
CANADA / JUDGMENT

Fisher v. Fisher

2009 BCCA 567

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 567 Fisher v. Fisher

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Fisher v. Fisher,

2009 BCCA 567

Date: 20091211

Docket: CA036489

Between:

Ronald Earle Fisher

Appellant

(Plaintiff)

And

Sharon Adele Fisher and

346681 B.C. Ltd.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, September 3, 2008

(Fisher v. Fisher, 2008 BCSC 1128, Docket No. E053818)

Counsel for the Appellant:

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Counsel for the Respondent,

S. Fisher:

S. Gill

Counsel for the Respondent,

346681 B.C. Ltd.:

R. Ward, Q.C.

L. Gill

Place and Date of Hearing:

Vancouver, British Columbia

September 28, 2009

Place and Date of Judgment:

Vancouver, British Columbia

December 11, 2009

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice D. Smith:

- [1] Ronald Earle Fisher appeals the order of September 3, 2008, granted under Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], which divided the family assets from his marriage to the respondent, Sharon Adele Fisher (the "Order"). The Order was corollary to the parties' order for divorce granted on October 17, 2007 (the triggering event).
- [2] The appellant raises three grounds of appeal: (i) the trial judge erred in fact in finding that the jointly owned recreational property on Quadra Island (the "Quadra Property") and the jointly owned condominium in Port Moody (the "Condominium"), both admittedly family

assets, were each subject to a family debt; (ii) the trial judge erred in law in finding that residential property at Whistler, B.C. (the "Whistler Property") owned by the corporate respondent (defendant) 346681 B.C. Ltd. (the "Company"), in which the respondent's mother held 100% of the shares until shortly before her death, was not a family asset, or in the alternative, that the trial judge erred in law in finding that an inter vivos gift by the respondent's mother to the respondent's two sons from her previous marriage was a valid transfer because the declaration of trust giving effect to the gift was a nullity based on the rule in *Saunders v. Vautier* (1841), 4 Beav. 115, 49 E.R. 282 (Eng. Rolls Ct.), aff'd (1841) Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch.); and, (iii) the trial judge erred in law by failing to reapportion the appellant's Life Income Fund ("LIF") in his favour. The reasons for judgment are indexed at 2008 BCSC 1128.

- [3] The standard of review on questions of fact is palpable and overriding error. Palpable error is one that is readily or plainly seen (*Housen v. Nicolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 5-6); overriding error is one that must have altered the result or may well have altered the result (*Van Mol (Guardian ad litem of) v. Ashmore*, 1999 BCCA 6, 58 B.C.L.R. (3d) 305 at para.12). A trial judge's findings of fact are to be accorded great deference: *Housen* at para. 11. An appellate court may only overturn findings of fact if it is established that the trial judge made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from the evidence: *Van Mol* at para. 9. Absent palpable and overriding error, an appellate court may not substitute its views of the evidence for those of the trial judge and may not interfere with the trial judge's decision provided there was some evidence upon which the trial judge could have reached his or her decision: *Housen* at para 1.
- [4] The standard of review on questions of law is correctness: *Housen* at para. 8.

Background

- [5] The appellant, Ronald Fisher, age 64, and the respondent, Sharon Fisher, age 55, were married on October 20, 1990. They separated on November 14, 2005, and were divorced on October 17, 2007. Both had children from previous marriages. The respondent's sons, R., age 27, and S., age 24, lived with the parties at the jointly owned family home in Coquitlam. The home was purchased in 1991 and sold in 2003. In July 2004, the parties purchased the Condominium.
- [6] The appellant has a Masters Degree in Business Administration. Prior to the marriage, he had been employed in the Advanced Communications department of B.C. Tel for about 20 years. In 1996 he was suffering from mental health problems and his employment was terminated. He accepted a severance package of \$54,000 in cash, salary continuance for one year, and a lump sum payout of \$476,874 for his pension interest which he invested in an RRSP. Thereafter, he worked with the respondent in a variety of businesses until March 29, 2005, when he was involved in a motor vehicle accident. He has been unemployed since that date and in receipt of CPP disability benefits.

