
CANADA / JUDGMENT

Freeland v. Farrell

2021 BCSC 1318

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1318 Freeland v. Farrell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Freeland v. Farrell,

2021 BCSC 1318

Date: 20210707

Docket: 185081

Registry: Victoria

Between:

George Edward Freeland

Petitioner

And

Heather Anne Farrell

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 67 and 73 on July 9, 2021.

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Petitioner:

M. J. Velletta

Counsel for the Respondent:

J. A. Hall

Place and Date of Trial:

Victoria, B.C.

May 31 - June 3, 2021

Place and Date of Judgment:

Victoria, B.C.

July 7, 2021

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INTRODUCTION

- [1] This petition arises out of a short-term, later-in-life romantic relationship. At the height of the relationship the parties bought a house ("Royal Wood" or "the property") together on the agreement that they would each pay half of the house purchase and expenses. They broke up before they moved into the house. The petitioner, Mr. Freeland, moved into Royal Wood alone.
- [2] Mr. Freeland seeks to have the respondent, Ms. Farrell, removed from title as she has not made any financial contribution toward Royal Wood.

- [3] Ms. Farrell contends that, because her name is registered on title as a joint tenant and she is named on the mortgage, she is co-owner of the property. While she concedes that she has failed to pay anything toward the property, Ms. Farrell argues that she has contributed value in two ways - first, by pledging her credit so the parties could obtain the mortgage and second, by assuming the risk of being held responsible for the mortgage all of these years.
- [4] Accordingly, she seeks to have Royal Wood sold pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347. She claims that she is entitled to half of the value of the property (less Mr. Freeland's contributions), which she says has increased since the parties purchased the property in late 2017.

BACKGROUND

- [5] The facts regarding the parties' relationship are not in issue.
- [6] Mr. Freeland and Ms. Farrell met in May/June 2017 and began dating shortly thereafter. At that time Mr. Freeland, a successful business person, owned a home on a lake outside of Victoria, a ski cabin and a commercial property, but had not owned a house in Victoria since his 2015 separation from his wife of 17 years. In early 2017, he was in the financial position to purchase a house.
- [7] Ms. Farrell is employed as an insurance adjuster and has been for over 30 years. According to her evidence, she has bought and sold real estate for 30 years and owns her own house with a modest mortgage. She considers herself to be knowledgeable in real estate investments. She has long subscribed to receive MLS listings in her preferred areas of Victoria and keeps a close eye on the market.
- [8] After dating for about three months the parties began talking about buying a house together in which they would live as a couple. They agreed that they would each:
- 1) pay half of the cash portion of the purchase price and other closing costs;
 - 2) obtain bank financing secured by a mortgage for the balance of the purchase price;
 - 3) be responsible for half of the mortgage payments, property taxes and other costs associated with ownership of the property; and
 - 4) own the house equally and live there together as a couple.
- [9] They began looking for a house.
- [10] In preparation, Mr. Freeland contacted the Royal Bank of Canada (RBC), with which he had been dealing for 15 years, to obtain pre-approved financing. On October 7, 2017, Mr. Freeland obtained a pre-approval in writing from RBC. The terms of the pre-approval were as follows:
- Purchase, 35% down, Purchase \$900000

- Homeline increase to 65% of new appraised value, max \$600000 value.
- [11] This pre-approval was in the words of the banker, "subject to formal approval as we need to value and approve the home you're purchasing and also value the lake property." Of note, this pre-approval was obtained without factoring in Ms. Farrell's financial situation or the prospect of her contributing to mortgage payments. As Mr. Freeland stated in response to a question from the banker as to whether Ms. Farrell wanted to be on the mortgage, "Heather does not want to be on the mortgage at this point. We are looking to see if I can do it myself and she is looking at some other investment options with her property."
- [12] With the pre-approval, Mr. Freeland felt confident in his ability to unilaterally obtain financing in order to start looking at properties. Mr. Freeland was firm in his evidence that his decision to buy a house was not in any way determined by his relationship with Ms. Farrell; he was ready and able to buy a house with or without her.
- [13] In late September 2018, Mr. Freeland made an offer on a house but was outbid. The offer was in his name alone.
- [14] On October 9, 2017, Mr. Freeland made an offer to purchase Royal Wood for \$810,000. The offer was unconditional and made in his name only. Two clauses are notable: first, he waived the subject to financing clause; and second, he had added, in handwriting, a clause that read "Heather Farrell will be added to title upon completion as Buyer."
- [15] According to the uncontroverted evidence, the vendors agreed to accept the offer on the basis that the handwritten condition be removed and Ms. Farrell added as a co-purchaser to the contract. The contract was amended accordingly. Ms. Farrell initialled the change and signed the contract. The amended offer was accepted by the vendor.
- [16] I find that the only reason Ms. Farrell was put on title at that time was because the vendor requested her to do so and that, at the time the parties entered into the Contract for Purchase and Sale of the property, they intended to be equal owners, pay equal shares of the price of the house (including the mortgage) and live in the property together.
- [17] Following the vendor's acceptance of the offer, both parties testified that they celebrated buying a house together.
- [18] It is clear from the evidence that Ms. Farrell was aware that if she was on title she also had to be on the mortgage. On October 10, 2018, the day after the contract was signed, Ms. Farrell sent an email to Mr. Freeland indicating concern about financing her half of the property. She wrote in part:

am doing a lot of thinking about the #'s and wondering what that will look like. Looks like my cost for HERE at Willowbrook is about \$900+/month, to cover mortgage, insurance and taxes. So call it \$1000/month.

