

CANADA / JUDGMENT

Cadwell Estate v. Martin

2021 BCSC 1089

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2021 BCSC 1089 Cadwell Estate v. Martin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cadwell Estate v. Martin,

2021 BCSC 1089

Date: 20210607

Docket: S217213

Registry: New Westminster

Between:

Shane Cadwell, as Executor of the Estate of Ruth Cadwell

Plaintiff

And

Billie Lisa Martin and Scott Russell Martin

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

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Place and Dates of Trial:

Port Coquitlam, B.C.

April 26-30, 2021

Place and Date of Judgment:

New Westminster, B.C.

June 7, 2021

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I. Introduction

- [1] As this case shows, when a significant financial transaction is casually entered into between parents and their adult children, tragic consequences may occur, if the terms of the transaction are not clear to the members of the family at the outset, or are not properly, legally documented.
- [2] On January 31, 2004 Bill and Ruth Cadwell (the "Cadwells") paid \$170,000 (the "payment") to their daughter Billie Martin and her husband, Scott Martin (the "Martins"), who are the defendants in this case. This case concerns the legal consequences of that payment.
- [3] The payment was used to assist with the purchase and construction of a new house that the Martins were buying from a developer (the "property"), which was modified to include a self-contained basement suite suitable for the Cadwells to live in (the "suite" or the "basement suite").
- [4] However, there was no contemporaneous written agreement about the payment. As I will explain, there was also no subsequent written agreement.
- [5] The house was built, with the suite, and the Martins and the Cadwells moved in, in September and October 2005.
- [6] Bill Cadwell was already quite ill with cancer when the payment was made. He died April 12, 2007, at the age of 76. Ruth Cadwell remained in the suite for a further 12 years until she died April 3, 2019, at the age of 81.
- [7] The Cadwells' son, Shane Cadwell, the plaintiff, brings this claim as executor of Ruth Cadwell's estate.
- [8] Ruth Cadwell had four daughters and one son. In order of seniority, her children are Laureen, Pamela, Billie, Nicole, and Shane. The father of Laureen and Pamela was a man named Raymond. Billie, Nicole, and Shane are the biological children of Bill and Ruth. Bill Cadwell was stepfather to Laureen and Pamela from when Laureen was about seven years of age.
- [9] For convenience, I will also sometimes refer to the family members by their first names.
- [10] Sadly, the dispute about the money led to considerable friction over the years between the Cadwells and the Martins, and among their children. The dispute festered for many years before resulting in this litigation, commenced July 22, 2019 after Ruth's death. Shane and Nicole formerly had good relationships with Billie and Scott Martin. Shane lived with the Martins for a time when he was a young adult. Nicole lived in the basement suite with her children for about a year, after Bill died, and got along well with the Martins. But as a result of the dispute, and this litigation, Billie and her siblings Shane and Nicole are no longer on speaking terms. Pamela would have testified at this trial in support of the plaintiff's case, but was too ill to testify. Laureen testified in support of the defendants' case. These are the circumstances that I earlier described as tragic.

- [11] As I am confident that everyone involved now recognizes, it would have been quite easy to document an agreement about the payment at the outset, thereby avoiding years of conflict.

II. The Claims and Defences

- [12] The plaintiff claims that the payment was an equity investment in the property, or that a resulting trust in the property was created. The plaintiff claims in the further alternative in unjust enrichment, or in debt, for repayment of the money as a loan, with interest. The Martins deny that an equity interest was intended or a trust created, and deny the claim in unjust enrichment. Their position is that the transaction was a loan. They say the loan was paid off by way of notional payments of rent applied against the loan over the years. Alternatively, they say that the loan claim is statute barred.
- [13] In support of their position that the loan was repaid by payments of notional rent over time, the Martins rely on a loan repayment schedule (the "repayment schedule"), allegedly initialled by Bill Cadwell in 2005. The plaintiff says this document is a forgery, created recently in order to defend this claim, and there was no agreement to pay notional rent.

III. Background

- [14] During his lifetime Bill Cadwell worked as a window washer. In more recent years he was self-employed. He operated a building maintenance or janitorial service company. For many years Ruth Cadwell managed a concession at a recreational facility, for the city of Port Coquitlam. She also had other jobs, and she helped manage Bill's maintenance business.
- [15] The Cadwells owned a home located on 236 Street in Maple Ridge. The home was located on three-and-one-half acres.
- [16] In late 1999 Bill was diagnosed with colorectal cancer. He was treated with radiation and chemotherapy. In 2000 he underwent surgery involving removal of the colon and rectum, forcing him to use a colostomy bag thereafter. Initially his health allowed him to continue working, but as time went on his health deteriorated. He had surgery for low back pain in 2001 or 2002. Eventually he needed a cane to assist in walking. He suffered from numbness in one of his feet that caused him to trip and fall. He had severe nerve pain.
- [17] By 2003 the Cadwells were finding that maintenance of their large property on 236 Street was too much for them, and they began looking for another place to live. They had some discussions with Shane about buying his house, a rancher, but they were unable to agree on terms.
- [18] At or about the same time, in 2003, the Martins were shopping for a new house. They were living in a home on Telep Avenue in Maple Ridge, that they had owned since approximately 1997. They were interested in buying a new home in a new residential Maple Ridge subdivision called Maplecrest, because it offered proximity to the schools they preferred for their two sons.

- [19] According to the Martins, the Cadwells approached them about the possibility of the unfinished basement in the house the Martins were interested in buying being finished with a suite for the Cadwells. The Martins agreed to have the basement finished with a suite for the use of the Cadwells. According to Nicole, Bill knew that he was dying, and he wanted Ruth to live with one of the daughters. Ruth had a very good relationship with Billie at the time. Nicole was living in Florida, where she had been since 1999. Laureen and Pamela were not practical options.
- [20] The Cadwells sold their home on 236 Street in or about December 2003. It is an agreed fact that the completion of the sale occurred January 28, 2004, three days before the payment of \$170,000 from the Cadwells to the Martins. The actual payment was to Scott Martin, but he placed the money into a joint account, and it was used to pay for the house, which is held by the Martins in joint tenancy.
- [21] The bank transaction record indicates that the Cadwells received \$292,250.15 by way of a cheque, of which \$170,000 was applied to a bank draft payable to Scott Martin. Two transfers of \$61,125 were then made into other accounts. The evidence at trial indicates that the remaining funds went into separate bank accounts of Bill and Ruth Cadwell. They generally kept their finances separate. It appears that over the years the Cadwells spent the rest of the money, as none of these funds remain in Ruth's estate.
- [22] The Martins signed the agreement to purchase the property on February 3, 2004. The transfer of the property to them took place on February 26, 2004. It appears they first purchased the lot, for a price of \$165,000, perhaps plus GST. Construction of the residence began some time thereafter and was completed in September 2005. The Martins arranged for further mortgage financing to pay the costs of construction. The Martins moved into the home in September 2005, and the Cadwells moved into the basement suite about a month later, in October 2005.
- [23] The initial contract between the Martins and the developer was for a purchase price of \$454,900, plus GST. That price included an unfinished basement. The Martins subsequently contracted with the developer to turn the unfinished basement into a suite, and to build a storage area, to compensate for the loss of the suite.
- [24] While the new residence was being built, the Martins continued to reside in their home on Telep Avenue, which they eventually sold. The Cadwells resided in rental accommodation.
- [25] The suite was constructed, with two bedrooms and two bathrooms, and a kitchen. It is approximately 1,200 square feet in area. The storage room is about 400 square feet in area.
- [26] The Martins have not retained the documents relating to their purchase of the home from the developer, and the construction of the home. They say that the additional cost to construct the suite was approximately \$120,000.