- [7] The respondent is a professionally accredited certified general accountant. During the marriage she was involved in a number of businesses, largely through her long-time association with Tom Martin whom she met in 1981, and with whom she maintained a business relationship until his death on January 27, 1997. Mr. Martin was a partner in a land development company in Langley. In 1990, after his business ran into difficulties in the real estate market, he became a non-resident of Canada and acquired interests in a "maze" of over 100 "companies, structures or entities" in at least eight or nine different jurisdictions. He also created the Martin Family Trust.
- [8] Between 2005 and 2007, after the commencement of the FRA action, the appellant withdrew \$24,000 from his RRSP and converted the balance of the RRSP into a LIF. In 2007, he withdrew \$54,000 from the LIF before the respondent became aware of his actions and obtained an interim order restraining the disposition of assets. By the date of trial, the appellant remained unemployed, living in the Condominium, and had an annual income of about \$20,259 from his LIF and \$7,843 from CPP disability benefits.
- (i) The Quadra Property
- [9] On August 19, 1992, the parties jointly purchased the Quadra Property for \$285,000. The offer to purchase was in the name of "Thomas Peter Martin and/or nominee"; the down payment of \$140,000 came from Mr. Tom Martin. The vendor financed \$150,000 of the purchase price. The mortgage was repaid in four instalments of \$37,500 from monies in the parties' joint bank account. At the date of trial, the Quadra Property remained in the parties' joint names, with clear title and had a value of over \$600,000.
- [10] From 1999 to 2002, the respondent realized some significant financial returns from investments in businesses connected to Mr. Tom Martin or the Martin Family Trust. She applied most of these gains to the payment of joint family debt, including the mortgage on the Coquitlam family home (\$155,000), a line of credit (\$225,000), and the parties' respective credit card and personal debts. She also used these monies to purchase a new vehicle (\$55,000).
- [11] During this period, the parties also suffered investment losses of \$190,000 and the appellant's RRSPs significantly diminished in value. The respondent expended considerable efforts to return the appellant's RRSPs to their original level. Between 2001 and 2002, the appellant's RRSPs again decreased in value and again the respondent managed to regain their losses.
- [12] At trial, the appellant claimed that Mr. Tom Martin was a silent one-half partner in the Quadra Property. He alleged that he had overheard a conversation between Mr. Tom Martin and the respondent in which she agreed to trade her interest in a property she and Mr. Martin co-owned in Las Vegas, for Mr. Tom Martin's interest in the Quadra Property. The respondent denied such a conversation. She said that she never owned or had an interest in real property in Las Vegas and that the \$140,000 down payment was a loan that had come from a \$250,000 mortgage she had arranged for Mr. Tom Martin on real property in Langley

that was owned by Happy Plants Ltd.

- [13] Happy Plants Ltd. was owned by Happy Plants Trust. The sole director of Happy Plants Ltd. was Peter Martin. Mr. Peter Martin was Mr. Tom Martin's father. Mr. Peter Martin was also the trustee of Happy Plants Trust; Mr. Tom Martin was the beneficial owner of the trust. Upon Mr. Peter Martin's death in February 1996, Happy Plants Trust was dissolved. Mr. Tom Martin died in January 1997; his estate was never probated. Following his death, his son Jim Martin became the sole beneficiary of what remained of the assets from Happy Plants Trust. He also became the sole officer, director and shareholder of Happy Plants Ltd., which was eventually wound up and its assets dispersed to Mr. Jim Martin.
- [14] On August 13, 1992, Mr. Peter Martin granted a power of attorney to the respondent that authorized her to secure a mortgage from National Holdings Ltd. on behalf of Happy Plants Ltd. On August 18, 1992, Happy Plants Ltd. passed a resolution authorizing the company to borrow \$250,000 by way of a mortgage from National Holdings Ltd. against real property in Langley owned by Happy Plants Ltd. The respondent, acting as Mr. Peter Martin's power of attorney, endorsed the resolution. The respondent also signed the mortgage document on behalf of Happy Plants Ltd. and Mr. Peter Martin pursuant to the power of attorney. The \$250,000 was paid out to the solicitors of Happy Plants Ltd., who in turn dispersed \$140,000 to the respondent.
- [15] The issue for the trial judge was whether the parties owed Mr. Jim Martin \$140,000 (as the beneficiary of Mr. Tom Martin's and Mr. Peter Martin's estates) or whether, as the appellant claimed, Mr. Tom Martin had owned a half interest in the Quadra Property and had traded his interest in that property to the respondent for her half interest in real property that they allegedly owned jointly in Las Vegas. Mr. Jim Martin said neither the Happy Plants Trust nor Mr. Tom Martin was an investor in the Quadra Property but that the \$140,000 was a loan and that it had not been repaid. He also testified that his father had never owned real property in Las Vegas as alleged by the appellant.
- [16] The trial judge found Mr. Jim Martin to be a credible witness and accepted his and the respondent's evidence. In that regard, she concluded:
- [41] Similarly, I find that the Happy Plant Trust (of which Mr. Jim Martin is the sole beneficiary) lent \$140,000 to purchase the property on Quadra Island which is held in the joint names of the plaintiff and the defendant. ... Mr. Martin and the defendant testified that the \$140,000 has never been repaid. Mr. Martin further testified that the Happy Plant Trust was dissolved and that therefore the money was owing to him directly as a beneficiary under the trust. As Mr. Martin was not a party to these proceedings, I cannot pronounce judgment in his favour, but I do find there is a debt owing to him for which both parties are responsible to pay, and fairness dictates that it should be repaid before the equity in the Quadra property is divided between the parties.

