

CANADA / JUDGMENT

De Angelis v. Siermy

2022 BCCA 401

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 401 De Angelis v. Siermy

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

De Angelis v. Siermy,

2022 BCCA 401

Date: 20221201

Docket: CA48059

Between:

Barbara De Angelis

Appellant

(Plaintiff)

And

Annie Siermy and J & A Properties Ltd.

Respondents

(Defendants)

And

456804 B.C. Ltd., Nick Kochan, Olga Kochan,

B.B.J. Holdings Ltd., Bill Kochan, and

John Does #1 through 20

Third Parties

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated
January 11, 2022 (Angelis v. Siermy, 2022 BCSC 31, Vancouver Docket S171068).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

September 16, 2022

Place and Date of Judgment:

Vancouver, British Columbia

December 1, 2022

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Justice Dickson

Summary:

The appellant appeals from an order dismissing her claims for breach of contract and unjust enrichment. She claims that her aunt, a respondent, is bound by a testamentary contract to leave the bulk of her estate to her, and breached that contract by changing her will in favour of others. The appellant contends the judge erred in not finding a binding contract by concluding the signatures on certain documents were not authentic and by making reasoning errors in his

assessment of credibility. She also contends that the judge erred in his analysis of her alternative claim of unjust enrichment against her aunt and her aunt's company. Held: Appeal dismissed. It was open to the judge to find the expert opinions on the authenticity of the documents to be inconclusive. The judge did not use circular reasoning in assessing the credibility of the respondent aunt, but tested her evidence against objective extraneous evidence. Finally, although the judge erred in finding the appellant was barred by the doctrine of clean hands from pursuing an unjust enrichment claim, the error was not a material one. The judge correctly applied the unjust enrichment framework and determined that there were juristic reasons for the enrichment of the respondents.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

- [1] The appellant Barbara De Angelis claims that her aunt, the respondent Annie Siermy, is bound by a testamentary contract to leave the bulk of her \$30 million estate to her, and breached that contract by changing her will in favour of others. The judge dismissed the appellant's claim for breach of contract and the alternative claim in unjust enrichment against her aunt and her company, the respondent J & A Properties Ltd. The appellant contends the judge made numerous errors in his reasoning which warrant setting aside the order below and recognition of her claims against the respondent.

Background

- [2] The parties belong to a family that has accumulated significant wealth through the acquisition of rental apartment buildings in Vancouver. It was the appellant's grandparents who set the family on this trajectory. The grandfather, Steve Kochan, arrived from Poland as an immigrant in 1925. After a stint in farming, he and his wife, Eva Kochan, began acquiring property. In the 1950s, they purchased three apartment buildings and two houses in Vancouver as well as properties in Burnaby, Parksville, and White Rock. Eventually they passed their holdings and development expertise on to their four surviving children, all of whom figure prominently in this dispute: the respondent, Annie Siermy, who is now in her late 80s; Mary Scott who is in her mid-80s; Bill Kochan, the father of the appellant, Barbara De Angelis, who is in his early 80s; and Nicholas Kochan, the youngest sibling, who is in his early 70s. From this point on, I will use first names for clarity and without intending any disrespect.
- [3] All four of Steve and Eva's children had a role in the family business. Annie, her husband Joe Siermy, who died in 2016, and Bill all played major roles while Mary and Nick had smaller ones. In the 1960s, Annie and Joe owned a property on Haro Street in Vancouver's West End and Bill owned an adjacent property. The two properties were combined and developed into an apartment block, and Vancouver Park Lane Towers Ltd. ("VPLT") was incorporated to hold the property. Joe, Annie, Bill and Nick each received 25% of the shares of VPLT. As a result, Joe and Annie together owned half of the company. Nick, who was only 18 at the time

of the share distribution and still in high school, received an equal share with Bill. This distribution is important to Barbara's contractual claim against Annie: she says Annie felt an obligation to make things right with Bill's family because Bill had given half of his interest in VPLT to Nick so that he could have a stake in the family business, while Annie and Joe had kept their half interest.

