
CANADA / JUDGMENT

Freeland v. Farrell

2022 BCCA 99

COURT

British Columbia Court of Appeal

DECIDED

16 March 2022

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2022 BCCA 99 Freeland v. Farrell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Freeland v. Farrell,

2022 BCCA 99

Date: 20220316

Docket: CA47653

Between:

George Edward Freeland

Respondent

(Petitioner)

And

Heather Anne Farrell

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Voith

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated July 7, 2021 (Freeland v. Farrell, 2021 BCSC 1318, Victoria Docket 185081).

Counsel for the Appellant (via videoconference):

M.B. Morgan

Counsel for the Respondent (via videoconference):

G.T. Rhone

Place and Date of Hearing:

Vancouver, British Columbia

February 8, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 16, 2022

Written Reasons by:

The Honourable Mr. Justice Marchand

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Voith

Summary:

The appellant challenges an order that she be removed from title of a property that she and the respondent purchased together during a short romantic relationship. She alleges that the trial judge erred by: (1) finding that she did not contribute value to the property such that she held the property on a resulting trust for the respondent; (2) concluding the unjust enrichment test was satisfied and imposing a constructive trust over the property in favour of the respondent; and (3) making an unenforceable order.

Held: Appeal allowed in part. The appellant failed to demonstrate that the judge committed any reversible error in her resulting and constructive trust analyses. There was a solid evidentiary basis for the judge's conclusion that the appellant did not provide material value to the property and was unjustly enriched by obtaining a legal interest in the property. The appeals from the judge's declarations that the appellant had no beneficial interest in the property and held the property in a resulting trust, or alternatively a constructive trust, for the respondent are dismissed. As the lender was not a party to the action, the judge's order that the appellant be released from the covenants of the mortgage is unenforceable. The unenforceable order is set

aside and replaced with an order that will achieve the desired result of the appellant transferring her legal interest in the property to the respondent.

Reasons for Judgment of the Honourable Mr. Justice Marchand:

Introduction

- [1] During the short-lived romance of George Freeland and Heather Farrell, the two planned to purchase a home together. On November 29, 2017, they closed on the purchase of a home in Victoria (the "Property"). They both signed the mortgage and were registered as joint tenants on title. Mr. Freeland provided the down payment and closing costs and has since made all mortgage and other payments related to the Property.
- [2] Mr. Freeland and Ms. Farrell's relationship ended before either of them moved into the Property. Mr. Freeland has lived there since.
- [3] On November 23, 2018, Mr. Freeland filed a petition under the Partition of Property Act, R.S.B.C. 1996, c. 347, seeking various forms of relief, including declarations that Ms. Farrell held her interest in the Property on a resulting trust for him and had no beneficial interest in the Property.
- [4] Following a four-day trial, the trial judge found that Mr. Freeland had rebutted the statutory presumption of indefeasibility of title by demonstrating that: (1) Ms. Farrell gave no value for her legal interest in the Property such that a resulting trust arose; and (2) Ms. Farrell was unjustly enriched by obtaining her legal interest in the Property such that a constructive trust should be imposed.
- [5] The judge declared that Ms. Farrell had no beneficial interest in the Property and held the Property in a resulting trust, or alternatively a constructive trust, for Mr. Freeland. The judge ordered that Ms. Farrell be released from the covenants of the mortgage and, once that had been done, removed from the title to the Property. The judge's reasons for judgment are indexed as 2021 BCSC 1318.
- [6] Ms. Farrell appeals the declarations and orders made by the judge. She submits the judge erred in disregarding the "uncontroverted" evidence that Ms. Farrell provided value for her interest in the Property and in failing to find the parties' agreement to co-purchase the Property provided a juristic reason for any enrichment of Ms. Farrell. In essence, Ms. Farrell submits the purchase would not have occurred, or would not have occurred on such favourable terms, if she had not been a co-purchaser of the Property and a co-covenantor on the mortgage. Ms. Farrell also submits the judge erred in making an unenforceable order requiring the lender to remove her from the mortgage when the lender is not a party to the litigation.
- [7] Ms. Farrell seeks a sale of the property and, subject to an accounting between the parties, one half of the sale proceeds.