(ii) The Condominium

- [17] Before Mr. Tom Martin's death, the respondent also assisted him with the management of Rossmont Pacific Limited ("Rossmont"). Rossmont is a Hong Kong company that was incorporated by Mr. Martin in 1996 to handle certain transactions for another of his companies, Cannon Street Investments Ltd. ("Cannon"). Rossmont was managed by Sovereign Trust International; its bank was the HSBC in Hong Kong.
- [18] The respondent described Rossmont as like "various layers of [an] onion", in that its main shareholder was another company, of which Cannon was a shareholder, which in turn was connected to an off-shore trust, the beneficiaries of which were the Martin family. In 1996, Mr. Tom Martin was diagnosed with terminal cancer. On December 16, 1996, he gave the respondent written authorization to complete transactions on his behalf for Cannon and to manage the off-shore family trust. He advised the respondent that a "Mr. Hanley" was his contact at Rossmont. After Mr. Tom Martin's death, the respondent travelled to the Grand Cayman Islands and assisted the Martin family in making an orderly transition of his business affairs. That included the release of \$1.5 million to his widow.
- [19] At trial, the appellant alleged the respondent had an interest in Rossmont. Mr. Jim Martin gave evidence about Rossmont under the protection of s. 4 of the Evidence Act, R.S.B.C. 1996, c. 124 and s. 5 of the Canada Evidence Act, R.S.C. 1985, c. C-5. He testified that he had seen the Rossmont incorporation documents shortly after his father's death but that they had been destroyed about 11 years ago. He candidly admitted that he did not know the exact ownership of Rossmont because it was owned by a chain of other companies. He maintained, however, that the ownership of Rossmont had not changed since its incorporation and that the respondent held no legal or beneficial interest in it or any of Mr. Tom Martin's other companies. The trial judge described the evidence in regard to Rossmont and Mr. Tom Martin's other companies as "cloudy" (at para. 35), but found as a fact that the respondent had no legal or beneficial interest in Rossmont. This finding was not appealed.
- [20] On July 20, 2004, the parties jointly purchased the Condominium for \$265,000. The respondent testified that they had to borrow the funds for the \$150,000 down payment as they had used the net proceeds of sale from their Port Coquitlam home to retire \$325,000 worth of debt. She said that with Mr. Jim Martin's knowledge, she arranged to borrow \$150,000 from Rossmont. Mr. Jim Martin confirmed that the respondent had advised him that she intended to borrow the funds from Rossmont. The balance of the purchase price for the Condominium was secured by way of a \$120,000 HSBC mortgage.
- [21] The respondent prepared the loan documentation, executed it and faxed it to Rossmont. She produced a written memo dated July 13, 2004, to a "Ms. Wong" at Rossmont. With the memo she enclosed a copy of her passport, a signed promissory note for \$150,000 dated July 20, 2004, and instructions on how and where to wire the funds. She did not disclose the promissory note until the eve of the trial.

- [22] At trial, the appellant alleged that the \$150,000 down payment came from Rossmont, in which he claimed the respondent had an interest, or alternatively from other personal assets of the respondent's including US held accounts or investments. The respondent denied these allegations.
- [23] The appellant also relied on apparently contradictory evidence as to the source of the \$150,000. The respondent had produced a memo dated July 5, 2004, to the notary public handling the transaction, in which she advised the notary that she would be wiring \$150,000 to her account but that she was not sure when it would arrive as she was "liquidating some investments". The respondent was not re-examined on the apparent contradiction between her memo and the promissory note and consequently had no opportunity to provide any explanation for the inconsistency.
- [24] The appellant further relied on the respondent's banking records from different accounts (both US and Canadian), which disclosed deposits and payouts at various times in various amounts. The appellant claimed the monies did not add up to \$150,000. On cross-examination, the respondent gave a detailed explanation on how, when and where the monies were advanced to her and in what amounts. The explanation in part included an initial plan by her to write off some of the loan monies against certain capital gains but when this was found not to be viable it was abandoned.
- [25] The trial judge accepted the evidence of the respondent and Mr. Jim Martin that she had no legal or beneficial interest in Rossmont. She also found that the monies were borrowed from Rossmont and had never been repaid. She summarized her findings as follows:
- [36] In conclusion, while there is evidence that the defendant had access to and authority over Rossmont Pacific Limited's bank account, there is no reliable evidence that she had any beneficial interest in it. It is possible that the defendant used Rossmont Pacific Limited as a vehicle to secret money off the shores of Canada, but the evidence taken as a whole did not establish that this was a likely occurrence. I find on a balance of probabilities that the outstanding debt of the defendant to Rossmont Pacific Limited for the purchase of the Port Moody condominium is likely a legitimate debt owing to that company, and that the defendant has not failed to disclose any offshore assets.
- ...
- [40] I have found that the transfer of funds from Rossmont Pacific Limited constitutes a legitimate loan and that the defendant has no beneficial interest in that company. The evidence established that the money all went toward the purchase of the Port Moody condominium and therefore should be repaid by both parties.