- [4] In 1992 the shares in VPLT were transferred to three holding companies so that income could be distributed in a more tax efficient manner. Annie and Joe incorporated the respondent J & A Properties Ltd. ("J & A"); Bill incorporated BBJ Holdings Ltd. ("BBJ") and carried out an estate freeze within BBJ as a result of which all growth in the value of the assets held by BBJ after 1992 will go to his daughters Barbara and Jill--valued at \$30 million as of the date of trial, with Barbara and Jill each entitled to \$15 million. Nick also incorporated a company to hold his 25% of VPLT. In addition to the VPLT shares, each of the holding companies owns one or two apartment buildings directly. At the time of trial, the value of the properties held by VPLT was estimated to be \$70 million.
- [5] The next generation too has played a role in the family business. Barbara was heavily involved in managing VPLT, a role that was formalized in 2011 when she became a salaried employee of the company.
- [6] Annie and Joe did not have any children. It is common ground that they had a strong bond with Barbara until the falling out in 2016 that led to this litigation. Beginning in the 1980s, Barbara helped with Annie and Joe's personal affairs, helped manage their health care and health-related issues, assisted with J & A's legal affairs and banking, and assisted with the 22-suite apartment building held by J & A on West 13th Avenue.
- [7] Barbara claims that, in exchange for these services, Annie agreed to leave the bulk of her estate to her ("the Legacy Agreement"). She says the agreement was formalized in 2002 when Annie executed estate documents leaving most of her estate to Barbara--an agreement Barbara says was confirmed in three letters written by Annie to explain to Joe why she had executed wills that did not leave her estate to him as she had in the past, described by the parties as the "Letters from the Grave".
- [8] Unbeknownst to Barbara, Annie changed her will in 2011 to leave most of her estate to Barbara's cousin Anne, the daughter of Annie's sister Mary. In 2015, Annie changed her will again, returning to the mirror wills she and Joe had in place for most of their marriage, with Anne as the residual beneficiary. It was not until just before Joe died in April 2016 that Barbara became aware that she was no longer Annie's beneficiary. When Joe disclosed this state of affairs to Barbara, she immediately confronted Annie, their relationship deteriorated, and this litigation ensued, fracturing the family that had until that point adopted as its motto "one for all and all for one."

At Trial

- [9] After concluding that the matter was suitable for resolution by way of summary trial--despite having taken a remarkable 19 days of court time--the judge turned to the Legacy Agreement. He had before him 15 binders of affidavit evidence and five binders of notices to admit and responses. At his request, Barbara and Annie were cross-examined on their affidavits. The parties also cross-examined the experts called to opine on the authenticity of the Letters from the Grave.
- [10] The judge began his analysis with an assessment of the parties' credibility, noting that Barbara's credibility was crucial to her claim because she was the only person to provide evidence in support of the Legacy Agreement: at para. 74(a). He found Barbara to be a defensive and argumentative witness under cross-examination, giving evidence that was contradicted by the documentary evidence and inconsistent with the evidence of two independent witnesses: the family accountant, Ted Kozub, and the lawyer who had drawn up the 2002 estate documents, Gordon MacRae. Although the judge found Annie to be a generally credible witness (at para. 77), he observed that her evidence too had its weaknesses. She had poor recollection, significant memory lapses, and remembered far more at trial than she had on examination for discovery: at para 75(b). The judge recognized that he was required to assess the credibility and reliability of these two parties in the context of the other evidence and the contemporary documentation.
- [11] The judge summarized Barbara's breach of testamentary contract claim at para. 88:
- a) Bill gave Nick a 25% interest in VPLT out of his share. Annie and Joe gave Nick nothing out of their share. Annie and Joe recognized that inequity and represented to Bill that they would leave a portion of their estates to him and/or his family to compensate him.
 - b) Based on Annie's representations, [Barbara] provided services to Annie and Joe, both on the business side and the personal side.
 - c) "From the 1980s onward", Annie affirmed her intention to leave the majority of her estate to [Barbara], both to balance out the inequity (of the transfer to Nick) and to compensate [Barbara] for many unpaid services (the Legacy Agreement).
 - d) The Legacy Agreement was "formalized" in 2002, through the drafting of an (revocable) alter ego trust which named [Barbara] as trustee and beneficiary.
 - e) The Legacy Agreement was common knowledge among [Barbara], Bill, Annie, and Joe.
 - f) Annie breached the Legacy Agreement in 2011 when she drafted a will leaving her estate to [Barbara]'s cousin Anne. She further breached the Legacy Agreement when, in 2015, she and Joe executed mirror wills (the "2015 Mirror Wills").
- [12] Other than the Letters from the Grave, the judge found no evidence to support the existence of the Legacy Agreement: at para. 230. First, he did not accept the starting premise that Annie was predisposed to leave her estate to Bill and his family in order to remedy an