- [8] For the reasons that follow, I would dismiss Ms. Farrell's appeal from the declarations made by the judge. I would, however, allow Ms. Farrell's appeal from the judge's order that she be released from the covenants of the mortgage on the Property. That well-intentioned order is unenforceable. I would replace the unenforceable order with another order (set out below) that should achieve the desired result of transferring Ms. Farrell's legal interest in the Property to Mr. Freeland.

Background

- [9] Mr. Freeland is a successful business person and Ms. Farrell is an insurance adjuster with over 30 years experience. The two met in May or June 2017. They began dating shortly afterwards. At that time, Mr. Freeland owned a home on a lake outside of Victoria, a ski cabin, a commercial property and various investments. He had not owned a home in Victoria since his marital separation in 2015. Ms. Farrell owned and lived in a home in Victoria that carried a modest mortgage.
- [10] After dating for several months, the parties began talking about buying a home together. At para. 8 of her reasons for judgment, the judge found that they agreed 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.
- [11] In preparation for looking for a home, Mr. Freeland obtained pre-approved financing from the Royal Bank of Canada ("RBC"). The terms were that RBC would finance 65% of the purchase price of a home to a maximum of \$600,000 on a purchase of \$900,000. The pre-approval was subject to formal approval, including an evaluation and approval of the home being purchased and a valuation of Mr. Freeland's lake property. The pre-approval was obtained without regard to Ms. Farrell's financial situation or her possible contributions to mortgage payments.
- [12] Mr. Freeland testified that his decision to buy a home in Victoria was independent of his relationship with Ms. Farrell. He was ready and able to buy a home without her. He made two offers to purchase homes in his name alone. He was outbid on the first. The second related to the Property.
- [13] On October 9, 2017, Mr. Freeland made an unconditional offer to purchase the Property for \$810,000. He added a clause to the offer that read "Heather Farrell will be added to title upon completion as Buyer."

[14] At the vendors' request, the offer was amended to remove the handwritten clause and add Ms. Farrell as a co-purchaser. There was no admissible evidence regarding why the vendors asked for this to be done. In any event, the amended offer was accepted.

[15] Though Ms. Farrell signed the contract of purchase and sale, she expressed some concerns about her ability to finance her half of the purchase. On October 10, 2017, she wrote to Mr. Freeland:

am doing a lot of thinking about the #'s and wondering what that will look like. Looks like my cost for HERE at [my home] 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 [the Property]. 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.

[16] On the understanding that Ms. Farrell needed time to organize her finances, Mr. Freeland paid the \$50,000 deposit. He testified that this was not a gift and he trusted that Ms. Farrell would come up with her share.

[17] The parties returned to RBC. Because Ms. Farrell was going to be on title, she also had to be on the mortgage. She provided financial information to RBC and the parties obtained formal approval of a mortgage for \$648,000.

[18] The transaction closed on November 29, 2017. Mr. Freeland paid the closing costs of \$128,000. Mr. Freeland and Ms. Farrell were registered as joint tenants and the RBC mortgage was also registered on title.

[19] The judge found that Ms. Farrell was put on title only because the vendors had requested it and because the parties intended to be equal owners, pay equal shares of the purchase price (including the mortgage) and live in the Property together.

[20] The parties took possession of the Property on November 30, 2017, but did not move in. Instead, they painted the interior and took some pre-planned trips.

[21] The parties broke up in mid-February 2018. Ms. Farrell continued to live in her home and Mr. Freeland moved into the Property. Up to that point, Mr. Freeland had made all of the mortgage payments. He testified that he did so in faith that Ms. Farrell would pay her share, but that did not occur.