(iii) The Whistler Property

- [26] The respondent's mother, Mrs. McLaren, acquired the Whistler Property before the parties' marriage through the Company. On July 27, 1988, Mrs. McLaren became the sole officer, director and shareholder of the Company. On July 29, 1988, the Company purchased the

Whistler Property and signed a declaration of trust that it held the Whistler Property in trust for Mrs. McLaren (the "1988 Declaration of Trust"). The 1988 Declaration of Trust gave Mrs. McLaren beneficial ownership of the Whistler Property. On June 22, 1998, Mrs. McLaren transferred her shares in the Company to R. and S. and the Company signed a second declaration of trust that it held the Whistler Property in trust for R. and S. (the "1998 Declaration of Trust"). Mrs. McLaren died on August 20, 1998. Between 1998 and the parties' separation in 2005, the respondent was the sole director and officer of the Company. Thereafter, R. and S. became the sole directors and officers of the Company.

- [27] Before the trial judge, the appellant alleged that the respondent was at all material times the true beneficial owner of the Whistler Property and that the Whistler Property was a family asset. The trial judge found that Mrs. McLaren was the beneficial owner of the Whistler Property until the 1998 Declaration of Trust, when she transferred her beneficial interest to R. and S. Therefore, she concluded, the Whistler Property was not a family asset. In the alternative, the appellant claimed that if Mrs. McLaren was the beneficial owner of the Whistler Property, the 1998 Declaration of Trust was invalid because it did not expressly grant the Company the authority to revoke the trust and replace it with another trust, and therefore the respondent inherited the Whistler Property when her mother died.
- [28] In support of his position, the appellant led evidence regarding the respondent's efforts in assisting Mrs. McLaren to locate the Whistler Property, in setting up the Company and the 1988 Declaration of Trust, the parties' use and expenditure of monies on the Whistler Property, their use of the Whistler Property as collateral security for some of their business activities, and comments allegedly made by the respondent to third parties suggesting that she was the true owner of the Whistler Property. The respondent testified that she never made any financial contribution to the purchase price of the Whistler Property and was not the beneficial owner of the Company's shares, had never claimed to be the actual owner of the property, and that Mrs. McLaren had stated on numerous occasions that it was her intention to leave the Whistler Property to her grandsons.
- [29] On this issue the trial judge made the following findings:
- [19] The initial source of the funds to purchase the Whistler property was disputed on the evidence. At her examination for discovery, the defendant deposed that part of the proceeds for the Whistler property came from the sale of her parents' property in Langley, and part came from the sale of property her parents held ... in Whistler. However, on examination in chief, the defendant explained that she had been mistaken on her examination for discovery because the [another property] was not sold until after the defendant Company had purchased the [Whistler property]. She produced documents that she found indicating that Mrs. McLaren had cashed in investments to raise the required purchase monies.

- [20] There is no evidence that the defendant herself contributed to the purchase of the Whistler property, other than the allegation of the plaintiff which was unsupported by any documentation. I find on a balance of probabilities that the source of funds likely came from the sale of the McLarens' properties and investments.
- [30] After rejecting the allegations that the respondent had financially contributed to the acquisition of the Whistler Property, the trial judge turned to the other evidence of contribution and use. Although she acknowledged that the Company had agreed to let the Whistler Property stand as collateral for a business loan of the parties, and that the property had been used by the parties for family purposes, she did not find those items of evidence determinative. Instead, she concluded that "on a balance of probabilities that the family, including the plaintiff, knew that it was Mrs. McLaren's asset and that she alone was entitled to endeavour to give it to her grandchildren before she died" (at para. 27).
- [31] In regard to the appellant's alternative submission, the trial judge declined to decide that issue. She found that it was inconsistent with the appellant's main submission that the Whistler Property was beneficially owned by the respondent. Furthermore, the appellant's statement of claim had not expressly pleaded that the 1998 Declaration of Trust was invalid. In her view it would be unfair to determine the issue because the appellant had raised this issue for the first time in final argument and the respondent had had no opportunity to lead evidence to refute the appellant's new legal position. In the result, the trial judge concluded:
- [29] In conclusion, I make no finding one way or the other as to whether R. and S. hold the Whistler property under a valid Trust Declaration, but I do make the finding that the Whistler property is not a family asset and is not subject to division under the Family Relations Act.