- [27] Nicole testified that Bill Cadwell told her that he had demanded the return of the payment from the Martins a few days after it was made to them. Scott Martin denies that Bill made this demand. He states that if Bill had done so, he would have paid it.
- [28] According to the hearsay evidence of Shane and Nicole, based upon conversations with Bill, when the payment was made, the Martins assured Bill that a proper legal document would be prepared at some later time. On this point there is some common ground with the evidence of Scott Martin. He says that a number of months later he prepared a memorandum, which was intended to document the agreement temporarily, until a more formal agreement could be prepared. Scott Martin prepared a memorandum dated November 9, 2004 (the "2004 memorandum"), thus, several months after the transfer, but well before the house was completed.
- [29] In general terms, the 2004 memorandum provided that \$170,000 plus reasonable bank interest would be paid to the Cadwells if the property were sold while the Cadwells were still alive (or to the survivor should either of them die prior to the house being sold), or would be paid to the Cadwells if the Martins predeceased the Cadwells, or either of them.
- [30] The 2004 memorandum, in full, is as follows:

To: Bill and Ruth Cadwell

From: Scott and Billie Martin

Date: November 9, 2004

Re: Property at 24303 McClure Drive Maple Ridge BC V2W 3E6

This letter will acknowledge that with regards to the house and property owned by Billie and Scott Martin located at:

24303 McClure Drive, Maple Ridge, BC, Canada

Should we (Billie and Scott Martin) decide to sell this house and property while either or both Bill Cadwell and Ruth Cadwell are alive, we (Billie and Scott Martin) will give Bill and Ruth Cadwell the sum of \$170,000.00 (One hundred and seventy thousand dollars and zero cents). We will also include reasonable bank rate interest on this sum of money.

· This money will be paid to Bill and Ruth Cadwell separately (divided equally between them) if both are alive at the time of the sale of the house. (\$85,000.00 plus interest to Bill Cadwell and the same to Ruth Cadwell).

Or

· This money will be paid directly to the survivor (\$170,000.00 plus interest) should either Bill Cadwell or Ruth Cadwell die before the house is sold.

Should we (Billie and Scott Martin) both die, and are survived by either or both of Bill Cadwell or Ruth Cadwell. The funds (170,000.00 plus interest) will be made available to them from our estate and paid as noted above if the house is sold by the executor.

This agreement is written by us (Billie and Scott Martin) and is in effect and binding upon us (Billie and Scott Martin) only while either Bill Cadwell or Ruth Cadwell are both alive.

Billie Martin

Scott Martin

- [31] There is no evidence that Bill Cadwell ever saw the 2004 memorandum, or made any response to it. However, the evidence establishes that Ruth received the 2004 memorandum. She showed the 2004 memorandum to Shane, and discussed it with him at the time. She annotated the 2004 memorandum with various strikeouts, substitutions, and additions. She retained a copy of it.
- [32] Pursuant to Ruth's annotations, the money would remain payable whether the Cadwells survived the Martins or not. The money would be paid to their estate, in the event that the Cadwells predeceased the Martins. Her notes state that the money would be "left as investment to estate of Bill & Ruth Cadwell on their demise to be equally divided to their surviving children". All five of her children are then listed. She also added a note saying "any monies pd to William & Ruth Cadwell will be deducted from the [principal] amount. Interest to be calculated annually."
- [33] Shane testified that he discussed the 2004 memorandum with Ruth while his parents were still living in the rental accommodation, while the new house was under construction. Ruth was not happy with the proposed terms. He recalls seeing the 2004 memorandum in its original form and again a week or a month later, with Ruth's annotations.
- [34] However, there is no evidence that Ruth presented a revised version of the 2004 memorandum to the Martins, or discussed the altered terms with them. There is no evidence that Bill saw the 2004 memorandum. It appears that other than discussing it with Shane, Ruth kept the annotated 2004 memorandum to herself, at the time.
- [35] Leaving aside the disputed loan repayment schedule allegedly initialled by Bill Cadwell, there is no written agreement between the Cadwells and the Martins about the payment.

- [36] Shane testified that on an occasion after the Cadwells moved into the suite, there was an argument between the Cadwells and the Martins, which resulted in Bill Cadwell demanding that the money be repaid, and saying that he wanted to move out. According to Shane, the Martins refused to repay the money. Shane stated that Bill's health was poor and there was nothing the Cadwells could do, practically speaking, to obtain the money and move out. This episode was not put to the Martins in cross-examination.
- [37] In September 2006 the Cadwells prepared wills. They saw a lawyer, James Norquist. Mr. Norquist's file contains a copy of the 2004 memorandum with Ruth's annotations, and a copy of the bank draft of January 31, 2004 in the amount of \$170,000. Ruth's will includes a clause stating:
- [A]t the date of preparation of this my Last Will and Testament my daughter BILLIE LISA MARTIN and my son-in-law SCOTT MARTIN owe my said husband and I the sum of ONE HUNDRED AND SEVENTY THOUSAND (\$170,000.00) DOLLARS, together with interest at a reasonable bank rate as agreed, which was loaned to them to purchase their residence located at 24303 McClure Drive, Maple Ridge, British Columbia on or about the 31st day of January, 2004 (hereinafter referred to as the "Martin Loan");
- [38] The will goes on to direct that her executor and trustee, Shane, take whatever steps may be necessary to collect the Martin loan or any part of the Martin loan that remains outstanding as of the date of her death. The loan is directed to form part of the residue of the estate, to be distributed equally among her five children. Bill Cadwell's will contains essentially identical terms. In Bill's will, the residue of his estate went to Ruth.
- [39] Shane Cadwell was involved in the making of the wills. He accompanied his parents to the lawyer's office and was present when the wills were signed.
- [40] As Shane confirms in his evidence, in making the wills the Cadwells wanted to "protect their investment", as he put it. This evidence and the surrounding circumstances make it clear that this was so. Shane was well aware of the disagreement between his parents and the Martins about the payment.
- [41] The Martins were not made aware of the making of the wills, or the terms of the wills.
- [42] According to the Martins, in approximately October 2005, around the same time that the Cadwells moved into the suite, they agreed with the Cadwells that the loan would be repaid by notional rent payments of \$1,200 per month, to be applied against the principal loan amount, without interest, for as long as the Cadwells remained resident in the suite. I will refer to this as the "repayment agreement".
- [43] Scott Martin testified that he prepared a four-page schedule showing how the \$1,200 per month would be applied against the principal of the loan, resulting in the loan being paid off in May 2017.

- [44] According to the Martins, Bill Cadwell confirmed his agreement and that of Ruth to the repayment agreement in or about September 2005. Billie Martin testified that Bill confirmed the agreement by initialing each page of the repayment schedule. She says this occurred one day when Bill Cadwell was present in her home on Telep Avenue. She says that she initialled each page as well, as did her friend Kelly Jorgenson, who happened to be present at the time.
- [45] After Ruth's death in 2019, the Martins produced a photocopy of the repayment schedule, purportedly initialled by Billie Martin, William Cadwell, and Kelly Jorgenson. The original document has not been found. The Martins suggest that Bill Cadwell retained the original document. However, no such document nor any photocopy was ever seen by Shane or Nicole Cadwell until after this litigation commenced, nor, as I will explain, is there any reliable independent corroborating evidence that the document was prepared in 2005 and initialled by Bill Cadwell at that time. How the Martins made a photocopy of the document containing Bill Cadwell's purported initials is not in evidence.
- [46] The Cadwells did not pay any actual rent to the Martins at any time. Nor did the Cadwells contribute to the ownership expenses of the property, including such things as mortgage payments, property taxes, insurance, or utilities. The Martins made no actual payments to the Cadwells in relation to the \$170,000.

IV. Analysis

A. Nature of the Payment or Agreement

- [47] The plaintiff's Further Amended Notice of Civil Claim contends that the Cadwells entered into an agreement with the Martins to jointly invest in the property, including shared ownership, in exchange for the Cadwells paying \$170,000 as a down payment for the property.
- [48] The plaintiff also pleads that a resulting trust in the property was created in favour of the Cadwells. In the alternative, the plaintiff contends that the \$170,000 plus interest was a loan, to be repaid on the sale of the property or on the death of Bill and Ruth Cadwell.

