchase and sale closing date to October 15, 2005. Mr. Bailie and Ms. Stock attended before the same lawyer to sign the conveyance documents. Ms. Stock and Mr. Bailie acted in concert to transfer title to the Salisbury Avenue property expeditiously following the separation.
- [138] Mr. Bailie, as the other party to the transfer of the Salisbury Avenue property, had material evidence to give regarding the amount owing on Ms. Stock's mortgage at the time of transfer, the circumstances of the transfer, and how he and Ms. Stock arrived at the \$275,000 sale price. Although Mr. Bailie put Ms. Bailie to the trouble of obtaining an order for substituted service, he remained in communication with Ms. Stock to the time of trial. His testimony was not equally available to both parties. Again, Ms. Stock could have called him to give evidence respecting the transfer of the former matrimonial home. Her failure to do so leads me to draw the adverse inference that Mr. Bailie's evidence would not have supported Ms. Stock's case with respect to the amount owing on her mortgage in October 2005, or the on the bona fides of the transfer.

Applicable Legal Principles

- [139] Persons who have standing to commence proceedings under the Fraudulent Preference Act include creditors who have judgment against the transferor at the time of the alleged fraudulent preference and creditors who had a liquidated claim against the transferor at the time of the alleged fraudulent preference: *M.P.H. Supply Ltd. v. Pajger et al.*, 2006 BCSC 1918 at paras. 26, 27.
- [140] At the time that Mr. Bailie transferred title to the Salisbury Avenue property to Ms. Stock, the plaintiff had neither a judgment nor a liquidated claim against Mr. Bailie. She was therefore not a "creditor" of Mr. Bailie at the time of the transfer and her claim under the Fraudulent Preference Act fails.

[141] The plaintiff also claims under the Fraudulent Conveyance Act.

[142] Sections 1 and 2 of the provide:

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

- (a) a disposition of property, by writing or otherwise,
- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

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

[143] The Fraudulent Conveyance Act has a broader application than does the Fraudulent Preference Act. Section 1 of the Fraudulent Preference Act applies to dispositions of property made "to delay, hinder or defraud creditors and others of their just and lawful remedies". The fact that the plaintiff was not a creditor of Mr. Bailie at the time of the transfer of title to the Salisbury Avenue property does not defeat the plaintiff's claim under the Fraudulent Conveyance Act. In *AWD v. CCDD*, 2004 BCSC 1142 at para. 146, the court, citing *Jack v. Parkinson* (1994), 91 B.C.L.R. (2d) 96 (C.A.), held that the phrase "creditors and others" in the Fraudulent Conveyance Act includes an estranged spouse.

[144] Where a sale or transfer of property is made for good consideration, the transaction will not be void as a result of the purchaser having notice or knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless the plaintiff establishes that the purchaser is a party to carrying out the fraudulent intention and purpose: *Gresham v. Gresham*, 1993 BCCA 107 at para. 13. In *Gresham* at para. 10, the Court of Appeal adopted as the correct statement of principle the following passage from the reasons for judgment of Mr. Justice Fry in *Re Johnson [Golden v. Gillam]* (1881), 20 Ch. D. 389 at 393:

The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily show that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons: the fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult. In the

case of *Harman v. Richards*, the Lord Justice Turner, then Vice-Chancellor, makes this observation: "It remains to be considered whether the settlement which was thus made for valuable consideration was also made bona fide, for a deed, though made for valuable consideration, may be affected by mala fides. But those who undertake to impeach mala fides a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

(emphasis added)

[145] Where the consideration is inadequate or nominal, a creditor need only show that the transferor intended to delay, hinder or defraud the creditor (or other) of his or her remedies. Where on the other hand, valuable consideration has passed, the creditor must also show that the transferee actively participated in the fraud. Where valuable consideration has passed, then the focus is not on the sufficiency of that consideration, but on the intentions of both parties to the transaction: *Chan v. Gresham*, 2002 BCCA 474 at paras. 20, 21.

Fraudulent conveyance of Salisbury Avenue property

[146] In *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.*, [1995] B.C.J. No. 1814 (S.C.), Baker J. succinctly stated the test for proof of fraudulent intent at para. 27:

27 Fraudulent intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding the transaction. Where some consideration has flowed from the transferee to the transferor, the court may consider the adequacy of the consideration in relation to the issue of intent, since a transfer at an undervalue raises suspicions about motive. Inadequate consideration may be considered to be a badge of fraud.