Discussion

1. Did the trial judge err in fact in finding that the monies advanced from Happy Valley Ltd. and Rossmont, for the parties' acquisition of the Quadra Property and the Condominium, respectively, were family debts?
- [32] The trial judge's resolution of these factual issues rested in large part on a framework she developed for her findings of credibility. At paras. 7-10, the trial judge summarized the framework as follows:
- [7] Findings of credibility between two parties to a matrimonial law suit are always difficult because often the evidence is overshadowed by emotional reactions and responses. In this case, I have formed the view that the plaintiff, a seemingly pleasant man, was often inconsistent and inaccurate in giving his evidence. He did not have a grasp of many details and would slip into vague renditions of conversations that had the flavour of reconstruction after the fact.

- [8] The defendant, less pleasant but more precise, was also prone to reconstruction. However, for the most part, the defendant's evidence was consistent with and often supported by the documentary evidence.
- [9] There were a number of other witnesses for both sides, mostly attesting to conversations about the Whistler property. All of these witnesses seemed credible, although the weight to be afforded to their evidence varied in accordance with their involvement with the affairs of the plaintiff and defendant.
- [10] In conclusion, I have been reluctant to accept the controversial testimony of either party unless corroborated by documents or other witnesses. Fortunately, there was sufficient evidence from these more objective sources to allow me to reach certain conclusions of fact.
- (i) The Quadra Property
- [33] The factual issue in regard to the Quadra Property was whether Mr. Jim Martin, as the beneficiary of Happy Plants Trusts and Happy Plants Ltd., was a co-owner or a creditor of the \$140,000 advanced by Happy Plants Ltd. for the purchase of the Quadra Property. The appellant disputes the trial judge's finding that the monies were a loan and are owed by the parties to Mr. Jim Martin. He relies on the fact that Mr. Jim Martin testified that the monies had not been repaid, but failed to expressly state that the monies were owed to him.
- [34] In arriving at this finding of fact, the trial judge relied on the documentary evidence (the respondent's power of attorney for Mr. Peter Martin, the \$250,000 mortgage between Happy Valley Ltd. and National Holdings Ltd., and the advancement of \$140,000 to the respondent from the solicitors for Happy Valley Ltd.) that the monies came from Happy Plants Trust (which was not disputed) and the oral evidence of Mr. Jim Martin whom she found to be a credible witness. The appellant submits that the trial judge erred in this finding because: (i) no demand for repayment or payment of the alleged loan was ever made in the 16 years before the FRA action; (ii) the respondent made no reference to the \$140,000 Quadra Property loan on her July 16, 2004 application for the Condominium mortgage or in her March 8, 2006 Form 89 Property and Financial Statement filed in the FRA action (although it was disclosed on her updated January 24, 2000 Property and Financial Statement); and (iii) the respondent stated in her examination for discovery in the FRA action that after the 2003 sale of the family home the parties were debt free.
- [35] The respondent's explanation for these oversights were that she had understood the parties had reached a post-separation agreement on the division of family assets in which she was to retain the Quadra Property, which was clear title, and the appellant was to retain the Condominium, which was subject to a mortgage. The respondent pleaded this alleged agreement in her statement of defence. She said that when she filed her March 6, 2008 Property and Financial Statement, she considered the Quadra Property as her asset and calculated its value as a "net" figure. The trial judge decided the preliminary issue of whether the parties had reached a binding agreement on the division of assets in favour of the appellant and then proceeded to divide the matrimonial property under Part 5 of the

FRA.