[22] The parties subsequently exchanged offers to sever the joint tenancy and remove Ms. Farrell from title. They were unable to agree on terms, which led to Mr. Freeland filing the petition.

[23] Ms. Farrell has never made any monetary contribution to the purchase or maintenance of the Property.

Trial Judge's Reasons for Judgment

[24] After setting out the background, the judge outlined the legal framework for her analysis.

[25] She noted that under s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], 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. Relying on *Aujla v. Kaila*, 2010 BCSC 1739 [Aujla SC], aff'd 2013 BCCA 158 [Aujla CA], citing *Virk v. Pannu*, 2006 BCSC 921 at paras. 8-12 [Virk], aff'd *Bajwa v. Pannu*, 2007 BCCA 260 [Bajwa], she held that Ms. Farrell was entitled to the benefit of this statutory presumption unless Mr. Freeland was able to rebut it.

[26] The judge then referenced *Suen v. Suen*, 2013 BCCA 313 at para. 34, in which this Court identified three ways in which the presumption of indefeasibility may be rebutted:

- (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;
- (ii) 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).

[27] The judge next addressed the parties' submissions on resulting trusts.

[28] Mr. Freeland took the position that he had rebutted the presumption of indefeasibility by demonstrating that Ms. Farrell gave no value for her legal interest in the property, such that a resulting trust should be inferred. Ms. Farrell countered that she contributed in two ways. She contended first that Mr. Freeland needed her to get the mortgage and second that she assumed the risk of being held responsible for the mortgage.

[29] The judge cited a number of leading authorities for the proposition that "where it is established that a transfer was made for no consideration, a resulting trust is presumed": at para. 53. She noted that: "[w]hether a co-purchaser gave valuable consideration for the transfer is a question of fact to be determined on the evidence in each case" (at para. 50); "[t]he 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" (at para. 53); and "the transferor's intention is key to the court's analysis" (at para. 53).

- [30] Given the parties' particular reliance on *Bajwa* and *Aujla SC*, the judge reviewed those decisions in some detail. In both cases, the primary co-purchasers made all of the payments to purchase the property at issue but needed the pledge of credit from the other co-purchasers to obtain mortgage financing. The courts held that the other co-purchasers had given valuable consideration by pledging their credit and the properties could not have been purchased without their pledges of credit. The other co-purchasers therefore had a beneficial ownership interest in the properties.
- [31] On the evidence in the case before her, the judge concluded that: (1) Ms. Farrell had not provided valuable consideration for her legal interest in the Property; (2) Mr. Freeland had rebutted the presumption of indefeasibility; and (3) Ms. Farrell held her legal interest in the Property on a resulting trust for Mr. Freeland. She reached these conclusions for the following reasons:
- Mr. Freeland was financially secure and could have financed the purchase of the Property on his own (at paras. 64-66);
 - Unlike *Bajwa* and *Aujla SC*, Ms. Farrell was a co-covenantor on the mortgage "merely because she was on title; not because she was in any way required for Mr. Freeland to obtain financing" (at para. 68);
 - Though Ms. Farrell may have taken on some risk, "that risk was not a real one in light of Mr. Freeland's financial position and the fact that there is sufficient equity in [the Property] and the lake property to cover the mortgage" (at para. 69);
 - Ms. Farrell could have been removed from the mortgage at an early stage but chose instead to "[hold] out for her share of what she believed was the increase in value of the property" (at para. 70);
 - There was no evidence that the mortgage hindered Ms. Farrell's opportunities to make other investments. In fact, Ms. Farrell "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" (at para. 71);
 - There was no evidence that Mr. Freeland intended to give Ms. Farrell an interest in the Property (at para. 74); and
 - Any uncertainty about when Ms. Farrell was expected to start paying her share became "abundantly clear" when the romantic relationship ended (at para. 76).
- [32] In the event she was incorrect in her findings about the resulting trust, the judge addressed whether Mr. Freeland had rebutted the presumption of indefeasibility via unjust enrichment.