inequity that had occurred when VPLT was incorporated: at para. 126. Instead, he found that when Annie, Joe, Bill and Nick each received 25% of the company, the siblings received their shares to some extent as family members, but Joe received his shares, not as "Annie's husband" but based on his efforts on behalf of the company. In particular, the judge found Joe had assumed the lead role in developing projects--a role further recognized in the grant of a life lease he and Annie received in the penthouse suite of an apartment block VPLT developed about six years after VPLT was incorporated as "payment for supervisory services rendered to the company": at paras. 118-121. The judge noted Joe was also named president of VPLT.

- [13] Second, the judge found that Annie's wills over the years did not reflect an intention to leave most of her estate to Barbara from the 1980s onward. To the contrary, until 1997, Annie and Joe had mirror wills leaving their estates to each other. Although in 1997 Annie made Bill her beneficiary--with Barbara and Annie's sister Mary as residual beneficiaries--the judge found that conduct reflected a testamentary, rather than contractual, intention: at paras. 141-146.
- [14] Third, the judge did not accept that the 2002 estate documents prepared by Mr. MacRae formalized the Legacy Agreement. He found instead that they effected an entirely reversible alter ego trust designed to sever Annie and Joe's joint tenancy in their VPLT shares--thereby addressing Annie's concern that if she died before Joe, the VPLT shares would all go to Joe and be lost to her side of the family. The judge noted that Barbara instructed Mr. MacRae at Annie's request, and that neither she nor Annie mentioned the existence of the Legacy Agreement to Mr. MacRae. The judge accepted Mr. MacRae's evidence that he told Annie, in Barbara's presence, that Annie could change her mind at any time, including changing the trustees, the beneficiary and the property in the trust. The judge also accepted Mr. Kozub's evidence that Barbara did not object when she heard this but, to the contrary, said she would do "whatever Annie wanted" and that she would step aside if Annie changed her mind. The judge found it significant that Barbara did not deny this conversation: at paras. 173-192.
- [15] Fourth, the judge found Barbara's conduct after 2002 was inconsistent with the existence of a Legacy Agreement to provide services to Annie and her company without remuneration: at paras. 205-206. In 2013, Barbara sought and entered into an employment relationship with VPLT, with her salary backdated to 2011. Barbara also sent instructions to the family law firm, Fasken Martineau DuMoulin, to provide advice on a rollout of VPLT assets to the holding companies of Annie, Bill and Nick. This course would have been inconsistent with the Legacy Agreement and the concept that Barbara was entitled to Annie's stake in VPLT: at paras. 211-214. Further, although Barbara discovered in March 2016 that she was no longer Annie's beneficiary, she did not raise the Legacy Agreement until a meeting of the family members and Mr. Kozub on December 21, 2016: at para. 222.
- [16] Finally, the judge turned to the Letters from the Grave, describing them as follows at para. 243:

- a) Letter from the Grave #1 is two pages, hand-written in Annie's distinctive, tidy hand. There is an initial part, and Annie's signature, followed by a two-paragraph post-script and second signature of Annie's. The defendants do not dispute that Annie wrote Letter from the Grave #1 or that it was designed to explain to Joe (after her death) her reasons for secretly diverging from their mirror wills. This letter does not mention or allude to a contract between Annie and Barbara. At best, it alludes to the fact that Annie had changed her will. Based on the text, Letter from the Grave #1 must have been written after 1997 and before 2015 (i.e., the period during which Annie's wills did not mirror Joe's). The letter does mention that Barbara and her husband have a lot of experience with the family business and "all us seniors" but does not go any further in addressing Barbara's contributions.
- b) Letter from the Grave #2 was typed on a typewriter on one page. The working theory of the parties is that the writer meant this letter to be a continuation (page 3) of Letter from the Grave #1. It is signed at the bottom in what appears to be Annie's signature. The size of the type is small, and the text takes up the entire width of the page. The text exists in one block and is not broken into paragraphs. The text of the letter specifically acknowledges that Annie had a verbal agreement to leave the bulk of Annie's estate to Barbara for helping to look after Annie and Joe's personal affairs and the companies. The letter goes through a number of examples of Barbara's work on behalf of the Siermys and VPLT.
- c) Letter from the Grave #3 is typed and signed in the same fashion as the second, although it is broken into two paragraphs with pagination suggesting it is a continuation of Letter from the Grave #2. The bulk of the letter continues with a long description of all of the services that Barbara has provided to Annie and Joe. In the bottom paragraph, the letter indicates that, given all the services provided by Barbara, "I have promised Barbara the bulk of my estate and all of your estate if you had predeceased me." I return to discuss this sentence below.