- [36] The appellant submits that the trial judge failed to follow her framework for the finding of fact that the parties owed Mr. Jim Martin a debt of \$140,000. He claims that, in the absence of any objective documentary evidence of an outstanding loan from Happy Valley Trust, a lack of evidence of any payment for the alleged debt over the 16 years since it was incurred, the respondent's failure to identify any debt on the Quadra Property in the July 20, 2004 mortgage application for the Condominium purchase and in her March 8, 2006 Property and Financial Statement, and her evidence at her examination for discovery that after the sale of the Port Coquitlam home the parties were "debt free", this Court should find that the trial judge's finding that \$140,000 was owed to Mr. Jim Martin amounted to palpable and overriding error.
- [37] There was contradictory evidence concerning the monies advanced to the parties from Happy Valley Trust. It might even be said that the evidence in support of the respondent's claim that these monies were a loan was also "cloudy". However, there are several undisputed facts. The monies were advanced by Happy Plants Trust to the respondent for the purchase of the Quadra Property. The respective owners of Happy Valley Trust were Mr. Peter Martin and his son, Mr. Tom Martin. Upon their deaths, Mr. Jim Martin became the sole remaining beneficiary of the assets of Happy Valley Trust. Although there was no express documentary evidence that these monies were advanced as a loan to the parties, there was also no express documentary evidence that they were made by Mr. Tom Martin as an investment.
- [38] The trial judge had to weigh the conflicting items of evidence on this issue. She rejected the appellant's theory that the investment was made by Mr. Tom Martin as a result of a land swap with the respondent. Mr. Jim Martin confirmed that his father never owned an interest in real property in Las Vegas. Although in her reasons for judgment she did not expressly refer to any documentary evidence in support of her finding, she clearly accepted the evidence of the respondent and Mr. Jim Martin that the monies were a loan. Although Mr. Jim Martin did not expressly say that the monies remained owing, counsel at trial expressly identified this as an issue to be determined, as did the trial judge, where she stated:
- [37] The defendant claims that the following debts arose from the marriage and for which both parties are jointly liable:

...

2. \$140,000 owing to Jim Martin with respect to the Quadra Island property;

...

- [41] ... Mr. Martin and the defendant testified that the \$140,000 had never been repaid. Mr. Martin further testified that the Happy Valley Trust was dissolved and that therefore the money was owing to him directly as a beneficiary under the trust. As Mr. Martin was not a party to these proceedings, I cannot pronounce judgment in his favour, but I do find there is a debt owing to him for which both parties are responsible to pay, and fairness dictates that it should be repaid before the equity in the Quadra property is divided between the parties.
- [39] In summary, I am satisfied there existed an evidentiary basis, both documentary and testimonial, upon which the trial judge could reasonably have inferred that the \$140,000 from Happy Valley Trust were advanced as a loan that remained outstanding and payable to Mr. Jim Martin as the sole remaining beneficiary of the Happy Valley Trust. In my view, it cannot be said that this finding amounted to palpable and overriding error.

(ii) The Condominium

- [40] The appellant submits there was insufficient evidence upon which the trial judge could find that the \$150,000 down payment was a loan from Rossmont and therefore that finding amounted to palpable and overriding error. He supports that position based on the absence of any objective documentary or oral evidence to verify that Rossmont was the source of the \$150,000 down payment for the Condominium, the inconsistencies and apparent contradictions in the respondent's evidence on this issue (which he says was unreliable if not suspect), and the last minute disclosure of the promissory note as evidence of the loan.
- [41] Again, the trial judge was faced with contradictory evidence on this issue and had to weigh each item of evidence with the evidence as a whole. No one item of evidence was determinative. Although the respondent provided no objective documentary evidence that established the \$150,000 as a loan from Rossmont, she did provide documentary evidence by way of her memo to Ms. Wong at Rossmont, the promissory note, and a detailed explanation on how, where and when the monies were deposited into her bank accounts and ultimately transferred to the notary public handling the transaction. The trial judge also had the testimony of Mr. Jim Martin who assisted the respondent in obtaining the loan.
- [42] The appellant does not claim that the trial judge misapprehended the evidence. His chief complaint appears to be the weight she assigned to the various items of evidence in order to reach her findings of fact. In my view, the trial judge did her best to fulfill that task, especially in view of the "cloudy" nature of some of the evidence. It is not for this Court to re-weigh or draw its own conclusions from the evidence. In summary, I am satisfied that the evidence as a whole provided a basis upon which the trial judge could draw the inferences of fact that the source of the \$150,000 was a loan from Rossmont and that it did not come from the respondent as alleged by appellant.
- [43] I would not accede to this ground of appeal.
2. Did the trial judge err in law in finding that the Whistler Property was not a family asset, and if it was not, in refusing to consider whether the 1998 Declaration of Trust was legally valid?