[147] Here, Mr. Bailie and Ms. Stock executed the transfer and the discharge of Ms. Stock's mortgage in considerable haste. The transfer of title occurred shortly after the separation. The acceleration of the transfer date was initiated by Ms. Stock, who was aware of the potential for the plaintiff to claim an interest in the Salisbury Avenue property. The transfer effectively divested Mr. Bailie of the principal asset against which Ms. Bailie could make a claim under the FRA. The amount owing under the mortgage at the time it was discharged from title was substantially less than the notional purchase price of \$275,000, which in turn was substantially less than the fair market value of the property at the time of transfer. These factors are all indicators of fraud: *Banton v. Westcoast Landfill Diversion Corp.*, 2004 BCCA 293 at para. 5.

[148] Even where a transfer is for good consideration, evidence of fraudulent intent on the part of the transferor and transferee will impeach the transfer despite good consideration: *LKB v. GJT*, [1997] B.C.J. No. 348 (S.C.) at para. 30.

- [149] I find that both Mr. Bailie and Ms. Stock intended to defraud the plaintiff by delaying or defeating her claim to an interest in the former matrimonial home.
- [150] Section 66(3) of the Family Relations Act provides:
- (3) If the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.
- [151] Section 66 of the Family Relations Act does not require that the property, when transferred, was a family asset. A transfer made prior to the triggering event, which in this case was the s. 57 declaration pronounced by Fisher J. on September 7, 2007, may be the subject of an order under s. 66(3) of the FRA: *Chen v. Wu*, 2003 BCSC 1468 at para. 41; *Elkaswani v. Elkaswani*, 2004 BCSC 498 at para. 53.
- [152] Before the court may make an order under s. 66(3), the plaintiff must establish that Mr. Bailie transferred the Salisbury Avenue property to Ms. Stock, and that she was not a purchaser in good faith for value. The plaintiff must also establish that the transfer was made for the purpose for defeating a claim to an interest in the property which she may have had then or in the future: *Elkaswani*, at para. 54. In *Elkaswani*, where the defendant husband transferred the matrimonial home to his brother, the court found that the conditions for a vesting order under s. 66(3) of the FRA had been satisfied, and that following the triggering event, the wife was entitled to an interest in the matrimonial home pursuant to s. 56 of the FRA. Accordingly, the court made an order vesting the property in the names of the wife and the husband's brother as tenants in common.
- [153] Ms. Stock submits that the transfer by Mr. Bailie to her of title to the Salisbury Avenue property was in the nature of a voluntary foreclosure, was made for valuable consideration and that there is no evidence of any fraudulent intention on her part. On that basis, Ms. Stock submits that the transfer should be upheld.
- [154] In *Chen v. Wu*, the husband conveyed real property to his parents shortly after the separation from the plaintiff wife. The parents were joined as parties in the proceeding but declined to appear. The court held at para. 43 that, for the plaintiff to obtain an order under s. 66(3) of the FRA, she must show that the purpose of the transfer was to defeat her claim to an interest in the property. In *Chen*, there was no evidence that any consideration passed from the husband's parents. At para. 46, the court drew an adverse inference from the timing of the transfer and the lack of a reasonable explanation for it, and found that the purpose of the transfer was to defeat the plaintiff's claim to an interest in the property.

- [155] The circumstances and timing of the transfer of the Salisbury Avenue property from Mr. Bailie to the Stocks lead me to conclude that Mr. Bailie made the transfer for the purpose of defeating the plaintiff's claim to an interest in the property. I am also satisfied that Ms. Stock was not a purchaser in good faith. She insisted that the date of the transfer be advanced as soon as she became aware of the separation, and did so in an attempt to pre-empt the plaintiff from successfully asserting a claim to an interest in the property.
- [156] The plaintiff has established the fraudulent conveyance of the Salisbury Avenue property, and that Ms. Stock was not a purchaser in good faith. The transfer was made without the knowledge of the plaintiff. Both Mr. Bailie and Ms. Stock intended to defeat the plaintiff's claim to an interest in the Salisbury Avenue property. The plaintiff has established her entitlement to relief under 66(3) of the FRA, which enables the court to "vest all or a portion of the property" in the plaintiff. It remains to determine the plaintiff's claim for reapportionment to her of 100 percent of the Salisbury Avenue property.

Reapportionment

[157] Section 65(1) of the FRA provides:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient,
or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[158] The plaintiff, as the party seeking reapportionment, bears the onus of proving that the equal division of family assets provided under s. 56 of the FRA would be unfair, having regard to the criteria set out in s. 65(1): *MacNeil v. MacNeil* (1995), 14 R.F.L. (4th) 24 (B.C.S.C.).

[159] Here, Mr. and Ms. Bailie were married for about 12½ years, although they had separated about 10 years after their marriage.