If I rent it for \$1500-\$1800 .if that's possible .it would give me \$500-800/month to apply to cost at royal wood. Gonna need a LOT more/ month to cover ½, if that's what you're thinking.

I think we just need to sit down and talk about costs/#'s / options.

I know they put me on title and if I'm not yet IN THERE or contributing .just yet I have no problem signing something to say that.

I love that you are taking the bull by the horns and figuring out the #'s and I want to be in life with you on this Just want to do it in a way that doesn't stress either of us out.

[19] On the understanding that Ms. Farrell needed time to figure out where to get money, Mr. Freeland paid the \$50,000 deposit. He testified that he trusted that she would come up with her half of the deal. Mr. Freeland testified that he never gifted Ms. Farrell that money or told her that she did not have to pay him back.

[20] The parties then engaged with the bank to obtain financing. Because Ms. Farrell was on title she had to be on the mortgage and the bank required information from her. However, Ms. Farrell argues that Mr. Freeland obtained mortgage financing only because she pledged her credit. I will return to this.

[21] The closing date was November 29, 2017. Mr. Freeland paid the closing costs of just over \$128,000 and the parties jointly covenanted for a mortgage for \$648,000. They went on title as co-owners of an undivided one-half interest in Royal Wood as joint tenants.

[22] Although she testified that she had access to a \$300,000 line of credit, Ms. Farrell was deciding whether to sell her house or rent it in order to pay her half. According to Ms. Farrell, Mr. Freeland told her that he would take care of the closing costs and that she could pay him back when she decided what to do with her house. Mr. Freeland testified that it was easier for him to pay and her to pay him back. She has yet to reimburse Mr. Freeland or to make any payments toward the purchase of the house.

[23] The parties took possession of Royal Wood on December 4, 2018. They did not move in at that point. The parties had pre-planned trips in December 2018 and January 2019 and they wanted to paint the interior before moving in. Essentially only Mr. Freeland's possessions from his rental room and things required for painting were moved into the property. Ms. Farrell testified at some length of all the work she did painting and doing trim. A photo of the parties from December 24, 2018 shows them painting the interior.

[24] Although Ms. Farrell arranged to have the mortgage payments due on her paydays, Mr. Freeland paid all of the mortgage payments while they were still a couple. According to Ms. Farrell, she was still deciding what to do with her house. Mr. Freeland testified that he kept paying the mortgage payments while they were together in faith that she would come up with her half. He stated that he "honestly doesn't know why" she never did.

- [25] On or about February 15, 2019, the parties broke up. Ms. Farrell remained living in her house. Mr. Freeland, who had for the preceding couple of months been staying at Ms. Farrell's house and his lake house, moved into Royal Wood. He emailed Ms. Farrell asking her not to come around to "his house" as he needed time alone. On February 18, 2019, Mr. Freeland authorised Ms. Farrell to attend Royal Wood in his absence to retrieve her belongings, stating "I trust you". He asked her to leave the key to the house and garage door opener behind when she left. Despite Mr. Freeland's request, she retained possession of the key and garage door opener.
- [26] On March 2, 2018, Mr. Freeland received correspondence from counsel for Ms. Farrell (who was not her counsel at trial) regarding severing ownership of the property. In that correspondence, Ms. Farrell agreed to be removed from the title and the mortgage if Mr. Freeland paid all the legal and transfer fees and paid her \$25,000. Ms. Farrell testified that the \$25,000 was her share of what she believed was the increase in value of the property.
- [27] Mr. Freeland testified that the demand for a cash payment angered him. In response to Ms. Farrell's counsel's letter, he agreed to remove Ms. Farrell from the title and mortgage at his expense but refused to pay her any money. He requested a payment of \$30,000 for things he had done for her, but agreed to forego that payment if Ms. Farrell did the same. Mr. Freeland testified that, in retrospect, his demand for money in exchange for her getting off title was "flippant." Through counsel, Ms. Farrell countered with a demand that Mr. Freeland pay her \$50,000 in exchange for her consent to be removed from title. She testified that she demanded more money as she believed that the property increased further from her initial offer. With her demands unmet, Ms. Farrell refused to provide her consent to be removed from title. Accordingly she remains on title and the mortgage.
- [28] Following this exchange Mr. Freeland had the locks at Royal Wood changed.
- [29] Ms. Farrell continued to attend the property. On one occasion she entered through the garage (with the garage door opener that she kept) and removed a couch that her parents had given Mr. Freeland a year earlier. This entry and repossession was without Mr. Freeland's knowledge and when he was not home.
- [30] In about July 2019 Ms. Farrell communicated through counsel that she wanted access to Royal Wood. Mr. Freeland responded through his counsel that a key would be available for her at his lawyer's office on the condition that she indicate why she wanted to attend the premises and that she provide an assurance that she would respect his personal property. Mr. Freeland testified that he had no idea why Ms. Farrell wanted to come into the house.
- [31] In August 2019, Ms. Farrell and her new partner confronted Mr. Freeland in his driveway demanding access to the house. Mr. Freeland responded that he was not prepared to give her access at that time but that there was a key for her at his lawyer's office. It was heated exchange that lasted about an hour. A few days later, Ms. Farrell attended with a locksmith and had the lock on the front door drilled off and replaced, leaving Mr. Freeland no key to get in the front door. This was again without Mr. Freeland's knowledge. Police were involved

and Mr. Freeland had to have the lock replaced.