[33] Relying on *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 987, 1993 CanLII 126, the judge noted that "[a]n unjust enrichment may arise where a person makes a substantial contribution to the property of another without compensation": at para. 82. She then set out the well-known formulation for an unjust enrichment to arise. To succeed in his unjust enrichment claim, Mr. Freeland had to establish:

- an enrichment to Ms. Farrell;
- a corresponding deprivation to him; and
- the absence of any juristic reason for the enrichment.

[34] Regarding the third element, the judge explained:

[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.

[35] The judge then concluded that: (1) Ms. Farrell would be enriched if she were to retain her legal interest in the Property; (2) Mr. Freeland would suffer a corresponding deprivation in losing half the value of the Property despite contributing all of the purchase money and paying all associated expenses; and (3) there was no juristic reason for Ms. Farrell's enrichment. Regarding juristic reason, the judge held:

[89] [T]here is no juristic reason for the enrichment because, although the parties agreed to share the expenses in relation to [the Property] 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 [the Property]; 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 [the Property] 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 [the Property], 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.

- [36] In all of the circumstances, the judge found that a monetary award would not be an appropriate remedy for the unjust enrichment. She found instead that a constructive trust should be imposed. She reasoned, in particular, that a constructive trust would allow Mr. Freeland to remain in his home without causing any financial hardship to Ms. Farrell. Given that Mr. Freeland had contributed the entire purchase price and provided all the funds required to maintain the Property, the judge found that Mr. Freeland was entitled to a 100% legal interest in the Property.
- [37] Finally, the judge made the following declarations and orders:
1. Ms. Farrell holds the Property in a resulting trust or alternatively a constructive trust for Mr. Freeland;
 2. Ms. Farrell has no beneficial interest in the Property;
 3. Ms. Farrell is to be released from the covenants of the mortgage on the Property; and
 4. Once Ms. Farrell has been removed from the mortgage, she is to be removed from the title to the Property forthwith.

Standard of Review

- [38] The standard of review is well-known. On questions of law, the standard of review is correctness. On questions of fact, the standard of review is palpable and overriding error. Absent an extricable question of law, the standard of review for questions of mixed fact and law is also palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

Resulting Trust

Position of Ms. Farrell

- [39] Ms. Farrell submits the judge erred in finding that she held her legal interest in the Property in a resulting trust for Mr. Freeland. Specifically, she submits the judge erred by disregarding her own findings of fact based on the "uncontroverted" evidence that Ms. Farrell provided value to the parties' joint acquisition of the Property.
- [40] Ms. Farrell contends that the purchase would not have occurred or would not have occurred on such favourable terms if she had not been a co-purchaser of the Property and a co-covenantor on the mortgage. She notes that the vendors did not accept Mr. Freeland's original offer and required that she be added as a co-purchaser. She also notes that Mr. Freeland was not formally approved for a mortgage on his own and that the eventual terms of the mortgage (\$648,000 or 80% of the purchase price of \$810,000) were more favourable than Mr. Farrell's pre-approval (65% of the purchase price to a maximum of \$600,000 on a purchase price of \$900,000).

- [41] Ms. Farrell submits the judge's finding that Ms. Farrell gave no value for her legal interest in the property amounts to a palpable and overriding error of fact. In oral submissions she went so far as to submit that the judge was obliged, as a matter of law, to find that Ms. Farrell provided value because she was required by the vendors to be a co-purchaser and took on risk as a co-covenantor on the mortgage.