[Emphasis added.]

- [17] The judge concluded that the second and third letters describing Annie's agreement to leave her estate to Barbara had been written by Barbara, and that she had either forged Annie's signature on those documents or obtained Annie's signature surreptitiously: at para. 332.
- [18] Turning to the alternative equitable remedy of unjust enrichment, the judge found it must fail for two reasons. First, because Barbara did not have clean hands, having forged the Letters from the Grave; and second, because she could not meet that part of the test for unjust enrichment which required the absence of a juristic reason for the services she had provided to her aunt and uncle over the years. The judge found two juristic reasons. First, he found that Barbara had been compensated through the family companies for some of the services she provided, both by way of salary for managing VPLT, and through growth in the value of the VPLT shares which indirectly benefited her through her father's holding company and the estate freeze; and second, he found that Barbara had provided the personal services to her aunt and uncle with a donative intent.

[19] The respondents commenced third party proceedings against related family companies. Those claims were settled before trial.

On Appeal

[20] The appellant contends the judge:

1. Failed to find a binding Legacy Agreement because he (a) erred in finding the Letters from the Grave were not authentic; and (b) used circular reasoning in his assessment of Annie's credibility; and
2. Failed to find an unjust enrichment because he (a) misconstrued the test for the doctrine of unclean hands as a bar to equitable relief; and (b) used flawed reasoning in analyzing whether there was a juristic reason for Barbara providing services.

[21] For the reasons that follow, I would dismiss the appeal. I see no material error in the judge's analysis of the contract claim. Although the judge erred in finding Barbara was barred by the doctrine of unclean hands from pursuing an unjust enrichment claim, that error does not affect his alternative basis for denying that claim.

1. The Legacy Agreement

- (a) The Authenticity of the Letters from the Grave

[22] The appellant takes issue with the judge's finding that Annie's signatures on the second and third Letters from the Grave were either forged or obtained surreptitiously, contending neither finding was open to him on the record and constituted palpable and overriding error of fact.

- i. Finding Signatures Were Forged

[23] The appellant says the judge's finding--that the signatures on the second and third letters were forged--directly contradicts the unanimous evidence of both parties' handwriting experts who opined that the signature consisting of the single word "Annie" on the letters was "probably Annie's". Although a trial judge is not bound to accept uncontradicted and cogent evidence, it is incumbent on the judge to provide reasons for rejecting such evidence: *Jampolsky v. Insurance Corporation of British Columbia*, 2015 BCCA 87 at para. 40, citing *Savinkoff v. Seggewiss*, 1996 CanLII 3367 (BCCA), 25 B.C.L.R. (3d) 1 at paras. 17-21. Here, says the appellant, the judge did not identify any sound reasons for rejecting the handwriting experts' opinion.

[24] I would not accede to this submission. The judge explained that, although the experts stated the signature was "probably Annie's" they did so on the basis that they could find no indication that the signatures had been forged. However, the judge found it significant that neither expert was able to say that the signatures were not forged, leaving open the question of whether the signatures had been forged so effectively that the forgery could not be detected. The context is important.

[25] Annie's expert, Mr. Kovacs, testified as follows:

- (a) "Annie" is not a complex series of writing movements and it is easier to simulate a simple signature than a complex signature.
- (b) Factors impacting on whether an attempt to forge a signature will succeed include the complexity of the signature and the handwriting skills of the person forging it.
- (c) The brevity and simplicity of the "Annie" signature, having only four distinct letters, was "a limiting factor on the confidence you can have in your opinion."