- [32] It was clear from Ms. Farrell's testimony that she attended the property fairly regularly to check on the condition of the property, which she referred to throughout her evidence as "our house", meaning hers and Mr. Freeland's. She testified about the condition of the eavestroughs and how water was running down the side of the house and concerns she had about her investment.
- [33] On November 23, 2018, Mr. Freeland filed the subject petition to have Ms. Farrell removed from the title and the mortgage.

LEGAL FRAMEWORK

- [34] Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 50 provides that indefeasible title is conclusive evidence at law and in equity that the person named in the title as registered owner is indefeasibly entitled to ownership of the land described in the title. It operates as a statutory presumption whereby the person registered on title is presumed to hold their legal or equitable interest to an estate in fee simple: see *Aujla v. Kaila*, 2010 BCSC 1739, citing *Virk v. Pannu*, 2006 BCSC 921 at paras. 8-12, aff'd 2007 BCCA 260 [under the name *Bajwa v. Pannu*]. Since Ms. Farrell is registered on title to Royal Wood, this statutory presumption applies unless Mr. Freeland is able to rebut it.
- [35] In order to succeed in his application to have Ms. Farrell removed from title, Mr. Freeland must rebut the presumption of indefeasibility.
- [36] In *Suen v. Suen*, 2013 BCCA 313 at para. 34, our Court of Appeal identified three ways in which the presumption of indefeasibility may be rebutted:
- i. Through the operation of a resulting trust which may be inferred where no value is given for a legal interest;
 - ii. Through the operation of an agreement between the parties that is contrary to the registered legal title; or
 - iii. Taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

See also *Bajwa* at paras. 12-14, 18, and 23; *Aujla* at paras. 31-36.

CREDIBILITY

- [37] My findings of fact depend to an extent on my findings of credibility. I have therefore considered the remarks of Harris J., as he then was, in *Aujla*, at para. 36 (citing *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, [1952] 4 W.W.R. (N.S.) 171 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[Emphasis added].

[38] Three witnesses were called in this trial - the parties and the mortgage specialist from RBC who dealt with the parties. As the mortgage specialist's evidence was not controversial, the credibility analysis involves only the parties.

[39] I found Mr. Freeland to be a very straightforward and candid witness. His answers were responsive. His evidence was corroborated by the documents. He did not have an axe to grind. He never said anything negative about Ms. Farrell; in fact, quite the opposite. He described her as financially sound and savvy in real estate. He said that she had a good job. He fairly conceded that he was being "flippant" when he responded to her demand for money in exchange for getting off title.

[40] In contrast, I found Ms. Farrell's evidence to be evasive and scripted. She did not answer questions directly, particularly in cross-examination. She had a story to tell and she took every opportunity to do so. I had to ask her on several occasions to answer what was being asked.

[41] Ms. Farrell's bitterness toward Mr. Freeland was apparent throughout her evidence. She expressed her unhappiness with how the relationship ended a number of times and said that the way he "ghosted her" was unlike any break up she had ever experienced. She took every opportunity to make gratuitous disparaging comments about Mr. Freeland's character, including making serious allegations involving fraud and deceit. She could not concede

anything in cross-examination. She was indignant when challenged about entering Royal Wood when Mr. Freeland was not home and about having the lock on the front door drilled out and replaced. She continually maintained that it is "our house" while placing her hand on her chest.

- [42] Ms. Farrell attempted to buttress her evidence by referring to documents that she did not provide and people she did not call as witnesses. Her evidence in places defied logic. For example, she maintained throughout her evidence that she always intended to pay her half of the expenses related to the purchase of Royal Wood. When asked why she did not contribute, she answered that Mr. Freeland had not asked her to. She also maintained that she and Mr. Freeland were trying to figure out how she could pay her share, yet testified that she had access to a \$300,000 line of credit with no outstanding balance, an "impeccable" credit rating and a house that was mostly paid off.
- [43] Generally, I find that Ms. Farrell embellished her evidence when she felt it served her and downplayed her evidence when she felt it served Mr. Freeland.
- [44] For these reasons, I find Ms. Farrell's credibility to be questionable. As a result, where her evidence conflicts with other evidence, I prefer the other evidence.

ISSUES

- [45] Mr. Freeland relies on the first and third considerations outlined above in Suen at para. 34 to rebut the presumption of indefeasibility. Accordingly the issues are:
1. Whether Mr. Freeland has rebutted the presumption of indefeasibility by demonstrating that Ms. Farrell gave no value for her legal interest in Royal Wood, such that a resulting trust is inferred; and
 2. Whether Mr. Freeland has rebutted the presumption of indefeasibility by demonstrating that Ms. Farrell was unjustly enriched by obtaining her legal interest in Royal Wood, such that a constructive trust should be imposed.
- [46] Mr. Freeland has also advanced an argument in relation to rescission and Ms. Farrell seeks occupational rent on the basis of ouster, but my findings with respect to the first two issues are dispositive and therefore, I need not consider those issues.
- [47] I will now consider each issue in turn.