1. Hearsay Evidence

- [49] Of necessity, in this case, I heard much hearsay evidence, concerning statements allegedly made by the Cadwells. All of this evidence went in without objection by either party and neither party made any submissions on the matter.
- [50] The admission of hearsay evidence in these circumstances was discussed by Justice Skolrood in a previous unsuccessful summary trial application brought by the plaintiff, indexed at 2020 BCSC 2091, at para. 35. There, Skolrood J. quoted extensively from the decision of Justice Voith in *Gutierrez v. Gutierrez*, 2015 BCSC 185 [Gutierrez], where Voith J. stated at paras. 30 to 34:

- [30] Hearsay evidence is presumptively inadmissible, and so the court must look first to the established exceptions to that rule, and then to the principles of necessity and reliability in order to determine whether the evidence should be admitted; *R. v. Khelawon*, 2006 SCC 57 at para. 42. Here, none of the established exceptions apply, and so the evidence proffered must meet the "twin criteria" of both necessity and reliability; *Khelawon* at paras. 2, 42.
- [31] Since Mr. Gutierrez is deceased, his direct evidence is no longer available to the court and so the requirement of necessity is met; *R. v. Blackman*, 2008 SCC 37 at para. 34.
- [32] In *Khelawon*, the Court addressed the need for threshold reliability and observed that "the central underlying concern is the inability to test hearsay evidence" and that a principled approach should be adopted in order to identify "those cases where this difficulty is sufficiently overcome to justify receiving the evidence"; at para. 61. The Court then identified two scenarios where this might be the case: where the truth and accuracy of the statement can still be sufficiently tested despite an inability to cross examine the declarant under oath in court, or where the circumstances are such that there is no concern about the trustworthiness of the statement; at paras. 62-63. The Court then noted:
- [92] When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not
- [33] Here, the Deceased did not leave a sworn or taped statement, nor were there early opportunities to cross examine him under oath, and so the first *Khelawon* circumstance, the presence of adequate substitutes, does not apply; *Khelawon* at para. 106. Turning to the second circumstance, inherent trustworthiness, I must consider whether there are "indicia of trustworthiness sufficient to displace the general exclusionary rule"; *Blackman* at para. 38.
- [34] A number of factors can be considered when assessing the threshold reliability of a hearsay statement, including:
- 1) the presence or absence of a motive to lie (*Blackman* at para. 42; *Khelawon* at para. 67);
 - 2) independent corroborative evidence that "goes to the trustworthiness of the statement" (*Blackman* at para. 55; *Khelawon* at para. 67; *R. v. Couture*, 2007 SCC 28 at para. 83);
 - 3) timing of the statement relevant to the event, contemporaneity (*Khelawon* at para. 67);
 - 4) the declarant's mental capacity at the time of making the statement (*Khelawon* at para. 107);

5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (Couture at para. 89; Khelawon at para. 86).

[51] The following comments by Justice Dardi in *Harshenin v. Khadikin*, 2015 BCSC 1213 are also helpful:

[32] Statements attributed to the deceased sometimes require consideration of the "principled approach" to hearsay. Four decisions of the Supreme Court of Canada guide the court's inquiry regarding the principled approach: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Starr*, 2000 SCC 40; and *R. v. Khelawon*, 2006 SCC 57. The admissibility of hearsay under the principled approach is summarized 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 if 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.

[33] The onus is on the party tendering the hearsay evidence to establish the necessity and reliability on a balance of probabilities. The court in this case must assess both the threshold reliability of the statement at issue and the statement's ultimate reliability having regard to the entirety of the evidence: *Khelawon* at para. 2.

[34] In this case, because the declarant is deceased, necessity is clearly established. That leaves for determination the issue of the reliability of the various statements attributed to the Deceased.

[35] A court is required to assess the reliability of a statement sought to be adduced by way of hearsay evidence by examining the circumstances under which that statement was made. A circumstantial guarantee of trustworthiness is established if the statement was made in circumstances which "substantially negate" the possibility that the declarant was untruthful or mistaken: *Smith* at 933.

[36] As a preliminary threshold issue, the court must first find on a balance of probabilities that the statement was made by the Deceased before it goes on to determine the treatment and weight of such evidence: *Creutz v. Estate of Kristian Winther*, 2007 BCSC 1463 at para. 99. In essence, this assessment turns on the credibility of the various witnesses: *Halfpenny v. Holien* (1997), 37 B.C.L.R. (3d) 186 (S.C.).

[52] As stated by Skolrood J. at para. 53, while the necessity requirement is no doubt met in the circumstances, the Court must still be satisfied as to the reliability of the evidence.

[53] As it seems the parties recognized, in the circumstances of this sort of case, attempting to analyze threshold reliability of each of the numerous statements separately is completely impracticable. As the evidence has been admitted without objection, and in the

circumstances of this case, threshold reliability is not in issue. In my view I must simply treat the hearsay evidence with considerable caution, recognizing its hearsay nature, and the self-serving motivations of the witnesses concerning the evidence. As I analyze the issues I must keep in mind the reliability of each particular item of hearsay evidence in the context of all of the circumstances.

2. Equity Investment

- [54] As noted, the plaintiff pleads that there was an actual agreement between the Cadwells and the Martins whereby they would "jointly invest" in the property, with the Cadwells paying the "\$170,000 down payment on the property".
- [55] In the context of the payment, I will sometimes refer to the Cadwells and Martins collectively as the "parties", by which I mean being parties to the payment, as distinct from parties to this action.
- [56] At trial, the plaintiff primarily asserts a proprietary interest in the property based on a resulting trust. This makes sense. On the evidence, the plaintiff cannot establish an actual agreement for a joint investment, or in other words, for joint beneficial ownership of the property.
- [57] What emerges from the evidence is that, when the payment was made, there was no real consensus as to the terms of any agreement about it. The parties likely had their own subjective views or expectations about the terms, but they put off actual discussions or negotiations. Later in the same year, in November 2004, the Martins presented the 2004 memorandum to, at least, Ruth, who disagreed with the proposed terms, but did not discuss the terms with the Martins, or present a counter-proposal to them.
- [58] I accept that, as admitted, the payment was used by the Martins as part of the purchase price for the property. Clearly the Cadwells understood this. Standing alone, this fact does not assist me very much with determining any joint intentions or agreement of the parties. I can speculate that the decision was made hurriedly, but reliable evidence about the details of the discussion is lacking. The parties were content to sort out the terms of their agreement at a later time. In the context of a close, trusting family relationship, this is not surprising. The parties had had significant, amicable financial dealings in the past. Before the Martins bought their own home on Telep Avenue in or about 1997, they had resided in the Cadwells' home on 236 Street for several years. The Cadwells charged rent that was well below the going market rate. When, during that time, Bill Cadwell had financial trouble and was sued by a contractor, the Martins lent him \$40,000 to resolve his difficulties, which was never formally repaid, except in kind. The Martins did not demand actual repayment.
- [59] The plaintiff relies heavily on evidence that Ruth Cadwell often referred to the payment as an "investment."

- [60] In my view, no specific or technical meaning can be inferred by Ruth's choice of this word. In ordinary usage, the word "investment" is not inconsistent with a debt obligation, as in the case of any person who holds investments such as guaranteed investment certificates or bonds. The evidence indicates that Ruth also referred to the payment as a "loan" at times. Notably, Ruth used the word "investment" in her notes on the 2004 memorandum, but her notes also support that she considered the payment a loan. For example, she added the words "any monies pd to William & Ruth Cadwell will be deducted from the [principal] amount", and "Interest to be calculated annually."
- [61] The Cadwells knew they were not going to be registered on title. They both had some business experience. They had owned property themselves, and they knew what a title was. They could have insisted on a shared title. Short of that, they could have insisted on an agreement for a beneficial interest. But the evidence does not support that the parties agreed to an equity investment.
- [62] The fact that both the Cadwells and Martins contemplated interest being paid is not consistent with an equity investment. Had an equity investment been intended, one would expect that instead of discussing interest, the parties would have discussed such things as proportionate ownership shares, sharing of expenses, or terms relating to disinvestment (for example, sale between the parties), or division of proceeds of sale. There is no evidence of any such discussions, and certainly no such agreement. As noted, the title was put into the names of the Martins alone shortly after the payment was made.
- [63] I conclude that the parties made no agreement for an equity investment by the Cadwells.