[26] Similarly, Barbara's expert, Mr. Green, testified as follows:

- (a) "Annie", being only five letters (with two duplicates), was not a complex signature and therefore easier to forge.
- (b) Annie's signature was one that "lends itself to being successfully simulated."
- (c) He had "average writing skill" and in 10 minutes, created two simulations of "Annie" that he included in his report that cannot be distinguished from the "Annie" known to have been written by Annie.

[27] In my view, the judge provided sound reasons for rejecting the experts' opinions concerning the authenticity of Annie's signatures on the second and third Letters from the Grave; on the record before him it was open to him to find that the signatures had been forged.

ii. Finding the Signature Could Have Been Obtained Surreptitiously

[28] The appellant submits that a finding the signature could have been obtained surreptitiously was an impermissible inference based on speculation and conjecture. She points out that Annie's signature could not have been obtained surreptitiously in the period following the March 2016 revelation of Annie's change in testamentary intentions, because Barbara immediately confronted Annie, and Annie confirmed that thereafter they were estranged and she did not sign any documents for Barbara. She submits that a finding that Annie's signature was obtained surreptitiously in the period before March 2016 is contrary to both the evidence and common sense because, in that period, Barbara believed she was the beneficiary of Annie's estate and had no reason to obtain Annie's signature surreptitiously.

[29] The respondents say the inference was open to the judge because there was evidence that Barbara had in the past had Annie sign a blank document. The judge made no findings to that effect, and in any event, that evidence does not in my view support an inference that Barbara could have obtained Annie's signature on two blank sheets of paper after learning that she was no longer the beneficiary of Annie's will. However, the judge's conclusion, quoted above, was that Annie's signature was "either obtained surreptitiously or forged". Since I have found that the latter finding was open to the judge on the evidence, it suffices to support his determination that the letters were not authentic. It follows that any weakness in the supposition that the signature could have been obtained surreptitiously is not a material

one.

- (b) Did the Judge Use Circular Reasoning in Assessing the Authenticity of the Letters from the Grave?
- [30] Having found the handwriting experts' evidence to be of no assistance in determining whether the second and third Letters from the Grave were authentic, the judge based his findings of inauthenticity on the content of the letters. He found a number of statements that indicated the letters were written by Barbara rather than Annie because they reflected Barbara's "belief structure" about the family and business history rather than Annie's.
- [31] The appellant says the judge relied on a reasoning error in assessing Annie's credibility because he failed to appreciate that Annie's "belief structure" about events--such as the reason for the allocation of the VPLT shares--was a subjective constraint derived from Annie's ever-changing testimony. He then used Annie's subjective evidence--without first testing it against objective extraneous evidence--as supportive of testimony that she did not write the letters because what she purportedly wrote in the letters was inconsistent with her subjective testimony at trial. As the appellant stated in her factum: "simply put, the judge failed to perform the check on Annie's wavering evidence that he himself said was necessary" by treating one part of Annie's unsupported testimony as corroborative of another part.
- [32] Respectfully, this argument is based on the flawed premise that the judge did not test Annie's evidence against objective extraneous evidence. To the contrary, the judge extensively assessed Annie's evidence against the contemporaneous documentary evidence before he turned to consider the Letters from the Grave.
- [33] For example, the judge rejected the first premise of Barbara's breach of contract claim--her allegation that Annie was predisposed to leave her estate to Bill and his family in order to remedy an inequity that had occurred at the incorporation of VPLT: at para 126. He came to that conclusion after addressing, at paras. 118-124, the contemporary documentary evidence, including the 1972 corporate resolution recognizing Joe's significant contribution to VPLT and granting to him and Annie a life lease over a penthouse suite. The judge concluded:
- [125] Hence, although there is a dispute on the evidence on this point, I accept Annie's evidence and reject Barbara's evidence. Barbara's evidence is based on hearsay. Annie's evidence is first-hand and supported by documentary and other evidence.
- [34] As discussed above, the judge also considered the objective disinterested testimony of the family's lawyer and accountant, the history of Annie's wills and other estate planning documents, and the conduct of Barbara and Annie.

[35] In summary on the grounds of appeal concerning the Legacy Agreement, I see no error in the judge's reasoning or his conclusion that the parties had not entered into a testamentary contract.

2. The Alternative Claim in Unjust Enrichment

[36] The appellant's alternative position at trial was that if there was no testamentary contract between herself and Annie, then Annie and J & A Properties Ltd. were unjustly enriched by the services she provided.