ANALYSIS

Issue 1: Whether Mr. Freeland has rebutted the presumption of indefeasibility by demonstrating that Ms. Farrell gave no value for her legal interest in Royal Wood, such that a resulting trust is inferred

- [48] Mr. Freeland seeks to rebut the statutory presumption of indefeasibility on the basis that Ms. Farrell did not contribute any value for her interest in Royal Wood.

- [49] In response, Ms. Farrell takes the position that she contributed value in two ways - first, that Mr. Freeland needed her to get the mortgage and second, that by pledging her credit she has assumed the risk of being held responsible for the mortgage all of these years.
- [50] Where a transfer of property is made for no consideration, the transferor must have intended either to give the interest in the property (a gift) or retain it (a trust): *Nishi v. Rascal Trucking*, 2013 SCC 33, at para. 27. Whether a co-purchaser gave valuable consideration for the transfer is a question of fact to be determined on the evidence in each case: *Bajwa* at paras. 16 and 18.
- [51] As noted by Arnold-Bailey J. in *Virk*, it is a long-established principle at common law that a resulting trust occurs in favour of a party who advances the purchase money for a property, subject to the statutory presumption of indefeasibility: at paras. 8-12, citing *Dyer v. Dyer* (1788) 30 E.R. 42 at 43. In *Pecore* at para. 20, Mr. Justice Rothstein described a resulting trust in this way:

A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

[Emphasis added.]

- [52] Similarly, in *Suen*, D. Smith J.A. described a resulting trust as follows:

37 The imposition of a resulting trust does not require proof of intention, but rather it is a legal doctrine that is imposed, "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, [Oosterhoff on Trusts: Text, Commentary and Materials, 7th ed. (Toronto, Carswell, 2009)] at p. 25" (Kerr at para. 16). It may also arise where a claimant seeks, "the recognition of his or her proportionate interest in the asset which the other has acquired with [his or her] property" (para. 25).

- [53] Accordingly, where it is established that a transfer was made for no consideration, a resulting trust is presumed. The onus is on the party seeking to rebut the presumption to prove on a balance of probabilities that it does not apply by demonstrating that a gift was intended: *Suen* at paras. 35-38; *Fuller v. Harper*, 2010 BCCA 421 at paras. 43-46, citing *Pecore v. Pecore*, 2007 SCC 17. As stated by Mr. Justice Cromwell in *Kerr v. Baranow*, 2011 SCC 10, the transferor's intention is key to the court's analysis:
- [17] Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In

either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

- [18] The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added [by Cromwell J.]).
- [19] As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds the property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).
- [Emphasis added.]
- [54] With these principles in mind, I turn now to consider whether Mr. Freeland has rebutted the statutory presumption of indefeasibility by demonstrating that Ms. Farrell gave no value for her legal interest.
- [55] As stated above, Ms. Farrell concedes that she has not paid anything toward Royal Wood but maintains that she contributed value by pledging her credit and incurring the risks of same. She relies on the cases of *Bajwa* and *Aujla* for the proposition that pledging one's credit for the purpose of obtaining a mortgage constitutes valuable consideration, thereby negating the inference of a resulting trust. She submits that the provision of her credit was instrumental to the acquisition of the property and thus constitutes a financial contribution such that the presumption of resulting trust does not arise.
- [56] Mr. Freeland counters that he could have qualified for the mortgage on his own and that he offered to let her off of the mortgage in March 2018 but she refused. He argues that *Bajwa* and *Aujla* are factually distinguishable on the basis that, in those cases, even though the co-purchaser did not make a financial contribution toward the purchase of the property, the provision of their credit was necessary for the purchase. In Mr. Freeland's submission, Ms. Farrell's pledge of credit was not necessary for obtaining a mortgage, he was willing and able to take her off the mortgage but she refused and there was never any real risk of default.
- [57] Given the parties' reliance on *Bajwa* and *Aujla*, it is necessary to review them in some detail.

- [58] In *Bajwa*, Ms. Virk appealed from an order that Mr. Pannu was entitled to a one-third equitable interest in real property that they had purchased together in 2001 for the benefit of her mother. Ms. Virk was in a romantic relationship with Mr. Pannu and before their relationship ended, they purchased a property for the benefit of Ms. Virk's mother. In order to obtain financing for the purchase, Mr. Pannu pledged his credit under the mortgage, while Ms. Virk, her mother and brother made the down payment. Ms. Virk, her mother and Mr. Pannu were registered as owners in fee simple as joint tenants, even though Mr. Pannu made no financial contribution towards the property either at the time of the purchase or thereafter. The trial judge found that by pledging his credit under the mortgage and assuming the risks associated with same, along with discovering the property and negotiating its purchase, Mr. Pannu gave valuable consideration for his interest.
- [59] The majority of the Court of Appeal upheld the trial judge's decision on the basis that Ms. Virk and her mother would have been unable to purchase the property without the assistance of Mr. Pannu because they would have been unable to obtain mortgage financing:

6 It is also common ground that the Virks were unable to purchase the property without the assistance of Mr. Pannu because they were unable to obtain mortgage financing. Mr. Pannu found the property through a realtor and secured a mortgage as a principal borrower. Without that assistance from him the Virks would have been unable to purchase the property. The trial judge found at para. 40 of her reasons that Mr. Pannu "was the driving force in terms of finding the Queen Street Property, engaging in negotiations for its purchase, and then facilitating its purchase by way of the mortgage with Envision [Credit Union]."