3. Resulting Trust

- [64] As stated above, the plaintiff pleads that the \$170,000 was used to purchase the property, creating a resulting trust in the property. Alternatively, the plaintiff contends that the \$170,000 was a loan, to be repaid on the sale of the property or on the death of Bill and Ruth Cadwell.
- [65] The concept of a purchase money resulting trust is explained in this way, in *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 [Nishi]:
- [1] A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution. This is called the presumption of resulting trust.

- [2] The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds at the time of the advance, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time.
- [66] In *Creyke v. Creyke*, 2016 BCCA 499 [Creyke], Justice Dickson, writing for the Court of Appeal, summarized as follows:
- [52] The presumption of resulting trust is engaged where an owner of property gratuitously transfers title to the property to another. The actual intention of the grantor is the governing consideration. However, where a gratuitous transfer is challenged the onus is on the transferee to demonstrate that a gift was intended. Unless the presumption is rebutted on a balance of probabilities, the transferee holds the property in trust for the grantor: *Pecore v. Pecore*, 2007 SCC 17 at paras. 24, 43-44.
- [53] The actual intention of the grantor is determined on the whole of the evidence. The presumption of resulting trust is simply a legal assumption the court will make if sufficient evidence on the point is not adduced. In many cases, persuasive and reliable evidence of the grantor's actual intention may be presented by the parties. The presumption of resulting trust will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities: *Pecore* at paras. 22-23, 44.
- [67] The Court in *Nishi* went on to criticize the trial judge in that case for distinguishing between intention to make a gift and intention to create a beneficial interest, but stated that the error was inconsequential (at para. 35). This is because:
- [37] In Canada, our jurisprudence is that there is no difference between the intention to make a gift and the intention that the transferor not hold a beneficial interest. In other words, in the case of a gratuitous transfer, there is a gift at law when the evidence demonstrates that, at the time of the transfer, the transferor intended the transferee to hold the beneficial interest in the property being purchased.
- [68] Therefore, based upon *Nishi*, if the transferor intended the transferee to hold the beneficial interest in the property being purchased, then there is, at law, a gift, at least as far as the legal or beneficial title to the property is concerned: see also *MacKinnon v. Donauer*, 2017 BCCA 437 at paras. 26-27 [MacKinnon].
- [69] In order for the presumption of resulting trust to arise, the transfer must have been gratuitous; that is, made for no consideration: *Pecore v. Pecore*, 2007 SCC 17 at para. 24 [Pecore]; *Bajwa v. Pannu*, 2007 BCCA 260 at para. 16; *MacKinnon*; see also *Styres v. Martin*, 2021 ONSC 1072 at paras. 80-88. The transferor "has the onus to show that the transfer was gratuitous, at which point the presumption of resulting trust takes effect", and the onus shifts to the transferee to prove that the transfer was intended as a gift: *M. Dhaliwal*

Holdings Inc. v. Pacific Blue Farms Ltd., 2014 BCSC 1482 at paras. 32-33. If the money was transferred as a loan to the party who holds title, the relationship between the parties is that of creditor-debtor, and resulting trusts do not apply: Bostrom v. Bigford, 2019 BCSC 79 at para. 93; Swanstrom v. Wuest, 2018 BCSC 2299 at para. 45; see also Dhaliwal v. Ollek, 2010 BCSC 1524 at para. 184.

- [70] Where a gratuitous transfer is being challenged, it is the actual intention of the transferor at the time of the transfer that is the "governing consideration": Creyke at para. 52; Kerr v. Baranow, 2011 SCC 10 at para. 18 [Kerr] citing Pecore. The Court in Pecore set out at paras. 55-59 principles with respect to the evidence courts may consider in determining the intention of the transferor, which I have considered in my analysis.
- [71] In my view, no purchase money resulting trust was created. The presumption has no application. The transfer was not gratuitous. The Cadwells did not intend to receive a beneficial interest in the property. In my view, the evidence indicates that the Cadwells viewed the payment as a loan when the \$170,000 was transferred.
- [72] In addition, beyond the fact that a loan was intended, the other evidence supports the conclusion that the payment was not gratuitous.
- [73] The Cadwells knew that there would be a cost to constructing the suite, and more broadly, reconfiguring the home to accommodate the suite, by building the storage area.
- [74] Shane Cadwell testified that his parents initially said they were going to be paying \$35,000-\$50,000 for the basement suite. Later, Ruth told him that the Martins needed \$170,000 in order to buy the lot.
- [75] Nicole was in Florida at the time, but spoke with her parents on the telephone. She thought the initial arrangement was for her parents to pay \$70,000 "to build the basement suite". But, she says, the deal changed and her parents were asked to pay \$170,000 for the lot.
- [76] As noted, the evidence of the Martins is that the payment was a loan. But they also say that the additional cost of building the suite exceeded \$120,000. This figure seems surprisingly high, especially in view of the fact that the contractual purchase price of the house, including the lot, was \$454,900 plus GST. However, I accept that some significant cost must have been involved to construct the suite.
- [77] I accept the evidence of the Martins that Bill Cadwell did not want to make any payments or have any financial obligations with respect to the suite. I find as well that Bill Cadwell was well aware that he was unlikely to live very long, and that Ruth would need a place to live. He wanted Ruth to live with and be looked after as needed by Billie. Therefore in exchange for the payment, the Cadwells were going to be permitted to remain in the suite, free of charge, for at least some period of time. Moreover, it was a family arrangement, where the Cadwells and the Martins would also expect to enjoy each others' company, and in addition the Cadwells would be able to rely on the Martins, particularly Billie, for help as needed.

[78] On the evidence, the Cadwells did not expect to have an ownership interest in the property. They expected to receive the foregoing benefits, and to receive repayment of their money, with interest. The arrangement was for mutual, reciprocal benefits.

B. Unjust Enrichment

[79] The plaintiff argues in the alternative that if there was no resulting trust in favour of the Cadwells, and no agreement for a loan, then the estate should succeed on a claim of unjust enrichment, with a remedy of a constructive trust over a share of the property, or a monetary award.

[80] The plaintiff argues that the Cadwells contributed \$170,000 of the purchase price of the home, asserted to have been \$454,900. The plaintiff argues that this was 37.4% of the value of the home at the time, and therefore, the estate should be granted a 37.4% share of the property. Based upon the recent BC Assessment valuation of the property at \$1,123,000, the plaintiff submits that the approximate current value of the Cadwells' "investment" would be \$420,000.

1. Legal Principles

[81] The basic elements of a claim in unjust enrichment were summarized in *Harraway v. Harraway*, 2009 BCCA 561 [Harraway], as follows:

[14] Unjust enrichment has three elements: see *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30 [Garland]:

1. An enrichment of the defendant;
2. A corresponding deprivation of the plaintiff; and
3. An absence of juristic reason for the enrichment.

(See also *Kerr* at para. 32.)

[82] The concept of "juristic reason" was refined by the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 44 to 46, as follows:

[44] First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories that can constitute juristic reasons include a contract (*Pettkus*, supra), a disposition of law (*Pettkus*, supra), a donative intent (*Peter*, supra), and other valid common law, equitable or statutory obligations (*Peter*, supra). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[45] The prima facie case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

[46] As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations.

[83] The analysis was summarized in *Wilson v. Fotsch*, 2010 BCCA 226 [Wilson] at para. 11:

[11] The basic outline for that analysis can be summarized this way:

1. Benefit/Enrichment
2. Detriment
3. Absence of a juristic reason for the enrichment
 - a. Established categories
 - i. Contract
 - ii. Disposition of law
 - iii. Donative intent
 - iv. Other valid common law, equitable, or statutory obligations
 - b. Reason to deny recovery
 - i. Public policy considerations
 - ii. Legitimate expectations
 - iii. Potential new category

Defences

Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible

Choice of Remedy

- a. Is a monetary remedy sufficient?
- b. Is a constructive trust required (or equitable damages for the value of the trust interest)?