Legal Principles

- [42] There is no debate that, as a registered owner, Ms. Farrell is entitled to the presumption of indefeasible title. Unless the presumption is rebutted, Ms. Farrell's title is conclusive evidence at law and in equity that she is indefeasibly entitled to an estate in fee simple to the Property: LTA, s. 23(2).
- [43] One of the ways that Mr. Freeland can rebut the presumption of indefeasibility is by establishing that Ms. Farrell holds her legal interest in the Property in a resulting trust for him: Suen at para. 34.
- [44] In *Kerr v. Baranow*, 2011 SCC 10, Justice Cromwell explained the concept of a resulting trust:
- [16] [I]t is widely accepted that the underlying notion of the resulting trust is that it 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, at p. 25.
- [45] A resulting trust can arise in various ways and is presumed to arise where an owner of property gratuitously transfers title to another. Of relevance to the circumstances of this case, in *Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at 414, the authors explain that resulting trusts can arise where one party purchases a property that is put into the names of both the purchaser and another person. They explain at 414: "[I]f property is purchased by A, and conveyance or transfer is taken from the vendor in the name of B, or in the names of both A and B, B presumptively becomes a resulting trustee of his or her interest for the benefit of A."
- [46] In cases of gratuitous transfers, the law generally presumes that the person who made the transfer of property intended a trust, not a gift, and the person who gave no value for the property is under an obligation to return the property to the original title owner: *Pecore v. Pecore*, 2007 SCC 17 at para. 20; *Kerr* at para. 19.
- [47] The presumption of a resulting trust can be rebutted. The onus is on the person who gave no value to establish that the person transferring the property intended a gift. If no gift was intended, a resulting trust is established and the person who gave no value holds the property in trust for the person who transferred the property. The actual intention of the person transferring the property at the time of the transfer governs. In *Kerr*, Cromwell J. explained:

- [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).
- [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 in original.]

Discussion

- [48] In this case, if Ms. Farrell gave value, that is the end of the inquiry. No resulting trust would arise. If she gave no value, then Mr. Freeland's actual intention is the governing consideration. If Mr. Freeland intended a gift, then the presumption of a resulting trust would be rebutted. If he did not, then the presumption would not be rebutted and the resulting trust would be established.
- [49] Ms. Farrell relies heavily on the decisions of this Court in *Bajwa* and *Aujla CA*.
- [50] In *Bajwa*, title to a property in Abbotsford was registered in the names of the respondent and the appellants. Although the respondent made no financial contribution to the acquisition or maintenance of the property, the summary trial judge rejected the appellants' argument that they had displaced the presumption of indefeasibility. Instead, she found that the respondent had established a one-third equitable (not just legal) interest in the property. In particular, she found that the appellants would not have been able to purchase the property without the respondent's assistance. It was common ground that the appellants were unable to obtain financing without the respondent as a principal borrower.
- [51] The summary trial judge ordered partition and sale of the property with the respondent to receive his one-third interest after accounting to the appellants for the payments made by them to maintain the property, including their mortgage payments.

- [52] This Court dismissed the appeal. Justice Low, for the majority, noted that the parties could have adduced evidence to establish that the respondent "became a covenantor for the mortgage debt gratuitously": at para. 12. While the appellants had endeavoured to displace the presumption of indefeasibility, the evidence instead established that the respondent had made a significant contribution to the purchase of the property. Justice Low held:
- [13] The [appellants] 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 [the respondent] 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. [The respondent] contributed significantly to the purchase of the property by pledging his credit and taking on a substantial debt. He made it possible for the [appellants] 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 [the respondent's] contribution was at least equal to that of the other two registered owners.
- [53] The factual background in Aujla CA is somewhat complicated. For present purposes it is unnecessary to detail all of that background. I will focus on the first of two transactions at issue in that case. The first transaction is the only transaction of relevance to this appeal.
- [54] The appellant claimed a beneficial interest in a property legally owned by other family members. When the property was initially purchased, the appellant and her parents were registered on title. There was a dispute about who contributed the down payment, but the appellant and her parents were all covenantors on the mortgage.
- [55] The judge found it unnecessary to resolve all of the factual disputes regarding the parties' respective contributions. It was sufficient in his view that the appellant had 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": Aujla SC at para. 59. As a result, the judge concluded that the respondents had not displaced the presumption of indefeasible title.
- [56] This Court dismissed the appeal. Though the appeal focused on the second transaction (in which the appellant transferred her interest in the property to her mother), this Court identified no error of law, reviewable error in the trial judge's assessment of the evidence, or reversible finding of fact.
- [57] Like the respondent in Bajwa and the appellant in Aujla CA, Ms. Farrell contends that she contributed value to the parties' acquisition of the Property. She highlights that the vendors insisted that she be a co-purchaser, Mr. Freeland only obtained pre-approval (never formal approval) of a mortgage and she took on debt and risk. She emphasizes the judge's finding that the parties intended Ms. Farrell to be a co-owner. She submits Mr. Freeland did not discharge his burden of proving the parties intended that Ms. Farrell held her interest in the