13 The Virks had to adduce evidence capable of displacing the presumption. They relied almost exclusively on the fact that they paid all of the \$35,000 down payment and Mr. Pannu paid nothing. They say that this fact gives rise to a resulting trust, an issue I will deal with presently. Their argument, however, all but ignores another critical fact. Mr. Pannu contributed significantly to the purchase of the property by pledging his credit and taking on a substantial debt. He made it possible for the Virks to buy property they otherwise were unable buy and he exposed himself to the risk of having to meet mortgage payments or reimburse a shortfall if there was default. The equity in the property at the time of purchase was only \$35,000 and it is not difficult for me to conclude, as I think the trial judge implicitly did, that Mr. Pannu's contribution was at least equal to that of the other two registered owners.

16 The Virks rely on Professor Waters' text, *Law of Trusts in Canada*, 2d. ed. (Toronto: Carswell, 1984) at 299. The passage on that page of the text says that for a resulting trust to be inferred the person said to be a trustee must have given no value for his legal interest. It follows that if it is found as a fact that the person whose equitable interest is challenged did give value, there can be no resulting trust. Whether value was given is a question of fact to be determined on the evidence in each case. The trial judge here found that Mr. Pannu gave value and there was evidence to support that conclusion. This is not a case like so many others in which one party has transferred an asset to another for no consideration. The evidence here supported the conclusion that Mr. Pannu was a co-purchaser which, in effect, is what the trial judge found to be the case.

[Emphasis added.]

[60] Hall J.A., dissenting in part, found that a resulting trust arose on the evidence, but that Mr. Pannu should receive a one-sixth interest in the property for the reason that his credit was essential to the purchase:

26 The circumstances here are that there were diametrically opposed positions set forth in the affidavits of the parties. But, in my view, I consider that the surrounding circumstances as gleaned from a perusal of the conveyancing file documents do cast light on what was truly intended at the time of purchase by the parties. In my judgment, it is clear from those documents that it was never intended that Mr. Pannu should be a person with an equity interest in that property that was being purchased. I consider that the learned judge erred in finding Mr. Pannu ought to be found to have a one-third interest in the property. I note that all funds for the purchase price of the property were contributed by the Virks and I consider there was a resulting trust in their favour by reason of that fact.

28 I consider, as I said, that the evidence from the contemporary conveyancing documents from the file of Mr. Hammond makes it clear that there was no common intention of the parties that the respondent Mr. Pannu should acquire a beneficial interest in the property. Because of the circumstance that all the funds to purchase the property were advanced by the Virks, I consider that he held his interest shown on title in trust for the benefit of the Virks. I do point out, however, that he was clearly a facilitator of the transaction and without him furnishing his credit via the mortgage required to finance the transaction the purchase could have not have been effected. Because of that circumstance I would consider it inequitable he not be appropriately rewarded for the services he provided and the risk he undertook. In my view, an equitable disposition in this case would be that he should be found entitled to a one-sixth interest in the property to recognize his contributions to the acquisition of the property. I would allow the appeal to the extent I have indicated. In view of the circumstance that this is a dissenting judgment I need not undertake any extensive discussion of costs, but I would have been inclined to order the respective parties to bear their own costs here and in the trial court because of divided success.

[Emphasis added.]

[61] In Aujla, Ms. Aujla sought a declaration that she had a beneficial interest in a property owned by her mother and sister. The property was initially purchased in 1989 and registered in the name of Ms. Aujla and her parents. At the time of the purchase, Ms. Aujla pledged her credit under the mortgage. In 1992, Ms. Aujla transferred her interest for consideration to her mother, who became the sole titleholder. In 2006, Ms. Aujla's mother transferred a half interest in the property to Ms. Aujla's sister.

[62] Ultimately, Harris J. held that Ms. Aujla lost her interest in the property when it was transferred to her mother for consideration in 1992 and therefore, Ms. Aujla had no basis to challenge the 2006 transfer. However, Harris J. found that, although Ms. Aujla was not a named purchaser under the Contract of Purchase and Sale and did not contribute funds

toward the purchase of the property in 1989, she nonetheless gave valuable consideration toward the purchase at that time by pledging her credit under the mortgage. Harris J.'s finding that Ms. Aujla contributed value turned on his finding that she was required to become a covenantor under the mortgage in order for the family to purchase the property in 1989:

40 In summary, I have concluded that Ms. Aujla did acquire a beneficial interest in the Property in 1989. This conclusion is based on a finding that Ms. Aujla was required to become a covenantor under the mortgage used to fund the purchase of the Property. Ms. Aujla was required to pledge her credit as a principal debtor. Unless she was on title it would not have been possible for the family to buy the Property. I reach this conclusion even though I reject Ms. Aujla's assertion that she contributed money to the purchase by funding the deposit and part of the purchase price and by paying the mortgage.