Quantification of the Remedy

- a. Value received (quantum meruit basis)

- b. Value survived (proportionate share basis)

Set-Off (equitable and legal)

Pre-judgment interest

2. Discussion

[84] In my view the claim in unjust enrichment must fail. The existence of a loan agreement provides a juristic reason. In addition, while there was an enrichment and corresponding deprivation at the outset, when the payment was made, over time and as events unfolded, these disappeared. Even without the Martins' loan obligations, the Cadwells received good value for the payment they made, over the course of time.

a) Enrichment and Deprivation

[85] As noted, the Martins acknowledge that the sum of \$170,000 was used to purchase the property. I accept the evidence of Scott Martin that the money simply went into the joint bank account of the Martins, and was used, together with the Martins' own money, as well as mortgage proceeds, to fund the purchase.

[86] However, the plaintiff overstates the benefit the Martins received from the payment.

[87] The plaintiff argues that the benefit to the Martins equates to a proportion of the current value of the property. I do not accept this. The Martins had already agreed to purchase the property, prior to the Cadwells approaching them to suggest that a basement suite be built for their use. The Martins already had a home, with equity, and had arranged mortgage financing. They also had some savings. While the contribution from the Cadwells undoubtedly helped, I accept the evidence of the Martins that they could have and would have purchased the property without any financial assistance from the Cadwells. The Martins have paid the costs of owning a home throughout, including the taxes, utilities, and maintenance costs. Accordingly, they would have enjoyed the benefit of the increase in value of the property without the payment the Cadwells made.

[88] The actual purchase price of the property, including the cost of construction of the suite, was significantly more than the originally contracted purchase price of \$454,900. That amount did not include GST, which was payable. In addition, the final price included some upgrades that the Martins asked for during the course of construction, as well as the cost of construction of the suite and storage area. The actual total purchase price is not in evidence.

[89] The plaintiff argues that the construction cost for the suite should not factor into the analysis because the suite enhances the current value of the property. While this could possibly be true, there is no actual evidence to support this argument. It is no more than speculative. Whether the suite actually adds to the value of the home presently would likely require appraisal evidence.

- [90] In return for the payment, the Martins agreed to construct the suite and to allow the Cadwells to reside there at no cost to the Cadwells. Initially Bill and Ruth, and then Ruth, remained in the suite rent-free for more than 13 years, from October 2005 until Ruth's death on April 3, 2019. This is a total of about 162 months. At trial, Shane Cadwell suggested that the current rental value of the suite could be in the range of \$1,500 per month. While this is not admissible as an opinion, it confirms the common-sense inference that the free rent was valuable. For example, even if the rental value was only \$1,000 per month, the total value would be \$162,000. The Cadwells also received other incidental financial benefits, such as the value of groceries and meals.
- [91] Nicole returned from the United States in June 2008. For about a year, from June 2008 until June 2009, Nicole and her children also resided in the suite, after Bill passed away. I infer that she was a guest of her mother's and did not pay rent.
- [92] In addition, I infer that the Martins understood that they would have some responsibility for helping the Cadwells as needed, and that this was an important part of the bargain for the Cadwells. Indeed, this was very likely the primary motivation for the Cadwells suggesting the arrangement in the first place.
- [93] At the time of the payment, the Cadwells looked primarily to Billie Martin for personal help to them. Their elder daughters, Laureen and Pamela, were not involved in their care. Nicole was residing in the United States. Although Shane Cadwell was also building a home, with a basement, the Cadwells did not ask him to build a suite for them.
- [94] I accept the evidence of Billie Martin that her parents relied heavily on her over the years. She did the grocery shopping, took them to their medical appointments, prepared meals, walked her mother's dog, and paid for groceries. I accept Billie's evidence that her mother's needs increased over time (as one might expect, with advancing age and declining health), and that over the last five years of Ruth's life, Ruth needed a lot of help. I accept Nicole's evidence that she also often helped Ruth, including cleaning the suite. But of course, Billie was on-site. There were times when Ruth and Billie were not getting along. But overall, among the siblings, Billie provided by far the most personal care for her parents.
- [95] The Martins also put up with Ruth's heavy cigarette smoking, including Ruth's smoking in the suite, which they objected to. Ruth refused to stop smoking in the suite. Her position was that the Martins knew she was smoker when she moved into the suite.
- [96] As noted, the evidence of Nicole Cadwell and Billie Martin shows that Bill Cadwell knew that he was dying from cancer at the time the payment was made. He wanted Ruth to be able to remain in the property, and to be cared for by their daughter Billie, in particular. This was part of the bargain the parties struck. The Cadwells in fact received this benefit.
- b) Absence of juristic reason for the enrichment

- [97] A juristic reason is easily established in this case. On the evidence as a whole, the parties agreed to a loan, as the basic nature of the transaction. There were clearly other terms of the parties' bargain as well, including that the suite would be constructed for the Cadwells to reside in without payment of rent.
- [98] The position of the Martins is that the transaction was a loan. The limited available and reliable evidence on the part of the Cadwells accords with this. Although the 2004 memorandum prepared by the Martins is somewhat ambiguous about the nature of the payment, it provides for repayment with interest, in certain circumstances. Ruth's annotations clearly contemplate a loan obligation. The wills prepared by the Cadwells are crystal clear in asserting that the transaction was a loan, and that it was then owed, with interest. In making the wills, the Cadwells had independent legal advice.
- [99] In summary, I conclude that the Martins have established a juristic reason for the enrichment, if any, in that there was a contract for a loan.
- c) Reason to deny recovery - legitimate expectations
- [100] If I am wrong in concluding that the Martins have established a juristic reason, in the form of the loan, I would find that there is a reason to deny recovery based upon the legitimate expectations of the parties.
- [101] This may be addressed from the perspective of what the parties objectively could have reasonably expected in light of all the circumstances when they entered into the "family arrangement" in this case: MacKinnon at para. 46.
- [102] Although the context is somewhat different, the comments of Justice Huddart in Wilson are applicable here. At para. 3, Huddart J.A. notes that where a cross-claim for unjust enrichment is not specifically pleaded, such a claim may be implicit. In this case, the plaintiff argues that the defendants have not counterclaimed for unjust enrichment. Nevertheless, in my view, the provision of mutual benefits must be considered in this case within the unjust enrichment analysis.
- [103] Justice Huddart went on to say:
- [9] My review of the authorities persuades me that courts have found ways to off-set reciprocal enrichments for many years with unpredictable and at times inconsistent results. In my view, the proper approach to reciprocal benefits can be found in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, where the Supreme Court explained that mutual enrichments should be considered at the juristic reason stage for the limited purpose of assessing the parties' legitimate expectations; otherwise, they should be considered at the remedy stage. Jurisprudence predating *Garland*, including past decisions of this Court such as *Toth v. de Frias* (1996), 78 B.C.A.C. 34 (C.A.), must be approached cautiously in view of its conclusions.

- [104] As I have already said, even without repayment of the loan, the Cadwells received good value for their payment. A reasonable expectation for the Cadwells at the time of entering into the bargain would have been that they would be permitted to reside in the suite rent free, for as long as they wished, or for their natural lives, unless the loan or some residual portion was repaid.
- [105] Conversely, if at the outset the Cadwells had understood that they would receive free rent and receive the other benefits they in fact received as a result of the payment, for the balance of their lives, which turned out to be more than 13 years in Ruth's case, they could not have reasonably and legitimately expected to receive, in addition, the return of their entire payment, with interest.
- [106] The plaintiff relies on Harraway. In that case, the court held that the evidence was insufficient to establish a valid and enforceable contract for a loan. In the absence of a valid and enforceable contract, a prima facie case of unjust enrichment was made out, because there was no juristic reason to justify the enrichment: at para. 47.
- [107] Harraway is not applicable here. The plaintiff does not argue that the loan agreement was not enforceable. In my view, the parties intended and entered into an enforceable loan agreement. No specific terms for repayment were entered into. As a demand loan, none were required. No agreement for interest was required, although there seems to have been a consensus between the parties that interest would be paid. The 2004 memorandum refers to "reasonable bank rate interest". Ruth Cadwell's notes did not amend that part of the 2004 memorandum. She added "interest to be calculated annually". The Cadwells' wills referred to interest at a "reasonable bank rate as agreed".
- [108] Accordingly, I conclude that the plaintiff has not established the basis for an award in unjust enrichment.