property in trust for Mr. Freeland.

- [58] In my respectful view, there are a number of flaws in Ms. Farrell's arguments.
- [59] First of all, there is no rule of law that a co-purchaser of a property who is also a co-covenantor on a mortgage must be found to have given value for the purchase of the property. In *Bajwa*, this Court held that whether a trustee gave no value for their legal interest in a property is a question of fact to be determined on the evidence in each case: at para. 16. Indeed, as noted above, *Low J.A.* referenced the possibility of the parties adducing evidence that the respondent "became a covenantor for the mortgage debt gratuitously": at para. 12.
- [60] Next, the judge was not obliged to find as a fact that Ms. Farrell gave value simply because: the vendors required Ms. Farrell to be identified as a co-purchaser; the mortgage was only formally approved with Ms. Farrell's participation; the mortgage carried greater debt on a reduced down payment; and Ms. Farrell would be personally liable in the event of a default on the mortgage.
- [61] In my view, the judge correctly understood that she was not involved in a theoretical exercise. She was engaged in an exercise of determining if Ms. Farrell in fact gave value.
- [62] None of the authorities relied on by the parties specifically addresses the question of whether any contribution, no matter how theoretical, forecloses the possibility of a resulting trust. In the context of unjust enrichment, in *Kerr*, *Cromwell J.* held that to establish the first requirement, an enrichment, the plaintiff must establish they provided a tangible benefit to the defendant and that the benefit may be positive or negative. He explained:
- [38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
- [Emphasis added.]
- [63] I see no reason in principle to apply a different standard to the exercise of determining whether Ms. Farrell gave value in the context of the resulting trust analysis. In my view, the question is whether she provided tangible, meaning real or material, value.
- [64] In this case, there was a solid evidentiary basis for the judge's conclusion that Ms. Farrell had not provided material value. The judge heard evidence about Mr. Freeland's business interests, income and assets. She found that he had the ability to obtain the financing necessary to purchase the Property on his own. There was no reason for the judge to think

the vendors would not have accepted a unilateral unconditional offer from Mr. Freeland (i.e., one that did not include a condition that Ms. Farrell be added as a co-purchaser). It was also open to the judge to conclude that, given Mr. Freeland's assets and income, any risk of personal liability to Ms. Farrell was not, using the judge's own word, "real".

[65] Finally, I do not agree that the parties' intention that Ms. Farrell be a co-purchaser carries the day.

[66] Ms. Farrell rests her argument on a paragraph from the trial judgment in Virk, where the summary trial judge held:

[9] The common law principle of resulting trust is modified however, by the Torrens land registration system in B.C. and the statutory presumption of indefeasibility. Under the Torrens system, a resulting trust cannot be implied merely by the fact that one registered owner advances the purchase money while another does not. The Torrens system instead places a burden on the party seeking to impugn the existing state of title, to provide evidence that the parties intended that a registered owner hold their interest in trust for another owner or party.

[Emphasis added.]

[67] In Bajwa, this Court dismissed an appeal from the judgment in Virk. In doing so, this Court noted that "[t]he trial judge did not discuss the issue of resulting trust at any length" presumably because "she found that [the respondent's] contribution to the purchase of the property was significant and, therefore, he was a co-purchaser, not a trustee": at para. 15. This Court then examined whether the respondent became a covenantor on the mortgage gratuitously, not whether the parties intended that the respondent held his title in trust for the appellants. If the evidence supported the conclusion that the respondent had become a co-covenantor gratuitously, the appeal would surely have been allowed.