(a) Clean Hands Doctrine

[37] As the judge noted at para. 355, a person who seeks an equitable remedy must come to court with clean hands. If they have engaged in misconduct and rely on that misconduct to make out their claim, they will be barred from equitable relief. However, the scope of the clean hands doctrine is limited, applying only in respect of misconduct "which has an immediate and necessary relation to the equity sued for": *DeJesus v. Sharif*, 2010 BCCA 121 at para. 85 (emphasis added). The doctrine is "narrowly applied and does not entitle a court to canvass all aspects of the party's behaviour known to the court": *Wang v. Wang*, 2020 BCCA 15 at paras. 45-47.

[38] The judge in this case found that Barbara's claim in unjust enrichment was barred by her prior misconduct in creating the bogus Letters from the Grave #2 and #3 to shore up her testamentary contract claim. He reasoned that since she relied on her belief in the existence of the Legacy Agreement to support her claim that she had provided services with an expectation of compensation, the unjust enrichment was "in relation to" the misconduct.

[39] With respect, the judge's analysis does not accord with the test for unclean hands. The test does not require only that there is some relation between the misconduct and the claim in equity, the misconduct must be necessary to the claim. The central question was whether Barbara was required to rely on her misconduct--the forged Letters from the Grave--to establish the elements of unjust enrichment:

1. An enrichment of Annie and J & A;
2. A corresponding deprivation of Barbara; and
3. The absence of a juristic reason for the enrichment.

See *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

It is evident that proving these elements did not depend on the forged letters. Indeed, the same unjust enrichment claim could have been made if the Letters from the Grave had never been written or raised at trial.

(b) Unjust Enrichment

- [40] Although the judge erred in finding that Barbara was barred from asserting an equitable claim, that error is not a material one because the judge proceeded to consider whether the elements of unjust enrichment could be made out on the evidence in any event. Having done so, he concluded the appellant could not succeed because there was a juristic reason for the services Barbara provided. The appellant contends the judge erred in so finding. I turn now to that question.
- [41] As outlined above, the third element of an unjust enrichment analysis requires consideration of whether there is a juristic reason to deny recovery. The three established categories of juristic reasons are contract, disposition of law, and gift (often referred to as donative intent). The list is not closed, and a juristic reason may be demonstrated by the reasonable expectations of the parties and public policy considerations: Kerr at para. 43.
- [42] The judge began by describing the categories of service Barbara identified:
- a) looking after Annie and Joe's personal affairs;
 - b) looking after Annie and Joe's health issues;
 - c) looking after Annie and Joe's relatives and friends;
 - d) looking after Annie and Joe's properties;
 - e) looking after VPLT's business/properties.
- [43] The judge characterized the services provided to Annie and Joe personally as flowing from donative intent (at paras. 371, 387), the services to Annie and Joe's friends and relatives as not constituting benefits received by Annie and Joe (at para. 352), and the services to Annie and Joe's properties and to VPLT as having been provided either because of donative intent or because they were rendered pursuant to the agreement captured by the family motto, "all for one and one for all" (at paras. 372, 387). The judge found that under that motto, it was understood that Barbara was compensated for any services she performed for the family by the benefits she received from the family business--including income she received from BBJ that had its origin in profits made by VPLT: at paras. 382, 386.
- [44] Barbara submits the judge made inconsistent findings because services cannot be both donative and contractual. A gift is given without expectation of reward, whereas consideration for the services provided is the essence of a contractual arrangement. The appellant contends the judge also erred in finding that the record supported either juristic reason in any event.
- [45] In finding donative intent, the judge noted that Barbara claimed in her affidavit that she had an expectation of being Annie's beneficiary by the late 1990s, when Annie made her a residual beneficiary. The judge found that expectation arose not in 1997 but only in 2002 when Annie made Barbara her direct beneficiary under the alter ego trust. The judge reasoned that any services provided before Annie included Barbara in her will could not have been due to an expectation of compensation, and so were undertaken with donative

intent. I see no error in that reasoning on the claim as argued. However, the judge then found that since the level of services Barbara provided did not change after 2002, her intent in providing the services thereafter must have continued to be donative.