C. Loan Agreement

- [109] The plaintiff's further alternative argument is that the Cadwells made a loan of \$170,000, which was never repaid. In addition to the repayment schedule, the Martins rely on a memorandum from them to the Cadwells dated December 5, 2006 (the "December 2006 memorandum") that they say supports the repayment agreement.
1. Was the loan repaid?
- [110] As stated above, I find that the Cadwells intended the payment to be a loan, and that the parties agreed it was such. The issue is whether the Martins have established the repayment agreement they assert. I am not persuaded that the Cadwells ever made any such agreement. I also conclude that the repayment schedule and the December 2006 memorandum are indeed forgeries.

- [111] I note that the 2004 memorandum makes no reference to payments of rent, actual or notional. The Martins contend that the repayment agreement was made later, in 2005. This is not consistent with the 2004 memorandum, but I recognize that the parties could have made a different agreement later on.
- [112] Billie Martin testified that discussions and the agreement for payment of notional rent occurred in or about September 2005, just before the parties moved into the newly constructed residence. She testified that she, her father, and her friend Kelly Jorgenson initialled the repayment schedule, as evidence of the repayment agreement, at the Martins' Telep Avenue residence. Scott Martin says that he prepared the repayment schedule. Neither of the Martins provided any details as to the discussions that led to the making of the alleged repayment agreement.
- [113] There is no evidence that Ruth ever saw the repayment schedule. She never told Shane or Nicole that there was a rental agreement. Their evidence about her statements about the "investment" are all inconsistent with the existence of the asserted repayment agreement.
- [114] On its face, the repayment schedule is difficult to accept as evidence of an actual agreement. If the parties were intending to document an agreement to repay the loan, it would be reasonable to expect some agreement signed by the parties that says so. One would expect signatures of both of the Cadwells. Bill Cadwell was not expected to survive, yet only he initialled the document, supposedly binding Ruth, but there is no evidence Ruth saw or approved of the agreement, or was even aware of it. The evidence indicates that Bill and Ruth kept their finances separate, for the most part. Oddly, there is only the repayment schedule, which the Martins assert was initialled, but not signed, and by Bill Cadwell only, in Ruth's absence. There is no explanation for the fact that Ruth did not sign or initial any document.
- [115] The document shows notional rent payments of \$1,200 per month being deducted from the starting balance of \$170,000, on October 1, 2005, and ending May 1, 2017. It does not say that it is a contract or agreement. Rather than being signed, each page purportedly shows the initials of the three persons involved, Billie Martin, Bill Cadwell, and Kelly Jorgenson. It makes no sense that the parties would take the trouble to initial the document, but not sign it, unless it was only intended as a schedule or addendum to some other document, of which there is no suggestion.
- [116] The repayment agreement and the schedule are inconsistent with the wills signed by the Cadwells in September 2006. If Bill or Ruth Cadwell had made such an agreement, or if they retained documents relating to such an agreement, they would have advised their solicitor James Norquist of same. Both wills state that as of the date the wills were prepared, the Martins owed the sum of \$170,000, plus interest. The solicitor's file and notes make no reference to any repayment agreement.

- [117] It is inconceivable that the Cadwells, or even just Bill Cadwell, could make such an agreement, and sign or initial the schedule, but not tell Shane about it. Shane was aware of the dispute between the Cadwells and Martins in 2004, when he discussed the 2004 memorandum with Ruth, and took his parents to see the solicitor in 2006, in part to address the matter of the loan.
- [118] According to the Martins, Bill Cadwell kept the original version of the repayment schedule. They have produced a photocopy only. If Bill Cadwell had initialled the document and retained it, it is likely that he would have told Ruth about it, and that the document would have been kept by the Cadwells. They would have provided it to their solicitor in 2006. No original version has been located, and there is no evidence of any copy other than the one the Martins recently produced.
- [119] In 2012 or 2013, Ruth provided Shane with a metal box containing some documents that she felt he might need in the future as her executor. The box contained her will, Bill's will, the 2004 memorandum with Ruth's annotations, and the evidence about the initial payment; that is, a copy of the bank draft and bank transaction record. These documents are in evidence at trial. However, the repayment schedule was not provided to Shane Cadwell. The copy of the repayment schedule and the December 2006 memorandum the Martins rely on did not surface until after this litigation commenced. I conclude that the reason Shane Cadwell never saw the repayment schedule until after the litigation commenced is that it did not exist until very recently.
- [120] The matter of Ruth's "investment" or loan was the topic of frequent arguments among Shane and Nicole Cadwell and the Martins, prior to Ruth's death in 2019. A text message from Billie Martin to Shane Cadwell on March 1, 2019 is consistent with this. It states:
- We are not trying to steal her investment so don't lecture me about that All you want to do is throw her investment in my face.
- [121] Had there been a repayment agreement, the Martins would simply have told Shane Cadwell that the loan had been repaid, in accordance with the repayment agreement.
- [122] I accept the evidence of Shane Cadwell that Billie Martin said to her mother a number of times over the years that the Martins were not trying to steal her "investment" and that her "investment" was safe.
- [123] At various times, Ruth asked Billie for return of her money, so that she could live elsewhere. With Nicole's assistance, Ruth surreptitiously recorded a conversation between herself and Billie Martin. A recording of the conversation and a prepared transcript are in evidence. Although Billie Martin testified that the conversation occurred in 2019, shortly before Ruth died, I prefer the evidence of Nicole Cadwell, and other circumstantial evidence about the recording, indicating that it was made in October 2014. In the conversation, Ruth asked for repayment of some of the money.

[124] In response, Billie stated:

I didn't sign a contract with a timetable, and I didn't have someone saying, now you have to go to the bank and give all the money back.

[125] Billie Martin's comments in this conversation and in the other conversations she had with Ruth about the loan are inconsistent with the existence of the alleged repayment agreement.

[126] In addition, there is compelling evidence that the repayment schedule is a forgery.

[127] An expert in computer fonts, Thomas Phinney, states that the repayment schedule is typed in 11 point Calibri font, which did not reach public use until January 2007, when Microsoft released this font with Windows Vista and Office 2007. In addition to the font issue, he states that the formatting of the document is consistent with the defaults of Microsoft Word 2007, but not with previous versions of Word. The particular style of Calibri numbers used in the document would only have been accessible to people using more advanced applications than Word, such as Adobe InDesign, and only if that person went out of his or her way to change the font styling in multiple ways, coincidentally matching a version of Word that was not available at that time. Mr. Phinney states unequivocally that the document could not have been created by anybody who was not a user of a publishing program such as InDesign. Mr. Phinney's opinions are unchallenged.

[128] At trial, Scott Martin testified that at the relevant time he used software that was not commercially available, and that he was a member of a Microsoft development network group, which allowed him to download text fonts not yet released. In summary, he testified that he had the technological expertise and ability to download and use the relevant Calibri font at the material time.

[129] However, his evidence in this regard is inconsistent with his evidence on examination for discovery, which he gave prior to seeing the Phinney report. There, he denied ever downloading any fonts, to his knowledge. He testified that he created the document using Excel, Microsoft's spreadsheet program.

[130] Mr. Martin has not adduced evidence that he was a user of publishing programs such as InDesign at the relevant time.

[131] The photocopy of the payment schedule was forensically examined by a qualified document examiner, Ms. Brenda Petty. Ms. Petty examined Bill Cadwell's purported initials on the repayment schedule as against his multiple signatures on his will made September 21, 2006. She concludes that the initials on the repayment schedule are not genuine and were not written by the hand of Bill Cadwell. Although Ms. Petty had only one document to work with (the will) and the repayment schedule includes only the initials of Mr. Cadwell, nonetheless, her opinion is persuasive and I accept it. The opinion is unchallenged.