- [160] The property was acquired by Mr. Bailie in 1985. Mr. Bailie disposed of the property by way of a fraudulent conveyance to the Stocks in October 2005. This disposition by Mr. Bailie of what was then a potential family asset shortly after the separation is a factor that would render an equal division of the Salisbury Avenue property unfair, and gives rise to the necessity for reapportionment: *Newson v. Newson* (1986), 2 R.F.L. (3rd) 137(B.C.C.A.).
- [161] The two other significant factors here are ss. 65(1)(e): "the needs of each spouse to become or remain economically independent and self sufficient", and (f): other circumstances, which include "liabilities of a spouse".
- [162] Mr. Bailie, despite having notice of the plaintiff's claims for orders setting aside the transfer of the Salisbury Avenue property to the Stocks, and for the reapportionment to her of the former matrimonial home, has chosen to take no part in these proceedings. There is no evidence before the court respecting Mr. Bailie's present income and expenses because he has failed to comply with an order of this court for the production of a Form 89 financial statement. By his order of May 13, 2008, Mr. Justice Truscott imputed an income of \$50,000 to Mr. Bailie and ordered that he pay child support, in the amount of \$759 per month, retroactive to October 15, 2005, which he has failed to do.
- [163] The plaintiff currently earns an annual salary of \$44,000 and has the care of the two children, aged 13 and 11. Since the separation, the plaintiff has borne the full burden of care of the children and will likely continue to do so. Because Ms. Bailie will probably bear all of the costs associated with raising these children until they each become self-supporting, her need to maintain economic self sufficiency is substantially greater than that of Mr. Bailie.
- [164] In *Kaur v. Ram*, 2006 BCCA 527, 62 B.C.L.R. (4th) 298, the Court of Appeal decided an appeal by the husband from an order of the trial judge reapportioning the appellant's interest in the former matrimonial home 100 percent in favour of the wife. The wife had custody of the two children of the marriage, aged 14 and 12 and the husband was in arrears of child support. The principal family asset was the matrimonial home.
- [165] In *Kaur*, the Court of Appeal allowed the husband's appeal to the extent of giving the wife a 75 percent interest in the matrimonial home, and directed that the home be sold when the last of the two children ceased to be a child of the marriage.
- [166] In *Kaur*, at para. 14, the Court of Appeal held that the burden of care on the custodial parent should not be ignored in dividing family assets, particularly where the payor spouse was an unreliable source of support for the children. The court also agreed with the trial judge that the needs of the respondent mother to become economically independent were greater than those of the father.
- [167] In *Bablitz v. Bablitz*, [1994] B.C.J. No. 278 (C.A.), the Court of Appeal reapportioned the matrimonial home 100 percent to the appellant wife. The husband was in arrears of child support. The wife had the care of four teen-aged children and had made the mortgage

payments, paid the taxes and maintained the matrimonial home since the separation. The factors which the Court of Appeal took into account at para. 17 in determining that an equal division would be unfair, and in reapportioning the matrimonial home 100 percent to the wife were that this was a long marriage; that the wife was responsible for the care of four teen-aged children and had received little maintenance since the separation; her need to become economically independent and self sufficient; and that she had maintained and preserved the property since the separation. The court held that the reapportionment of 100 percent in favour of the wife would provide her and the children with the security and independence to which they were entitled.

- [168] In *Neate v. Neate*, [1997] B.C.J. No. 996, 33 B.C.L.R. (3d) 146 (C.A.), the Court of Appeal upheld the reapportionment of the parties' interests in the former matrimonial home 100 percent in favour of the respondent wife. Because the husband's business was not economically viable, he had failed to make an adequate contribution to the support of the children. The wife bore the burden of the children's care. Because of her child-rearing responsibilities during the marriage, she was economically disadvantaged. In *Neate* at para. 23, the court held that the wife had a significantly greater need than the husband to become and remain financially independent and self sufficient, primarily because of her child-rearing responsibilities. In upholding the trial judge's decision to reapportion the matrimonial home entirely to the wife, the court also took into account the wife's need to provide a proper home for her children with little support from the husband.
- [169] Reapportionment of the matrimonial home 100 percent to one spouse is a remedy that is rarely awarded: *Kaur*. In my view, this is an appropriate case for such an award. The plaintiff's need to remain economically self sufficient while bearing all of the costs associated with the care and upbringing of two teen-aged children is a paramount factor in this case. Mr. Bailie has not contributed by way of child support to the children and his non-attendance at this proceeding likely foreshadows further disregard of his obligations to the children. I conclude that an equal division of the matrimonial home would be unfair. The Salisbury Avenue property will be reapportioned 100 percent in favour of the plaintiff.