- [46] In my view, and with respect, the judge erred in focusing on the level of services provided. The relevant question was whether Barbara at some point continued to provide services with the expectation that she would be compensated by being made the beneficiary of her aunt's estate.
- [47] The appellant's claim that she provided those services because she expected compensation, rather than because she had a donative intent, rests on her being named as beneficiary under the 2002 alter ego trust. However, as discussed above, the judge determined during his analysis of the Legacy Agreement that the creation of that trust did not amount to a promise by Annie to compensate Barbara for her services. The judge accepted Mr. MacRae's evidence that Barbara and Annie knew Annie could choose a different beneficiary at any time, and that Barbara stated she would step aside if Annie changed her mind. Barbara could not have expected compensation if she was willing to be removed as the beneficiary. As there was no promise of compensation, it was open to the judge to find that Barbara's continued help to her aunt and uncle was based on the same donative intent that had motivated her since her teen years, and that her change of heart regarding those intentions arose only after 2016.
- [48] It was also open to the judge to find distinct juristic reasons for different categories of services, as he did in distinguishing between the personal services provided to Annie and Joe, and those provided to their company and VPLT. But I agree with the appellant that it would be difficult to uphold a finding by the judge that the services Barbara provided to the family companies could be described as either donative or contractual; the categories are mutually exclusive. However, that is not what the judge did. Rather, he found that the services provided to Annie's companies were either "provided with donative intent, or under the umbrella of the family motto" (at para. 372), that is, as "part of the family ethos that everyone contributes and everyone gains from the family enterprise": at para. 362.
- [49] It was the respondents' counsel who described this arrangement as a "contract." It is evident from the judge's reasons that he regarded it as akin to a joint family venture--an arrangement or understanding rather than a formal contract--saying:
- [384] the family enterprise was reorganized in 1992, and the personal shareholdings of Annie, Joe, Bill, and Nick were spun out into holding companies. After that date, the profits of VPLT would be paid out to each of the holding companies on an annual basis. It was up to the directors of those holding companies to determine the most efficient, and presumably the fairest, distribution within that family unit.
- [386] What is clear is that [Barbara] received some amount of income that had its origin in VPLT. I noted above that [Barbara] has undertaken not to seek any damages that might be claimed from BBJ or from Bill Kochan. However, under her claim in unjust enrichment, [Barbara]

alleges that she performed unpaid work for VPLT. We know that VPLT divided its annual profits between the three holding companies. To the extent that some of those funds were paid to BBJ and Bill then made tax-driven decisions about its allocation, [Barbara] is stuck with Bill's decisions. Any such allocation by Bill, if unfair to Barbara, does not mean that Annie, or J & A, or even VPLT received a benefit from [Barbara]'s work without a juristic reason. Instead, that scenario supports the defence contention that every family member would contribute to the enterprise and every family member would benefit from it. As noted, Barbara has released any claim she has against BBJ. On the basis of the analysis above, I dismiss any claim relating to work performed by [Barbara] for the family business.

[Emphasis added.]

- [50] It is open to a defendant to establish a juristic reason to deny recovery grounded in the parties' reasonable expectations. In the circumstances of this case, the judge was satisfied that the respondents had established that it would not be unjust to allow Annie and Joe and their company to retain the benefit of the services provided by Barbara--based on the reasonable expectations of the parties about the way the burdens and benefits of the family businesses were to be allocated: Kerr at para. 114.
- [51] The appellant argues it was an error for the judge to consider mutual benefits at the juristic reason stage of the unjust enrichment inquiry because in both family and non-family cases of mutual benefit conferral, any alleged offsetting of benefits is to be considered at the defence/remedy stage of the analysis where the defendant bears the onus of proof: Kerr at paras. 109-115. However, the appellant has stated this principle too categorically. As Justice Cromwell explained in Kerr at para. 109, mutual benefit conferral "can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment". He stated further:
- [115] The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

It was accordingly open to the judge at the juristic reason stage to consider the nature of the family's give and take concerning the family companies.

- [52] In summary on this ground of appeal, I see no basis to interfere with the judge's conclusion that Barbara provided services to Annie and Joe's company on the basis that "everyone contributes and everyone gains" from the family enterprise, and that it was not an unjust enrichment for Annie and Joe's company to retain the benefit of these services.

Disposition

[53] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Dickson"

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