- [132] Ms. Petty also notes that the document was prepared using the Calibri font, which was not available to the public until January 30, 2007. She supports the opinion of Mr. Phinney. She says that creating the document in 2005 would have required a special program downloaded by a technically savvy individual. In my view this description does not apply to Mr. Martin.
- [133] In an affidavit sworn after his examination for discovery, Mr. Martin states that he downloaded early versions of operating systems and programs that were not commercially available, and this is why he may have had a font on his computer that was not available to the general public in 2005. This scenario is refuted by another expert opinion adduced by the plaintiff, that of Francois Cleroux, an expert in Microsoft software. Mr. Cleroux states that Mr. Martin's affidavit evidence in which he explains how he could have had the Microsoft Calibri font installed on his computer that was not yet available to the general public cannot be correct. This opinion is also unchallenged.
- [134] At trial, for the first time, Mr. Martin contends that he created the document on a basic word processing program built into the Windows operating system, called WordPad. It makes no sense that a person who claims to be a sophisticated computer user would create a document in this way, and this is inconsistent with his examination for discovery evidence that he used Excel.
- [135] In summary, and in all of the circumstances, I reach the irresistible conclusion that the repayment schedule is indeed a forgery, created by Mr. Martin recently, for the purpose of responding to the plaintiff's claims. In my view, it represents the agreement that the Martins wish they had made with the Cadwells, but did not make.
- [136] Billie Martin's best friend, Kelly Jorgenson, testified that she initialled the repayment schedule at the Telep Avenue home, and that Bill Cadwell initialled the document at the same time. She was unable to say when she initialled the document, but recalled that she did so while the Martins were still residing at the Telep Avenue residence. She was present by happenstance, and agreed to initial the document. Although Ms. Jorgenson seemed to me to be a pleasant and sincere witness, her evidence is impossible to reconcile with my firm conclusion that the document is a forgery, and that no such agreement was made. I observe that Ms. Jorgenson was testifying about events that allegedly occurred more than 15 years ago, and which would have had minimal significance to her at the time. I have noted previously the lack of any signifiers of formality in relation to the document. I conclude that Ms. Jorgenson is definitely wrong about having witnessed Bill Cadwell initial the document.
- [137] The eldest Cadwell sibling, Laureen, testified that on an occasion when she came to visit her parents after they moved into the suite, she had a discussion with her mother about these financial arrangements with the Martins. According to Laureen, her mother said that the Cadwells had lent money to the Martins, and that each month money would be deducted from the loan as rent. Laureen was not told the amount of the loan. Her father

told her later that he knew he was dying of cancer, and he needed a safe place for Ruth to live. Laureen had no further discussions with the Cadwells over the ensuing years about these financial arrangements.

- [138] Laureen was unspecific about when exactly the conversation with her mother occurred. In examination in chief, she testified that the conversation took place in the suite. In cross-examination, she testified that the conversation may have taken place at an earlier time, when the Cadwells were still living in a rental apartment, before they moved into the suite.
- [139] Laureen's recollection about this conversation with her mother is vague. It was a single conversation, many years ago, which had minimal significance at the time. It was not memorialized in any way. There was a degree of advocacy in Laureen's testimony on this topic. I am unable to place any weight on this part of her testimony.
- [140] Both Ms. Jorgenson and Laureen have reasons to favour the Martins in this dispute. Ms. Jorgenson is best friends with Billie, who has told her that the Martins could lose their house if they lose this case. Laureen has a good relationship with the Martins, but not with her other siblings.
- [141] Most importantly, the evidence of Kelly Jorgenson and Laureen is impossible to reconcile with my overall conclusions about the repayment agreement and the repayment schedule.
- [142] In summary, I reject the contention of the Martins that there was an agreement between themselves and the Cadwells for repayment of the loan by way of notional rent payments. Moreover, I conclude that the repayment schedule is a forgery. I reject the testimony of the Martins about it, and find that their testimony on this topic was deliberately false, and an attempt to mislead the Court.

2. Limitation of Action

- [143] The defendants contend that the loan was a demand loan, meaning that it was payable upon demand, and demand could have been made at any time after the loan funds were advanced on January 31, 2004.
- [144] The plaintiff argues that as long as Ruth lived in the residence, there was no cause of action. The plaintiff argues that the limitation period only began to run when Ruth Cadwell lost the use of the property through her death, and when the estate made demand on the defendants for payment of the loan, and the defendants denied the debt. The plaintiff denies that the loan was a demand loan.
- [145] I accept that the loan was a demand loan, not a contingent loan. It was not payable on a future date, or upon the occurrence of a specified event: *Kong v. Saunders*, 2014 BCCA 508 [Kong] at para. 18. There is no evidence that the loan was contingent.

- [146] On this point, the position of Shane Cadwell as plaintiff is not consistent with his own evidence. He testified that he supported Ruth's repeated demands for repayment of the money. He would regularly tell Billie that their mother wanted her money, so that she could move out of the suite. At trial he conceded that he was not aware of any preconditions that would prevent the Cadwells from claiming repayment of the money.
- [147] There is ample evidence that Ruth Cadwell believed the loan was payable at all times.
- [148] Shane and Nicole both testified that Ruth repeatedly demanded payment of some or all of the money on numerous occasions over the years. This evidence is also supported by the testimony of Norma Allen, Ruth's long time friend, who testified that Ruth believed she was owed \$170,000, that she had said that she was unable to get her money back despite asking Billie Martin for it, and that not getting repaid prevented her from moving out of the basement suite.
- [149] The Cadwells' wills reflect their view that the loan was due and owing at that time, in September 2006. The wills allowed for the possibility that the loan or a part thereof could be repaid at some point in time. The wills do not reflect any condition or contingency. The 2004 memorandum suggests possible contingent terms, but was after the fact, and never agreed to.
- [150] The present Limitation Act, S.B.C. 2012, c. 13, came into force June 1, 2013. On the basis of s. 30 of the present Limitation Act, the former Limitation Act, R.S.B.C. 1996, c. 266, applies to this claim.
- [151] Because the former Limitation Act applies, and because the loan was a demand loan, the limitation period began to run on the day the loan was made. The six-year limitation period under the former Act applies: *Kong*, paras. 17, 20, 24, 36. Accordingly, subject to extension, the cause of action for enforcement of the loan was statute barred as of January 31, 2010.
- [152] Section 5(1) of the former Limitation Act provides for an extension of the limitation period where the person against whom an action lies confirms the cause of action before the expiration of the limitation period. Confirmation occurs if the person acknowledges the cause of action or makes a payment in respect of the cause of action. However, under s. 5(5), an acknowledgement must be in writing and signed by the maker. In this case there is no evidence of a written acknowledgement from the Martins that would serve to extend the limitation period.
- [153] Scott Martin's memorandum of December 15, 2006 does not extend the limitation period. It is unsigned. More importantly, it is not genuine. Like the repayment schedule, it was prepared recently, probably after these proceedings were commenced. Even if it were genuine, and signed, it would only extend the limitation period to December 15, 2012. These proceedings were commenced in 2019, following Ruth's death. There was no payment in respect of the cause of action that would serve to extend the limitation period.

[154] Accordingly, the plaintiff's claim is statute-barred.

3. Estoppel

[155] The plaintiff argues that the Martins are estopped from relying on the limitation defence. The plaintiff relies on Billie Martin's assurances to Ruth Martin that the "investment" was safe, her statements to Shane Cadwell that "we are not trying to steal her investment", and similar comments made to Nicole Cadwell. They rely on Billie Martin's failure to deny that the money was owing.

[156] Estoppel by representation was summarized in this way by the Supreme Court of Canada in *Ryan v. Moore*, 2005 SCC 38 [Ryan] at para. 5:

[5] Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132, at p. 164).

[157] A discussion of the principles applicable to an argument of estoppel in respect of a limitation defence is set out in the decision of Justice Pearlman in *Beavis v. Beavis*, 2014 BCSC 590 [Beavis], as follows:

[46] A party invoking promissory estoppel must establish that:

- (a) the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and be acted upon;
- (b) the representee has changed their legal position to their detriment in reliance on the representation.

See *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R.50.

[]

[48] There must be a clear and unequivocal representation intended by the maker to affect legal relations between the parties. For both estoppel by conduct and promissory estoppel, the underlying principle is that it would be unfair or unjust to allow the maker of the representation to resile from his words or conduct and to enforce strict legal rights: *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 (C.A.) at paras. 27-30.