The Promissory Notes and the Abatis Debt

- [170] Ms. Stock counterclaims against the plaintiff, Mr. Bailie and Abatis for judgment for debt in the amount of \$14,497.73 together with interest from February 15, 2007, at the rate of five percent per annum. Her claim is for monies she alleges that she advanced to pay expenses of Abatis. In addition, her claim includes \$3,500 that she advanced to Mr. Bailie in December 2005, to pay for him to take a Disneyland vacation with the children. Ms. Stock relies upon five promissory notes for evidence in the amounts she advanced from time to time for Abatis.
- [171] The first of these is a handwritten promissory note dated October 18, 1999, drawn on Abatis letterhead by the plaintiff at the request of Ms. Stock. By this note Mr. Bailie confirmed that he had borrowed \$6,500 "for a company loan". This note provided for interest to be

calculated at two percent yearly, and that the loan could be prepaid without penalty, but was due in full by October 18, 2004. Mr. Bailie signed this note as "President of Abatis". The plaintiff signed the note as a witness. I find that Ms. Bailie assumed no personal liability for payment of this note.

[172] On February 1, 2000, Abatis issued a replacement note, also prepared by Ms. Bailie, which recorded a payment to Ms. Stock of \$2,500 on that date and provided that the outstanding balance of \$4,000 was due in 2005.

[173] On February 15, 2000, Abatis provided a handwritten note prepared by the plaintiff confirming that Abatis had borrowed \$46,000 from Ms. Stock to finance the purchase of a Case Bobcat machine. This promissory note provided for interest calculated annually at five percent, and that the loan was payable in February 2003.

[174] On June 22, 2000, Ms. Bailie signed a handwritten note again prepared on Abatis letterhead, which provided that: "This revised promissory note is a replacement of the previous note for the amount of \$4,000", and confirmed an outstanding balance of \$8,000 due in 2005 to Ms. Stock.

[175] On February 2, 2001, Mr. and Ms. Bailie signed a "Promise Note" to Su-Ying and Siegfried Stock which provided:

We, The Bailies have borrowed the total sum of \$62,750 from the Stocks over the period of last two years for the purchase of truck and Bobcat and some major expenses for our company, ABATIS Tree Services. We agree to use the assets of the company as the security for the loan.

The loan will be payable on Feb 1 2004 at interest of five percent annually.

No new money was advanced under this note. The truck referred to in the note is the F350. Ms. Stock testified that the Promise Note contained an error because she advanced no funds for the purchase of the F350 truck. However, Ms. Stock did register a PPSA security agreement over both the Bobcat and the F350 truck on January 2, 2001, and registered a discharge of that security on April 2, 2004.

[176] In cross-examination, Ms. Stock acknowledged that she treated the \$46,000 she had advanced for the purchase of the Bobcat as a corporate loan to Abatis. At discovery, Ms. Stock confirmed that the full amount of \$62,750 referred to in the promissory note dated February 2, 2001 had been advanced for Abatis:

Q That's not the question I'm asking. Maybe it's my fault. It's your understanding that the \$62,750 was loaned by you effectively for the benefit of Abatis Tree Services Ltd.? Yes or no?

A Yes.