59 For current purposes it is sufficient for me to find, first, that Ms. Aujla made a material contribution to the acquisition of the Property by pledging her credit as a mortgagor and taking on a substantial debt that made it possible for her parents to buy a property that they could not otherwise have acquired. In light of my conclusion that Mr. Pressad explained to Nasib and Gurcharan the significance of Ms. Aujla being registered on title, I conclude that the defendants have not displaced the presumption of indefeasible title.

[Emphasis added.]

[63] Having considered all of the evidence and the case law, I find that Ms. Farrell did not provide valuable consideration for her legal interest in the property for a number of reasons.

[64] First, Mr. Freeland was and is financially secure. He was pre-approved for a mortgage on his own. While that pre-approval was subject to the valuation of Royal Wood and his lake property, it is clear from the evidence before me that those conditions were easily met. Ms. Farrell was not involved in that pre-approval. The bank did not have any of her information. Ms. Farrell's financial information only became necessary when she became a co-purchaser of Royal Wood. Once she was going to be on title it was necessary for her to be a covenantor under the mortgage. Only then did she become part of the mortgage approval process.

[65] Ms. Farrell contends that the mortgage was approved only after the parties' collective dealings with RBC and that, on the face of it, the pre-approval that Mr. Freeland received in October 2017 would never have succeeded. Specifically, she says that Mr. Freeland did not have the funds to meet the pre-approval requirements as, in her submission, the mortgage application appears to have required \$200,000 in annual income yet Mr. Freeland's 2016 annual income was only \$117,000.

[66] There is no evidence to support Ms. Farrell's contention that the only reason the parties obtained a mortgage was because of her credit. Mr. Freeland's evidence with respect to his personal and corporate finances satisfies me that he was more than able to meet the requirements set out in the pre-approval. Using his TFSA savings and re-mortgaging his lake

property was one of the many ways he could have financed the purchase of Royal Wood. I also note that the closing price of Royal Wood was less than the amount Mr. Freeland was pre-approved for in October 2017.

- [67] Of note, Ms. Farrell called as a witness the mortgage specialist at RBC that assisted Mr. Freeland alone then both of the parties together. He was not asked about whether it was necessary for Ms. Farrell to pledge her credit in order for Mr. Freeland to obtain mortgage financing for the purchase of Royal Wood. This was, in my view, significant, as the mortgage specialist was the best (and perhaps only) witness who could answer that question. Instead, he testified that all persons registered on title must also be registered on the mortgage.
- [68] The facts on this petition are distinguishable from Bajwa and Aujla where the primary co-purchaser who made all of the payments needed the pledge of credit from the other co-purchaser in order to obtain mortgage financing to purchase the property. The evidence clearly establishes that Ms. Farrell was a covenantor merely because she was on title; not because she was in any way required for Mr. Freeland to obtain financing.
- [69] Second, by pledging her credit Ms. Farrell may have taken on a risk but that risk was not a real one in light of Mr. Freeland's financial position and the fact that there is sufficient equity in Royal Wood and the lake property to cover the mortgage. In fact, Ms. Farrell adduced a property appraisal for Royal Wood dated October 23, 2020 which indicates that the value of Royal Wood has appreciated substantially since the time it was purchased in November 2017. Given the recent conditions in the real estate market, it is likely that Royal Wood has further increased in value since the time of the appraisal. As well, Ms. Farrell testified that she checks the mortgage account regularly so she is aware that Mr. Farrell has made all of the mortgage payments in full and on time.
- [70] Finally, it is in my view significant that Ms. Farrell did not have to remain a covenantor to the mortgage; she chose to. In March 2018, when Mr. Freeland offered to pay all the costs to have her removed from the mortgage she refused to sign the required consent, holding out for her share of what she believed was the increase in value of the property.
- [71] Ms. Farrell claims that being on the mortgage hindered her opportunities for other investments but there is nothing in the evidence to support this. There is no documentation suggesting that she was refused financing by virtue of her being a covenantor under the Royal Wood mortgage. Further, had she wanted out of the mortgage, she knew that Mr. Freeland was willing and able to make that happen. I find that Ms. Farrell, a savvy business person, made a calculated decision to continue to assume the (minimal) risk of being a covenantor on the mortgage in exchange for a share in what she viewed as a good investment. In her mind, the anticipated gain was clearly greater than the risk.