- [44] The appellant reiterates his position that the trial judge erred in her assessment of the evidence in finding that the Whistler Property was not a family asset. However, as with the Quadra Property and the Condominium, there was conflicting evidence before the trial judge as to the true ownership of the Whistler Property. After weighing all of the evidence, the trial judge concluded the Whistler Property was not a family asset.
- [45] She reached this conclusion by relying on documentary evidence, which established that the Whistler Property had been acquired from the assets that were owned by Mrs. McLaren and not the respondent. The trial judge found that Mrs. McLaren was the beneficial owner of the Whistler Property and accepted it was always her intention to gift her beneficial interest in the Whistler Property to her grandsons.
- [46] In my view there was an evidentiary basis upon which the trial judge was able to reach these findings. I find no error in fact or law in the trial judge's determination that the Whistler Property was not a family asset.
- [47] In regard to the alternative submission, the Company submits that the trial judge was correct in refusing to consider the issue of whether the 1998 Declaration of Trust was invalid because it was not pleaded and as a result the trial record was not complete. It submits that neither the Company nor the respondent had the opportunity to address this issue in the evidence because the legal argument was first raised by the appellant in final argument. In the alternative, the Company provided a detailed legal analysis of why, on a proper application of the rule in *Saunders v. Vautier*, the 1988 Declaration of Trust was lawfully terminated.
- [48] The appellant's pleadings in his statement of claim included the following:
- 35(g) A determination of family assets pursuant to s. 58, including without limiting the generality a declaration that the Defendant Sharon Adele Fisher is the beneficial owner of 100% of shares of 346681 B.C. Ltd. issued in the name of Evelyn McLaren deceased who died on 20 August 1998 and further for a declaration that such shares are a Family Asset
- (h) Pursuant to sections 58, 59, 65 and 66 a declaration of ownership and possession of such family assets as may be appropriate under the circumstances, and
- (i) Pursuant to sections 65 and 66 an order that such property of the Defendant Sharon Adele Fisher as may be just and reasonable, be vested in the Plaintiff.
- 36 The Plaintiff seeks the following additional relief:
- (a) A declaration that the Estate of Evelyn McLaren deceased who died intestate on 20 August 1998 it holds in trust, as bare trustee, for the Defendant Sharon Adele Fisher all of the shares it holds in 346681 B.C. Ltd. The Plaintiff says that 346681 B.C. Ltd. is the owner of the Whistler Property and that the said Whistler Property was acquired with the funds of the Defendant Sharon Adele Fisher

...

- (c) As against the Defendant 3466681 B.C. Ltd. a declaration that it holds [the Whistler Property] in trust for the Defendant Sharon Adele Fisher on a resulting or constructive trust or in the alternative that it holds an interest in the Whistler Property in trust for the Plaintiff pursuant to a constructive or resulting trust. The Plaintiff says that with respect to the Whistler Property he has made both direct and indirect financial contributions to said Whistler Property including but not limited to, the acquisition, maintenance and aggrandizement in value of the said property.
- [49] At the core of these pleadings is the appellant's claim that the respondent is the actual beneficial owner of the Company's shares and thus of the Whistler Property. The pleadings do not address the appellant's alternative argument that the Whistler Property devolved to the respondent as the sole beneficiary of her mother's estate because the 1998 Declaration of Trust was invalid.
- [50] I agree with the trial judge's refusal to decide this complex trust issue on the basis that it would be prejudicial to the respondent and the Company to do so in the absence of notice through proper pleadings. It may well be that the respondent and the Company would have chosen to lead evidence on this issue, which may have shed light on the circumstances in which the 1998 Declaration of Trust was formulated and signed. See *Emmett v. Arbutus Bay Estates Ltd.* (1994), 95 B.C.L.R. (2d) 339 at para. 9 (C.A.), *Scott Bros. Gravel Co. v. N.W. Hullah Corp.* (1967), 59 W.W.R. 173 at paras. 9-11 (C.A.).
- [51] More importantly, however, is the fact that R. and S., who hold the shares in the Company and claim to be the beneficial owners of the Whistler Property, are entitled to notice of such a claim and to be given the opportunity to address the issue. It is their ownership of the assets, being the shares of the Company, that are being attacked by this argument and they may well have something to say about the claim.
- [52] I would not accede to this ground of appeal.
3. Did the trial judge err in law in failing to reapportion the LIF in favour of the appellant?
- [53] The trial judge concluded that: "This was a seventeen year marriage and there is no reason to depart from an equal division of all the assets after satisfying the joint debts."
- [54] The appellant submits that the trial judge erred in failing to reapportion the LIF in his favour because it was acquired by way of a locked-in RRSP that originated from the lump sum payment he received from B.C. Tel for his pension upon the termination of his employment relationship. His pension was earned after 26 years of service, of which 20 years pre-dated the marriage. In short, the appellant seeks a reapportionment of the LIF that would have him receive 88% of the asset (based on his pre-marital contributions) and the respondent 12% of the asset.