- [177] Although the February 2, 2001, promissory note refers to the Bailies having borrowed \$62,750 from the Stocks to purchase equipment and pay expenses of Abatis, the February 15, 2000, note clearly provided that Abatis, rather than the Bailies, had borrowed \$46,000 of that amount for the purchase of the Bobcat. Furthermore, Ms. Stock has acknowledged that she understood that the amounts she advanced under the notes were for the benefit of Abatis.
- [178] The plaintiff never guaranteed payment of the debts of Abatis, nor did she agree to indemnify Ms. Stock in the event that Abatis failed to repay the loans. Further, when Mr. and Ms. Bailie signed the February 2, 2001, promissory note, they specifically agreed to use the assets of Abatis, rather than their own assets, as security for the loan. In all of these circumstances, I find that all of the monies advanced by Ms. Stock or her husband for the benefit of Abatis, including the amounts recorded in the promissory notes, were loans to Abatis, and that Abatis was liable for those debts. Accordingly, the plaintiff does not owe Ms. Stock the amount claimed in her counterclaim, and is not indebted to her in any amount.
- [179] Because Ms. Stock also claims against Mr. Bailie and Abatis, it remains necessary to consider whether she has proven the amount of her claim.
- [180] The promissory notes contained no payment schedule because neither Abatis nor Mr. Bailie had the financial means to make regular payments. Ms. Stock confirmed that the only payment ever made on any of the promissory notes was the payment of \$2,500 made on or before February 1, 2000, and recorded in the February 1, 2000, promissory note.
- [181] Ms. Stock also agreed in cross-examination that the Abatis loans were separate from the mortgage loan. On that basis, the rental payments from the Salisbury Avenue property (for the period February 15, 2004, through September 15, 2005) that Ms. Stock applied to the Abatis loan ought to have been applied to the mortgage loan. However, Ms. Stock has calculated her counterclaim in the amount of \$14,497.73, taking those rental payments into account, and has not sought to amend that claim.
- [182] Ms. Stock also applied \$19,278, representing the difference between her purchase price for the Salisbury Avenue property and the amount she alleges was owed to her under the mortgage at the time of the transfer, in reduction of the balance she claims is due to her for the Abatis loans.
- [183] Ms. Stock has produced no copies of cheques respecting the loan for the purchase of the Bobcat and no documents relating to the sale of either the F350 truck or the Bobcat. According to Ms. Stock, she and her husband "took over" the F350 truck from Mr. Bailie on November 15, 2005, and then credited \$22,000 against the Abatis loan. Ms. Stock did not produce any contract for the purchase of the F350 truck from Mr. Bailie. Her evidence on cross examination that she "might" have documents at home relating to this transaction was entirely unsatisfactory, particularly when one recalls that the trial of this action was first adjourned in May, 2008 to permit the Stocks additional time to prepare for trial.

- [184] Ms. Stock also testified at trial that in March 2006, Mr. Bailie sold the Bobcat for either \$25,000 or \$26,000, and gave her \$18,000 from the sale proceeds, which she applied against the Abatis loan. On discovery, her evidence was that the buyer of the Bobcat had given her a cheque for a little more than \$18,000, and that she also sold the buyer a trailer for the Bobcat. Ms. Stock was unable to produce the cheque from the purchaser of the Bobcat, or any other documents verifying these transactions.
- [185] Ms. Stock created her calculation of the outstanding loan amount after the commencement of these proceedings, and without any supporting documentation, other than the promissory notes. She has chosen not to call Mr. Bailie, whose testimony may have shed light on the amounts realized for the sale of the Bobcat and the F350 vehicle, and on the loan balance. Ms. Stock admits that the F450 truck, as well as Mr. Bailie's Corvette, are both parked in her driveway and yet she has taken no steps to recover any of the amounts that she claims to be owed to her from Abatis or Mr. Bailie by seizure or sale of these vehicles. I infer from Ms. Stock's failure to call Mr. Bailie that his evidence would not have assisted her.
- [186] I find that Ms. Stock has failed to establish on a balance of probabilities that the amount she claims, or any amount, remains due and owing on the Abatis loans.
- [187] In light of this finding it is not necessary to decide whether Ms. Stock's debt claim on the promissory notes is statute barred.
- [188] I have found that the plaintiff is not personally liable for payment of any of the notes and that Ms. Stock has failed to prove that the amount she claims or any amount is outstanding. The counterclaim of the defendant Ms. Stock against the plaintiff and Abatis is dismissed.

REMEDY

- [189] There will be orders for the following relief:
- (a) an order that the transfer of the Salisbury Avenue property from the defendant David Vince Bailie to the defendants Thomas Stock and Su-Ying Stock constitutes a disposition of property made to delay, hinder or defraud creditors and to deprive the plaintiff of the just and lawful remedies, and is void and of no effect against the plaintiff;
 - (b) an order vesting title to the Salisbury Avenue property in the plaintiff;
 - (c) an order that as between the plaintiff and the defendant David Vince Bailie, the plaintiff is awarded 100 percent of the Salisbury Avenue property;
 - (e) an order that Ms. Stock has an equitable mortgage charging the Salisbury Avenue property in the amount of \$145,820;

(d) an order for sale of the Salisbury Avenue property, with the plaintiff to have sole conduct of the sale. Upon completion of the sale of the Salisbury Avenue property, the plaintiff will pay to the defendant Su-Ying Stock the sum of \$145,820 from the proceeds of sale, which will fully satisfy and discharge Ms. Stock's interest in the property. The plaintiff will retain 100 percent of the remaining net proceeds of sale of the Salisbury Avenue property.

[190] The counterclaim of the defendant Ms. Stock against the plaintiff and Abatis is dismissed.

[191] Costs will follow the event. The plaintiff, as the substantially successful party is entitled to costs at Scale B against Mr. Bailie, and against Su-Ying Stock and Thomas Stock.

"PEARLMAN J."

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