- [72] Based on the above, I am satisfied that Mr. Freeland has established that Ms. Farrell did not provide valuable consideration for her legal interest in Royal Wood. Accordingly, there arises the presumption that Ms. Farrell holds her legal interest in a resulting trust for Mr. Freeland.
- [73] The onus then shifts to Ms. Farrell to disprove this presumption of resulting trust.
- [74] The evidentiary focus is on the transferors' actual intention at or around the time of the transfer: Fuller, at paras. 48-50, citing Pecore. Generally, this is done by leading evidence that the transferor, Mr. Freeland, intended a gift. There is no evidence of that. In fact, as above, Mr. Freeland expressly denies intending a gift and Ms. Farrell never advanced that proposition. Instead, Ms. Farrell acknowledges that she has always been responsible for half of the cost of the property and claims that she has always intended to pay it. She provides as the reason for not so doing that Mr. Freeland never asked her to.
- [75] I do not accept Ms. Farrell's explanation.
- [76] While the evidence is that Mr. Freeland covered the deposit and closing costs pending Ms. Farrell deciding how she wanted to finance her share, there was always an expectation that she would reimburse him for her half. There is no evidence that she did not have to pay unless and until Mr. Freeland asked her to. If there was any vagueness around when Ms. Farrell was expected to start paying her share by virtue of the parties' romantic relationship, that uncertainty was gone in March 2018 when the parties attempted to negotiate Ms. Farrell's removal from title and the mortgage. At that point it was abundantly clear that the romance was over and Mr. Freeland was going to live in Royal Wood.
- [77] Ms. Farrell has had over three and a half years to make a payment. Although she claims that she has (and has always had) the means to pay her half, Ms. Farrell has contributed no monies to the purchase of the property, the mortgage payments or the costs of maintaining the property.
- [78] Having considered all of the evidence I am not satisfied that Ms. Farrell has displaced the presumption of resulting trust.
- [79] Accordingly, I am satisfied that the presumption of indefeasibility has been rebutted and I find that Ms. Farrell holds her legal interest in Royal Wood on resulting trust for Mr. Freeland.
- [80] If I am incorrect in these findings, I will continue to consider whether Mr. Freeland has rebutted the presumption of indefeasibility via unjust enrichment.

Issue 2: Whether Mr. Freeland has rebutted the presumption of indefeasibility by demonstrating that Ms. Farrell was unjustly enriched by obtaining her legal interest in Royal Wood, such that a constructive trust should be imposed

[81] The statutory presumption of indefeasible title may be displaced by the enforcement of an agreement between the parties in order to prevent an unjust enrichment should the face of the title be upheld: *Skender v. Skender*, 2005 BCSC 418, aff'd 2006 BCCA 162. In *Kerr v. Baranow*, 2011 SCC 10, Mr. Justice Cromwell explained the doctrine of unjust enrichment in the following terms:

31 At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason

[Emphasis added.]

[82] An unjust enrichment may arise where a person makes a substantial contribution to the property of another without compensation: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 987. To succeed in an unjust enrichment claim the petitioner must establish three elements:

- 1) an enrichment to the respondent;
- 2) a corresponding deprivation to the petitioner; and
- 3) the absence of any juristic reason for the enrichment.

See *Kerr* at para. 32.

[83] Regarding the first element, an enrichment, the court has taken an economic approach. There must be a tangible benefit which has enriched the respondent and which can be restored to the petitioner in kind or with money: *Kerr* at paras. 37 and 38.

[84] The second element, a corresponding deprivation, bears relation to the respondent's gain. Put another way, the respondent's gain has led to or caused the petitioner's loss: *Kerr* at para. 39.

[85] The third element, the absence of juristic reason, means that there is no reason in law or justice for the respondent's gain: *Kerr* at paras 40-41. It contemplates the autonomy of the parties, including their legitimate expectations and their right to order their affairs by contract. Juristic reasons may include, for example, the petitioner's intention to give a gift or a contract, but juristic reasons are not limited to a closed list.

[86] In determining whether there is a juristic reason for the enrichment, the petitioner must first show that no juristic reason from an established category exists to deny recovery (*Kerr* at para. 43, citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 44-46). If he is successful, the petitioner has made out a prima facie case under the juristic reason analysis which may be rebutted by the respondent if she can show why the enrichment should be retained, bearing in mind the parties' reasonable expectations and public policy considerations.

- [87] Mr. Freeland argues that the enrichment to Ms. Farrell is her half interest in Royal Wood despite making no financial contribution; the corresponding deprivation to him is a loss of a half interest in the property despite making all the necessary financial contributions to maintain that interest; and that there is no juristic reason for the enrichment.
- [88] Ms. Farrell takes the position that there is no enrichment and corresponding deprivation as she acknowledges that any accounting between them must account for Mr. Freeland's financial contributions to the property. She further responds that the juristic reason for the enrichment is the contract that the parties entered into to purchase the property.
- [89] I disagree with Ms. Farrell. Given my findings above, I am satisfied that:
- 1) there would be an enrichment for Ms. Farrell if she were to share in the value of Royal Wood by retaining her legal interest;
 - 2) there would be a corresponding deprivation to Mr. Freeland to lose half of the value of Royal Wood by being deprived of the other half interest, despite contributing all of the purchase money and paying all the expenses associated with the property; and
 - 3) there is no juristic reason for the enrichment because, although the parties agreed to share the expenses in relation to Royal Wood equally, Ms. Farrell has provided no value and accordingly has offered no consideration in exchange for her legal interest. Mr. Freeland was never obliged to fund Ms. Farrell's share of expenses in respect of Royal Wood; nor did the parties contemplate or agree to such an outcome. In addition, I find that it is unreasonable for Ms. Farrell to have expected to retain her interest in Royal Wood for three and a half years without making any financial contribution, especially since she had the opportunity to be removed from the title and the mortgage at Mr. Freeland's expense as early as March 2018. There is nothing she did that would warrant her being entitled to her legal interest in Royal Wood, nor is there any reason that Mr. Freeland would have intended to make such a gift. Ultimately, it would be unjust in these circumstances if Ms. Farrell were to retain her legal interest.
- [90] Having found that to allow Ms. Farrell to remain joint owner of the property would amount to unjust enrichment, I must consider the remedy.
- [91] The remedy for a claim of unjust enrichment may be monetary or proprietary through a constructive trust. Through a constructive trust, one person is required by operation of law to hold certain property for the benefit of another. As noted in Waters, Gillen and Smith: Waters' Law of Trusts in Canada, 4th ed. 2012 at 396-397, a constructive trust effectively performs the same function as a resulting trust:

Distinguishing the resulting trust from the constructive trust is also not easy because the lines have been blurred. Sometimes the same facts allow both a constructive trust theory and a resulting trust theory to be deployed. ...

There is even more overlap between resulting trusts and those constructive trusts which arise to reverse unjust enrichment. The reason is that both kinds of trusts typically perform the same function: they return property to the person from whom it came. In *Fulton v. Gunn* [2008 BCSC 1159] for example, an interest in land was acquired by a son using purchase money that came from his mother. It was held that this created a resulting trust for the benefit of the mother; and it was also held in the alternative that the son had been unjustly enriched at the expense of the mother, and so held the property on constructive trust for her. To the extent that resulting trusts are seen as arising by operation of law, they are really just a sub-species of constructive trust. The distinction between resulting and constructive trusts is perhaps best put in this way - while constructive trusts have nothing to do with intention, express or implied, resulting trusts can be explained either on the basis of intention or imposition of law.

[Emphasis added.]

[92] A constructive trust may be imposed as a remedy where:

- 1) monetary damages are inadequate;
- 2) there is a "direct" or "special" link to the contribution that founds the action and the property in which the constructive trust is claimed; and
- 3) the contribution to the property was substantial.

See *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 987-988; *Harraway v. Harraway*, 2009 BCCA 561 at para. 52.

[93] In considering whether to impose a constructive trust, the court may only consider the parties' respective contributions related to the property and not "the totality of their financial and social dealings with one another": *Suen v. Suen*, 2016 BCCA 107 [Suen #2] at para. 58. While contributions related to things like grocery bills, security services or utilities are not to be considered, the court may take into account the parties' respective mortgage payments, municipal taxes and home insurance payments: *Suen* #2 at paras. 59-63. I pause to note that, in *Suen* #2, the Court of Appeal did not find that the petitioner's mortgage payments raised issues of unjust enrichment because the mortgage was his sole responsibility, was a charge against his interest in the property, and the respondent was not enriched from the payments given that he had completely paid for his equity interest in the property at the time of purchase.

[94] In *Beblow*, the Supreme Court of Canada held that if a constructive trust in respect of an interest in property is found, the extent of the interest held in trust must be proportionate to the contribution to the property: at 988-999.

[95] I find the following facts to be significant in considering the appropriate award:

- 1) Mr. Freeland has made a substantial contribution to Royal Wood as he has paid every expense (including the purchase price) associated with it;

- 2) Mr. Freeland has lived in Royal Wood for over three years;
- 3) He considers Royal Wood his home, has made friends with his neighbours and is happy there;
- 4) He has maintained Royal Wood for over three years and has made some improvements to the property; and
- 5) It would be costly for Mr. Freeland to move, particularly in light of the fact that house prices have increased since late 2017 when Royal Wood was purchased.

[96] In all of the circumstances, I find that a monetary award is inappropriate. It would deprive Mr. Freeland of his home and create financial hardship for him. I am satisfied that a constructive trust is the appropriate remedy for several reasons: it allows Mr. Freeland to maintain his home and it does not create any hardship for Ms. Farrell. Ms. Farrell has never lived in Royal Wood, nor has she ever expressed a genuine desire to do so; she has maintained her own home and still resides there; and she will be in exactly the same position financially as she was before Royal Wood was purchased having not contributed to purchasing or maintaining it.

[97] In quantifying the constructive trust, I find that Mr. Freeland contributed the entire purchase price for Royal Wood and all the funds related to maintaining it. Therefore, I find that Mr. Freeland is entitled to a 100% legal interest in Royal Wood which is proportionate to his contributions.

[98] Having decided that Ms. Farrell holds her legal interest in Royal Wood in trust for Mr. Freeland, it is unnecessary to consider the other arguments regarding rescission and ouster raised by the parties.

CONCLUSION

[99] I make the following declarations:

- 1) Ms. Farrell holds the property in a resulting trust or alternatively a constructive trust for Mr. Freeland; and
- 2) Ms. Farrell has no beneficial interest in the property.

[100] I make the following orders:

- 1) Ms. Farrell is to be released from the covenants of the mortgage on the property; and
- 2) Once Ms. Farrell has been removed from the mortgage, she is to be removed from the title to the property forthwith.

[101] The parties may contact Supreme Court Scheduling to schedule a hearing date to address the issue of costs.

"The Honourable Madam Justice Murray"

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