- [55] This submission, with respect, ignores the fact that the appellant's pension no longer existed as a family asset at the triggering event. Section 56 in Part 5 of the FRA gives each spouse prima facie undivided half interest as a tenant in common in the family assets upon the occurrence of the triggering event. A triggering event is defined as a separation agreement, a declaratory judgment under s. 57, an order for dissolution of marriage or judicial separation or an order declaring the marriage null and void. In this case, the triggering event was the order for divorce on October 17, 2007. By that date, the appellant's pension asset had been converted into a LIF. Section 58 of the FRA defines "a right of a spouse under an annuity or a pension, home ownership or retirement savings plan" as a family asset. The appellant's LIF is in the nature of an annuity and therefore was a defined family asset subject to a prima facie equal division between the parties.
- [56] The appellant's claim for reapportionment of this asset was raised for the first time on appeal. As a result, this Court has not had the benefit of the trial judge's analysis on whether the evidence supports a finding of unfairness based on the statutory criteria in s. 65 of the FRA. In my view, that omission alone precludes the appellant from advancing this ground of appeal. See *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at para. 32.
- [57] However, ignoring for the moment the timing of when this issue was first raised, I find no merit in the appellant's claim to reapportionment of the LIF. Reapportionment of a family asset, including a pension, is subject to the statutory criteria set out in s. 65(1) of the FRA. The trial judge concluded, based on the evidence before her, that given the length of the marriage the family assets should be divided equally. That finding, in my view, must be given deference by this Court absent any error of law.
- [58] There is no error of law in a trial judge equally dividing a family asset that came into existence before the marriage and was used to acquire another asset during the marriage, particularly after a lengthy marriage: *Livingstone v. Livingstone*, 1999 BCCA 295, 68 B.C.L.R. (3d) 109, *Wheatley v. Oliver* (1996), 21 B.C.L.R. (3d) 209 (C.A.) at para. 19. There is also no error of law in rejecting a claim for reapportionment of a family asset that was acquired wholly or in part by pre-marital assets of one of the spouses. In *Taylor v. Taylor* (1998), 50 B.C.L.R. (3d) 212, Madam Justice Prowse, for the Court, noted:
- [28] Nor would I give effect to counsel's submission that there should be a reapportionment of the RRSP's based on reasoning by analogy from Part 6 of the FRA and related regulation. Although the legislature chose to amend the FRA and enact Reg. 77/95 to provide for a division of employee pensions which factor out contributions made prior to marriage, it has not taken steps to amend the legislation to provide for similar treatment of RRSP's. It could have done so, for example, by providing that only that portion of an RRSP accumulated subsequent to marriage was a family asset for the purpose of division under the FRA.

- [59] The burden of proof was on the appellant to demonstrate, based on the statutory criteria in s. 65, that an equal division of the LIF would be unfair. He did not address that issue before the trial judge and therefore did not meet that burden. It is not for this Court to review the evidence, at this time, in the context of the statutory criteria for reapportionment of a family asset.
- [60] Having said that, in my view the trial judge did err in law by dividing the LIF as of November 30, 2005 rather than the date of trial. The date for characterizing an asset as a family asset is the triggering event: *Blackett v. Blackett*, (1989), 40 B.C.L.R. (2d) 99 (C.A.). The date for the valuation of a family asset, for the purpose of its division under Part 5 of the FRA, is generally fixed as of the date of trial. This principle was confirmed in *Newson v. Newson*, (1986), 3 B.C.L.R. (2d) 1 (C.A.) at para. 8:

The proper date for determining the character of assets as family assets, business assets, or other assets, is the date of the triggering event; and the date for determining their value is the date that is appropriate, having regard to the asset and what has happened to it, but not earlier than the date of the triggering event.

- [61] The trial judge's expressed intention was to divide the family assets equally. That required the value of the family assets to be determined as of the date of trial. By choosing a date other than the date of trial, the trial judge effectively reapportioned that asset in favour of the respondent without finding that the presumptive equal division would be unfair based on the factors in s. 65(1) of the FRA. See *Toth v. Toth*, 13 B.C.L.R. (3d) 1 at para. 55, 17 R.F.L. (4th) (C.A.). While it might reasonably be inferred that the trial judge chose the earlier valuation date in order to address the appellant's pre-triggering event withdrawals of \$24,000 and \$54,000, respectively, the disposal of a potential family asset close to the triggering event should have been addressed by way of a compensation order under s. 66 of the FRA (see *Newson*).
- [62] In the result, I would allow the appeal in part by varying paragraph 8 of the Order to provide that the respondent is entitled to a compensation order for one half of the \$24,000 and \$54,000 withdrawals, respectively, made by the respondent before the triggering event, and that the parties shall each receive credit, in the division of assets, for one half of the balances in the accounts of their respective RRSPs and LIFs as of October 17, 2007. In all other respects, I would dismiss the appeal.
- [63] In view of the respondent's substantial success in this appeal, I would award her 90% of her costs.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Tysoe"

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