[68] The trial decision in Virk pre-dates a number of relevant and binding authorities, including Pecore, Kerr, Aujla CA and Suen. As I have outlined, based on these authorities and the judge's well-supported conclusion that Ms. Farrell provided no tangible value to the acquisition and maintenance of the Property, a resulting trust presumptively arose. The onus then shifted to Ms. Farrell to demonstrate that Mr. Freeland intended a gift. There being no evidence of such an intention, Ms. Farrell failed to rebut the presumption of a resulting trust. A resulting trust in favour of Mr. Freeland was therefore established and it displaced the presumption of indefeasibility of Ms. Farrell's title.

[69] Though unnecessary to the analysis, Ms. Farrell's argument regarding the intention of the parties fails for another reason. The judge found that the parties' intention that Ms. Farrell would be a co-purchaser was not unconditional. It was based on Ms. Farrell contributing half the cost to acquire and maintain the Property. But that did not happen. She shirked her end of the bargain.

- [70] There was no evidence that the parties set their minds to what would happen in the scenario that actually unfolded. It is a long stretch to think they would have intended Mr. Freeland to carry the Property at his sole expense, allowing Ms. Farrell to later extract half the increased value of the Property subject only to an accounting to Mr. Freeland for the money he alone put into the Property.
- [71] Ms. Farrell has failed to demonstrate that the trial judge committed any error of law or palpable and overriding error of fact in her resulting trust analysis. I would dismiss this ground of appeal.

Constructive Trust

Ms. Farrell's Position

- [72] Ms. Farrell submits the judge erred in finding that Ms. Farrell held her legal interest in the Property in a constructive trust for Mr. Freeland. Specifically, she submits the judge erred by concluding that she would be enriched and Mr. Freeland deprived if she were to share in the value of the Property and by failing to conclude there was a juristic reason for any enrichment. Ms. Farrell contends that: (1) she provided valuable consideration for the Property; (2) with an accounting, Mr. Freeland would suffer no deprivation; and (3) the parties' agreement to be co-purchasers provides a juristic reason for any enrichment.

Legal Principles

- [73] There is, again, no debate that to succeed in his unjust enrichment claim, Mr. Freeland has to establish:

- an enrichment to Ms. Farrell;
- a corresponding deprivation to him; and
- the absence of any juristic reason for the enrichment.

- [74] In *Kerr*, Cromwell J. noted that the Supreme Court of Canada "has taken a straightforward economic approach to the first two elements -- enrichment and corresponding deprivation": at para. 37. Justice Cromwell explained:
- [38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

- [39] Turning to the second element -- a corresponding deprivation -- the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (Peel, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (Pettkus, at p. 852; Rathwell, at p. 455).
- [75] With respect to the third element, Cromwell J. confirmed that a two-step analysis is required to determine whether there is a juristic reason to deny recovery. At the first step, the court is concerned with established categories that can constitute a juristic reason, such as a contract, a disposition of law or a donative intent. If there is no established category, a prima facie case under the juristic reason part of the analysis arises. The prima facie case is rebuttable at the second step. At the second step, the onus is on the defendant to identify another reason why the enrichment should be retained. The exercise at the second step turns on two factors, namely the parties' reasonable expectations and moral and policy-based arguments about whether particular enrichments are unjust: Kerr at paras. 43-44.
- [76] Remedies for unjust enrichment are restitutionary and are aimed at requiring the defendant to "repay or reverse the unjustified enrichment": Kerr at para. 46. In most cases, a monetary award is an adequate remedy: Kerr at para. 47. When a monetary award is not appropriate or sufficient, a remedial constructive trust may be imposed: Kerr at para. 50.
- [77] In Kerr, Cromwell J. described the broad nature of the constructive trust as a remedial tool and what is required to establish a constructive trust:
- [50] Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (Pettkus, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (Pettkus, at pp. 852-53; Soroohan, at p. 50).