[49] In *ML Plaza Holdings Ltd. v. Imperial Oil Limited*, 2006 BCSC 352, aff'd 2006 BCCA 564, leave to appeal to SCC refused 31849 (May 3, 2007), Madam Justice Boyd considered the application of the doctrine of promissory estoppel to a limitations defence at paras. 84-88:

[84] In my view, in the circumstances of this case, the plaintiff has not established that Imperial Oil is estopped from relying on any limitation defence due to the doctrine of promissory estoppel. In order to rely on such a doctrine a party must establish (a) that the other party

has, by words or conduct, made a promise or assurance which was intended to affect their legal relationships and be relied upon; and (b) that, in reliance on the promise or assurance not to rely on the limitation period defence, the representee failed to commence an action within the relevant limitation period. (See *Maracle v. Travellers Indemnity Co. of Canada*, (1991) 80 D.L.R. (4th) 652 (S.C.C.).

[85] Here, while there were ongoing discussions and negotiations wherein Imperial Oil repeatedly agreed to remediate the property to commercial standards, there is no evidence that Imperial Oil ever expressly or impliedly agreed to waive whatever limitation period might be applicable. There was a lengthy exchange of correspondence between Mr. Nabata and Mr. Downs in the fall and winter of 1995, in which Mr. Nabata objected to Imperial Oil proceeding with any remedial work. By way of letter dated November 16, 1995 Mr. Nabata advised that ML Plaza would only consent on certain terms, including Imperial Oil's agreement to provide ML Plaza with a "complete indemnity as to any costs or damages that it might suffer". Mr. Downs responded by letter dated February 28, 1996 in which he stated:

My client has agreed to delay the commencement of the work until next week in order to give your client ample time to commence legal proceedings if it so desires. Otherwise, my client will be commencing installation of the remediation system on the leased premises on or about March 7, 1996 and, if the consent of the tenants is obtained as aforesaid, on the lands offsite the leased premises.

Lastly, in order to ensure there is no misunderstanding between the parties, my client is not, by commencing the work, accepting the terms and conditions of your letter of November 16, 1995.

[86] In my view the correspondence which passed between the parties makes it clear that neither party had any intention of waiving any of their legal rights and that neither party did so in reliance on the other.

[87] To the extent that it can be said Imperial Oil's willingness to remediate the site amounts to an assurance relied upon by ML Plaza, I find that this assurance is entirely different to that required at law to establish promissory estoppel. This was an assurance of a willingness to remediate the site, not an assurance that it would not rely on any limitation defence.

[88] Here, Lee has admitted that he and Mr. Nabata discussed the possibility of suing Imperial Oil in 1995 but chose not to do so. There is no evidence that either Lee or Mr. Nabata relied on anything which Imperial Oil said or did, in holding off on the filing of a protective Writ.

[]

[51] These authorities establish that the doctrine of estoppel may be invoked by a plaintiff to prevent a defendant from relying upon a limitations defence. However, the plaintiff must still demonstrate that the requirements for an estoppel have been met if she is to rely upon the doctrine as an answer to Mr. Beavis' limitations defence.

[Emphasis Added.]

[158] In summary, the plaintiff must establish:

- a) That the Martins, by words or conduct, made a representation to Ruth Cadwell that was intended to be acted upon by her; and
- b) That Ruth Cadwell acted upon the representation in such a manner that it would be inequitable to allow the Martins to rely on the limitation defence.

[159] There must be a clear and unequivocal representation intended by the maker to affect legal relations between the parties: *Beavis* at para. 48.

[160] In the context of limitation of actions, the relevant promise or assurance occurs where a party promises or assures the other party, by words or conduct, that a limitation period defence will not be relied upon, intending that the other party rely on the promise or assurance, and the other party has, in reliance on that promise or assurance, failed to commence an action within the relevant limitation period: *ML Plaza Holdings Ltd. v. Imperial Oil Limited*, 2006 BCSC 352 at para. 84, *aff'd* 2006 BCCA 564, leave to appeal to SCC refused [2007] S.C.C.A. No. 56.

[161] Merely acknowledging that the obligation exists is insufficient. So, for example, in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, in the context of settlement discussions between an insured and an insurer, the Supreme Court of Canada stated:

An admission of liability is frequently made in the course of settlement negotiations. There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promisor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum.

[162] Billie Martin simply confirmed that the money or the "investment" was "safe" and that the Martins were "not trying to steal it". These sorts of generic assurances are insufficient to create an estoppel precluding reliance on a limitation defence.

[163] The evidence does not establish that Billie Martin made a promise or assurance intended to affect the parties' legal relationship in some way, and to be acted upon by Ruth, and in particular in relation to a limitation defence. Plainly, neither party discussed limitations, or, in all likelihood, were even aware of such things. But more broadly, the evidence does not establish that Ruth Cadwell relied upon such a promise or assurance by, for example, failing to commence an action within the relevant limitation period, or even by avoiding or postponing obtaining legal advice.

[164] In the result, the plaintiff has not established the basis for an estoppel preventing the Martins from relying upon the limitation defence.

4. Variation argument

[165] The plaintiff makes an argument related to his argument for estoppel based upon alleged variation of the loan agreement. Relying on *Rosas v. Toca*, 2018 BCCA 191 [Rosas], the plaintiff argues that Billie Martin's assurances that the "investment" was safe, and that the Martins were not trying to steal the "investment", amounted to agreements to vary the loan agreement, and had the effect of extending the applicable limitation period.

[166] However, in *Rosas*, the facts were quite different. A loan of \$600,000 was due to be repaid in one year. Each year, the borrower, Ms. Toca, came to the lender, Ms. Rosas, and said words to the effect of "I will pay you next year". Ms. Rosas always agreed to extend the term. The Court of Appeal held that these were mutual agreements to extend the term of the loan, and were enforceable without fresh consideration.

[167] The Court of Appeal articulated the issue in this way:

[49] Ms. Toca requested a number of extensions to the repayment date on the loan, on each occasion Ms. Rosas agreed and she forbore to pursue collection on the loan. If the extensions are enforceable they would obviate the limitations defence.

[168] The court held that the annual modifications extended the date on which payment was due by several years, and consequently delayed the running of the limitation period for that same time: *Rosas* at para. 186.

[169] In this case, the evidence does not support any submission that there were agreements to extend the term of the loan. It was not a term loan. The evidence does not support mutual agreements to create or extend a due date for payment, before which no action could be brought, as in *Rosas*.

V. Conclusion and Costs

[170] For the foregoing reasons, the plaintiff's claim is dismissed.

[171] The plaintiff claims special costs of the proceedings, based upon the forged repayment schedule as well as on the reliance by the Martins upon that document at trial, and their fabricated testimony about the alleged agreement.

[172] This is reprehensible conduct which would ordinarily merit an award of special costs. See for example: *Webber et al v. Cdn. Aviation Ins. Mgrs. Ltd.*, 2003 BCSC 274 at para. 14; *Hundley v. Garnier*, 2011 BCSC 1317 at para. 34.

[173] I summarized the principles applicable to an award of special costs in *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2020 BCSC 1089 at paras. 118-119.

[174] However, the plaintiff has been unsuccessful. The authorities in British Columbia hold that costs and in particular special costs cannot be awarded to an unsuccessful party, other than in highly exceptional cases involving matters of public importance: *Negus v. Yehia*, 2018 BCSC 2319 at para. 61 [Negus]; *aff'd* 2019 BCCA 307. *Negus* cited *Walker v. Brown*, 2013 BCSC

204; which in turn cited *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 30, and *Barclay (Guardian ad litem of) v. British Columbia (Attorney General)*, 2006 BCCA 434 at para. 22. This is not a highly exceptional case involving matters of public importance.

[175] The court has discretion to deny the successful party costs to which they would otherwise be entitled: *Allart Estate v. Allart*, 2016 BCSC 768 at paras. 10-14 [Allart].

[176] Conduct similar to that which justifies special costs against an unsuccessful party can justify depriving a successful party of costs: *Allart* at para. 14.

[177] Therefore, even though they are the successful party, I decline to order costs in favour of the Martins. There is no order as to costs.

"Verhoeven J."

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