Discussion

- [78] Ms. Farrell's submissions on the first two elements of unjust enrichment turn on her submission that she gave value for her legal interest in the Property. I have already found that the evidentiary record supports the judge's factual finding that Ms. Farrell provided no tangible value to the acquisition and maintenance of the Property. As a result, there is no basis to interfere with the judge's conclusion that Ms. Farrell would be enriched and Mr. Freeland correspondingly deprived if she were to obtain a half-interest in the Property in the circumstances of this case. Ms. Farrell would obtain a beneficial interest in a valuable property. Even with an accounting, Mr. Freeland would lose that very same beneficial interest.

- [79] As for juristic reason, I cannot agree that the parties' intention that Ms. Farrell be a co-purchaser provides any justification for her to retain an enrichment in the form of a beneficial interest in the Property.
- [80] As noted, the parties' intention was rooted in the expectation that Ms. Farrell would pay her share. She did not. Ms. Farrell simply cannot assert at the first step of the juristic reason analysis that a bargain she breached establishes a juristic reason for her to retain an enrichment. At the second step of the analysis, Ms. Farrell's unilateral and unexplained failure to live up to her end of the bargain shatters any reasonable expectation she may have had to a beneficial half-interest in the Property. Further, I can think of no moral or policy reason to justify her retaining a beneficial half-interest in a property that, on the judge's supported findings, she did not contribute to in any tangible way.
- [81] In terms of remedy, the judge identified a number of valid reasons why a monetary award would be inappropriate and inadequate. Given Mr. Freeland's exclusive and direct contributions to the acquisition and maintenance of the Property, the judge sensibly imposed a remedial constructive trust over the entirety of Ms. Farrell's legal interest in the Property.
- [82] Ms. Farrell has failed to demonstrate that the trial judge committed any error of law or palpable and overriding error of fact in her constructive trust analysis. I would dismiss this ground of appeal.

Unenforceable Order

- [83] It is not clear to me why Mr. Freeland did not name RBC as a respondent in his petition. RBC has a clear interest in the Property and the outcome of the case. As RBC is not a party, I agree with Ms. Farrell that the judge's order that she be released from the covenants of the mortgage is unenforceable.
- [84] Given the rapid increase in the market value of residential properties across British Columbia over the past few years, the judge's findings with respect to Mr. Freeland's financial circumstances and Mr. Freeland's demonstrated ability to service the mortgage, it is highly unlikely that RBC will object to releasing Ms. Farrell from the covenants of the mortgage.
- [85] In these circumstances, I would set aside the judge's unenforceable order and impose a practical solution. Specifically, I would require Ms. Farrell to transfer her legal interest in the Property to Mr. Freeland on her receipt of evidence that RBC has consented to her being removed from the mortgage. Once that has been done, the parties can promptly remove Ms. Farrell from the title as ordered by the judge. In the event that Mr. Freeland is unable to secure the consent of RBC to release Ms. Farrell from the covenants of the mortgage, I would grant the parties leave to return to the court below for directions.

Disposition

- [86] For all of these reasons, I would dismiss Ms. Farrell's appeal from the declarations made by the judge that she holds the Property in a resulting trust, or alternatively a constructive trust, for Mr. Freeland and that she has no beneficial interest in the Property.
- [87] I would allow Ms. Farrell's appeal from the judge's order that she be released from the covenants of the mortgage on the Property. I would instead order that Ms. Farrell transfer her legal interest in the Property to Mr. Freeland on her receipt of evidence that RBC has consented to her being removed from the mortgage.
- [88] If Mr. Freeland is unable to secure the consent of RBC to release Ms. Farrell from the covenants of the mortgage, I would grant leave to the parties to return to the court below for further directions.

"The Honourable Mr. Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Voith"

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Prepared on 27 October 2026 · Esheria